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Submission S023

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Family and Community Development Committee

**SUBMISSION TO THE PARLIAMENTARY INQUIRY INTO ABUSE IN DISABILITY
SERVICES STAGE 1**

Introduction

NDS is the peak body for non-government disability service providers with 200 members in Victoria and 1,010 nationally. We have a diverse and vibrant membership including small, medium and larger service providers who support thousands of people with disability. Our members employ over 8,000 people in Victoria and are supported by countless volunteers in delivering vital services. NDS is committed to improving the disability service system to ensure it better supports people with disability, families and carers and to build a more inclusive community. NDS has been at the forefront of the campaign to support the introduction of the National Disability Insurance Scheme (NDIS) and we are now supporting service providers as part of its trial in the Barwon region.

NDS is pleased to make a submission to this Inquiry and we sincerely hope the outcomes of the Parliamentary Inquiry, along with the current investigation by the Ombudsman, will improve the safety and wellbeing of people with disability in Victoria. This Inquiry provides an opportunity for the Victorian community to engage with people's experiences and to understand and acknowledge that people with disability are overrepresented as victims of abuse. NDS abhors any abuse, neglect or crimes against people with disability and we are committed to working to protecting and promoting the rights of people with disability who use services. NDS believes that abuse occurs in an environment where the rights of people with disability are not fully acknowledged or respected.

NDS has been active in leading sector responses to issues of abuse and neglect. We believe there is much that can be done to strengthen quality and safeguarding practices in Victoria with a particular focus on prevention and building open, positive complaints cultures in services.

The safety of people with disability is paramount in service delivery and it is everyone's business. Safety and quality does not rest with one entity, or one set of rules; it is protected by a landscape of actors and activities. Organisations have a leading role in preventing abuse, whilst the policies, standards and regulations which governments establish are also highly important. Universal systems and natural supports through to specific requirements in an individual support plan and organisational cultures are all critical. Measures also need to be attuned to the risks faced by specific groups of people including women, children, people with intellectual disability, and those who rely on non-verbal communication.

A sector in transition:

The disability sector is going through a major transformation with the implementation of the NDIS. It is important that any examination of abuse and neglect issues in Victoria and the current safeguarding arrangements gives regard to this. The NDIS fundamentally changes the existing structures in the disability sector and demands new regulatory responses from governments. The NDIS, with its expansion of one-to-one support in people's homes and the community, will pose new challenges in terms of safeguarding people with disability. However, without underestimating these challenges, we should not forget the extent to which large-scale institutions harboured abuse, despite being built with the intention of maximising the security and supervision of residents. Isolation from community life makes people more, not less, vulnerable to abuse. The NDIS with its emphasis on choice and control by people with disability, and its focus on community inclusion, offers the real possibility of stronger inherent safeguards.

Being a national program, the NDIS also offers us the opportunity to move to a national framework for Quality and Safeguards. NDS welcomes this direction, and hopes that a national framework will enable the effective elements of the current systems to be retained and extended, whilst removing the duplication and confusion which currently occurs with each Australian state and territory implementing their own safeguards framework. NDS wants to see unhelpful regulatory burdens minimised, with a risk-based approach to bureaucracy and a collaborative approach to promoting and monitoring quality.

NDIS Quality and Safeguards National Framework:

The NDIS Quality and Safeguards National Framework is currently being developed through COAG. The recent NDS [submission](#)¹ on this Framework to the Department of Social Services outlines the NDS position regarding Quality and Safeguarding, and is attached to form part of this submission.

NDS supports a continuation of the government's role in safeguarding the quality of disability services, rather than reliance on market forces or universal safeguards, due to significant risk of harm in some areas. NDS has identified nine principles which introduce the core features and institutions that NDS believes will provide an effective quality and safeguarding system, as follows:

1. Regulation has a minority role in promoting quality and safeguards
2. Choice is a necessary but not a sufficient driver of quality
3. All disability providers should comply with a code of conduct based on the National Standards for Disability Services
4. Compliance monitoring should be proportionate to risk, assessed in relation to the risk profile of the organisation and the risk profile of the participant
5. Some risk can be managed through individual planning
6. Co-regulation recognises a shared responsibility for standards
7. Restrictive interventions require independent legal authorisation
8. Disability safeguards should enhance – not replicate universal systems
9. Ensure quality and safety throughout the transition to a mature market

Another recent [NDS paper](#)² sets out policy advice for governments on how to improve safety screening for support workers, and canvasses many of the broader issues pertinent to your inquiry. This paper argues for:

- a consistent national legislated requirement on criminal history checking for those working with vulnerable people in the aged care, disability support and child care sectors;
- allowing employers to choose a screening provider, including from non-government options;

¹ <http://www.nds.org.au/publications?s=NAT&c=>

² http://www.nds.org.au/asset/view_document/979324288

- allowing employer discretion, within guidelines, to manage and mitigate on-the-ground risks posed by particular employees or work settings that may be revealed in the criminal history check; and
- development of a statutory and resourced national employee exclusion scheme to prohibit workers who are established, on the balance of probability, to have committed unacceptable breaches of a pre-determined code of conduct (primarily precluding criminal conduct).

The recent [Submission](#)³ to the Victorian Ombudsman's Investigation into Disability Abuse is also available, with its key considerations restated in this submission.

Victoria's Quality and Safeguarding Framework:

Victoria currently has a well-developed disability Quality and Safeguarding Framework. This includes (but is not limited to) the legislative framework of the Disability Act 2006, the Office of the Disability Services Commissioner, Office of Professional Practice, Office of the Public Advocate and community visitor program, reporting of incidents to the Department of Health and Human Services (DHHS), Quality Standards and independent accreditation, and the recently introduced Disability Worker Exclusion Scheme (DWES).

This framework includes some valuable elements that have helped position Victoria as being a national leader in terms of safeguarding. The modern legislative framework of the Disability Act 2006, which emphasises the rights of people with disability and clearly sets out the responsibilities of disability service providers has been a good guide to the sector. The active role of the Office of Disability Services Commissioner (ODSC) in encouraging people with disability to speak up, with the *'It's OK to Complain'* campaign, coupled with the on line complaints recording system, has widespread recognition amongst disability service providers and has helped improve the culture and practice of disability service organisations. The independence of the Commissioner from the DHHS, and its applied focus on disability, unlike other statutory offices around Australia, have been strengths of the system.

The Office of the Public Advocate (OPA) makes a positive contribution to quality and safeguards. The Community Visitors program has shone a strong light on practices within group homes, and has played a positive role in raising issues of abuse and neglect. It is particularly important for people who may not have natural supports within their lives. NDS has a protocol in place with the Community Visitors and we maintain a regular dialogue

³ <http://www.nds.org.au/publications?s=VIC>

about ways to improve the Community Visitors Program. The OPA's Independent Third Person's program which trains volunteers to assist people with a cognitive disability or mental illness during interviews or when giving formal statements to police is another highly valuable initiative. The Public Advocate's [IGUANA](#)⁴ initiative has also made a positive and practical contribution to improving practice.

The Office of Professional Practice also plays a valuable role in safeguarding the rights of people who are subject to restrictive interventions and compulsory treatment, and development of standards and resources relating to such practices. The Office's continued focus on promoting reduction in the use of seclusion and physical restraint as well as in the use of chemical and mechanical restraint, is acknowledged as a highlight of Victoria's current safeguarding regulatory system.

The recent introduction of the [Disability Worker Exclusion Scheme](#) (DWES)⁵ has been welcomed, however as it stands, has serious limitations. DWES only covers workers in supported accommodation and falls well short of a comprehensive approach to safeguarding. To be more effective, DWES should be legislated for and must cover disability services beyond just supported accommodation but also areas such as day services and in home care. It should also ensure comprehensive protection for service providers who provide information to the Department about workers in relation to untested allegations of criminal or negligent behaviour. NDS would like to see establishment of a national barred persons' scheme, with adequate resourcing to ensure it can provide natural justice for potential barred persons. Such a scheme would prevent people who have offended, but who have not been convicted, from moving across providers, sectors or jurisdictions and re-offending.

The long standing implementation of quality standards and accreditation in Victoria has also stood disability providers in good stead, and has been a driver in quality review and improvements. Similarly various initiatives, projects and programs of the DHHS are valuable, for example the [guide on supported decision making](#)⁶ which assists service providers and others to create an environment where people with disability can make decisions to the extent

⁴ Interagency Guideline for Addressing Violence, Neglect and Abuse, Office of the Public Advocate, 2014, see

<http://www.publicadvocate.vic.gov.au/file/file/Publications/IGUANA%20guideline%20FINAL.pdf>

⁵ See <http://www.dhs.vic.gov.au/about-the-department/plans,-programs-and-projects/projects-and-initiatives/disability-services/disability-worker-exclusion-scheme>

⁶ See <http://www.dhs.vic.gov.au/about-the-department/documents-and-resources/policies,-guidelines-and-legislation/supporting-decision-making-guide>

they are able. Like all quality initiatives however, they must be subject to constant review and improvement.

