



Australian Government  
Department of Social Services

# NDIS QUALITY AND SAFEGUARDING FRAMEWORK

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## Foreword

The Disability Reform Council (DRC) is pleased to release the National Disability Insurance Scheme (NDIS) Quality and Safeguarding Framework. The Framework is designed to ensure high quality supports and safe environments for all NDIS participants. It seeks to help participants and providers access information and resolve issues quickly, and strengthen the capability of participants, the workforce and providers to participate in the NDIS market.

The NDIS represents a significant reform to the way supports and services are delivered to people with disability. A nationally consistent approach to quality and safeguarding is essential to support the realisation of the NDIS vision and to support participants to make informed choices, while also ensuring there are appropriate safeguards in place to facilitate high quality support provision in a new market environment.

Many people contributed to the development of the Framework, including people with disability, their family members and carers, service providers, advocacy groups and representatives of professional organisations. They have made a valuable contribution through their participation in public consultation meetings, online forums, and by providing written submissions. There will be further opportunities to contribute to the Framework in the design and implementation phases.

During transition states and territories will maintain their current arrangements and responsibilities to protect people with disability. Governments will seek to incorporate lessons learned during this phase in the development of the new quality and safeguarding arrangements, which are designed to apply at full scheme.

As we move towards full implementation of the NDIS, all Governments remain committed to building a nationally consistent and responsive quality and safeguarding system that supports participant choice and control in the NDIS market.

The Hon Christian Porter MP  
Minister for Social Services  
Disability Reform Council Chair

# 1. Overview and context

## 1.1 The National Disability Insurance Scheme

The National Disability Insurance Scheme (NDIS) represents a fundamental change to how supports for people with disability are funded and delivered across Australia. In the past, the majority of supports were delivered through government agencies, and providers were 'block funded' by government agencies to deliver particular supports to a certain number of people with disability. In the NDIS, people with disability are at the centre of the system. People with a permanent and significant disability that affects their ability to take part in everyday activities and those who would benefit from early intervention receive individualised funding to access reasonable and necessary supports. NDIS participants receiving funded supports and people who are not eligible for individualised funding can access community-based supports through [Information, Linkages and Capacity Building](#) (formerly called Tier 2).

The Productivity Commission's inquiry report into [Disability Care and Support](#) recommended the NDIS replace existing disability support systems, which were underfunded, unfair, fragmented and inefficient, and which gave people with disability little choice and no certainty of access to appropriate supports. The Productivity Commission argued that the NDIS would generate longer-term savings through the benefits of early intervention, increased economic participation of people with disability and their carers, and the likelihood of increased productivity in the disability system.

The NDIS is administered by the National Disability Insurance Agency (NDIA). After three years of trial, from 1 July 2016 the NDIS commenced transition to full scheme across New South Wales, Victoria, Queensland, South Australia, Tasmania, the Australian Capital Territory and the Northern Territory on a geographical or age basis. Discussions are underway on the future of disability services provision in Western Australia.

Once the NDIS is fully established, the number of people with disability receiving government-funded support is expected to increase to 460,000. To meet demand, the workforce will need to double. A range of new providers are also expected to enter the market.

## 1.2 The need for an NDIS Quality and Safeguarding Framework

The NDIS has potential to produce major benefits for people with disability, their families and the broader community, but it also holds some potential risks. An NDIS Quality and Safeguarding Framework is needed to ensure that capability is built in the new market-based system, the rights of people with disability are upheld, and the benefits of the NDIS are realised.

Implementation will require a consistent national approach to quality and safeguarding. In addition to advancing the rights of people with disability, a National Quality and Safeguarding Framework is required to support choice and control in the NDIS by empowering individuals and driving quality improvement. Choice and control also mean that participants are able to make decisions about the level of risk they are prepared to take and have the tools and information they require to make informed judgements about the quality and suitability of providers.

### ***Replace existing quality and safeguarding measures***

In the new market-based system, participants will choose their providers, rather than providers being contracted by government agencies. This means that many of the current quality and safeguarding measures—which are managed through funding agreements—will no longer apply. A new system is needed to replace these measures, which have enabled governments to meet their duty of care to people with disability accessing funded supports. Government maintaining a stewardship role in the NDIS is consistent with the finding of the Harper [Competition Policy Review Report](#) that this is appropriate in emerging markets in the human services.

### ***Empower and support participants***

The NDIS recognises that giving people with disability choice and control over their supports can help to improve their outcomes. It also helps develop a market of providers focused on supporting participants to meet their goals. While a number of state-based disability systems have begun to provide people with disability more choice and control in recent years, many are used to being allocated particular supports from a fixed menu. Given this, many NDIS participants will need assistance to build their capability to take control of their supports. Without this assistance, they may find it difficult to choose between providers, ensure their supports are delivered in a way that meets their needs, and make a complaint or change providers.

*In relation to people with intellectual disability, Fitzsimons reminds us of the personal barriers which lead to a vulnerability to abuse “[these] include learned helplessness, low self-esteem, self-blame, denial, sense of responsibility to others, fear of retaliation, fear of the unknown, lack of skills and knowledge, poverty. People with a disability, particularly intellectual disability, have learned to comply with the directions of those they believe are in positions of authority. As a result they are less likely to resist or report abuse”. Many participants in the scheme will struggle to recognise and report on*

*poor quality service as well as matters of abuse or behaviour which harms them...  
[Endeavour Foundation submission].<sup>1</sup>*

A connected approach to quality and safeguarding is needed to empower and support participants to make informed choices about providers, and to equip them to raise issues or make complaints when needed. This system will need to provide information about rights and options, build participants' skills and confidence, help them to make connections, and provide decision-making supports to those who need them.

Focusing on building the capability of participants and supporting them to make connections recognises that the actions people take themselves—or that their family, friends and others around them take—are likely to be the most important component of the quality and safeguarding system. It also recognises the need for participants to be informed and discerning 'consumers' for the benefits of a market-based system to be realised, in particular to encourage providers to be flexible, responsive to participants' needs and innovative.

### ***Address systems issues identified through recent inquiries***

Recent inquiries into abuse of people with disability in institutional settings (discussed further at 1.3.3) have identified that particular groups are at increased risk of violence, abuse and neglect, including women with disability, people with intellectual or cognitive disability, people with disability who identify as Aboriginal or Torres Strait Islander, and people with disability from culturally and linguistically diverse (CALD) backgrounds. They have also identified issues with some current systems, including that organisational cultures have not always respected the rights of people with disability and the failure in some systems to take appropriate action when problems have arisen. A new system needs to recognise the increased risk that some people with disability experience and address issues identified with current systems.

### ***Ensure quality***

The NDIS is designed to provide people with disability the reasonable and necessary supports they need to live their lives and achieve their goals. Ensuring that supports are safe and of high quality will be important to the everyday quality of life of participants. It will also be important to ensuring that the social and economic benefits of the NDIS for individuals and the broader community can be realised and that the scheme is sustainable.

### ***Provide consistency***

Currently, quality and safeguarding measures vary between state, territory and Commonwealth funded services and there is fragmentation between systems. The NDIS Quality and Safeguarding Framework needs to ensure that participants receive the same protections no matter where they live.

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<sup>1</sup> Endeavour Foundation submission to NDIS Quality and Safeguarding Framework consultation, 2015. Available online at <https://engage.dss.gov.au/ndis-qsf-submissions/1430362057/>  
In-text quote taken from Fitzsimons, N.M. (2009) *Combating violence and abuse of people with disabilities, a call to action*. Baltimore, Maryland: Brookes Publishing Co.

### ***Reduce the duplication of requirements for providers***

The duplication of regulatory, contractual and other legislative requirements in current systems increases complexity and costs. Providers who operate nationally have to understand and comply with the different requirements in each jurisdiction. Those that operate across community service sectors are also required to demonstrate compliance with multiple systems.

A nationally consistent system—with mutual recognition of compliance with other equivalent standards when appropriate—will reduce duplication for providers and make it easier for participants to understand what they can expect of workers and providers. It will also make it easier for participants who move interstate or choose to purchase supports (such as equipment) from elsewhere in Australia. Reducing duplication—when possible and appropriate—while maintaining safety and quality standards, should support the growth of a market of providers able to deliver effective supports to participants.

### ***Enable effective monitoring and responses***

Recent inquiries have identified that existing systems can lack systematic data collection to assess the extent of problems and coordination to address identified issues. A national system will enable trends and emerging issues to be identified and addressed. There are also likely to be benefits in terms of monitoring the overall integrity and effectiveness of the Framework.

## **1.3 Framework development**

An *NDIS Quality and Safeguarding Framework* represents significant regulatory policy and has potential to impact on businesses, community organisations and individuals. As such, Commonwealth, State and Territory governments were required to consider a range of options (non-regulatory, self-regulatory, quasi-regulatory, co-regulatory and regulatory) and assess their associated benefits, impacts and costs through consultation and impact analysis. This process meets the Council of Australian Governments' requirements for best practice regulation.

The Framework has also been informed by recent public inquiries into the abuse of people with disability and children in institutional settings, and other NDIS-related policy work.

### **1.3.1 Consultation**

Governments developed a [consultation paper](#) outlining a range of options for a national quality and safeguarding system. The paper drew on information about existing quality and safeguarding systems in the disability and other relevant sectors in Australia and internationally, and the research literature. It was released in February 2015.

Consultation on the options involved the following activities between February and May 2015:

- 16 public meetings in capital cities and regional locations in each state and territory
- seven provider meetings in locations around Australia
- six workshops with specific stakeholder groups
- 220 submissions
- 585 questionnaire responses about particular quality and safeguarding measures, and
- an online discussion forum.

Officials from different jurisdictions also engaged in targeted stakeholder consultations.

The consultation identified a high level of agreement about most of the quality and safeguarding measures that should be adopted. While stakeholders emphasised the need to focus on developmental measures as the foundation of effective quality and safeguarding, most also considered a high level of regulation necessary, particularly while the market is developing and participants are building their capability to make informed choices about providers. Stakeholders supported a tiered approach to regulatory requirements for the workforce and providers, with requirements proportionate to the level of risk associated with the type of support provided, and the needs of the participants they support. Stakeholders also stressed the human rights basis for the Framework, particularly the need to ensure the rights of people with disability to dignity and respect, and to live free from abuse, neglect, violence and exploitation, as outlined in the [UN Convention on the Rights of Persons with Disabilities](#). The [full report of the consultation findings](#) is available on the Department of Social Services website.

