# Office of the Public Advocate (Qld)

## Systems Advocacy

# Submission to the National Disability Insurance Scheme

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

April 2015

Queensland Government

# Introduction

## The Public Advocate (Qld)

The Public Advocate was established by the *Guardianship and Administration Act 2000* (Qld) to undertake systems advocacy on behalf of adults with impaired decision-making capacity in Queensland. The primary role of the Public Advocate is to promote and protect the rights, autonomy and participation of Queensland adults with impaired decision-making capacity (the adults) in all aspects of community life.

More specifically, the functions of the Public Advocate are:

- promoting and protecting the rights of adults with impaired capacity for a matter;
- promoting the protection of the adults from neglect, exploitation or abuse;
- encouraging the development of programs to help the adults reach the greatest practicable degree of autonomy;
- promoting the provision of services and facilities for the adults; and
- monitoring and reviewing the delivery of services and facilities to the adults.[1]

In 2015, the Office of the Public Advocate estimates that there are approximately 115,745 Queensland adults with impaired decision-making capacity (or 1 in 32 adults).[2]

Consistent with the functions of the Public Advocate, this submission focuses on rights and safeguards for adults with impaired decision-making capacity. The primary factors that can impact decision-making capacity include (but are not limited to) intellectual disability, acquired brain injuries arising from catastrophic accidents, mental illness, ageing conditions such as dementia, and conditions associated with problematic alcohol and drug use.

It is important to note that not all people with these conditions will have impaired decision-making capacity, and that impaired decision-making capacity does not necessarily impact all areas of an adult's life, and may fluctuate in response to situational issues.

It is likely, however, that many people with intellectual, cognitive or psychiatric disability (hereafter referred to as cognitive impairment) may, at some point in their lives if not on a regular and ongoing basis, experience impaired decision-making capacity in respect of a matter. It is also likely that many will require support with their decision-making, including access to and the analysis of information, determining and weighing up available options, and communicating decisions.

An analysis of the available information on NDIS participants from quarterly reports indicates that in 2015, there were 5,004 NDIS participants who may have some form of cognitive impairment. This correlates to 66% of all participants (excluding the South Australian trial site).[3]

Of this group, 41% had a primary disability type of Autism and related disorders, 39% intellectual, 17% "other neurological", 10% developmental delay, 9% Cerebral Palsy, 8% Down Syndrome, 8% "other intellectual/ learning", 8% Schizophrenia, 7% "other psychiatric", and 6% global developmental delay. The bulk of these participants were in NSW and Victoria as these trial sites had the broadest intake criteria.[4]

The remaining 34% of NDIS participants had a range of primary disability types not typically associated with impaired decision-making capacity such as multiple sclerosis or physical disability.

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[1] *Guardianship and Administration Act 2000* (Qld) s 209.

[2] Office of the Public Advocate, 'The Potential Population for Systems Advocacy' (Fact Sheet, Office of the Public Advocate (Queensland), April 2015).

[3] National Disability Insurance Agency, 'Quarterly Report to COAG Disability Reform council' (Report, 31 December 2014) <http://www.ndis.gov.au/sites/default/files/documents/Report_to_the_Disability_Reform_Council_2014-15_Q2_02.pdf>.

[4] Ibid.

# Interest of the Public Advocate (Qld)

The Public Advocate has a strong interest in the issue of quality and safeguarding. Through both family experience and having worked with people with disability for over 20 years in roles spanning from front-line service delivery to her current position as Public Advocate in Queensland, she has seen both the positive and negative elements of support for people with disability first-hand.

As a result of both her personal and professional experiences, and the broad range of issues that she has encountered and sought to address at both individual and systemic levels, the Public Advocate is concerned to ensure that the forthcoming transformational change to the disability services sector (through the implementation of the National Disability Insurance Scheme (NDIS)) is undertaken in a way that both enables and empowers people with disability while still ensuring that there are sufficient safeguards to respond to and address issues should they arise.

In addition to this submission, which relates to the broader quality and safeguarding framework, the Public Advocate is also tabling a submission commenting on the proposals specifically relating to restrictive practices that are presented in the Consultation Paper.

## Participation in consultation

Since the introduction of the NDIS, the Public Advocate has been strategically involved in the development and approaching implementation of the NDIS, both at the state and national levels. To this end, the Public Advocate has been an active participant in consultation processes and will continue to do so in the future.

The Public Advocate has participated in the following activities as a part of considering her position in respect of what might constitute a robust quality and safeguarding framework for the NDIS; these activities have subsequently informed her response to the Consultation Paper:

- Engagement in discussions as a member of the Australian Guardianship and Administration Council (AGAC), and contribution to AGAC’s submission to the Consultation Paper;
- Convenor of a Queensland Quality and Safeguards Interest Group;
- Attendance at the Council for Intellectual Disability National Roundtable on Quality and Safeguarding in the NDIS held in Sydney on 27 March 2015; and
- Attendance at the Brisbane face-to-face consultation about a quality and safeguarding system for the NDIS held on 1 April 2015.

Being an active participant in the activities outlined above has assisted the Public Advocate to develop key principles to enable an informed response to the NDIS quality and safeguarding framework.

# Position of the Public Advocate (Qld)

## No diminution of safeguards for people with disability in Queensland

The development of a quality and safeguarding framework for the NDIS represents a unique opportunity to promote and operationalise a rights-based framework that aligns both with the human rights instruments to which Australia is a signatory, such as the United Nations *Convention on the Rights of Persons with Disabilities* (UNCRPD),[5] and with contemporary models of support and services for people with disability.

While the Public Advocate is supportive of the forward-thinking and innovative approach that is potentially heralded by the NDIS, the Public Advocate is also cognisant of the need to ensure that there is no diminution of safeguards for people with disability.

In Queensland, the current level of regulation is represented in a diagram at **Appendix One**. While there have been some changes in this framework over time (including a reduction in safeguards that occurred in 2014),[6] by and large these safeguards represent those that were introduced around a decade ago in response to allegations of abuse and neglect in a specific disability service provider.

In 2004, the Adult Guardian submitted a report detailing instances of serious abuse against people with disability at the Care Independent Living Association on Bribie Island (Care Bribie) to the then Minister for Communities, Disability Services and Seniors, the Honourable Warren Pitt MP.[7] A number of people were subsequently charged in relation to allegations of abuse occurring at this facility that were both disturbing and shocking. The abusive conduct was found to have been supported by those managing the facility.[8] The sentencing judge observed that this conduct “went beyond what could be regarded as reasonable in a civilised society and inflicted unjustifiable suffering on unfortunate and very vulnerable children”.[9]

The regulatory framework that was implemented in Queensland also acknowledged and responded to a series of reports tabled in the Queensland Parliament from the mid-1990s concerning abuse and neglect of people with disability residing in institutional-type living environments and/or receiving inappropriate models of support and care including:

- *Report of an Inquiry Conducted by the Honourable D G Stewart into Allegations of Official Misconduct at the Basil Stafford Centre*, tabled in the Legislative Assembly 11 March 1995;
- *Report to the Minister for Health and the Parliament of Queensland on Investigations by the Health Rights Commissioner at Baillie Henderson Hospital, Toowoomba*, tabled in the Legislative Assembly 26 November 1996;
- *Ministerial Inquiry into the Cootharinga Society Townsville*, tabled in the Legislative Assembly 15 September 1998; and
- *A Review of the Basil Stafford Centre Recommendations: Report to Disability Services Queensland by the Honourable W J Carter QC*, tabled in the Legislative Assembly 1 June 2000.

Collectively these reports detailed findings of abuse and neglect, insidious institutional cultures, and inappropriate models of care.

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[5] *Convention on the Rights of Persons with Disabilities,* opened for signature on 30 March 2007, [2008] ATS 12 (entered into force on 3 May 2008) ‘*Convention on the Rights of Persons with Disabilities*’.

[6] See the *Communities Legislation (Funding Red Tape Reduction) Amendment Act 2014* (Qld).

[7] Statement by Honourable F.W.Pitt (member for Mulgrave, Minister for Communities, Disability Services and Seniors) Queensland Parliament, 31 August 2004.

[8] R v Lister [2009] QCA 368.

[9] Ibid.

The Queensland Government at the time committed to developing the Disability Sector Quality System (which was introduced in 2004 as a direct response to the allegations of abuse at Care Bribie), and strengthening legislative protections for people with disability.

In accordance with this, a review of the *Disability Services Act 1992* was undertaken with a view to improving "mechanisms for preventing abuse of any kind against anyone".[10] The reforms ultimately passed by Parliament in 2006 included mechanisms to ensure funded disability service providers meet standards that underpin the Disability Sector Quality System including:

- Legislative recognition of the disability service standards;
- A legislated pre-approval process before an organisation is eligible to receive funding;
- A certification process that provides for an external/independent body to carry out regular audits of a service provider's compliance with the disability service standards under the Disability Sector Quality System;
- The ability for a regulation to set out prescribed requirements in relation to the provision of disability services by funded providers including for example how an organisation protects people with disability from abuse, neglect and exploitation;
- A range of sanctions for non-compliance by funded disability service providers;
- Powers for investigating and monitoring funded disability service providers (including a power for authorised officers to apply for a warrant to enter a funded service to investigate non-compliance, or to enter without a warrant if there is an immediate risk of harm to a person with a disability);
- A complaints handling process; and
- Criminal history screening for employees of funded disability service providers.[11]

Subsequent to this, in 2006, the Honourable William Carter QC commenced a review in relation to the "existing provisions for the care, support and accommodation of people with an intellectual/cognitive disability who represent a significant risk of harm to themselves or the community".[12] Carter found a crisis-driven and reactive response to this issue with an over-reliance by disability service providers on practices such as detention, seclusion and restraint (including chemical restraint) of people with disability.