A better focus on prevention: the Zero Tolerance initiative:

In 2013, NDS established the Zero Tolerance project⁷. This developed a comprehensive Framework which provides a platform for the non-government sector to support broader safeguarding approaches for people with disability, and identifies specific strategies for service providers to improve prevention, early intervention and responses to abuse, neglect and violence experienced by people with disability.

Development of the Zero Tolerance Framework reflected input from a broad array of stakeholders, including representatives from service providers, statutory bodies, advocacy organisations, people with disability and academics. NDS also conducted consultation forums across Australia and ran focus groups with people who use disability services (a published report is available). A key insight from these focus groups is that while policies and procedures matter, organisational culture matters more. The Zero Tolerance Framework provides a comprehensive, evidence-based 'curriculum' for providers to prompt improved approaches to tackling the risk of abuse. Building on the Framework, NDS has published advice for service providers on recruitment and screening practices.

The Framework addresses the following categories:

- 1. Understanding Abuse**
 - Promoting and applying human rights
 - Education and training to understand abuse, neglect, exploitation and violence
 - Risk factors and signals of abuse

- 2. Practices and Safeguards which can help prevent abuse**
 - Implementing policy and practice that protect people's rights
 - Empowering people with disability
 - Creating the right organisational cultures

- 3. Addressing Risk for Specific Groups and Service Settings**
 - Targeted approaches for groups at increased risk of abuse
 - Understand and address service features and settings that increase risk
 - Understanding behaviours of concern

⁷ see <http://www.nds.org.au/projects/article/194>

4. Responding to abuse

- Early Intervention and response
- Supporting the person
- Meet organisational requirements

5. Analysis, Learning and Improvement

- Maintaining and analysing records
- Continuous improvement approach
- Supporting initiatives to reduce abuse

Zero Tolerance potentially addresses the gap in Victoria in terms of providing a rights based framework with practical resources to enhance responses to abuse and neglect at the preventative end, in particular improving people and culture practices in disability services. NDS initially funded the Zero Tolerance project from its own resources. We have been delighted to hear that the Victorian government has now agreed to fund further implementation of the Zero Tolerance Framework. This program will include a focus on resource development, training for Board members and senior leaders, as well as training disability support workers to identify and respond to abuse. It will also include updating of the well-received on-line human rights training tool which has been made available in Victoria, NSW, Tasmania and Queensland and is expected to be extended nationwide in 2015.

Human Rights Online Project:

The range of [Human Rights tools and resources](#)⁸ developed by NDS in consultation with our members and people with disability recognise that issues of power and powerlessness can underpin abuse. The resources are designed to assist organisations to build human rights and the empowerment of people with disabilities into the heart of their service provision. Resources include a video for board members, who have a critical role to play in creating a human rights culture within their organisations, an on line Human Rights in Disability Services training program targeting disability support workers, and a complementary Training Guide for Managers.

These human rights resources will be updated, and further promoted as part of the upcoming Zero Tolerance work. This will contribute to changing the culture of community services organisations in Victoria and thus contributing to the prevention of abuse.

What can be improved?

⁸ See <http://www.nds.org.au/projects/article/110>

Whilst NDS recognises that the existing Victorian quality and safeguards framework has positive elements and has contributed to safer quality services, there is room for systemic improvement in Victoria, prior to a new set of national safeguarding arrangements being developed. The current array of initiatives and structures do not form a comprehensive framework for safeguarding, and do not incorporate sufficient emphasis and investment in prevention, and driving best practice responses to allegations of abuse.

The shortcomings of the overall current framework are apparent in media reports of abuse. They are also confirmed in the 2014 report of the Victorian Equal Opportunity and Human Rights Commission into the experiences of people with disabilities reporting crime: [Beyond Doubt](#)⁹. This report found that there is urgent work to do to ensure that people with disabilities have equitable access to justice and safety, and makes recommendations applicable to a range of broad range of government bodies and authorities. NDS supports the implementation of these recommendations.

The existing body of structures and initiatives can be confusing to navigate for people with disability, families, carers and service providers, particularly as measures are both within and independent of the funding department. NDS recommends that the State Government should examine how these processes might be streamlined and communication improved to enable easier access to advice and the ability to make reports. Such consideration should also involve a review and possibly strengthening of the ODSC's capacity and powers.

Governments must also assure that these critical watchdogs, the Office of Public Advocate, the Disability Services Commissioner and a range of advocacy and self-advocacy organisations are adequately resourced to carry out their important work. Service providers must also be better resourced to improve their human resource practices and ensure they have high quality complaint management and investigation systems in place to prevent abuse and improve responses when abuse occurs.

NDS notes that whilst some of the safeguarding initiatives operated by the Department have value, they operate within a confusing web of compliance requirements, some of which are directly relate to safeguarding of people with disability (eg. DWES), whilst others are focused on financial compliance and throughput recording. Increasingly, individual Departmental regions are unilaterally introducing their own reporting and regulatory requirements for service providers in the absence of a clear or coherent policy direction. Other requirements,

⁹ See <http://www.humanrightscommission.vic.gov.au/index.php/our-projects-a-initiatives/experiences-of-people-with-disability-reporting-crime>

such as DHS' current incident reporting system, have long required an overhaul, to integrate into on line risk management systems which will improve the ability to analyse trends and data and improve the efficacy of safeguarding arrangements. It is noted that the Department has recently commenced a review into incident reporting systems.

Consideration of any restructuring of safeguarding bodies and streamlining of processes will need to consider the potential benefits and disadvantages of such moves given the limited but uncertain timeframe prior to the expected implementation of a national Quality and Safeguarding framework. Whilst there is clearly scope for restructuring of bodies and responsibilities to achieve a more streamlined and comprehensive safeguarding system; such change would also cause disruption and possibly further confusion for consumers. It is arguable that the resources required for such restructuring would be better invested in preventative activities and strong advocacy and self advocacy activities for people with disabilities. It is recommended that the Inquiry give careful consideration to balancing the full costs of structural changes with the potential benefits likely to accrue to consumers within the time prior to introduction of a National Framework. Resources may be better targeted to increasing community based prevention initiatives, such as Zero Tolerance and increasing advocacy and self advocacy supports over the next two to three years, and lobbying the Federal government for adoption of key elements of Victorian safeguards within the national Framework, rather than investing in an major overhaul of the existing Victorian safeguarding system.

Conclusion:

In summary, NDS welcomes the Parliamentary Inquiry into abuse in disability services. NDS recognises there are a number of structures and initiatives in Victoria which contribute to the safety and quality of disability services. However these currently can be confusing to navigate, overly bureaucratic at times, and have a limited focus on prevention and improvement of practice. Overall, there must be a much greater focus on prevention and building cultures in disability services that protect and promote the human rights of people with disability. NDS recommends that the Inquiry gives careful consideration to balancing the costs of any restructuring of the current Victorian safeguarding system prior to adoption of a National Quality and Safeguarding Framework with the potential benefits of investment in prevention and advocacy focused initiatives.

The NDS Zero Tolerance initiative provides an evidence based solid framework, which incorporates a strong emphasis on prevention and practice. Initial funding for this initiative and the Human Rights on line training is welcomed. If these can be rolled out across the sector they will make a very real and practical contribution to improving the safety and wellbeing of people with disability.

I would be pleased to brief you or your staff further on this submission.

Yours sincerely,



Sarah Fordyce
Acting State Manager, Victoria
National Disability Services

Attachments:

- *NDS Submission on the NDIS Quality and Safeguarding Framework, April 2015*
- *NDS Improving Safety Screening for Support Workers, August 2014*



NATIONAL DISABILITY INSURANCE SCHEME (NDIS) QUALITY & SAFEGUARDING SYSTEM SUBMISSION

National Disability Services (NDS)
May 2015

Introduction

NDS appreciates the opportunity to comment on proposals for the NDIS quality and safeguarding system. Disability service providers have a strong interest in developing a system that: drives quality; provides risk-based safeguards for participants; minimises red tape; and ensures that regulations do not unfairly advantage some providers over others.

Recent NDS work that informs our submission includes the Zero Tolerance initiative, a policy paper on staff screening and a discussion paper on Quality and Safeguards (2014) which proposed a co-regulation approach.

The proposed framework is structured around three domains: development, prevention and correction. All are important; however, NDS would like to see a stronger focus in the prevention domain on ensuring capable and high-quality services. Investment that fosters positive organisational cultures which value the rights, aspirations and individuality of people with disability is an essential foundation of an effective system.

This submission begins by setting out how NDS thinks the quality and safeguarding system should look. We then answer each of the consultation paper questions.

Summary: The NDIS quality and safeguarding system

The following nine principles introduce the core features and institutions that NDS believes will provide an effective quality and safeguarding system.

1. Regulation has a minority role in promoting quality and safeguards

Evidence gathered for the NDS Zero Tolerance initiative highlights the importance of development and prevention strategies instead of overly relying on regulatory measures. Beyond a certain point, regulation simply generates red tape rather than improved quality or safeguarding. This means the system must invest properly in:

- the knowledge, capacity, social networks and personal resources of participants and their families
- disability provider and workforce knowledge and skills for creating high-quality service cultures with robust complaints and feedback systems
- broader community knowledge and awareness of disability rights to enable inclusion, personal advocacy and bystander interventions.

