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| ADJ Consultancy Services |
| To: | This consultation paper was prepared by the NDIS Senior Officials Working Group for the Disability Reform Council.  |
| From: | Adam Johnston, Proprietor, ADJ Consultancy Services |
| CC: |  |
| Date: | 29th April 2015 |
| Re: | Consultation paper: Proposal for a National Disability Insurance Scheme Quality and Safeguarding framework |

• What are the most important features of an NDIS information system for participants?

• How can the information system be designed to ensure accessibility?

• What would be the benefits and risks of enabling participants to share information, for example, through online forums, consumer ratings of providers and other means?

As someone with a permanent disability, one of the most annoying things about the NDIS is its presumptive nature. This whole consultation seems to assume the NDIS will somehow be miraculously better. It isn’t; it’s the same old government-funded welfare bureaucracy that we are already faced with.[[1]](#endnote-1)

Information should also be in all possible forms. Too often, bodies providing goods or services (be they government, private or charitable) assume everyone has online access and is computer literate. In truth, this is a cost cutting exercise, using demonstrated by staff reductions and, a cost-shift in terms of consumers (who have computers) be left to print out forms and other literature which in the pre-computer era, the agency/company would have provided. From personal experience as a former complaints handler with the NSW Ombudsman, literacy (not to mention technical literacy) was a challenge for many and, it was not unknown for me and other colleagues to print materials and put them in an envelope for a caller.

Providers should be statutorily prohibited from passing on any of the costs of providing information to participants. Equally, if participants are going to rate providers, legislation should be passed extinguishing any provider’s claim to redress for adverse or defamatory commentary. The power imbalance between provider and participant will likely be so pronounced in many cases, that such legislation is necessary, particularly if you want to cultivate an environment of disclosure, where people feel they can make complaints (see discussion below)

• Are there additional ways of building natural safeguards that the NDIS should be considering?

• What can be done to support people with a limited number of family and friends?

I draw to your attention the submission I have already made to the McClelland Royal Commission.[[2]](#endnote-2) It has been my deep concern for some time that, as is happening in NSW,[[3]](#endnote-3) that disability and other care services are being outsourced to the non-government/charitable sector. Let us not forget that the Royal Commission has been finding many *allegedly* benevolent organisations seriously wanting when it comes to the care and protection of people placed in their care. Yet, as this consultation talks about safeguards, NDIS pilot site contracts are being awarded to bodies like St. Vincent de Paul; fortunately, others who originally supported the NDIS concept are coming to the realisation that we in the disability sector are being sold a policy lemon[[4]](#endnote-4) – and it’s the same policy lemon we have been expected to suck since time immemorial. This time immemorial position is to be satisfied with life-long charity, be it from the taxpayer, their delegate, or a conga-line of apparently benevolent organisations who claim to want to “do-good”. But, is any of this truly safe? In this context, “safe” means not only physically safe, but emotionally, psychologically and financially safe?

Firstly, from my own experience, there is the Part 3A jurisdiction of the NSW Ombudsman, concerning child protection, as well as the Ombudsman’s responsibilities under the Community Services (Complaints, Reviews and Monitoring) Act 1993 (CS CRAMA). While this is all designed to be educative, protective of vulnerable people, as well as maintain public confidence in services for children, families and those with disabilities, it relies on several key pillars. Firstly, organisations have to be willing to recognise abuse, neglect or a complaint; oversight bodies don’t have the resources to deploy staff at agencies and, must rely on agency to report, document and retain files for later audit. Equally, clients and families must be willing to lodge complaints; this can be extremely difficult when you are in a relationship of dependence with an organisation. Other factors at play can be how a provider organisation views complaints or allegations of staff misconduct. If they are viewed negatively, as a threat to reputation, resources and government funding, they may well be implicitly (if not overtly) discouraged. Again, as suggested above, I would suspend the operation of defamation and like laws, with regard to all NDIS funded services, to facilitate greater disclosure.