### **1.3.2 Impact analysis**

An impact analysis was conducted to assess the net benefit of each potential regulatory option. In some cases, the costs and dollar value of benefits could not be meaningfully calculated because of the limitations of available data (including gaps and inconsistencies), and the hidden nature of some harms. Overall, the impact analysis identified that the benefits of an improved regulatory system, in reducing harm to participants, would outweigh the costs to governments and providers. Additionally, moving to a national system has the potential to eliminate duplication and consolidate existing regulation.

### **1.3.3 Public inquiries**

There have been a number of inquiries into abuse and neglect in disability services following reports of abuse in 2014.

The Parliament of Australia's Senate Standing Committee on Community Affairs (2015) [Report on the inquiry into abuse and neglect against people with disability in institutional and residential settings, including the gender and age related dimensions, and the particular situation of Aboriginal and Torres Strait Islander people with disability, and culturally and](#)

[linguistically diverse people with disability](#)<sup>2</sup> made a number of recommendations. These included:

- a national disability worker registration system to undertake screening, and administer qualification requirements
- a national system for reporting, investigating and eliminating violence, abuse and neglect of people with disability
- a national system of provider accreditation and broad serious incident reporting, and
- use of positive behaviour support strategies instead of restrictive practices.

At the national level, the Royal Commission into Institutional Responses to Child Abuse also made recommendations around screening people working with children that are relevant to worker screening for the NDIS.

Findings from the Victorian Ombudsman's (2015) [Reporting and Investigation of Allegations of Abuse in the Disability Sector: Phase 1 - The Effectiveness of Statutory Oversight](#)<sup>3</sup> concluded that 'despite areas of good practice, oversight arrangements in Victoria are fragmented, complicated and confusing', meaning 'the system is fundamentally failing to deliver protection in a coherent and consistent way.' The Ombudsman's recommendations focused on the need for a single independent oversight body for the disability sector and the role of advocacy.

The Victorian Parliamentary [Inquiry into Abuse in Disability Services](#)<sup>4</sup> made a number of recommendations about the design of the NDIS Quality and Safeguarding Framework, in particular that there be:

- a single independent oversight body
- mandatory reporting of abuse, neglect and exploitation to the oversight body
- an independent advocacy and capacity building body
- measures to ensure guardianship of last resort
- a national quality assurance agency responsible for worker screening, and worker and provider registration, and
- a national evaluation of the various state and territory-based community visitor schemes.

#### **1.3.4 Related policy work**

Other NDIS-related policy work has informed the Framework. This includes the development of the NDIS through the experience in the trial sites, the [Information, Linkages and Capacity](#)

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<sup>2</sup> Parliament of Australia's Senate Standing Committee on Community Affairs (2015) *Report on the Inquiry into Abuse and Neglect Against People With Disability in Institutional and Residential Settings, including the gender and age related dimensions, and the particular situation of Aboriginal and Torres Strait Islander people with disability, and culturally and linguistically diverse people with disability.*

<sup>3</sup> Victorian Ombudsman (2015) *Reporting and investigation of allegations of abuse in the disability sector: phase 1 - the effectiveness of statutory oversight.*

<sup>4</sup> Parliament of Victoria, Family and Community Development Committee (2015), [Interim Report on the Inquiry into Abuse in Disability Services.](#)

[Building](#), the [Integrated Market, Sector and Workforce Strategy](#), and the reform of the National Disability Advocacy Program.

## 1.4 Framework objectives

The overall objectives of the NDIS Quality and Safeguarding Framework are to ensure NDIS funded supports:

- uphold the rights of people with disability, including their rights as consumers
- facilitate informed decision making by people with disability
- are effective in achieving person-centred outcomes for people with disability in ways that support and reflect their preferences and expectations
- are safe and fit for purpose
- allow participants to live free from abuse, violence, neglect and exploitation, and
- enable effective monitoring and responses to emerging issues as the NDIS develops.

The Framework is designed to balance the need for appropriate protections that meet governments' duty of care obligations with the need to enable participants to take reasonable risks so they can reach their goals. The aim is to establish a flourishing market that offers people with disability genuine choice and control. The Framework is also designed to suit the emerging market-based system in which participants are building their capability to act as informed consumers, the workforce is growing rapidly, and new providers are entering the market.

## 1.5 Framework principles

The following key principles underpin the Framework.

### ***Human rights***

The NDIS gives effect to a number of key provisions in the [UN Convention on the Rights of Persons with Disabilities](#). Consistent with this, the NDIS Quality and Safeguarding Framework is intended to uphold and respect the rights of people with disability. This includes the right to dignity and respect; to live free from abuse, neglect, violence and exploitation; and to participation and full inclusion in the community.

As such, the Framework includes measures to build the capability of people with disability to take control of their supports, as well as measures to prevent abuse and neglect and respond to any issues that emerge.

### ***The presumption of capacity to exercise choice and control***

The Framework, like the NDIS, starts from a presumption that all people with disability have the capacity to make decisions and exercise choice and control. Strategies for reducing harm need to be weighed-up against the likelihood of harm occurring and its severity, and the impact this will have on choice and control. This allows for the dignity of risk, which includes

“supporting people to take informed risks to improve the quality of their lives”.<sup>5</sup> Rather than trying to find ways to eliminate all risk—which can be highly restrictive and out of proportion to the level of risk involved—the dignity of risk for NDIS providers means working with participants to define acceptable risk levels<sup>6</sup> in delivering supports to achieve their goals. This must be done in a way that considers the individual circumstances of each participant. It also means supporting participants in positive risk-taking, including recognising when the risk is something the participant can decide on, and negotiating how best to support the wishes of the participant.

People will however come to the NDIS at varying stages of readiness to take control of their supports. The Framework includes developmental measures to support participants to become informed consumers, equipped to choose quality supports that enable them to live their lives the way they want, and advocate for their rights. It also recognises that there needs to be an option for participants who are unable or unwilling to exercise choice.

### **National consistency**

As the NDIS is a national scheme, it is important that regardless of where they live in Australia, participants can expect the same level of protection.

### **Proportionality and risk responsiveness**

The risk involved in delivering a support can be affected by the extent to which the participant is at heightened risk of abuse and neglect, and the potential risk associated with the particular type of support. Risk management must be tailored to different types of risk:

- **Risks at the individual level**
  - Personal characteristics – such as age, skills, limited communication and complex medical conditions – can be associated with heightened risk. Certain groups, such as women, children, Aboriginal and Torres Strait Islander people, those from non-English speaking backgrounds, and those with intellectual disabilities and complex mental illnesses, may be at higher risk of abuse.
  - People who have family and friends around them on a regular basis, or who receive supports from several different providers, may be less vulnerable to abuse and dangerous practices than people who are isolated.
- **Risks based on types of support**
  - The effects of the support: some services, such as peg feeding and administration of prescription drugs, can have serious adverse effects when not carried out correctly.
  - The level of personal contact involved: supports that require a level of intimate personal contact with the participant, such as showering and toileting, can provide opportunities for abuse.
  - The environment in which the support occurs: supports that are delivered in an environment in which there is limited external visibility or direct supervision—or if

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<sup>5</sup> Victorian Equal Opportunity and Human Rights Commission (2014) *Rights and risk - how human rights can influence and support risk management for public authorities in Victoria*, Carlton, Victoria.

<sup>6</sup> Australian Government (2010) *Fact Sheet, AS/NZS ISO 31000:2009, Risk management – principles and guidelines*.

the support does not require professional registration—can pose a higher risk of abuse for participants.

Proportionality forms a component of a risk-responsive regulatory system, which recognises that risk of harm is experienced differently by individuals, and that regulatory tools for mitigating risk must be responsive. The Framework is therefore designed to be risk-responsive and person-centred, with measures tailored to the strengths, needs and circumstances of participants that increase or decrease risks, and the risks inherent in certain types of supports. At the individual level, the planning process enables individual risks to be identified and safeguards developed. At the system level, the regulatory requirements for workers and providers are tiered to ensure regulation is proportionate to the level of risk associated with the needs of the participants supported, and the type of support offered. Workers and providers delivering supports considered to pose a higher risk will have higher compliance requirements. The regulatory system will also respond to market failure risks with prudential monitoring for some segments of the market.

### ***Efficiency and effectiveness***

The NDIS entails a transition from a government-managed to a market-based system. The Framework is designed to support the development of an efficient and effective NDIS market and achieve the right balance between regulation. This is to ensure quality and safe services, and minimise barriers to market entry. The bar for entry into the market is not set so high that it would prevent market growth and create unnecessary red tape, nor so low that it would enable workers and providers who would pose an unacceptable risk to participants to enter and operate.

Developmental measures are included to develop the capability of participants, workers and providers, and to encourage providers to be flexible and responsive to participants' needs. Market oversight mechanisms will also support a competitive market that meets the varying needs of participants across Australia. The Framework reduces duplication and allows for mutual recognition of compliance with equivalent standards when possible, so the system is easier for people with disability to navigate and red tape is reduced for providers.

## **1.6 Framework components**

Figure 1 outlines the structure and components of the NDIS Quality and Safeguarding Framework.

The [UN Convention on the Rights of Persons with Disabilities](#), the [Disability Services Act 1986](#), [National Disability Strategy 2010–2020](#), and the [National Disability Insurance Scheme Act 2013](#) provide the foundations.

The Framework itself consists of measures targeted at individuals, the workforce and providers within developmental, preventative and corrective domains.

Measures in the developmental domain are intended to strengthen the capability of people with disability, the workforce and providers. While these are not regulatory functions, they are included in the Framework because they are fundamental to supporting quality and safeguarding.

Measures in the preventative domain are intended to prevent harm and ensure quality services are delivered to people with disability.

Measures in the corrective domain are intended to resolve problems, enable improvements to be identified to avoid the same problems recurring, and provide oversight of the system.

Across each of the domains, the measures interact to create a system that is mutually supporting and reinforcing. Investment in the developmental and preventative domains is intended to prevent adverse outcomes, so less corrective action is required. Additionally, some elements that are classified as preventative or corrective also have developmental aspects because of the importance of building capability to support positive outcomes for participants. For example, complaints are corrective, but also present an opportunity to learn from mistakes and improve practice (developmental), which in turn reduces the likelihood these same issues will occur again in future (preventative).

