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29 May 2015

Research Director
Communities, Disability Services and Domestic and
Family Violence Prevention Committee
Parliament House
George Street
BRISBANE QLD 4000

I refer to the request received from the Communities, Disability Services and Domestic and Family Violence Prevention Committee in relation to the reference concerning the adequacy of existing financial protections for Queensland Seniors.

The Office of Public Guardian [OPG] was established on 1 July 2014 under the provisions of the *Public Guardian Act 2014* and exercises responsibilities under that legislation for adults with impaired capacity for a matter and relevant children in out of home care under the Queensland Child Protection system.

Background

The OPG combines the roles that were previously undertaken by the Adult Guardian and Child Guardian and has special responsibilities to support and protect the rights of children and young people in the child protection system. The OPG supports children in care through two specific programs; the community visitor program for children in care, which aims to ensure children and young people in the child protection system are safe and well and are being properly cared for, and the child advocacy program, which gives children in care an independent voice, ensuring their views are taken into consideration when decisions are made that affect them.

Children and young people in out-of-home care have particular needs that must be addressed in order to ensure their safety and improve their emotional, physical and psychological well-being.

The Charter of Rights for a child in care under the *Child Protection Act 1999*, section 74 and Schedule 1 describes the core rights that apply to every child and young person who is in the child protection system and includes the right to be provided with a safe and stable living environment and to be placed in care that best meets their needs and is culturally appropriate.

The OPG also works to protect the rights and interests of adults who have an impaired capacity to make their own decisions, recognizing that everyone should be treated equally, regardless of their state of mind or health.

The OPG Charter with respect to adults with impaired capacity is to:

- Make personal and health decisions if we are their guardian or attorney
- Investigate allegations of abuse, neglect or exploitation
- Advocate and mediate for people with impaired capacity, and educate the public on the guardianship system.

The OPG also provides an important protective role in Queensland by administering a community visitor program to protect the rights and interests of the adult if they reside at a visitable site.

The *Public Guardian Act 2014* and *Guardianship and Administration Act 2000* set out OPG legislative functions and powers and the *Powers of Attorney Act 1998* regulates the authority for adults to appoint substitute decision-makers which can include OPG.

OPG is one element in the Queensland System that makes provision for the protection of adults with impaired capacity for matters. Other relevant legislation includes:

Powers of Attorney Act 1998:- empowers individuals to make provision in advance of loss of capacity by means of Enduring Powers of Attorney [EPOA] and Advanced Health Directives [AHD] for circumstances where they might in the future lose the capacity to make decisions for themselves

Guardianship and Administration Act 2000;-empowers the independent Queensland Civil and Administrative Tribunal to appoint guardians and /or administrators for an individual where QCAT is satisfied that an individual lacks capacity for a matter

Public Guardian Act 2014: - creates a statutory guardian of last resort

Public Trustee Act 1978:- creates a statutory administrator of last resort

Neglect, Exploitation and Abuse of Adults

It is a sad fact that many adults, as they age, and who thus come within any description of “seniors”, do suffer a decline in their capacity to make decisions for themselves, particularly in relation to financial matters. Because of these factors of decline they also become increasingly subject to potential abuse at the hands of families, friends and carers again particularly in relation to financial matters.

OPG is vested with specific powers to investigate complaints or allegations relating to adults [Section 19] who it is suggested are:

- Neglected , exploited or abused
- Have inappropriate or inadequate decision-making arrangements.

Detailed provisions are made in Chapter 3 Part 3 of the *Public Guardian Act 2014* in relation to the conduct of these investigations. Where an investigation indicates the necessity for action to be taken e.g. if financial abuse of a person is indicated, the Public Guardian may take action such as suspending a guardian/administrator operating under an enduring instrument for up to 3 months [section 34] , bring an application to QCAT for the appointment of a guardian and/or an administrator, etc.

Where OPG investigations indicate that criminal offences may have occurred such investigations are referred as a matter of course to the Queensland Police Service for investigation as to any potential breach of the criminal law.

Financial Abuse

Financial abuse can include any form of improper use of an older person's property or money without his or her knowledge, permission or consent. This can include, but is not limited to forgery, stealing, forced changes to a will, involuntary transfer of money or property to another person, withholding funds from the older person and failure to repay loans. Financial abuse can include the misappropriation of funds under an enduring power of attorney, such as when a trusted person (usually a family member or close family friend), is legally appointed with enduring powers to manage the financial affairs of the older person, who is increasingly unable to manage their own affairs.

As indicated it is an adult guardian function of the Public Guardian to 'protect' an adult with impaired capacity from neglect, exploitation or abuse. The Public Guardian may investigate any complaint or allegation that an adult with impaired capacity is being, or has been neglected. One of the challenges that the OPG faces is that abuse and mistreatment is often unrecognised, underreported and hard to detect.

Investigations

The investigative function of the OPG is a re-active (not pro-active) function. Allegations of abuse must be reported before any investigation can commence. Not being a proactive investigative power, the initiation of an investigative process relies upon those involved in the person's life to identify that the person is at risk of abuse. The OPG recognises that a person subject to abuse may not be able to report it, or be in a position to report it. In such circumstances, the OPG works with carers, support providers and family members to immediately report suspicions of abuse to the agencies involved with the person's care, and also to report the matter to the OPG or the police directly where a criminal offence is suspected.

Under its investigative powers, the Public Guardian has the power to require people to produce records and accounts; gain access to any relevant information, including medical files, or issue a summons to a person requiring them to provide information.¹

Investigations of allegations of abuse include but are not limited to:

- financial (such as misusing a person's money)
- exploitation (such as taking advantage of the person)
- abuse of power of attorney (such as under an Enduring Power of Attorney the person may not be acting in the interests of the person with impaired capacity)

The purpose of an investigation is to identify the level of risk for the vulnerable person and the action needed to best protect them. Investigations gather evidence to find out whether the allegations can be substantiated on the balance of

¹ See Chapter 3, Part 3 of the *Public Guardian Act 2014*

probabilities. Where possible, the OPG tries to resolve allegations informally, however if necessary, the OPG also refers matters to the police or where relevant, to QCAT.

Outcome of Investigations

The OPG has limited powers when determining neglect, exploitation and abuse and it does not have the power to prosecute cases of abuse. The primary focus of an investigation is to determine whether the decision-making support or care is deficient and amounts to neglect, exploitation or abuse, and then help the person with impaired capacity obtain better arrangements for their support and care.

Where an investigation reveals that an adult with impaired capacity has inadequate decision-making support in place, an option might be for the adult to have a formal guardian appointed to make certain personal decisions on the person's behalf, or for an administrator to be appointed to make financial decisions. However, QCAT is responsible for determining the outcome of this matter – not the Public Guardian. An application would therefore be made to QCAT to determine the most appropriate person to make decisions for the adult for personal or financial matters. QCAT may determine that the most appropriate person to make these decisions is someone from the adult's supportive network, such as a family member or a friend.

There may be some complaints which the OPG cannot investigate, for example, if the person does not have impaired capacity or if there is a more appropriate body to investigate an allegation. In these cases, where the OPG has been advised of an issue outside of its jurisdiction, the OPG will refer the matter to the appropriate agency.

One problem that OPG currently encounters with its powers to investigate allegations of neglect, exploitation or abuse of a person is that any investigation currently underway ceases on the death of an individual. OPG has been seeking legislative empowerment to continue any such investigations to their logical conclusion notwithstanding the death of the individual whose affairs are being investigated.

Community Visitors Program

Role of Community Visitors

The Public Guardian appoints community visitors on a casual basis to protect the rights and interests of adults with intellectual, psychiatric or cognitive disability. Community visitors provide a rights protection and abuse prevention service to more than 6000 Queensland adults who may be subject to abuse, neglect or exploitation due to their impaired decision-making capacity resulting from disability.

Community visitors make inquiries and lodge complaints for, or on behalf of, residents of visitable sites. Community visitors have the power to refer complaints to an external agency—for example, the Department of Communities, Child Safety and Disability Services (DCCSDS), Queensland Health, or the Residential Services Unit where appropriate.

Issues that may be enquired into by a community visitor include:

- adequacy of services provided for assessment, treatment and support
- appropriateness of standards of accommodation, health and wellbeing
- provision of services in a way that is least restrictive of the person's rights
- adequacy of information available for consumers about their rights
- operation of an accessible and effective complaints process

OPG community visitors can also inquire into other matters at the request of the Public Guardian and refer unresolved complaints to external agencies for investigation or resolution.

The Public Guardian has specific powers to protect against abuse of an adult with impaired capacity. This includes the power to suspend the operation of all or some of an enduring power of attorney's power if there is reasonable grounds to suspect that the attorney has neglected their duties or abused their powers.² The Public Guardian may also apply to the Queensland Civil and Administrative Tribunal (QCAT) for a warrant to enter and remove an adult where there are reasonable grounds to suspect immediate risk of harm, because of neglect (including self-neglect), exploitation or abuse.³

Visits to accommodation sites

The OPG's adult community visitors independently monitor three different types of accommodation called 'visitable sites' where vulnerable adults live. Visitable sites are:

- disability accommodation provided or funded by DCCSDS
- authorised mental health services
- private hostels (level 3 accreditation)

Adult community visitors conduct regular visits to more than 1,200 visitable sites across Queensland. These visits are unannounced so that community visitors can observe the standard of service delivery provided by the site on a typical day. However, when they attend a site, community visitors are required to:

- notify staff when they arrive at the site
- discuss any concerns with consumers and staff
- clarify any issues when reasonable and practical to do so
- resolve complaints by or for a consumer
- report to staff when leaving the site.

When on the site, the community visitor has legislative authority to: access all areas of a site; require staff to answer questions; request documents related to the support of adults with impaired capacity at the site; make copies of relevant documents; and talk in private with the adults, or staff at the facility. At the end of each visit, the

² See section 34(1), (2)(b) of the *Public Guardian Act 2014*

³ See section 36 of the *Public Guardian Act 2014* which empowers the Public Guardian to apply to QCAT under section 148 of the *Guardianship and Administration Act 2000* for a warrant to enter and remove the adult with impaired capacity.

community visitor then produces a report which is sent to the service provider and the Public Guardian.

Community visitors perform an essential function of being independent 'eyes and ears' on the ground who are able to identify issues that others (including family) may not be able to see.

Observations by Queensland Community Visitors

Under the community visitor program, community visitors have observed and reported instances of financial abuse of persons with impaired capacity, particularly where family members have used the funds of persons with disability for their own means, or misused funds or other assets accessed under a power of attorney.

Further, in institutional or residential settings, community visitors have identified situations where inadequate financial management on behalf of a person with impaired capacity has led to failure to provide the person in their care with reasonable access to services such as dental, medical, podiatry, or assessments for other health care needs including, but not limited to, speech and language pathology, psychiatry, psychology, dieticians and diabetes services.

While these issues relate to persons with impaired capacity of all ages, many of these issues are particularly relevant for seniors with impaired capacity.

Fundamental Issues

Under Queensland Law all persons are presumed to have full capacity to make any decision they wish in accordance with law.[Schedule 1 *Guardianship and Administration Act 2000*] It is only where it can be established on acceptable evidence that a person lacks capacity to make a decision on a particular matter at a particular time that the Queensland legislative scheme allows for the appointment of a person to make an assisted or substituted decision to be made for that individual in those circumstances.

The concept of assisted or substituted decision making for individuals who lack capacity is arguably no longer reflective of currently acceptable international standards for decision making for individuals who lack the necessary capacity. The United Nations *Convention on the Rights of Persons with Disabilities* has now set the international standard for decision making for individuals who lack capacity as being that of supported decision making. Queensland has not yet made the necessary legislative amendments to reflect such a new International standard in practice.

It is important to ensure that if government is mindful to introduce policies or legislation to assist specific groups in the community it does so in a way that does not discriminate against such groups or individuals within such groups.

Whilst the concept of seniors is normally taken to relate to persons over the age of 65, care must be taken to avoid stigmatising individuals who are part of such a group. Whilst the likelihood of capacity issues arising does increase with age, age of

itself should never be the justification for imposing constraints on individuals or giving them special privileges which do not reflect the fundamental principle that an individual possess full capacity to make their own decision until the contrary is individually established.

To suggest therefore that there may be a need for government to create specific schemes for seniors merely because they are seniors in relation to issues of financial literacy, etc. is arguably not justified. Given that capacity issues arise for individuals at all stages of their life, any such schemes, if introduced by government, should focus on the vulnerability of individuals no matter what their age and not upon persons merely because they are part of a particular age profile.

OPG fully supports the creation of programs that improve financial literacy, assist in independent financial decision making, target internet scams and provide advice and support for all persons who comprise the Queensland community but believes that these should be widely available and targeted at all persons who may vulnerable to abuse notwithstanding their age. It is vulnerability to abuse that should be targeted for government action, not merely a particular age segment of the Queensland community.

If such a general community wide approach is adopted this does not prevent relevant messages being developed that appeal to different age segments of the Queensland Community in accordance e.g. with different levels of technological skills possessed generally by particular age groups, etc. The advertising industry for example is well used to the adoption of principles of segmented marketing to cover the full gamut of the community.

Persons with impaired capacity are often socially isolated and dependent upon close family or friends who are entrusted by the person with their financial assets and resources. While not all seniors with impaired capacity will face financial abuse, their vulnerability places them at significant risk of abuse by unscrupulous family members or friends who have access to their financial assets. Failure to recognise and identify the risk factors can result in the person having their money stolen, or resources used against their will, for the benefit of a person other than the senior.

While community visitors are sometimes able to identify suspected financial abuse of seniors in residential or institutional care settings, they are limited by having no jurisdiction to visit persons with impaired capacity living in the community or at aged care facilities. In such circumstances, clinical staff (whether in residential, institutional or community settings) are often best placed to identify and address the common risk factors for abuse and exploitation, and recognise risk factors and potential perpetrators of abuse.

It is recommended that there be industry agreed standards of care for clinical staff regarding recognition and identification of risk factors relating to abuse and exploitation. Clinical staff should also be required to be mandatory reporters where abuse or exploitation of persons with impaired capacity is suspected, regardless of the nature of abuse or exploitation. Greater responsibility should be placed upon clinical staff and those persons involved in the day-to-day care to understand and

identify risk factors, particularly the ability to identify and address common risk factors for abuse and exploitation, both in recognizing the signs of abuse and risk factors identifying potential perpetrators of abuse.

