**A Submission – Proposal for the National Disability Insurance Scheme Quality and Safeguarding Framework**

**A National System – A National Framework**

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**Date: 30 April 2015**

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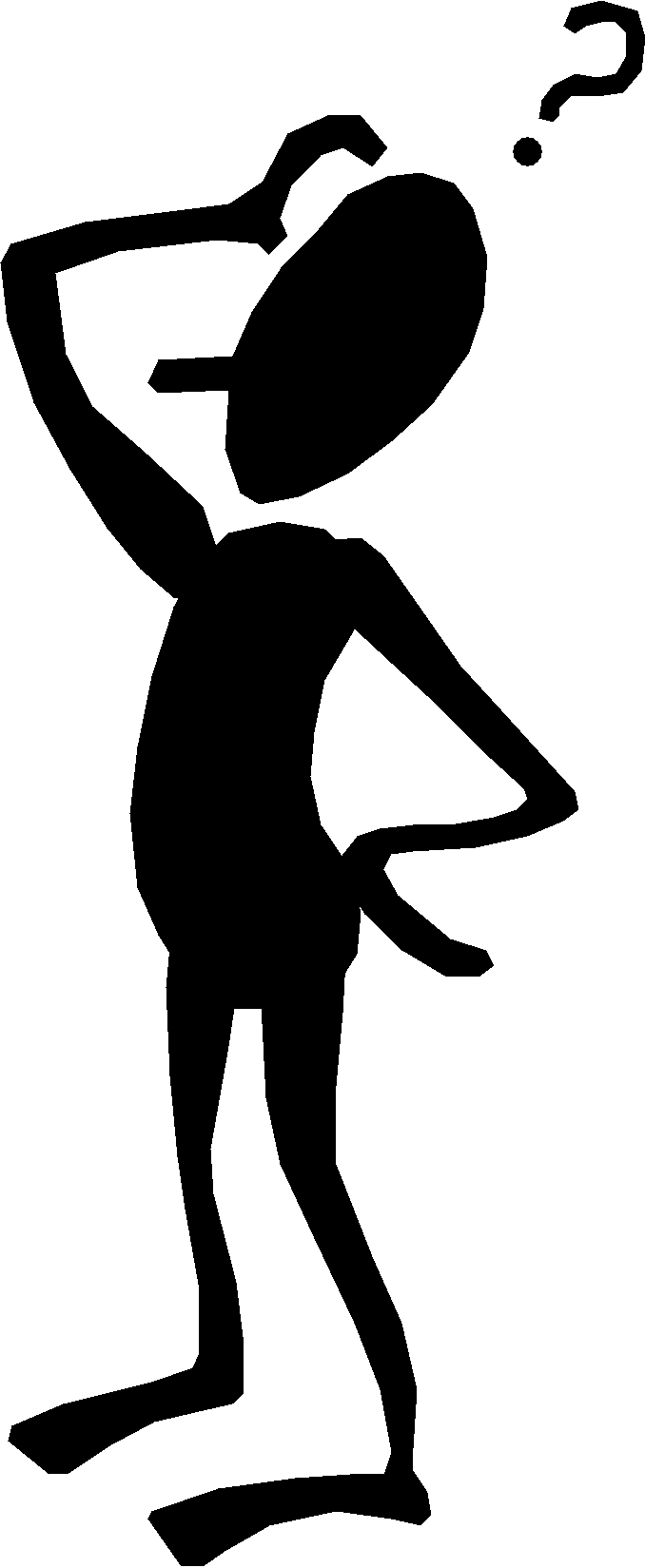
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**FRANKLY SPEAKING**

**P**rior to engaging the detailed content of the submission, the writers submit the following introductory pages as a means of highlighting what they consider are a set of critical questions that must be confronted. Additionally, they highlight extracts from the submission that represent what they argue are statements that represent realities, if the Quality and Safeguarding Framework for the NDIS is to be truly effective.

DECISION-MAKING MADE EASY - ASKING THE RIGHT QUESTIONS



|  |  |  |
| --- | --- | --- |
| No: | Questions | Answer |
| 1. | Should the National Disability Insurance Act and Rules be amended to incorporate innovative ideas for the National Quality and Safeguarding Framework? | **YES** |
| 2. | Should the Quality and Safeguarding Framework be totally separate from and independent of the National Disability Insurance Agency? | **YES** |
| 3. | Should the Quality and Safeguarding Framework be totally and only a National framework with no option for ‘nationally consistent’ individual jurisdictional frameworks? | **YES** |
| 4. | Should the Quality and Safeguarding Framework incorporate failed elements of existing individual jurisdictional systems? | **NO** |
| 5. | Should the Quality and Safeguarding Framework recognise the individual participant’s right to choose? | **YES** |
| 6. | Should the Quality and Safeguarding Framework seek to control and impose itself on all entities and individuals who may provide services and supports to people with disabilities? | **NO** |
| 7. | Should the legislative provisions underpinning the National Disability Insurance Scheme and national quality and safeguarding framework, once fully rolled-out, totally and unequivocally supersede the legislative, structural and operational parameters currently operating in individual jurisdictions? | **YES** |

**FOCUS ON KEY MESSAGES**

1. The NDIA is neither the equivalent of a government department responsible for the provision of disability services nor a watchdog responsible for monitoring quality and managing safeguards – It is an insurance company***.***
2. A founding principal of any proposed framework is the acknowledgment and application of the importance of separating those responsibilities and powers that should rightly be that of the NDIA and those that must come under the jurisdiction of a single national body that is independent of, and separate from, the NDIA.
3. Those who will make the final decisions in relation to the critical elements of standards and quality assurance and safeguards and associated functions must not to take the easy way out. Clearly, the easy way out would be to simply transplant that which currently exists in particular jurisdictions, albeit with some minor changes to the systems and process that operate at a jurisdictional level.
4. Given that the NDIS and its operational arm, the NDIA, represent the most significant initiative applying to disabilities ever to be taken by any government in Australia’s history, it is therefore crucial that the next steps should not be based on more of the same, particularly where ‘the same’ has clearly not worked.
5. It is essential that investigations be considered as a crucial element of a safeguarding system. Further, that investigations are not open to the waxing and waning of the individual or entity that has the authority to investigate. It is also equally important that the investigative process is independent of the funder and the service provider. And further, that the outcomes of the investigative process are transparent.
6. The significant gap in the so-called safeguards systems currently operating is the failure of those with the power to do so to vigorously pursue consequences for those individuals who transgress.
7. While it is not uncommon for the various disability jurisdictions to be high on the rhetoric of standards and what should constitute benchmark quality inputs, the reality has tended to be that quality assurance has become a tick the box exercise on inputs.
8. Those charged with finalising the quality and safeguarding system that is eventually established for the NDIS must be prepared to acknowledge that whatever their framework it will be vulnerable at times to the unscrupulous and the incompetent.
9. There is little point in establishing strategies, frameworks, rules and regulations, policies and procedures, and practices that are impossible to fully police.
10. The positive rhetoric promoting the effectiveness of currently operating state-based systems, certainly from Victoria’s perspective, is akin to an advertising campaign by those who hold positions of power and authority and do no want to see it go. Indeed, it could well be argued that by promoting more of the same in terms of a quality and safeguarding framework, those currently in positions of power are seeking to maintain their place in the sun through the NDIS/NDIA

**An Overview of this Submission**

This submission is divided into three parts with each then further divided into particular sections. It should be noted however, that a synergy exists between each.

**PART A**

**Section 1** – Sets out a proposed quality and safeguarding model that the writers consider necessary in order to ensure a national framework, rather than promoting one that simply reflects a multiplicity of frameworks deemed to be nationally consistent.

The rationale for the model is cognisant of what now seems to be a generally accepted view that significant abuse and neglect is occurring in the disability sector and hence it seems reasonable to suggest that the safeguards currently operating are clearly failing.

**Section 2** – Details the key elements of a proposed quality framework.

**PART B**

**Section 1 –** Provides a response to the National Disability Insurance Scheme (NDIS) consultation paper Part 1.

**Section 2** **–** Provides a response to the National Disability Insurance Scheme Consultation paper Part 2.

In relation to the consultation paper, while the writers note that it makes reference to existing safeguards operating in particular jurisdictions, this submission casts a word of warning in promoting any one particular current approach. Indeed, the writers submit that the NDIS must be prepared to take up the challenge by being bold and thinking outside the square, rather than simply seeking to recast what already exists in various jurisdictions, albeit under slightly different guises or language.

**PART C**

Represents commentary on the consultation paper and what can be described as guiding principles underpinning the writers’ quality and safeguarding model.

**Section 1 –** Provides a conceptual basis on which the writers have structured their proposed quality and safeguards model as in Part A. In additions it addresses what the writers contend are the focus issues that must be considered in order to ensure that whatever quality and safeguards are established are based on a logical structural framework. Significantly, the writers emphasise particular key words and principles that reflect the sensitive and often complex relationship between the rights of an individual and the notion of safeguards, in order to ensure that framework is not created as a restrictive or paternalistic protection of the individual.

**Section 2** - Addresses what the writers call the significance of language, arguing that the prime descriptors used in a quality and safeguards framework must be unambiguous. Further, that incongruities associated with language such as ‘choice’ are avoided.

**A NOTE ON REFERENCES**

Where references are made to current practices, systems and processes in the submission they generally relate to Victoria. Notwithstanding this however, the writers contend that given the following, Victoria provides a reasonable basis on which to make comment relevant to the proposed quality and safeguarding framework for the NDIS.

