

***Proposal for a National Disability  
Insurance Scheme Quality and  
Safeguarding Framework***

COMMONWEALTH OMBUDSMAN  
(IN CONSULTATION WITH STATE/TERRITORY  
OMBUDSMAN GROUP)

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## EXECUTIVE SUMMARY

This paper has been prepared following consultation between the office of the Commonwealth Ombudsman<sup>1</sup> and the offices of each of the Australian state and territory Ombudsmen.

The Ombudsman community supports the government's plans to implement a quality and safeguarding framework for the National Disability Insurance Scheme (NDIS), which aims to balance the need to protect participants in their interactions with providers with the desire to maximise choice and control.

This paper outlines a principles-based approach we suggest would provide a sound starting point for designing and implementing an appropriate complaints and oversight model, which focuses on:

- jurisdiction
- powers
- accessibility
- independence
- procedural fairness
- accountability.

The complaints and oversight function will be a key component of the protections available to NDIS participants and, in order to be fully effective, must work in tandem with the other preventative and corrective aspects of the framework, as well as interacting closely with existing specialised oversight bodies at the national and state and territory levels.

We suggest the government consider giving the Commonwealth Ombudsman responsibility for the NDIS complaints and oversight function. We acknowledge that the Commonwealth Ombudsman has work to do to fully understand the challenges, opportunities and issues involved in overseeing the NDIS. However, we consider his office has experience, commitment, capacity, national coverage and relationships that would form a solid foundation from which to deliver this important role.

We have also made some broad comments about the other elements of the framework relating to registration; staff vetting; protections for self-managing participants; mandatory reporting; and the use of restrictive practices.

We trust that our submission provides the government with a useful perspective on the key considerations in establishing an effective national oversight model for the NDIS. We are mindful that there is still a lot of work to be done before the final model is agreed, and would welcome the opportunity to be involved in further discussions – on both our broader comments and our specific suggestion regarding a potential role for the Commonwealth Ombudsman – as the government's considerations progress.

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<sup>1</sup> The Commonwealth Ombudsman is also the ACT Ombudsman.

## INTRODUCTION

This paper has been prepared following consultation between the office of the Commonwealth Ombudsman<sup>2</sup> and the offices of each of the Australian state and territory Ombudsmen. We welcome the opportunity to respond to the *Proposal for a National Disability Insurance Scheme Quality and Safeguarding Framework* (the Framework) consultation paper.

### The Ombudsman group

As a general rule, each of our offices has broad oversight of the administrative decisions and actions of all government departments and agencies within their respective territory.<sup>3</sup> Our offices also have a role in investigating certain complaints about services delivered by contracted providers on behalf of government.<sup>4</sup>

Each of the Ombudsman offices services its own jurisdiction, but is also an important part of a national network of Ombudsman that together provides the public and government with assurance and oversight at the local, state and federal levels. As a group, our offices engage in learning, debate and collaboration aimed at improving complaint handling and oversight within and across our respective jurisdictions. Members of the group can, and do, tap into one another's areas of respective strength and experience to inform and build their own office's understanding of, and capacity to deal with new and emerging areas of complaint and oversight.

We have outlined below some examples of work relevant to this consultation that is currently being undertaken by our offices.

*Commonwealth Ombudsman:* The Commonwealth Ombudsman has jurisdiction to investigate the administrative decisions and actions of the National Disability Insurance Agency (NDIA).

*NSW Ombudsman:* Unlike some other Australian jurisdictions, where there is a separate oversight body for disability matters, the NSW Ombudsman's office directly scrutinises organisations delivering disability services. As a result of legislative changes brought about by the merger of the Community Services Commission with the NSW Ombudsman in 2002, the Ombudsman's office is required to have a Community Services Division headed by a Community and Disability Services Commissioner, who is also a Deputy Ombudsman. The NSW Ombudsman's office provides a good example of the way in which disability oversight can be delivered in an active and transparent way by an Ombudsman, in conjunction with their other oversight functions.

The NSW Ombudsman's office (and Commissioner) also has special functions relating to examining the circumstances, and the cause and patterns of deaths, of people with disability in residential care; and coordinating the NSW Official

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<sup>2</sup> The Commonwealth Ombudsman is also the ACT Ombudsman.

<sup>3</sup> This usually excludes the decisions and actions of members of parliament/legislative assembly and their staff, and the actions and decisions of members of courts and tribunals. The Commonwealth and some state and territory Ombudsman offices also have jurisdiction to investigate complaints about organisations who deliver services under contract on behalf of government.

<sup>4</sup> The Commonwealth Ombudsman (as the Overseas Students Ombudsman and Postal Industry Ombudsman) also has jurisdiction to investigate complaints about commercial entities delivering services to the public.

Community Visitors scheme. Since 3 December 2014, the NSW Ombudsman's office has also had responsibility for the disability reportable incidents scheme – Australia's first (and only) legislated scheme for reporting and overseeing the handling of serious incidents in supported group accommodation.