Issues worthy of consideration

It is the view of OPG that if the approach of addressing the needs of protecting all vulnerable persons in the community from financial abuse were to be adopted and not merely a focus on persons who might be classified as seniors the following issues would be worthy of detailed consideration:

- Greater obligations to be imposed on financial service providers and similar suppliers of services to simplify all contractual documentation into Plain English and require such documentation to be certified by a relevant agency or professional body as being fair between all parties before utilisation to establish legal relationships.
- Impose a mandatory cooling off period [e.g. one to two weeks] whereby a consumer can withdraw from any contractual relationship at no cost to the consumer.
- Establishment of a public agency to which any person whose capacity for a matter is in question might complain particularly in relation to internet scams with such public agency being empowered to investigate the complaint and enforce any findings that the public agency might make in relation to the matter under complaint.
- Education programs focussing on all segments of the community explaining the rights of all individuals as consumers particularly consumers who may have an incapacity for a matter
- Provide explicitly that all contracts or other arrangements with any person with incapacity for a matter contain the right to make all such arrangements void at the instance of the person with the incapacity.
- Establishment of an agency which on a 24 hour basis can provide all persons with advice as to their obligations under all forms of financial or other arrangements.
- Imposing an obligation on Internet Service Providers to remove from access by search engines all material reasonably suspected as being fraudulent in intent.
- Mandatory reporting should be required for clinical staff working with people with impaired capacity, whether in residential or home support settings, to identify, report and prevent cases of financial abuse and exploitation. Suspected abuse or exploitation could be referred to the Public Guardian (or other appropriate agency) for investigation, or police where a criminal offence is suspected to have occurred.
- There should be funding and investment in training clinical staff to identify and address common risk factors for abuse, and funding for broad public education regarding how powers of attorneys operate, and how assets can and should be used as directed by the person, including what to do and where to go if financial abuse or exploitation is suspected.

No doubt there are many other suggestions that the Committee might consider to be meritorious.

If the Committee desires an expansion on any of the matters mentioned herein please do not hesitate to contact this office.

Yours sincerely,



KEVIN MARTIN
Public Guardian

Office of the Public Guardian (Queensland)

Submission to the Australian Government Department of Social Services

Consultation Paper: Proposal for a National Disability Insurance Scheme Quality and Safeguarding Framework

Background to the Public Guardian

On 1 July 2014 a new independent statutory body—the Office of the Public Guardian (OPG)—was established to protect the rights and wellbeing of vulnerable adults with impaired decision making capacity, and children and young people in out-of-home care (foster care, kinship care), residential care and youth detention.

The OPG combines the roles that were previously undertaken by the Adult Guardian and Child Guardian and has special responsibilities to support and protect the rights of children and young people in the child protection system. The OPG supports children in care through two specific programs; the community visitor program for children in care, which aims to ensure children and young people in the child protection system are safe and well and are being properly cared for, and the child advocacy program, which gives children in care an independent voice, ensuring their views are taken into consideration when decisions are made that affect them.

Children and young people in out-of-home care have particular needs that must be addressed in order to ensure their safety and improve their emotional, physical and psychological well-being.

The Charter of Rights for a child in care under the [Child Protection Act 1999](#), section 74 and Schedule 1 describes the core rights that apply to every child and young person who is in the child protection system and includes the right to be provided with a safe and stable living environment and to be placed in care that best meets their needs and is culturally appropriate.

The OPG also works to protect the rights and interests of adults who have an impaired capacity to make their own decisions, recognizing that everyone should be treated equally, regardless of their state of mind or health.

Our charter with respect to adults with impaired capacity is to:

- Make personal and health decisions if we are their guardian or attorney
- Investigate allegations of abuse, neglect or exploitation
- Advocate and mediate for people with impaired capacity, and educate the public on the guardianship system.

The OPG also provides an important protective role in Queensland by administering a community visitor program to protect the rights and interests of the adult if they reside at a visitable site.

The [Public Guardian Act 2014](#) and [Guardianship and Administration Act 2000](#) set out our legislative functions and powers and the [Powers of Attorney Act 1998](#) regulates the authority for adults to appoint substitute decision-makers.

Position of the Public Guardian

The Office of the Public Guardian welcomes the opportunity to comment on the National Disability Insurance Scheme (NDIS) *Consultation Paper: Proposal for a National Disability Insurance Scheme Quality and Safeguarding Framework* (the framework).

The NDIS quarterly and annual reports indicate that in 2015 there were approximately 5000 NDIS participants with some form of cognitive or intellectual disability, comprising nearly 66% of all participants (excluding children in South Australia). Within this context, in the 2013-14 financial year, there were 2,774 persons for whom the Adult Guardian (now the Public Guardian) was appointed as guardian. Of this cohort, approximately 40% have an intellectual disability, with almost one quarter of guardianship clients having diagnoses of complex co-morbidities and behavioural issues, requiring specialist disability and mental health services.

In light of the significant numbers of individuals within the NDIS who have some form of cognitive or intellectual disability, guardianship clients of the OPG will fall within a broader cohort of individuals will struggle to act as 'consumers' within a market based disability system or to make their own choices regarding the NDIS, let alone contractually negotiate disability supports.

The framework appears to be focused primarily upon mainstream disability quality and safeguard needs and does not address the needs and vulnerabilities of persons with cognitive or intellectual disability. While the majority of mainstream services and safeguards proposed may operate well for many persons with disability, they are inadequate for this cohort. In addition to this, these persons often face additional barriers of isolation from community and families, and may have complex personality, challenging behaviour and difficult life circumstances.

It is essential that the framework gives full consideration to the United Nations Convention on the Rights of Persons with Disability (the Convention). A central aspect of the Convention¹ is supporting people with disability to make their own decisions and choices under the NDIS, while ensuring that safeguards are proportional and tailored to the individual's support needs.

Independent advocacy is a critical safeguard that should be addressed under the framework. Persons with impaired capacity should have independent advocates to assist in negotiating 'reasonable and necessary' supports at the assessment stage, and that safeguards are proportional to the needs and vulnerabilities of the individual.

Safeguards and protections which are specifically designed to address the vulnerabilities of persons with intellectual or cognitive disability are essential, particularly for those with

¹ See Article 12, *United Nations Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, GA Res 61/106. UN Doc A/Res/61/106 (entered into force 3 May 2008), signed by Australia 30 March 2007. Accessed 27 April 2015 at <http://www.un.org/disabilities/convention/conventionfull.shtml>

formal and informal substitute decision making arrangements who will require significant support in making decisions under the NDIS.

Safeguards should protect against undue influence being exerted on individuals seeking support under the NDIS, and ensure that supports provided respect the rights, will and preferences of the person.² While issues of conflict of interest, undue influence, abuse and exploitation are not specific to persons with disability, people with disability are statistically at higher risk of such abuse than the rest of the population. It is therefore recommended that much could be gleaned regarding safeguards relating to appointments and exercise of powers of attorney to ensure such arrangements are governed by legislation, free from conflict of interest and undue influence.³ Safeguards should ensure freedom from such interference, while maintaining a balance between safeguarding and over-regulation of the highly private and personal nature of decision-making.⁴

While the NDIS offers many positive opportunities for those with mainstream disabilities, the deafening silence within the framework regarding the specific needs of those with intellectual, cognitive and psychiatric disabilities remains deeply disquieting. Should this void fail to be addressed, this cohort will be at significant risk of abuse, exploitation and neglect under the NDIS.

A summary of the recommendations of the OPG are set out on pages 5 to 10. The full response to the questions and issues raised in the consultation commence from page 11.

The OPG would be please to lend any additional support as development of this framework is progressed. Should clarification be required regarding any issues raised, the OPG would be happy to make representatives available for further discussions.

² Committee on the Rights of Persons with Disabilities, *General Comment No 1 (2014) Article 12: Equal Recognition before the Law*, UN doc CRPD/C/GC/1, 11 April 2014, <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/GC.aspx> accessed 22 June 2014, paragraph 22, at 5

³ S.N. Then, "Evolution and innovation in guardianship laws: Assisted decision-making" (2013) *Sydney L. Rev.*, 35, 133-166 at 160

⁴ Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws (ALRC Report 124)*, August 2014 accessed at <http://www.alrc.gov.au/publications/equality-capacity-disability-report-124> 22 February 2015 at 109

Summary of Recommendations

Recommendations – Information Systems

- *Information, tools and resources need to be culturally, linguistically and user-friendly for persons with intellectual or cognitive disability. Information needs to be accessible to persons: from a variety of different cultural backgrounds, with differing levels of capacity, and ability to develop information technology skills.*
- *Information systems should have safeguards regarding undue influence which may be exerted upon persons with intellectual or cognitive disability to provide false and/or misleading feedback.*

Recommendations – Building Participant's Capacity

- *The framework should prioritise identification and provision of external safeguards proportional to an individual's vulnerabilities and needs while natural safeguards remain underdeveloped.*
- *Safeguards should provide for recognition that where a person has impaired capacity they have access to experienced independent disability advocates at the assessment stage and ongoing under the NDIS. Guardianship or other substitute decision-making arrangements to assist in decision-making under the NDIS should be matter of absolute last resort.*
- *Significant investment should be provided to fund personnel and social infrastructure (such as appropriate accommodation and housing) to support the development of social relationships for socially isolated persons with disability.*
- *Clarification is required within the framework regarding what safeguards will exist if a person fails to develop the social relationships as proposed under the framework and remains socially isolated.*
- *Safeguards should ensure volunteers in community organisations are vetted as safe to work with persons with disabilities.*
- *Safeguards should reflect and recognise the relational aspect of decision-making and provide clear guidelines regarding duties and obligations required to be met by those providing decision-making and other NDIS funded support.*

Recommendations – Monitoring and Oversight

- *Service level and system safeguards are required that are:*
 - *proportionate to the individual needs and vulnerabilities of the person*
 - *flexible to being scaled up or down dependent upon development of natural safeguards*
 - *recognise and address vulnerability of disabled persons to abuse, violence and neglect*
 - *protect vulnerable persons from assuming risk they do not comprehend*

- *The framework should provide mechanisms for:
 - *support providers and family members to be supported to be aware of, and recognise the signs of persons who are at risk of abuse, or are being abused, and*
 - *have systems to address suspicions of abuse, as well as referred to the police directly where a criminal offence is suspected*
 - *early intervention and prevention mechanisms to ensure identification of risk factors and prevent abuse**
- *National quality and safety standards should be developed with ‘zero tolerance’ towards violence, abuse and neglect*
- *Investment should be made in infrastructure, and building service provider capacity in regional, rural and remote locations, particularly where there are existing gaps in services such as in the delivery of specialist disability care*
- *System and service level safeguards should be included in the framework to provide robust audit, investigation and oversight powers*
- *External system level government safeguards, such as independent visiting programs and judicial oversight should be a central element within the framework to ensure that supports are provided which are free from abuse, conflict of interest or undue influence upon the person being supported, to protect the person’s rights, and protect against violence, abuse, neglect and exploitation.*
- *Safeguards for emergency and crisis care should be included as critical elements of the safeguarding framework, so that persons with high support needs are not left without support when a service provider is unable to continue to provide essential support or care.*
- *There must be an independent oversight body for the NDIS with a physical presence in all NDIS jurisdictions, responsible for overseeing both the National Disability Insurance Agency (NDIA) and providers of disability supports and services. This body should be an appropriately designed oversight body which is aligned with a disability model of care and support.*
- *An independent oversight body should:
 - *be legislatively empowered with a pro-active and re-active, inquisitorial, audit-like role to oversee support provision*
 - *protect a person’s rights and protect against abuse, neglect or exploitation*
 - *receive complaints from anyone regarding any matter relating to the operation of the NDIS,*
 - *be empowered to take remedial action to rectify a situation, award damages, remove inappropriate service providers or nullify contractual arrangements under the NDIS, and*
 - *publicly report on critical incidents and allegations.**
- *Reporting serious incidents should be a legislatively mandated responsibility of the service provider*

- *Service providers should be obligated to provide post-abuse support where a person is found to have been abused, neglected or exploited while under their care and support*

Recommendations – NDIA Provider Registrations

- *Option 4 provides the only appropriate option to provide assurance for participants and their families, and ensure appropriate regulation and setting of standards for service providers.*
- *Registration should be of the highest quality standard, and require minimum industry agreed standards to be met in order to obtain and maintain registration.*
- *Service providers who fail to meet industry based standards should not be registered or be de-registered.*
- *The NDIA should be empowered to de-register service providers where they fail to provide services or meet minimum standards, and prohibit individuals in management of that service provider from engaging in disability service provision for a period of 5 years or more.*
- *Clarification is required under the framework regarding how these safeguards will operate in conjunction with other quality and safeguard frameworks, such as in health and mental health fields.*
- *Services that require more direct ‘staff-participant contact’ or which lack supervision such as personal care support, respite or supported residential services should be automatically required to participate in a quality assessment*
- *Registration of services (including mainstream services providing support services under the NDIS) should be dependent upon the level of vulnerability and needs of the person with disability.*
- *Registration and de-registration of individuals working with vulnerable persons should be legislatively mandated, rigorous and of the highest quality and standard, to ensure the vetting and barring of persons from employment or volunteer support of persons who pose a risk to persons with disability.*
- *Mechanisms should be provided so that if persons are unable to meet or continue to meet the required standards for compulsory working with disabled persons’ checks, they should not be able to be employed in the disability industry.*
- *Registration processes for all prospective employees and volunteers should include criminal background checks (including spent convictions) regardless of the level or nature of service to be provided.*
- *The NDIA should be legislatively empowered to de-register and enforce penalties against providers or community organisations that fail to reasonably protect persons with disability from violence, abuse and neglect to whom they are providing disability support or related services.*
- *Safeguards should ensure that adequate and appropriate decision-making assistance and information is provided to the person so that they are aware of their responsibilities and the implications of personal choices made under the NDIS and protect against abuse or exploitation in the process.*

- *Safeguards should be provided to address situations where the assumption of risk by the person with disability leads to adverse outcomes.*