* Disability legislation have been operating in Victoria since 1986
* Funding and services agreements have existed for many years between the relevant government department and funded disability agencies
* A Disability Services Commissioner responsible for dealing with complaints has been in existence sine 2007
* A Public Advocate has been operating since 1986
* A number of advocacy entities have been funded since 1986

**PART A**

**Focus on a Proposed Quality and Safeguarding Framework**

**Part A: Section 1 A Proposed Safeguards Framework**

**Magnifying the Proposed Safeguarding Framework – A Summary**

**In summary**, the writers present an overview of the key elements of their proposed safeguards model as detailed further below. They emphasise that the model specifically relates to the proposed NDIS safeguarding framework and that, although acknowledging a link between this and quality and standards, they have adopted a separate focus on the matter of quality and standards.

1. **A separate and independent Compliance Authority**

The proposed framework highlights the significance of separating the legislated role and functions of the National Disability Agency (NDIA) from what might be described as additional functions critical to a safeguarding framework. As such, the writers propose a safeguarding framework that establishes a compliance authority that is totally independent and separate from the NDIA. Further, they propose the authority should be called the National Disability Compliance Authority (NDCA), the significance of the name being its focus on its direct relationship to the NDIS, as in a singular national approach to disability. Further, the primary focus being that of compliance.

In terms of where the NDCA sits from a structural perspective, the writers further submit that this body should report via a Chief Executive Officer directly to the Disability Commissioner within the Australian Human Rights Commission. By establishing this link, the writers contend that it gives emphasis both to the Authority itself as well as providing the Disability Commissioner with real and direct operational authority.

1. **The application of consumer law**

Underpinning the model is recognition that people with disabilities should have the same rights, responsibilities and opportunities as others in society. An inherent part of this recognition is that consumer law does exist and these laws should be used as and when appropriate, as opposed to necessarily separating disability as a ‘special case’ that requires its own consumer laws.

1. **A ‘by-request’ approach**

The writers recognise that all participants and other individuals funded through the NDIS have the opportunity to purchase services necessary to meet their reasonable and necessary supports. They also acknowledge that some will choose to manage their own funding and purchase independent of accredited providers. The writers therefore submit that in those instances where services are purchased and provided within a participant’s personal living environment, for example, in home support, then to simply automatically apply an inspectorial system that applies to accredited providers is inappropriate.

As such, by not automatically applying the inspectorial approach, but instead acknowledging that not all situations are the same, the notion of choice and independence are reinforced, and for those situations it will therefore be entirely inappropriate to automatically impose an inspectorial system.

Clearly, the reason for such inappropriateness is in part tied to the rights of the individual participant and secondly to recognise that it has been his or her choice to purchase services which may be outside that of accredited providers list. Therefore, the model proposed by the writers emphasises what they describe as a ‘by-request approach’. This is one whereby the participant who is using services other than accredited services or whose services are being provided in the participant’s home, the approach must be one of requesting inspectorial intervention. This is opposed to that of Disability Compliance Inspectors having an automatic right of entry.

1. **A focus on prevention, inspection and compliance**

Notwithstanding the content of 3 above, the model proposed by the writers also establishes a strong focus on prevention. Or, in other words, they promote the notion that it is far better to prevent abuse, neglect, exploitation and violence occurring as opposed to seeking to address it once it has occurred. Therefore, a key element of the proposed model is that of an inspectorial and compliance function. In order to facilitate this function the writers have therefore proposed that one of the Directorships reporting to the CEO of the NDCA is that of a Director responsible for reviewing and acting on incident reports and complaints, investigating matters arising from such reports, having the power to inspect, direct and investigate, as well as operating a complaints management system.

In essence, the combinations of these functions embrace to some degree existing functions as undertaken by Victoria’s Community Visitors, Victoria’s Disability Services Commissioner (DSC) and the DHHS’s requirement to submit incident reports. However, there are three significant differences to those functions and the structures to fulfil them as currently operating in Victoria.

* Firstly, establishing the legislative power to inspect and impose required actions as a result of inspections, similar to Workplace Inspectors under Victoria’s OH&S Act 2004.
* Secondly, recognising the relationship between reporting, investigations and complaints management by bringing them under one umbrella.
* Thirdly, establishing the power to initiate consequential actions as a result of non-compliance.

1. **A focus on consequences**

An element sadly lacking in the disability sector, and certainly is the case in Victoria, is that despite the emphasis given to the alleged significance of the Community Visitors, the DSC and the Public Advocate, only on rare occasions have real and meaningful consequences arisen in response to demonstrated and proven cases of neglect, abuse, exploitation and violence. Indeed, apart from a small number of cases which have been prosecuted through the legal system, there is strong evidence to suggest that Boards of funded agencies who have failed in their governance responsibilities, Chief Executive Officers and senior managers, the Secretary of DHHS, the DSC and the Public Advice, have never been brought to task for what some might call their failure to vigorously pursue their roles in adequately preventing and addressing abuse, neglect, exploitation and violence.

Therefore, the writers incorporate consequences as a major pillar in their proposed safeguarding framework.

*As a final summary comment, the writers urge that the powers who will determine the safeguarding framework for the NDIS must be bold and innovative. Thus, rather than simply seeking to cut and paste a failed system that incorporates – Community Visitors, Disability Services Commissioners and Public Advocates, their focus must be on innovation. If ever innovation were required in the disability sector, now is the time.*

*If ever honesty were needed in terms of acknowledging the failures of the existing individual jurisdictional so-called safeguards, now is the time. And, if ever a safeguarding mechanism were needed that acknowledges the necessity of* ***Prevention*** *and* ***Consequences*** *as part of its framework and integrating them with –* ***Reporting*** *and* ***Investigation****, now is the time to be bold and grasp the opportunity to do so.*

**Three separate but integrated elements**

The elements that are focused are:

* A Fully National System
* Safeguards and the National Disability Insurance Scheme
* Quality Assurance – More than A Checklist Approach – Discussed in Section 2

The importance of seeing these three parts in a holistic way is to counter the current narrow, self-protection discussions that have been occurring about the development of a quality and safeguarding framework. Much of the discussion has focussed on what is currently occurring in various jurisdictions where such discussions simply seek to promote more of the same. As such, this current self-serving approach has the potential to limit innovation and instead stifle what is the most significant action event to occur in Australia concerning disability.

The writers argue that due consideration must be given to the issues addressed through each of the three parts. If not, the outcomes arising from what is possibly being considered in relation to quality and safeguards increases the risk of the NDIS being encumbered with expectations and functions which are not in keeping with it being an insurance scheme, and which will eventually threaten its sustainability. Further, such an approach would to lead to the NDIA undertaking functions not appropriate to its primary functions. Eventually, this would burden the NDIA with high cost bureaucratic inefficiency and self-protection, an imposition that has little to do with approving applications for participation, allocation of funds and individual planning.

**A Note of references:**

Many of the views expressed in this paper are based on the writers’ long-term involvement and knowledge of Victoria’s disability sector and the reasonable assumption that undue consideration is being given to what is operating in Victoria and promoted as being a ‘cure-all’. The writers have also closely monitored papers that have been made public, as well as commentary associated with the NDIS.

**A Fully National System**

**Introduction**

The writers argue the first order of business that must be addressed as part of any deliberations of the Council of Australian Governments (COAG) and its Ministerial Disability Reform Council (DRC) are the following.

* The NDIS as an Insurance Scheme
* The NDIS as a National System
* A Separation of Powers and Responsibilities

While it should not be necessary to highlight that the NDIS has been established as an insurance scheme and it is intended to be a nation-wide scheme, it seems clear from some of what has been written and spoken in relation to quality assurance and safeguards, for example, that these two critical factors have either been ignored or forgotten.

Therefore, unless due consideration is given to the scheme being a national insurance scheme, then it seems reasonable to conclude that the outcomes of deliberations as to what should constitute particular activities and authorities of the National Disability Launch Transition Agency (NDIA) post the three-year trial period, will compromise the legislative authority invested in the National Disability Insurance Scheme Act 2013 (the Act) and the intent forged by the Productivity Commission.

1. **A National scheme – A National Approach**

Thus, the following addresses what the writers contend are matters that should be critically considered in order to inform the current thinking associated with the full rollout of the NDIS.

1. **The NDIS as an Insurance Scheme**

Object 3 (1) (b) of the Act clearly states that object as being to ‘provide for the National Disability Insurance Scheme in Australia.’ The traditional concept and definition of ‘insurance’ is one of transferring risk of a loss to the insurance company in exchange for payment by the insured. In the case of the NDIS the premium is paid from taxes collected.

Therefore, the NDIA as the body responsible for managing the insurance scheme on behalf of government via the NDIS is equivalent to an insurance company. People with disabilities who are assessed as being eligible to receive a benefit from the insurance company, in the form of funds to meet their reasonable and necessary supports, are the main beneficiaries of the scheme. Nonetheless, all Australians under the age of 65 are covered by the scheme in terms of being potential beneficiaries of the scheme.

***The NDIA is neither the equivalent of a government department responsible for the provision of disability services nor a watchdog responsible for monitoring quality and managing safeguards – It is an insurance company.***

The NDIA is in the business of insurance, albeit that the Insurance Scheme it is responsible for managing is the funding for persons or entities to enable them to assist people with disabilities to participate in the economic and social life of the community and funding reasonable and necessary supports for participants, and to assist with individual planning. Anything else would compromise these statutory functions.

1. **The NDIS as a National System**

As Object 3 (1) (b) of the Act clearly states, the Disability Insurance Scheme is a ‘National’ scheme. Given this, and given the Act is Commonwealth legislation, so it must be that everything associated with the scheme must come under a national umbrella.