*Victorian Ombudsman:* The Victorian Ombudsman is currently conducting an investigation into how allegations of abuse in the disability sector are reported and investigated, including the effectiveness of statutory oversight mechanisms in reviewing incidents and reporting on deficiencies. The report on Phase 1 (Statutory Oversight) will be released in the first half of this year to inform the NDIS Quality and Safeguards Framework, and the final report covering Phase 2 (Incident Reporting) will be tabled in the second half of the year.

## **Focus of our submission**

The discussion below focuses primarily on the preventative and corrective elements of the Framework, being the areas in which our offices are best placed to provide useful comments.

We have made particular comments about key principles of administrative oversight that we consider should be central to the government's approach in establishing an NDIS quality and safeguarding framework.

We suggest that the Commonwealth Ombudsman is well positioned to take on the function as the national complaints and oversight body for the NDIS.

We consider that this submission provides a useful starting point for the government's thinking in designing an effective oversight mechanism for disability matters. We are mindful that there is a long way to go before a final model is decided and would welcome the opportunity to be involved in further discussion as development of the Framework advances.

## **PART 1: SYSTEMS FOR HANDLING COMPLAINTS**

There are three primary considerations when assessing the appropriate mechanism for dealing with disability complaints:

- the essential characteristics of a complaint handling system
- the body or bodies that best embody those characteristics, and
- how complaints handling is integrated with other elements of the NDIS quality and safeguarding framework.

We consider each of these below.

### **Essential characteristics of a complaint handling system**

The Australian and New Zealand Ombudsman Association (ANZOA) produced a policy statement in 2010 regarding the 'Essential criteria for describing a body as an Ombudsman'.<sup>5</sup> The principles outlined in that paper provide a useful starting point when considering the establishment of any new complaints framework.

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<sup>5</sup> [http://www.anzoa.com.au/ANZOA-Policy-Statement\\_Essential-Criteria-for-calling-a-body-an-Ombudsman\\_Feb2010.pdf](http://www.anzoa.com.au/ANZOA-Policy-Statement_Essential-Criteria-for-calling-a-body-an-Ombudsman_Feb2010.pdf)

Those principles, listed below, provide the basis for our discussion of the possible options for complaints:

- jurisdiction
- powers
- accessibility
- independence
- procedural fairness
- accountability.

### ***Jurisdiction***

The oversight body should have clear, ideally statutory, jurisdiction to deal with disability complaints. The consultation paper provides three broad options for the scope of the complaints scheme, being:

1. complaints about all funded supports
2. complaints about a subset of supports funded by the NDIS (such as specialist disability services)
3. complaints about all supports specifically targeting people with disability regardless of whether the support is funded by the NDIS.

We believe that, at a minimum, all complaints about government-funded disability supports<sup>6</sup> should fall within the jurisdiction of a central oversight body. Given the capacity of NDIS participants to make, and participate in, complaint processes will vary significantly, it will be important to ensure that there is a single body with the clear mandate to deal with such complaints.

However, it would also be feasible to provide the oversight body with a broader jurisdiction to receive all complaints relating to disability.<sup>7</sup> Ombudsman offices already engage in broader areas of complaint handling that involve oversight of government and private organisations within an industry, for example the Commonwealth Ombudsman's current role as the Overseas Students Ombudsman and the Postal Industry Ombudsman. In addition, the Commonwealth Ombudsman will assume the role of Private Health Insurance Ombudsman from 1 July 2015.

The central body need not deal with every disability complaint itself, but might identify those complaints it should investigate directly and those that would be better handled by another oversight body. This would include those oversight bodies that exist at the national, state and territory levels to deal with complaints from people with a disability about mainstream services, such as in consumer affairs matters. The issue of

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<sup>6</sup> This would include all supports purchased using NDIS funds, as well as specialised supports that we understand will continue to be purchased using 'block funding' arrangements.

<sup>7</sup> The primary role of the oversight body would be government-funded disability supports. However, given that issues affecting people with disability range across whole-of-life matters, it is likely that many complaint issues raised with the oversight body would include those outside of the NDIS. It is important that people with disability are assisted as much as possible to make and resolve complaints, including provision of a one-stop-shop by the oversight body, with warm transfers to more appropriate agencies, where appropriate.

delegations, transfers and referrals to other oversight bodies is discussed in more detail below under 'Integration of central complaints handling with quality and safeguarding framework'.

The central body could also be empowered to:

- provide broader advice to government about the implementation of policy initiatives, including the National Disability Strategy, drawing on the operational intelligence provided by analysis of complaints
- in the event that such arrangements are implemented – oversight the administration of:
  - a national mandatory incident reporting scheme
  - a national staff vetting system and associated 'barred persons' register, subject to certain safeguards.<sup>8</sup>

We are mindful of the role the Administrative Appeals Tribunal (AAT) has in reviewing decisions under the *National Disability Insurance Scheme Act 2013*. We do not propose that the appointment of a central oversight body should impact in any way on the continuation of the AAT's merits review role. In fact, we consider that routine liaison between the AAT and the oversight body about issues of systemic and/or common interest should be a key feature of the oversight function's consultation and engagement arrangements.