**Figure 1. Components of the NDIS Quality and Safeguarding Framework**

<b>Underpinning foundations</b>		
<i>UN Convention on the Rights of Persons with Disabilities; National Disability Strategy 2010–2020; National Disability Insurance Scheme Act 2013</i>		
<b>Components</b>		
<b>Developmental:</b> Building capability and support systems	<b>Preventative:</b> Preventing harm and promoting quality	<b>Corrective:</b> Responding if things go wrong
<b>Individuals: supporting and empowering people with disability</b>		
<b>Providing participants information for decision-making</b> Providing accessible information on how the NDIS works, participant rights, providers and complaints processes	<b>Safeguarding participants through planning, implementation and review processes</b> Having formal safeguards in the NDIS planning, implementation and review processes	<b>Responding to complaints</b> NDIS complaints commissioner receiving and responding to complaints about NDIS-funded supports, as well as ensuring that all registered providers have an internal complaints system
<b>Building participants' capability</b> Supporting participants to build knowledge, skills and confidence to exercise choice and control	<b>Funding advocacy services</b> Funding formal individual and systemic advocacy services outside of the NDIS	<b>Responding to serious incidents</b> Providers reporting on and commissioner investigating dangerous situations
<b>Strengthening natural supports</b> Supporting participants to strengthen family and other support networks and participate fully in their community	<b>Supporting self-managing participants</b> Ensuring self-managing participants are equipped to manage their supports	<b>Community visitors</b> Continuing existing state and territory schemes during the transition and conducting a review to evaluate their role in full scheme
<i>Links to information, linkages and capacity building</i>	<i>Links to supported and substitute decision-making (guardianship systems) and National Disability Advocacy Framework</i>	<i>Links to universal protections outside the NDIS (e.g. police, other regulatory and complaints systems)</i>
<b>Workforce: promoting a safe and competent workforce</b>		
<b>Building a skilled and safe workforce</b> Supporting the development of an NDIS workforce with the attitudes and skills that meet the needs of participants	<b>Screening workers</b> Screening workers to help ensure they keep people with disability safe  Ensuring workers have the skills for specific roles through provider quality assurance system and registration	<b>Monitoring worker conduct</b> Monitoring through employee screening functions, serious incident reports, complaints and breaches of the code of conduct
<i>Links to Integrated Market, Sector and Workforce Strategy</i>	<i>Links to National Framework for Protecting Australia's Children</i>	
<b>Providers: encouraging safe, innovative, high-quality support provision</b>		
<b>Building provider capacity and best practice</b> Supporting the development of a diverse and sustainable provider market able to meet demand and provide safe and high-quality services	<b>Reducing restrictive practices</b> Ensuring restrictive practices are reduced or eliminated by introducing consistent quality requirements for behaviour support practitioners and relevant providers, and reporting. The senior practitioner will conduct an educative role in the reduction of restrictive practices	<b>Investigating non-compliance with the code of conduct</b> Investigating potential breaches of the code of conduct and taking appropriate action

	<p><b>Ensuring provider safety and quality</b>          Having provider quality requirements proportionate to the type of support offered and the needs of participants, and that builds a culture of continuous improvement. This includes oversight of the NDIS market</p>	De-register or bar as NDIS provider
<p><i>Links to NDIS Sector Development Fund</i></p>	<p><i>Links to National Framework for Reducing and Eliminating Restrictive Practices</i></p>	

### 1.6.1 Elements of quality and safeguarding outside of the Framework

Not all risks associated with the NDIS need to be addressed by the Framework: some are addressed through other means.

In particular, the NDIA will have systems for detecting fraud and related issues associated with the responsibility for paying providers and verifying that supports have been delivered. Complaints about the NDIA, or NDIA-funded local area coordinators, will be addressed through existing regulation, such as the Administrative Appeals Tribunal and the Commonwealth Ombudsman.

Some risks will also be managed through both the Framework and other related policies. This is why the Framework explicitly incorporates the links with other NDIS-related policies (such as [Information, Linkages and Capacity Building](#) and the [Integrated Market, Sector and Workforce Strategy](#)), universal protections (e.g. police, fair trading bodies, consumer protection, and other regulatory and complaints systems), and policy in other related areas (such as the [National Plan to Reduce Violence against Women and their Children 2010–2022](#) and the [National Framework for Protecting Australia’s Children](#)).

### 1.6.2 Regulatory functions

Figure 2 outlines where the regulatory components of the Framework sit and how they are connected.

The **NDIS complaints commissioner** will receive and support the resolution of *complaints* about providers of NDIS-funded supports, receive and investigate *serious incident reports*, and investigate potential breaches of the NDIS code of conduct. The commissioner will refer matters related to non-compliance with provider standards to the NDIS registrar; serious incidents relating to inappropriate or unauthorised use of a restrictive practice, or that indicate unmet behaviour support needs, to the senior practitioner; matters relevant to the risk assessment of individual workers to screening functions; and other matters to relevant authorities (such as the police, consumer affairs agencies and other regulatory bodies) as needed.

The **NDIS registrar** will have responsibility for registering providers; managing the NDIS practice standards and certification scheme; leading the design and broad policy settings for nationally consistent NDIS worker screening; monitoring provider compliance; and taking action as required. The registrar will also monitor, review and report on the effectiveness of the NDIS market of supports, including anti-competitive conduct and early indicators of risk of thin markets and market failure.

The **senior practitioner** will oversee approved behaviour support practitioners and providers; provide best practice advice; receive, review and report on provider reports on use of restrictive practices; and follow-up on serious incidents that suggest unmet behaviour support needs. The senior practitioner will refer concerns about worker or provider non-compliance to the NDIS registrar. Approval for the use of restrictive practices will continue to be managed through current state and territory government processes.

**NDIS risk-based worker screening** will be nationally consistent, with responsibility for overall design and broad policy settings resting with the registrar, and operational responsibility—including the management and operation of worker screening units—resting with the states and territories. Risk-based worker screening for the NDIS will play an important role in reducing the risk of unsafe workers providing support to people with disability. Appropriate advisory mechanisms will need to be established to ensure that people with disability, their families and carers, and also support providers, have the opportunity to contribute to the development and operations of these regulatory bodies.

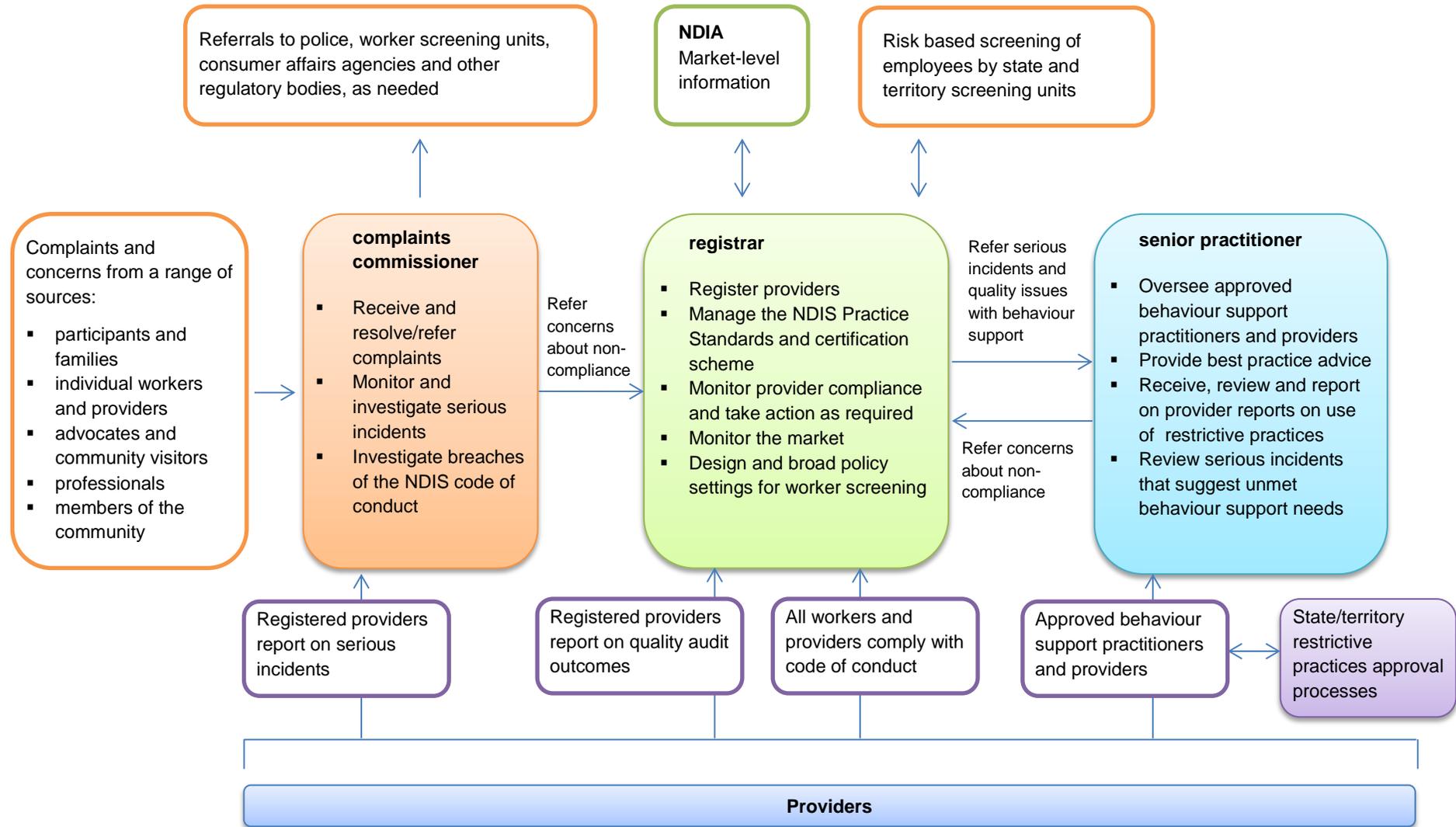
## **1.7 Implementing and refining the Framework**

During the trial, existing state and territory quality and safeguarding arrangements and the *NDIA terms of business for registered support providers* are being used. There will be a need to transition from state and territory quality and safeguarding arrangements to the new national system in line with the broader roll-out of the NDIS.