2. Choice is a necessary but not a sufficient driver of quality

Increased consumer choice will help to assure quality, if there is investment that promotes informed choice and enhances the quality and range of services from which participants can choose. However, choice alone cannot replace standards and monitoring. The point can be illustrated by considering a different consumer-oriented market—restaurants. Consumer choice helps drive quality and diversity among restaurants, but the public rightly expects some standards to be monitored and enforced to protect them from harm. They do not believe that choice should expose them to the

risk of food poisoning. Similarly, as important as choice is in the design of the NDIS, it should not be so broad that it puts participants at risk of harm.

3. All disability providers should comply with a code of conduct based on the National Standards for Disability Services

In December 2013 the Disability Reform Council of Ministers adopted revised National Standards for Disability Services which have a stronger emphasis on human rights, person-centred approaches and choice and control than their predecessors. These Standards must form the practice foundation for all disability support providers including universal application of core safeguards such as appropriate staff vetting and supervision, complaints systems and incident monitoring.

NDS proposes that:

- all organisations that provide disability support to NDIA participants (including participants who self-manage) are required to register with the NDIS and adhere to a provider code of conduct based on the National Standards for Disability Services
- a mandatory national human services system for staff and volunteer screening is established, including a properly resourced and empowered barred worker scheme
- NDIA prices recognise the costs for providers of implementing mandatory safeguards.

Providers of generic services (for example, gardening and house cleaning) should not be required to comply with National Disability Standards unless it is specified in a participant's plan (arising from the participant's risk profile).

Where a participant directly employs their support workers the NDIA should not require them to register as a provider. However, the NDIA should monitor their compliance with minimum standards and legislation such as work health and safety, tax and industrial law.

4. Compliance monitoring should be proportionate to risk, assessed in relation to the risk profile of the organisation and the risk profile of the participant

While all registered disability providers must adhere to minimum standards (through a provider code of conduct), the level of monitoring and compliance burden should depend on risk profiles. This means that compliance monitoring should be less for an organisation that has a long and unblemished record of supporting people with disability, skilled and qualified staff, sound governance and a quality assurance system than for an organisation that has none or only some of these characteristics. Similarly, compliance monitoring should be less for an organisation that supports participants with a low-risk profile than for organisations that support participants who, for example, have intellectual disability, require assistance with personal care and/or have few natural supports.

NDS proposes that:

- all registered providers report regularly with evidence of self-assessed compliance with the provider code of conduct
- independent inspections or audits of compliance are undertaken by an industry regulatory body where specific risks are identified such as: a particular pattern of complaints and incident reports; recent entrance to the market and a lack of a relevant

- service record; a lack of quality systems and a thin market where participants have fewer service provider options
- independent quality evaluation with a focus on outcomes is required (and funded through higher prices) in higher-risk support situations such as:
 - one-to-one support for people who require decision or communication support to exercise choice and control
 - circumstances where restricted interventions may be required
 - service settings such as shared supported accommodation where clients are more isolated from natural support
 - where a service is already subject to professional registration requirements (such as therapy services), or where a provider has third-party quality accreditation, this would reduce or eliminate the need for other auditing or quality evaluation
 - the results of independent quality evaluations or third party accreditation reviews should be publicly available to inform consumer choice
 - to avoid duplication, there should be cross-recognition of quality systems across human services; providers should be able to choose the quality monitoring arrangement that suit them best.

5. Some risk can be managed through individual planning

If restrictions on risk-taking are overly-broad, it can diminish a person's quality of life. This will be addressed by a more individual approach to risk management through individual plans that enable participants to take reasonable risks and make choices on the same basis as the rest of the population.

Building risk management into participants' plans recognises that risk profiles vary markedly according to a person's disability, their preferences, the nature of the support and the circumstances in which the service is provided. It requires skilled planners with access to reliable information, including information from providers and information about the individual's history with support services and their family circumstances. This planning should principally be provided by specialist planners outside of the NDIA.

6. Co-regulation recognises a shared responsibility for standards

NDS proposes a co-regulation approach to oversee quality and safeguards in the NDIS. This should include a national non-government disability industry regulator empowered by legislation to:

- develop and monitor a provider code of conduct which must be complied with as part of the NDIA registration requirements
- operate a system for addressing complaints about breaches of the code that providers are unable to resolve
- monitor and report on serious incidents and the use of restrictive practices
- promote high-quality practice and provide expert practice advice on how to reduce or eliminate the use of restrictive practices.

It makes sense for the industry to hold itself accountable for quality practice similar to many professional practice bodies. However, there must also be checks and balances.

NDS proposes that an independent statutory body is made responsible for ensuring the industry body fulfils its responsibilities and addresses any perceived conflicts of interest. This body must have powers to address escalated complaints and initiate investigations as it sees fit. This could be achieved through expanding the functions, powers and independence of the Aged Care Commissioner or Commonwealth Ombudsman.

7. Restrictive interventions require independent legal authorisation

Sometimes restrictive interventions are necessary to prevent serious harm, but high quality services can reduce or eliminate the need to use these interventions. The fundamental human right to liberty must be protected through ensuring:

- a formal process overseen by civil administrative tribunals is established to monitor and authorise restrictive interventions that breach the right to liberty
- positive behavior plans are in place wherever restrictive interventions are authorised
- expert practice advice is available to inform both the authorisation process and provider practices to help reduce and eliminate the need for restrictive interventions.

NDS's position is based on the view that an independent legal process is the proportionate level of authorisation for a potential breach of the right to liberty, as occurs in the mental health and criminal justice systems and in the disability system in some jurisdictions. All Australian governments have already committed to a national approach to the reduction and elimination of restrictive practices. However, practice still varies considerably. Urgent investment is required to develop the details of a workable national system. Clarity is required on where the responsibility for seeking authorisation sits, recognising that a participant may be using several providers with a restrictive practice in place (such as pharmaceutical restraints).

8. Disability safeguards should enhance – not replicate universal systems

Universal quality and safeguarding institutions, including the Police, Courts, Human Rights Commission, Consumer Affairs, Safe Work Authorities, Public Advocates, Ombudsman and the Fair Work Commission, should be responsive to people with disability. However, the complex array of disability-specific and universal systems across different jurisdictions sometimes overlaps and obscures the roles and responsibilities of various core institutions. Currently many stakeholders report that they do not know where to go if they have disability concerns.

The NDIS provides an opportunity to create an easier-to-navigate and nationally-consistent system. This should be a system where disability-specific institutions do not duplicate the functions of universal regulators, but do interact with them within a clear hierarchy of functions, where issues can be escalated as appropriate.

It is also important that competent independent advocacy is available to assist complainants to access both universal and disability specific systems and to raise disability awareness and enhance the effectiveness of universal systems.

9. Ensure quality and safety throughout the transition to a mature market

The risks during the transition phase will be different from the ongoing risks in a mature market. The steep growth rate creates a risk of undersupply of both providers and workers which in turn, risks deterioration in quality. There is also a risk of safeguarding system gaps occurring as responsibilities for disability services transfer from governments to new and emerging systems. To mitigate these risks, all governments must take extra care to ensure the quality and safety of services in their jurisdiction throughout the transition. This should include early investment to promote worker knowledge of the rights and values that underpin the NDIS, as well as ensuring providers have the knowledge and tools to create organisational cultures that support customer feedback and continuous quality improvement.

NDS also notes the importance of effective engagement with the sector to ensure timely identification of any unanticipated issues and ongoing co-design.

Response to questions in the consultation paper

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

Participants and their supporters should be able to recognise and choose the quality of support they want and be in a position to reject providers that do not meet their needs, or treat them with respect. This can be achieved in part through ensuring effective information, linkages and capacity building (ILC) services.

Market information products and individualised funding will enhance choice and quality but will not be sufficient on their own. Investment in the following ILC products is required to protect and promote informed participant choice:

- information and advice including from specialist disability associations and information networks
- information about independent advocacy services
- research, evaluation and dissemination of reliable educational products about what works, for whom, under what circumstances and at what cost
- contract-based quality control for block funded ILC services
- education on human rights, quality and legal capacity –the Victorian Disability Commissioner’s ‘it’s OK to complain’ campaign is a good example.

It is important to recognise that ILC products are not just about information for participants. Broader community disability rights awareness across all stakeholders will enable both stronger personal advocacy and also bystander interventions. Anyone who experiences or witnesses a breach of rights (including abuse or neglect) should recognise it, and know how to respond.

The development domain and information systems are also canvassed in the consultation on the ILC framework. Therefore, the attached [NDS submission to the ILC consultation](#) is relevant to this discussion.

How can the information system be designed to ensure accessibility?

To ensure the most effective NDIS information system, the NDIA should:

- ensure multiple formats and platforms of delivery are available (e.g., pictorial, Easy English, read to speak, multilingual, mixed media, apps, face to face, access for Auslan users and video conferencing)
- identify key community partners to facilitate access and circulate information such as specialised disability associations and local government
- draw on existing ILC services that have a community focus and are locally responsive as these services inherently build local, informal and accessible networks.

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?