Carter found there continued to be a practice of grouping together in congregate care arrangements people with disability who exhibited 'challenging behaviours' and were subject to such restraints.[13] Many such clients continued to reside on the site of the former Basil Stafford Centre, which Carter described as 'prison like in character,' 'totally unacceptable,' and representing 'a gross infringement of the relevant person's human rights.'[14] Amendments to the *Disability Services Act 2006* in 2008 introduced a regulatory scheme for reducing and eliminating restrictive practices.[15]

The Public Advocate is concerned to ensure that the Disability Reform Council, who will ultimately agree to a recommended model for the quality and safeguarding framework for an NDIS, is aware of Queensland's history of abuse and neglect, which underpinned the introduction of Queensland's quality and safeguarding framework, before making a decision that these safeguards are no longer necessary. It should be noted that the issues experienced by people with disability over the course of Queensland's history are by no means limited to this jurisdiction.

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[10] Honourable F.W. Pitt, Member for Mulgrave and Minister for Communities, Disability Services and Seniors, Ministerial Statement to Queensland Parliament (31 August 2004) 2079.

[11] These reforms were contained in the Disability Services Bill 2006 introduced into Queensland Parliament on 9 March 2006.

[12] Carter William QC, *Challenging Behaviour and Disability: A Targeted Response*, (Report to Warren Pitt MP, Minister for Communities, 2006, 4.

[13] Ibid 74.

[14] Ibid 90.

[15] *Disability Services Act 2006* (Qld) pt 6.

Furthermore, they are not only part of the international and Australian history for people with disability but remain a current and an ongoing risk to people with disability who are often reliant on others to provide the necessary support to enable them to participate actively in social, economic and community pursuits.

The Public Advocate would not support any diminution of safeguards for people with disability in Queensland. This includes safeguards in respect of restrictive practices which are discussed in a separate submission.[16]

### Recommendation

There must be no diminution of safeguards for people with disability in Queensland.

## Core Principles

The following core principles inform the Public Advocate's response to the Consultation Paper:

1. ***Rights-based approach***: The introduction of the NDIS must be recognised as an invaluable opportunity to apply a nationally consistent response towards supporting all people with disability across Australia in a manner that is premised upon a contemporary rights-based approach. The NDIS must ensure that that the obligations, duties and principles under the UNCRPD to which Australia is a signatory are upheld and implemented. This should be the minimum threshold against which all options are tested.
2. ***Presume, build and support capacity***: Consistent with the UNCRPD, a person is presumed to have capacity to make decisions for a matter and must be adequately supported to make decisions and exercise their legal capacity. A person should not be found to lack capacity to make decisions until all practical steps have been taken to support him/her to make that decision. Substitute decision-making should only be used as a last resort.
3. ***Maximise choice and control***: The NDIS must ensure that participants are active and engaged consumers who are able to exercise choice and control over the supports that they need to live the life they want. [17] Having true choice and control is an important safeguard in and of itself, although many people with disability will need support to realise this principle which represents a significant departure from the current models of disability support services.
4. ***Prioritise consumer satisfaction and outcomes***: The introduction of a customer-driven marketplace of disability service provision must also result in consumer satisfaction with the outcomes received from the contractual engagement of supports and services being appropriately prioritised. People with disability must be provided with the support and resources they need to become 'savvy consumers' and service organisations must prioritise consumer satisfaction and undertake (and be enforced) to deliver the outcomes people with disability want.
5. ***Zero tolerance to abuse, neglect and exploitation***: All persons, including those who are particularly vulnerable due to cognitive impairment, have the right to be safe from abuse, neglect and exploitation. There must be a zero tolerance towards abuse, neglect and exploitation in the NDIS.
6. ***A risk-based approach depending on a person's vulnerability***: While core quality and safeguards must be part of an NDIS risk-based approach, preventative measures should also allow for flexibility in the system and the exercise of maximum autonomy. The vulnerability of people with cognitive impairment must be recognised, with higher level safeguards for those in receipt of personal and/or residential care and support. The formal safeguarding system should avoid bureaucratic and overly prescriptive approaches that have not been proven to enhance safety and quality for people with disability.

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[16] See Office of the Public Advocate, *Submission to the National Disability Insurance Scheme: proposal for a national disability insurance scheme quality and safeguards framework (restrictive practices)* (April 2015).

[17] Disability Reform Council, *Proposal for a National Disability Insurance Scheme Quality and Safeguarding Framework*, Consultation Paper (2015) 11.

# A recommended framework for quality and safeguards under the National Disability Insurance Scheme

An ideal framework for quality and safeguards for the NDIS should be characterised by a risk-based approach to preventative strategies (one that balances this to enable maximised choice and control for participants) complemented by a heavy emphasis in the developmental and corrective elements.

Under such a model, those participants who have the capacity to safely manage the potential risks associated with purchasing supports and services from the ‘open market’ can choose from a broader range of services in accordance with their particular needs. Furthermore, while ‘open market’ providers may not necessarily have to be as heavily regulated in terms of adherence to standards, employment practices, policies and procedures, people with disability would still have the safety net of strong oversight and complaints mechanisms and the benefits of information, education and assistance in navigating the system and exercising their rights.

Conversely those participants who may be particularly vulnerable and therefore experience a higher level of risk (for example people with cognitive impairment and/or impaired decision-making capacity in receipt of personal care services in closed environments such as residential care) will be supported by the dual safeguards of having both highly regulated services (where safety and quality are guaranteed) as well as the safety net associated with independent oversight and monitoring.

A table summarising the recommended approach is at **Appendix Two**, with the Public Advocate’s consideration of the options presented in the Consultation Paper outlined in the section below entitled ‘Analysis of proposed options.’

# General comments

The Consultation Paper has presented a number of options for a quality and safeguarding framework inclusive of developmental, preventative and corrective elements. The options under each element correspond to four broad levels of safeguards. These are summarised in **Appendix Three**, and will be discussed in this submission.

While a response to specific proposals presented in the Consultation Paper is in the next section, the Public Advocate has a number of general comments concerning the analysis undertaken in the Consultation Paper and the scope of options proposed and has made recommendations for further development of certain elements of the quality and safeguarding framework.

## Proposals for the framework should be tested against the threshold of compliance with the UNCRPD

The proposals for a quality and safeguarding framework for the NDIS should be tested against the threshold of compliance with the objectives and principles of the United Nations *Convention on the Rights of Persons with Disabilities* (the UNCRPD).[18]

The UNCRPD heralded a recent paradigm shift; that is, a new way of thinking about disability. Underpinned by what is known as the 'social model of disability', the Convention incorporates a contemporary approach to disability and emphasises the importance of:

- recognising that disability is an evolving concept and that disability results from the interaction between people with impairments and their surroundings as a result of attitudinal and environmental barriers;
- the right and capacity of people with disability to make valued contributions to their communities; and
- recognising that all categories of rights apply to people with disability, who should therefore be supported to exercise those rights.

The ideological and philosophical landscape has changed significantly since the design of the current state-based disability service systems and associated regulatory frameworks, in particular heralded by the adoption by Australia of the UNCRPD in 2008. The philosophy underpinning the UNCRPD moves away from a social welfare approach to a rights-based approach, shifting from the idea of people with disability as objects of social protection to that of being rights-bearers.

An important overarching principle in the UNCRPD, particularly relevant to the NDIS is 'reasonable accommodation'. This refers to the support, modifications and adjustments that must be made so that people with disability can exercise their rights on the same basis as others. Importantly, discrimination is now defined by article 5 of the Convention to also mean the failure to provide adequate accommodation.[19]

The UNCRPD places specific obligations on state parties relevant to many aspects of the NDIS quality and safeguarding framework such as the right to legal capacity, to act with autonomy and make their own decisions;[20] the right not to be deprived of their liberty unlawfully or arbitrarily and that any deprivation of liberty is in conformity with the law;[21] the right to effective participation in the justice system;[22] the right to be free from exploitation, violence and abuse;[23] the right to access information in accessible formats and accessible technologies;[24] and the right to protection from arbitrary or unlawful interferences with privacy.[25]

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[18] *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, [2008] ATS 12 (entered into force 3 May 2008).
[19] *Convention on the Rights of Persons with Disabilities*, art 5.
[20] *Convention on the Rights of Persons with Disabilities*, art 12.
[21] *Convention on the Rights of Persons with Disabilities*, art 14.
[22] *Convention on the Rights of Persons with Disabilities*, art 13.
[23] *Convention on the Rights of Persons with Disabilities*, art 16
[24] *Convention on the Rights of Persons with Disabilities*, art 21.
[25] *Convention on the Rights of Persons with Disabilities*, art 22.

A general principle of the UNCRPD includes “respect for inherent dignity, individual autonomy including the freedom to make one’s own choices, and independence of persons”.[26] Article 12 imposes an obligation on state parties to recognise that people with disability enjoy legal capacity on an equal basis with others. That is, the right to be recognised as a person before the law and the subsequent right to have one’s decisions and choices legally validated and recognised.[27] Read with article 5, an overarching principle of equality and non-discrimination, there is an obligation on state parties to ensure support is provided to people with disability to enable them to exercise their legal capacity, so as to avoid discrimination.

This places a particular onus on Australian governments to provide people with disability the support they need to exercise their rights, with the use of substitute decision-making being a true last resort. Yet the proposals in the Consultation Paper are not inclusive of supportive decision-making strategies.

Overall, there is a lack of rights-based analysis in the Consultation Paper, and no discussion of how the options might meet Australia’s obligations under the UNCRPD. The Public Advocate would respectfully suggest that further analysis should be undertaken and that any final proposals presented to Australian Governments are informed by information pertaining to the extent to which they are consistent with the UNCRPD.

## An under-developed risk-based approach to regulating quality and safeguards

While a risk-based approach drawing on consumer protection and industry regulation ideology has been adopted in the proposals for regulation in the Consultation Paper, the Public Advocate was disappointed at the unsophisticated and under-developed nature of the analysis, in particular that:

- There is little/no analysis of risk across different potential NDIS participant populations;
- There is little/no analysis of potential for market failure in the NDIS; and
- There is a high emphasis on industry self-regulation which would not seem to suit a market that can be characterised, overall, as one of high risk for some potential participants with a high risk of failure.