This document is intended to be a high level-policy with significant work still to be done on the implementation design and roll out of the Framework.

As the Framework is designed to underpin the emerging market-based system, it will need to be reviewed to ensure it remains fit for purpose once capability has grown and the market has become more established.

**Figure 2. Regulatory functions**



## 2. Individuals

The following developmental, preventative and corrective measures are designed to help people with disability to exercise choice and control over how their supports are delivered. The measures will help them resolve any issues they encounter with workers or providers.

### 2.1 Developmental

#### 2.1.1 Providing participants information for decision-making

##### *The context*

Participants need access to quality information to exercise genuine choice and control over their supports in a market environment. Quality information will help participants be empowered consumers, including by choosing their providers, negotiating delivery of their supports with confidence, assessing quality and asserting their rights, and raising issues when required.

##### *Current activities*

In the trial, the NDIA provided information to people with disability and their families in a range of ways, including through the website, webinars, expos, collaboration with community organisations, fact sheets and videos. A range of private online information sites have also emerged to meet the needs of NDIS participants. These include directories with basic information about providers, platforms that enable participants to leave feedback and for providers to respond, and eMarkets through which participants can find and purchase supports.

##### *What participants need for informed decision-making*

To facilitate choice and control in the NDIS market, information must be comprehensive, reliable and accessible to all people with disability and their families.

**Accessible** information will be:

- clear and jargon free
- available in various formats to meet different communication needs, including Easy English, community languages, Auslan, braille, audio, video, large print and screen-reader accessible
- culturally appropriate
- available through a one-stop-shop website, but also delivered through various channels, including online (social media platforms, apps and live chat), over the phone, face-to-face (individually or through forums), through peer networks—local area coordinators, advocates, community and mainstream services—in traditional and community media, and in relevant public places, and
- tailored to reach people who might not otherwise contact the NDIA.

**Comprehensive** information will cover the full range of subjects that participants need to understand, including:

- navigating the NDIS
- rights and responsibilities
- the planning process
- support types and pricing structures
- what to do if something goes wrong
- what providers are registered, their locations and operating hours, as well as the supports they offer
- how to communicate and negotiate with a provider, and
- provider quality (this may include responsiveness, delivery of individual participant outcomes and commitment to service improvement, as well as anecdotal information from people who have accessed supports from providers).

**Reliable** information will be:

- up-to-date
- accurate
- relevant, and
- available from independent and objective sources.

The NDIS information system must be built not only on information provided to participants, but information created by participants. There is substantial value in online forums where peers can connect with each other to share ideas and experiences, as well as provide feedback about their experience with providers. However, there are also potential risks associated with these forums, including providers manipulating their ratings so they appear more positive or, on the flipside, trolling, unfounded or unfair criticism, and lack of information about whether complaints have been satisfactorily resolved. Peer information may also not be that helpful for niche or specialist supports because sample sizes are too small for information to be reliable.

There should be a mix of both anecdotal information from peers and independently verified information on quality, since it would be inadequate to rely solely on any one source.

Any online feedback forums will need to be independently moderated and should give providers the opportunity to respond to complaints. Consideration will need to be given to how current legislation for registered health professionals, which prevents them from advertising and using testimonials, could limit their ability to interact with participants online.

As well as a single entry point to the system and peer-to-peer information sharing, JFA Purple Orange's research into an [NDIS eMarket](#) identified that participants want to be able to buy supports online (either through a central eMarket or direction to provider websites) and use the eMarket to help manage their supports (accessing targeted information and managing interactions with the NDIA and with providers).

As valuable as the private online information sites that have emerged during the trial are, they are unlikely to fulfil all of the identified information needs of participants and their

families. As identified in the Harper [Competition Policy Review Report](#) and the Commonwealth Government's response, there is a clear role for government in promoting informed choice, particularly in newly created markets, such as the NDIS. In the absence of this, participants could find it difficult to access information, be unable to access information about all of their options, be open to undue influence from providers, and find it difficult to compare providers based on objective information. For this reason, the NDIA will need an ongoing role in information provision.

### Illustrative quotes from the consultation

*It is only from other clients' experiences that I would be able to get a better feel for the various providers. However an open mind would still have to be kept to a certain degree as each individual's experience may not always be the norm. [Person with disability, New South Wales, questionnaire]*

*An effective way to ensure consumer rating forums offer useful information is to ensure they include random sample surveys of client views, not just volunteer contributions. [National Disability Services, submission<sup>7</sup>]*

*The system should be based on participants' requirements and provide the opportunity to understand: participants' rights and responsibilities; the service providers in the local area; the services they can assist with; contact details; specialist skills; meeting quality and service standards; membership of any industry or professional body related to standards. [RichmondPRA, New South Wales, submission<sup>8</sup>]*

*People with disability and their natural supports need information available in a range of formats and from sources that suit their individual needs. For example, some people will be comfortable with a centralised website, others will rely on a local, trusted community organisation. [New South Wales Council for Intellectual Disability, submission<sup>9</sup>]*

### How it will work

Participants will draw on a range of sources to make decisions, including the views of family and friends, trusted professionals, other participants, and various information resources. Non-government online sites will continue to support participants to connect with each other and providers. Government information provision will not displace these other information resources, but will seek to complement them. Some existing non-government sites enable instant notification to the provider and give the provider the opportunity to publically or privately respond to service users. Service users are also invited to provide feedback on their level of satisfaction with the provider's response. This type of functionality establishes a

<sup>7</sup> National Disability Services submission to NDIS Quality and Safeguarding Framework consultation, 2015. Available online at <https://engage.dss.gov.au/ndis-qsf-submissions/1430370763/>

<sup>8</sup> RichmondPRA submission to NDIS Quality and Safeguarding Framework consultation, 2015. Available online at <https://engage.dss.gov.au/ndis-qsf-submissions/1430700049/>

<sup>9</sup> NSW Council for Intellectual Disability submission to NDIS Quality and Safeguarding Framework consultation, 2015. Available online at <https://engage.dss.gov.au/ndis-qsf-submissions/1430724703/>

feedback loop that is much more informative for people than just viewing the original complaint.

The NDIA will provide information about the NDIS in various formats and through various channels to ensure all participants and their families have access to the information they need. Additionally, they will develop an eMarket to provide information about all registered providers. The eMarket will enable participants to understand their support options, make informed choices and connect with providers who can help them to achieve their goals. It will build on data collected at the time providers register, such as the supports they offer and their location, and allow comparisons of pricing structures. It will identify local providers and providers with special capabilities that are relevant to individual participants.

As it is further developed, the eMarket should make the process of connecting with providers more efficient (for example, by providing the option to make an initial appointment or seek further information), allow participants to purchase supports online, and give participants the opportunity to share information. The Health Practitioner Regulation National Law, which applies to certain Health Professionals including physiotherapists and occupation therapists, strictly controls registered practitioners' advertising and prohibits the use of testimonials. Governments will monitor whether this legislation has a significant impact on their ability to engage with participants online in the way that other providers are able to and, if necessary, consider options.

Consideration will need to be given to the provision of independently verified, objective information on provider quality. Models for achieving this have already been implemented internationally, such as in the United Kingdom by the [Care Quality Commission](#). This body publishes independent provider reports on quality, but also uses a 'traffic light' approach to summarise the information in a meaningful way for service users.

Typically, quality reports currently being produced in Australia through quality certification and audit processes contain content that is more relevant for informing the provider and regulatory bodies of the areas of the business that are working well or that need improvement from an operational service delivery perspective. However, these reports tend not to be as helpful for communicating information on quality that is more relevant and useful from a service-user perspective.

Implementing such an approach for the NDIS will also need to consider how to inform participants about the provider's response to audit findings on areas requiring improvement. This should also form part of their considerations (establishing the equivalent of a "feedback loop"). The provision of publically available independent quality information should still encourage providers to view the audit process as creating opportunities for improvement, rather than presenting a business risk. Further work is needed to explore how to complement peer review information on quality with objective, independent information, which is directly relevant to what participants need, easy to understand while also giving providers the opportunity to make improvements.

**Linkages:** local area coordinators, peer networks and independent advocacy services have a key role in helping participants to assess information and make decisions. The complaints commissioner will have a role in informing participants about their rights and complaints processes. The provider registration system will offer participants information about the types of supports providers have been approved for and the NDIS practice standards they have met.

The eMarket will also provide important information to support the NDIS registrar in monitoring the market and managing risk.

## 2.1.2 Building participants' capability

### *The context*

The NDIS is built on the principle of a person-centred approach, recognising that participants should be treated as experts in their own lives. For many participants, the NDIS gives them a power they have previously been denied to exercise choice and control over their lives.

To exercise choice and control, participants need to understand and assess available information, and use decision-making and self-advocacy skills. Some participants, particularly those who are already accessing individualised funding in existing systems, will come to the NDIS ready and willing to assess information, make informed choices, and negotiate with providers. Others, particularly those who have had limited choices within existing systems, will need to build the knowledge, confidence and skills to do this. Some may be unwilling or unable to exercise choice and control. The NDIS will need to respond to this variation in individual capability and preference.

Participant choice and control has the potential to drive change in the sector, which will support the development of more flexible, responsive and individualised services. However, this change will not happen automatically. In the past, many people with disability have seen providers as an extension of government and trusted services on that basis. Seeing providers as market operators will represent a significant shift in perception. Participants will need to understand their rights and have the confidence and skills to negotiate with providers about how their supports are delivered—and make complaints—when needed. Some participants could face high 'transaction costs' (for example time, effort and stress) in taking a more active role with providers. For others, changing providers if they are dissatisfied might seem daunting, burdensome or risky, particularly if they are highly dependent on the service for their daily living. Historically, the power imbalance between providers and people with disability has meant that people have often been reluctant to complain because they fear retribution (such as losing a service) or have had negative experiences with complaints processes. There is a risk that some participants will tend to settle for inadequate support because the alternative seems unattainable due to these transaction costs, in the same way many people tend not to change banks even when they are unhappy with their current provider.