As such, the writers deplore the concept that has been promoted in relation to standards, where it has been suggested that all that is required of the various jurisdictions is that standards developed by them must be ‘nationally consistent’. ***This concept is not consistent with the notion of a national scheme.*** There must be only one set of standards applying to the providers of disability services.

The notion of ‘national’ rather than ‘nationally consistent’ must apply to:

* Accreditation of service providers
* Registration of employees
* Standards and Quality Assurance
* Safeguards and an Inspectorial System
* A Complaints Mechanism
* Advocacy

Each of the above is incorporated as a component of the framework proposed by the writers and as detailed further below.

1. **A Separation of Responsibilities and Authorities**

A founding principal of any proposed framework is the acknowledgment and application of the importance of separating those responsibilities and powers that should rightly be that of the NDIA and those that must come under the jurisdiction of a single national body that is independent of, and separate from, the NDIA.

The significance of this is twofold.

*Firstly, the role and responsibilities of the NDIA must not be compromised by seeking to make it an, ‘all things to all people’ type entity. The NDIA must be allowed to do its legislated work of assessing eligibility and allocating funds without being loaded down by being required to also function as an auditor, advocate, service reviewer, receiver of complaints and incident reports, and policeman.*

*Secondly, and as demonstrated by the mixed set of functions and authority given to the Department of Health and Human Services (DHHS) in Victoria, being a standards setter, a funds allocator, a self-monitor, a contractor, a service provider and a receiver of complaint and incident reports****, does not work****.*

Therefore, the concept of a separation of powers must be applied to the NDIA and a separate body established, as in a national body to take responsibility for and to have the authority to act in relation to the elements identified in (ii) above. It will only be through the establishment of such an entity that people with disabilities as participants, their families and the general public will be confident that the functions as described above are truly independent of the NDIA.

It is reasonable to suggest that in Victoria consumer and public confidence in disability services is at its lowest ebb since the establishment of the Intellectually Disabled Persons Services Act in 1986. In part, this is as a result of the Yooralla rapes and the failure of the now DHHS and watchdog entities to actually do their job of protecting the rights of people with disabilities to be able to live free of abuse, neglect, exploitation and violence. Therefore, to have state and territory entities maintaining a presence or involvement in a national scheme, either by way of maintaining state jurisdictional control or by a process of transplanting what currently exist in those jurisdictions, is untenable.

Therefore, and as a means of avoiding repeating the mistakes of the past, the writers propose that consideration be given to something akin to that as described and as diagrammatically represented below.

**An Independent Entity**

**Name:** National Disability Compliance Authority (NDCA)

**Purpose:** To uphold the rights of persons with disabilities to receive high quality supports and to live free from abuse, neglect, exploitation and violence, by having sole authority and responsibility for:

* Accreditation of individuals and entities funded through the NDIA
* Registration of individuals seeking to provide specialist disability services
* Monitoring standards and quality assurance
* Operating a national complaints mechanism, and
* Establishing and implementing a national inspectorial system.

**Jurisdiction:** All individuals across Australia who are registered and entities that are accredited to provide specialist disability services and supports to people with disabilities.

**Structure:** As represented by the diagram below

**Notes:**

**Location and Reporting** **of the NDCA**

Principal options include:

1. Location in the Australian Human Right Commission with reporting to the Disability Discrimination Commissioner, or
2. Located in the Department of Social Services reporting directly to the Minister, or
3. A stand-alone Authority.

The writers preferred option is (i) arguing that by linking with the Australian Human Rights Commission this will give real teeth to that Commission, while at the same time emphasising the link between human rights and people with disabilities to be free from abuse, neglect, exploitation and violence.

**Structure Below Director Level**

Principal options include:

1. Staff employed and managed via the NDIA;
2. Provision of a contract function for delivery of the three directorate functions in each of the seven jurisdictions, but independent of the jurisdictions’ governments and public sector;
3. The functions and support staff operating under the Human Rights Commission.

The writers’ strong preference is option (iii) noting its link to the above.

**A Structural Approach**

1. **Failed Systems and Processes**

The positive rhetoric promoting the effectiveness of currently operating state-based systems, certainly from Victoria’s perspective, is akin to an advertising campaign by those who hold positions of power and authority and do no want to see it go. Indeed, it could well be argued that by promoting more of the same in terms of a quality and safeguarding framework, those currently in positions of power are seeking to maintain their place in the sun through the NDIS/NDIA.

The reality is the systems and processes that have now been operating in Victoria, and no doubt other jurisdictions, for several years are simply not working, despite good intentions. For example, despite the introduction of a Disability Services Commissioner (DSC) almost eight years ago, the role has not fulfilled the expectations of many of those who have made complaints. The reality is that the DSC has not used those powers that exist in legislation. The DSC processes are elongated and unnecessarily complex and the focus is on compromise rather than fault and consequences.

In terms of service auditing, despite the Department of Health and Human Services (DHHS) having introduced a costly auditing regime, as undertaken by independent companies, it is reasonable to conclude this process is little more than a ‘tick the box’ exercise. Therefore, it has done little to truly test whether services managed by DHHS as well as those funded by DHHS are meeting the standards that are required to be met. It must also be noted that DHHS has consistently refused to release the audit reports and thus transparency as to outcomes is totally absent.

Victoria’s Community Visitors program that operates under the Public Advocate, while having had some import in identifying what they describe as systemic neglect and abuse, in reality has no authoritative power. Also, other than calling for an inquiry, the Public Advocate has failed to show initiative in pursuing systemic concerns through her office.

Although the Secretary of DHHS has significant powers under the Disability Act 2006, as associated with funding, monitoring, evaluating, reviewing and contracting disability services, as well as having lead responsibility for administering the Disability Act, it is reasonable to conclude these functions and responsibilities have not been exercised to a level that satisfies the expectations of people with disabilities and their families as well as the general public.

1. **A Reflective Comment**

The writers urge those who will make the final decisions in relation to the critical elements of standards and quality assurance and safeguards and associated functions not to take the easy way out. Clearly, the easy way out would be to simply transplant that which currently exists in particular jurisdictions, albeit with some minor changes to the systems and process that operate at a jurisdictional level.

It is therefore critical that senior bureaucrats in state and territory-based departments, Disability Service Commissioners and Public Advocates are not given the inside running in seeking to influence the directions of the NDIS Quality and Safeguarding Framework.

*It is critical that simply continuing to apply a multiplicity of standards, ineffective safeguards and service monitoring and a general dearth of consequences when failures to meet required standards and statutory obligations are identified, does not provide the base for innovating the NDIS quality and safeguarding framework.*

Given that the NDIS and its operational arm, the NDIA, represent the most significant initiative applying to disabilities ever to be taken by any government in Australia’s history, it is therefore crucial that the next steps should not be based on more of the same, particularly where ‘the same’ has clearly not worked.

***The writers urge COAG and Senator Fifield to cast off the shackles of the sameness of conservatism, and instead to be bold in establishing a truly national system. A system focussed on innovative structures and outcomes that better deal with the risk of abuse, neglect, exploitation and violence, and not simply applaud the inputs of yesterday, and transplant these into a ‘new system’.***

**Safeguards and the National Disability Insurance Scheme**

**A Reflection**

If the safeguards that will operate under the National Disability Insurance Scheme are to provide a truly effective protective framework, then discussion on this subject must go beyond the myopic view currently being expressed by some.

For example, it is all too convenient to simply consider what is currently occurring in the various states where there is an existing complaints mechanism established under the jurisdiction of a Disability Complaints Commissioner or equivalent, or look at those elements of disability legislation that relate to safeguards, and to suggest or assume these provide an effective framework.

While much has been written about rights, as applying to people with disabilities, including the right to be safe and live free from abuse and neglect, it is essential to explore in greater depth what this actually means in the context of safeguards. Or, in other words - ***What is it that the safeguards are seeking to protect?*** If we are clear as to what it is we are seeking to ‘safeguard’ then we will be in a better position to be able to articulate the mechanisms best able to do this.

If there are existing mechanisms that should be considered as possibly being part of the new safeguard regime then they should not be accepted at face value simply because they exist at the moment. It is essential they be subjected to critical analysis in terms of how effective they are, or have been; and further whether or not they fit the concept of a national framework.

The underlying thesis presented by the writers is that simply transitioning what currently exists in particular jurisdictions, even with some fiddling around the edges, is not appropriate. The concept of a holistic and single national system must be applied.

As such, the following explores the following:

* The concept of safeguards and the four-elements of a safeguard system
* Current deficits
* The NDIS and a single system

1. **What do we mean by safeguards?**

Although different interpretations may exist as to what is meant by safeguards, the writers submit that it is unarguable that in the context of people with disabilities they must be:

***Measures established and actions applied to uphold the rights of people with disabilities, to protect them from harm and to prevent something undesirable happening to them.***

Thus, safeguards must be about protecting people with disabilities from neglect, abuse, violence and exploitation. Given this, it must also be recognised that neglect, abuse, violence and exploitation can come in many forms and particularly abuse and neglect can be perpetrated either as a direct action, or by an inaction, by a person or entity charged with providing a duty of care to persons with a disability.

Given the duty of care imperative, it therefore stands to reason that safeguards must, at the very least, include preventative measures. However, no matter how stringent preventative measures might be, their effectiveness cannot be totally guaranteed. Therefore, safeguards must go beyond preventative risk management. Thus, while the first element of a safeguard system is that of risk prevention strategies, other strategies must also form part of an overall safeguards system. Further detail is provided below in relation to what are described as the four pillars of safeguards. These four pillars should be considered as applicable to the NDIS.