The Public Advocate would have liked to see a greater analysis of risk for different profiles of NDIS participants. An analysis of NDIS quarterly reports and annual reports indicates that in 2015 there were 5,004 NDIS participants who may have some form of cognitive impairment and/or impaired decision-making capacity. This constitutes 66% of all participants (excluding the South Australian trial site).[28]

People with cognitive impairment are at a much higher risk for abuse, neglect and exploitation and also require different developmental strategies for building their capability in navigating the system, getting the outcomes they want, and exercising their rights. At a preventative level, services that provide supports to people with cognitive impairment (particularly residential services providing personal care and support) must have the highest levels of safeguards given the vulnerability of their clientele.

The options discussed in the Consultation Paper place a heavy emphasis on industry self-regulation, yet without an underlying analysis of the potential for market failure. For example, levels one and two (see **Appendix Three**) broadly describe an approach that is suited (in the ideology of consumer protection and industry regulation) to markets characterised by low risk to participants and low risk of market failure. This does not characterise the NDIS marketplace.

The Public Advocate would recommend a more detailed and sophisticated risk analysis be undertaken in respect of both risk to different populations of potential participants and to the NDIS market in general.

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[26] *Convention on the Rights of Persons with Disabilities*, art 3.

[27] E Flynn and A Arstein-Kerlake, ‘Legislation Personhood: Realising the Right to Support in Exercising Legal Capacity’ (conference proceedings at the Australian Guardianship and Administration Council World Conference, Melbourne, 2012) 1.

[28] Above n 3. Of this group, 41% had a primary disability type of Autism and related disorders, 39% intellectual, 17% “other neurological”, 10% developmental delay, 9% cerebral palsy, 8% Down syndrome, 8% “other intellectual/learning”, 8% schizophrenia, 7% “other psychiatric”, and 6% global developmental delay.

## Onus on consumers without adequate developmental strategies

Across all levels of proposed regulation there is a significant onus on consumers with respect to both navigating the system in terms of deciding what might constitute safe and high quality providers, and also in making complaints when something goes wrong.

Such an approach is not suitable for all consumers, particularly many of those who have some level of cognitive impairment.

There are numerous well-known barriers existing in current systems that prohibit and restrict people with disability from accessing appropriate avenues to address grievances, many of which have not been addressed as part of the proposals in the Consultation Paper.

There is currently a lack of accessible information for people with disability, in particular people with cognitive impairment, about their rights and where to go to pursue grievances and make complaints. Information, where it is available, is often not provided in a format that people with cognitive impairment can understand or they are not provided with the support they need to understand this information. Individuals can also experience fear in speaking out against such systems and this fear is exacerbated by the high degrees of reliance on service providers who provide support across multiple aspects of everyday living.

Participants with cognitive impairment will need a significant investment in supports to help build their individual capability, particularly when considering the issue of how best to enhance, develop and/or maintain natural safeguards. The Consultation Paper has not engaged with the issue of support for decision-making, which will be needed and must be provided to fulfil Australia's obligations under the UNCRPD.

Many people with disability will need both informal and formal support, particularly during crucial processes such as applying for supports, developing their plan, choosing a provider, and organising and documenting the structure and provision of supports and services. Given the contractual nature of service provision under the NDIS, without such support there is a danger of increased reliance on substitute decision-makers (for example guardians appointed through tribunal processes) which:

- is at odds with the principles and obligations in the UNCRPD;
- will lead to a significant resource impost on state systems (in particular public guardians and tribunals); and
- presents the risk of creating a two-tiered system whereby those who have guardians, who are usually more experienced in dealing with such processes, will gain more from the system than those without.

Independent advocacy can also play a crucial role in supporting participants to voice their issues and complaints.[29] Independent advocates not only support people to pursue grievances but can also play a key role in building an individual's capability and supporting an individual to navigate complex systems and processes. The Consultation Paper fails to recognise the importance of independent advocacy and the role it plays in keeping systems accountable and honest.

The Public Advocate would recommend further work be undertaken in the developmental elements of the proposed quality and safeguarding framework to ensure that it is inclusive of more effective strategies for people with cognitive impairment and/or impaired decision-making capacity, including recognition for the role of supported decision-making and advocacy.

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[29] See, for example, Deane (cited in 'Draft Report on Caring for Older Australians' (Transcript of Proceedings at Brisbane on Friday, 25th March 2011, at 8.29 am, Australian Government Productivity Commission (AGPC), 2011e) 737 - 738, <http://www.pc.gov.au/__data/assets/pdf_file/0019/107443/20110325-brisbane.pdf>); Colin Goble, '"Like the Secret Service isn't it." People with Learning Difficulties,' Perceptions of Staff and Services: Mystification and Disempowerment' (1999) 14(4) *Disability & Society* 449-461; Nursing Home Deaths Spark Concerns Over Aged Care Complaints System' (ABC News, 7 November 2013) <http://www.abc.net.au/news/2013-11-07/nursing-home-deaths-spark-concerns-over-aged-care-complaints-sy/5075260>; 'Elder Abuse' (Second Report of Session 2003-04, Vol. 1, House of Commons Health Committee (HCHC)) 29.

# A market-based approach without concomitant focus on consumer satisfaction

The introduction of a customer-driven marketplace of disability service provision offers a number of opportunities and challenges for support services as well as current quality and safeguarding systems.

Arguably the current orientation of disability support services as well as quality mechanisms (including complaints management systems) sees people with disability as ‘passive’ recipients of welfare-type services. The NDIS provides a direct challenge to this in that, for the first time, people with disability will be directly able to purchase the services and supports they choose to drive the outcomes they seek to achieve.

Yet, despite the consumer and market-based terminology in the Consultation Paper, there is a lack of engagement with strategies for ensuring consumers get the outcomes they want from the services they purchase (or in other words how customer satisfaction will be a focus under an NDIS) across all levels and elements of the proposed framework.

For example, while acknowledging that ‘mainstream’ services may operate outside what has traditionally been considered the ‘disability service system’, the framework does not answer the following questions:

- How will participants, in particular participants with cognitive impairment, be supported to become ‘savvy consumers’?
- How will services be re-oriented to ensure that consumers get the outcomes that they want and how will the level of satisfaction with their services be measured?
- Who has responsibility for monitoring outcomes and satisfaction levels, and should a more regulated market be the option decided upon to enable this?
- What types of corrective actions will consumers have available to them if they are not satisfied and they do not get the outcomes that they want?

Supporting participant satisfaction will require education and, where necessary, appropriate supports to assist people with disability to understand and navigate the nature of their contractual arrangements with service providers; the relationship between personal expectations and the service provider-participant agreement/ contract; and any remedial rights.

Services will need to re-orient their business strategies so that preventative mechanisms not only include recruitment, screening, and policy frameworks aimed at preventing abuse and neglect (although these are highly important) but also ensure that services can deliver high levels of customer satisfaction. These are not strategies traditionally employed in the disability service sector and have not been discussed in the Consultation Paper.

Corrective action and enforcement will also look and feel different. One avenue for corrective action could be Australian Consumer Law (ACL), yet there is also little discussion of this in the Consultation Paper. Arguably, reliance on consumer law or general contract law as a corrective strategy when participants do not get the outcomes they are seeking is likely to be far beyond the capability of many participants and, at minimum, will require assistance, support and advocacy in navigating civil law mechanisms.

Current complaints processes in disability services generally focus on adhering to correct administrative process rather than on delivering satisfactory outcomes for complainants. In contrast, the literature on good practice in complaints management requires that the resolution of customer dissatisfaction be the key priority during the complaints-handling process.[30]

Stakeholders with whom the Public Advocate consulted indicated that complainant satisfaction needs to be an important priority when processing complaints associated with the provision of supports through the NDIS.

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[30] Sarah Cook, Complaint Management Excellence: Creating Customer Loyalty Through Service Recovery (electronic version, Kogan Page, 2012).

The Public Advocate would recommend a greater focus in the proposed framework on strategies that will:

- enable participants to become ‘savvy consumers’;
- guide services to re-orient their approach toward customer satisfaction and delivering the outcomes participants want;
- promote and the guide the development of a range of appropriate corrective mechanisms to be applied when participants are not satisfied with the outcomes they receive from their contracts; and
- enable support in the process of seeking remedy in these situations.

## The absence of investigative and monitoring strategies

The existing community visitor programs in most states and territories perform a very important role. Such programs need to be retained and potentially broadened under the NDIS.

Inspectorates and inquisitorial/investigative approaches are extremely beneficial to supporting people with disability, particularly those with cognitive impairment, who often experience significant barriers in raising grievances and complaints and who are often highly vulnerable to abuse, neglect and exploitation. These programs operate as important monitoring and preventative mechanisms in what are effectively ‘closed environments’, for example disability residential services where a high proportion of people with cognitive impairment live.

The lack of discussion in the Consultation Paper about such initiatives is concerning for the Public Advocate.

The Public Advocate would recommend a review of existing programs with consideration for the scope of these programs under an NDIS as well as legislative and funding arrangements. For example, Queensland Community Visitors are currently only empowered to visit state-funded disability services. Legislative amendments (including transitional legislative arrangements) will be needed to ensure the effective operation of these programs, or similar ones if continued under the NDIS, including during the transition period.

## Enforcement and compliance mechanisms

The Public Advocate has summarised the existing safeguards and complaints management systems in Queensland in **Appendix One** and the four broad levels of quality and safeguarding options outlined in the Consultation Paper in **Appendix Three**. When comparing these two summaries it is evident that there is a lack of detail about the enforcement and compliance mechanisms that will be in place under the NDIS. It is still unclear, and there is no detail in the Consultation Paper, as to what mechanisms will be in place to ensure that providers of support comply with any set minimum standards or Code of Conduct.