There is great potential for social media and other internet formats to spread market information. However, to protect consumers and ensure productive use of consumer rating forums the NDIA should fund a moderation system provided by a third party. Otherwise subjective and anonymous opinions or reviews could provide misleading, unhelpful or damaging information. This is particularly important in the early stages of market development.

An effective way to ensure consumer rating forums offer useful information is to ensure they include random sample surveys of client views, not just volunteer contributions.

Are there additional ways of building natural safeguards that the NDIS should consider? And what can be done to support people with a limited number of family and friends?

To help build social connections, natural safeguards and decision support for participants the NDIA should invest in:

- peer support groups for people with disability as well as mentoring and volunteer coordination services
- support for enhanced planning and supported decision making when natural support is not enough, made available outside of NDIA staff
- community inclusion support in plans that is designed to help build networks.

Where a lack of natural support networks is identified, participants should be put in touch with independent advocacy services through local area coordination services or through their planners.

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

The rapid implementation of a new disability support system that makes many existing quality and safeguarding features redundant raises the risk of eroding standards. However, NDS is confident that with strategic investments, governments can raise the bar on quality standards. The following features should be available in advance of the transition to the NDIS to promote high-quality support that is sensitive to different levels of risk and able to enhance the positive influence of participant choice on the market.

- 1. Investment in provider and workforce capacity:** Sector development initiatives led by industry and research organisations should be funded by the NDIA. In particular, they should promote worker knowledge of the rights and values that underpin the NDIS as well as organisational cultures that support customer feedback and continuous quality improvement. It's also important that organisations have the know-how and tools to create internal quality systems where:
 - the voices of participants and their families are heard and respected
 - organisations record and respond to complaints and incidents in a timely way and implement strategies to reduce negative incidents
 - providers collect information on customer satisfaction
 - standardised tools for measuring outcomes for providers would be valuable
 - providers engage and listen to participants about their quality preferences, perception of outcomes, and as witnesses in any allegations or incidents.
- 2. Provider quality systems should be reinforced by clear standards:** The sector development initiatives should be aligned to the achievement of quality standards.
- 3. Fair and risk-based quality compliance systems:** To help providers to deliver high-quality support, there needs to be market regulation that protects minimum standards. This requires consistent and fair application of compliance with quality standards, including for self-managed plans to ensure that market competition is not at the expense of essential safeguards (such as appropriate staff screening). The NDS proposals for provider registration support this feature.

We will know we have achieved the desired fair and contestable support market state when there is a strong connection between price and quality.

- 4. Participant plans must respond to individual risks, including with appropriate prices:** NDIA prices and related individual package sizes should recognise the intensity of support needed to ensure sustainable provision, consistent with quality standards.

The skill, knowledge and access to information of planners will be crucial to the effectiveness of individually tailored safeguards. Planners will need to consider individual characteristics or circumstances as well as support needs to determine any need for extra safeguards to complement generic provider registration requirements.

Safeguards may be supported in plans with differentiated prices that reflect specific worker qualification or professional registration requirements. Where there is no relevant professional safeguard, despite complex skill and supervision needs, differentiated prices are still required to enable provider organisations to ensure appropriate staff skills, such as for:

- positive behaviour support and complex community inclusion support
- invasive personal care interventions (such as bowel and bladder care, prevention of aspiration, tracheotomy care, PEG feeding and administering medication).

Should there be an independent oversight body for the NDIS?

Yes, there is a need for an independent oversight body for the NDIS.

NDS advocates for a co-regulation model for achieving oversight objectives, which acknowledges and empowers the role of all stakeholders.

What functions and powers should an oversight body (bodies) have?

The NDS co-regulation proposal involves establishing a combination of oversight infrastructure, functions and powers to replace existing disability specific regulators:

1. **A national non-government disability industry regulatory body** empowered by legislation to fulfil the following responsibilities:
 - To develop, promote and monitor a provider code of conduct (consistent with the National Disability Standards) required for NDIA registration.
 - To sanction providers, including by recommending de-registration to the NDIA, where they do not comply with the code of conduct.
 - To receive, help to resolve and investigate complaints that providers are not compliant with the code, where necessary.
 - To monitor serious incident reporting and the use of restrictive practices.
 - To evaluate and approve other quality management or accreditation systems that will demonstrate compliance with the code of conduct and independent quality evaluation requirements of the NDIA.
 - To collect, analyse and disseminate data and evidence about good practice. This would further develop the evidence base for recognising and responding to allegations or incidents of malpractice in different risk environments.
 - To establish self-governance structures that address perceived conflicts of interest and independence from the providers it investigates. This could be similar to the independence achieved by professional registration bodies.
2. **An independent statutory oversight body** with the following responsibilities:
 - To ensure the industry regulatory body fulfils its responsibilities and properly addresses actual or perceived conflicts of interest.
 - To investigate as they see fit any complaints about providers which have been escalated from the industry regulatory body.
 - To undertake investigations as they fit in response to serious incidents, complaints or observed patterns.
 - To promote the awareness of universal regulators about disability issues.

This body could be established through legislation that extends the independence, functions and powers of an existing oversight body. For example, the Office of the Aged Care Commissioner could become the Office of the Aged Care and Disability Commissioner with legislation that also increases its independence as a statutory body. Alternatively the Office of the Commonwealth Ombudsman could have extended powers to enable it to oversee the industry body and investigate providers that offer services funded by the NDIA, in addition to its existing responsibilities with the NDIA.

3. **A legal process for authorising restrictive interventions** should be overseen by the civil and administrative tribunals, with advice from expert panels. This should be complemented by monitoring by the industry body and the provision of practise advice on reducing and ending the use of restrictive practices.
4. **A mandatory national staff screening system** that covers non-registered workers across human services including disability services, aged-care and those working with children. This would be empowered by legislation that:
 - requires employers to seek employee history information through a continuously up-to date national criminal history check (similar to some working with children checks where the police notify employers if there are developments related to an employee) and referee checks
 - identifies certain prescribed offences (as identified in aged care regulation at the moment) that prohibit a person from working with vulnerable people
 - establishes a properly resourced **national barred persons scheme to:**
 - prohibit workers who have seriously breached standards (these should contain similar features to the Australian Health Minister's Advisory Council proposals for a code of conduct for non-registered health care workers)
 - formally investigate and make findings about when a breach has occurred on the balance of probabilities (i.e. when a court conviction doesn't apply)
 - provide sufficient natural justice processes for potential barred persons, including recourse to appeal a decision
 - require that providers, the industry regulatory body, the police and courts refer alleged offenders to the scheme as appropriate.

NDS proposals for a national staff screening system are also described in the attached [NDS staff screening policy paper](#) issued in October 2014.

5. **Market stewardship** will be carried out by the NDIA in cooperation with the proposed national industry regulatory body. This function should include drawing on the powers of universal market regulators such as Consumer Affairs, the Fair Work Commission and the Australian Competition Commission, to guard against abuse of market power or anti-competitive practices. To fulfil this function it will be important to collect and monitor data trends on the following variables:
 - consumer demand and preferences
 - structure and composition of the market
 - workforce sustainability
 - quality practice
 - outcomes and impact.

Considering the options for provider registration, which option would provide the best assurance?

It's important to strike a balance between enabling a reasonable level of risk for participants and due diligence in accordance with the use of public money and

community expectations. NDS supports a nuanced version of Option 3 in the consultation paper which requires compliance with a provider code of conduct for all registered providers and external quality evaluation for some higher risk support types. NDS believes that a provider should be able to choose to have third party accreditation, and if they did so, would meet the external quality evaluation requirement.

However, there are concerns that if the extra cost of accreditation is not paid by all providers, then 'cowboy operators' will have an unfair competitive advantage which may put participants at risk. To address this risk, amongst others, NDS seeks to strengthen compliance monitoring of the code of conduct (as outlined below). We also recommend that providers that have third party accreditation are not subject to the same level of industry body scrutiny or independent quality evaluation as new entrants to the market, and that current duplication in accreditation requirements across sectors is reduced. The advantage for current providers will be increased flexibility to use the quality systems that suit them best and to focus on outcomes rather than process-focused audits.

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

Minimum quality standards (such as adherence to health and safety legislation) are equally relevant to all disability service organisations whether or not the participant is managing their own plan. If they are not essential standards for providers of self-managed packages then they should not be mandatory for any providers.

Therefore, **all disability support providers should be required to sign on for minimum quality standards** which are communicated in the provider code of conduct, covering human rights, staff screening and supervision, complaints systems, and incident monitoring.

NDS recognises that some providers funded through the NDIS will not be disability support providers, such as cleaners, gardeners, taxi drivers and some technology suppliers. It may not be necessary to register these providers which offer services in a much broader market. However, if there are significant risks identified with these services for some individuals, then other safeguards can be put in place in the individual's plan. For example, some individuals may require supervision and monitoring for their in-home cleaning staff to ensure they do not take advantage of the participant's specific vulnerability.

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

One of the most difficult areas to resolve in this framework is an appropriate level of external quality control. NDS recognises the benefits of external quality systems. Moreover, it is very important that providers that have invested in third party accreditation are not disadvantaged in the new system.