Relatively few participants and their families are likely to have experience in employing people and managing a substantial amount of funding. Accordingly, participants and their families who choose to manage their own funding arrangements (self-manage) may need help in areas such as understanding employment law and setting up payroll systems.

### ***Current activities***

In trial sites, a number of capability building activities are already underway for participants. In other locations, there are activities to support people with disability and their families prepare for the transition.

### ***What capability building supports participants need***

In the consultation, stakeholders emphasised the importance of helping participants to understand information about their rights and options and building participants' skills to make decisions about their supports, negotiate with providers and stand up for their rights, when needed.

Some of the broader skills that stakeholders suggested should be fostered among NDIS participants included:

- understanding and asserting rights and responsibilities
- informed decision-making
- communication
- managing budgets
- building healthy relationships
- recognising good and bad quality supports
- recognising and responding to violence, abuse or neglect, and
- making a complaint or suggestion.

Stakeholders noted that while many participants may only require access to information to exercise choice and control, some would need support from a local area coordinator, support coordinator or other knowledgeable person, to be able to experience the same opportunities. In particular, stakeholders identified that people with intellectual and cognitive disability and people with complex communication needs can face much greater barriers to exercising choice and control and will need access to decision supports.

### Illustrative quotes from the consultation

*Much more than the design of the information system itself, access to a knowledgeable first contact person/mentor/LAC who can support and guide consumers in accessing appropriate information and assist in developing an informed and focussed package will be critical in the success of information provision and capacity building for people with a disability. [Clarke, D and Wise, submission<sup>10</sup>]*

*People with disability commonly have not had the opportunity to develop their skills for choice and control and self-protective behaviour. On the contrary, people with disability commonly have lived lives with very limited choice and control and a high level of dependence on support providers. All these factors apply particularly to people with intellectual disability whose intellectual impairments impede their ability to take control of their own lives. Family members, who are often key advocates for people with intellectual disability, come from a history of being expected to be grateful for support that is provided and many have narrow horizons and limited confidence to pursue grievances. [New South Wales Council for Intellectual Disability, submission<sup>11</sup>]*

*Individuals with intellectual disability generally need considerable support to develop their capacity to exercise choice and control. This requires skills development, supported decision-making, and opportunities for choice and control starting with routine decisions that arise through the individual's day-to-day experiences. [Minda Incorporated, SA, submission<sup>12</sup>]*

### How it will work

The NDIA released a [\*Draft Information, Linkages and Capacity Building Commissioning Framework\*](#) in December 2015. It identified five streams of support:

- information, linkages and referrals
- capacity building for mainstream services
- community awareness and capacity building
- individual capacity building, and
- local area coordination.

Many of the activities envisaged have the potential to make an important contribution to the informal safety net surrounding people with disability and to capability building.

The Individual Capacity Building Stream aims to help people better communicate their preferences and make informed and independent decisions. People will be supported to access courses, groups and organisations that can assist them to build their knowledge and skills. It may also link them with self-advocacy, mentoring and peer support groups, and support people with disability, their families, carers and communities to work together with and for people with disability.

<sup>10</sup> David Clarke and Cliff Wise submission to NDIS Quality and Safeguarding Framework consultation, 2015. Available online at <https://engage.dss.gov.au/ndis-qsf-submissions/1430964652/>

<sup>11</sup> NSW Council for Intellectual Disability submission to NDIS Quality and Safeguarding Framework consultation, 2015. Available online at <https://engage.dss.gov.au/ndis-qsf-submissions/1430724703/>

<sup>12</sup> Minda Incorporated submission to NDIS Quality and Safeguarding Framework consultation, 2015. Available online at <https://engage.dss.gov.au/ndis-qsf-submissions/1430354367/>

Local area coordinators will have an active role in promoting inclusion and working to address some of the systemic barriers to participation that people with disability can face. They will also support individual people with disability to address barriers they encounter to accessing mainstream and community services. At this stage, it is also envisaged that local area coordinators will deliver capability building activities for participants and people with disability who are not eligible for the NDIS, as well as their families and carers; explain the NDIS to potential participants; and support participants to develop and implement their plans.

*Information, linkages and capacity building* activities will evolve as more is learned about the support that people with disability want and what proves effective. Capability building strategies that could be supported through *information, linkages and capacity building* or individual plans include mentoring, peer support and circles of support (see Box 1).

### Box 1: Capability building strategies<sup>13</sup>

**Mentoring:** a mentor is a trusted and experienced advisor. Mentoring can be an effective strategy where there is effective matching, training and support of mentors, and mentors follow through.

**Skills development programs:** programs to build the skills of people with disability.

**Role models:** user led organisations can be particularly valuable in providing an opportunity for role modelling that builds confidence.

**Peer support:** interactions with people in similar situations can provide a way of pooling experience and providing mutual support. Online groups are increasingly a way for people to connect and share information. In areas where the NDIS has already been rolled out, web-based and in-person groups of participants and families with shared interests are meeting to discuss their experiences and ideas.

**Learning by doing:** action learning to solve problems involves learning by doing with the support of a facilitator.

It will be important to ensure evidence-based models are used. Consideration also needs to be given to ways of testing whether approaches that have proven to be effective overseas will work in the Australian context. User-led organisations for example, have been supported by governments in the United Kingdom and could enhance self-efficacy of people with disability, as well as provide opportunities for people with disability to enhance their skills, be employed and help their peers.

## 2.1.3 Strengthening natural supports

### *The context*

Natural supports (family, friends and community connections) provide an important informal safeguard for people with disability. A person with disability who has a supportive network of family and community members and is included in their community will be better protected

<sup>13</sup> *Capacity building for people with disability, their families and carers*. Report to the Independent Advisory Council of the National Disability Insurance Scheme, September 2015.

by these natural safeguards than they could by any safety net built by governments. However, some people with disability, particularly those exiting institutional environments, will not have strong existing networks. Others will have ageing carers and so need to identify additional supports. Carers may also need supports to maintain their role, and mainstream services and community organisations may need support to effectively include people with disability.

### ***Current activities***

In the trial sites, both in-person and web-based groups of participants and families are discussing their experiences and sharing ideas. Building and strengthening natural supports may also be a goal in a participant's NDIS plan and providers can be funded to support the participant to achieve that goal.

### ***What's needed to strengthen natural supports***

The consultation emphasised the importance of natural supports and inclusion of people with disability. Stakeholders noted the value that peer support and buddying can provide, helping people to share information and experiences while also building relationships. Some people will need support to build the skills to make connections, while others may not be interested in building relationships or may have been put-off by past negative experiences. Participants should be supported, but not forced, to make connections.

Parents, as well as siblings, and other informal support people can play a role in supporting people with disability to exercise choice and remain safe, but some may need support to take on this role. Some family members may try to take control when the person with disability would prefer they did not, and this should be considered by the NDIA, local area coordinators and support coordinators as the person's plan is developed and implemented.

Circles of support could help people develop a network to plan for the big life questions. Circles of support are often comprised of the person with disability, a key family member and workers who are directly involved in supporting the person in particular aspects of their life. They meet regularly to establish a shared vision about how to support the person with disability to achieve their goals, identify and address changing needs, and (when necessary) integrate supported decision-making into the person's day-to-day life. Stakeholders suggested that circles of support were a valuable way to foster collaboration and coordination between key people involved in a participant's life.

### Illustrative quotes from the consultation

*It's very important to have peer support. It happens by phone and group meetings are important too. Twenty years ago I was a wreck. I had to write notes to shop keepers and I was afraid to speak publicly. Now I can't shut up (because of peer support). [Women with Disabilities Victoria, submission<sup>14</sup>]*

*Informal carers generally have the person's best interests at heart, are experienced in communicating with the person, see them regularly enough to notice any problems and are likely to have their trust and be called upon in a time of need. Informal carers can also be key sources of information and often play the role of advocate for the person they care for. However, informal carers cannot effectively fulfil the role of natural safeguard without adequate, ongoing information and support that takes into account the caring arrangement. [Carers NSW, submission<sup>15</sup>]*

*Siblings will likely have the longest relationship with the person with disability. If siblings are supported they are likely to contribute much to the emotional and social wellbeing of their brother or sister. This is particularly important because many people with disability, especially intellectual disability, can become isolated. Without effective support, siblings have a tendency to move away from their family, with long-term consequences for the whole family and for the person living with disability. [Siblings Australia, submission<sup>16</sup>]*

### How it will work

There will be activities funded through *Information, Linkages and Capacity Building* and individual packages. These will support people with disability to make connections in their community, carers to maintain their role, and communities and mainstream services to be inclusive. Peer supports will be available to help participants to share information, tips and their experiences, while building relationships. Local area coordinators will build positive attitudes in the community and help to facilitate meaningful participation and inclusion of people with disability.

In supporting the role of families, it will be important for NDIA planners and local area coordinators to ensure it is the voice of the person with disability guiding their plan, not a family member taking control of decision-making when this is not what the participant wants. In supporting the role of friends and community connections, it will also be important to recognise whether the person has not made connections because of a lack of skills, past negative experiences or a lack of desire, and not push them to make a friend or join a group if this is not what they want.

<sup>14</sup> Women with Disabilities Victoria submission to NDIS Quality and Safeguarding Framework consultation, 2015. Available online at <https://engage.dss.gov.au/ndis-qsf-submissions/1431658324/>

<sup>15</sup> Carers NSW submission to NDIS Quality and Safeguarding Framework consultation, 2015. Available online at <https://engage.dss.gov.au/ndis-qsf-submissions/1430376305/>

<sup>16</sup> Siblings Australia submission to NDIS Quality and Safeguarding Framework consultation, 2015. Available online at <https://engage.dss.gov.au/ndis-qsf-submissions/1430360324/>

## 2.2 Preventative

### 2.2.1 Safeguarding participants through planning, implementation and review processes

#### ***The context***

Effective planning is a key element of quality support in a person-centred system. Participants should be supported to identify and manage risk as they interact with the NDIS through access to the level of assistance they need to develop and implement their plans.

Individual planning, implementation and review processes should also include formal safeguards. These should be proportionate to the level of risk the participant faces, based on their capacity, their natural support network and the supports available to them, as well as the level of risk they choose to accept.