For example, Queensland’s current system provides for the chief executive to empower an authorised officer (who have extensive powers of investigation and entry into support services) to investigate in circumstances where there is a serious concern that a funded service is failing to deliver a funded product or service, or where harm may be being done to a consumer.[31] The chief executive may also issue compliance notices requiring the funded service to remedy serious concerns or comply with the notice,[32]an interim manager may even be appointed,[33] and ultimately funding can be ceased and recovered.[34]

The development of enforcement and compliance mechanisms should be central to safeguarding and securing quality outcomes for people with disability. Without such mechanisms in place, a quality and safeguarding framework would essentially be ineffective as the processes put in place have no means by which they can be enforced and ensure that they are being complied with.

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[31] *Community Services Act 2007* (Qld) ss33-40.

[32] Ibid s19.

[33] Ibid s20.

[34] Ibid s22.

The Public Advocate recommends that there be further consideration and development of enforcement and compliance mechanisms under the NDIS, inclusive of corrective strategies for where participants are not getting the outcomes and services that were agreed to in their service contract.

## Scheduled review of the quality and safeguarding framework

The Consultation Paper does not discuss any proposed strategy for the review of the quality and safeguards framework. While the framework should be fully reviewed within five years after its implementation, there should also be flexibility to respond to issues as they arise.

Such a review should be directed by and involve a broad cross-section of individuals and agencies who have been involved with the NDIS, with particular emphasis given to the views of participants and those with lived experience of disability.

## Summary of general recommendations:

Prior to the Australian Government making any final decisions on a Quality and Safeguarding framework for the NDIS, further developmental work should be undertaken on certain elements of the framework including:

1. Proposals for the framework should be tested against compliance with the UNCRPD;
2. A more detailed and sophisticated risk analysis should be undertaken in respect of risk, both to different populations of potential participants and to the NDIS market in general;
3. The developmental elements of the proposed quality and safeguarding framework should be inclusive of further strategies to enhance capability for people with cognitive impairment, including through supported decision making and advocacy;
4. There should be greater engagement across the developmental, preventative and corrective elements of the proposed framework with customer satisfaction and delivering the outcomes participants want. This should include a focus on what corrective mechanisms will apply when participants are not satisfied with the outcomes they receive from their contracts and how they will be supported to seek remedy;
5. The community visitor programs that exist across most states and territories should be reviewed as part of a consideration of the monitoring and investigative programs that will be in place under an NDIS, including during any transitional periods;
6. There needs to be further development of compliance and enforcement mechanisms under the NDIS, inclusive of corrective strategies for when participants do not get the outcomes that were agreed to in their service contract; and
7. Any quality and safeguarding framework that is developed under the NDIS must have a review period within the first five (5) years of implementation of the framework, and any reviews conducted should be done in consultation with people with disability.

# Analysis of proposed options

## Developmental elements of the framework

### Recommended approach

#### Emphasis

There must be a heavy emphasis on the developmental elements of the NDIS quality and safeguarding framework. Where required, people with disability must be supported to develop their capacity to exercise choice and control and become 'savvy consumers'. Support, including informal and formal support in decision-making, must be provided to people with disability to enable them to access, understand and analyse information, and to make informed decisions.

#### Key Strategies

The key strategies should include:

1. Accurate and accessible information both for participants as well as for their families, providers of support and the broader community.
2. Decision-making support to enable participants to access, understand and analyse information, and to make decisions.
3. Planning assistance, referral and case management not only through roles such as NDIA Planners and Local Area Coordinators but also through information and resources, and through funded supports where necessary and appropriate.
4. Advocates who will assist participants to understand and exercise their rights.
5. Training, education and advice for service providers on recognising and responding to complaints, as well as preventing, recognising and responding to abuse, neglect and exploitation.
6. Building and developing natural safeguards and enhancing inclusive communities.

### Accessible information

Access to information and support for all participants will provide invaluable opportunities for participants to make well-informed decisions and increase the expectations that people with disability may hold not just in respect of their own lives but also in relation to the way in which supports and services are provided to them.

The Public Advocate is supportive of the key types of information identified in the Consultation Paper as being important to distribute to participants such as:

- The NDIS and your rights under an NDIS;
- Navigating the system;
- Support types and availability of supports; and
- Service quality standards and choosing a provider.[35]

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[35] Disability Reform Council, above n 17, 15.

The Public Advocate recommends that the following types of information should also be included:

- How to ensure your contracts with service providers deliver on the outcomes you want and how to take remedial action when it does not;
- What constitutes abuse, neglect and exploitation and how the person, or others, can take action;
- Accessing informal and formal complaints management systems; and
- Available independent advocacy support.

When developing a NDIS Information System it is essential that information is accessible. Under the UNCRPD, state parties are obliged to provide accessible information to people with disability about forms of assistance, support services and facilities.[36] Simply relying on participants to use the internet to access information is an insufficient means of providing information to participants, particularly those with cognitive impairment. Furthermore, developing plain English versions of information is just one strategy that may be available and appropriate; others may include:

- Conducting forums – with clear case examples about an individual's life experiences.
- Allowing participants (and their families) to attend workshops – where participants could learn practical skills such as how to interview for a support staff member.
- Ongoing and continuous information seminars which are specified to topics (eg. information seminar on pathways to resolving disputes or complaints).
- Holding live online webinars – on specific topics in an accessible format.
- A telephone information service – where people with disability and their family and supporters can ring to get advice, information and referrals.

There should be opportunities for people with disability to learn from other people with disability and their experiences. People with disability should be included in the development of initiatives involving training and workshops. The inclusion of people with disability in such initiatives can lead to a relationship that fosters trust and potentially lead to people with disability taking similar risks to achieve outcomes as well as more accessible resources.

The success of strategies such as those summarised above has already been demonstrated through many of the transition readiness activities that are being pursued, and should form a key component of the ongoing implementation of the NDIS. This could align well with strategies supported by the Information, Linkages and Capacity Building framework.

The ultimate goal in providing information to participants must be building the capacity of participants to retain and exercise choice and control. Participants need to be empowered to achieve the goals they want, get the outcomes they have identified and become 'savvy consumers'.

## Support to access and analyse information and make choices and decisions

The UNCRPD places an obligation on state parties to ensure that support is available to people with disability to exercise their legal capacity on an equal basis with others in all aspects of life.[37]

In particular, people with cognitive impairment will need support to access and analyse information to enable them to make informed choices and decisions about the services and supports they want under an NDIS. Not all people with disability will have the informal supports in their lives to provide this. This means there is an onus on the NDIS to ensure that such support is provided.

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[36] *Convention on the Rights of Persons with Disabilities*, art 4(h).

[37] *Convention on the Rights of Persons with Disabilities*, art 12.

For some participants there will be a clear need to provide long-term support in relation to their individual plans, particularly with respect to ensuring their ability to engage meaningfully in processes such as reviewing their plan, fulfilling agreed outcomes of their plan, and potentially re-negotiating contractual arrangements with providers of support so that outcomes are achieved. The Public Advocate recommends that such a role is best placed with an independent person who can support the participant throughout the process and assist the participant to increase their capability to manage their own plan.

## Planning assistance, referral and case-management

The Public Advocate is supportive of the roles of NDIA Planner and Local Area Coordinators (LACs) identified in the Consultation Paper.[38] It will be very important that the NDIA Planner ensures that outcomes are clearly identified in a plan and that, when reviewing the plan, the identified outcomes have been met. The Public Advocate is also aware of the important role that LACs play in linking and referring people to other relevant supports/organisations and recommends that LACs might be best placed alongside or within mainstream services such as neighbourhood centres.

Another crucial role is coordination and case-management. The increasing complexity of social service systems was a key societal change that prompted the development of State and Territory guardianship regimes and this need to negotiate the labyrinth of social services continues to drive appointments of substitute decision-makers today. Along with the provision of decision-making support (discussed above), providing assistance with case-management, referral and planning will be a crucial way for the NDIS to ensure people's decision-making capacity can be protected and preserved (and pressure on state guardianship systems minimised).

## Advocates to assist participants to understand and exercise their rights

Under the NDIS, the role of relevant legal authorities and advocates should be recognised as important safeguards for people with disability. These roles are particularly important for those participants who have no family or other people who support them, and who may therefore be highly isolated.

In 2012, the Law and Justice Foundation of New South Wales published a report on access to justice and legal needs in Australia. This report ultimately found that "people with a disability are not only more likely to experience legal problems but are, in fact, more vulnerable to a wide range of legal problems".[39] The number of legal problems people with disability face may increase with the introduction of the NDIS. It is crucial for individuals to be able to access independent advocacy to not only navigate the NDIS but also to deal with urgent matters as they arise.

Access to advocacy plays a critical role in supporting vulnerable people to voice their issues and complaints.[40] Under the NDIS there must be a commitment to ensure that independent advocacy is available to individuals and that it is adequate to meet the need and demand for advocacy services.

It is essential that advocacy services remain independent and that the value of upholding this independence is not diminished. Having independent advocacy can help to ensure that systems and services remain accountable for their actions. Advocacy can also play a role in supporting people through the NDIS processes and in building an individual's capability.

Block-funding is the most appropriate way to ensure that there is long-term viability of independent advocacy support for people with disability. Being block-funded will enable advocacy services to develop strategic plans and therefore have greater impact in influencing positive changes for people with disability; in doing so, it may also help mitigate against market failure.

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[38] Disability Reform Council, above n 17, 16.

[39] Christine Coumarelos, Deborah Macourt, Julie People, Hugh M. McDonald, Zhigang Wei, Reiny Iriana and Stephanie Ramsey, 'Access to Justice and Legal Needs Volume 7' (2012) at 18 <http://www.lawfoundation.net.au/ljf/app/&id=FC6F890AA7D0835ACA257A90008300DB>.

[40] Above n 29.

