

Safeguards and the NDIS

In July 2014, the Commonwealth, State and Territory governments began consultations to inform the development of a Consultation Regulatory Impact Statement to seek community input on the development of a national disability safeguards and quality framework. Set out below are the minimum safeguards the Disability Complaints Commissioners¹ agree should form part of a national quality and safeguards framework for people with disability under the National Disability Insurance Scheme (NDIS).²

The Commissioners recognise the importance of dignity of risk and its central role within a person-centred service system based on choice and control, and they welcome the NDIS's commitment to enabling participants to exercise their rights not just in planning and managing their supports, but in their wider lives as well.

Within this context, the Commissioners recognise that each person with disability faces different risks and different levels of vulnerability. This can be for a range of reasons, including the impact of a person's disability, the extent of their informal and formal support networks, the type of support required and the setting in which its delivered, and the availability of appropriate supports in the local community.

Any national safeguards system must, therefore, take a sophisticated and proportionate approach to managing risk.

It should not duplicate the responsibilities of other independent community or mainstream oversight and safeguarding bodies³ but instead work with them to promote the rights of people with disability to speak up and access the same range of protections available to the rest of the community.⁴ Such an approach acknowledges that not all people with disability will require the same level or type of protection, and a person's level of vulnerability may vary from setting to setting, or change over time.

A proportionate safeguards framework supports service providers by identifying the characteristics of particular services or settings where people with disability will benefit from a more structured approach, enabling providers to direct their resources and expertise effectively.

1 The Disability Complaints Commissioners group encompasses NSW, Victoria, South Australia, Western Australia, Northern Territory, ACT, New Zealand, and the Australian Disability Discrimination Commissioner. Queensland and Tasmania do not currently have Disability Complaints Commissioners.

2 This paper updates the previous paper *Safeguards and the NDIS*, published in April 2013. The minimum safeguards outlined in this document are in addition to those relating to quality frameworks and standards for registered and other support providers.

3 Examples include consumer protection bodies, health care complaints authorities, public guardianship and trustee agencies, etc

4 All governments have a responsibility to improve the reach and effectiveness of all complaints mechanisms under the National Disability Strategy (*Areas for future action 2.6*).

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Independent oversight and analysis of the data gathered through the different functions of the safeguarding framework (including complaints, critical incidents reports, inquiries, reviews and monitoring) provides valuable feedback about the evolving disability market. This will assist people with disability, service providers and the NDIS by providing evidence of the quality of services and outcomes.

One of the acknowledged benefits of the NDIS is the drive to develop a nationally consistent approach to disability service delivery. It will take time to build such a system, and any proposed safeguards framework must be adaptable enough to work with the current jurisdictional differences while also driving the shift to a single national approach. The framework will also need to be responsive to any new challenges or risks that emerge from the developing disability sector.

Against the background of our work in the disability sector over many years, and following discussion and agreement with people with disability, the Commissioners strongly believe that NDIS participants and potential participants should have access to the minimum safeguards set out below.

The success of a new system of safeguards is dependent on the needs of people with disability being recognised in the design of the system. A new safeguards function will need to be equipped with disability expertise and resources to ensure that

information is provided through a range of communication methods, and navigation of the system is accessible for people with varying abilities.

We also recognise the critical related need for a solid strategy to support the development and provision of safeguards. In this regard, the Commissioners are keen to work with Commonwealth, State and Territory governments and people with disability on a robust set of arrangements for the delivery of the necessary safeguards.

1. Independent oversight,⁵ consisting of a body(ies) with:

- complaint handling and investigative powers to:
 - » receive, resolve⁶ and investigate complaints
 - » conduct 'own motion' inquiries and investigations⁷
 - » assist people with disability to make complaints, and
 - » review the pattern and causes of complaints, identify systemic issues for service improvement, and make recommendations to improve the handling and resolution of complaints.

Central to these functions is the need to:

- » include the provision of information, education, training and advice about matters relating to complaints and complaint handling

5 Concerned with supports funded by the NDIS, and people with disability who receive, or are eligible to receive, supports funded by the NDIS.

6 Including the resolution of complaints at a local level, and through alternative dispute resolution.

7 'Own motion' inquiries should be able to be conducted in relation to matters about which a complaint could be made.

- » establish a nationally consistent complaints reporting system, requiring the prescribed reporting of key information about complaints to the independent oversight body(ies),⁸ and
- » include legislative provisions to ensure protection of complainants from any detrimental action (or threat of detrimental action) linked to a complaint.
- Legislative responsibilities to conduct ongoing reviews into the effectiveness of aspects of the NDIS (ie: monitoring, review and inquiry functions)⁹
- Responsibility for promoting access to advocacy and supported decision-making.