### **Powers**

In order to be effective in its responsibilities, it is vital that the oversight body has clear and readily-applied powers to:

- investigate, make inquiries into, and resolve individual and systemic complaints
- conduct investigations and inquiries on its own motion, including of systemic issues
- conduct planned and unannounced visits and inspections, in connection with individual complaints, and systemic and own motion investigations
- conduct mediation / conciliation processes
- require and compel people and organisations within its jurisdiction to provide information/documents and appear to answer questions relevant to an investigation
- protect, and ensure the confidentiality of information collected in the course of its investigations
- provide protections for whistle-blowers and other people wishing to make public interest disclosures, and protection from retribution as a result of making a complaint
- decide if, how and when to deal with matters within its jurisdiction

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<sup>8</sup> For example, appeal rights for those who are barred.

- delegate or transfer matters to other oversight bodies that may be better placed to consider a particular matter
- reach conclusions about an investigated matter and, where warranted, furnish a report to a provider, the NDIA, the Minister, Parliament, the Council of Australian Governments (COAG) Disability Reform Council, Parliamentary Committees and other designated regulatory bodies, directly or by publication, and
- make directions or recommendations for remedial action, whether in a particular case or in a matter of broader administration.

Complaint handling and investigations should be aimed at identifying opportunities for improvement. This might take the form of an agreed outcome for an individual participant or improvements to business or complaints processes for a particular provider or for the Scheme as a whole.

It is also important to recognise that people with a disability will expect the complaints system to have a strong emphasis on the effective resolution of their complaints. The oversight body should be encouraged, and empowered, to resolve complaints consistent with ‘person-centred’ and rights-based approach to service delivery.<sup>9</sup>

### ***Accessibility***

The oversight body must be visible, readily accessible to all participants, and easily used. This is particularly true in a system where complainants will have varying levels of capacity to make complaints, and to engage in a complaints process.

A complaints body should ensure accessibility by:

- engaging in community education about its role and powers, and the way its work intersects with that of related complaint organisations
- engaging in community education about participants’ rights to complain, both to providers and to the complaints body
- maintaining a local presence and networks in capital cities, and engaging in regular outreach to regional and remote areas
- establishing regular engagement with stakeholders, community gatekeepers, advocacy and peer support organisations
- accepting complaints via multiple channels including but not limited to in-person, telephone, mail, email, online, TTY and interpreter
- assisting people to make complaints
- applying a broad definition of ‘complaint’ to ensure that all expressions of dissatisfaction with a provider are accepted as a complaint and handled accordingly
- accepting complaints made directly by a participant, on their behalf by another person, jointly with another person, and anonymously

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<sup>9</sup> By way of example, section 3 ‘Objects and principles’ of the *Community Services (Complaints, Review and Monitoring) Act 1993* (NSW) strongly emphasises this kind of approach.

- providing information and advice in accessible formats and media.

### ***Independence***

The consultation paper discusses the three levels at which complaints might be managed, from self-regulation through to an independent statutory complaints function.

In our view, the establishment of an independent statutory body – whether as a new organisation or as a function of an existing oversight body – would provide optimum assurance to the Australian community (including the government, participants and providers, and the broader public) that complaints are considered impartially and without regard to monetary or registration constraints that might be seen to constrict the processes of an industry-aligned or internal complaints mechanism.

To assure true independence, we suggest the oversight body should:

- be impartial
- be established in way that makes it independent of the regulator and policy department/s
- have an appointed head, who is employed for a fixed term and removable only for misconduct or incapacity.

### ***Procedural fairness***

An oversight body must demonstrate a commitment to procedural fairness in its conduct and decision making.

Consistent with a person-centred and rights-based approach, complaints should be investigated with a view to resolving participants' concerns, but should also provide appropriate opportunities for both complainant and providers to comment on proposed outcomes or findings. This is particularly true in instances where the investigation might make adverse findings or determine that a desired remedy is not warranted or appropriate, or where the investigation is likely to be the subject of a public report.

### ***Accountability***

The oversight body must also be accountable to complainants and the broader community for the work it does, and the decisions it makes. It should be required to prepare an Annual Report to Parliament on the work of the office, to be supplemented by public reports on a quarterly basis regarding complaint numbers and trends and its conclusions on matters of a serious or systemic nature. It should also be required to report to the Minister, the COAG Disability Reform Council, and relevant Parliamentary Committees as appropriate.

The oversight body should be subject to, and accountable for service and timeliness standards with respect to the key aspects of its operation, including communicating with complainants and providers, and investigating complaints. By effectively collecting and analysing data about its own operations, the oversight body should also be able to model continuous improvement of its own procedures and performance.

### ***Fostering good complaints systems***

In addition to characteristics identified by ANZOA, it is critical that the oversight body also be accountable for fostering the implementation and delivery of good, person-centred complaints systems by providers, including by:

- preparing, publishing and publicising best practice guides for complaint handling
- offering training for providers and their staff on complaint processes
- educating providers, participants and the broader community about the importance of, and right to make complaints about disability services
- conducting training and information sessions for participants, advocates, peak bodies and other interested parties about how to participate in complaints processes and reasonable expectations of outcomes and remedies
- providing feedback to the NDIA, Parliament, other oversight bodies, providers, participants, and the broader community about trends arising from complaint investigations
- establishing a community of practice for state, territory and federal bodies handling disability-related complaints.