## Training, education and advice

Investing in the training and education of providers of support should be an important element of the developmental part of the quality and safeguarding framework. Providers of support will need to be aware of the expectations and standards of the scheme to ensure that people with disability are being appropriately supported to achieve outcomes.

Further, the development of a positive organisational culture should also be a high priority for providers of support and the NDIS. Providers of support must emphasise the prioritisation of consumer satisfaction and tailoring supports to each individual participant. They must also receive regular and consistent training, education and advice on:

- Nationally consistent policies such as reducing and eliminating restrictive practices and zero tolerance for abuse, neglect and exploitation.
- The philosophy, goals, objectives and principles of the NDIS (this could be carried out by the NDIA).
- Proactively identifying issues, processes for handling complaints and addressing complaints. This would be inclusive of information relating to whistle blower protections for employees and external complaints handling processes.

Much of this educative and training role could be carried out by the independent statutory body responsible for oversight and/or complaints handling (discussed in the corrective section).

## Natural safeguards and inclusive communities

Intentional safeguards are important for people with disability. The need for a combination of informal and formal safeguards must be recognised and implemented under an NDIS. The development of natural safeguards is an important strategy and should be a priority from the earliest possible stage in a person's life. There must also be minimal limitations (bureaucratic and regulatory) placed on the extent to which individuals can use informal arrangements.

In some circumstances however participants will have no natural safeguards and this should be a key priority addressed in a participant's plan. The following initiatives present ways in which natural safeguards can be developed or enhanced:

- Mentoring programs and peer support groups;
- Neighbourhood programs/activities;
- Local community programs/activities that promote and foster the inclusion of people with disability in all aspects of community life;
- Family-to-family initiatives where people can learn from the experiences of others and foster trusted relationships; and
- Supporting people with disability to access independent advocacy to support them to represent their views, wishes and interests.

When considering safeguarding arrangements, there is a need to consider both mainstream and disability-specific systems and how these systems can jointly safeguard and protect people with disability.

To help ensure the success of the developmental aspects of the quality and safeguarding framework, a high priority must also be placed upon Stream 4 of the NDIS Framework for Information, Linkages and Capacity Building (formerly known as Tier 2),[41] in particular the whole of community responsibility to support and include people with disability in their local communities.

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[41] Disability Reform Council, *National Disability Insurance Scheme – A Framework for Information, Linkages and Capacity Building,* Paper (2015) 7-8.

# Preventative elements of the framework

## Recommended approach

### Emphasis

There should be a risk-based approach to the preventative elements of the quality and safeguarding framework to allow for maximum flexibility, innovation and choice. People who are at high risk of abuse, neglect or exploitation (for example residential and personal care provided to people with cognitive impairment) should have access to the most prescriptive and formal safeguards. Other areas should maintain minimum standards, but also create space for industry innovation and self-regulation.

### Key Strategies

The key strategies should include:

1. Registering of providers of support and individuals who work with participants.
2. Minimum standards and codes of conduct that reflect and uphold the principles of the UNCRPD.
3. A national framework to prevent and respond to abuse, neglect and exploitation of people with disability.
4. High quality employment practices for providers of support, which include screening and referee checks.
5. Consumer-driven quality processes that are risk-based depending on the vulnerability of the consumer.

## Registered service providers and individuals who work with participants

The Public Advocate recommends that paid providers of support be registered with the NDIA and that there be different registration types, with differing requirements, dependent upon whether or not the registration is for an individual or organisation. Unpaid/informal supports should not be subject to registration.

All registered providers should be required to adhere to minimum standards that are developed and set by the NDIA. However, the minimum standards should be developed in a way that promotes and encourages innovative practices while still ensuring high quality service delivery that is respectful of and responsive to individual differences and upholds human rights. For example all providers of support should abide by the Code of Conduct and adhere to all existing legislation. They should also be bound to uphold Australia's obligations under the UNCRPD. Failure to comply would lead to de-registration.

In practical terms the registration process should be simple to access and apply. It is hoped that by having a simplified registration process there will be an increase in more localised supports thereby increasing the choice of providers for people with disability in regional, rural and remote locations. It is important that the registration process is not so onerous that it acts as a disincentive to becoming a provider of support as this would be likely to limit choice for people with disability.

Once an individual or organisation has been registered with the NDIA, their registration must be reviewed at regular intervals. All review processes should involve people with disability as a central part of the process and as commentators/respondents in assessing a provider's adherence to the minimum standards. Further, organisations that are seeking registration should consider the engagement of a person with lived experience of disability on their Board of Management.

In considering the proposed options in the Consultation Paper[42], option 4[43] provides the greatest level of protection however this must be approached in a way that still ensures choice and control for participants.

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[42] Disability Reform Council, above n 17, 32.

The Public Advocate supports a risk-based approach to regulation requirements. For example, organisations providing unsupervised personal care and residential support to people with cognitive impairment may need to meet additional registration requirements such as:

- Mandatory external quality audits;
- Regular inspection by community visitor type programs;
- More extensive prescribed policy, procedure and guidelines (including procedures and guidelines on complaint handling; abuse, neglect and exploitation);
- Highest level of employee screening; and
- Minimum qualifications for certain staff.

In addition to a formal registration process, the Public Advocate is supportive of having a barred registration list that prohibits people or providers of support from working with participants under the NDIS in certain circumstances. However, there is a need to develop strict criteria about what matters lead to banning a person or provider of support and an allowance for the right to appeal such decisions.

## Embedding the principles of the UNCRPD through a Code of Conduct

The Code of Conduct must embed the principles of the UNCRPD and must align and uphold the articles of the UNCRPD. The Code of Conduct should be written in such a way that it is easy to understand and easy to apply in practice. Practical examples of what might be considered good practice would be a useful adjunct to the Code of Conduct itself.

In light of the need to ensure that people with disability, including those who have cognitive impairment, are able to understand the minimum standards that they should expect from providers of support, the Code of Conduct should also be available in a variety of accessible formats.

The NDIS Code of Conduct will form a crucial part of the NDIA registration process and will be a key tool to measure the performance of providers of support as well as guide the culture of the NDIS.

## A national framework for preventing and responding to abuse, neglect and exploitation

There must be a high priority placed on preventing and responding to abuse, neglect and exploitation. A national framework should be developed, with which individual registered providers' policies, procedures and practice guidelines must adhere.

The framework should convey a clear position regarding the NDIA's expectations of providers of support, and should comprise tools and resources to support all levels of response inclusive of prevention, early intervention and remediation strategies. The framework should be explicit about the minimum standards while also presenting information about what might comprise best practice in preventing and responding to abuse, neglect and exploitation.

The framework should be made publicly available, broadly promoted and presented in a range of accessible formats to ensure that the general community is equally aware about the potential risks for people with disability, and so that they know where to go to report any concerns they may have.

The NDIS must ensure zero tolerance for abuse, neglect and exploitation, with instances of any such actions forming the basis for the banning of providers of support. Organisations that do not enforce a zero tolerance approach should also be treated harshly with a 'show cause' notice issued in relation to why they should not be de-registered.

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[43] Disability Reform Council, above n 17, 39-41.

## High quality employment practices

As referenced in the Consultation Paper, the research conducted by the Royal Commission into Institutional Responses into Child Sexual Abuse has suggested that perpetrators can be categorised in three ways: serial offenders who deliberately target sectors where they can gain access to vulnerable people; opportunistic occasional offenders; and offenders who react to particular situational factors.[44]

To ensure that staff are safe to work with participants, the quality and safeguarding framework must recognise people in each of these categories and limit and/or eliminate their ability to work with participants under the NDIS. This is a broader strategy than simply criminal history screening, which although important, of itself will not guarantee the safety of participants.

A combination of strategies such as 'working with vulnerable people' clearances and the creation of a barred registration list could potentially be complemented by training, policies and guidelines on choosing and selecting staff and building organisation cultures intolerant to abuse, neglect and exploitation. The independent oversight body (discussed in the corrective section) could play a significant role here.

People with disability who choose to self-employ staff and/or manage their own support arrangements need accessible information about how best to do so in a manner that enables them to ensure their safety as far as possible while allowing for the necessary flexibility that may be required.

Organisations that are employing staff to work with people with disability as providers of support need to, at minimum, obtain information relating to an individual's criminal history. Under the NDIS, high quality employment practices should be mandated by including referee checks together with employment screening (including checking with the barred registration list). Again there is value in setting minimum standards while also highlighting a range of best practice approaches that might be applied.

There should also be an increasing professionalisation and skilling of the disability sector workforce with a combination of regulatory and industry self-regulatory approaches to setting minimum qualifications for support staff and encouraging multi-disciplinary approaches where appropriate.

There are numerous opportunities for avoiding duplication in screening programs for staff. For example 'working with vulnerable people' checks (similar to those applied in the ACT) can be developed for people who work across multiple sectors involving support for vulnerable clients; this might include those working in the aged care sector and those working with children, in addition to those working with people with disability.

Further, people who are already subject to screening processes through their professional registration should not have to participate in further screening under the NDIS. An example of this cohort of people are psychologists and occupational therapists who are required to be registered with the Australian Health Practitioner Regulation Agency (AHPRA).

## Consumer-driven quality processes that are risk-based

Providers of support under the NDIS must be open to receiving feedback about their services on a regular basis and have mandatory processes for measuring consumer satisfaction that should be taken into account in the reviews of their registration. Consistent with the new approach of the NDIS, the key focus for a provider of support should be consumer satisfaction.

The Public Advocate is aware that auditing and accreditation processes do not necessarily identify system failures or when services that are being delivered are not of a high quality standard. They are also costly, time consuming and often overly bureaucratic. The Public Advocate is therefore supportive of most providers of support (excluding those engaged in high risk service provision as identified above) conducting internal audits that are inclusive of consumer feedback and that measure their performance against the outcomes of each

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[44] Disability Reform Council, above n 17, 56-57.

individual's plan. These internal audits should then be submitted to the NDIA for review, collation and public reporting. In all such processes, however, the views of consumers should be weighted appropriately and any identified concerns that have emerged through this process must be acted upon and rectified. This can be complemented by occasional spot checks and inspections from relevant independent bodies.

