

30 April 2015

NDIS Quality and Safeguards Framework Consultation Team  
Department of Social Services  
Em. NDISqualitysafeguards@dss.gov.au

Dear Sir/Madam

### NDIS Quality and Safeguarding Framework

Please find attached our submission in response to the Consultation Paper.

Sylvanvale appreciates the opportunity to participate in the consultation process, and commends DSS for the inclusive nature of the process.

Yours sincerely



Pauline Stanley  
Chief Executive Officer  
PS15-031

2 Mikarie Place  
Kirrawee NSW 2232

PO Box 29  
Sutherland NSW 1499

T 02 8536 0100  
F 02 9521 3610  
W [sylvanvale.com.au](http://sylvanvale.com.au)

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# Proposal for a National Disability Insurance Scheme

## Quality and Safeguarding framework

### Introduction and context

- Sylvanvale provides ways for children and adults with a disability to live in their communities as they choose. We do this by providing advice, flexible support, childcare and education. We provide services to children with and without disability, and to adults with disability. Within our service provision to adults with disability, our main service is supported accommodation, including support to clients with extremely challenging behaviours and to clients exiting the criminal justice system.

### General comments

- **The Framework and guardianship mechanisms:** The visual representation of the Framework does not include guardianship mechanisms. Given the vital role that guardians play in safeguarding, the function should be included. Consideration should also be given how to address the practical difficulties in having guardians appointed.
- **The Framework and market mechanisms:** The visual representation of the Framework and, to some extent, the commentary does not recognise the impacts of introducing a quasi-market for disability services and that market mechanisms can be one element of the quality and safeguarding framework. Having said that, market mechanisms alone are clearly insufficient to provide for quality and safeguarding and it is recognised that not all customers will have genuine choice in the new market.
- **Pricing and quality:** Moving beyond *quality management*, there can be a connection between the *quality of service delivery* and pricing. Some of the NDIA's prices are arguably inadequate, and this might reduce the quality of service delivery. This issue is not considered in the paper.
- **Inappropriate transfer of risk:** By virtue of the design of NDIS, the Scheme transfers participant-related and financial risks from Government to service providers. Efficient/optimal risk management allocates the risks to the party in the best position to know about them and in the best position to take precautions.<sup>1</sup> As NDIA provides planning and determines the funding package, it is arguable that - at least for some participants or for certain periods - risks should be borne by the NDIA. In this regard, it is relevant to note that a participant is not obliged by NDIA to disclose any information about risks to the provider (to the extent that they are not even obliged to share the plan with the provider.)
- **Regulation related to service types:** At a number of points in the Consultation Paper, it is suggested that the degree of regulation for quality

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<sup>1</sup> Morris, D., McGregor-Lowndes, M. and Tarr, J. (2015) Government grants – an abrogation or management of financial risks?, *Performance management in nonprofit organizations: global perspectives*. Z. Hoque and L. D. Parker (Eds). New York, Routledge: 369-393.

and safeguarding purposes should be tailored to the type of service delivery (e.g., group recreation activities might not attract the same requirements as might other services). We suggest that risk should be assessed on the basis of the individual's circumstances as a whole. The type of service delivery is, at best, a proxy measure of the need for quality and safeguarding for a particular participant.

- **Balancing choice and control, and duty of care, in service delivery:** Safeguarding is about achieving an appropriate balance between choice and control for the individual participant, with the duty of care to the participant. Given the importance of these issues, including in matters of legal liability, it would be beneficial for NDIA to provide guidance to participants and service providers on how these worthy goals should be balanced. Such guidance should include case studies to help inform understanding.
- **Employment of family members:** To the best of our knowledge, the paper does not mention the NDIA Operational Guidelines<sup>2</sup> which limit the employment of family members. Without wishing to debate the policy issues raised by the NDIA's decision on this issue, the decision was undoubtedly informed by quality and safeguarding issues and thus should be mentioned in the finalised Framework. If the policy is maintained in its current form, the question arises whether the NDIA's position is enforceable in practice, especially when the plan is self-managed.

## Part 1: Proposed Quality and Safeguarding framework for the NDIS

### Developmental domain

#### Providing information for participants

##### QUESTIONS

- 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?

- DSS is commended for its elaboration of the information needs of participants.
- These information needs are likely to be highest at the time of intake into the Scheme, and at key stages in the person's life.

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<sup>2</sup> NDIS "Operational Guideline – Planning and Assessment – Supports in the Plan - Household Tasks" and NDIS "Operational Guideline – Planning and Assessment – Supports in the Plan – Personal Care Supports".