In terms of the proposed independent oversight body for the NDIS, it is vital that it ensures the complaints systems of both the NDIA and disability support providers are appropriate to meet the needs and expectations of people with disability. For this reason, it could have a specific legislative mandate to drive the objective of robust, accessible, and responsive complaints systems.<sup>10</sup>

### **Consideration of Commonwealth Ombudsman as the NDIS oversight body**

We have outlined above our view that the complaints and oversight functions for disability services should be performed by an independent, statutory body. More specifically, we suggest that the government consider the Commonwealth Ombudsman as the national disability complaints and oversight body.

The Commonwealth Ombudsman's office possesses each of the key characteristics described above and has experience, geographic presence, networks, relationships, business processes and infrastructure that would provide a sound starting point for the complaints and oversight functions for the NDIS. The addition of the NDIS oversight function to an existing body, such as the Commonwealth Ombudsman, would also accord with the Productivity Commission's recommendation<sup>11</sup> in September 2014 that '*Consideration should be given to subsuming new roles within existing ombudsmen rather than creating new bodies.*'

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<sup>10</sup> Government might consider adopting a similar model to that available at section 14 of the *Community Services (Complaints, Reviews and Monitoring) Act 1993*, which gives the NSW Ombudsman responsibility for reviewing service providers' complaint handling systems.

<sup>11</sup> Recommendation 9.3, Productivity Commission Inquiry Report No. 72: *Access to Justice Arrangements*, September 2014

In suggesting the Commonwealth Ombudsman as a suitable candidate for the national complaints and oversight role, we acknowledge that much more needs to be done to understand the challenges, opportunities and issues involved in setting up such a national function. This would also involve a strong commitment to engagement and working with key disability stakeholders during any transition to such a role.

### ***Experience and commitment***

The Commonwealth Ombudsman has broad jurisdiction to oversight the administration of Australian government agencies and their contracted service providers. The office's central purpose is to:

- provide assurance that the organisations it oversees act with integrity and treat people fairly, and
- influence enduring systemic improvement in public administration in Australia and the region.

The office has proven experience in, and commitment to conducting activities that will be central to the effectiveness of a disability services oversight function, including but not limited to:

- delivering accessible, effective and targeted complaint handling services to resolve individual complaints and systemic issues
- engaging with agencies (providers) to influence administrative improvements
- engaging with policy and regulatory agencies on best practice in public administration
- providing authoritative advice on complaint handling and good administration
- monitoring implementation of recommendations it makes to agencies (providers)
- influencing agencies (providers) to improve internal complaint handling
- exercising efficient and effective oversight of intrusive and coercive actions performed by agencies (providers) within its jurisdiction
- promoting good administrative practice within agencies (providers).

The Commonwealth Ombudsman's office is also committed to improving its own administration and reputation by:

- ensuring complaint handling processes are examined and refined as necessary
- strengthening office accountability through improved performance reporting, evaluation, audit and governance
- building its capacity as a trusted adviser on good public administration.

### ***Agility and capacity to deliver new functions***

The Commonwealth Ombudsman's office has been given a number of new functions in recent years, demonstrating the high regard in which the office is held by government and the public, as well as the government's confidence in the ability of

the Commonwealth Ombudsman to take on, and effectively deliver, new areas of oversight.

A number of these new functions have seen the Commonwealth Ombudsman's office tasked with work in very different areas to its previous core business. A good example of the office's agility in taking up new functions was in the commencement of the Overseas Students Ombudsman (OSO) role. Prior to taking on that role, the office's focus was entirely on overseeing the administrative actions and decisions of government agencies and contracted providers, but the OSO function saw the office take on responsibility for oversight of private providers delivering education services to overseas students in Australia. This required the office to develop specialised complaint handling arrangements to accommodate a complainant group with diverse cultural and linguistic backgrounds; understand and apply new legislation; adapt its IT systems to incorporate a new jurisdiction; and initiate and foster relationships with stakeholders and organisations that had not previously been engaged with a central point of oversight.

### ***Geographic and networking coverage***

The oversight body will be required to operate across a broad geographic area, and will be required to work effectively with complainants, providers, state and local government, oversight bodies, and community, advocacy and peak bodies. The Commonwealth Ombudsman currently has offices and staff in six capital cities<sup>12</sup> and, as a result, has developed effective working relationships with community and advocacy organisations across Australia that would be important in delivering the oversight function. Where possible we seek to collocate our offices with state and territory oversight bodies to assist in providing an integrated service to the public.

### ***Relationships***

The Commonwealth Ombudsman is also the Defence Force, Immigration, Law Enforcement, Postal Industry, ACT and Overseas Student Ombudsman. From 1 July 2015, he will assume the role of Public Health Insurance Ombudsman.

The office has the proven ability to work cooperatively and effectively with agencies, other Ombudsman offices, and other oversight bodies at the state and federal level across a range of jurisdictions. In a number of its functions the office also engages with, and oversees, contracted service providers and commercial bodies.