Some participants will also need supported decision-making to ensure their will, preferences and rights direct the decisions that affect their lives. Supported decision-making is when one person gives another the support they need to make decisions about their own life. In the NDIS, supported decision-making will be crucial to ensure that people with communication needs, cognitive, intellectual or psychosocial disability are able to exercise genuine choice and control.

#### ***Current policy***

Under the [NDIS Act 2013](#), the NDIA has a central role in safeguarding the interests of participants. This includes working with participants to assess and manage risks.

Supported decision-making is encouraged over substitute decision-making whenever possible. However, the [NDIS Act 2013](#) makes provision for nominees to be appointed when necessary. The NDIS operates in conjunction with existing state and territory-based safeguarding mechanisms for people with significant cognitive impairments or mental illness, such as guardianship tribunals and public advocates.

The [NDIS Act 2013](#) also makes provisions for self-management of support plans.

#### ***What supports and safeguards do participants need in the planning, implementation and review process?***

In the consultation, stakeholders identified an opportunity to build people's decision-making skills through the NDIA planning process. They also identified the need for the process to include a thorough exploration of opportunities, risks and safeguards. While some were particularly concerned about risk, a number of stakeholders emphasised the need to include the concept of positive risk taking (or dignity of risk) within the Framework because, in the words of one person with disability, 'if you don't take risks you don't learn'.

Stakeholders also noted that some people will need more support with the planning process than others. There was support for a risk-based and person-centred approach that includes identifying risks and safeguards through individual planning. Many stakeholders also identified the need for particular consideration for specific populations, including measures to:

- recognise gendered violence and the heightened vulnerability of women and girls with disability to exploitation, violence and abuse, and provide adequate safeguards
- ensure access to culturally appropriate information and supports for Aboriginal and Torres Strait Islander and culturally and linguistically diverse populations
- enable people with intellectual disability to exercise choice and control, and provide adequate safeguards that recognise their heightened vulnerability to exploitation, abuse and neglect
- recognise the particular needs of:
  - people with psychosocial disability
  - people with progressive neurological conditions
  - children with disability and their families, and
  - lesbian, gay, bisexual, transgender, and intersex people.

Stakeholders noted the importance of funding decision-making supports and of providers (particularly those with great influence over people's day-to-day lives) facilitating supported decision-making on a day-to-day basis. This might include for example, taking the time to ask a person what they would like for breakfast and suggesting some options rather than providing a standard breakfast every day, or asking what they would like to do on the weekend and suggesting some options rather than taking them to the same activity every weekend.

### ***How it will work***

The NDIA has primary responsibility for planning, implementation and review processes. The way this is operationalised is expected to evolve over time, particularly during transition to full scheme. Accordingly, the discussion below focuses primarily on the key functional components of the system, rather than on how they might operate in practice.

**Plan development:** when individuals first make contact with the NDIS, they will be provided with different levels of support to develop their plans, depending on their personal circumstances including the informal supports and advice they can draw on outside the scheme.

Some participants will have the capability to develop their own plan without assistance. Participants who have few informal supports, are isolated, or who have more than one family member with a disability—placing extra strain on their family—may need some support to develop their plan and will be assisted by a local area coordinator.

Participants at higher risk may include those:

- with involvement in the justice or child protection system
- receiving 24 hour support
- living in supported accommodation or a large residential centre
- with dual disability
- who have recently acquired a spinal cord injury or brain injury, or
- with a history of abuse or neglect.

These participants will usually require a greater level of support to develop their plan and will usually work with an NDIA planner.

Participants' support requirements may change during the planning process. A participant who initially does not require assistance to develop their plan may request assistance from a local area coordinator at any time. If a participant does not develop their plan within the set period, this will also trigger contact with a local area coordinator.

**Risk assessment:** it is generally agreed that a holistic assessment of the risks a participant faces, which takes into account their family circumstances, informal supports and individual capabilities, is critical to enabling informed choice. It is also critical to identifying those who may be most at risk of abuse, violence, neglect and exploitation or who may be vulnerable to other risks, such as service provider failure. Families and carers, in particular, can play an important role supporting individuals to make choices about their supports.

Participants will take part in a formal risk assessment during the plan development process. They will be asked a range of questions about their personal perceptions of their own safety, their informal safeguards and the level of assistance they need. There may also be questions about their experience managing their finances.

Based on information provided by the participant, their local area coordinator, an information gatherer or their NDIA planner, the NDIA will consider the participant's vulnerability to exploitation, abuse and financial risk and the assistance required to support implementation of their plan or to manage their funding. The NDIA planner will then work with the participant to discuss ways of managing risk and build strategies to reduce risk into plan implementation.

**Supporting decision-making:** supporting participants to develop their self-advocacy and decision-making skills, and to understand their rights, is vital to ensuring they can use the information that is available to them to make informed choices.

If people with disability need more assistance to exercise choice and control (determined by their risk assessment), their plan could provide access to specific supports to build their knowledge and ability to make choices, understand their plan and exercise their rights, when required. This could include training courses and mentoring programs, and facilitating access to local support networks so people can learn from the experiences of others. If a participant needs supported decision-making, this can also be funded through their plan.

While supported decision-making will be encouraged and provided, there will be provision for nominees to be appointed when necessary.

**Plan management:** a participant's support plan is a central vehicle for identifying opportunities to build and strengthen their knowledge, skills and relationships. For the purposes of plan management, participants will also be provided with different levels of support based on the outcome of their risk assessment.

- Participants will be able to **self-manage** if they wish to, and there are no insurmountable financial and personal risks. These participants will take responsibility for the implementation of their own plan, including paying providers and hiring their own staff, or engage a plan manager to assist them with the financial management of their plan. A plan manager offering financial management will help mitigate financial risks but is not expected to have line of sight to mitigate broader risks.
- A proportion of participants will have their **funding managed by the NDIA** but not require any assistance to choose providers or change providers. In this case, the NDIA's role will be to make payments to providers.
- Some participants will implement their plan with the support of a **local area coordinator**. A key part of the local area coordinator's role will be directing participants to relevant mainstream and community supports and providing some guidance for participants to select suitable providers.
- Participants who are vulnerable to exploitation or abuse or lack the confidence and capabilities to manage their plan will have access to a **support coordinator** to help them implement their plans. Support coordinators will work intensively with participants to shortlist and investigate suitable providers, choose preferred providers, create an agreement with the providers, and to move to a different provider if required. Support coordinators will be registered NDIS providers.

An important role of both local area coordinators and support coordinators will be assisting participants to understand the differences in the level of risk associated with different types of providers. This is because the quality assurance requirements providers are required to meet will depend on the types of supports they provide and the participants they support. Some self-managing participants may choose to use providers that have not undergone any NDIS-specific quality assurance and are not registered. Others may feel that they want and need a higher level of assurance because of their personal circumstances. Local area coordinators, support coordinators and other planners could help participants assess what is best for them.

**Plan review:** a participant's plan will usually be reviewed after 12 months, although a plan review can be initiated before this time if there is a change in circumstances. Plan reviews provide an opportunity to assess the supports being provided and whether they are proving effective. The review is also an opportunity to reassess risk in relation to a participant, and the strategies for managing risk.

**Monitoring and evaluation:** a key factor for the success of the NDIS will be a capacity to respond flexibly and in a timely way to emerging issues on quality and safety. This includes responding immediately in crisis situations.

The effectiveness of the NDIA's role in this area will be monitored through the oversight and governance arrangements applying to it, including through the National Disability Insurance Agency Board, the COAG Disability Reform Council and the Joint Standing Committee on the NDIS. Issues that have implications for both the NDIA's responsibilities and the Framework could also be highlighted through own motion investigations undertaken by the NDIS complaints commissioner and NDIS registrar, so that appropriate cross-agency responses can be developed.

**Accountability:** there are a number of different groups involved in safeguarding participants while they develop and implement their plans, including NDIA planners, outsourced local area coordinators, information gatherers and participants themselves. However the NDIA will be accountable for agreeing to a participant's plan based on a considered risk assessment, including identification and implementation of appropriate safeguarding strategies to manage and reduce risk.

**Linkages:** local area coordinators and support coordinators will have a role in supporting some participants to achieve their goals and to choose providers.

The NDIS complaints commissioner can be alerted if a plan review process identifies complaints about a particular provider, and the NDIS registrar can also be alerted if the process identifies issues with a provider's practice that require investigation. The NDIS registrar will also have a role in investigating issues that emerge with service agreements (for example, providers locking people into long support periods or preventing people from making their complaints public), so these can be addressed.

## 2.2.2 Funding advocacy services

### *The context*

Formal individual advocacy has an important role in supporting people with disability to identify and speak up about their concerns when something is not right, and in protecting people from discrimination, abuse and neglect. Formal systemic advocacy also plays an important role in identifying and addressing system-level issues.

Advocacy for people with disability can be defined as speaking, acting or writing with minimal conflict of interest on behalf of the interests of a disadvantaged person or group to promote, protect and defend the welfare of, and justice for, either the person or group by:

- acting in a partisan manner (i.e. being on their side and no one else's)
- being primarily concerned with their fundamental needs
- remaining loyal and accountable to them in a way that is empathic and vigorous (while respecting the rights of others), and
- ensuring duty of care at all times.

### **Current policy**

The Commonwealth Government funds advocacy services through the National Disability Advocacy Program. Some states and territories also fund complementary advocacy programs to build skills and capacity and to support individuals to promote and protect their human rights.

### **What is needed to support participants to stand up for their rights**

In the consultation, many stakeholders identified an ongoing need for independent advocacy services to protect and promote the rights of people with disability. Stakeholders said that, at the individual level, independent advocates provide people with disability 'someone in their corner', who is independent of providers and the NDIA. At the system level, they help to identify and address issues affecting the rights of multiple people with disability.

Some of the supports the NDIS funds through individual plans and *information, linkages and capacity building* overlap with some supports traditionally provided by advocacy services. The National Disability Advocacy Program needs to be further developed to ensure it is complementary to the supports and safeguards made available through the NDIS.