- Sylvanvale commends NDIA for introducing information sessions for people with disability and for carers, and the fact that the majority of its print and other information is in plain English. It is pleasing to see that some publications are also in Easy English and some community languages. As highlighted in the first progress report of the Parliamentary Joint Standing Committee on the National Disability Insurance Scheme, NDIA needs to do more to reach out to the CALD communities.
- In relation to information sharing of consumer ratings, etc., these can be a powerful means on enabling informed consumer choice, in the same way that TripAdvisor and Amazon ratings inform consumer choice. However, there need to be learnings from the experience of these sites about the problems of fake reviews and defamatory posts. Comments should be moderated to prevent defamatory material from being posted, to the detriment of the person posting, any person posted about, and the website owner. Further, there should be capacity for management responses to comments.

### **Building natural safeguards**

#### **QUESTIONS**

- 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?

- The paper correctly identifies the need to build safeguards, including strengthening natural safeguards, through the plan development process, the use of Local Area Coordinators, targeted funding of community organisations, and through education and employment. The concern for people with a limited number of family and friends is also appropriate.
- Two comments are offered. First, in relation to the targeted funding of advocacy and peer support organisations, this requires a substantial investment, well beyond the existing investments in Disability Support Organisations.
- Second, in relation to those people with a limited number of family and friends who are currently accessing services, frontline workers often play a very important role in informing and building the capacity and confidence of the people they support, and this role might be promoted through appropriate system-wide investments. Further, community visitors could play a role.

## Preventative domain

### Service level safeguards — support for service level capacity building

#### QUESTIONS

- What kind of support would providers need to deliver high-quality supports?
- Service providers should take responsibility for developing their capacity to deliver high-quality supports, in the context of an appropriately functioning market (i.e., one where NDIA does not exercise monopsonistic power).
- What is likely to continue to be beyond the capacity of all but the very largest providers is extensive and rigorous practice-oriented research. Appropriate investment by government in such research will benefit people with disability, service providers and the system as a whole.
- In view of the commitment of Australian Governments to the 'National Framework for Reducing and Eliminating the Use of Restrictive Practices in the Disability Service Sector', this might also be an area in which continued investment by government is appropriate.
- See our earlier comments about the benefit of NDIA providing guidance to participants and providers on the appropriate balancing of choice and control, and duty of care, in service delivery.

## Corrective domain

### Oversight functions

#### QUESTIONS

- Should there be an independent oversight body for the NDIS?
- What functions and powers should an oversight body have?
- Given the potential nexus between NDIA pricing and the actual *quality of service delivery* (not mere *quality management*), if NDIA continues to use fixed prices for some supports, consideration should be given to the establishment of an independent pricing tribunal, perhaps along the lines of the Independent Pricing and Regulatory Tribunal of NSW.
- Further, it is important that Australia learn from the UK experience of the necessity for a level of market oversight, especially contingency arrangements if major providers of essential services cease trading.<sup>3</sup>

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<sup>3</sup> House of Commons Committee of Public Accounts. (2011) *Oversight of user choice and provider competition in care markets*. London, The Stationery Office.

## Part 2: Detail of key regulatory elements of the Quality and Safeguarding framework

### NDIA provider registration

#### QUESTIONS

- 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?

- The paper correctly poses the question about how a balance can be reached between providing assurance, on the one hand, and letting participants and carers make their own choices, on the other.
- There is limited research<sup>4</sup> on how consumers actually incorporate quality and safeguarding information into their decision-making, and Governments might consider sponsoring research on this issue so that governments' decisions about the regulation of quality and safeguarding can be evidence-based.
- Any solution should aim for long-term sustainability. Given that there will inevitably be scandals, there seems little point in deciding on a low-regulation solution if it is likely that a higher-regulation solution will be imposed in response to the first major scandal.
- We note that the comment at page 41 about the costs of assessments (stated to be \$5000 for large providers) relates to the external verification process only (and even this estimate is on the low side), and does not in any way reflect the real costs of maintaining a quality management system in order to meet the Standards.
- We believe that Option 3 should be mandatory for those providers:
  - of supports involving invasive personal care
  - of supports which might involve restrictive practices, and
  - of participants who – as a result of their disability – need intensive support to receive and process information.
- The overall result of the quality evaluation should be made available, rather than the evaluator's report to management. There is likely to be considerable variation among evaluators about their reflections and recommendations, whereas there is likely to be less variation in the overall result. Further, making the management report publicly available is likely to result in sanitised reports, and thus inadvertently reduce their potential benefit.

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<sup>4</sup> The available evidence is summarised in: Turnpenny, A. and Beadle-Brown, J. (2015 in press). Use of quality information decision-making about health and social care services - a systematic review. *Health and Social Care in the Community*.