It should be noted that the Public Advocate makes this recommendation against the caveat that there is a strong emphasis placed on the developmental and corrective parts of the framework. The developmental and corrective elements of the framework have more potential to foster better outcomes for people with disability because of the focus (in the developmental element) on building capacity and empowering consumers combined with strong oversight, monitoring and compliance including inspectorates.

## Safeguards for participants who manage their own plans

Overall, participants should have choice and control over what level of risk they are willing to accept. There is a need to operate from a risk-enablement approach and not in a manner that is primarily concerned with risk-management. However, the Public Advocate believes that a minimum level of safeguards must be included in the framework, including for those that manage their own plans. These include for example that:

- The purchase of personal care and other in-home supports should only be from registered providers;
- The purchase of personal care and/or residential services for people with cognitive impairment should only be from registered providers with the highest levels of safeguards;
- All services purchased under the self-management of plans should be subject to the jurisdiction of the independent complaints body (see Corrective section); and
- There should be no exclusion of any services from the restrictive practices regulatory frameworks that must be developed (see separate submission from the Public Advocate on Restrictive Practices).

In order for participants to successfully manage their own plans, many will need support to build their capability to do so and to develop a system of natural safeguards. Supporting participants to manage their own plans should be seen as a priority as this will allow for participants to have more choice and control over their lives and the overall achievement of the outcomes in their plans. The development phase of a plan will prove to be crucial in safeguarding an individual. A participant's plan will need to take into account any potential risks and include strategies on how to manage and mitigate such risks. The plan will also need to identify systems for responding when things go wrong, including where to go for support in rectifying the matter. A key strategy that will need to be developed is how to manage disputes between a participant and their provider of support and how to re-negotiate the terms of a contract if required.

Participants will also need information and support to understand how to engage a provider of support, which should include information about insurance for employees. In addition to this, participants will need access to independent legal advocacy to obtain legal advice in particular instances. For example, a participant may need independent legal advice about the repercussions of terminating a contract with a provider of support or simply to better understand or re-negotiate terms of a contract.

It is noted that under the NDIS a participant may not manage their plan if the NDIA is satisfied that the management of the plan would represent an unacceptable risk to the participant.[45] It is unclear how this works in practice and how this supports the notion of allowing participants to exercise choice and control. If a participant is denied the ability to manage their own plan then every effort must be made to build a participant's capability to manage their own plan in the future.

Overall the approach to participants who manage their own plans should be informed by a more sophisticated risk assessment, which includes an analysis of the vulnerability of people with cognitive impairment where they, or their plan nominee, proposes to engage in self-management.

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[45] *National Disability Insurance Scheme Act 2013* (Cth) s44(2)(a).

# Corrective elements of the framework

## Recommended approach

### Emphasis

There must be a heavy emphasis on the corrective elements of the framework. The emphasis must be on independent oversight and monitoring with strong investigative, directive and enforcement powers. Proactive monitoring (equivalent to existing community visitor programs) is an integral component.

### Key Strategies

The key strategies should include:

1. An independent statutory oversight body that has the ability to handle individual complaints, initiate investigations and be dedicated to overall systemic improvement.
2. Inspectorates or external visitors such as the Community Visitor Program who can proactively identify concerns or complaints.
3. Strong enforcement and compliance powers.
4. Mandatory reporting of critical incidents and deaths.
5. Strong whistle-blower protections for individuals who wish to complain about the conduct of others.
6. Continuance of systemic advocacy.
7. Improving the capability and capacity of universal and mainstream complaints agencies to be responsive to people with disability.

## An independent oversight body

The Public Advocate strongly supports the establishment of a national independent statutory body to provide a necessary layer of external and independent scrutiny. Such a body should also ensure an avenue for individuals to have complaints resolved; maintain the accountability of the system as a whole; and provide a driving force for overall systems improvement. The independent statutory body should have complaints jurisdiction over all funded supports in the NDIS, and over the NDIA itself.

The Public Advocate recommends that the national independent statutory body have the following functions and powers:

- Receive and handle individual complaints raised by or on behalf of people with disability;
- Initiate independent investigations and inquiries in response to identified individual and/or systemic issues;
- Provide education and training to enable capacity-building for people with disability and their families. Such training could include information on how to identify abuse, where to go for support and how to go about addressing complaints and concerns;
- Provide education and training to providers of support, including the development of best practice guidelines on how to proactively address concerns or complaints and how to identify and respond to abuse, neglect and exploitation;
- Either in response to complaints or on their own initiative, exercise the following powers:
  - Power to enter, inspect and seize documents;
  - Power to issue compliance notices;

  - Power to direct the NDIS to issue compliance notices and show cause notices; and
  - Power to direct the NDIS to de-register a provider and/or ban an individual.
- Actively monitor and provide oversight of the National Disability Strategy; and
- Publish annual reports on its activities.

### *Complaints*

In considering complaints management, the functions of the national independent statutory body in respect of this should also be supported by the internal complaints processes of service providers. There is, however, a need to significantly enhance existing approaches to complaints handling under the NDIS to ensure that it is oriented towards consumer satisfaction, as well as being accessible and responsive to people with cognitive impairment. This is addressed in more detail below (see 'Improving the capability and capacity of mainstream and universal complaints agencies').

In the course of the Public Advocate consulting with stakeholders on the responsiveness of complaints systems for adults with impaired decision-making capacity, several contributors raised concerns about whether funding allocations under the NDIS would be sufficient to enable providers of support to maintain adequate organisational administration processes and the risks associated with not doing so. Without appropriate internal complaints systems being factored into minimum standards of registration and being adequately costed into funding equations, some services may either choose not to provide such services, or alternatively may pass the cost of such services onto participants.

## Inspectorates or external visitors

The Public Advocate submits that a Community Visitor Program or similar external independent inspectorate is required under an NDIS because it is a vital safeguard for people with disability, in particular people with impaired decision-making capacity. External visitors provide a level of scrutiny that is typically absent within funded accommodation and support services for people with disability, and yet is often considered necessary for the prevention of abuse and neglect which may occur within the context of institutionalised living.[46]

In Queensland, Community Visitors provide a rights protection and abuse prevention service to more than 6,000 Queensland adults who may be subject to abuse, neglect or exploitation due to impaired decision-making capacity.[47] The Queensland Community Visitor Program conducts regular visits to more than 1,000 'visitable sites' across Queensland.[48]

A Community Visitor Program can act as a key outreach mechanism for people residing in supported accommodation services and is also an important vehicle for identifying and addressing issues for an adult with impaired decision-making capacity who may find it extremely difficult to enter into complaint-making systems, let alone navigate them.[49] The Community Visitor Program provides a means by which concerns can be proactively identified without relying on individuals having to seek out and access a complaints management system.

With the introduction of the NDIS, there is an urgent need to review the legislative framework for the Community Visitor Programs that exist in a variety of formats across most Australian jurisdictions. The current legislative framework will require expansion and a number of changes to ensure that the Community Visitor Program is supported and continues to have authority under the NDIS, including during any transitional period.

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[46] See Carolyn Frohmader (cited in Xavier Smerdon, 'Independent Inquiry Call Over Yooralla Abuse' (Pro Bono Australia News, 25 November 2014) [24] <http://www.probonoaustralia.com.au/news/2014/11/independent-inquiry-call-over-yooralla-abuse# >).

[47] Office of the Public Guardian, *Community Visitors* <http://www.publicguardian.qld.gov.au/adult-guardian/adult-community-visitors>.

[48] Ibid.

[49] Office of the Anti-Discrimination Commissioner Tasmania (OADCT), Submission of the Anti-Discrimination Commissioner, Tasmania, to the Australian Law Reform Commission, Inquiry into Equality, Capacity and Disability in Commonwealth Laws (2014) 6 <http://www.antidiscrimination.tas.gov.au/__data/assets/pdf_file/0006/277449/14.01.30-ADC_Submission_to_ALRC_re_capacity.pdf>.

## Strong enforcement and compliance powers

In Queensland, Authorised Officers within the Department of Communities, Child Safety and Disability Services (DCCSDS) have specific powers to ensure that parties are complying with the *Community Services Act 2007* (Qld) and their individual funding arrangements. These powers include the ability to enter places, requiring that information be produced, and inspecting documentation.[50]

It is important that a similar role exists under the NDIS to ensure that there are appropriate mechanisms in place to respond to issues of concern in respect of complying with standards of regulation, including the treatment of individual participants.

In addition there is a need for strong enforcement powers to add weight to compliance requirements and standards of registration. These should include, for example:

- Power to issue compliance notices;
- Power to issue show cause notices;
- Power to suspend/cancel registration or to direct the NDIS to suspend/cancel registration;
- Power to ban providers/individuals; and
- Power to put in place an interim manager.

As outlined above, these roles and powers could be accorded to the national independent statutory body.

Strong compliance and enforcement mechanisms are crucial to an effective quality and safeguarding system for vulnerable people, particularly those with cognitive impairment, for whom abuse, neglect and exploitation often goes unrecognised, unreported and without appropriate responses from mainstream complaints agencies (including the criminal justice system). It is also important to ensure that participants get the outcomes they want and that have been agreed to with providers of support.

## Mandatory reporting of critical incidents and deaths

There should also be a role for the national independent statutory body to review the deaths of participants that occur whilst they are in the care of a provider of support or institutional setting. Participating in such reviews will enable the oversight body to acquire information that can assist in the development of initiatives to ensure that re-occurrences of similar incidents are avoided and help to encourage the continuous improvement of the current systems.

Along with the reporting of critical incidents, the reporting and systematic analysis of the deaths of people with disability under an NDIS (in a manner consistent with the role of the NSW Ombudsman)[51] is also important for the transparency of the system.