On the other hand, NDS also recognises that in some circumstances tightly prescribed quality accreditation regimes can restrict consumer choice. The success of the NDIS

market and the ability for consumer choices to drive quality requires that providers can enter the market, or innovate, with relative ease.

NDS recommends the following compliance measures to complement a vibrant NDIS market, minimise red-tape and assure non-negotiable quality standards. These proposals are designed to ensure providers that have invested in quality accreditation do not need to duplicate their efforts:

- All disability providers (including those operating with self-managing participants) should be required to sign up to, and be compliant with a provider code of conduct managed by the industry regulatory body.
- Monitoring of the code of conduct should include regular reporting on self-assessment (with relevant documentary evidence) by all providers. There should also be risk-based audits carried out at times determined by the industry body, such as in response to particular patterns of complaints or incidents, or for new entrants with a lack of a relevant service record or quality system or where there is a thin market. If a provider has third party quality accreditation this can suffice in terms of compliance reporting for the code of conduct.
- Providers should be required to report 'serious' incidents and complaints to the industry body, which will provide incident and complaints data to the NDIA and independent oversight body ('serious' includes deaths and criminal assaults).
- Providers can be required to improve their practice and systems or be 'de-registered' if found to be non-compliant with the code of conduct.
- Additional external quality evaluation will be required where there are more significant risks of malpractice, abuse or neglect, this includes:
 - invasive and/or complex one-to-one support for people who require decision and/ or communication support to exercise choice and control
 - circumstances where restricted interventions may be required
 - service settings such as shared supported accommodation (i.e. group homes) where clients may be more isolated from natural support.
- Independent quality evaluation for higher risk supports, the results of which are made publically available, should be funded in NDIA prices. Providers should be able to choose the independent quality evaluators they wish to use (within guidelines) and if they have third party quality accreditation (including from other human service systems) this will likely suffice.
- The quality evaluation system should operate risk-based checks which mean higher ratings will result in lower auditing and review burdens.

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

Internal complaints processes will be a requirement of the code of conduct and ideally complaints will be resolved at the provider level. However, it is also important to have an external complaints system. This provides an additional incentive to providers to resolve

complaints and it offers a quality safeguard that empowers consumers and does not create red-tape.

The NDS proposals for co-regulation provide an external complaints system through an industry body that receives complaints about registered providers. If these are not satisfactorily resolved, complainants or the party complained about can also appeal to a statutory oversight body which may choose to investigate either the industry body handling of the complaint or the complaint itself.

NDS also suggests it would be useful to continue to operate the national abuse and neglect 'hot-line' and refer on as appropriate. This has proven to provide a useful entry point for some complainants and advocates.

There is also a need for well-functioning independent advocacy services to help resolve complaints. These services should be funded from a source other than the NDIS and should be available to assist people with disability make complaints about all disability services (regardless of whether or not they are funded by the NDIS).

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?

NDS recommends that the industry body should focus on disability support funded by the NDIA, while the statutory oversight body should have a broader scope for raising disability awareness in complaints systems across all funded disability services. This may include those in the education, transport, local government and justice sectors.

What powers should a complaints body have?

The powers of the proposed industry and oversight bodies are described above.

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

Community visitors have played an important role in the past, especially for people who have been isolated from natural support. However, it is unclear how these schemes will complement the NDIS system which provides safeguards for more isolated participants through individualised planning processes, plan nominees where required and a broad ILC service framework.

NDS envisages that over the longer-term community visitor schemes could be evolved or phased out as strong peer support and independent advocacy services are in place and as the broader quality and safeguarding infrastructure takes form.

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

Employers must have this responsibility. This is because employers have the duty of care, the detailed information about the client, employee, circumstances and also the

necessary levers to appropriately manage identified risks. However, employers should be provided with the following guidance and limits to their discretion:

- employers must be required to seek employee history information through a continuously up-to date national criminal history check and referee checks
- if a check identifies certain prescribed offences (as identified in aged care regulation at the moment) they should be prohibited from employing the person to work with vulnerable people
- they should check with and refer to the proposed 'barred person scheme'
- they should uphold Standard 6 of the National Standards, which expects staff to be inducted, suitably qualified, skilled and supported. This includes knowledge of the principles underpinning the NDIS as well as compliance with industrial and work health and safety legislation, such as ensuring training for manual handling.

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

See the attached [Zero Tolerance best practice staff screening sheet](#).

Of the staff safety screening options described, which option, or combination of options, do you prefer?

A low threshold for entry to the disability support workforce will enable workforce growth to respond to increasing demand. However, there are risks that must be addressed. NDS recommends a combination of Options 2 and 4 suggested in the consultation paper, with the following additional elements:

- A national human service standard for criminal history checking for workers and volunteers working in disability services, aged care and with children. This should be continuously kept up to date, as occurs in some working with children checks. It is desirable to have a consistent screening approach across jurisdictions and adjacent sectors because the information that is gained from criminal history checks is equally informative about risks to vulnerable persons in all these sectors. Furthermore, providers and workers tend to work across sectors and state or territory boundaries.
- Contestability in terms of what organisations can provide the screening check. This will help ensure efficiency and prevent the delays and costs often associated with the compulsory use of centralised government schemes.
- Portability of checks so a worker can take an up-to-date check to various employers.

NDS does not support a system where a card is provided which determines whether a person can be employed or not. This does not give the employer sufficient information to manage any risks that may be indicated in a criminal history check.

As noted above, there is also a need to establish a national barred persons scheme. This is the only just and efficient way to prevent people who have offended, but who have not been convicted, from moving across providers, sectors or jurisdictions and re-offending. This is an essential safeguard that is missing in the current system. It needs to be properly resourced to ensure it can provide natural justice for potential barred persons.

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?

All organisations providing disability support services funded through the NDIA should have to register with them and sign up to the code of conduct, including those only working with self-managed participants.

If a self-managing participant wishes to directly employ an individual then they should not be required to register as 'a provider' but rather be monitored by the NDIA to ensure they comply with some minimum conditions and the law, including:

- checking criminal history, referees and the barred persons list for their workers
- minimum legal standards including:
 - work health and safety legislation such as the requirements for adequate employee screening and induction to ensuring the worker has necessary knowledge and skill and proper provision of work safety insurance
 - tax and industrial rules to prevent sham contracting.

There must be a clearly understood duty of care at the point of plan development when assessing self-management possibilities which will require access to reliable information about the participant's history, capacity and family circumstances. NDIS cannot extinguish this duty of care.

NDS does support a streamlined facility for a provider to register with the NDIA to provide support to just one participant where this might be appropriate, on an exceptions basis.

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

Education and training is required for self-managing participants on how to effectively direct support staff as well as worker rights and their legal requirements. This could be provided through a mentoring program where people with experience of managing plans and/or managing staff, are available to mentor self-managing participants.

Who should decide when restrictive practices can be used?

There needs to be a legal and external authorisation and review processes for restrictive practices. NDS recommends this process is overseen by civil administrative tribunals. There must also be clarity on where the responsibility for seeking authorisation sits, recognising that a participant may be using several providers with a restrictive practice in place (such as sedation).

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?

Investment in expert advice and service development is necessary to reduce the use of restrictive practices. The NDS recommends that the industry regulatory body should

provide expert practice advisors who are tasked with both advising on, and monitoring the reduction and elimination of restrictive practices. The proposed expert practice advisers should be responsible for:

- advising the authorisation and review process overseen by administrative tribunals
- provider education on strategies that reduce restrictive practices
- monitoring implementation of positive behaviour plans and evaluating quality
- collecting, analysing and disseminating data.

Are there safeguards that we should consider that have not been proposed in these options (regarding restrictive interventions)?

As some individuals who would be eligible for disability support will not approach the NDIS, the NDIA needs to consider how they will reach these individuals or their families through an outreach function. A proportion of these individuals or families will have very complex needs (including challenging behaviour) that may require support or intervention from a range of service systems. These supports need to be coordinated, possibly through quite intensive case management. Clear and effective protocols need to be in place between the NDIA and various government departments to ensure the service system best placed to coordinate or manage the supports for these individuals and/or families is identified and the appropriate responses are put in place.

What kinds of support are providers receiving now from state and territory departments that you think would be helpful under the NDIS?

Providers disagree about the value of senior practitioners in some states at present. The criticism that the advice of some senior practitioners is impractical, suggests that the role might be better performed through an industry body where concern about rights could be combined with access to practical expertise.

Expert advisors could also be made available to wider sectors that provide services to people with disability who have challenging behaviours (e.g. education and justice) and also to some families.

Would you support mandatory reporting on the use of restrictive practices?

Developing and implementing a positive behaviour plan is essential wherever restrictive practices are used. NDS supports the mandatory reporting and monitoring of these plans whenever they contain restrictive practices – but not of every incident.

There needs to be a responsive online system with a streamlined process for reporting. Useful data should be disseminated and connected to benchmark reports and quality certification. It would be used by providers and the industry body to improve practice. While it may add to compliance costs in some jurisdictions, this monitoring has been shown to help prevent breaches of rights, reduce the use of restrictive practices and improve outcomes.