Nonetheless, legal and social sanction will only go so far. Again, I was prompted to write to Justice McClelland after negative experiences as a board member of a major NSW charity. It was large, bureaucratic and, elements of its approach to money were truly disturbing.[[5]](#endnote-5) As I told His Honour, my greatest fear is that we will have another Royal Commission in ten years’ time, into abuse and neglect under the NDIS. Many of the same factors are in play now; vulnerable populations, powerful provider agencies looking to maintain or increase their funding and, governments who argue they are more and more fiscally constrained. This is part of the justification for outsourcing to the private or NGO sectors. If these bodies assume public responsibilities and spend public funds, they should be subject to scrutiny as if they were public authorities. This was my argument to the NSW Parliament’s Public Accounts Committee’s inquiry into the Efficiency and Effectiveness of the NSW Audit Office.[[6]](#endnote-6) The Committee accepted my recommendation that the Auditor be empowered to follow the dollar, drawing on a recommendation from ICAC.[[7]](#endnote-7)

Ideally, if NGOs are going to continue to play a role in the care of people under the NDIS, my preference would be for much wider reforms. These bodies should be able to be directly “recalled” to Parliament, for full inquiry. This was part of my reason to writing to the Special Commission established by former NSW Premier the Hon. Barry O’Farrell, to inquire into Recall Elections. My submission proposed not only recalling MPs, but public officials and, also those non-government bodies who were granted public funds.[[8]](#endnote-8) I stand by these views and, think the cause of transparency in government and public administration would be greatly aided if such reforms were implemented in all jurisdictions across Australia.

Finally, we need to talk about what it could mean to be emotionally, psychologically and financially safe. To me, the thought of being dependent on an NDIA approved NGO for my very means of existence is something which is already emotionally taxing and psychologically draining. NGOs, charities and churches do have their dark side. And this isn’t limited to abuse and neglect; I’ve written elsewhere about the many and varied shortcomings of disability employment services, which have generally been outsourced to the charitable sector for a number of years.[[9]](#endnote-9)

Many charities know their clients are fairly “captive;” too often, service delivery reflects this fact. Governments are disinclined to disturb this arrangement; so long as the frail, aged and disabled *appear* to be cared for, that seems to be enough. Never mind how mind-numbing the process may be for some of us, at times.

• What kind of support would providers need to deliver high-quality supports?

As soon as we start talking about supports, we invariably start talking about public subsidies. I’m reluctant to endorse any suggestion of more taxpayers’ money for NGOs who become NDIS providers. This just perpetuates the grant/subsidy mentality that is all pervasive in the NGO sector. My 2015 Pre-Budget submission rails against the concessions and subsidies given to NGOs and others; I offer the Pre-Budget submission as an alternative view, as well as an opportunity for the Federal Government to cull the number of rent-seekers.[[10]](#endnote-10)

While there should police and Working With Children Checks providers should not expect the NDIA, the government or participants to pay, for what should be mandatory minimum standards/

• Should there be an independent oversight body for the NDIS?

• What functions and powers should an oversight body have?

An Ombudsman style body should have oversight. Ideally, this should happen at the State and not the Commonwealth level. The NSW Ombudsman, for one, already has experience in protective and community services jurisdictions. More importantly, where malfeasance is found (or likely) the Ombudsman should be able to launch action in civil and criminal courts, on behalf of families and participants. Legislation should prescribe the civil standard of proof in all matters, a flexible approach to rules of evidence and, that presumptions should always be weighed against providers and their staff. In my view, such reforms are essential to protect the true interests of participants and their families. I further believe that this is the correct approach to take when dealing with the NGO sector.

• Considering the options described above, which option would provide the best assurance for:

 – Providers?

 – Participants?

• Should the approach to registration depend on the nature of the service?

• How can the right balance be reached between providing assurance and letting people make their own choices?

While quality assurance schemes might sound reassuring to some, the danger with these is that they become “tick-box” exercises people place little ongoing emphasis on. Thus, there can be great variance between documentary and actual compliance. The reversal of the onus of proof, as well as maintaining and enhancing State-based oversight and inquisitorial bodies, should provide effective protective structures. The NDIA should have little or nothing to do with oversight or quality assurance and, much of the money going to the NDIA should be returned to the States. The States are the level of constitutional government closest to the people in receipt of care and support. In my view, the referral to Canberra never made sense and, I welcome and support Western Australia’s non-participation in the NDIS.