## Strong whistle blower protections

One of the key reasons that people with disability do not complain about the services they receive, which was confirmed through the Public Advocate's consultation with stakeholders, is fear of retribution. This was also identified as a key reason underpinning why staff of disability service organisations often do not report suspected abuse perpetrated by colleagues.

There should be strong legislative and policy initiatives to protect the safety of complainants (both service providers and service users) under the NDIS.

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[50] *Community Services Act 2007 (Qld)* ss 33, 35, 40, 43.

[51] New South Wales Ombudsman, *Reviewable Deaths* < https://www.ombo.nsw.gov.au/what-we-do/our-work/community-and-disability-services/reviewable-deaths>.

## Continuance of systemic advocacy

Systemic advocacy should be seen as a key component of a quality and safeguarding framework and can be supported by various organisations including the national independent statutory body.

In addition to this body, other organisations such as the Community Visitor Program, existing Public Advocates/Guardians and independent advocacy organisations should be supported to continue their systemic advocacy efforts under an NDIS. In some cases, this may require legislative change to enable the existing Public Advocates and Public Guardians to operate within a national legislative framework.

## Improving the capability and capacity of mainstream and universal complaints agencies

'Universal safeguards' are the legal protections that exist for all citizens in Australia. This includes Australian Consumer Law (ACL), public health and criminal legislation. These legal frameworks represent safeguards that operate outside the scope of the NDIS but still have application for all people with disability. For example, in Queensland, people with disability can lodge a discrimination complaint with the Anti-Discrimination Commission (Qld), lodge a complaint about health services with the Health Ombudsman (Qld), or report a crime to the Queensland Police Service.

Under the NDIS, participants will rely on mainstream and universal complaints agencies, in addition to NDIS specific complaints processes. Yet many of these agencies do not have a good record of being responsive to people with disability, particularly people with cognitive impairment.

The literature on making complaints consistently states that most people, regardless of disability, choose not to complain,[52] with only four to five per cent of dissatisfied customers opting to pursue grievances using formal complaints processes.[53] The low level of complaints made by people generally is indicative of numerous attitudinal and structural barriers to accessing complaints mechanisms.[54]

In February 2015, the Public Advocate published a scoping paper about complaints management systems for adults with impaired capacity.[55] The findings of this paper have been briefly summarised for the purposes of this submission. The Public Advocate found that there were a number of potential issues or barriers limiting the ability of current complaints systems to achieve the key principles necessary to ensure effective complaints handling for people with impaired decision-making capacity (as outlined below):

- *Accessibility:*[56] A complaints management system must welcome and promote the ability to make complaints. People with impaired decision-making capacity may not know or understand that complaints management systems exist, how to recognise them, what their purpose is, how to use them, or that service consumers have a right to complain. Some access mechanisms (such as brochures and online feedback mechanisms) are often unsuitable for people with a pronounced cognitive or communication disability and can add to the complexity and confusing nature of formal complaints systems. Further, fear of retribution or the withdrawal of service may be a significant barrier to making a complaint.

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[52] Tor W Andreassen and Sandra Streukens, 'Online Complaining: Understanding the Adoption Process and the Role of Individual and Situational Characteristics (2013) 23(1) *Managing Service Quality* 4-24, 4; Cited in Sarah Cook, *Complaint Management Excellence: Creating Customer Loyalty Through Service Recovery* (electronic version, Kogan Page, 2012); Iddo Gal, Pnina Weisberg-Yosub, Maya Shavit and Israel Doron, 'Complaints on Health Services: A Survey of Persons with Disabilities' (2010) 21(3) *Journal of Disability Policy Studies* 181-188, 181.

[53] See Disability Services Commissioner Victoria (DSCV), *Good Practice Guide and Self Audit Tool: Developing an Effective Person Centred Complaints Resolution Culture and Process* (2nd ed, 2013) 18 <http://www.odsc.vic.gov.au/public/editor_images/GoodPracticeG_10FINALWeb_02.pdf>; Refer to the Queensland Ombudsman website (Queensland Ombudsman (2013) <http://www.ombudsman.qld.gov.au/>.

[54] See for example, Gal et al., above n 52.

[55] Office of the Public Advocate, 'Strengthening voice – a scoping paper about complaints management systems for adults with impaired capacity' (Scoping Paper, Office of the Public Advocate (Queensland), February 2015) <http://www.justice.qld.gov.au/__data/assets/pdf_file/0020/362342/strengthening-voice-scoping.PDF>.

[56] Ibid 9-11.

- *Fairness:*[57] Fairness, as it is operationalised within complaints management systems, incorporates a number of concepts including impartiality, confidentiality and transparency. Adults with impaired decision-making capacity, however, are not always treated fairly. Their issues may be poorly handled or dismissed because of negative stereotypes about people with cognitive impairment; scepticism about the credibility of their claims; perceptions about how well the complainant's evidence will stand up under rigorous scrutiny (for instance, within the legal system); and failure to undertake thorough, objective and independent investigations about presented issues.
- *Customer Focus:*[58] Customer-focused complaints management systems demonstrate high degrees of responsiveness towards the needs of all complainants. Responsiveness towards adults with impaired decision-making capacity within the complaints management process may be compromised by the failure of complaints-handling and frontline service staff to adapt to the communication needs of complainants with disability and communicate with them in accordance with those needs. Systemic responsiveness towards complainants with impaired decision-making capacity however relies on recognition of their decision-making limitations and the need for decision-making support. This may be a difficult task for complaints agency staff who are often not trained or knowledgeable in this area.
- *Efficiency:*[59] Efficiency refers to the resourcing, structuring and operation of complaints management systems in ways that promote proficient and accountable handling of complaints. The lack of resources can significantly impede upon the efficient resolution of complaints and has the potential to lead to poorer processes. The tension between promoting efficiency, following correct administrative procedures, and resolving concerns is difficult to manage, and priority must be given to prioritising satisfaction, particularly for people with disability under the NDIS.

Having a robust process whereby the above principles can be applied as the threshold measure for evaluating the effectiveness of complaints handling mechanisms within an organisation, including by addressing any issues or barriers that are identified in this process, is also necessary in ensuring that the fifth key principle, that of *systems improvement*, also comprises an integral part of an organisation's operations.

The Public Advocate identified a number of strategies to enhance complaints systems for people with impaired decision-making capacity including:

- *Prioritising satisfaction:*[60] The shift towards a user-driven and competitive marketplace of disability service provision means that complaints management processes for adults with impaired decision-making capacity will need to be oriented more toward consumer-based philosophies of customer satisfaction rather than charitable models of service provision. Prioritising and supporting participant satisfaction will therefore require that adults with impaired decision-making capacity are no longer seen as passive service recipients but are actively assisted to become savvy consumers of the systems that support them. It is also likely that many will require education and, where necessary, appropriate supports to assist them with understanding and navigating the nature of their contractual arrangements with service providers; the relationship between expectations and the service provider-participant agreement/contract; and their rights and responsibilities within the feedback process.
- *Proactive identification of dissatisfaction and complaints:*[61] Reconceptualising 'access to complaints management systems' as 'identification of dissatisfaction may offer additional safeguards for people with disability, particularly people with impaired decision-making capacity. As outlined previously in this submission it cannot be assumed that all individuals will be able to seek out and access appropriate complaints management systems. For those individuals who cannot access such systems there is value in having proactive safeguards such as inspectorates and external visitors who can actively pursue complaints on an individual's behalf.

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[57] Office of the Public Advocate, above n 55, 11-13.
[58] Office of the Public Advocate, above n 55, 13-14.
[59] Office of the Public Advocate, above n 55, 14-15.
[60] Office of the Public Advocate, above n 55, 18-19.
[61] Office of the Public Advocate, above n 55, 20-22.

- *Ensuring access to independent advocacy:*[62] Facilitating access to high-quality, independent advocacy is necessary to strengthen the voices of vulnerable people. Independent advocacy can act as an important safeguard and assist in keeping systems accountable.
- *Informal complaint-making processes:*[63] Complaining at a local level can negate the need for adversarial processes and minimise stress for individuals. There are obvious drawbacks to such informal processes including the potential for conflicts of interest. However, providers of support need to be open to receiving complaints and need skills to help progress complaints to ensure that people with disability have the greatest possible access to complaints management systems.
- *The adoption of facilitative and inquisitorial approaches:*[64] The adoption of highly localised, yet robust and independent, processes can lead to the resolution of conflicts congenially and strengthen the relationship between the provider of support and the customer. The avoidance of adversarial processes allows for the ability to mediate and conciliate complaints.
- *Providing guarantees of safety:*[65] Concerns about safety is one of the reasons that people with disability do not complain about the services they receive. Protecting complainants from potential retribution should be a priority for a safeguarding framework. In addition to protecting individuals with disability, there should also be strong whistle-blower protections for providers of support who report poor and abusive support practices of co-workers.
- *Establishing systems:*[66] Appropriate resourcing and operationalisation of consumer feedback systems will be necessary to ensure individuals, including those with impaired decision-making capacity, have access to structured local and formal complaints resolution mechanisms. The financial costs of implementing such systems may increase however, under the NDIS, the emphasis should be on customer satisfaction and as a result funding such systems should be seen as a priority.

These principles and strategies are of course also equally relevant for any complaints system developed for the NDIS itself. Nevertheless significant work must be done, perhaps under the auspices of the National Disability Strategy to improve the responsiveness of mainstream and universal complaints systems for people with disability in Australia.

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[62] Office of the Public Advocate, above n 55, 22-24.
[63] Office of the Public Advocate, above n 55, 24-26.
[64] Office of the Public Advocate, above n 55, 26.
[65] Office of the Public Advocate, above n 55, 27.
[66] Office of the Public Advocate, above n 55, 27-28.