1. **The four pillars of a safeguard system**

Given that prevention must be the first pillar in a safeguard system, what then are the other pillars and what measures or activities must be incorporated into each of the four pillars identified in the diagram below?

**The Four Pillars of Safeguards**

**Prevention**

**Reporting**

**Investigation**

**Consequences**

1. **Prevention**
   * + Much that has being written about safeguards as well as the actual safeguards that have been put in place has tended to focus on the reporting of incidents and complaints. While acknowledging that complaints reporting and management and incident reporting are integral to a safeguards hierarchy, nonetheless the first pillar must be prevention.
     + As the old adage goes ‘prevention is better than cure’. This adage could have no greater applicability than in the disability sector and as relating to the prevention of neglect, abuse, exploitation and violence towards people with disabilities. As already noted above, while there is no guarantee that any preventative strategy will necessarily always work, the basic assumption must be that if the strategies are operationally sound, and applied at all times, it is more likely than not that they will work.
     + Therefore, there are a number of preventative strategies that must be written into any future safeguard document. And further, these must be mandated as an automatic requirement and therefore not subject to ‘ifs, buts or maybes’. Certainly, while there is evidence to suggest that some of these preventative strategies currently exist, we know that they have not always worked. In part the reason for this is that they have not necessarily been inculcated into the culture of disability services.
     + It is concerning that the concept of duty of care is not written into Victoria’s Disability Act. Nor has it been given any prominence by entities such as the Public Advocate, the Disability Services Commissioner or service providers, including DHHS. Therefore, it is reasonable to suggest that neither the legal nor moral obligations associated with duty of care have been given priority in the provision of services to people with disabilities. This must be changed.
     + Although not necessarily exhaustive the following are submitted as constituting the elements of the prevention pillar:
   * Applying the rules of effective recruitment and staff selection including advertising widely, ensuring clarity of roles and responsibilities for the positions being recruited, undertaking a thorough selection process.
   * Applying pre-employment checks including referee, police checks and any necessary medical clearances.
   * Instituting detailed induction/orientation programs, preferably undertaken prior to new staff working with clients.
   * Establishing a ‘buddy system’ whereby new staff work alongside experienced, longer term staff in the initial phase of employment.
   * Applying a probationary period and ensuring that appropriate reviews are undertaken during the course of the probation.
   * Not allocating a new staff member to a lone roster position until, and unless, there is absolute satisfaction as to the person’s knowledge and abilities.
   * In the event of serious issues or concerns arising during the period of the probation, applying the terms of probation by discontinuing the employment of the staff person.
   * Implementing regular performance reviews which include the staff member’s knowledge of his or her position, assessment of his or her operational performance, and assessment of his/her knowledge of relevant legislation and policies and procedures.
   * Ensuring on-the-job day-to-day performance management including role modelling by more experienced colleagues and spot checks.
   * Having available mandatory in-house training and development programs.
   * Rotating staff through various programs or rosters in order to ensure they establish a broad understanding of the service in which they are employed, and also to avoid what might be called the ‘ownership’ syndrome developing, whereby individual staff establish a belief they actually "own" the client, the roster or the program.

In addition to the above, the one critical preventative element is that of effective and regular supervision, whereby this includes role modelling, observation and immediate remedial action if required. Associated with the matter of effective supervision is ensuring that supervisors, particularly those involved in direct service to clients, actually undertake the task of supervision and are not, either as a result of organisational requirements or of their own volition, tied up in bureaucratic processes and locked away in the office doing paperwork.

Further on the matter of supervision, there must also be the requirement for middle level managers to regularly observe the practices of their line reportees and base grade staff in the operational environment. In other words, they must place themselves in a position of knowing what is going on.

While the above addresses what might be termed preventative strategies to be applied by service providers, there is also the critical issue of external monitoring.

**Innovation in Prevention**

In Victoria certainly, much has been made of the role played by Community Visitors since their inception in 1986 under the Intellectually Disabled Persons Services Act.

If one were to listen uncritically to the white noise that surrounds the commentary about the role that has been played by Community Visitors allegedly addressing abuse, neglect and violence, one could be forgiven for believing they are knights in shining armour. However, in terms of prevention, the facts speak for themselves. On their own admission, and as articulated in the 2014 Community Visitors Annual Report, the Community Visitors note that despite the reporting of their concerns about abuse and neglect having been ‘a continuing theme in recent years’, there is now concerns that abuse and neglect represent ‘a systemic problem.’ And, as also expressed by the Public Advocate, to whom Community Visitors report, this is only the ‘tip of the iceberg.’

Therefore, despite Victoria’s Disability Act 2006 providing Community Visitors with the authority to visit residential facilities and inquire into particular aspects of the facilities operations, the outcomes of these powers are effectively a responsibility of the Public Advocate to only report to Parliament. Further, it must also be emphasised that they do not have the power to visit specialist disability service providers. Therefore, Community Visitors, despite being well meaning and no doubt carrying out their role in accordance with the legislation, have clearly been ineffectual in preventing abuse, neglect, exploitation and violence.

Thus, the question arises - Should Community Visitors be part of the NDIS safeguarding framework?

**Equal rights and equal protection**

In response to the above question the writers answer – No. Given it has not worked in Victoria, what sense does it make to implant it into the NDIS system. Instead, the writers propose an approach that more appropriately and more effectively reflects equal rights and equal protection for people with disabilities. In order to meet this objective, the writers have looked to the rights and protection given to employees when compared and contrasted to the rights and protection given to people with disabilities.

Certainly, there is no denying that the disability sector is high on the rhetoric of rights. One only has to listen to the policy makers, the academics and watchdogs as well as the advocacy organisations. Yet, activating these high sounding rights in funded specialist residential and day services is far from convincing.

By contrast, employees in Victoria, and the writers assume elsewhere in Australia, have their right to be able to work in an environment that is safe and free from abuse, neglect, exploitation and violence enshrined in action-based law through Victoria’s Occupational Health and Safety Act 2004 (OH&S Act). The mandated provisions of this legislation contrast significantly in terms of rights applicable to employees to the much softer approach applied in the disability sector through the Disability Act 2006 and policy statements as applying to the rights of people with disabilities.

Critically, employees have the right to appoint health and safety representatives within the local work area, whereby these health and safety representatives have significant powers designated to them, including the imposition of what is known as Provisional Improvement Notices (PINs). Associated with this is that contravention of a PIN is deemed as an offence under the legislation. Also significantly, the provisions of the OH&S Act provide for Workplace Inspectors, who not only have the authority to visit workplaces at any time, but also to impose PINs, which may require particular rectification of irregularities or defects in the workplace. In addition, the OH&S Act specifically prohibits discrimination against employees and emphasises the enforcement authority of workplace inspectors. The writers emphasise that this Act also allows Workplace Inspectors to require names and addresses to be provided and they have the authority to give directions. They can also serve infringement notices that can lead to prosecution action. Compliance with particular codes and orders is mandated.

In addition to the provisions of the OH&S Act and the rights and protections that are afforded to employees, noting that the writers have no dispute with this, employees also have the protection of WorkSafe, whereby matters of dispute can be taken and judgements made that require employers to meet certain findings of the WorkSafe authority.

By contrast, none of these definitive requirements are imposed on accredited service providers in Victoria, and none of the protections afforded workers are afforded to people with disabilities who receive services and supports through accredited agencies.

As such, the writers propose the incorporation of an approach based on OH&S and WorkSafe provisions but as applying to the rights and protection of people with disabilities to be able to receive services and support free of abuse, neglect, exploitation and violence. As such, they highlight the need to establish Disability Compliance Officers who have the legislative authority to go beyond the powers of inspection as currently available to Community Visitors and to go beyond the power of waiting for complaints to be made, as is the case with the DSC, and having the authority to be proactive and focussed on prevention and compliance.

**(ii) Reporting**

Victoria has long had an incident reporting system established under the authority of the now Department of Health Human Services and as applied to services managed by DHHS as well as agencies funded by that department. In terms of complaint mechanisms, the creation of the Disability Services Commissioner under the Disability Act 2006 established a complaints process managed by that office. This was extended to what might be called ‘internal complaints’ within service agencies, whereby all registered service providers are required to have a complaints mechanism and are required to report annually to the Disability Services Commissioner in relation to the complaints managed by them.

Essentially, incident reporting to the Department and the submission of complaints to the Disability Services Commissioner are both forms of reporting. In effect, incident reporting is primarily an internal process, whereas the making of complaints, as applying to the Disability Services Commissioner, is an external process

Despite incident reporting having been in place for approximately a quarter of a century, and the Disability Service Commissioner having operated since mid-2007, there is clear evidence to suggest that these processes have not been effective in stemming the tide of neglect, abuse, exploitation and violence in the disability sector in Victoria. Evidence of this in part resides in articles in The Age newspaper and the recent ABC Four Corners program (24/11), which highlighted significant abuse, including rapes, in one of Victoria's largest and highest-funded disability service providers. The evidence also resides in the recent call as made by Victoria’s Public Advocate in the 2014 Annual Report of Community Visitors, that abuse and neglect is systemic across the disability accommodation sector and has not only been reported by Community Visitors over a number of years but it is growing.

The evidence also resides in the fact that prior to its election the newly elected government in Victoria announced its intention to undertake a broad-based inquiry into the disability sector. And further, the evidence resides in the fact Victoria’s Ombudsman also recently announced an investigation and a Senate Inquiry is currently underway. Therefore, while it is important to acknowledge the existence of incident reporting and complaints management, given this indisputable evidence the question must be asked – Why have reporting safeguards failed?