### **Quotes from the consultation**

*Many people living with disability will require considerable support to make decisions and exercise real choice and control in their lives. Advocacy services are often fundamental in this process... self-advocacy, independent supported advocacy and the active participation of disabled person's organisations and peer support groups are best positioned to facilitate real choice and control. [National Ethnic Disability Alliance, submission<sup>17</sup>]*

*The role of advocacy organisations is essential in building capacity of people from NES/CALD background with disability. Advocacy organisations play a role in supporting these people...to develop skills and capacity through information sessions, skills development workshops, and self-advocacy skills development. [Multicultural Disability Advocacy Association of NSW, submission<sup>18</sup>]*

<sup>17</sup> National Ethnic Disability Alliance submission to NDIS Quality and Safeguarding Framework consultation, 2015. Available online at <https://engage.dss.gov.au/ndis-qsf-submissions/1430369407/>

<sup>18</sup> Multicultural Disability Advocacy Association of NSW submission to NDIS Quality and Safeguarding Framework consultation, 2015. Available online at <https://engage.dss.gov.au/ndis-qsf-submissions/1430703382/>

### **How it will work**

The Commonwealth Government will fund advocacy services outside of the NDIS through the National Disability Advocacy Program. Through this, advocacy will remain accessible to all people with disability, regardless of whether they are eligible for the NDIS.

A *Transitional National Disability Advocacy Program Framework* has been developed to outline the principles (see Box 2) and outcomes for advocacy services during the transition to the NDIS.

#### **Box 2: National Disability Advocacy Principles**

1. All people have the right to be free from abuse, neglect and discrimination.
2. All people have the right to pursue any grievance or complaint. All people have the right to privacy, dignity and confidentiality.
3. All adults have an equal right to make decisions that affect their lives, and to have those decisions respected.
4. Children and young people with disability have the right to participate, in whatever capacity, in decisions that impact on their lives.
5. Adults with disability are presumed to have capacity to make and take part in decisions affecting all aspects of their life.
6. Disability advocacy is inclusive of legal advice and representation where it is required to assist people with disability to exercise their rights.
7. Facilitating effective and appropriate communication for people with disability is an essential component of disability advocacy.
8. The will, preferences and rights of people with disability who may require decision-making supports must direct the decisions that affect their lives.
9. Diversity and difference – including the practices, values, beliefs and cultures of individuals and families – must be respected.
10. Disability advocacy is an essential tool for fostering the full and effective participation and inclusion of people with disability in society.
11. The role of families, carers and other significant persons in the lives of people with disability is to be acknowledged, respected and resourced.

#### **Safeguards**

12. Access to independent individual and systemic advocacy is an essential component of a quality and safeguarding system, assisting to identify and act on concerns, and protect people with disability from abuse, neglect and discrimination.

In 2016, DSS consulted people with disability, advocacy services and other interested parties to help shape the future of the National Disability Advocacy Program. The consultation will help ensure the program provides appropriate services in a changing disability environment, including the introduction of the NDIS.

### 2.2.3 Supporting self-managing participants

#### ***The context***

Providing an option for participants to self-manage their package gives them choice and control and helps improve their outcomes.<sup>19</sup> It is also intended to provide greater flexibility: participants can choose workers or providers that are not part of the formal social care system, but may be better suited to providing support because of their attitude, personal compatibility or common interests. There is a need however for safeguarding mechanisms to minimise potential harm and meet governments' duty of care.

#### ***Current policy***

The current [NDIS Act 2013](#) enables participants to self-manage their supports and take responsibility for:

- choosing and arranging supports
- paying providers
- keeping records and receipts for services provided, claimed and paid, and
- reporting to the NDIA on the amount spent on items in their NDIS plan.

The [NDIS Act 2013](#) provides safeguards around who can self-manage. Participants are able to self-manage if they have the capability to manage their own plan, or a nominee who can manage their plan on their behalf. Those who self-manage can choose to access unregistered or registered providers. A plan manager offering financial management will help mitigate financial risks but is not expected to have line of sight to mitigate broader risks.

#### ***What safeguards are needed for self-managing participants?***

In the consultation, safeguards around who can self-manage and plan were seen as important, but opinion was divided about the level of safeguards that should apply to workers and providers delivering supports to self-managed participants. Some stakeholders argued that providers supporting self-managing participants should be required to comply with the same requirements as registered providers, or a limited subset of these, and that workers should be screened. They believed that this would provide a level playing field for providers, support better outcomes for participants, and provide protection against workers known to have committed abuse or neglect. Others suggested the emphasis should be on capability building, and that self-managing participants should be allowed to choose any provider other than close family members. They believed that this would best reflect the NDIS principle of choice and control, enable participants to choose the provider that best meets their needs and preferences, and maximise access to support.

There was agreement on the importance of providing information, resources and supports to self-managing participants to help them maximise the benefits and reduce any potential

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<sup>19</sup> Productivity Commission (2011), *Disability Care and Support*, Appendix E.

risks. Likewise, the Independent Advisory Council of the NDIS has recommended that clear information be provided to help people use self-managed options and that training be made available. Information needs may include negotiating with workers and providers, budgeting and managing finances, understanding the advantages and disadvantages of choosing registered and unregistered providers, recruiting and managing staff, and participants' responsibilities as an employer when directly employing workers (including wages, superannuation, occupational health and safety, working conditions, and insurance requirements).

Some participants may also choose to employ a personal assistant or intermediary organisation (such as a cooperative) through their plan to help manage their budget. In Europe, where these types of organisations have been used, there is anecdotal evidence that they can help reduce the risks of self-management, however their effectiveness has not been evaluated. Evidence also indicates that people without the capacity to act for themselves using self-management systems through third parties may be at greater risk of financial exploitation, as well as significant levels of unreported abuse, exploitation and neglect.<sup>20</sup>

#### **Illustrative quotes from the consultation**

*For a number of years [our son] did receive services from providers. The difficulties we had were that there was always someone different turning up and we never knew them intimately. The people who worked with him, the people who came, often did not have enough information about [him] and what was going on. There was no continuity from day to day. If [he] had a seizure on the Tuesday, no one knew on the Wednesday what to do. It was just impossible. If a worker had an accident on the way... no one turned up, he'd scream for two hours. If they couldn't come for sickness, they weren't able to provide another worker in time. It just did not work. Therefore, [he] went to individualised funding. [He] selects his own workers. That's important because he then knows who's coming in to support him. They are reliable. He has currently five support workers and if one can't turn up, they'll ring another one who can. It just works perfectly. I would never go back to a system where there's a provider trying to provide staff to our son. It does not work. [Parent, Adelaide, public meeting]*

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<sup>20</sup> Goodwin, A., (2014) Churchill Fellowship Report.

*Isn't NDIS all about choice for the client? So shouldn't they have the option to choose whoever? Obviously they would have more protection if they went with someone who was a registered provider, but at the end of the day it's all about choice and freedom of choice. [Provider, Geelong, public meeting]*

*Registered providers have to meet certain standards to be accredited to legally provide selected services. Unregistered providers, such as family and friends, may not have the training to provide services that are safe and reliable. There will be unscrupulous providers looking to make money out of this scheme and also family members may see this as an opportunity to make a quick buck. Who is going to assess the validity of the services provided? Who is going to monitor unregistered providers? [Person with disability, Queensland, questionnaire]*

### **How it will work**

**Eligibility for self-management:** Under the [NDIS Act 2013](#) and NDIS Rules, self-management can be disallowed when the participant is an insolvent under administration, or self-management would present insurmountable financial and personal risk to the participant. These arrangements will continue in the full scheme. Consideration of whether a participant is able to self-manage takes into account:

- whether material harm, including material financial harm, could result if the participant were to manage the funding for supports
- the vulnerability of the participant to physical, mental or financial harm, exploitation or undue influence
- the ability of the participant to make decisions
- the capacity of the participant to manage finances, and
- whether a court or a tribunal has made an order under a Commonwealth, state or territory law under which the participant's property (including finances) or affairs are to be managed, wholly or partly, by another person.

A participant with a plan nominee can have their nominee self-manage their plan on their behalf, but the NDIA can disallow this if it is not satisfied that the nominee will act in the participant's best interest or has the capacity to manage finances.

Before making a determination that self-management is not possible, NDIA planners must consider whether any potential risks can be managed through the participant's informal networks or through safeguarding strategies.

The NDIA will ensure, where required, self-managing participants have access to support and resources to build their capacity to self-manage. Some participants may not need any funded supports to manage their plans. Those who do need a greater level of support could be provided with funding as part of their plan to learn specific skills, for example, how to budget and how to meet their obligations as employers.

Where self-management of some supports would pose a risk, participants may be able to self-manage certain supports while the NDIA manages others, or they may be able to use a manager or intermediary organisation funded in their plan to help manage their budget. For some, this could be a personal preference, because being an employer creates

obligations. For example, a participant might wish to manage their NDIS funding to pay for transport to appointments, but would prefer not to have responsibility for employing support workers directly. Others may choose to have the NDIA manage some of their supports because they will have more control to change their provider if they choose, or they feel that the NDIA will make sure that the providers are safe and will provide a quality service. Participants may also self-manage, but choose a supplier that is registered and has met the quality standards expected for the type of supports they offer.

In other cases, risk around self-management may be effectively managed by having regular contact between the NDIA and the participant or shortening timeframes for plan reviews.

It is important to note that, while the provision of additional supports may help mitigate the risks entailed in self-management, the nature of the additional supports should be tailored to the risks for each participant. The appointment of a financial intermediary for example, may assist with payment issues, but would not in itself address risks relating to poor decision-making about a provider. The potential for access to unregistered providers through a registered plan manager or intermediary service will also need to be clearly articulated and the risks communicated to self-managing participants.

The effectiveness of these safeguards will be reviewed once there is more evidence about self-management.

**Information provision and supports to assist with self-management:** NDIA planners will provide those who wish to self-manage information about the rights and responsibilities of the role, and discuss with them potential risks and management strategies. When needed, plans for self-managing participants will include resources to assist them to select providers who will best meet their needs and negotiate with these about how they would like their supports delivered.

**Monitoring:** the NDIA will develop monitoring processes to ensure the arrangements that self-managing participants have in place are working. This will take place in the context of plan review.

**Complaints:** self-managing participants will be able to make complaints about their providers to the NDIS complaints commissioner, regardless of whether the provider is registered with the NDIS registrar.