Recommendations – Systems for Handling Complaints

- *An independent, external complaints system should be accessible to persons with impaired capacity and provide:*
 - *meaningful access to complaints mechanisms*
 - *afford fair and equal hearing during the complaint making process*
 - *enable sufficient flexibility in responses*
 - *should be sufficiently resourced to address the needs of persons with impaired capacity*
 - *seek resolution of issues to reasonable satisfaction*
- *An independent complaints system should be independent of the NDIA, apply to all funded supports, and have representation and presence at the local and regional level in each State and Territory.*
- *An independent complaints body should be legislatively empowered to:*
 - *Review ‘reasonable and necessary’ funding assessments and support*
 - *review poor, inadequate or failed service delivery*
 - *direct provision of emergency or interim support to a person where there are allegations of abuse, neglect, exploitation or violence, or service delivery failure*
- *An appropriately empowered complaints body should have as a minimum, the following legislated powers:*
 - *resolution of complaints through mediation and conciliation*
 - *pro-active and re-active inquisitorial power to investigate complaints*
 - *the ability to gather evidence and information*
 - *power to investigate whether a person with impaired capacity has been, is being, or is at risk of being neglected, abused or exploited and provide independent reports*
 - *ability to appoint an independent advocate*
 - *protection of whistle-blowers or persons with disability who register complaints against service providers*
 - *power to operate an independent community visitor program*
 - *provision of information, education, training and advice about matters relating to complaints and complaints handling*
 - *evaluation of complaints to identify systemic issues for service improvement*
 - *monitoring and public reporting on the effectiveness of complaints handling*
- *An external community visitor scheme is an essential safeguard. Community visitors should be empowered to:*
 - *visit all persons receiving support under the NDIS on a regular and irregular basis.*
 - *examine relevant documentation relating to the NDIS support*
 - *recommend to appropriate agencies how to rectify or resolve issues*

- *A strong community visitor program should be focused upon providing help and support to the most vulnerable persons under the NDIS regardless of their setting (home, residential or otherwise).*
- *Community visitors should be legislatively mandated to report allegations or concerns of risk of abuse, exploitation or neglect of people with impaired capacity.*
- *A community visitor program should be linked with an appropriately resourced independent advocacy program that is able to advocate for resolution of issues within the NDIS. The OPG child advocate program is recommended as an appropriate and efficient model for an independent advocacy program.*

Recommendations - Ensuring staff are safe to work with participants

- *It should be the primary responsibility of service providers to interview and vet prospective paid and voluntary employees.*
- *Government should provide a service through which criminal background checks (across Commonwealth and State jurisdictions, including spent convictions) of prospective employees can be made, and keep a register of banned individuals.*
- *There should be legislative requirements that place the onus upon the person seeking employment to disclose investigations which relate specifically to abuse, violence, exploitation or neglect of vulnerable persons which may not have amounted to a charge or conviction, but may have resulted in a dismissal from employment. These factors could be taken into consideration in considering suitability for employment. Failure to disclose these details could be considered as a ground for dismissal should they later be disclosed.*
- *A combination of Options 1, 2, 3 and 4 should be adopted for vetting and employment requirements by service providers.*
- *Police checks should be mandatory with the establishment of a screening agency to coordinate police clearances from Commonwealth and State territories, and criminal history information obtained through international information sharing arrangements.*

Recommendations – Safeguards for Participants who manage their own plans

- *All service providers and workers under the NDIS should be required to be registered regardless of whether people manage their own plans or not.*
- *Consideration should be given to the development of a category of 'limited' registration, which could ensure providers of choice would undergo external screening (for criminal backgrounds and working with vulnerable persons checks), and limit the number of people to whom they are able to provide such services before they are required to undergo formal registration procedures with the NDIA.*
- *All prospective service providers should be required to substantiate their skill base and how they will be able to support the person to meet the goals as set out in the participant's plan.*

- *All service providers should be subject to external scrutiny to ensure against undue influence or conflict of interest in service provision, and be subject to NDIS complaints and investigations processes and scrutiny by an independent oversight body or Ombudsman.*
- *Funding should be refused to any service provider where an external assessment determines the service provider has failed to fulfil the goals and objectives of the service funded or provides sub-standard care or support.*
- *Where the screening process identifies an individual as inappropriate for providing disability support services, they should be prohibited from providing support to persons under the NDIS.*

Recommendations – Reducing and eliminating restrictive practices in NDIS funded supports

- *There should be a comprehensive, nationally consistent legislative regime governing restrictive practices used with children and adults.*
- *The legislative scheme should have strict penalties for the abuse and misuse of restrictive practices (physical, chemical, mechanical and environmental) and obligate service providers to develop and use positive behaviour support plans, with the aim of reducing and eliminating the use of restrictive practices.*
- *Oversight, monitoring and judicial review processes of restrictive practices should be legislated to ensure the human rights of the person are protected.*
- *Restrictive practices should only be authorised by an independent decision maker. It is recommended that consideration be given to establishing an independent office holder, such as an Office of a Senior Practitioner, to authorise approve use of restrictive practices, oversee best practice in their use, and assist in providing advice and training to the sector.*
- *There should be mandatory reporting requirements on the use of restrictive practices*

NDIS Consultation

NDIS quality and safeguarding

NDIS Proposal: *A key developmental safeguard is to provide participants access to high quality information. This includes development of an online platform specifically focused on disability supports.*

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

Anecdotal evidence suggests that there are currently 67-70 per cent of people accessing NDIS services at trial sites who have an intellectual disability, and that tools, resources and information systems available have not always been user-friendly for this cohort.⁵ The NDIS online system is primarily targeted towards mainstream disability needs and does not address the specific needs of those with intellectual or cognitive disability, who require information to be communicated in a way and means that is accessible in accordance with their disability.

An NDIS information system needs to be accessible for persons with disability who have differing levels of capacity and levels of ability to develop information technology skills. It also needs to be accessible to families, carers or support persons and consideration needs to be given how to support families or carers who also do not have information technology skills, for example, persons with intellectual disability who are cared for by older parents or relatives who are not be technologically savvy nor able to navigate any information system.

It is also not clear whether the NDIS will be funding computers and special equipment required to enable persons with disability to access the information system online as a 'reasonable and necessary' support, or whether funding will be provided for internet access, particularly for those in remote or rural locations who may find obtaining access to NDIS offices more challenging.

How can the information system be designed to ensure accessibility?

An information system needs to take into consideration the high percentage of users (67-70% currently at trial sites) of the NDIS will have an intellectual, cognitive or mental disability, including the risk these individuals may be doubly disadvantaged by not having English as their first language.

Information systems need to be culturally, linguistically, and easily accessible for all ranges of disability, and where possible have symbols to enable people to navigate the system. It is well known that people with intellectual disability often have poor literacy skills. Written information, whether on a computer screen, or on paper, may likely confuse the person unless attempts are made to accommodate their literacy level. Therefore an information system needs to accommodate their disability, such as adopting plain and simple English.

⁵ See comments from Ms Paige, Chief Executive Officer, Queenslanders with Disability Network to the Joint Standing Committee on the National Disability Insurance Scheme, National Disability Insurance Scheme Oversight, Public Hearing, Friday 13 March 2015, Brisbane, at page 27, available online at http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/National_Disability_Insurance_Scheme

Care needs to be taken to ensure that what is represented online is not open to misunderstanding. Information systems need to recognise that a person with intellectual or cognitive disability may not fully comprehend the nature of the information before them (e.g., that it is an opinion or subjective experience only). Therefore an information system needs to be complemented by a face-to-face customer service or community visitor program with independent advocacy support to assist people to understand and navigate any online NDIS system.

[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?](#)

An information system has advantages for those people with disability who are savvy consumers of goods and services.

It appears that the presumption underlying the sharing of 'consumer feedback' in online forums is that participants will have the ability to navigate information systems, share information online, and understand consumer ratings as being an anecdotal means of sharing experiences of services received. While this would work for the mainstream population of persons with disability, the risk is that participants who have intellectual or cognitive disability may place undue reliance upon consumer ratings without fully comprehending the risks entailed.

While such a system may be of assistance to families or carers, persons with moderate to severe intellectual or cognitive disability would:

- struggle to find such a system accessible
- may place more reliance upon the information shared than would other members of the population and
- may not be equipped with the mental ability or skills to rigorously test the validity of information posted on the sites.

There is therefore a high risk that the feedback forums will be open to misinterpretation, or unduly relied upon by those with intellectual or cognitive disability.

There is also a risk that a person with intellectual disability may be unduly pressured by a provider to submit good ratings online. It is well known that people with intellectual disability have a tendency towards being open to suggestion, and are known to acquiesce by confirming statements or agreeing to a suggestion because they believe this is expected of them. People with intellectual disability can be easily influenced by external factors, and may not have the requisite mental skills to weigh the pros and cons of the information received. They may also agree more readily with authority figures (such as parents, carers or service providers), because they want to please or placate people in authority. They are therefore more likely to be influenced by the suggestions of others in positions of 'power' over them. These issues are exacerbated by the challenges of online 'anonymity' or potential for misuse of another person's identity online. All these factors place a person with intellectual disability at significant risk of being 'used' by an unconscionable service provider (or other person) to provide positive ratings and feedback, or alternatively, to

provide false and unsubstantiated negative feedback. It is not clear that the information system has considered or provided safeguards against such misuse or abuse.

The information system proposal appears to assume that the person with disability is, or will become, a 'fully independent consumer'. Such an information system will only be effective for those individuals who: have access to the internet; can navigate their way around a computer and the internet; and are trained in, or supported to, develop basic information technology skills. Even for those who may be trained to develop such skills, persons with moderate to severe intellectual disability will still struggle to navigate, comprehend or use such a system without substantial external support.

Significant work needs to be done to ensure that tools, information and resources are available and accessible for the significant numbers who will be clients of the NDIS and have an intellectual or cognitive disability, without an excessive reliance for accessing such information online.

Recommendation

- *Information, tools and resources need to be culturally, linguistically and user-friendly for persons with intellectual or cognitive disability. Information needs to be accessible to persons: from a variety of different cultural backgrounds, with differing levels of capacity, and ability to develop information technology skills.*
- *Information systems should have safeguards regarding undue influence which may be exerted upon persons with intellectual or cognitive disability to provide false and/or misleading feedback.*

Building participants' capacity

NDIS proposal: *A key developmental safeguard will be to develop and build the capacity of participants for self-direction and self-advocacy to focus on building personal support networks and help people connect with mainstream and community-based supports.*

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

The priority to protect highly vulnerable persons from harm

The framework seeks to 'focus on building individual capacity and natural safeguards', while 'some measures will also be required to prevent harm to people with disability'.⁶ While focusing on the development of natural safeguards for persons with mainstream disability, the framework manifestly fails to provide for appropriate and effective safeguards for those highly vulnerable individuals with severe intellectual, cognitive or mental disability and complex behavioural problems who may only ever develop limited natural safeguards, or not develop them at all.

The framework must recognise the high vulnerability of this cohort as the primary priority. Development of natural safeguards should be a secondary priority. Safeguard measures should be proportional to the needs and vulnerability of the individual person. The focus should primarily be on preventing harm, and the secondary focus upon development of individual capacity and natural safeguards, and not the other way around.

Challenges for persons with impaired capacity in developing self-advocacy or self-direction abilities

It appears that the presumption behind building natural safeguards is that people with disability should be supported to be on a developmental 'continuum' to independent decision making. It appears the underlying philosophy is that all persons with disability will be able to develop and enhance their own 'natural' abilities enabling them to advocate and make decisions 'independently'.

Development of such independence may however, be far more challenging and possibly elusive in practice. It will require the NDIS to provide substantial, life-long support packages to enable self-direction for those with significant and complex intellectual and cognitive disability needs. While funding and support may be provided to develop 'natural' safeguards, the reality is that it will be very challenging for many of these individuals to develop even a rudimentary level of self-advocacy or self-direction, if at all.

The OPG recognises that all persons with disability have an equal right to self-advocate and self-direct. However, not all persons with disability have an equal ability (regardless of supports and skills provided) to do this. Article 12 of the Convention places an obligation on the state to provide support where a person needs assistance to exercise their legal capacity and make decisions that respect their will, preferences and rights.

⁶ National Disability Insurance Scheme, *Consultation Paper: Proposal for a National Disability Insurance Scheme Quality and Safeguarding Framework*, p19

For those with impaired mental capacity who obtain disability support through the NDIS, building these 'natural' safeguards will be an extremely challenging journey. The framework however, does not make it clear "how" the building of their natural safeguards will be achieved. There are significant issues that need to be addressed in the building of such safeguards:

- Will the NDIS provide the substantial funding required for the intensive and expensive supports which will be required for this cohort to address their complex support needs?
- Will timeframes be attached to funding by which time it is assumed the natural safeguards will be built?
- What additional safeguards exist should the natural safeguards fail to be established?
- How will the appropriateness and effectiveness of the person's individual natural safeguards be measured?
- What level of 'independence' is assumed, or sought to be achieved?
- Is it intended that the person should have a goal of full independence or would the ability to make decisions with the substantial and life-long support of others satisfy the building of independent decision-making and advocacy?

A risk is that decision-making and advocacy supports may be withdrawn prematurely when only a rudimentary level of decision-making ability is attained, whereas this cohort will need varying levels of on-going decision-making and advocacy support throughout their lives. Therefore, any safeguards regarding self-advocacy or self-direction should take into consideration the potential life-long need for such supports.

Persons with cognitive or intellectual disability who have impaired communication skills are also at risk of being misinterpreted and misunderstood, and are more vulnerable to risk of abuse, neglect and exploitation. While the framework focuses upon building 'natural' safeguards, it does not address what will happen if a person is never able to develop these natural safeguards and cannot self-advocate or make decisions to protect and promote themselves within the NDIS, regardless of significant funding packages to achieve this goal. These issues are of significant concern for the OPG as it is likely that while the NDIS focuses primarily upon building individual capacity and safeguards, our clients will never achieve the level of sophistication for self-direction and self-advocacy required to build adequate natural safeguards.

Providing appropriate and effective external safeguards while natural safeguards are developed

While development of natural safeguards for people with intellectual or cognitive disability is supported by the OPG, there is real concern that there will be inadequate external safeguards to protect this vulnerable cohort while their natural safeguards are developed. There is a lack of research based evidence regarding what are appropriate and effective ways of developing the skills of those with more severe forms of intellectual disability, challenging behaviours, and severe communication challenges. In addition to the lack of evidence based practice for this cohort, not all persons with intellectual or cognitive disability will have, or develop the ability to reach the level of 'adept independent consumer' or develop natural safeguards as assumed by the framework. Therefore greater clarity is required from the NDIS regarding 'how' safeguards for this cohort are intended to

be developed and what additional safeguards will operate *in the meantime* to ensure that there is robust oversight, protection and safeguarding of this cohort who will struggle or never fully develop adequate 'natural' safeguards.

For those with severe and complex intellectual or cognitive disability for whom developing natural safeguards will be a challenge (or even impossible), strong external and independent protective safeguards are required in proportion to the *needs* and *vulnerability* of the person with disability. While a person with disability has under-developed natural safeguards they are at a heightened risk of abuse or violence. Therefore, while 'natural safeguards' are developed, it is crucial that external safeguards match the vulnerability of the person with disability until they are able to self-advocate and speak out against violence, abuse and neglect.