There are several reasons why incident reporting and the complaints management process have been relatively ineffective as stand-alone safeguards in reducing the actual and potential likelihood of incidents, including abuse and neglect, occurring.

In terms of incident reporting it is reasonable to suggest this process has not been as effective as it should have been as a protective measure largely due to the following:

* Not all incidents which should be reported are reported or are readily available; noting Community Visitors in Victoria were highly critical in their 2014 annual report of the failure of incidents to be reported or reports to be available during their visits
* The content of many incident reports lacking clarity and not providing all the information as required
* An absence of timely follow-up in relation to the incidents being reported
* A failure of management to use incident reports as a management tool to identify potential systemic issues, training needs or individual staff incompetence
* Incident reports are not promoted with emphasis given to their being a mandated requirement
* Incident reports are not linked to quality assurance provisions and performance management, noting that the former Minister responsible for disability in Victoria requested the Disability Services Commissioner monitor and review incidents involving staff to client assault and unexplained injury. However, other than report on themes in his 2014 Annual Report, the Disability Services Commissioner provided no analysis of the reports in terms of how incidents related to legislative or process failures and did not note any links to quality assurance provisions.

In terms of complaints management it is reasonable to suggest the reason why this process has not been as effective as it should have been as a protective measure is largely due to:

* The processes adopted by Victoria’s Disability Services Commissioner have been unnecessarily complex and elongated
* Victoria’s Commissioner has established a mantra whereby he considers failures in communication as the basis for complaints and therefore the establishment of more effective communication is the answer to reducing complaints
* In effect this attitude denies the existence of neglect, abuse, exploitation and violence as being the real basis for particular complaints submitted to him
* Despite the Commissioner reporting each year that complaints have not been resolved or were only been partially resolved, in some instances the Commissioner closed these cases
* Despite the Commissioner having investigative authority under the Disability Act 2006 he has consistently refused to undertake investigations of those complaints that have either been deemed not suitable for conciliation or where conciliation has failed
* Despite the Commissioner’s advice that a number of complaints relate to the failure of service providers to meet their legislative responsibilities, the Commissioner has failed to report on such legislative failures in his annual reports
  + The Commissioner has also failed to name, in his annual report, those organisations that have not met their legislative obligations, and/or the number of complaints made against individual organisations

Therefore, if reporting through incidents reports and the lodgement of complaints are to be part of a new safeguard model, although not necessarily exhaustive, the following are submitted as constituting the elements of the reporting pillar:

* Mandatory Reporting as applies for child protection
* Mandated Incident Reporting for all accredited providers
* A complaints mechanism
* The requirement of all reports to include:
  + - The detailed nature of the incident or complaint, including dates/times/location
    - Identification of all entities or individuals involved
    - Details to whom the report/complaint is directed and actions taken.

**(iii) Investigating**

Although investigative powers already exist for Victoria’s Disability Services Commissioner, as evidenced through his annual reports he has failed to implement even one single investigation since 2010. Equally, although DHHS also has the power to investigate allegations of, for example, abuse and neglect or other types of complaints as applying to its own service provision as well as those funded through the department, there is a strong prima facie case to suggest the former Secretary of DHHS failed to exercise authority in this regard.

A classic example of the failure of both DHHS and a funded agency relates to the review jointly commissioned by DHHS and the Yooralla organisation in relation to rapes and associated reporting and follow-up issues that occurred in service outlets operating under the jurisdiction of Yooralla. Despite the obvious necessity for the consultant, who was engaged by DHHS and Yooralla to investigate the allegations, an excuse used by both was that the consultant did not interview the complainants alleging that he had been asked not to do so by the police. Subsequently, the police denied this allegation.

The writers argue that even where the police may be involved in investigating allegations, the organisation also has an obligation to conduct its own internal investigations. Not to do so is a clear abrogation of its responsibilities to protect the rights of those people with a disability who are supported by the organisation.

Obviously, the importance of the investigative process is to provide opportunity to the complainant as well as the respondent to state their case, and also to seek to determine whether or not the allegations can be substantiated. Substantiation may include witness statements, documented evidence, and observational evidence as in signs of physical abuse and the like. Therefore, not to investigate clearly denies the complainant his or her right to have a complaint addressed in a way that has a greater chance in determining the efficacy or otherwise of the complaint. Indeed, it is argued the investigation of complaints is a protective device for the complainant and also the respondent, with fairness and natural justice being applied to both.

Therefore, it is essential that investigations be considered as a crucial element of a safeguarding system. Further, that investigations are not open to the waxing and waning of the individual or entity that has the authority to investigate. It is also equally important that the investigative process is independent of the funder and the service provider. And further, that the outcomes of the investigative process are transparent.

**(iv) Consequences**

Although there is a range of consequences that can be applied to individuals and entities who fail to meet their service and legislative obligations, it is reasonable to conclude that it is rare for any significant consequences to be applied to individuals and entities who transgress, in a significant way, their service and legislative obligations. A glaring example of this failure is that of the Yooralla rapes.

While it is true that the two rapists were jailed as a consequence of their horrendous behaviour towards people with disabilities in their care, it is essential to note this action did not come about as a result of the Yooralla Board, Chief Executive Officer or indeed DHHS taking the initiative to bring these matters to the attention of the police.

That writers are also aware, as a result of their involvement with people with disabilities and their families, of a number of cases where DHHS and particular funded agencies have failed, and in some cases refused, to mete out appropriate consequences to staff who failed a duty of care towards those people with a disability in their care or, as in the case of the Disability Services Commissioner, to make any such recommendations.

In terms of individuals who transgress significantly against people with disabilities, a range of options is available to managers. And while acknowledging industrial agreements and Fairwork requirements may have some import, nonetheless, again it is reasonable to suggest that rarely are any of the options as below applied:

* + - Charges leading to court action
    - Termination
    - Demotion
    - Monetary fines
    - Formal counselling
    - Additional training and support

It is all very well to suggest or infer that reporting and a complaints mechanism represent the end-point of a safeguards process. However, along with investigations, the significant gap in the so-called safeguards systems currently operating is the failure of those with the power to do so to vigorously pursue consequences for those individuals who transgress.

1. **A New Approach - More than a Transplant or Fiddling Around the Edges**

As already expressed above, the writers submit that it would be short-sighted of those responsible for establishing the next steps for the NDIS to simply transplant that which is currently operating in particular state or territory jurisdictions, or pretend to establish something new by simply fiddling around the edges.

1. **Concluding Comment**

The writers can only again emphasise that a truly functional safeguarding system must include the elements identified in this submission. They also must again emphasise that the safeguarding system that is to be established for the NDIS must be a national system and must be managed at the national level by an independent national entity.

Nothing could be more foolish than to take that which currently exists in particular jurisdictions and pretend that it is working in the way intended and is therefore appropriate to the needs of a national system.

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**Part A: Section 2 - Quality Assurance**

**More than A Checklist Approach**

**Introduction**

Quality Assurance (QA) as a concept and practice first became prominent in product manufacturing. It was introduced as a way of preventing mistakes in the production process or defects in manufactured products. This assisted in minimising complaints from the purchasers of such products, whether distributors or as end sale purchasers. It is also reasonable to suggest that the better the quality in terms of manufacturing consistency and quality, the greater the level of confidence by the purchasers.

It is only in relatively recent times that the concept and practice of QA has been widely applied to human services and applied to administrative and procedural activities associated with service delivery. Thus it is that QA has become somewhat of a catch cry in the disability sector. Sadly however, while it is not uncommon for the various disability jurisdictions to be high on the rhetoric of standards and what should constitute benchmark quality inputs, the reality has tended to be that quality assurance has become a tick the box exercise on inputs. Essentially, the focus has been on the administrative process of ticking-off whether or not particular policies and procedures exist as opposed to focusing on the implementation and outcomes for the people the system is designed to service.

In terms of manufacturing, two principles underpin QA. The first is described as ‘Fit for purpose’, or in other words - Is the content of the QA suitable for the intended purpose? The second is described as ‘Right first time’, or in other words - Does the QA lead to mistakes and deficits being eliminated? Therefore, how might these two principles be applied to QA in disability services?

1. **The QA Components in the Disability Sector**

In terms of ‘fit for purpose’, a QA system for the disability sector must focus on the objectives, in all elements, of services to peoples with disability. Thus, when consideration is given to the myriad of objectives and principles that abound in various pieces of legislation and policy statements, both the standards and the safeguards must address these. This includes the principles as articulated in Section 4 of the National Disability Insurance Scheme Act 2013.

In terms of getting it ‘right the first time’, given the mounting evidence of widespread abuse, neglect, exploitation and violence across the whole of the disability sector, it is now imperative that the QA system that is established for the NDIS must get it right the first time.

*There is no room for experimentation through trialing models, or having multiple systems just so long as they are ‘nationally consistent’. The greater the number of jurisdictions establishing their own systems and standards, despite allegedly being ‘nationally consistent’, the greater the multiplier effect will apply and the greater the watering-down of what should be one system one approach.*

The QA system that is established for the NDIS must, without any variation or debate, be a single system mandated for all jurisdictions that have signed up to the NDIS.