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National Disability Services is the peak industry body for non-government disability services. Its purpose is to promote and advance services for people with disability. Its Australia-wide membership includes over 1030 non-government organisations, which support people with all forms of disability. Its members collectively provide the full range of disability services—from accommodation support, respite and therapy to community access and employment. NDS provides information and networking opportunities to its members and policy advice to State, Territory and Federal governments.



National Disability Services





Improving safety screening for support workers

Introduction

It is the right time to achieve nationally consistent workforce screening

Governments are currently developing the quality and safeguarding framework for the National Disability Insurance Scheme (NDIS), with a consultation draft expected late in 2014. NDS strongly supports mandatory criminal history checks and effective screening-out of malpractice by support staff in disability services being part of this policy. This type of safety screening is one important tool in a broader framework of safeguards to reduce the risk of abuse, neglect, theft or any other harm to people with disability.

Some governments across Australia are already reviewing the way they screen community sector workers. Currently, there are inadequacies in screening processes as well as inconsistencies across states and territories and between service sectors with very similar needs. At best this wastes resources and goodwill in sectors that have few spare resources and at worst it contributes to avoidable abuse and neglect of vulnerable people.

Ad hoc development of workforce screening policy is a problem

Given the NDIS will roll out across Australia over the next five years, it makes sense for any interim state developments in workforce screening to be consistent. However, NDS has observed that worker screening reform is not evolving in a coherent way. This could be wasteful and disruptive to the sector, especially if newly imposed bureaucratic schemes become redundant shortly after introduction.

NDS acknowledges the significant challenge for all Australian governments to agree on a nationally consistent approach to workforce screening. However, we urge leadership in this task, and an immediate stop to ad hoc and reactive policy development. The time is right, with the NDIS safeguards in development and the focus on related matters in the child care and aged care sectors. It is clear that clients, workers, employers and governments would all benefit from a more coherent and efficient system for screening across all jurisdictions and sectors. Rather than ad hoc responses to crisis, we need a well thought-out system that addresses all the relevant policy drivers. This paper's proposals have this in mind.

Key policy drivers

Policy on screening of workers in the disability sector must address the following issues:

- **Recruitment to meet rapid growth in workforce demand:** On the one hand, anticipated rapid growth will increase the risk of inappropriate employees entering or moving around the sector. On the other hand, it is important that screening processes do not create unreasonable barriers to entry through high costs and/or lengthy delays as this could contribute to serious staff shortages.
- **National consistency:** Despite the inherently similar needs across states and territories, there are many differences in screening requirements for the disability sector nationwide (see Appendix A).
- **Consistency across related community sectors:** All community support sectors need to prevent potential offenders gaining access to vulnerable people. A common screening process makes sense across the disability, child care and aged care sectors, as many employees and employers work across more than one sector, and workers move between sectors.
- **Balancing risk and rights:** NDIS participants will have the right to choose their supports and who provides them. Workers also have rights to privacy and natural justice – for example, to have workplace allegations properly investigated. However, both participant and employee rights are moderated by reasonableness, employment law and the responsibility of government and employers to reduce risks of abuse or neglect. Getting the balance right can be assisted by a risk-based approach to safeguards that ensure the level of checking is proportionate to the risks of the work performed. Also, the use of independent systems helps reduce conflicts of interest and breaches of natural justice.
- **Balancing risk and costs:** Bureaucratically imposed screening costs, however essential, must be managed efficiently to keep the sector sustainable. This calls for coherent systems that reduce duplicated effort and also choice in screening providers that enable market forces to drive value for money.

These issues can be resolved. This paper discusses several commonsense policy design solutions. The key challenge is achieving a common commitment and cooperation across governments to agree and implement solutions.

Recent developments and issues in the current systems

Recent employment screening developments in South Australia, Victoria, ACT and Queensland have increased the costs and logistical burdens for disability support providers and may not usefully improve safety or achieve consistency with other jurisdictions. This is at a time when consistency should be increasing and safeguards made more efficient and effective, in line with the rollout of the NDIS and rapid growth in services (and related workforces) in disability and aged care nationwide.

The increased costs and burdens, such as long delays, or risks of legal action against employers by employees, arise from the following impediments:

- Unnecessary duplication across sectors and jurisdictions.
- Inadequate discretion for employers over managing risks identified for an employee or employment situation.
- Lack of choice in which screening agency can be used to conduct the checks.
- Screening investigation requirements that go beyond criminal history checks and which may not address the principles of natural justice for workers and where employers could be subject to adverse action claims.

Duplication in requirements across community support sectors and jurisdictions

The aged care sector is regulated nationally by the Accountability Principles 1998 (pursuant to the Aged Care Act 1997). This requires providers to obtain a national police certificate, every three years, for staff or volunteers, and to refuse employment to anyone convicted of murder or sexual assault, or convicted and imprisoned for assault for more than two years.

The disability sector does not have national regulation; states and territories have a mix of contractual and legislative mechanisms providing a wide variety of screening requirements for the workforce (see Appendix A). This variation impacts on what employees or volunteers are covered, the level of detail required, costs, timeliness and the specific processes required. In South Australia and Queensland, an employee working in disability and aged care support is required to undergo two checks – doubling the cost. One employer reports having to get four separate checks for one employee, all of which draw on the same information, so that the employee can work across state borders and for various client groups.

The child care and protection sector has different guiding legislation for mandatory background checks in each state or territory, it prescribes varying procedures and requirements and lacks a national framework. In most cases, a working with children check (WWCC) is required, which is more than a 'point in time' criminal history check as it involves ongoing monitoring for a period (such as three years). If an offence is committed during the period covered by the certificate, the administering authority will inform the relevant employers.

Reviews of the child care and protection system, including the current Productivity Commission review, call for a national, or nationally consistent, approach to screening as outlined in the COAG National Framework for Protecting Australia's Children 2009-2020ⁱ. The Royal Commission into Institutional Responses to Child Sexual Abuse has also been consulting on this matter. It has said that non-government organisations and institutions support a national approach, but that governments have reservations. The Commission will be 'carefully considering whether a national screening agency would offer any advantages'ⁱⁱ.

An inconsistent approach to screening across jurisdictions or sectors is counterintuitive, given that support workers move around, and given the similarity of the risks that can be addressed through cross-sector screening. The advantages of consistency are evident –

it would reduce waste and duplicated effort, and increase confidence in and clarity about the checks.

In the interests of consistency, the offending threshold prescribed in the aged care sector could apply as a minimum across all sectors. Similarly, the ongoing monitoring of a national WWCC would benefit all sectors. Beyond that, there is a need for employer discretion to consider and manage risks revealed through criminal history screening in different work settings and under different regulatory requirements.

Level of discretion for employers to manage risk

Four jurisdictions allow employers to make a judgment about the suitability of employees based on the criminal history information – sometimes within guidelines about prescribed exclusions (as seen in the NSW Disability Inclusion Act 2014). However, this discretion is significantly reduced in some jurisdictions, including:

- In South Australia, all individuals working or volunteering in the disability sector are required to undergo screening through the government screening unit. This was introduced in July 2013 and amended from July 2014 to include a determination about whether a candidate can be considered for employment prior to employer discretion. The assessment has been extended to cover not only a national criminal history check but also information on criminal charges regardless of the outcome (using information from the Courts Administration Authority), workplace records, professional misconduct and disciplinary action against an applicant, and allegations of abuse (using incident reporting records). Employers are not given the record, or reasons for a positive or a negative decision, so cannot make their own judgments on a record.
- ACT introduced a 'working with vulnerable persons registration', to apply to disability from November 2014. This is similar to South Australia in that the screening unit will make the assessment of suitability for employment on behalf of employers.
- Queensland has a 'yellow card' process (blue card for working with children), where the state undertakes the screening process for criminal history and determines whether a candidate is approved.
- Victoria requires providers to seek departmental approval to hire candidates whose check reveals a criminal record. Department contract managers process the approval, which can be lengthy. Victoria has also recently introduced an impractical requirement for international criminal checks on everyone who has worked overseas in the previous 10 years (including existing staff). Other jurisdictions allow statutory declarations and/or referee checks where a police check is difficult or unreliable.

The assessment of suitable workers needs to consider specific circumstances alongside the screening results. Unlike employers, or participants and their families, a centralised system cannot consider detailed matters such as the nature of the work, the level of supervision, the level of client vulnerability, mitigating action and more. It also creates unnecessary delays in recruitment. However, it could be appropriate and relatively simple to provide guidance and to prescribe some levels of offending that must be excluded.

Employers are also best placed to make decisions on how to assess and manage checks for employees who have worked overseas. There is no such thing as an ‘international police check’, and a careful commonsense approach needs to be applied.

Prescribed screening agencies increase cost and timing pressures

Five jurisdictions allow employers to choose from various mechanisms to obtain police checks. Costs vary from about \$42 to \$85, depending on whether they check with the police directly or use a non-government broker agency, which obtains national checks and other screening with a fast turnaround. It can take between 48 hours to a week to complete these checks. When there is no prescribed process, providers can make a call on how urgently they need the check and can use the same check for aged care or disability services.