## Systems for handling complaints

### QUESTIONS

- 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?

- Any NDIS complaints system should only apply to supports funded by the NDIS or government more generally. It is unreasonable to suggest that the NDIS complaints system should apply to supports funded by other means.
- Any disability complaints office having jurisdiction over service providers must replace and not duplicate existing State-based schemes.
- In designing the new system, some elements of the existing State-based schemes should *not* be transferred into the national scheme, as they have been designed assuming that people with disability have no choice about service provider and they do not reflect the realities of NDIS. For example, some provisions of the Community Services (Complaints, Review and Monitoring) Act 1993 (NSW) (sections 22, 28 and 45) and the Community Services (Complaints, Review and Monitoring) Regulation 2004 (clauses 5 and 6) for complaints, written reasons for decision, and Tribunal reviews about the “withdrawal, variation or administration” of a service are inappropriate in the new quasi-market.
- The suggestion that there be a body authorised by law to investigate and resolve individual complaints that cannot be resolved by the provider at first instance is supported, but with qualifications. It is recognised that feedback, including complaints, are often a rich source of information for service providers. It must also be recognised that, in any system, a small number of complainants demonstrate unreasonable complainant conduct which can generate high costs for respondents and thus for the system as a whole.<sup>5</sup> An appropriate balance is required, perhaps along the following lines.
  - First, there might be a filtering process to ensure that the oversight body only becomes involved where the subject of the complaint is deemed significant and otherwise meets public interest requirements.
  - Second, one of the issues going to the public interest should be whether the participant has access to universal safeguard

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<sup>5</sup> NSW Ombudsman, (2012) *Managing unreasonable complainant conduct: A manual for frontline staff, supervisors and senior managers*, 2<sup>nd</sup> ed.

systems and whether it is reasonable to expect the consumer to access those systems (similar to any other citizen).

- Third, given that market choice will be available for some consumers for the first time (as raised in our general comments above), one consideration going to the public interest should be whether the participant's needs have been addressed by changing service provider or can be readily resolved if they were to do so. If so, any oversight body should not become involved unless there are countervailing public interest considerations.
- Fourth, the complaint body should take into account the maximum price set by the NDIA for the particular support.<sup>6</sup>
- Fifth, there should be provision for NDIS to pay for the additional costs borne by the service provider in responding to the complaint if:
  - the costs were significant, and
  - one of the following conditions apply
    - the complaint is not sustained or sustained to a minor degree, or
    - the costs of responding to the complaint were increased because of unreasonable complainant conduct.
- Community Visitor Schemes are valued, and should operate for:
  - any person subject to restrictive practices *in any setting*
  - participants who – as a result of their disability - need intensive support to receive and process information, and
  - participants who have limited family and friendship networks and who agree to the support.

## Ensuring staff are safe to work with participants

### Possible approaches

#### QUESTIONS

- 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?

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<sup>6</sup> This is not to suggest that any support provided should not be of reasonable quality. However, the NDIA's funding model will clearly encourage providers to be efficient in their service delivery; the lower the maximum price set by NDIA, the more likely that there can be trade-offs in the quality of service provision. To give an example from the airline industry, there can be no reasonable expectation of 'business class' service by a discount carrier; of course, the discount carrier must prove its airworthiness.

- Given recent scandals, and given that NDIS will result in more one-on-one support, we support the imposition of all the options.
- The national system of controls should be based on the best elements of the current State systems, with the aim of real-time updating of service providers about any changes in the clearances of current staff.

### Safeguards for participants who manage their own plans

#### QUESTIONS

- 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?

- In relation to Option 1, people self-managing should not be able to choose unregistered providers where:
  - participants – as a result of their disability – need intensive support to receive and process information, or
  - their supports might involve restrictive practices.
- Where a person who is self-managing is the employer, she or he should be subject to the same responsibilities as any other employer.

### Reducing and eliminating restrictive practices in NDIS funded supports

#### Authorisation

#### QUESTIONS

- 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?

- We support the National Framework for Reducing and Eliminating the Use of Restrictive Practices in the Disability Service Sector.
- We support either Option 3 or 4, provided that Option 3 includes the requirement for the involvement of a person independent of the provider (along the lines of the current NSW arrangements). If Option 4 is prescribed, and especially if the decisionmaker is a tribunal, the tribunal must be appropriately resourced to ensure that it can make

such decisions on a timely basis. In either case, there must be provision for emergency use of restrictive practices where required.

### **Monitoring and reporting**

#### **QUESTIONS**

- 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**)?

- We support a combination of Options 1 and 2. Option 3 appears to be onerous, potentially returning little overall benefit for people with disability or the system as a whole.