# Concluding Comments

I commend the Australian Government for its considered approach to developing a quality and safeguarding framework for the National Disability Insurance Scheme (NDIS) even while I am concerned by what appears to be the limited analysis of options against the minimum threshold of Australia's obligations under the United Nations *Convention on the Rights of Persons with Disabilities*.

I welcome the introduction of the NDIS and see this as an opportune time to make positive systemic changes to the way in which supports are accessed by people with disability. Given that the circumstances of many people with disability increase their vulnerability, especially those who have impaired decision-making capacity, I strongly support the need for a quality and safeguarding framework. In doing so, I believe that we need to adopt a balanced approach that recognises differing levels of risk and enables the highest possible safeguards to be applied where needed while still ensuring a simplified approach and enabling people with disability to have maximum autonomy within the new service system.

The focus of the NDIS must be on achieving outcomes for people with disability. This should be central to any model that is developed, recognising that this must be applied within the context of a consumer-driven market-based approach to service delivery.

The quality and safeguarding framework under the NDIS cannot rely solely on any one singular mechanism to effectively safeguard people with disability. The framework must work as a cohesive structure that draws upon a number of mechanisms working in a coordinated and integrated manner. The framework needs to be iterative in nature so that it can be progressively enhanced in accordance with the growing understanding that will be generated as the new disability service system evolves over time. Further to this, there may be instances where particular safeguards are not sufficient to adequately and appropriately protect people with disability and the framework must have capacity to apply corrective strategies to resolve such issues.

The framework must work as a cohesive infrastructure that offers appropriate protections for people with disability, especially when responding to instances of abuse, neglect and exploitation, but that also reduces the burden of overly bureaucratic processes and enables a system that is easy to navigate and access.

In closing, thank you for the opportunity to provide a submission in relation to the proposed quality and safeguarding framework for a NDIS. I would be pleased to further discuss the views that I have conveyed in this submission at any time and/or to assist in the next stages of developing the quality and safeguarding framework should this be of assistance.

Yours sincerely,

JMCook.

Jodie Cook
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**Office of the Public Advocate**

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# Appendix 1: Summary of Queensland quality and safeguarding mechanisms

| DEVELOPMENTAL | PREVENTATIVE | CORRECTIVE |
|---|---|---|
| ▪ Information provided in brochures, websites (by the funding department and service providers).<br>▪ Independent Advocacy Organisations provide information, advice, support and advocacy (e.g. People with Disability Australia, Speaking Up For You, Queensland Aged and Disability Advocacy, Queensland Advocacy Incorporated, Rights in Action Cairns, Independent Advocacy Townsville etc.).<br>▪ Informal support provided by family, friends and supporters. | ▪ Funding agreements (contracts) with funded disability service providers.<br>▪ Requirements of funded disability services to:<br>– meet Human Services and Quality Safeguards;<br>– undergo independent quality auditing<br>– develop certain policies (eg prevention of abuse, neglect and exploitation);<br>– ensure employees have undergone criminal history screening (‘yellow card’ system);<br>– provide financial reports and submit quarterly reports;<br>– comply with restrictive practices regulatory regime.<br>▪ Professional registration (e.g. Australian Health Practitioners Regulation Agency) for allied health professionals.<br>▪ Individual funding agreements for self-directed funding. | ▪ The Chief Executive (of the funding department) may take the following actions in relation to a *serious concern*:<br>– request information from a service provider;<br>– obtain a report from an authorised officer who has conducted an investigation;<br>– issue a compliance notice;<br>– appoint an interim manager;<br>– cease funding and recover unspent funds.<br>(*Serious Concerns* include: improper use of funding; failure to deliver a funded service; causing harm to an individual; contravening the *Disability Services Act 2006*)<br>▪ Authorised officers can:<br>– investigate, monitor and ensure compliance with legislative requirements;<br>– conduct an investigation to determine if there is a serious concern;<br>– enter a place with consent or with a warrant to conduct a search, undertake an inspection, copy or take documents, confer with people in the place, take photographs or film.<br>▪ Complaints can be made to**:**<br>– service providers (who must have internal complaints systems);<br>– funding department;<br>– Queensland Ombudsman.<br>▪ Critical incidents must be reported to the funding department.<br>▪ Public Guardian can investigate allegations of abuse, neglect and exploitation.<br>▪ Deaths in Care are reported to the State Coroner.<br>▪ Public Advocate undertakes systemic advocacy on behalf of adults with impaired capacity.<br>▪ Community Visitor Program conducts a visiting program in funded disability services.<br>▪ Independent Advocacy Organisations provide advocacy, information, advice and legal representation. |

# Appendix 2: A recommended framework for NDIS quality and safeguards

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|---|---|
| **DEVELOPMENTAL**<br>Building the capability of people with disability to be able to exercise choice and control and become 'savvy consumers'. Support must be provided to people with disability, where required, to enable them to make well-informed decisions. | **EMPHASIS: STRONG**<br>▪ Accurate and accessible information not only for participants but also for their families, providers of support and the broader community.<br>▪ Decision-making support to enable participants to access, understand and analyse information and make decisions (in upholding Australia's obligations under the UNCRPD).<br>▪ Planning assistance, referral and case management through means such NDIA Planners, Local Area Coordinators and/or funded services where required.<br>▪ Advocates who will assist participants to understand and exercise their rights.<br>▪ Training and education for service providers on recognising and responding to complaints, abuse, neglect and exploitation.<br>▪ Building and developing natural safeguards and enhancing inclusive communities. |
| **PREVENTATIVE**<br>A risk-based approach that allows for maximum flexibility, innovation and choice. Maximum level of safeguards where people are at high risk of abuse, neglect and exploitation. | **EMPHASIS: LESS PRESCRIPTIVE; EMPHASISING FLEXIBILITY, INNOVATION AND CHOICE**<br>▪ Registration of providers of support and individuals who work with participants.<br>▪ Minimum standards and codes of conduct that reflect and uphold the principles of the UNCRPD.<br>▪ A national framework to prevent and respond to abuse, neglect and exploitation of people with disability.<br>▪ High-quality employment practices for providers of support, inclusive of screening and referee checks.<br>▪ Consumer-driven quality processes that are risk-based depending on the vulnerability of the consumer. |
| **CORRECTIVE**<br>There must be a heavy emphasis on independent oversight and monitoring with strong investigative, directive and enforcement powers. Proactive monitoring (equivalent to existing community visitor programs) is an integral element. | **EMPHASIS: STRONG**<br>▪ An independent statutory oversight body that has the ability to handle individual complaints, initiate investigations and be dedicated to overall systemic improvement.<br>▪ Inspectorates or external visitors such as the Community Visitor Program that can proactively identify concerns or complaints.<br>▪ Strong enforcement and compliance powers.<br>▪ Mandatory reporting of critical incidents and deaths.<br>▪ Strong whistle-blower protections for individuals who wish to complain about the conduct of others.<br>▪ Continuance of systemic advocacy.<br>▪ Improving the capacity of universal and mainstream complaints agencies to be responsive to people with disability. |

# Appendix 3: NDIS quality and safeguarding framework – Summary of options

| DEVELOPMENTAL | LEVELS | PREVENTATIVE | CORRECTIVE |
|---|---|---|---|
| The aim is to build individuals' own natural safeguards through knowledge and support.<br>To achieve this aim participants will be provided with information and support through the following means:<br>▪ Holding expos in relation to the NDIS<br>▪ Phone helpline<br>▪ Internet/website online forums<br>▪ NDIA Planner<br>▪ Local Area Coordinators (LACs)<br>▪ Family, friends and supporters<br>▪ Peer support and mentoring programs<br>▪ Advocacy services | **Level 1 – self-regulation** | ▪ Industry self-regulation<br>▪ Seeks to build the capability of participants to manage their own risks<br>▪ Providers of support:<br>- Comply with existing laws<br>- Adhere to a NDIS Code of Conduct<br>- Encouraged to have safe recruitment processes<br>- Encouraged to use "good practice" in accordance with National Standards for Disability Services | ▪ Onus on participants to pursue concerns or complaints, including through mainstream services such as Health Ombudsman or Fair Trading<br>▪ Participants can choose to change their provider of support<br>▪ NDIA will only investigate complaints if they are serious enough to warrant de-registration or suspension of a provider of support<br>▪ Providers of support will operate their own complaints management and feedback systems |
| | **Level 2 – risk-based regulation**<br>(inclusive of level 1) | ▪ Participant testimonials on websites<br>▪ Additional provider of support registration requirements to limit risk<br>▪ Provider of support to comply with set minimum standards<br>▪ Providers of support to report serious incidents<br>▪ Police background checks and referee checks to be completed<br>▪ Onus on provider of support to notify relevant authorities about an employee engaging in abuse, neglect or exploitation of a participant | ▪ Industry-initiated complaints body or contracted third party (e.g. Complaints and Referrals Resolution Service)<br>▪ Capacity to refer serious matters to NDIA<br>▪ Serious matters to be dealt with by the NDIA<br>▪ Potential for employees to be placed on a banned persons list to ensure that they can no longer work with participants of the NDIS |
| | **Level 3 – mandated regulation**<br>(inclusive of levels 1 and 2) | ▪ All individuals who intend to support participants on the NDIS must participate in mandated screening processes (e.g. working with vulnerable people clearance)<br>▪ Providers of support required to have effective internal complaints management systems<br>▪ Providers of support required to participate in independent evaluations | ▪ External complaints body that could sit within the NDIA<br>▪ Providers of support can be de-registered by the NDIA |
| | **Level 4 – high-level regulation**<br>(inclusive of levels 1, 2 and 3) | ▪ Creation of a banned persons list that prohibits individuals from working with participants of the NDIS<br>▪ Positive onus on provider to notify relevant authorities about an employee engaging in abuse, neglect or exploitation of a participant<br>▪ Providers of support must participate in quality evaluations and quality assurance/industry certification | ▪ Independent complaints body (external to the NDIA)<br>▪ Capacity to refer matters to the NDIA<br>▪ Providers of support can be excluded from registration |