Service providers' actions would be assessed against the relevant standards, in the expectation that these would vary according to the type of support. Where the complaint is best dealt with by a mainstream complaints handling body, for example, a consumer affairs regulator, the complainant would be assisted in making contact with the proper body.¹⁰

The analysis of complaint data collected through a national reporting system will identify systemic weaknesses that can pose a risk to participants and the sustainability of the NDIS, allowing these to be addressed proactively.

2. Safeguards to prevent and effectively respond to abuse, neglect and exploitation – including:

- development of a comprehensive national framework for preventing, identifying and effectively responding to abuse, neglect and exploitation of people with disability
- a requirement to report critical incidents,¹¹ particularly in the context of high risk service settings [with oversight of the handling of matters by an independent oversight body(ies)]
- the introduction of a consistent national system for screening people engaged to support people with disability under the NDIS, using a comprehensive clearance and bar model¹²

8 In this regard, we refer to the provisions of s.105 and s.106B of the *Disability Act 2006* (Vic), requiring services to provide an annual report to the Disability Services Commissioner, including information about the number, type, and the outcome of complaints. NSW has adapted the Victorian online reporting system and included quality framework recording for use in its own sector, and WA has developed its own complaints reporting technology based on the same parameters as Victoria and NSW.

9 See the *NSW Community Services (Complaints, Reviews and Monitoring) Act 1993* (and related provisions in the *NSW Ombudsman Act 1974*).

10 It will be important for people with disability to be provided with support throughout the complaints process, where necessary.

11 See Part 3C (*Protection of people with disability*) of the *NSW Ombudsman Act 1974*.

12 This model is largely consistent with the probity checking arrangements in place in the ACT and Queensland under the *Working With Vulnerable People (Background Checking) Act 2011* (ACT), and the *Disability Services Act 2006* (Qld). However, these systems would be enhanced by ensuring that adverse findings from the proposed critical incidents reporting system are factored into the screening (and related risk management) system.

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- the introduction of an ‘unconscionable conduct’ (or exploitation) offence,¹³ and
- regulation and effective oversight of the use of restrictive interventions.¹⁴

3. Community Visitors

At a minimum, we consider that Community Visitors should be available to people with disability living in residential care funded under the NDIS, given their relative vulnerability.¹⁵

Among other things, Community Visitors perform a critical role in independent monitoring, resolution of complaints and emerging issues, and advocacy support.¹⁶

4. Public Guardian/Public Advocate

We would expect that the national system would incorporate the best aspects of the public guardian/public advocate roles, in the context of a person-centred approach.¹⁷

5. Disability Advisory Council(s)

We recognise the importance of an advisory council(s) that represents people with disability.

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- 13 The creation of an offence for exploiting people with disability would serve as a ‘safety net’ for all service delivery arrangements, including those that will fall outside of the safeguards proposed for providers registered under the NDIS.
- 14 Restrictive interventions include chemical, mechanical and physical restraint, and seclusion. The *National Framework for Reducing and Eliminating the Use of Restrictive Practices in the Disability Service Sector*, endorsed by the Disability Reform Council in March 2014, identifies accountability as a guiding principle and specifies this should be supported by transparent reporting mechanisms. These include: detailed independent monitoring; access to independent processes for complaints, or review and appeal of decisions to use restrictive practices; analysis of trends to evaluate the effectiveness of the strategies and identify any increased reliance on the use of restrictive practices.
- 15 There would be merit in committing to ongoing dialogue between relevant stakeholders regarding the scope for expanding the Community Visitor scheme to potentially include other kinds of care arrangements that will emerge under the reform agenda. We consider that there is also likely to be an important and increasing role for ‘independent persons’ more generally under the NDIS, particularly where the person with disability does not have an informal support network, or where there are higher levels of vulnerability and/or risk involved. For example, the use of independent persons who could: visit people with disability in the community, where the planning process identifies this need; discuss proposed restrictive interventions (and the person’s rights) with the person with disability and report where the person does not understand or legislative requirements are not being met; and provide supported decision-making assistance.
- 16 It is worth noting the model of advocacy and assistance provided under New Zealand’s National Health and Disability Services Advocacy Service, which provides a combined visiting and advocacy approach (outlined in Part 3 of the *NZ Health and Disability Commissioner Act 1994*).
- 17 Important aspects include supportive and substitute decision-making, investigating complaints or allegations that a person is under inappropriate guardianship or is being exploited or abused or in need of guardianship, and promoting the development of the ability and capacity of persons with disability to act independently. We note the approach outlined in the *Victorian Guardianship and Administration Bill 2014* and the introduction of a ‘supportive guardian’ function.