Need for decision-making support without automatic default to guardianship appointments

Those who are subject to guardianship orders are particularly vulnerable, and it is anticipated that the NDIS will identify many more individuals who have impaired capacity, with no formal guardian or support persons to assist them to make decisions. The automatic default *should not* be appointment of a formal guardian (such as the Public Guardian), but should be upon addressing the advocacy and decision-making support needs of the person. Guardianship appointments should only ever be sought and made as a last resort, and should only be made if there is no other person appropriate and available to assist the person in their decision-making.

The framework should provide for safeguards that assess when a person has impaired capacity and then determines what supports are required to assist them to self-advocate and self-direct their care. A key decision-making support would be to ensure that they have experienced and independent disability advocates available at the assessment stage and ongoing under the NDIS to assist them to navigate the system and disability supports and services for which they will be funded. This would ensure that those who are isolated and do not have family or other support persons involved in their lives are not disadvantaged, as against other persons who have strong advocates to assist them. Safeguards should ensure that supports, such as independent advocates are provided until those natural safeguards are determined to have been established.

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

While the framework acknowledges the social isolation of many of those with disabilities, it is not clear how the NDIS will address situations where a person demonstrates limited ability to develop social relationships, or what happens when those relationships fail.

There is a risk that when people with impaired capacity are identified under the NDIS and have limited or no family or friends to support them, that guardianship appointments will be sought. There is anecdotal evidence from trial sites that suggest there has been an exponential increase in guardianship appointments sought for persons who are identified as having impaired capacity and no appropriate person to assist them in their decision-making. This risk is heightened as persons with impaired capacity are identified as socially isolated with no family or friends to advocate on their behalf.

The majority of existing OPG guardianship clients are physically, psychologically, socially and emotionally isolated from social communities and familial networks. These individuals do not have other persons engaged in their lives who are either appropriate or willing to assist them in decision-making, therefore a guardianship appointment to the Public Guardian is made as a last resort. Isolation is therefore often a central factor in guardianship appointments. These individuals are then at risk of further social isolation if they are placed in residential or institutional settings such as an aged care facility, where they lack support to develop their life skills and interact with peers of their own age or with the local community. Difficulties in developing social relationships may be further complicated by complex personality or behavioural issues.

Developing interpersonal skills requires not only the availability of targeted programs and support services, but also substantial long term funding and investment of personnel and infrastructure. If the NDIS is to support individuals to develop social networks and relationships, then the dearth of appropriate disability focused community accommodation is a critical issues that needs to be addressed. For those that live in residential facilities, including aged care facilities, supports will need to be directed towards developing and maintaining life, behavioural and social skills, as well as providing meaningful engagement in employment, community, and social activities. This however, requires government to provide substantial investment in the community infrastructure, as well substantial funding packages for individuals concerned.

“Building capacity in the Community” – need for formal safeguards for support networks

The OPG supports the development of community support networks and relationships of persons with disability, provided there are adequate safeguards governing the role of voluntary and separately funded organisations who provide support under the NDIS. While the framework promotes the development of personal relationships through engagement with the community there do not appear to be adequate safeguards governing community support networks proposed to be developed by the Local Area Coordinator (LAC).

Under the framework it is proposed that the LAC be responsible for building capacity in the community, through targeted funding of community organisations. It is not clear how ‘separately funded’ organisations will ensure that volunteers or others within the organisation will be vetted to ensure that predators do not use this as an opportunity to identify and prey upon the most vulnerable and isolated, having avoided the scrutiny of a ‘registration’ system for service providers. Safeguards need to be implemented to ensure vetting of all volunteers.

Safeguards should provide guidelines and regulation of decision-making supports

Under the Convention individuals are recognised as interdependent, social and relational beings who carry out decision making within a social and relational context and who need their support networks to be recognised.⁷ Safeguards should reflect and recognise this relational aspect of decision-making in line with the Convention, establishing duties and obligations in the operation of such support. Guidelines, regulation and training should be a

⁷ See Article 12(3) of the Convention. See also J. E. Lord and M. A. Stein, ‘Contingent participation and coercive care: Feminist and communitarian theories of disability and legal capacity’ in B. McSherry and I. Freckleton (eds), *Coercive Care: Rights, law and policy*, London, Routledge, 2013 at p45

requirement for those individuals who will be providing support, whether as carers, clinicians, community members and paid or voluntary support workers who provide disability supports or assistance to persons with disability. For example, training should be required in relation to understanding and navigating communication and language barriers that a person with intellectual or cognitive disability may face, in order to better support the person.

Recommendations

- *The framework should prioritise identification and provision of external safeguards proportional to an individual's vulnerabilities and needs while natural safeguards remain underdeveloped.*
- *Safeguards should provide for recognition that where a person has impaired capacity they have access to experienced independent disability advocates at the assessment stage and ongoing under the NDIS. Guardianship or other substitute decision-making arrangements to assist in decision-making under the NDIS should be matter of absolute last resort.*
- *Significant investment should be provided to fund personnel and social infrastructure (such as appropriate accommodation and housing) to support the development of social relationships for socially isolated persons with disability.*
- *Clarification is required within the framework regarding what safeguards will exist if a person fails to develop the social relationships as proposed under the framework and remains socially isolated.*
- *Safeguards should ensure volunteers in community organisations are vetted as safe to work with persons with disabilities.*
- *Safeguards should reflect and recognise the relational aspect of decision-making and provide clear guidelines regarding duties and obligations required to be met by those providing decision-making and other NDIS funded support.*

Monitoring and oversight

NDIS Proposal: *Measures are required to prevent harm to people with disability, including formal individual safeguards; service level safeguards and system level quality measures.*

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

A vulnerable person should be protected from assuming risk they do not understand

A safeguard system cannot assume that all barriers to accessing disability supports will be broken down by support mechanisms alone. The framework suggests that a level of risk will be assumed by the NDIS participant under their support plan. As discussed above, people with impaired capacity will most likely struggle to fully comprehend the risk that will be imposed upon them under the NDIS let alone contractually negotiate their support arrangements. The framework does not take into account that a substantial proportion of NDIS clients will have intellectual or cognitive disabilities who will not be able to assume this level of risk. Additional service level and system safeguards are required proportionate to the individual needs and vulnerabilities of the person with disability, so that a vulnerable person is protected from assuming risk they do not understand.

This cohort does not fit the category of 'savvy' consumer assumed under the NDIS. The current framework is underpinned by an ideal that all people with disability will become 'consumers' able to: navigate the market based system; recognize abuse or problems; and complain or report the matter to a service provider or appropriate authority. The framework appears to assume that self-regulation of the market will be a sufficient safeguard against abuse within the system. A safeguards and quality system that builds the abilities and capacities of persons with disability must therefore be sufficiently flexible to being scaled up or down dependent upon an individual's needs or risk factors.

Quality supports recognise and address the vulnerability of disabled persons to abuse

A person being harmed may not be able to report abuse, or be in a position to report abuse. Support providers and family members need to be aware of, and recognise the signs of persons who are at risk of, or are being abused, and have systems to address suspicions of abuse internally, as well as to the police directly where a criminal offence is suspected.

While abuse may be perpetrated by a carer or service provider, in a residential or institutional context persons with disability are just as vulnerable to violence or abuse from other members of the residence as they are from a carer. Early intervention and prevention mechanisms should be in place in the service to ensure identification of risk factors and prevent abuse from happening. It is the responsibility of the service provider in the first instance, to recognize, respond, report and record cases of violence, abuse and neglect. All care and support staff within residential and institutional settings should have a professional and legislatively obligated responsibility to speak out and report suspected abuse. Service agreements and the development of national quality and safety standards should have 'zero tolerance' towards violence, abuse and neglect, ensuring that staff address issues of abuse by carers, as well as ensuring residents in the institution or residential care service are safe from violence and abuse from other residents. Reporting of abuse should be encouraged so

that staff do not remain silent, and are ensured that reporting will be taken seriously and addressed through the appropriate channels. Without agreed national standards, there is ongoing risk of inconsistent approaches across services in every state towards violence, abuse and neglect across services, leaving staff to develop their own informal thresholds of what is considered to be violence, abuse or neglect.

Investment in building service provider capacity, particularly in regional, rural and remote areas

The provision of high quality supports also presupposes that: expertise and personnel capacity of service providers has been developed in urban, regional, rural and remote areas; there is availability and funding of support required; there is appropriate and efficient oversight, scrutiny, transparency and accountability of support provided; and support outcomes are measureable, evaluated and achieved.

Providers need support to build expertise and personnel in areas where there are existing service delivery gaps. Government needs to invest in infrastructure, training and in building the capacity of service providers, particularly in rural and remote locations where there are current gaps in services, most notably in delivery of specialist disability care. If the gaps in service delivery persist, there will be no 'real choice' (or possibly no service at all) available to persons with disability and a real risk of abuse or neglect in situations where service delivery is withdrawn or fails.

Service level safeguards should be subject to robust audit, investigation and oversight powers

In order to ensure providers are suitable to provide supports under the NDIS government should have an on-going role in ensuring relevant laws and national standards are complied with, and the human rights of the person with disability are protected. Where there is heightened vulnerability (such as in the cases of persons with impaired capacity), it is essential that the government assumes a proportionate increase in responsibility to oversee service level safeguards to ensure that supports or other mechanisms relating to the person are appropriate, effective, and individually tailored to each person's needs.

External system level government safeguards, such as independent visiting programs and judicial oversight are essential to ensure that supports are provided which are free from abuse, conflict of interest or undue influence upon the person being supported. Where supports include the use of restrictive practices, it is essential that safeguards are closely regulated and transparent, apply for the shortest time possible and are subject to regular external, independent judicial review. Without appropriate external oversight, there is significant risk that vulnerable persons (such as those with impaired capacity) will not be adequately protected from abuse, neglect or exploitation.

Safeguards for crisis care

Anecdotal evidence suggests that some accommodation service providers are holding back (or even refusing) provision of accommodation to some high needs clients on the basis that such services may not continue to be fully funded under the NDIS.

If, and when, a disability service provider folds or fails, people with disability supports will still need to be provided with alternative emergency or interim service provision to meet their daily support and care needs. Circumstances may also arise in which service providers are unable to provide the service funded, or may withdraw delivery of disability support services. While in urban areas it may be less difficult to find interim or emergency crisis care while alternative support arrangements are made, the critical nature of these situations are exacerbated in regional, rural and remote regions.

It is not clear under the framework who will fulfil the responsibility of addressing interim or emergency crisis care. Will the NDIA step in to ensure emergency support is provided? Will it fall to the responsibility of the state to provide disability support in the home, or will persons needing high level care have to be placed in health facilities until alternative arrangements are made? There are serious concerns that the framework does not address support responsibilities where providers are no longer able to provide disability support and the person with disability has care withdrawn. The government needs to plan for crisis care so that these persons are not left without support, particularly where high levels of daily support are required.

Should there be an independent oversight body for the NDIS?

Need for an independent oversight body

It is essential that there is an independent oversight body for the NDIS, responsible for overseeing both the National Disability Insurance Agency (NDIA) and providers of disability supports and services. This body should be an appropriately designed oversight body which is aligned with a disability model for care and support.

A national quality framework should safeguard people with disability by addressing both the personal and systemic barriers that people with mental disability face to full participation in society. This includes recognising that government has the responsibility for breaking down systemic barriers through robust oversight, monitoring and enforcement of safeguards, particularly for the most vulnerable. An independent, impartial oversight body could provide a means of fair and equitable access to justice, which may not otherwise be seen to be provided if the NDIA alone were responsible for investigating the service or itself.

Independent and impartial oversight can also assist in securing and maintaining public trust in the NDIS, and highlight shortcomings in internal regulation both in the NDIA and in service and support providers.

What functions and powers should an oversight body have?

Role of oversight body

The oversight body should have a physical presence in every jurisdiction. It should have power to receive complaints from anyone regarding any matter relating to the operation of the NDIS, and be empowered to consider, investigate matters and take remedial action. A full range of powers should be provided to the oversight body to direct the NDIA or service provider to rectify a situation, award damages, remove inappropriate service providers or

nullify contractual arrangements under the NDIS. The oversight body should have a role of independent monitoring and assessment not only of the NDIS market, but also of the appropriateness and effectiveness of the disability supports provided, including whether the rights of the person with disability are protected.

While under the proposed framework it is envisaged that the NDIA will oversee the operation of the NDIS, this oversight body should provide robust and independent oversight of the NDIA and operation of the service and support providers under the NDIS. The body should be focused upon protecting the rights and interests of persons with disabilities who require 'reasonable and necessary' supports under the NDIS. It is inappropriate to have a consumer protection agency as a model for safeguards for disability services, and therefore the model for the oversight body should be consistent with a disability model of support and care. While consumer protection law may be appropriate for items such as 'aids and equipment', it is grossly inappropriate to compare purchasing or consuming of a faulty or unsafe product and services, or unfair treatment from businesses, with the provision of essential disability services required for a person to exercise their fundamental human right to participate in society and live independently. The oversight body must be especially equipped and tailored to deal with and relate to those individuals who are intellectually or cognitively impaired, or do not have mainstream contractual making skills.

Persons with impaired capacity need a strong protective framework to oversee the provision of disability supports and ensure that supports: meet their objectives, are free from abuse; and the person's rights are protected. While service providers have primary responsibility for ensuring that the disability supports meet their intended goals under the NDIS, an independent oversight body should be legislatively empowered with a pro-active, inquisitorial, audit-like role to oversee support provision.

An oversight body could ensure that:

- supports provided are reasonable and necessary and meet the person's needs
- internal safeguards or restrictive practices are proportional to the person's vulnerability and situation and
- delivery of supports are free from abuse, conflict of interest or undue influence.

An independent oversight body should as a minimum:

- Function on the basis of statutory law and report to Parliament and the relevant minister directly
- Be accorded with quasi-judicial powers so that they can undertake investigations and site visits at their own initiative and institute, where necessary, proceedings in court
- Have the status and mandate to make binding orders: for the NDIA or service providers to take remedial action; award damages; remove inappropriate service providers; nullify adverse contractual arrangements
- Have access to confidential information to enable them to carry out their mandate (e.g., cases of abuse, violence or neglect), in addition to materials accessible through freedom of information policies

- Have clear procedures for the registration, investigation and processing of complaints, including special procedures with respect to communicating with, and investigating complaints from persons with impaired capacity
- Collect and publicly publish data and reports on complaints, abuse, neglect and exploitation, misconduct and outcomes of investigations

Additional mechanisms, such as pro-active and relational community visitor programs and independent advocacy are also key to ensuring accountability and integrity in the delivery of support services.