However, the following states mandate a state government-based process with higher costs and longer timeframes:

- The South Australian screening unit assessment (which is wider than criminal history) costs about \$100 for disability paid staff and \$55 for volunteers, and requires providers to pay for both aged care and disability checks for the same employee. It can take up to four weeks if nothing is flagged, and much longer if any type of information is flagged.
- The ACT check costs \$71 with no fee for volunteers. Registration does not cover aged care. However, as the requirements are at least equivalent, it seems likely that a registration for working with vulnerable persons would suffice for the aged care sector (this is yet to be tested and will depend on information-sharing provisions). Timing is also yet to be tested but it is anticipated it will be four weeks.
- The Queensland yellow card is currently \$80.40. An aged care check can also be required (\$55), because the government check is not an open report where employers can see what offences are recorded on the certificate. It can take between four and six weeks.
- While Victoria does not prescribe a process for obtaining the check, it does impose a requirement if there is a disclosable criminal record. Anecdotally, it has taken up to nine weeks to obtain approval for a volunteer with a minor criminal record.

Mandating the use of a government screening process rather than non-government options may be inconsistent with the competitive neutrality principles: “The objective of competitive neutrality is the elimination of resource allocation distortions arising out of the public ownership of entities engaged in significant business activities (Competition Principles Agreement 1995 as amended 2007)” “Competitive neutrality policies aim to promote efficient competition between public and private businesses” (Productivity Commission)(see Appendix B).

There are exceptions to the competitive neutrality policy where benefits outweigh costs. However, in at least some of the cases above, the government process results in higher costs, imposes duplication and creates lengthy delays which will affect workforce

recruitment. This would be mitigated if providers were allowed to draw on non-government screening options (albeit within regulatory guidelines).

Furthermore, where the prescribed process includes additional screening of unconvicted incidents (for example, allegations of abuse that cannot be substantiated in a court), potential infringements of natural justice rights for employees and legal risks for employers need to be considered. This is especially the case when the screening draws on workplace incident reports from employers. Alternative approaches to tackling the very real and important issue of unconvicted malpractice need to be considered in light of broader developments around safeguarding. These are discussed below.

Screening out workers with a record of unconvicted malpractice

Disability organisations are committed to reducing the risk of abuse, neglect, theft or any other harm perpetuated by staff against people with disability. NDS advocates a zero tolerance approach and has developed a framework for achieving this in our sector. Many contributors to a sectorwide consultation on this framework reported concerns about criminal conduct by employees going unreported, and/or unconvicted people and convicted offenders moving between services and jurisdictions to avoid detection. Providers report that when they terminate an employee based on malpractice, often there is a settlement and related deed under Fair Work that prevents them disclosing the details to other employers.

This is one of the issues that South Australia and ACT are seeking to address with their new screening schemes. Victoria has also recently introduced an employee exclusion scheme which places extensive reporting and investigation requirements on employersⁱⁱⁱ. In addition to the logistical burden and costs, these new schemes raise questions about natural justice for workers and could perhaps have perverse outcomes of pushing some investigations and allegations underground. Our research indicates there are already perceived disincentives for reporting issues of malpractice. There is also a risk that employers could be sued for damaging a worker's livelihood with unsubstantiated incident reports.

It is important that poor practice is addressed by employers. Mostly poor practice issues are not of a level that needs to be escalated to state reporting. Rather, the full suite of good employment, performance management, early intervention and prevention techniques outlined in the NDS framework for zero tolerance need to be applied. This includes having an organisation code of conduct, encouraging bystander intervention, creating a positive complaints culture, training and supervision. Screening is only one part of an effective and safe recruitment process – there is considerably more that an employer can and should do, as outlined in the NDS 'Zero Tolerance practice advice 1: safer recruitment and screening'^{iv}.

However, with more serious offending the only way to properly address the issues of unconvicted malpractice, while respecting worker rights, is to establish a properly resourced independent body with investigation powers. NDS believes an investigation body with powers to prohibit some workers (similar to the powers of professional

registration bodies) should be a core component of a broader safeguarding framework. There are two options for achieving this:

1. a mandated registration scheme, allowing employees to be struck off; or
2. a legislated exclusion scheme that places prohibition orders on employees.

Either option will require legislated investigative powers; should be national and cover the disability and aged care sectors (reflecting employee mobility); should be independent; should have an avenue for appeal; and should not create unreasonable burdens or risks for employers. The benefits of option 2 include that it does not set up a bureaucratic barrier to enter the workforce, and it can cover all employees in the sector who might behave criminally. Either option could operate with a code of conduct, as recommended for the non-regulated health sector^v, which would clarify expectations for the workforce.

NDS envisages that the complaints, investigations and prohibition orders would be reserved for criminal conduct with insufficient evidence or severity for a court, although often it may be appropriate to also involve the police. Unlike a court, proof should rest on the balance of probabilities, and the process should make it easier for witnesses with cognitive or communication impairments to give evidence. There may also be scope for prohibition orders based on serious code breaches such as sexual relationships with clients.

Conclusion: Maximise the opportunity to establish nationally consistent workforce screening

NDS urges all governments to work together to create a more effective and efficient national screening system to meet the growing needs of the disability and aged care sectors. The alternative is duplicated screening costs, additional burdens on local providers, lengthy delays in recruitment and the continued risk of unconvicted abusers moving across state and territory boundaries and across sectors.

The current policy design discussions around the NDIS offer an opportunity to take this policy development process forward at a national level. It should also coordinate with any related work in the aged care sector or work responding to the findings of the Royal Commission on Institutional Responses to Child Abuse. This paper presents arguments that support the following elements being included in the policy design:

- Introduce a consistent national legislated requirement on criminal history checking for those working with vulnerable people in the aged care, disability support and child care sectors. This should include threshold offences similar to the aged care accountability principles as a minimum and require ongoing monitoring similar to the WWCC. Sector specific guidelines would also be required to aid suitability decisions.
- Allow employers to choose a screening provider, including from non-government options. Any workforce vetting system can cause unacceptable lag times between receiving an employment offer and being cleared to commence work, which with higher costs can hamper employee recruitment. Unacceptable delays have already been experienced in jurisdictions with a government-prescribed and controlled

screening process. This impact must be considered in the design of appropriate safeguards.

- Allow employer discretion, within guidelines, to manage and mitigate on-the-ground risks posed by particular employees or work settings that may be revealed in the criminal history check. An overly cautious centralised approach could stop some good potential employees entering the sector, even when they present a risk that is manageable and acceptable. Alternatively, some issues in a person's criminal record may pose a significant concern for some disability support roles but not be screened out by a centralised system, and the employer will not be aware of this risk if the record is not revealed in the check. This problem has been reported.
- Develop a national employee exclusion scheme to prohibit workers who are established, on the balance of probability, to have committed unacceptable breaches of a pre-determined code of conduct (primarily precluding criminal conduct). Enable this scheme by establishing a properly resourced independent body with legislated powers to conduct investigations of serious malpractice in cooperation, where appropriate, with the police. This scheme should be constructed so that it does not create unreasonable financial burdens or legal risks for disability service providers.

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About National Disability Services

National Disability Services is the peak industry body for non-government disability services. Its purpose is to promote and advance services for people with disability. Its Australia-wide membership includes 960 non-government organisations, which support people with all forms of disability. Its members collectively provide the full range of disability services—from accommodation support, respite and therapy to community access and employment. NDS provides information and networking opportunities to its members and policy advice to State, Territory and Federal governments.

Appendix A: State and territory requirements for criminal history screening for disability provider employees

	The requirement	Level of employer discretion	Costs of check	Time for check
NSW	<p>The NSW Disability Inclusion Act 2014 requires funded disability service providers to carry out a criminal record check every 4 years for all people who work directly with people with disability. This includes volunteers, employed contractors and trainees. The Act also requires at least one reference check prior to employment.</p> <p>The NSW government also requires WWCC for employees and volunteers working with children (under 18).</p> <p>In NSW the onus for getting a WWCC is on the employee (or volunteer) which must be verified by the organisation.</p>	<p>Employers may engage a person:</p> <p>(i) who has not been convicted of an offence set out in Schedule 2 (murder, prescribed sexual offences defined in the Criminal Procedure Act or assault resulting in 2 or more years in prison)</p> <p>(ii) where the person has been convicted as above –but has not been convicted of further offences within 10 years after the person’s release from prison (or 10 years after the conviction if not imprisoned),</p> <p>(iii) they are satisfied is suitable to be involved in the provision of services to the target group.</p>	<p>\$42.00 for each national police check. Employers pay.</p> <p>\$80 for each WWCC. Paid employees pay some organisations will reimburse their employees.</p> <p>Volunteers are free.</p>	<p>About 4 weeks but the new WWCC is experiencing teething issues and taking longer.</p>
WA	<p>Disability Services Commission contracts require organisations to have current police clearance for staff, practicum placement students, volunteers and board members.</p> <p>Where the staff member will be working with children, particularly unsupervised, they must obtain the WWCC within 3 weeks.</p> <p>A current copy (max 6 months) of the police check will suffice for most disability organisations if the employee is moving from one organisation to another.</p>	<p>The employer has complete discretion.</p> <p>Direct employers are expected to comply, however the onus is usually on the supporting organisation.</p>	<p>\$50 for a WA police check for an employee</p> <p>\$30 for a volunteer or student</p>	<p>Usually within 5 working days. Some organisations use private companies such as NCC which have a 48 hour turnaround.</p>
ACT	<p>The Working with Vulnerable People (Background Checking) Act 2011 commenced 2012. Individuals working in disability must register by November 2014</p>	<p>The employer only discretion after approval from the State process</p>	<p>\$71 no cost for volunteers</p>	<p>Unclear cont./</p>