Therefore, the NDIS QA must not only include a set of standards, but also include the level of adherence to all that goes to make up the elements of safeguards as well as assessing the service input and outputs in terms the service purchasers as in persons with disabilities. Assurance of the quality of that which is being provided must be judged, not on the assurance that a checklist has been completed or that providers simply say standard have been met. The customers or the purchasers of the services, as in people with disability, must determine their satisfaction, or dissatisfaction, with the service quality. The outcomes must not be compromised by the cry for ‘more money’ nor should they be assessed by adjectives or evasive descriptors such as, "high", “good” and "poor". The benchmark standards and compliance requirements must be assessed as either being met or not met in terms of their impact on client outcomes.

**2**. **QA – A Total System**

If quality is to be assured, then it cannot simply be a matter of having a stand-alone set of standards that operate like a checklist that, once ticked off, the assumption can be made that the standards have been met. A set of standards is of course important, and indeed necessary in terms of providing the benchmark against which service delivery and client outcomes can be assessed. Nonetheless, unless there is a marrying of the standards with the safeguards as detailed above, and there is compliance against both the standards and the safeguards, quality will not be assured.

Above all else, the purpose of having a QA system is to ensure that the rights of people with disabilities, including their right to be protected from abuse, neglect, exploitation and violence is assured to the highest degree possible. Or, in other words, getting it right the first time. By association, the objective of a QA system must also be to assure that the elements of such a system meet the purpose for which they were designed. That is to assess against the benchmark, which is to provide safeguards and to ensure compliance with both.

It cannot be stressed too strongly that a QA system and process is not simply about the system itself. What it is about is people. That is, people with disabilities. Too often in the disability sector significant effort is put into designing systems and processes and allocating technical and high sounding terminology and then largely ignoring the issue of how best to assess. Too often in the disability sector, despite the rhetoric of rights, the outcomes of the people with disabilities becomes lost in the design process. Therefore, in a word, Quality Assurance in the context of the NDIS must be more than a focus just on the process; it must also focus on the outcomes

The diagram below provides a schematic view of the link between standards, compliance and safeguards. It identifies Quality Assurance as the over-reaching structure under which the functional elements of standards, safeguards and compliance operate and are linked.

Quality Assurance

Safeguards

Standards

Compliance

**3. Concluding Comment**

While references has been made above to quality assurance coming out of the manufacturing of products and then being adapted to human services, the single most important thing to remember in terms of a QA system for the NDIS, is that we are not talking about widgets, or motor vehicles, or household products - the NDIS is about people, and more importantly about people with disabilities.

Therefore, unlike the potential for product recall in the manufacturing sector if the product is found to be faulty this option is not available in the disability sector. Once damage has been done to people, particularly vulnerable people, then more often than not it cannot be remediated.

If it is that the NDIS QA system is to truly protect people with disabilities there are three critical ‘must do’ requirements.

It must be:

1. A single National system without any opportunity for individual jurisdictions to impose their own options whether allegedly ‘nationally consistent’ or not.
2. A composite system that links standards, safeguards and compliance.
3. A single national system that imposes uncompromising consequences on those providers who fail to meet the Quality Assurance requirements.

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**PART B**

**A Response to the NDIS Consultation Paper**

**Part B: Section 1 - The Consultation Paper Part 1: Proposed Quality and Safeguarding framework for the NDIS**

This section addresses specific elements of the consultation paper Part 1 by noting particular elements and the submission writers’ comments.

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| **Page Ref:** | **Paper’s Content** | **Submission Comment** |
| 10 | “Replace existing state-based arrangements”  Concept of “nationally consistent.” | Argue that the use of these two terms sends a mixed message and in effect they are mutually exclusive of each other. If the framework is to “replace existing state-based arrangements” then the assumption must be that there will be single set of arrangements.  By contrast, the term “nationally consistent” infers that individual jurisdictions will have the option of applying their own model or framework, just so long as they are consistent with the model or approach defined as the national framework.  The adoption of this approach is clearly incompatible with the notion of having one framework only – that is a national framework. |
| 10 | The concept of a ’risk based framework’ | The two types of risks as in poor quality supports and the risk of harm to an individual apply equally to non-disabled individuals.  Therefore, to seek to impose more stringent approaches to those as applying to non-disabled people compromises the concept of people with disabilities having the same rights and opportunities and obligation as others in the community.  As such, the NDIS framework must not impose a second layer of protection where broad-based protection mechanisms already apply. Indeed, the concept of ‘risk’ must be recognised for what it infers, where risk is an inherent element in any user-provider relationship, hence the notion of consumer protection. |
| 11 | The objectives and scope | It is considered unnecessary to promote the framework as creating yet another framework to address rights, when there is ample coverage of this via legislation and human rights and antidiscrimination.  Further, it is contradictory to promote the notion of choice and control while at the same time imposing rules that have the potential to restrict choice.  This submission proposes a scheme whereby real choice must be allowed to be the driver rather than manufactured choice. |
| 11 & 12 to 19 | The developmental domain | While the writers support the notion of natural safeguards, they express significant concern this section of the consultation paper makes many assumptions and seeks to promote an approach that is potentially costly yet unlikely to meet the stated objectives and scope of a national framework.  In the first instance, while giving lip service to every person being at a different stage, readers could be forgiven for thinking that there is a belief that if the right level and type of information is provided then all people with disabilities have the capacity to reach ‘independent decision making.’ Clearly this is nonsense and shows a distinct lack of understanding of the broad spectrum of disability types and levels.  The writers argue that the NDIA should not be a marketing service for providers and potential providers, regardless of whether they are individuals or entities. As applies in the commercial world, the writers submit that it must be up to the individual provider and potential provider to market their own services.  In terms of entitlements and what can be done if expectations are not met, other than perhaps an information pack, which can be provided by the NDIA when a person is accepted into the system, the writers again submit the active responsibility for this must rest with the independent entity.  While it may well be that the NDIA can and should take responsibility for the broader matter of ensuring the provision of accessible information, the writers emphasise the prime responsibility for this must rest with that entity. They suggest that not to have a single entity with this as a prime responsibility has potential to lead to mixed bag in the way information is made available.  On the matter of natural safeguards, that writers contend this is a matter for the individual, his or her family, circle of friends, or any advocacy support that he or she may seek. As such, the writers warn against a formal entity whether the NDIA or any other organisation seeking to interfere in what are principally private matters. Indeed, the writers argue to do so constitutes a paternalistic approach that is unnecessary and inappropriate.  The concept of Local Area Coordinators employed through the NDIA is argued to be unnecessarily bureaucratic and interventionist.  To suggest that the NDIA ‘has an important role to play in supporting people with disability’, in the writers’ view goes beyond what the role of the NDIA should be. As mentioned elsewhere in this submission, the writers urge against attempting to make the NDIA an all-things-to-all-people type entity.  On the matter of education and employment, the writers note the reference to ‘mainstream systems’. They are however, concerned the reference to this in the context of is that the NDIA may have a part to play. Surely, if there is a true belief in the power of purchasing, and the option of service users taking their business elsewhere, then the onus for improving their ability at educating potential purchasing participants about their services and marketing to them, rests with the providers.  The writers continue to express their concern at the theme that pervades the consultation paper, of what they call the ‘more principle’ with more power and authority being granted to the NDIS and NDIA and, more and more entities being engaged in systems and processes.  They argue this approach has the potential to make quality and safeguards top-heavy and eventually unworkable. |
| 12 & 19 to 22 | Preventative | While the writers are supportive of the notion of preventative strategies they argue that accreditation of providers should not be with the NDIA. Also, they submit that workers should be registered to work within the disability system, and implicit in registration is also the potential for de-registration of people. The development of personal registration would eliminate ‘red tape’ for service providers and would also contribute towards recruitment efficiencies.    Apart from this, while the consultation paper sought to emphasise the notion of natural supports, it has ignored those supports and protective mechanisms that exist for the general population, which of course includes people with disabilities. It seems someone incongruent for the paper to talk of reducing restrictive practice and to suggest that there are 8000 to 9000 people across Australia who are currently subjected to such practices, while at the same time suggesting safeguard mechanisms which themselves have the potential to be restrictive.  While reducing restrictive practices is a praiseworthy goal, the writers consider this has the potential to be distracting. They query whether there needs to be a National Framework for Reducing and Eliminating Restrictive Practices, and the development of detailed operational guidelines and mechanisms as appropriate in jurisdictional settings. Nonetheless, they recognise that much work has already taken place, as indicated in Part 2 of the Consultation paper, pp 75 to 87, and Appendix F, Restrictive Practices.    The writers note that the regime which exists in Victoria in the Disability Act 2006 arose out of the Intellectually Disabled Persons’ Services Act of 1986, which itself arose out of the separation of disability (or mental retardation as it was then called) from mental illness. They query whether the Victorian regime has ever been significantly scrutinised as to its effectiveness in providing a high quality of life to people with disabilities who may cause harm to themselves or others; and a high quality of support to the ‘others’ who may be affected by the person with a disability. Consequently, the writers caution against establishing a separate regime within a quality and safeguards system – while noting that work has proceeded on the basis that a separate regime is necessary, albeit that this work arose as a result of a National Strategy that was in place before the creation of the NDIS.  Further, the writers again express alarmed at the consideration (on p 111 of the Consultation paper) as to whether or not this is a ‘national’ or ‘nationally consistent’ regulatory framework, and deplore any suggestion that the system and its components is anything but one national system.    The writers direct attention to the preventative measures they have proposed by way of Disability Compliance Inspectors (DCIs). |
| 12 & 22 to 27 | Corrective | In terms of ‘after an event’ corrective functions, while supporting the notion of an independent complaints, oversight and compliance entity and process, the writers emphasise that it must be truly independent of the NDIA and also be a single national system unfettered by state and territory jurisdictions.  The writers query the statement on p 24, ‘The NDIA will oversee operation of the NDIS’ as implying that the NDIA has an oversight function – while indicating that a key issue for the scheme is whether there is also a case for establishing a body with an independent oversight function. Therefore, the writers proposed National Disability Compliance Authority functions encompass standards and quality assurance, accreditation of providers and registration of individuals; incident reporting, investigation, and complaints management. |

**Part B: Section 2 - The Consultation Paper Part 2 - Detail of key elements of the Quality and Safeguarding Framework**

This section addresses specific elements of the consultation paper Part 2 by noting the particular elements and the submission writers’ comments.