It is possible that the oversight function could be carried out by either a Commonwealth Disability Ombudsman, (or similar independent statutory officer) or operate through a state based oversight body. The advantage of a Commonwealth Disability Ombudsman is that there would be greater consistency in oversight decisions than through a fragmented and regionalised state based system. However, any Commonwealth oversight body must have physically based state and territory representation to ensure that the system is physically accessible.

Complaints handling

The oversight body should be responsible for ensuring complaints systems within services and the NDIA are properly managed and overseen, and ensure administrative decisions made by the NDIA, including the registrations of persons or services and assessments of support, are able to be independently and fairly reviewed.

The oversight body should have legislative power to ensure that the human rights of persons with disability are protected. It should be based upon disability principles under the Convention and not 'consumer' related principles, such as under consumer protection law. Consumable goods are of an entirely different nature or classification to disability supports and services. Disability supports under the NDIS will be 'reasonable and *necessary*' supports required by the person in order for them to participate in society. These supports are essential for living. Failure to provide a disability service can be critical to the health, welfare and care of the person concerned. While complaints mechanisms should operate within services and the NDIA, there should therefore be mechanisms by which persons can appeal to an independent body outside of those organisations, which has disability expertise and is based upon disability and human rights principles. Complaints should be able to be externally reviewed and resolved impartially, independently, free from allegations of conflict of interest or undue influence from within a disability related context.

Serious incident reporting

Both children and adults with disabilities in all settings are at high risk of serious incidents occurring,⁸ such as abuse, neglect, exploitation, death or serious injury. Independent oversight is needed to ensure service providers under the NDIS are accountable for ensuring

⁸ Jones, L., Bellis, M.A., Wood, S., Hughes, K., McCoy, E., Eckley, L.,... Officer, A., (2012). "Prevalence and risk of violence against children with disabilities: A systematic review and meta-analysis of observational studies", *Lancet*, 380, 899-907 at 906

early intervention, and prevention of violence, abuse and neglect in all settings of disability care, whether in institutional, residential or home settings.

Serious or 'critical' incidents threaten the safety of people or property. For transparency and accountability, the first response to critical incidents should be managed internally, and also reported directly to an independent body for oversight of: how the critical incident is handled, what lessons are learned, and procedural changes made to ensure the critical incident does not recur. Appropriate and effective responses to serious incidents, (such as abuse or injury) need to recognise that the risk of violence and abuse towards persons with disability occurs in all service and support settings⁹ and may not always be 'reported'. People with disability should be able to feel 'safe' from violence, abuse or neglect regardless of where they live, and whom they receive support and care from.

While the framework recognises that serious or critical incidents may occur, the concern is that the framework is reliant upon such incidents being 'reported'. It does not address the situations where such incidents may not be reported, particularly by vulnerable persons with impaired capacity who are at risk of abuse or violence. The prevalence and seriousness of these matters mean that reporting serious incidents should be a mandated responsibility of the service provider, and an oversight body should be empowered to pro-actively and reactively investigate allegations of abuse, neglect or exploitation and publicly report on critical incidents and allegations.

Ensuring vulnerable persons are protected from abuse and supported

Research suggests persons with disability, both adults and children, are at a higher risk of violence and abuse than their non-disabled peers.¹⁰ Children with disability, often have increased layers of protection available to protect against a risk of abuse or report abuse, particularly where there are mandatory requirements to report acts or risks of significant harm to children. However, children with disability still remain at a greater risk of violence being perpetrated against them than their peers without disability. The WHO Department of Violence and Injury Prevention and Disability recently reviewed the prevalence and risk of violence against children with disabilities and found that up to a quarter of children with disabilities will experience violence within their lifetimes, and are three to four times more likely to be victims of violence than their peers without disability.¹¹

It is the responsibility of the government to ensure that the rights and interests of its citizens are protected. This is critical when those citizens are highly vulnerable to abuse and violence. Service providers should be responsible for ensuring their services uphold and protect the person's rights. However it is also the state's responsibility to ensure these rights are enshrined in law, protected, monitored and enforced. Under Article 16 of the

⁹ Cambridge, P., Beadle-Brown, J., Milne, A., Mansell, J., & Whelton, B. (2011) "Patterns of risk in adult protection referrals for sexual abuse and people with intellectual disability", *Journal of applied research in intellectual disabilities*, 24(2), 118-132 at 125

¹⁰ See Hughes, K., Bellis, M.A., Jones, L., Wood, S., Bates, G., Eckley, L.,... Officer, A., (2012) "Prevalence and risk of violence against adults with disabilities: A systematic review and meta-analysis of observational studies", *Lancet*, 379, 1621-1629; and Jones, L., Bellis, M.A., Wood, S., Hughes, K., McCoy, E., Eckley, L.,... Officer, A., (2012). "Prevalence and risk of violence against children with disabilities: A systematic review and meta-analysis of observational studies", *Lancet*, 380, 899-907

¹¹ Jones, L., Bellis, M.A., Wood, S., Hughes, K., McCoy, E., Eckley, L.,... Officer, A., (2012). "Prevalence and risk of violence against children with disabilities: A systematic review and meta-analysis of observational studies", *Lancet*, 380, 899-907

Convention, the State is responsible for taking ‘*all appropriate legislative, administrative, social, educational and other measures*’ to protect persons with disabilities from exploitation, violence and abuse. Legislation should be enacted that confirms Australia’s commitment to the Convention and prescribes Government’s role of ensuring appropriate measures are in place to prevent, investigate potential risk of abuse, report serious incidents and ensure appropriate post-abuse support is provided to foster the health, welfare and well-being of the person with disability, appropriate to their age, culture and gender.

While not all persons with disability will need the same level of protection, there is an obligation on the government to ensure that safeguards are proportional to the vulnerability of the individual, particularly where they need substantial (and in some cases ‘total’) support to manage their own NDIS plans. This is crucial to safeguard highly vulnerable persons such as those with impaired capacity. There should be legislative power vested in the independent oversight body to enable protection from neglect, exploitation or abuse, and empower the oversight body to investigate any complaint or allegation that a person with disability is being, or has been neglected, exploited or abused.

The oversight body should also have systems oversight, with robust powers of inquiry, investigation and oversight of the NDIA and service providers. Individuals with complex and severe intellectual, mental or cognitive disability are often unable or restricted in their ability to develop skills, including skills to recognise and report abuse. The oversight body should ensure the human rights of the person concerned are protected and the person with disability is appropriately supported in the aftermath of a critical incident.

Investigative powers

The oversight body should be empowered to investigate and resolve individual complaints that are unable to be resolved with the provider in first instance, and be adequately empowered to direct the NDIA or service provider to remedy the situation. The body could be invested with robust investigative powers, including the power to require production of records and accounts; provide access to any relevant information, including medical files and the ability to issue a summons to a person requiring them to provide information.

An investigation could identify the level of risk for the vulnerable person and the action needed to best protect them. Investigations could gather evidence to find out whether the allegations can be substantiated on the balance of probabilities. Where possible, allegations should be resolved informally, however where a criminal offence is reasonably suspected to have occurred, the matter should be referred to the police. Where relevant, matters could also be referred to an independent judicial body to review a contested administrative decision made by the NDIA. The oversight body should also have power to investigate and review the death of a person to whom specialist disability supports are provided in a residential care setting.

It is essential that the oversight body is also empowered to address potentially abusive cultures in organizations and services, and identify and address issues related to a

breakdown in care relationships. Investigation of critical incidents should be conducted separately and independently from the registering body (the NDIA) to afford greater natural justice to the service provider being investigated and transparency within the process. Recommendations or orders could be made by the independent body to the NDIA regarding on-going registration issues which may arise as a result of the investigation.

Safeguards for participants who manage their own plans

Where a participant with impaired capacity manages their own plan with assistance, there are proportional and individually tailored safeguards to audit or review the plans. Such safeguards should ensure that the person's choices and management are free from undue influence and conflict of interest (financial, emotional or otherwise) from those providing support to the person. Periodic audits, regular and irregular reviews would ensure the decision-making supports provided to the person continue to be appropriate to their needs and effective, and that the management of the plan reflects the person's will, preferences and that their rights are protected.

Recommendations

- *Service level and system safeguards are required that are:*
 - *proportionate to the individual needs and vulnerabilities of the person*
 - *flexible to being scaled up or down dependent upon development of natural safeguards*
 - *recognise and address vulnerability of disabled persons to abuse, violence and neglect*
 - *protect vulnerable persons from assuming risk they do not comprehend*
- *The framework should provide mechanisms for:*
 - *support providers and family members to be supported to be aware of, and recognise the signs of persons who are at risk of abuse, or are being abused, and*
 - *have systems to address suspicions of abuse, as well as referred to the police directly where a criminal offence is suspected*
 - *early intervention and prevention mechanisms to ensure identification of risk factors and prevent abuse*
- *National quality and safety standards should be developed with 'zero tolerance' towards violence, abuse and neglect*
- *Investment should be made in infrastructure, and building service provider capacity in regional, rural and remote locations, particularly where there are existing gaps in services such as in the delivery of specialist disability care*
- *System and service level safeguards should be included in the framework to provide robust audit, investigation and oversight powers*
- *External system level government safeguards, such as independent visiting programs and judicial oversight should be a central element within the framework to ensure that supports are provided which are free from abuse, conflict of interest or undue influence*

upon the person being supported, to protect the person's rights, and protect against violence, abuse, neglect and exploitation.

- *Safeguards for emergency and crisis care should be included as critical elements of the safeguarding framework, so that persons with high support needs are not left without support when a service provider is unable to continue to provide essential support or care.*
- *There must be an independent oversight body for the NDIS with a physical presence in all NDIS jurisdictions, responsible for overseeing both the National Disability Insurance Agency (NDIA) and providers of disability supports and services. This body should be an appropriately designed oversight body which is aligned with a disability model of care and support.*
- *An independent oversight body should:*
 - *be legislatively empowered with a pro-active and re-active, inquisitorial, audit-like role to oversee support provision*
 - *protect a person's rights and protect against abuse, neglect or exploitation*
 - *receive complaints from anyone regarding any matter relating to the operation of the NDIS,*
 - *be empowered to take remedial action to rectify a situation, award damages, remove inappropriate service providers or nullify contractual arrangements under the NDIS, and*
 - *publicly report on critical incidents and allegations.*
- *Reporting serious incidents should be a legislatively mandated responsibility of the service provider*
- *Service providers should be obligated to provide post-abuse support where a person is found to have been abused, neglected or exploited while under their care and support*

NDIA Provider Registration

NDIS Proposal: *The framework states that the aims of the registration system for the NDIS are twofold. Firstly, it aims to support the participant through supporting the “goal of choice and control for participants, including confidence that the providers that they choose are safe and competent”. Secondly, the framework aims to ‘minimise the red tape burden on providers, including the elimination of unnecessary duplication of quality, compliance and reporting systems’.*

Considering the options 1-4, which option would provide the best assurance for providers and participants?

Options 1 and 2

An easy registration process with basic registration requirements (Option 1) or additional registration conditions (Option 2) will make it easy to quickly enter into the NDIS and commence operation, and might be favoured as a quick and easy process by providers. However, it is precisely for this reason that both Option 1 and 2 are inappropriate.

It would be reckless for the NDIS to have a system that enables swift entry (and therefore also swift exit) of the ‘disability service provider market’. While it may encourage the registration of some good operators, it will also attract unreliable operators who will commence operation, and then due to a multiplicity of factors, enable them to quickly fold their business operations and leave the market. Quick entry may also lead to inadequate business planning and development, and poor or hurried recruitment. This can lead to failure to develop an appropriate service delivery model and expose persons with disability to high risk of abuse or neglect. De-registration after abuse or neglect has been identified is ‘too little, too late’. Inadequate and hasty registration processes could lead to serious and adverse (possibly irreversible) outcomes for persons with disability and their families/carers, and negatively impact upon the reputation of the NDIS.

History has shown that self-regulation of quick start schemes are doomed to fail, or result in sub-standard service provision. The recent debacle regarding registration of training organisations in Australia highlights the significant risk of allowing organisations to be registered without rigorous initial and ongoing scrutiny. Failure to regulate the vocational and education training standards in Australia effectively led to the demise of the international student market and seriously damaged Australia’s international reputation in this field. The outcome of this fiasco led to recognition of the need for tighter regulation and registration requirements. Registration should require close scrutiny by the NDIA to ensure that persons employed in the service provider have practical knowledge and experience of disability and support needs, and are appropriately trained and vetted.

While there are many high quality disability service providers, the risk of an easy registration process for service providers leads to a significant (and unacceptable) risk that the door will be opened wide to unreliable operators quickly entering and exiting the system without responsibility or penalty. Unconscionable operators may also be driven by business decisions that place profit before the quality of service delivery, with potentially callous

disregard for persons with disability who are dependent upon their services. This risks leaving people with disability stranded with no, or sub-standard, services and no real recourse to justice when the operation folds, fails or withdraws its services for 'business reasons'. Failure of unreliable and dodgy registered service providers will only tarnish the NDIS, and lead to distrust by the community and persons with disability in the provision of disability services under the NDIS.

Options 3 and 4

Registration under Option 3 is dependent upon participants' experiences of the supports they receive. While quality evaluations would be undertaken by an independent evaluator, the requirement to undertake the evaluation would be dependent upon the nature of the service provided, and not the vulnerability of the individual. The focus of Option 3 is upon enabling the participant to have access to 'independent outcomes-based quality based information to help them make choices', but does not exclude poor quality providers from the available options.

Option 3 assumes that all persons with disability are able to equally weigh the pros and cons of various providers. It does not take into consideration that persons with impaired capacity may need substantial decision-making support (even total support) to determine whether a provider is appropriate or not. It also assumes that if the person is supported by family or a carer to make these decisions, that these family members are also savvy 'consumers', which is often not the case.

Further, option 3 allows sub-standard operators to continue in the market. This option results in a lowest common denominator model for the NDIS, and exposes vulnerable persons such as persons with impaired capacity with high support needs to an unacceptable risk of sub-standard care. Option 3 fails to provide sufficient identification, scrutiny and regulation of poor service providers and is not supported by the OPG as an appropriate model for registration of service providers.

Only Option 4 provides a level of appropriate registration and regulation of the market through quality assurance/industry based certification, where providers who fail to meet industry based standards would be excluded. While it is recognised that this may reduce the choice available to participants, it is considered less risky than allowing sub-standard operators to proliferate and continue operation, placing vulnerable persons at risk of sub-standard care and support, and abuse and neglect. The only appropriate system of registration is one that provides external rigour with respect to the establishment of the organisation, training and experience of staffing, and where the NDIA establishes industry wide standards that must be met and maintained in order to be registered as a service provider.