Commonwealth Ombudsman staff maintain effective working relationships with state, territory and federal oversight bodies, which enable the identification of issues of mutual interest. Through cooperative working relationships and Memorandums of Understanding with other Ombudsman and oversight bodies, we have developed sophisticated referral and transfer arrangements in areas of overlapping or closely-related jurisdiction.

These kinds of relationships and working arrangements could be used effectively in the NDIS Framework, where the central body will need to work closely with other oversight bodies to resolve systemic issues of mutual interest; refer complaints and/or complainants to oversight bodies where their particular expertise may be required; and rely on other oversight bodies to share information and knowledge relevant to NDIS oversight functions.

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<sup>12</sup> The Commonwealth Ombudsman currently has offices in Canberra, Sydney, Melbourne, Brisbane, Adelaide and Perth.

### ***Business processes and systems***

The Commonwealth Ombudsman has established office-wide processes for receiving, assessing and investigating complaints. The processes promote a fair and consistent approach to complaint handling, but also provide flexibility in instances where a particular complaint or agency might warrant a different approach. These guidelines could be used as a baseline in establishing arrangements for overseeing the NDIS.

The office also has a central public contact function, for receiving, assessing and triaging complaints at the point of receipt, which could be adapted and expanded to accommodate intake of NDIS complaints.

The office currently undertakes a number of specialised oversight functions, including inspections of law enforcement records and immigration detention centres. The processes and experience developed in these functions could serve as a solid starting point for developing arrangements to or perform similar activities in an NDIS oversight role.

### ***Other considerations***

#### **Commitment to consultation and development**

In addition to its jurisdiction over the NDIA, the Commonwealth Ombudsman has jurisdiction over the Commonwealth policy and service agencies delivering everyday supports to people with a disability, including the Department of Human Services (income support and Medicare), the Department of Social Services (social security, family assistance and disability policy) and the Department of Health (health policy), and has gained some awareness of issues affecting people with disability through oversight and complaints in these areas. However as, to date, funding and oversight of most disability services has been at the state and territory level, the Commonwealth Ombudsman's office has had only limited direct exposure to specific complaints about disability services, with most being complaints about the NDIA.

We are mindful that the body carrying out the NDIS oversight function will need to have a strong awareness of, and commitment to engaging with the challenges facing participants, both in accessing disability supports and in accessing and making complaints. The Commonwealth Ombudsman has expressed a commitment to undertaking an internal review of his office to identify areas for improvement, with a view to boosting its capacity to engage and assist people with a disability in making complaints, and in investigating and resolving those complaints. The key focuses of the review will be incorporated into a central 'action plan', and will likely include (but not be limited to):

- working in partnership with state and territory Ombudsman offices (where relevant Disability Commissioners) to provide a person centric complaints and oversight function in the NDIS trial sites
- assessing the accessibility of its communication products and its arrangements for receiving complaints from people with a disability
- assessing the adequacy of training and other support available to its staff to more actively engage people with a disability in complaints, own motion investigations, and other consultative processes

- assessing the adequacy and flexibility of its arrangements for accepting, and acting upon complaints made on behalf of, or jointly with a person with a disability
- assessing the adequacy of its arrangements for recruiting people with a disability to roles within the office, and accommodating their workplace support needs
- identifying, and engaging with individuals, peak bodies and advocacy organisations to develop the office's understanding of, and ability to respond to the challenges facing people with a disability in interacting with disability support providers and government.

### **Deployment of resources**

If the Commonwealth Ombudsman was to take on the NDIS oversight function, it would be a significant increase in the responsibility and workload of his office, and it would need to be funded accordingly.

We are aware there may be some concern in the disability community about an existing organisation taking on the NDIS oversight responsibilities. Some have suggested that funds allocated for the new function might be absorbed into the existing body's standard operating costs over time, with the result that the resources for, and focus on the NDIS would reduce too.

We are mindful of these concerns and of the importance of ensuring that the new function is committed, in both practice and perception, to specifically protecting the quality of disability supports. We suggest that these concerns could be readily addressed by establishing a separate division of the Commonwealth Ombudsman's office,<sup>13</sup> including a Deputy Ombudsman assigned solely to the NDIS function.<sup>14</sup> This could be achieved administratively or through legislative change. The Ombudsman could also be required to include specific information in his regular public reporting about the performance on the NDIS function to provide transparency about how resources are utilised.

### **A considered, phased approach**

There are presently many different approaches across the states and territories to the various aspects of overseeing disability services. Each of these has its own advantages and challenges and some jurisdictions do not even have any significant arrangements for independent oversight of disability services.

In deciding the most appropriate model and moving towards implementation, we strongly encourage the government to closely examine the existing state- and territory-based models to work out which approaches and processes work, and should be used as a basis for a strong national model. This should apply to complaints, oversight, official visitor, mandatory reporting, staff vetting, and restrictive practice arrangements.

We suggest it is important the government be mindful of ensuring that existing examples of good or best practice are not overlooked in deciding the new national

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<sup>13</sup> The AAT has implemented a separate division of its operations, which is dedicated entirely to handling NDIS reviews.