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| **Page Ref:** | **Paper’s Content** | **Submission Comment** |
| 30-44 | NDIA Provider Registration | While the writers note the current use of the word ‘registration’ for providers, they contend the NDIS should establish consistency with other industries and adopt the use of the word ‘accreditation’ when referring to organisations.  While the language of ‘registration’ is reflected in the NDIS Act and Rules applying to provider registration, there are no real obstacles to changing the language. In terms of evolving the system as it currently appears in the NDIS Act and Registered Provider of Support Rules, the writers submit that a body independent of the NDIA should register providers of support – and that this should be a provider **accreditation** system.    The writers have also proposed the **registration** of individuals who work in the disability sector, consistent with the registration of other professional individuals.  The writers strongly support the view that any accreditation system minimise the red tape burden on providers, and eliminate duplication. (As an aside, the writers note that the duplication exists because of there being Federal, State and territory systems as well as there being separate systems in, for example, disability, aged care, child care, even though the basic requirements are essentially the same.)  The writers are sceptical that a tiered approach to regulation really minimises the red tape burden. Further, the writers query the value of adding elements such as a Code of Conduct. Surely the legislated principles in the NDIS Act and the legislated Standards are the basis for judging whether or not a provider has met service obligations.  As noted elsewhere in this paper, the writers strongly urge the establishment of an independent body to undertake and monitor the accreditation of agencies who provide specialist disability services. On this point the writers also caution against seeking to require the accreditation of those providers who are accredited in their own right through their professional organisations, for example, physiotherapists, teachers, builders etc. In essence, the writers express grave concern that there is a potential for what might be described as a ‘takeover’ where there is an unrealistic requirement for any community-based organisation or private enterprise entity that may happen to be contracted by a participant in the NDIS to be accredited with the NDIS. |
| 45-55 | Systems for handling complaints | Currently in Victoria the system for reporting and managing complaints operates on a tiered basis through the individual agency, DHHS or the DSC. It should be noted that a complaint can only be handled by the DSC if it is about a registered service provider.  While the writers fully support the application of existing consumer complaint mechanisms, equally they believe that a participant of the NDIS who wishes to raise a complaint should be able to do so if the respondent is being paid from NDIS funds. The general public should also be able to complain about entities or individuals funded from the NDIS funds via Chapter 2.  The writers support the notion of having a specific and identified complaints stream within an independent body. However, they also argue the necessity of ensuring that the process for dealing with complaints is not confined to one whereby there is an assumption that all complaints can be conciliated and no one is necessarily brought to task. As such, they believe the complaints process must also be linked to a compliance regime that has penalties.    The submission writers challenge any suggestion of continuing the practice which operates in Victoria of agencies being required to report to the DSC on complaints made to them and their resolution, this being particularly when the process is one of reporting, without any necessity to resolve.  Critical in terms of complaints reporting, management and investigation, is the matter of sustainability. Therefore, while urging a national approach to this area, the writers contend that the structure within the national approach must facilitate prompt attention when complaints are made. Evidence in Victoria suggests that despite the concerns that are expressed through complaints, there is often an elongation in the process to deal with them.  The writers simply argue that if an individual considers an issue significant enough to lodge a complaint, then efficiency in dealing with that complaint must be the byword. |
| 56-66 | Ensuring staff are safe to work with participants | While the writers are cognisant that there is generally a range of checking measures prior to employing staff to work with people with disabilities, they argue that in addition to the standard range of potential employee checks as identified in the consultation paper, there are five critical considerations. One, that no matter how thorough and diverse pre-employment checks, there is always the potential for abuse to occur. Two, given this, it is therefore of equal consideration that once employed and registered, employees are adequately supervised and their performance and attitude monitored. Three, that where employees perpetrate or commit acts of abuse, neglect, exploitation or violence, severe consequences must be imposed. Four, that where employees commit acts of neglect, abuse, exploitation and violence, those in management and governance roles must be brought to account. Five, there must be a recognition that not all people who work with people with disabilities will necessarily be registered simply because those individuals with a disability who choose to manage their own funds and make their own purchases must be able to do so without being restricted to only employing someone registered to provide such services.  Therefore, while the writers suggest that the decision about whether employees are safe to work with people with disabilities must firstly rest with the independent registration body, it must be constrained to only those who work with accredited service providers; again noting the right of participants who manage their own funds to determine who they might employ.  On the matter of how much of a person’s history is required, the writers contend that it is nonsense to suggest that there is a finite amount of information that will necessarily and totally confirm the safety of someone to work with a person with a disability. Therefore, they argue that the information sought should not go above and beyond that which might normally apply for anyone seeking to be employed to provide services, care and support to others. |
| 67-74 | Safeguards for participants who manage their own plans | Inherent in the concept of participants managing their own plans is that those participants choose who it is who will provide their reasonable and necessary supports for which they are funded.  Therefore, the concept of managing the plan is a matter for the individual, either of his or her own volition or through some other support sought by him or her. Indeed, the writers submit that this area goes to the very heart of choice and independence and in so doing challenges any attempt at the application of interventionist strategies.  Essentially, the writers contend that if the NDIS is to operate truly as an insurance scheme, and if it is to truly embrace other laws which support independence and social and economic participation of people with disabilities, and if it is truly about choice and control by the participant, then this constant desire to establish a protective regime that then becomes restrictive must be avoided.  All too often there have been attempts to circumvent risk by seeking to impose restrictive practices and, although well intended, these then defeat the whole notion of the positives of self-determination and choice. Apart from this, and as already noted elsewhere in this paper, the fact is that regardless of the positive noises made about existing systems associated with standards, quality and safeguards, they have not worked. Even in the most stringent systems, including the financial world, child protection, legal services, contravention of the rules will always occur, and no amount of protectionism will make any system entirely watertight.  As such, those charged with finalising the quality and safeguarding system that is eventually established for the NDIS must be prepared to acknowledge that their framework will be vulnerable at times to the unscrupulous and the incompetent. |
| 75 | Reducing and eliminating restrictive practices in NDIS funded supports | Refer to comments made in Section 1 above. On the matter of mandatory reporting, the writers contend that this should apply to the mandatory reporting of abuse, neglect, exploitation and violence. However, to apply mandatory reporting to what are called restrictive practices is not supported. The rationale for this being that despite having had such reporting in Victoria since 1986, there is no evidence of which the writers are aware, of such reporting having been effective. Apart from this, however, the writers argue that if there is mandatory reporting of abuse, neglect, exploitation and violence, and if the platform of investigation and consequences is applied, as articulated further above, then it is difficult to see how, if restrictive practices are to occur, they would not be addressed through other processes.  The writers believe there is a grave danger that while seeking to establish a quality and safeguarding framework that truly meets the objectives of quality and safeguarding, there appears to be a tendency to seek to incorporate a range of strategies and mechanisms that go beyond what might be considered to be the normal. The writers acknowledge the importance of supporting and protecting vulnerable people. Equally, however, they abhor any suggestion that these people should have a framework imposed on them that places them in a restricted environment. The simple matter is that risk is risk, and the prevention and monitoring of risk must be able to be activated within a sustainable system.  The writers argue that there is little point in establishing strategies, frameworks, rules and regulations, policies and procedures, and practices, that are impossible to fully police and even when policed, action outcomes are watered down to a level so as to become virtually ineffective. After all, as evidenced by the situation occurring in Victoria, the legislative provisions that already exist for the Secretary of DHHS, the DSC and funded agencies are regularly ignored without any penalty being imposed. |

**PART C**

**Contributions to the Quality and Safeguarding Framework**

**Part C: Section 1 - A Conceptual Foundation**

The writers submit that it is essential that the role of the NDIA must be confined to the following functions only:

* Assessor of eligibility,
* Funder of eligible participants and,
* Funder of individuals and entities as per Chapter 2 of the NDIS Act.

As such they argue that a separate agency should be established for the purpose of:

* Accrediting service providers funded under the NDIA or used by participants who have their funds managed by the NDIA
* Registering individuals who provide services through registered providers
* Establishing and monitoring quality standards
* Managing and investigating complaints and incident reports
* Undertaking inspections and issuing compliance orders
* Monitoring the delivery of services and supports provided by funded agencies
* Managing a complaints mechanism.

The basis of this argument is two-fold and based on the following:

1. **The NDIA as an agency of the NDIS**

The NDIS Act provides for the establishment of the national disability insurance scheme. Hence, the main function of the NDIA is to manage the funds provided through the NDIS as allocated by government, by way of funding eligible participants as well as individuals and entities funded under Chapter 2 of the NDIS Act.

1. **A separation of functions**

By seeking to also include functions such as provider accreditation, standards settings and monitoring, and service monitoring and complaints management, as part of the overall role of the NDIA, in the writers’ view conflicts with the main role as a gatekeeper and funder. Additionally, they argue that not to separate the functions as listed above and to be managed by a separate agency ignores practices common to other sectors.