Minimum industry wide standards pre-suppose that anything less than those standards is not satisfactory. Organisations that fail to meet such standards should not be funded by tax payers to deliver below par services that will fail to appropriately and effectively deliver the outcomes intended under a participant's plan. Rigorous registration requirements should

provide greater security for persons with impaired capacity who may struggle to fully understand the level of risk that they are to assume under a less rigorous registration system. Anything less than mandated participation in an external quality assurance system would be an insufficient safeguard for vulnerable persons with moderate to severe intellectual and cognitive disabilities, particularly those under guardianship orders.

Cross sector registration

What is not clear from the framework is what will happen if a service provider operates across different sectors which both require registration. Will there be separate standards required to be supplied and who will be responsible for oversight? Clarification is needed within the framework regarding how these safeguards will operate in conjunction with other quality and safeguard frameworks, such as in health and mental health fields.

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

Services that require more direct 'staff-participant contact' or which lack supervision such as personal care support, respite or supported residential services should be automatically be required to participate in a quality assessment. Registration of other services (including mainstream services providing support services under the NDIS) should be dependent upon the level of vulnerability of the person with disability. Mainstream services, such as household supports or taxi services can be a risk to the most vulnerable members of the population, particularly where such supports have no external supervision, or where the vulnerable person may be alone with the mainstream support service (e.g., transportation by taxi). There was extensive media coverage in 2014 of two separate high profile cases where taxi drivers (in Western Australia and New South Wales) were charged with sexual abuse of a disabled person for whom they were hired to provide regular transport. These cases highlight that the risk lies not with so much with the nature of service, but with the vulnerability of the person, and their ability to choose, manage and speak out regarding potential concerns, and critically, their ability to speak out if they are at risk of abuse, exploitation or neglect.

Safeguards should be proportional to the vulnerability and support needs of the person, and tailored to their individual needs. If the NDIS is focused upon providing choice and control to the person with disability, the approach towards registration should be focused not only the nature of the service provided, but where persons are identified as vulnerable and at risk, additional registration should be required for those mainstream services that are funded by the NDIS to provide support to persons with disability, no matter what the service. Therefore assessments should be made whether, for example, a gardening service or taxi service poses heightened risk of abuse to a vulnerable person (such as a person with impaired capacity and complex behavioural or health needs) who lives or travels on their own and is funded by the NDIS for regular supports by the mainstream provider.

Registration and de-registration of individuals seeking to work with vulnerable persons should be legislatively mandated, rigorous and of the highest quality and standard, to ensure the vetting and barring of persons from employment or volunteer support of

persons who may be a risk to those needing disability services or supports. Vetting should likewise be proportional to the vulnerability and needs of the person with disability. Registration processes should include ensuring criminal background checks (including spent convictions) are conducted on prospective employees and where support services are regularly required from mainstream services for vulnerable persons, criminal background checks and registration should be an additional requirement. Mechanisms should be provided so that if persons are unable to meet or continue to meet the required standards for compulsory working with disabled persons' checks, they are no longer able to be employed in the disability industry.

The NDIA should be legislatively empowered to de-register and enforce penalties against providers or community organisations that fail to reasonably protect persons with disability from violence, abuse and neglect to whom they are providing disability support. The NDIA should also be empowered to de-register service providers where they fail to provide services or meet minimum standards, and prohibit individuals in management of that service provider for engaging in service provision for disabled persons for a period of 5 years or more.

[How can the right balance be reached between providing assurance and letting people make their own choices?](#)

The NDIS is predicated upon people making their own choices and is based upon enabling persons with disability to assume the risks of the decisions and choices that they make. It is recognised that historically, people with intellectual, cognitive or psychosocial disabilities have been placed under substitute decision-making arrangements and denied the chance to learn decision-making skills, justified by a philosophy of protectionism that enables others to make decisions on their behalf in their 'best interests'.¹² It is also acknowledged that the ability to make one's own choices (and therefore assume risk) is a crucial component in decision-making. A support model, with appropriate and effective safeguards should ensure that adequate and appropriate assistance and information is provided to the person, so that they are aware of their responsibilities and the implications of their choices and to protect against abuse or exploitation in the process.

However, while all people have the same right to make decisions regardless of whether they have a disability or not,¹³ not all persons with disability have the same ability to choose, or assume decision-making risk. Where people have impaired decision-making abilities, they should be supported in exercising their right to make their own decisions as far as possible.¹⁴ However, it is essential that the framework recognise that some people, albeit possibly a small cohort with impaired capacity may never be able to assume 'the full risk' of decisions to be made. This cohort will require substantial funding and support packages to develop decision-making skills, which may require life-long support to exercise. While they are

¹² see P. Gooding, 'Supported Decision-Making: A Rights-Based Disability Concept and its Implications for Mental Health Law', *Journal of Psychiatry, Psychology and Law*, 20:3 (2013), 431-451, at 436

¹³ See Article 12 of the Convention

¹⁴ *Ibid.*, ALRC Report 124 at 44; see also P. Gooding, 'Supported Decision-Making: A Rights-Based Disability Concept and its Implications for Mental Health Law', *Journal of Psychiatry, Psychology and Law*, 20:3 (2013), 431-451, at 436

unable to assume and comprehend the risks associated with their decisions, strong protections and safeguards are still required.

There are significant problems with respect to how the principle of participant choice manifests itself when it involves persons with severe intellectual or cognitive disability who may require significant, if not 'total' decision-making support in order to be able to make decisions, such as those with impaired capacity. While every human being has the fundamental right to make their own decisions, the practice of assisting someone with severe intellectual disability, coupled with their often complex behavioural issues is a far more complicated and costly process than expressed in the simplicity of the 'principle of choice'. While the NDIS is predicated upon the philosophy that people will be able to exercise choice and live independently, the framework omits to address how this will operate in practice regarding persons with severe intellectual, cognitive or psychosocial disability who often have complex personality and behavioural challenges and difficult life circumstances. The real risk is that a severely intellectually or cognitively disabled person is far less likely to live independently, make their own choices and assume decision-making risk as other persons with mainstream disability, because of the extremely high cost of the substantial funding package that this would require.

A person with impaired decision-making ability, such as person under a guardianship order is not able to fully comprehend and therefore fully assume decision-making risk. As a society, we have a social and moral obligation to assist and safeguard persons with impaired capacity¹⁵ particularly where they are vulnerable to abuse or exploitation. While people with disability should be enabled to make decisions and exercise choice and be supported to develop those skills, until those skills are developed the principle of 'choice' should not extend to abandoning highly vulnerable people to risky situations.

Therefore where specific decision-making vulnerabilities are identified, (such as a person with intellectual, cognitive or psychosocial disability), the state should assume risk which is proportionate to the intellectual or cognitive impairment, needs and vulnerabilities of the individual. In such circumstances all supports (including mainstream services used by vulnerable persons) should satisfy the registration requirements, meet minimum safety and quality standards, and be externally determined as appropriate and effective for the purpose. The NDIS would be negligent to assume that persons with impaired decision-making capacity can assume all, or even substantial risk. The NDIS therefore cannot abrogate its responsibility to safeguard against risk of abuse, neglect, exploitation, conflict of interest or undue influence in the support relationships which it funds.

It is also of concern that the framework does not deal with what happens when decision-making goes 'wrong'. Invariably, it is the person's family or carers who are left with the outcome of poor decision-making. In the case of people with impaired capacity with no family or carers, this responsibility will invariably fall to Government. Therefore, an appropriate balance needs to be found to ensure that all people with disability (particularly those with impaired decision-making capacity) are supported to the extent of their decision-

¹⁵ G. Richardson, 'Mental Disabilities and the Law: From Substitute to Supported Decision-Making?' *Current Legal Problems*, Vol.65 (2012), 333-354 at 340

making needs, to enable the best possible outcome for the person and to safeguard as far as possible against negative outcomes.

Recommendations

- *Option 4 provides the only appropriate option to provide assurance for participants and their families, and ensure appropriate regulation and setting of standards for service providers.*
- *Registration should be of the highest quality standard, and require minimum industry agreed standards to be met in order to obtain and maintain registration.*
- *Service providers who fail to meet industry based standards should not be registered or be de-registered.*
- *The NDIA should be empowered to de-register service providers where they fail to provide services or meet minimum standards, and prohibit individuals in management of that service provider from engaging in disability service provision for a period of 5 years or more.*
- *Clarification is required under the framework regarding how these safeguards will operate in conjunction with other quality and safeguard frameworks, such as in health and mental health fields.*
- *Services that require more direct 'staff-participant contact' or which lack supervision such as personal care support, respite or supported residential services should be automatically required to participate in a quality assessment*
- *Registration of services (including mainstream services providing support services under the NDIS) should be dependent upon the level of vulnerability and needs of the person with disability.*
- *Registration and de-registration of individuals working with vulnerable persons should be legislatively mandated, rigorous and of the highest quality and standard, to ensure the vetting and barring of persons from employment or volunteer support of persons who pose a risk to persons with disability.*
- *Mechanisms should be provided so that if persons are unable to meet or continue to meet the required standards for compulsory working with disabled persons' checks, they should not be able to be employed in the disability industry.*
- *Registration processes for all prospective employees and volunteers should include criminal background checks (including spent convictions) regardless of the level or nature of service to be provided.*
- *The NDIA should be legislatively empowered to de-register and enforce penalties against providers or community organisations that fail to reasonably protect persons with disability from violence, abuse and neglect to whom they are providing disability support or related services.*
- *Safeguards should ensure that adequate and appropriate decision-making assistance and information is provided to the person so that they are aware of their responsibilities and the implications of personal choices made under the NDIS and protect against abuse or exploitation in the process.*

- *Safeguards should be provided to address situations where the assumption of risk by the person with disability leads to adverse outcomes.*

Systems for handling complaints

NDIS Proposal: *Under the NDIS the disability sector will transition to a more market-based model and complaints will be a part of a consumer-driven system. Complaints can be dissatisfaction with a decision, service or product.*

Explicitly addressing the needs of persons with impaired capacity

Persons with impaired capacity often face multiple barriers within existing frameworks and systems regarding acceptance of, identification and resolution of complaints. The Office of the Public Advocate Queensland has identified¹⁶ that members of this group may experience:

- lack of meaningful access to complaints mechanisms
- not being afforded fair and equal hearing during the complaint making process
- not being responded to with sufficient flexibility
- not having access to sufficiently resourced complaints management systems
- 'resolution of their issues to reasonable satisfaction' has a lesser priority than using complaints data for systems improvement

A complaints system should be accessible to persons with impaired capacity. While it is positive that the NDIS will focus service providers upon the individual needs and goals of the person with disability, a problem with the market-driven system is its inaccessibility to vulnerable persons with impaired capacity. Without adequate support to navigate the contractual complexities of the NDIS, the idea of an accessible complaints systems focused upon 'customer satisfaction' and 'service provision' in the marketplace will be meaningless to this cohort. There is also a risk that the more difficult a client is (particularly those with complex behavioural needs) who also complain, may be viewed from a business perspective as too difficult to provide service to. The result may be services are withdrawn, with the risk that no service provider is then willing or able to take the person on, and the person (with high and complex needs) is unable to receive disability support.

Persons with impaired capacity have historically faced significant barriers to offering feedback or providing complaints, having been disadvantaged by limited or prejudiced notions surrounding credibility of their claims, or an inability to provide appropriate 'evidence' to substantiate their complaints. Regardless of the availability and diversity of mechanisms intended to support access, a complaints systems needs to be predicated upon the recognition that many persons with impaired capacity will struggle to either express, or navigate any complaints mechanisms, and will need substantial proactive support to do so.

¹⁶ The Office of the Public Advocate Queensland, Systems Advocacy, *Strengthening voice: A Scoping Paper about complaints management systems for adults with impaired capacity* at <http://www.justice.qld.gov.au/justice-services/guardianship/public-advocate/our-publications> accessed 20 April 2015.

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

Complaints regarding NDIS supports should in the first instance be handled at their source. Where a person has a complaint with the service provider or NDIA, there should be internal complaint systems within these organisations that are accessible, fair, responsive and efficient. It is important that should these complaints fail to be resolved at the internal level, that there is an external body to which the complaint may be escalated and resolved.

While there should be an independent and external complaints system, it is essential that this independent complaints system has clear representation and presence at the local and regional level in each State and Territory. It is crucial that such a system is not reliant only upon web based complaints systems, but has personal representatives able to meet with and provide an accessible and responsive complaints system face-to-face. This will assist in overcoming systemic barriers which people with impaired decision-making capacity have traditionally faced, and who may likewise struggle with navigating an online based complaints system.

There may be circumstances in which complaints could be made directly to the independent complaints agency. Specialist independent complaints agencies can provide important channels for persons with disabilities to file complaints regarding service providers, abuse, neglect, undue influence or misconduct by personnel without fear, ensuring that their matter receives a prompt and proper independent and unbiased investigation. An external complaints mechanism has the ability to provide greater accountability in the sector; enhance community trust in the NDIS; and encourage victims of abuse, neglect or exploitation to speak out. Such an organisation however, should be sufficiently resourced, and legislatively empowered to take action on serious issues that arise from complaints investigations.

An independent complaints body could enable poor service to be reviewed, or investigate neglect or failure to provide services as funded under the NDIS. Such a body should be mandated to provide independent reports upon complaints, including issues of abuse, neglect or exploitation by service providers. It could also assist in providing compliance reports, and general information regarding organisational performance (for example, average days taken to finalise complaints and investigations, percentage of complaints resolved, number of cases substantiated, or de-registrations or prosecutions recommended).

An external complaints mechanisms should be legislatively mandated and provide legislative protection for those who complain or whistle-blow. The person with disability receiving support, families, carers, visitors, or staff of service providers or staff within the NDIA should be safe to report issues or make complaints. There should be appropriate legislative, policy and procedural protections in place to reduce and eliminate fear of retribution or reprisal. The framework should provide safeguards that address the fear that no services will be available to the person with disability, should a complaint be made.

Where a person's support needs are high and complex there are already limited service providers available, particularly in regional, rural or remote areas. In such circumstances, the threat that no other support will be available is a real and genuine fear should a complaint be made. Therefore any independent oversight or investigative complaints body needs the ability to direct a localised response plan that places responsibility upon service providers or another designated body to provide emergency or interim arrangements to meet the person's needs while other more permanent arrangements are made, particularly where there are allegations of abuse.