As a potential participant, I am concerned about dealing with yet another bureaucracy. This is why I would prefer to continue to deal with State agencies, rather than another body. One of my concerns is that the NDIA might come to see itself as “a one stop shop” regarding disability. Monopoly or oligopoly markets are rarely efficient or customer focused[[11]](#endnote-11) and, should be avoided.

• How important is it to have an NDIS complaints system that is independent from providers of supports?

• Should an NDIS complaints system apply only to disability-related supports funded by the NDIS, to all funded supports, or to all disability services regardless of whether they are funded by the NDIS?

• What powers should a complaints body have?

• Should there be community visitor schemes in the NDIS and, if so, what should their role be?

It is essential for transparency and credibility for the complaints system to be entirely independent from the NDIS, the NDIA and providers. However, the NDIA and registered providers should be required to pay a levy to fund the complaints system and, this should also be a cost which cannot be passed to participants. There are precedents for industry funded Ombudsmen, like the Energy and Water Ombudsman NSW.

• Who should make the decision about whether employees are safe to work with people with disability?

• How much information about a person’s history is required to ensure they are safe to work with people with disability?

• Of the options described above, which option, or combination of options, do you prefer?

Police checks and Working with Children checks should generally be sufficient. A diploma in disability may be useful or desirable, but as someone with a disability I have come to keenly value something which is all too often missing; the capacity of care staff to speak *and understand* conversational English. It is probably politically incorrect to mention this, but it is a growing frustration, as the profile of care staff has shifted markedly over the last 10 to 15 years.

• Should people who manage their own plans be able to choose unregistered providers of supports on an ‘at your own risk’ basis (Option 1) or does the NDIS have a duty of care to ensure that all providers are safe and competent?

• What kind of assistance would be most valuable for people wanting to manage their own supports?

The Government could do much if it made disability trusts less restrictive and easier to use. NDIS funding could go in there and be dispensed by trustees, who will know the participant well. As stated, it would be my preference not to have any relationship with the NDIA or NDIS per sae and, if people wish to self-manage, some of those who do so will be motivated to keep distance between ourselves and the NDIA.

Again, it would be preferable for the NDIA to be broken up into State and Territory bodies, to better reflect how services are (and should continue) to be delivered.

• Who should decide when restrictive practices can be used?

• What processes or systems might be needed to ensure decisions to use restrictive practices in a behaviour support plan are right for the person concerned?

• Are there safeguards that we should consider that have not been proposed in these options?

• For providers, what kinds of support are you receiving now from state and territory departments that you think would be helpful if it was available under the NDIS?

• Would you support mandatory reporting on the use of restrictive practices? Why/Why not?

• If you support mandatory reporting on the use of restrictive practices, what level of reporting do you believe should occur (based on one, or a combination of, the options above)?

Restrictive practices should only be used with the oversight of say, the Public Guardian, alongside mandatory reporting to an Ombudsman or like body, to double check the appropriateness of an action. This is because restrictive practices are an extreme course of action in a liberal democracy. People’s families or guardians should be able to quickly and equally institute action for redress, with the assistance of the Ombudsman, if wrongdoing is found (see earlier answer regarding the extension of Ombudsman powers).