	The requirement	Level of employer discretion	Costs of check	Time for check
SA	<p>The Disability Services Act 1993 places a legal obligation on funded disability service providers to ensure that before a person is engaged in a prescribed position, they undergo an assessment of relevant history by an authorised screening unit.</p> <p>The Disability Services (Assessment of Relevant History) Regulations 2014 require people seeking to work or volunteer with people with disability to undergo disability services employment screening through the government screening unit.</p> <p>Where the role of a person working in the disability sector also involves working with children, only a child-related employment assessment will be required, i.e. a disability services employment assessment will not be required. If they also work in aged care they need more than one check.</p> <p>If more than one type or check is required, they are charged separately - except for volunteers who are only charged once (dependent on the screening application forms being attached together and submitted at the same time).</p>	<p>The employer only has discretion after approval has been given by government based on their detailed assessment through the government screening unit.</p>	<p>\$99.55 for child-related and disability services employment screening for paid employees.</p> <p>\$82.50 for all other forms of screening for paid employees.</p> <p>\$55.00 for all forms of screening conducted for volunteers and students on placement.</p> <p>Figures include GST.</p> <p>These costs accumulate if the person requires a disability and aged care check.</p>	<p>About 20 business days if no flags are raised in the initial screening. More time if the name registers in a database. Could take more than 8 weeks depending on the relevance, complexity, and amount of information which requires assessment.</p>
Vic	<p>The service agreement requires funded disability providers to police check staff and volunteers prior to engagement. The DHS has recently indicated that providers are required to obtain 'international police checks' for all staff members (including current staff) who have worked overseas in the past ten years.</p> <p>People who work or volunteer with children need a WWCC (Care and Protection of Children Act 2012).</p> <p>Employers of residential disability services must participate in the Disability Worker Exclusion Scheme (DWES)</p>	<p>Victoria requires employers to seek departmental approval to hire any candidates that have a 'discloseable' record.</p> <p>From 29 September 2014 providers of residential disability services must also check with the DWES</p>	<p>About \$50 for a police check</p> <p>\$85 for a private screening provider which may be more in-depth screening (e.g. fit2work).</p> <p>No cost for the department decision where required for discloseable records</p>	<p>Could be a few days or if it is a common name several weeks.</p> <p>The check of discloseable records by the department has been known to take 9 weeks.</p> <p style="text-align: right;">cont./</p>

	The requirement	Level of employer discretion	Costs of check	Time for check
Qld	<p>The Department of Communities, Child Safety and Disability Services requires a criminal history check for employees of services they fund.</p> <p>A “yellow card” is provided to the employee who must produce this if requested. In addition if the client is a child with a disability the employee/volunteer must have a “Blue Card” to work with children</p> <p>These cards /checks are renewed every three years using the same application process. For new employees an application for a blue or yellow card needs to be made prior to or on the first day of commencement of employment.</p> <p>If a volunteer already holds a volunteer blue card they may engage the person immediately (yellow card application still needs to be made). However if the volunteer does not hold a blue card already, they may not commence until the positive notices are obtained</p>	<p>The employer only has discretion for applicants who have been issued with a positive notice – ie they are approved to work with children or people with disability. Employers are not necessarily given the reasons for a positive or negative notice.</p>	<p>\$ 80.40 cost to the employer per application for a ‘Yellow card’</p> <p>\$78.65 cost to the employer per application for a ‘Blue Card’.</p>	<p>Usually 4 to 6 weeks.</p>
Tas	<p>There are no requirements but providers do undertake checks. Employees tend to pay for their check on commencement of a job. After that organisations may pay to update the check.</p> <p>The Registration to Work with Vulnerable People Act passed late in 2013. However, it will be rolling out for children only over the first three years and with requirements for individuals working with children with disability taking effect from October 2015.</p> <p>There is not agreement for broader coverage.</p>	<p>The employer has complete discretion.</p>	<p>\$45 for a police check</p> <p>\$70 for WWCC under the new legislation for paid employees and \$12 for volunteers</p>	<p>5 days if nothing found nationally - but could be ten days if there is a conviction</p>
NT	<p>The quality part of service plans requires employers to “Maintain a system of criminal history checks for all staff.”</p> <p>People who work or volunteer with children need a WWCC (Care and Protection of Children Act 2012.)</p>	<p>The employer has complete discretion.</p>	<p>About \$50 for the standard police check</p> <p>Or range of prices for private providers.</p>	<p>Unclear</p>

Can staff doing disability and aged-care work use one check? And why?		Are international police checks required?
WA	Yes -the check is the same. Regulations that determine how it should be considered differ.	No -some providers do however, it is recognised that from some countries a police check is meaningless.
NSW	Yes, the check is the same. Regulations that determine how it should be considered differ.	No -a statutory declaration will suffice.
SA	No - Aged care providers do not have to use the screening unit but are encouraged to do so. Either way they need to pay for a separate check. Aged care checks consider a National Criminal History Record (NCHR) in line with the accountability principles. Disability employment screening uses the NCHR and also assesses information on criminal charges, regardless of the outcome using information from the Courts Administration Authority. In addition, workplace records are considered, including professional misconduct and disciplinary action against an applicant, and allegations of abuse in disability employment (using information from the incident reporting system).	Unclear – not sure whether the screening unit considers international police checks
ACT	Unclear	Unclear
Vic	Yes -the check is the same. Regulations that determine how it should be considered differ.	Yes – this is a new policy
Qld	No -agencies with federal funding require NCHR (cost is currently \$51.65). The main difference is that the NCHR is an open report where all offences are recorded on the certificate to be presented to an employer. Therefore the employer can consider specific crimes which should exclude employment in aged care. The blue and yellow cards do not list offences -the employer only receives a positive notice that will allow them to recruit the volunteer or new employee.	No -however there is a reliance on background checks from the Department of Foreign Affairs in relation to refusing entry to undesirable persons to the country. There is a hotline for enquiries that welcomes information requests 1800 113 611
Tas	Yes -the check is the same. Regulations that determine how it should be considered differ.	No
NT	Yes -the check is the same. Regulations that determine how it should be considered differ.	No

Appendix B: Commonwealth Competitive Neutrality Principles and policy

Are the principles in scope?

The broad principles of competitive neutrality^{vi} apply to regulatory functions where they meet the following business criteria:

1. there is some user charging;
2. there is an actual or potential competitor; and
3. managers of the activity are not restricted by law or policy from choosing alternative sources of supply.

Clearly criteria three is only the case in relation to employment screening to the extent which the relevant government deems it so. It is not a national requirement.

The principles are generally intended for 'significant businesses'. It is possible that a screening regime does not constitute a significant business - defined as having a turnover of more than 10 million (in 1999). However, we argue that governments should seek to be in line with the spirit of the principles unless there is a good reason not to.

Governments can also choose not to apply the principles where costs outweigh benefits.

Weighing up costs and benefits

The 2010 South Australian Guide to the Implementation of Competitive Neutrality^{vii} outlines some of the considerations for selection of the appropriate level of competitive neutrality:

"Section 3.1.5 provides a schematic summary of the selection matrix for a significant business activity when determining which measure to apply, whether it be pricing reform, commercialisation or corporatisation. It is important to consider the costs and benefits of a particular measure in the medium to long term.

The relevant benefits may include:

- increased market contestability that may result in incentives for lowering costs in markets traditionally dominated by public sector businesses;
- improved assessment of the performance of government business;
- better use of the community's resources; and
- better clarification and performance monitoring of non-commercial objectives.

The costs to be considered in the assessment may include:

- the cost of enabling legislation;
- the cost associated with managerial and cultural change;
- the cost of calculating the relevant tax equivalents, debt guarantee fees etc; and
- the cost of administering and monitoring compliance with the changes."

Endnotes

ⁱ Productivity Commission 2014, Childcare and Early Childhood Learning, Draft Report, Canberra.P309-311

ⁱⁱ Royal Commission into Institutional Responses to Child Sexual Abuse, June 2014. Interim Report, Commonwealth of Australia p 131-137.

ⁱⁱⁱ <http://www.dhs.vic.gov.au/about-the-department/plans,-programs-and-projects/projects-and-initiatives/disability-services/disability-worker-exclusion-scheme>

^{iv} <http://www.nds.org.au/projects/article/171>

^v Australian Health Ministers' Advisory Council, 2014. Consultation paper: A National Code of Conduct for health care workers. Council of Australian Governments

^{vi} <http://ncp.ncc.gov.au/and> in the 1999 Treasury paper found at <http://archive.treasury.gov.au>

^{vii} <http://dpc.sa.gov.au/national-competition-policy>