[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?](#)

An NDIS complaints system should apply to all funded supports. While the NDIS is responsible for funding supports, they should also be responsible for complaints systems governing all such funded supports.

The NDIS is already a complex system, and to separate 'disability-related' support complaints from other funded supports would be a logistical and complex nightmare for consumers to navigate. It would create a systems gap and confusion amongst consumers as to the right agency or avenue by which to complain about different supports. It could also lead to disability related complaints being resolved in an accessible, fair, responsive and efficient manner, while other (non-disability) complaints would not have the same recourse to justice and the ability to have issues resolved.

With respect to disability services that are not funded by the NDIS, it is envisaged that these services would include disability services provided to those persons who are not eligible under the NDIS and are therefore residually funded by the respective State or Territory. It is considered that it would be more appropriate for these supports to remain within a complaints system that is addressed locally in the respective State or Territory under existing disability service complaints schemes.

[What powers should a complaints body have?](#)

A disability complaints office should be independent of the NDIA. It should be empowered to receive complaints not only about service provision, but also funding decisions made by the NDIA.

An appropriately empowered complaints body should have as a minimum, the following legislated powers:

- Facilitation of resolution of complaints through mediation and conciliation at the local and regional level (through engagement with the NDIA or local service provider as appropriate)
- Pro-active and re-active inquisitorial power to independently investigate complaints:

- the ability to gather evidence and information, such as require production of records and accounts; gain access to any relevant information held by the service provider or NDIA, including medical files;
- power to issue a summons to a person requiring production of information.
- Power to investigate whether a person with impaired capacity has been, is being, or is at risk of being neglected, abused or exploited.
- Ability to appoint an independent advocate for the person where necessary to support them in the complaints process
- Protection of whistle-blowers or persons with disability who register complaints against service providers or the NDIA
- Power to operate an independent community visitor program
- Provision of information, education, training and advice about matters relating to complaints and complaints handling
- Mandate to evaluate and review patterns and causes of complaints, identify systemic issues for service improvement and make recommendations for the improved handling and resolution of complaints
- Mandate for monitoring and regular public reporting on the effectiveness of complaints handling by the NDIA and service providers.

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

There should be an external community visitor scheme to act as an essential safeguard within a complaints or systemic monitoring of the NDIS and its operation, whether in a residential, institutional or home setting. Community visitor programs can provide an outreach service to some of the most vulnerable persons with impaired capacity in the community, and assist in providing external community-based scrutiny of services provided. Further they are a hands on, and immediately accessible means of providing persons with impaired capacity with face-to-face access to feedback and complaints processes, through the use of trained and independent visitors.

Visitors could assist persons with disability, families and carers, and service providers to proactively raise issues of concern. They provide external scrutiny to prevent abuse, neglect and exploitation, all of which can occur in any disability service provision setting. Where restrictive practices are engaged, community visitors would also be able to observe how such practices are applied in situ. Empowering community visitors to visit such settings where disability supports are provided, ensures that those persons with complex and severe disabilities who are often limited in their contact with the community or outside world, are provided independent contact and avenues for communication, particularly in order to address complaints or concerns in service delivery and care, and can be an essential safeguard where a person's natural safeguards are underdeveloped.

Operation of an independent community visitor program

A strong community visitor program should be focused upon providing help and support to the most vulnerable persons under the NDIS, whether living at home, in residential care, mental health facilities, forensic disability services, or transitioning from detention or prison into the NDIS. There appears to be little benefit in having a community visitor program focused upon persons who expressly do not wish to be visited, however, a safeguard system should be focused upon those who are considered to be the most vulnerable and would benefit from regular visits from a community visitor. Under such a system, regularity of visiting could be determined by the needs and vulnerabilities of the person with disability. If they are in long term care, or well settled, the community visitor could visit less frequently or not at all, or the person should be entitled to refuse to receive visits from a community visitor.

Community visitors should be mandated to report allegations or concerns of risk abuse, exploitation or neglect of people with impaired capacity. The community visitor program should have a monitoring and oversight role with investigative powers to ensure that people with impaired capacity or behavioural issues are identified, supported and their rights protected. Community visitors could also make enquiries and lodge complaints on behalf of persons, with the power to refer complaints to the service provider or NDIA for initial resolution, where appropriate.

The program could be managed by the oversight or complaints body, to ensure nationally consistent monitoring, and prosecution regarding matters of abuse, neglect or exploitation. Community visitors could also ensure that follow-up support is provided to people who are victims of abuse.

Some of the issues that could be enquired into by a community visitor could include:

- Adequacy of services provided for assessment and support
- Appropriateness of standards of accommodation, health and wellbeing
- Provision of services in a way that is least restrictive of the person's rights
- Provision of services in a way that is effective to produce the outcome sought
- Adequacy of information available for consumers about their rights
- Operation of an accessible and effective complaints process

The community visitor program should have legislative authority, including the ability to obtain relevant information regarding the support and care provided to the person with disability. Under a community visitor program to residential sites, a community visitor should be empowered to access all areas of a site, require staff to answer questions, request documents related to the support of persons with impaired capacity at the site; make copies of relevant documents and talk in private with the person or staff at the facility.

Independent Advocacy program linked with community visitor program

A community visitor program should be linked with an appropriately resourced independent advocacy program that is able to advocate for resolution of issues within the NDIS. This model could be modelled on the OPG child advocate program which is linked with the community visitor program.

The OPG's child advocates protect the rights of children and young people in the child protection system by helping them express their views, particularly in legal matters. This includes making the child or young person's wishes known in court proceedings; they can make submissions to the court on the child or young person's behalf and may even call or cross examine witnesses. They can also help a child or young person bring an application in the Queensland Civil and Administrative Tribunal to review decisions made by child safety about contact with family members—parents and siblings—and about changes to their care arrangements. Child advocates may attend family group meetings and court ordered conferences, with the child or young person or on their behalf, and they can help resolve disputes and make official complaints to the authorities, which could include the police, health service or the Ombudsman.

A similar model could be developed under the NDIS in order to protect the rights of those who are most vulnerable in the NDIS, by helping them to express their views and ensure protection of their rights. In this way an independent advocate could assist the person to seek resolution of issues with the service provider or NDIA, so that their concerns are adequately understood and addressed.

Recommendations

- *An independent, external complaints system should be accessible to persons with impaired capacity and provide:*
 - *meaningful access to complaints mechanisms*
 - *afford fair and equal hearing during the complaint making process*
 - *enable sufficient flexibility in responses*
 - *should be sufficiently resourced to address the needs of persons with impaired capacity*
 - *seek resolution of issues to reasonable satisfaction*
- *An independent complaints system should be independent of the NDIA, apply to all funded supports, and have representation and presence at the local and regional level in each State and Territory.*
- *An independent complaints body should be legislatively empowered to:*
 - *Review 'reasonable and necessary' funding assessments and support*
 - *review poor, inadequate or failed service delivery*
 - *direct provision of emergency or interim support to a person where there are allegations of abuse, neglect, exploitation or violence, or service delivery failure*

- *An appropriately empowered complaints body should have as a minimum, the following legislated powers:*
 - *resolution of complaints through mediation and conciliation*
 - *pro-active and re-active inquisitorial power to investigate complaints*
 - *the ability to gather evidence and information*
 - *power to investigate whether a person with impaired capacity has been, is being, or is at risk of being neglected, abused or exploited and provide independent reports*
 - *ability to appoint an independent advocate*
 - *protection of whistle-blowers or persons with disability who register complaints against service providers*
 - *power to operate an independent community visitor program*
 - *provision of information, education, training and advice about matters relating to complaints and complaints handling*
 - *evaluation of complaints to identify systemic issues for service improvement*
 - *monitoring and public reporting on the effectiveness of complaints handling*
- *An external community visitor scheme is an essential safeguard. Community visitors should be empowered to:*
 - *visit all persons receiving support under the NDIS on a regular and irregular basis.*
 - *examine relevant documentation relating to the NDIS support*
 - *recommend to appropriate agencies how to rectify or resolve issues*
- *A strong community visitor program should be focused upon providing help and support to the most vulnerable persons under the NDIS regardless of their setting (home, residential or otherwise).*
- *Community visitors should be legislatively mandated to report allegations or concerns of risk of abuse, exploitation or neglect of people with impaired capacity.*
- *A community visitor program should be linked with an appropriately resourced independent advocacy program that is able to advocate for resolution of issues within the NDIS. The OPG child advocate program is recommended as an appropriate and efficient model for an independent advocacy program.*

Ensuring staff are safe to work with participants

NDIS Proposal: *People with disability have the right to feel safe and be safe when accessing supports under the NDIS. An essential element in achieving this is to minimise the risk that those who work or volunteer with people with disability pose a threat to their wellbeing or safety. Employee recruitment practices, including criminal history screening is regarding as an important first step in preventing abuse.*

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

It should be the primary responsibility of service providers to interview and vet prospective paid and voluntary employees. However, the government should provide a service through which criminal background checks (across Commonwealth and State jurisdictions, including spent convictions) of prospective employees can be made, and Government should also hold a register of banned individuals. It should be the responsibility of the service provider whether to employ the person or not, dependent upon the information received on the criminal background checks and the role they will be performing in the organisation (for example, whether they will have any direct contact with a person with disability or be purely administrative).

While service providers should be responsible for vetting of individuals (particularly those engaged in direct contact and disability support), there should be legislative responsibility placed upon the providers to tailor the employment of workers to meet the individual vulnerabilities of the person in question. Vetting of persons for employment should not only relate to the nature of the service provided, but should also be contingent upon the vulnerability and needs of the person with disability. For example, ensuring that staff are safe to work with participants should require the service provider to take into consideration that gardening services to a person with heightened vulnerability, such as a person with complex or more severe disability who is less equipped to protect themselves from abuse or violence, may require higher levels of scrutiny and screening for employment than for 'less vulnerable' persons. Workers and service providers should be able to be de-registered for failing to conform to best practice industry standards, and service providers could be found to have committed an offence where they have unreasonably failed to protect a person from violence, abuse or neglect.

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

Perpetrators of abuse often choose their victims because of the victim's intellectual, cognitive or mental disability figuring that detection is unlikely, and will seek out individuals because of their apparent 'passivity, vulnerability, lack of believability and cognitive ability'.¹⁷ Predators are indifferent towards society's most vulnerable, and invariably actively seek out those who are unable to speak out for themselves. It is the role of government to ensure that those who are vulnerable and unable to protect their own rights

¹⁷ Gill, M. (2010) "Rethinking sexual abuse, questions of consent, and intellectual disability" *Sexuality Research and Social Policy*, 7(3), 201-213 at 203-4

and interests are adequately safeguarded. Detailed criminal history records should be required from the person seeking employment. It should be the responsibility of the person seeking to be engaged by the service provider to disclose a complete criminal history, including convictions or charges of offences committed in Australia and internationally. The Federal Police or equivalent agency, could be responsible for providing a written report about the criminal history of the person, including Federal or State criminal history. However, the problem with criminal history checks, is that they rely on convictions only. Therefore legislative provisions should be considered that place the onus upon the person seeking employment to disclose investigations which relate specifically to abuse, violence, exploitation or neglect of vulnerable persons which may not have amounted to a charge or conviction, but may have resulted in a dismissal from employment. These factors could be taken into consideration in considering suitability for employment. Failure to disclose these details could be considered as a ground for dismissal should they later be disclosed.

Services should be primarily responsible for the person's safety, applying internal safeguards proportionate to the person's vulnerability. This should be coupled with monitoring by an independent government agency (such as a Disability Ombudsman or independent oversight body through a community visitor program) with robust oversight and enforcement powers, and rigorous registration procedures by the NDIA, to ensure that staff employed by service providers are and remain safe to work with people with disability.

[Of the options described above, which option, or combination of options, do you prefer?](#)

Option 1 proposes risk management by employers; Option 2 requires referee checks for all roles and police checks for certain employee roles; Option 3 provides for the establishment of a screening agency to provide working with vulnerable people clearances; and Option 4 provides for the creation of a barred person list. A combination including all of these options is preferred.

As discussed above, initial responsibility for vetting of prospective employees and volunteers, and managing the associated employment risk lies primarily with the service provider. However, it is clear from ongoing issues of abuse, neglect and exploitation of persons with disability within highly regulated disability service environments such as Queensland, that this is insufficient in itself to protect and safeguard persons with disability against violence and abuse.

Police checks should be mandatory (as discussed above), with the establishment of a screening agency that is able to coordinate police clearances from Commonwealth and State territories, and through international information sharing arrangements on criminal history backgrounds with countries from which many prospective employees might be drawn. The advantage of Option 3 is that the screening agency would be able to consider a broad range of information, such as police checks, spent convictions, and non-conviction information such as civil cases, apprehended violence orders and child protection information and orders and work history. In determining whether a clearance is required or

reasonable under the circumstances, the service provider should ensure that the need for clearances reflects the needs and vulnerabilities of the person with disability, so as to protect those who are highly vulnerable, such as those with impaired capacity.

An additional deterrence would be the creation of an excluded or barred person list as a condition of registration for certain types of work with providers as a component of an overall vetting system that includes screening processes. This would provide additional barriers to gaining employment in the disability service industry for those persons who repeatedly offend against and prey upon vulnerable persons. Any service provider employing a person on the barred list should be prima facie guilty of a statutory offence.

Recommendations

- *It should be the primary responsibility of service providers to interview and vet prospective paid and voluntary employees.*
- *Government should provide a service through which criminal background checks (across Commonwealth and State jurisdictions, including spent convictions) of prospective employees can be made, and keep a register of banned individuals.*
- *There should be legislative requirements that place the onus upon the person seeking employment to disclose investigations which relate specifically to abuse, violence, exploitation or neglect of vulnerable persons which may not have amounted to a charge or conviction, but may have resulted in a dismissal from employment. These factors could be taken into consideration in considering suitability for employment. Failure to disclose these details could be considered as a ground for dismissal should they later be disclosed.*
- *A combination of Options 1, 2, 3 and 4 should be adopted for vetting and employment requirements by service providers.*
- *Police checks should be mandatory with the establishment of a screening agency to coordinate police clearances from Commonwealth and State territories, and criminal history information obtained through international information sharing arrangements.*

Safeguards for participants who manage their own plans

NDIS Proposal: *A key aim of the NDIS is to ensure that participants are able to determine their own best interests, have choice and control, and be equal partners in decisions that affect their lives, to the full extent of their capacity. This includes taking control of the planning and delivery of supports if they wish.*

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?

The OPG recommends that registration should be required of all service providers and workers under the NDIS regardless of whether people manage their own plans or not.