1. See generally, my submissions to the Productivity Commission’s Disability Care and Support Inquiry, See my

first submission: <http://www.pc.gov.au/inquiries/completed/disability-support/submissions/sub0055.pdf> ; Second submission - <http://www.pc.gov.au/inquiries/completed/disability-support/submissions/sub0186.pdf> ; Third submission - <http://www.pc.gov.au/inquiries/completed/disability-support/submissions/subdr0716.pdf> my appearances at the Sydney public hearings were equally ineffectual at halting the NDIS juggernaut

<http://www.pc.gov.au/projects/inquiry/disability-support/public-hearings> as 28 April 2015 [↑](#endnote-ref-1)
2. See generally, “Submission: The Care of People with Disabilities” [↑](#endnote-ref-2)
3. See e.g.: **Tensions over 14.5k NSW jobs shift in NDIS,** By [Marie Sansom](http://www.governmentnews.com.au/author/marie-sansom/) and [Julian Bajkowski](http://www.governmentnews.com.au/author/julian-bajkowski/) on August 7, 2014 in [Federal](http://www.governmentnews.com.au/category/sector/federal-government/), [Health & Social Services](http://www.governmentnews.com.au/category/health-social-services/), [Jobs](http://www.governmentnews.com.au/category/jobs/), [Law](http://www.governmentnews.com.au/category/law/), [Management](http://www.governmentnews.com.au/category/management/), [Procurement](http://www.governmentnews.com.au/category/procurement/), [State](http://www.governmentnews.com.au/category/sector/state-government/) at <http://www.governmentnews.com.au/2014/08/tensions-14-5k-nsw-jobs-shift-ndis/> as at 28 April 2015 [↑](#endnote-ref-3)
4. See e.g.: **NDIS: rights-based paradigm shift or same old charity?,** *By Heike Fabig Ramp Up 11 Apr 2013,* <http://www.abc.net.au/rampup/articles/2013/04/11/3734962.htm> as at 28 April 2015 [↑](#endnote-ref-4)
5. Refer to Endnote ii and, see generally, the Zip attachment in that email entitled “Papers”. This includes a range of submissions I made to State and Federal Parliament, the NSW Independent Commission Against Corruption, expressing my disquiet about various actions (or omissions) by the Board of which I was a member. Also included is my statement of resignation, presented when differences came to a head. [↑](#endnote-ref-5)
6. See generally, Submission No. 7 at <http://www.parliament.nsw.gov.au/prod/parlment/committee.nsf/0/BDDEDC83E0A9FF20CA257BCF000C442C> as at 29 April 2015 [↑](#endnote-ref-6)
7. See ibid, p. 2 of 11 at [http://www.parliament.nsw.gov.au/prod/parlment/committee.nsf/0/bddedc83e0a9ff20ca257bcf000c442c/$FILE/Submission%20No%207.pdf](http://www.parliament.nsw.gov.au/prod/parlment/committee.nsf/0/bddedc83e0a9ff20ca257bcf000c442c/%24FILE/Submission%20No%207.pdf) as at 29 April 2015. The committee supported and cited my submission in its final report ([http://www.parliament.nsw.gov.au/Prod/Parlment/committee.nsf/0/7a16b6d80ef9244cca257bea0023d739/$FILE/Efficiency%20and%20effectiveness%20of%20the%20Audit%20Office%20of%20NSW.pdf](http://www.parliament.nsw.gov.au/Prod/Parlment/committee.nsf/0/7a16b6d80ef9244cca257bea0023d739/%24FILE/Efficiency%20and%20effectiveness%20of%20the%20Audit%20Office%20of%20NSW.pdf)) and I thank the Committee Chairman and my local State MP Jonathan O’Dea for his support in pressing for the recommendation to be implemented [↑](#endnote-ref-7)
8. See generally, my submission at <http://www.dpc.nsw.gov.au/__data/assets/pdf_file/0008/131120/06_Johnston.pdf> as at 29 April 2015 [↑](#endnote-ref-8)
9. See e.g.: my submission to the House inquiry into Strengthening the Job Seeker Compliance regime at <http://www.aph.gov.au/sitecore/content/Home/Parliamentary_Business/Committees/Senate/Education_and_Employment/Strengthening_Job_Seeker/Submissions?print=1> (open submission 12) as at 29 April 2015 [↑](#endnote-ref-9)
10. See generally, “Pre-Budget Submission” attached [↑](#endnote-ref-10)
11. See generally, my submission to the Competition Policy Review at <http://competitionpolicyreview.gov.au/files/2014/07/ADJ.pdf> as at 29 April 2015 [↑](#endnote-ref-11)