*The writers contend that unless the foundation on which a quality and safeguarding framework is to be built is unambiguous and reflects the statutory role of the National Disability Insurance Scheme, there is then the potential for the framework to become a ‘framework of convenience’. Or, in other words it will become a framework that is not fully national in the sense that all that is required is for the signed-up jurisdictions to be ‘nationally consistent’. Further, that it is ambiguous by failing to clearly delineate the rules governing authorities and responsibilities.*

The following therefore addresses what the writers submit are the necessary and unambiguous principles on which the framework must be built.

**Principles - Set One**

**The Immutable Principles**

Must include:

* A genuine right to choose and for choice not to be restricted by ideology
* Safeguards available to the rest of the community are also available to people with disabilities
* The principle of non-encroachment

**Principles - Set Two**

**The Statutory Functions of the NDIS and NDIA**

The legislative powers and responsibilities of the NDIS restrict the NDIA to:

* Providing coordination, strategic and referral services
* Funding eligible individuals for reasonable and necessary supports
* Providing general supports to, or in relation to non-participants
* Funding non-participants
* Funding entitles to assist people with disabilities

**Principles - Set Three**

**The Separation of Powers and Responsibilities**

* The significance of the legislative provisions relate to the powers and responsibilities of the NDIA
* By association, the legislative limitations imposed on the NDIA therefore determine those functions, responsibilities and authorities that are not the province of the NDIA
* The powers and authority given to the NDIA, along those with functions that are not, must therefore set the rules to guide the quality and safeguards framework

**Principles - Set Four**

**Understanding Streams**

The NDIS Act 2013 effectively provides for three streams of recipients:

1. Participants eligible to receive funds and who choose to self-manage
2. Participants eligible to receive funds and who choose to have the NDIA manage their funds
3. Persons or entities deemed eligible to receive assistance or funds

The importance of highlighting the streams is because of their association with the questions of –

Where responsibilities for setting, and monitoring quality standards lie?

How stringent the safeguards should be and to what degree they should be over and above those that exist for the non-disabled population?

**3.** **Aligning principles, quality, standards and safeguards**

Based on the comments as detailed further above the writers present an outline of a proposed quality and safeguards framework.

**Significantly the proposed model addresses**:

* The relationships between standards and quality
* The application of steams as inferred by the NDIS Act
* The distinction to be made between eligibility, funding and monitoring
* Boundaries delineating authorities and responsibilities
* Consumer safeguards and avenues for appeal
* A distinction between individuals and services funded under Chapter 2 of the Act as well as those individuals funded under Chapter 3 of the Act, and those individuals who are funded under Chapter 3 who elect to have their funds managed by the agency the agency.
* A distinction between services used by participants where the agency manages the funds and those where participants manage their own money.

The proposed model distinguishes between quality as applicable to the services provided and safeguards as applicable to the individual consumer.

**4.** **Quality as a component of the framework**

This draft model takes account of the definition of quality as provided in the consultation paper whereby quality is described as, “*The extent to which a support is able to meet a participant’s requirements”.*  Additionally, the draft model also takes into account of the definition provided by the writers that quality must be an attribute or input measured against a particular standard or benchmark.

Given this, the writers therefore contend that quality, however defined, must be directed to measuring the **input of services and service providers** based on, as relevant, quality standards and benchmark measurement determined for such standards against the **outcomes or benefits to the individual client**.

The schematic diagram below represents the interdependency between Standards – Benchmarks, Inputs and Client Outcomes.

People interested inn **Outline Of People** also searcho  **Client Outcome**

Given National Standards for Disability Services have already been developed, the writers submits that these standards, even if requiring some modification, should be applied as the standards for determining the suitability of service providers be they individuals or entities. Then, associated with the standards, benchmarks should be developed for particular service types. Clearly, the measurement of outcomes for the individual participant must be against his or her plan.

In terms of service providers and the quality of services provided the writers contend that the NDIA should have no involvement other than for fund management, as in the case of participants who ask the NDIA to manage the funds allocated to them by the NDIA, or as in the case of providers who are allocated funds by the NDIA under Chapter 2 of the NDIS Act.

Instead, the writers contend that there must be a separation of the roles and responsibilities of the NDIA as a gatekeeper into the NDIS and a distributor of funds from that of being an accreditation body for service providers and a quality assessor.

As such, the writers emphasise the importance of a separate entity to that of the NDIA being established for the purpose of agency accreditation and quality control through service monitoring and deregistration where applicable.

The following tables identify the role of the NDIA, in terms non-participants (Table 1) and service providers (Table 2).

**Table 1**

**Involvement of NDIA with Consumers**

|  |  |  |  |
| --- | --- | --- | --- |
| **The Role of the NDIA** | **The Person with a Disability** | | |
| Persons assessed as a participant and therefore receiving individual funding packages & plans. But, whose funds are self-managed. | Persons assessed as a participant and therefore, receive Individual funding packages & plans. But, whose funds are managed by the NDIA | Persons who are not participants but who are funded under Chapter 2 of the NDIS Act |
| NDIA has no role other than to allocate funding. | Subject to NDIA for funds management only | NDIA has no role other than to allocate funds. |

**Table 2**

**Provider Accreditation**

|  |  |  |  |
| --- | --- | --- | --- |
| **Provider Accreditation and Service Monitoring** | **Service Providers** | | |
| Individuals and entities not funded by the NDIA and providing a service to a person where the person with the disability is self managing his/her funds. | Entities providing services to people with disabilities whose funds are being managed by the NDIA | Entities that are funded under Chapter 2 of the NDIS. |
| Not applicable.  Standard Consumer Protection. | Accreditation applicable | Accreditation applicable |

**Safeguards as a Component of the Framework**

The writers consider it important to distinguish between quality, as in the services provided to individuals with disabilities and the safeguarding of the individuals receiving those services.

**Part C: Section 2: The Significance of Language**

This section addresses particular language considered important in addressing the matter of safeguards and that also used in the consultation paper.

The writers explore the implication of how language can be used or indeed misused in the context of quality and safeguards.

The writers submit that the matter of language is critical in the sense that while quality and safeguards must be just that, they must not however, be restrictive on the rights of the individual.

|  |  |
| --- | --- |
| **Language** | **Definition and Issues** |
| **National** | **The Definition**  A definition is not provided in the consultation paper.  However, Part 1 (p.10) of the consultation paper does make reference to “The NDIS quality and safeguarding standards framework will replace existing state-based arrangements …”. Or in other words existing state-based arrangements will no longer apply following the implementation of the national framework.  **Issue**  The writers submit that it must be made clear that ‘national’ means ‘national’. Therefore, the only interpretation that can be give to this is that there is to be one single quality and safeguards framework that is to be adopted and applied Australia wide. |
| **Nationally Consistent** | **The Definition**  A definition is not provided in the consultation paper.  However, Part 1 (p.10) of the consultation paper does make reference to the “proposed framework is intended to be nationally consistent.”  **The Issues**  Clearly, using the terms ‘national’ and ‘nationally consistent’ as though they are interchangeable and in effect mean the same thing is contradictory to the concept of ‘national’ as there being one system. As such the writers condemn this complimentary usage arguing that the term nationally consistent should be deleted and greater emphasis must be given to promoting the NDIS and all of its associated administrative functions as constituting a single nation-wide system where the rule is that all jurisdictions must be required to follow the one set of rules and processes. |
| **Framework** | **The Definition**  A definition is not provided in the consultation paper.  **The Issues**  The writers understand the framework to mean the rules and structures associated with what are described as quality standards and protecting people with disabilities from harm and unacceptable risk. |
| **Quality** | **The Definition**  The consultation paper describes quality as “The extent to which a support is able to meet a participant’s requirements.”  **The Issues**  The writers challenge this definition arguing that it is limiting in the sense that it assumes the individual’s requirements are the basis of the measurement. The writers submit that quality must be an attribute or input measured against a particular standard or benchmark. |
| **Safeguards** | **The Definition**  The consultation paper while not specifically describing safeguards does describe, “safeguarding” as an action designed to protect rights and be safe from risk of harm and neglect while maximising choice.  **The Issues**  The writers submit that safeguards, and hence the action arising from them, must be the same or equivalent to those applying to the rest of the community in terms of consumer rights. They further argue that to seek to establish a set of safeguards that treat people with disabilities as individuals to be wrapped in cotton wool contradicts the notion of people with disabilities as having the same rights, opportunity and responsibilities as others in the community. |
| **Choice** | **The Definition**  This most significant concept is not described in the glossary of terms section of the consultation paper,  **The Issues**  Notwithstanding the above, the writers emphasise that choice must not only mean the right to choose but also that the range of options is not limited by ideology and controlling factions. |
| **Capacity** | **The Definition**  The consultation paper defines capacity as ‘Understanding, skills and knowledge to support and enable individuals to exercise choice and control, and to participate in the community.’  **The Issues**  The writers express concern that capacity is linked to participation in the community. They argue that the definition must be limited to that of being able, with appropriate information to demonstrate a capability to exercise choice and make independent decisions. |
| **Restrictive practices** | **The Definition**  Is defined as any intervention that restricts the right of freedom of movement of a person with a disability who display challenging behaviour and where the intervention is to protect from harm.  **The Issues**  The definition provided is exclusively focussed on the behaviour of the person with a disability. While this is clearly has application to people with challenging behaviours the definition does not however, address those practices that may be restrictive to people with disabilities who do not exhibit challenging behaviours. Further, the definition, although well meant does not address practices that are restrictive by their nature but would not or are not applied to non-disabled people.  As such, the writers urge that consideration must be given to the safeguards framework not being restrictive to the point of being discriminatory against people with disabilities. |

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