<sup>14</sup> A similar model is currently used by the NSW Ombudsman, where one of the three Deputy Ombudsman is designated as the Community and Disability Services Commissioner and provided with staff to be used specifically for performing that function.

arrangements, and the skills and experience of those delivering high quality oversights are not lost as a national approach is implemented.

We would support a phased approach to introducing the national framework, which would be focused on identifying best practice and ensuring a successful transition to a nationally consistent oversight system (including a coordinated and cooperative approach to gradually handing over those responsibilities to the national body).

### **Opportunities for review and revision**

The move to a national framework with a central point of oversight will be a significant change to the way that disability services have been managed in the past. With this in mind, we suggest the government may want to consider building in clear opportunities for review and revision of certain elements of the national framework, including (but not limited to):

- the structure, funding, legislation and jurisdiction of the central oversight body, and
- the model, funding and placement<sup>15</sup> of any official visitor scheme.

### **Integration of central complaints handling with quality and safeguarding framework**

Complaint handling cannot be seen in isolation from the other critical elements of the NDIS quality and safeguarding framework. It should be recognised that a substantial level of government and non-government service provision to people with disability will continue to be delivered outside the NDIS. For example, not all people with disability will be eligible to participate in the Scheme, and state-based universal service providers must continue to strive to meet their obligations to people with disability.

Therefore, it is important to recognise that the new central oversight body would not handle all complaints from people with disability and, when appropriate, it should facilitate participants using other complaints mechanisms applicable to particular complaints. Rather, we suggest that the central body would be able to identify those complaints directly within its jurisdiction that it wishes to investigate and be empowered to use a combination of delegations, warm transfers and referrals to direct certain complaints to other oversight bodies when it considers those bodies are better placed to handle those complaints. Existing legislative arrangements also permit formal joint investigations and delegation of powers between the Commonwealth and State and Territory Ombudsman offices; these are mechanisms that could be used to ensure complaints are dealt with in the most appropriate manner.

It is important that the national oversight body can guarantee and drive a nationally consistent and seamless safeguarding system in relation to the NDIS. Accordingly, any power given to the national oversight body to delegate should not be associated with an obligation on it to do so. However, what all stakeholders recognise is the overriding objective of seeking to promote the rights and legitimate interests of people with disability. This principle should guide all decisions by the independent national body as to whether certain functions should be delegated – either on a case-by-case basis or more generally – to a State or Territory oversight body.

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<sup>15</sup> Whether it is established as part of the oversight body, as a standalone function, or as part of some other central oversight function

This approach would ensure that strong messaging and education could be provided to providers, participants and the broader community about how and where to complain about disability support providers. It would also minimise the risk of fragmentation and the need for multiple complaints. This kind of ‘no wrong door’ approach is currently available in many Ombudsman jurisdictions and can be used to great effect to minimise the burden on complainants to identify which oversight body is the right one to approach in their particular circumstances.

Points of referral and transfer might include, but not be limited to: other Ombudsman offices, public advocates, the Australian Human Rights Commission, child protection services, health complaints commissioners, professional registration bodies, and consumer protection agencies.

### ***Additional powers / safeguards***

#### **Official visitor scheme**

The consultation paper asks whether the official / community visitor arrangements currently used in the states and territories to conduct unannounced visits to inspect disability services will continue to be required under the NDIS.

We consider that a community visitor scheme would greatly complement the registration and complaints functions, by providing an additional layer of assurance. In particular, we consider that community visitors would play a vital role in ensuring that those participants who are most vulnerable because they do not have ready access to support from family, friends or advocates, are provided with the benefit of oversight of their supports.

We are aware that presently the states and territories operate a number of different models of official / community visitor scheme. For example, in NSW Official Community Visitors are paid, trained and coordinated by the NSW Ombudsman, while in Victoria Community Visitors are volunteers and are coordinated by the Office of the Public Advocate. We do not have a particular view about where a community visitor program should sit as part of the Framework. However, we would strongly support the implementation of a national scheme with a suitably trained and paid staff that is authorised to work closely with the independent oversight agency to decide the locations, providers and types of supports that might be targeted in their visits, and to make complaints and refer other matters to the independent body as required.

We consider that the availability of a community visitor scheme – along with a strong advocacy program, complaints mechanism and the complaints agency’s own visit and inspection arrangements – would ensure a robust and comprehensive system that is equipped to both identify and monitor specific instances of concern and to drive broader systemic analysis and improvement.

#### **Mediation / conciliation**

We are mindful that, in certain circumstances, a participant may have only one choice of provider for a particular support and – notwithstanding their complaint – may decide to continue to engage with that provider. In such cases, conciliation or other dispute resolution processes may provide an effective approach for recovering those relationships. We suggest that consideration be given to authorising the oversight body to conduct mediation or conciliation processes where appropriate.

### **Reporting and information sharing**

Consideration will also need to be given to specifying the circumstances in which the oversight body would be authorised or required to share information with and/or make a report to another regulatory or oversight body. Similarly, arrangements should be made to specify the instances in which other oversight bodies would be authorised or required to share information with and/or refer a complaint to the complaints body. This might relate to organisations including the NDIA, the Australian Human Rights Commission, law enforcement agencies, child protection authorities and other designated oversight organisations.