Persons providing disability support should be accountable for how they support people in accordance with their support needs, protecting the person against intentional and unintentional abuse.¹⁸ It is not clear how unregistered providers can be held financially or otherwise accountable for supports funded by the NDIS if they fail to provide services that meet agreed industry standards, or if the supports fall short of minimum standards and are sub-standard, or fail to meet the goals and objectives set out under the participant’s plan.

Safeguards should ensure that the person who is supported fully understands their own personal accountability and responsibility for decisions made. This includes robust communication and information mechanisms to assist the person to recognise that active participation involves personal responsibility and risk¹⁹, and what risk is to be assumed by the person with disability if they manage their own plan. Allowing for participants to choose their own providers of supports should not negate the state’s responsibility to protect its vulnerable citizens from harm and to be accountable for how government funds are spent.

While the government is obligated under the Convention to provide reasonable accommodation and supports to assist people to make their own decisions, it is also obligated under Article 16 to ensure that persons with disability are protected from abuse, neglect and exploitation. There is an explicit duty of care to ensure that while persons with disability are supported to make decisions, there should be safeguards that are proportional to their needs or vulnerabilities, and support measures provided to the person are free from conflict of interest or undue influence.

All providers should be subject to external scrutiny and monitoring processes. This is essential to provide adequate safeguards, particularly in circumstances where persons with intellectual or cognitive disability manage their own plans. It is difficult to see how individuals with impaired decision-making capacity will be able to either manage plans on their own, or be able to assume the risks associated with choosing an unregistered provider of supports. The danger of power imbalance or conflict of interest whereby a family member or carer could place pressure on the person with disability to choose an

¹⁸ See T. Carney, “Supported Decision-Making for People with Cognitive Impairments: An Australian Perspective?”, *Laws* (2015), 4, 37-59 at 45

¹⁹ *Ibid.*, ALRC Report 124 at 30

unregistered service provider to personally benefit the family member/carer, rather than the person with disability is a significant risk. A person with a mild or even moderate intellectual or cognitive disability may be placed under undue pressure to self-manage their own plan (under supervision of a family member or other interested person) and to choose a provider who would not satisfy the NDIS registration process. Unscrupulous family members or other interested persons have been known to seek access to a person's disability funding and in such circumstances may place undue pressure on the person to use a 'family friend' as a 'service provider', and enable misuse of either some or all of the funding support. This could affect public confidence in the NDIS if problems emerge with the support provided, and it could also be open to suggestion that the person never fully understood the nature of the risks that they were assuming.

While persons who manage their own plans should be free to choose providers of support, the person must be able to comprehend the risk that they are undertaking. While the OPG recommends that all service providers be registered, a possible means of addressing this situation is through the development of a category of 'limited' registration. 'Limited' registration could ensure providers of choice would still undergo external screening (for criminal background and working with vulnerable persons checks). However the person would be limited in the number of people to whom they are able to provide such services before they are required to undergo formal registration procedures with the NDIA. They should be able to provide justification as to their skill base and how they will be able to support the person to meet the goals as set out in the participant's plan. Such providers should still be subject to external scrutiny to ensure against undue influence or conflict of interest in service provision, and be subject to NDIS complaints and investigations processes and scrutiny by the independent oversight body or Ombudsman. In addition to this, funding should be able to be refused to be provided to the 'limited' provider if external assessment determines that the service provider is failing to fulfil the goals and objectives of the service funded or providing sub-standard care or support.

Where the screening process identifies an individual as inappropriate for providing disability support services, they should be prohibited from providing support to persons under the NDIS. On this basis, persons with disability will still be able to choose to receive supports from anyone they wish, however, the support provider must still satisfy basic registration and vetting criteria.

Recommendations

- *All service providers and workers under the NDIS should be required to be registered regardless of whether people manage their own plans or not.*
- *Consideration should be given to the development of a category of 'limited' registration, which could ensure providers of choice would undergo external screening (for criminal backgrounds and working with vulnerable persons checks), and limit the number of people to whom they are able to provide such services before they are required to undergo formal registration procedures with the NDIA.*

- *All prospective service providers should be required to substantiate their skill base and how they will be able to support the person to meet the goals as set out in the participant's plan.*
- *All service providers should be subject to external scrutiny to ensure against undue influence or conflict of interest in service provision, and be subject to NDIS complaints and investigations processes and scrutiny by an independent oversight body or Ombudsman.*
- *Funding should be refused to any service provider where an external assessment determines the service provider has failed to fulfil the goals and objectives of the service funded or provides sub-standard care or support.*
- *Where the screening process identifies an individual as inappropriate for providing disability support services, they should be prohibited from providing support to persons under the NDIS.*

Reducing and eliminating restrictive practices in NDIS funded supports

NDIS Proposal: *Approaches to the use of restrictive practices under the NDIS will continue to implement the Australian Government's commitment to reduction and elimination of restrictive practices in services for persons with disability. Options proposed how such aims could be achieved. The options are divided into two groups: how decisions to include a restrictive practice in a behaviour support plan are made (authorisation) and when and how providers should report that they have used restrictive practices (monitoring).*

The Queensland experience

Self-regulation of restrictive practices failed in Queensland. After extensive reviews, it was deemed essential that legislative oversight was the only way to achieve proper regulation of the use of restrictive practices. Problems relating to inadequate legislative oversight of restrictive practices were identified by the Hon. William Carter, Q.C. in his report in 2006, *Challenging Behaviour and Disability: A Targeted Response*. The report recognised that self-regulation with respect to restrictive practices had not worked and legislative reform was needed. This led to implementation of a strong regulatory scheme which now oversees the use of restrictive practices in Queensland.

Historically, there were issues in the disability sector that restrictive practices were not legislatively supported and family members and direct care givers and service providers were exposed to allegations of acting unlawfully. Experience in the Queensland sector has shown that self-regulation of restrictive practices does not work. Further, it is considered that as restrictive practices are serious impositions upon the fundamental human rights of liberty and security of the person their use should be subject to rigorous legislative protections, oversight and review.

The need for a nationally consistent legislative scheme governing restrictive practices

It is essential that there is a comprehensive legislative regime to protect the rights of persons with disability who are subject to the use of restrictive practices. Such a regime should include strict penalties for abuse of the restrictive practices, and obligate service providers to develop and use positive behaviour support plans in line with the aim of reducing and eliminating the use of restrictive practices in services for persons with disability.

There is national commitment to reducing and eliminating the use of restrictive practices. Restrictive practices should be clearly defined and limited by legislation, to regulate the use of restraint (physical, chemical, mechanical and environmental), seclusion and other actions which prevent an individual from exercising their rights. The primary purpose of the use of restrictive practices should be to protect the person or others from harm, and should only be used as a last resort and be the least restrictive option available.

The OPG supports the idea that there should be either a nationally consistent legislative scheme or a single piece of Commonwealth legislation that governs the use of restrictive practices for both children and adults. The advantage of Commonwealth legislation is that

this could also enable greater consistency with the use of restrictive practices across aged care facilities and other privately funded hospitals and services. However, without legislative governance and clear oversight by an independent judicial authority, it is difficult to see how the national commitment to reducing and eliminating restrictive practices will be achieved. Compliance with legislative obligations should not be negotiable for any person seeking to use restrictive practices, whether as a registered or un-registered provider of services. All persons and organisations seeking to provide disability services or supports should be obligated to comply with legislation governing restrictive practices and subject to criminal penalties for their misuse or use outside of the regulated scheme.

Oversight, monitoring and review of the practices could be conducted by locally based judicial bodies to ensure that the human rights of the person are protected and that the usage of restrictive practices are reduced, with a focus upon elimination of their use. Legislatively empowered oversight bodies should also monitor the use of any restrictive practices to ensure that best practice is complied with and that the use of restrictive practices does not amount to abuse through the misuse of physical interventions. The framework should therefore ensure that service provision and clinical care are focused upon the reduction and elimination of the use of restrictive practices.

[Who should decide when restrictive practices can be used?](#)

Approval should be by an independent judicial body or independent statutory office holder only

Restrictive practices should only be a matter of last resort. Given that restrictive practices are a serious imposition upon the human rights of security and liberty of a person, only a judicial body, or independent office holder, should have authority to authorise use of restrictive practices.

The use of restrictive practices should not subject to undue influence being placed upon a guardian (for example, by a service provider seeking to influence the guardian who may be a family member, with a threat to otherwise withdraw service delivery) or made by a service provider who has a clear conflict of interest. A properly resourced, skilled, independent, and impartial judicial body or independent statutory office holder should be legislatively empowered to examine the circumstances surrounding a request for the use of restrictive practices, authorise use, and monitor the use to ensure that a positive behaviour plan is in place and that progress is being made towards restricting and eliminating the use of restrictive practices.

Use of restrictive practices must be justified and approved only as part of a specific individualised positive behaviour support plan, which will clearly benefit the individual and assist in the achievement of that objective. If authorisations are made by an independent statutory office holder, these decisions should be reviewable by an independent and impartial judicial body.

Approvals should be subject to judicial review

An independent judicial body should be legislatively mandated to be able to approve, review the use of the restrictive practice, ensure the practice is used for the shortest time

possible, and that the measures applied are appropriate, effective, and proportional to the needs of the person.

It is essential that any judicial body should have representatives who are skilled, knowledgeable and experienced in the area of behavioural management of persons with intellectual, psychiatric or cognitive impairments. Approvals for restrictive practices should be regularly reviewed and therefore approval should operate for a limited time only. While there is an approval of a restrictive practice in operation, it should be monitored by an independent person or body (such as through a community visitor program), who should be legislatively required to report to the judicial body upon each review. At a review hearing, the continuing need for restrictive practices should be justified by the service provider, and evidence provided of the effectiveness of existing restrictive practices used, and a plan provided regarding progression towards reduction and elimination of the use of the practice.

This process would bring greater compliance with the requirements of Article 12(4) of the Convention and provide a clear separation between the service provider and the person who has decision-making power for the person with challenging behaviour, and provide clear and transparent pathways for accountability.

[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?](#)

Legislation should be enacted to ensure that the focus of a restrictive practices regime should be upon the development of the individual person and the services delivered to them. An individualised and flexible approach should provide for and specifically address the person's specific needs and the circumstances of the individual case, as the essential element of providing proper care and support for the person with intellectual or cognitive disability and challenging behaviour.

The positive behaviour support plan should be legislatively mandated to emphasise the development of positive, socially valued skills as well as strategies for reducing the challenging behaviour. The objective of the plan should be to eliminate, as much as possible, the need for the restrictive practice. The development of behaviour support plans and the plan for the care and support of the individual person should be developed by an appropriate specialist in conjunction with the person, and where appropriate, with his/her family member/carer, or guardian.

Services need to be designed and implemented for the purpose of developing the individual and enhancing their opportunity for a quality life. An essential element in this process is the encouragement of a coordinated and cooperative relationship between disability service providers and other system providers, such as the health system, to ensure that a comprehensive multi-disciplinary assessment of the person is undertaken. This is of particular consequence where the person has complex co-morbidities and needs, requiring disability, general health and psychiatric support.

Establishment of an independent office holder, such as an Office of a Senior Practitioner, could assist in providing advice and training to the sector. This would enable a person with clinical and practical expertise to oversee and encourage implementation of best practice in reducing and eliminating the use of restrictive practices. It is also essential that the recruitment and development of suitably qualified allied health and other support staff and their ongoing training and personal development are a high priority within this sector so that staff know and implement best practice with respect to persons with an intellectual or cognitive disability with challenging behaviour.

[Are there safeguards that we should consider that have not been proposed in these options?](#)

Option 1 (voluntary code of practice) provides insufficient monitoring, accountability and oversight of a significant imposition upon a person's human rights and, as a model of self-regulation has been shown to fail. Option 2 (substitute decision makers must be formally appointed guardians) risks placing an unsustainable demand for increase service provision by the OPG, and would likely increase requests for guardianship appointments, conflicting with the principle that formal guardianship appointments should be a matter of last resort. The OPG therefore strongly objects to Option 2. Option 3 (providers would be authorised to make decisions under specific conditions) provides insufficient protection against the conflict of interest between the service provider and person with disability and provides insufficient independence and accountability to ensure reduction and elimination in the use of restrictive practices.

Only Option 4 (restrictive practices can only be authorised by an independent decision maker) provides adequate safeguard to enable appropriate and effective level of monitoring, oversight and review essential for any restrictive practices regime. This option provides for a clear separation between the provider and decision-maker, enabling accountability and transparency in the approval and use of restrictive practices. While it is recognised that this is likely to be a formal and time-consuming task, this is proportionate to the serious nature of infringing a person's fundamental human rights of liberty and security of the person, and their right to make unrestricted decisions about their own life, support and care.

[Would you support mandatory reporting on the use of restrictive practices? Why/Why not?](#)

The OPG would support mandatory reporting on the use of restrictive practices as outlined above. Restrictive practices are a serious imposition upon a person's fundamental human rights. Service providers should be motivated and publicly accountable for meeting the national commitment to reduce and eliminate the use of restrictive practices.

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

Monitoring and reporting on the use of restrictive practices is an essential component in reducing and eliminating the use of restrictive practices.

Option 1 (reporting mandatory use of restrictive practices only) and Option 2 (reporting all positive behaviour plans which include a restrictive practice) provide insufficient motivation and public accountability by service providers to adopt best practices that seek the reduction and elimination of the use of restrictive practices.

In line with Option 3, providers of supports should be required to regularly report on each use of chemical, physical and mechanical restraint and seclusion. If a cost effective and appropriate electronic monitoring system can be established (similar to Victoria's Restrictive Intervention Data System) to enable reporting on each use of chemical, physical or mechanical restraint, access would be provided to more accurate data and provide greater transparency in the use of such restrictive practices nationwide, holding service providers to account for the continued use of such practices.

Recommendations

- *There should be a comprehensive, nationally consistent legislative regime governing restrictive practices used with children and adults.*
- *The legislative scheme should have strict penalties for the abuse and misuse of restrictive practices (physical, chemical, mechanical and environmental) and obligate service providers to develop and use positive behaviour support plans, with the aim of reducing and eliminating the use of restrictive practices.*
- *Oversight, monitoring and judicial review processes of restrictive practices should be legislated to ensure the human rights of the person are protected.*
- *Restrictive practices should only be authorised by an independent decision maker. It is recommended that consideration be given to establishing an independent office holder, such as an Office of a Senior Practitioner, to authorise approve use of restrictive practices, oversee best practice in their use, and assist in providing advice and training to the sector.*
- *There should be mandatory reporting requirements on the use of restrictive practices*