### **The need for advocacy**

In our view a disability oversight body is not likely to be truly accessible in the absence of a robust and well-funded disability advocacy program. While a complaints body can make every effort to be visible and approachable, there will likely remain instances where participants are unwilling or unable to make a complaint in the absence of a trusted source of support.

Indeed, while we recognise the importance of nurturing self-advocacy and understand that some complainants will prefer to use family members to assist them in making complaints, in some instances this is not appropriate or desirable due to conflicts of interest and other factors.

We are aware that advice, support and advocacy are available via the National Disability Advocacy Program (NDAP), including to appeal decisions made by the NDIA. However, it is not clear whether that support will extend to making complaints about the provision of services under the Scheme. We suggest that arrangements for advocacy in making complaints – both to the central body and other oversight agencies – should be explicitly outlined in either the Framework or the NDAP.

### **Mandatory reporting**

Presently there are a range of approaches applied across states and territories to the definition of a 'reportable incident' with respect to a person with disability, and how and to whom such matters must be notified. These variations may leave people with disability living in some states with a lower level of protection than those living in other jurisdictions.

We are aware of the comments made by Disability Commissioners in their November 2014 statement regarding 'Safeguards and the NDIS', to the effect that there should be safeguards to prevent and effectively respond to abuse, neglect and exploitation of people with disability. In line with those comments, we suggest the government consider implementing:

- a national framework for preventing, identifying and effectively responding to instances of abuse, neglect and exploitation of people with disability; and
- a requirement to report critical incidents, with oversight by an independent body or bodies.

The NSW Ombudsman's oversight of NSW's scheme for reporting and overseeing the handling of serious incidents in supported group accommodation is the first legislated scheme in Australia, and would provide a useful starting point for the government in considering a national incident reporting framework.

## PART 2: NDIA PROVIDER FRAMEWORK

The Framework proposes four possible levels of provider registration, ranging from basic ‘light touch’ registration through to compulsory participation in an external quality assurance system for certain types of supports.

We are aware that participants and providers alike are resistant to any suggestion of a one-size-fits-all registration arrangement. While participants should be provided with a measure of assurance when purchasing supports, this must be balanced against the need for flexibility and choice of provider.

The consultation paper acknowledges that the delivery of certain types of supports to particularly vulnerable people might necessitate a higher level of scrutiny and assurance. However, it also acknowledges that the Scheme aims to promote choice and competition in the supply of supports, and that imposing unnecessarily onerous registration requirements might discourage some providers from entering, or staying in the market.

### Quality assurance

Quality assurance can be an important and valuable process, and one that many providers of specialist disability supports would already be complying with under existing government contracts or as part of an industry or professional registration process. We suggest that this level of scrutiny continues to be appropriate for providers delivering supports of a specialist, intimate or high-risk nature.

At the other end of the spectrum, requiring that providers delivering everyday products and services – such as cleaning, gardening, mechanical and handyman jobs – subject themselves to rigorous quality assurance processes might push small providers out of the market and, in turn, reduce competition and choice for participants. It may be that option 1 or 2 is a better fit for those providers.

### Suggested model

**We support a ‘mixed’ model that enables registration requirements to vary according to the type, frequency and location of the support would be the most appropriate.**

A tiered registration arrangement would provide a sensible approach to balancing risk minimisation against the desire to maintain choice and competition.

All providers – regardless of the level of registration – should be required to:

- indicate their awareness of, and compliance with all relevant state, territory and federal laws relating to their industry
- provide details of their internal complaint handling arrangements, and
- subscribe to, and abide by an NDIS Code of Conduct.

Consideration might also be given to requiring that providers and/or their staff be members of any relevant professional bodies applying to their industry.

## Code of conduct

If a Code of Conduct is implemented for the NDIS, we suggest that it should clearly set out:

- the standards required of the provider and its employees to maintain registration, including that:
  - the provider and its staff behave and deliver services in manner that is consistent with the International Convention on the Rights of Persons with Disabilities
  - the provider establish clear and transparent arrangements that meet or exceed an established minimum standard for identifying and handling complaints, and make these known to staff and participants
- that a serious failure to comply with the Code of Conduct may constitute grounds for a provider's registration to be reviewed or suspended, or for the regulator to impose a higher standard of registration.

### ***Provider complaint processes***

Providers should be provided with assistance and guidance in establishing accessible and visible complaints processes, where they are not already in place. In particular, it is important to ensure providers and their staff understand that participants should not be required to communicate their complaint in a particular way, or even necessarily to call it a complaint. Indeed, providers should be encouraged to treat any and all expressions of dissatisfaction with a decision, action or service as a complaint and act accordingly.

## **PART 3: VETTING PROVIDER STAFF**

We are aware that presently a number of different systems are in operation across the states and territories to check a potential employee's suitability to work with people with disability. In some jurisdictions, employees are required to undergo a police check while in others they may be required to apply for a more rigorous 'working with vulnerable people' clearance. We agree that this is problematic and makes it difficult for employers operating across jurisdictions and for workers moving interstate to ensure they maintain a suitable level of clearance.

We are supportive of the introduction of a nationally-consistent standard of background checks for people delivering NDIS-funded supports. This is another area where there is a need to carefully balance the desire to provide adequate protections to participants while ensuring that the standard of vetting is not so high, or the processes so onerous, as to discourage good workers from entering (or remaining in) the disability services industry.

If a decision is made to implement a national system of background checks and appointing a central body to coordinate that process, there would seem to be value in also assessing whether the current state-based 'working with children' checks might be absorbed into the same, or a similar process. A broad, 'working with vulnerable people' clearance might be suitable for use across the disability, aged care and children's services industries.

## **‘Barred’ persons**

The consultation paper also seeks views about whether, at the top end of the scale, a national register of ‘barred persons’ might be appropriate. People included on the register would not be permitted to work in disability service organisations or deliver disability services of any sort.

We acknowledge there may be value in establishing a list of people who have been deemed unsuitable to deliver NDIS supports. However, as a barred persons register usually works only on a reactive basis – that is, on the basis of a conviction or formal adverse finding – we would see this as complementary to, rather than instead of, proactive screening processes that are able to consider a variety of factors in a person’s history to form a view about their suitability for work in the disability services sector.

In creating this kind of list consideration must also be given to the possibility that people may be reported by ex-employers on a punitive basis, rather than for established wrongdoing. The thresholds for adding a person to the register should be sufficiently high to ensure the likelihood of erroneous reporting is minimal, and there should also be arrangements for reviewing a person’s ‘barred’ status when requested.

It is important, too, that a barred persons list not be seen as an exhaustive list of unsuitable people for engagement in the disability services sector. Consideration should be given to ensuring that employers are able to access adverse information about potential workers, in the event that there are behaviours or findings that were not sufficient to have them barred but may be relevant to the employer’s decision about their suitability for certain types of work.

On the other hand, and consistent with the right of people with disability to exercise control over their own lives, we suggest the system should also allow for people with disability to seek limited work or ‘engagement’ exemptions for those individuals who are barred, in circumstances where the person with disability demonstrates that the granting of the exemption would serve to promote (and not prejudice) their rights.

In our view, relevant employment proceedings (including significant findings from any legislated ‘reportable incident’ scheme) should feed into any legislative system for screening individuals who are applying to work with vulnerable people with disability.

## **PART 4: PROTECTIONS FOR SELF-MANAGING PARTICIPANTS**

The question of what, if any, protections should be provided to self-managing participants is contentious and not easily answered. Many participants who self-manage have chosen that option precisely because they do not want to be limited to using only those providers who are registered with the NDIS.

We support the availability of a self-managed option for those participants who are willing and able to do so. It is important that self-managing participants are not limited

to using only registered providers.<sup>16</sup> Rather, the focus should be on providing sufficient information, training and support for self-managing participants to effectively manage the funds and assess the suitability of providers and staff to deliver supports, and assisting them to use NDIS-registered providers for particular supports where they choose to do so. We consider that a mix of options such as this provides supportive and flexible options for self-managed participants, and should also include access to quality-checked providers in situations where they wish to have a measure of assurance.

Consistent with a ‘no wrong door’ approach, complaints about both registered and unregistered providers could be made to the central oversight body, but in many instances it may be appropriate to refer those matters to other complaint bodies, such as consumer protection or industry complaints and oversight agencies. In line with the principle of building capacity and encouraging self-managing participants to make informed decisions about their supports, people with a disability should also be able to access whichever complaint mechanism they feel best suits their circumstances. In some instances, participants may even prefer to deal directly with a complaints agency that specialises in, for example, consumer affairs or industry complaints than to deal with a broader disability-focused oversight function. This also reinforces the importance of strong and collaborative working relationships between the national disability oversight body and other relevant oversight and complaints organisations.

## **PART 5: REDUCING & ELIMINATING THE USE OF RESTRICTIVE PRACTICES**

Presently, there are a range of approaches being taken across the states and territories to recording, monitoring and reporting the use of restrictive practices. Although all state and territory governments have committed to reducing and, where possible, eliminating the use of restrictive practices, the current arrangements make it difficult to assess when, where and why restrictive practices may still be being used.

We would support the implementation of a clear legislative framework for authorising the inclusion of restrictive practices in behaviour management plans, and monitoring and reporting on every use of those practices. The Senior Practitioner in Victoria (part of the Office of Professional Practice within the Department of Human Services) is a highly regarded model and might provide a useful starting point in considering a national approach. However, we would suggest that any national oversight of this sort of function should – like the complaints and oversight function – be established as an independent and impartial function.

Community Visitors are an important mechanism for identifying (and where necessary reporting) the use and misuse of restrictive practices in supported accommodation environments.

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<sup>16</sup> The government may decide that certain types of supports must only be purchased from registered providers. This might include supports of an intimate, specialist or medical nature, or where the government otherwise considers the risks presented by an unregistered provider delivering the support are unreasonable or unmanageable.