**Workers:** self-managing participants who are hiring workers directly—rather than through a provider—will be encouraged to ensure workers have screening clearances. Working With Children Checks (or equivalent) are currently required in all jurisdictions and parents managing their child's plan will be encouraged to sight those checks when hiring workers directly. Additionally, in certain jurisdictions workers in particular occupations are required by law to have a Working with Vulnerable Persons Check or a Working With Children Check. Workers must comply with this requirement.

The NDIS code of conduct will apply to all workers whether they are directly employed by self-managing participants, employed by an unregistered provider or employed by a registered provider.

**Providers:** the NDIS code of conduct will apply to all providers, regardless of whether they are registered. There will also be some additional safeguards around specific types of support that may pose a higher risk. Where current law requires that an allied health practitioner be registered with the [Australian Health Practitioner Regulation Agency \(AHPRA\)](#), participants will only be able to seek this type of support from a professional registered with AHPRA. Where the type of support is high risk and should only be delivered by a competent professional, but not subject to existing requirements (either AHPRA or self-regulating allied health professions), participants can only seek the support from a provider registered with the NDIS registrar. The full list of high-risk supports is yet to be finalised, but is expected to include allied health services not covered by AHPRA registration, services involving the implementation of behaviour support plans and restrictive practices, and early childhood intervention services.

## 2.3 Corrective

### 2.3.1 Responding to complaints

#### *The context*

An effective complaints system is needed to give participants confidence to raise any issues that they encounter, and to ensure that individual workers' or providers' practice is rectified or they are excluded from the NDIS market, when necessary. This will support development of an effective and competitive NDIS market and ensure participants have access to high-quality supports that help them achieve their goals.

Complaints management systems are a key protection in most markets. A strong consumer protection Framework can be an important way of building confidence in the market when deregulating or privatising service provision. It can help to ensure that when things go wrong, something is done about it. It can also drive change and improvements across the system.

In the NDIS, participants are customers and purchasers of products and supports. Customers who are not happy with a product or service can raise their concerns with the provider. However, experience across many different sectors suggests people will not necessarily exercise their right to complain.

People with disability can face multiple barriers to making a complaint about their provider either through a providers' internal complaints system or a universal complaints systems. These include lack of experience asserting their rights as consumers, fear of retribution, negative experiences with complaints systems (including not being believed) and difficulty

communicating what happened without support. Additionally, in the case of violence, neglect and abuse, people can face substantial barriers to making a complaint.

To address these, measures are needed to give participants the confidence to speak up and the skills they need to navigate complaints systems. The developmental measures included in the NDIS Quality and Safeguarding Framework will help participants to understand what they should expect from providers and build their capability and confidence to stand up for their rights. However, there will also be a need to focus on detecting problems early so they do not escalate, and on identifying and correcting serious problems, even when participants do not or cannot complain about them.

A strong regulatory system will help ensure that providers respond appropriately to complaints and that corrective action can be taken when necessary. It will also enable regular analysis of complaints data to identify systemic issues and drive system improvements. This will be particularly important in the context of the developing NDIS market.

In markets where there is strong competition, providers are more likely to take steps to obtain consumer feedback. However, in less competitive markets or in situations where consumers are less likely to communicate with each other, providers have fewer incentives for effective complaints handling and other feedback mechanisms. It will take time to build a competitive NDIS market. New issues are also likely to arise as providers and participants adapt to the new environment, new providers enter the market and some existing providers exit or merge with others.

An effective complaints system will support better outcomes for participants, providers and the NDIS market as a whole. Complaints can be an important source of intelligence, leading providers to improve the way they operate and the quality of the supports they offer, thereby helping them to attract more customers.<sup>21</sup> Effective internal complaints management can also prevent damage to a provider's reputation: effective handling of a complaint can turn a disgruntled customer into a satisfied and loyal one.<sup>22</sup>

### **Current policy**

Current state and territory complaints functions for funded disability services are generally managed through contracts with providers. Some state and territory functions (such as an Ombudsman, a Human Rights Commission or Public Advocate) also have a broader role in responding to complaints.

Protections for consumers of products and services are also available through universal systems. In the NDIS, participants will have a more direct role in purchasing products and supports, and the consumer guarantees in the Australian Consumer Law are expected to

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<sup>21</sup> For a useful literature review see Larivet, S. and Brouard, F. (2013), 'Complaints are a firm's best friend' in *Competitive intelligence, analysis and strategy: creating organisational agility*, Sheila Wright (Ed), Routledge.

<sup>22</sup> See for example Buttle, F. and Burton, J. (2002) 'Does service failure influence customer loyalty.' *Journal of Consumer Behaviour*, 1, pp.217–227.

cover most disability related services. State and territory governments have also put in place a range of sector specific measures.

Australian Consumer Law prohibits certain types of conduct that may lead to consumer detriment. Prohibited conduct includes, but is not limited to, misleading and deceptive conduct, false or misleading representations, use of unfair contract terms, unconscionable conduct, and undue harassment or coercion in relation to the supply of or payment for goods or services. These prohibitions apply to suppliers of disability supports in the same way that they apply to other industries. Under Australian Consumer Law, when you buy products and services they come with automatic guarantees that they will work and do what you asked for. These rights are known as the [Australian consumer guarantees](#) (see Box 3).

**Box 3: Australian consumer guarantees<sup>23</sup>**

Under Australian Consumer Law, businesses automatically guarantee the goods and services that they supply to consumers. A person acquires goods or services as a consumer if the amount paid or payable for those services does not exceed \$40,000, or the goods or services are of a kind that are ordinarily acquired for personal, domestic or household use or consumption.

Relevant consumer guarantees relating to goods include that:

- Goods are of acceptable quality (that is, fit for all purposes for which goods of that kind are commonly supplied, acceptable in appearance and finish, free from defects, safe and durable).
- Goods are reasonably fit for any purpose disclosed by the consumer or represented by the supplier.
- Goods correspond with any description given in their supply.
- The manufacturer of goods will take reasonable action to ensure that facilities for the repair of goods are reasonably available for a reasonable period after the goods are supplied.

Relevant consumer guarantees relating to services include that services will be:

- Rendered with due care and skill.
- Reasonably fit for the purpose for which the services are acquired by the consumer, which the consumer makes known to the supplier.
- Delivered within a reasonable time if no time period is fixed or agreed.

If a business fails to deliver any of these guarantees, depending on the circumstances (i.e. minor or major fault), consumers may have rights for:

- repair, replacement or refund
- cancelling a service, or
- compensation for damages and loss.

If you have a minor problem with a product or service, the business can choose to give you a free repair instead of a replacement or refund. When you have a major problem with a product, you have the right to ask for your choice of a replacement or refund.

Where any of the consumer guarantees are not met, consumers can:

- contact the seller or service supplier to seek a resolution of the failure to meet the guarantee. Consumers with disability may do this themselves or with the assistance of a support person (for example, a friend, family member or a disability advocacy organisation)
- contact the Australian Competition and Consumer Commission (ACCC) or a state/territory consumer affairs regulator to make a complaint. Some state/territory regulators may also assist with advocacy for consumers with disability (e.g. Consumer Affairs Victoria).

If it is not possible to reach agreement with the supplier, the consumer can consider taking legal action.

<sup>23</sup> Summarised from [www.accc.gov.au/consumers/consumer-rights-guarantees/consumer-guarantees](http://www.accc.gov.au/consumers/consumer-rights-guarantees/consumer-guarantees), accessed 24 June 2016.

In 2013, Consumer Affairs Australia and New Zealand agreed to a national project to educate consumers with disability and their families, as well as providers, on their rights and obligations under Australian Consumer Law. The ACCC has taken a lead in developing the project and has engaged with the NDIA, disability support organisations, disability advocates and state disability services commissioners to develop the communication strategy. While the project initially focused solely on NDIS participants, the scope was extended following stakeholder feedback to include other consumers with disability and broader purchases, such as Internet and phone services, building services and health services. The ACCC has released new information guides for consumers with disability about their rights, and for businesses about their obligations under the Australian Consumer Law.

Some NDIS-funded supports will also be covered by industry-based protections. For example, people accessing supports from health professionals registered with the [Australian Health Practitioner Regulation Agency](#) (AHPRA) can [lodge a formal complaint through the agency](#) if they are not satisfied with their supports. Depending on the nature of the complaint, there may be implications for that individual's professional registration.

Some other NDIS-funded supports—including those provided by allied health professionals not registered with AHPRA—may be covered by industry-specific complaints mechanisms. For example, Speech Pathology Australia accepts complaints about its members if someone believes that a member has breached the association's code of ethics.

### ***What's needed to enable participants to make complaints and have them addressed?***

The need for an effective complaints system was a strong theme in the consultation. Stakeholders emphasised the need for an NDIS complaints system that will:

- help participants understand their rights and what they should expect of providers
- give participants the confidence to complain, when needed, by addressing the power imbalances that people with disability can face when raising issues
- be accessible to all participants
- be easy to navigate
- respond to serious incidents as well as complaints
- enable other stakeholders (such as advocates, community visitors and workers) to make complaints and ensure issues can be addressed when participants are unable or unwilling to make a complaint
- support the resolution of complaints between providers and participants, when possible, and provide an escalation pathway when needed, and
- enable the identification of systemic issues and drive improvement actions, including through provider reporting on complaints.

Many people with disability and advocates noted the significant barriers people with disability face in making complaints and having them addressed. In particular, this includes not being believed by authorities when reporting an incident. Stakeholders emphasised the need for effective supports to enable people to complain and have their issues resolved. They

also stressed the need for there to be serious consequences for providers that behave unethically, are grossly incompetent, or that put the safety and wellbeing of participants at serious risk.

The consultation and impact analysis identified the need for both internal provider complaints processes and an independent statutory complaints body for the NDIS. This approach is consistent with the principles set out in the Harper [Competition Policy Review Report](#).

Requiring registered providers to have their own internal complaints systems will help to encourage provider responsiveness to participants' needs, service improvement and the timely resolution of issues. Whenever possible and appropriate, it will also give providers the opportunity to respond to feedback and improve their service before an issue is escalated.

An independent statutory complaints body will uphold the rights of people with disability, give participants the confidence to raise issues they have been unable to resolve with their provider, and support resolution. It will help identify individual workers or providers that pose a serious risk to other participants, highlight corrupt or unethical conduct, and be the trigger for corrective action. It will also enable systemic issues to be identified and addressed at both the individual provider and NDIS market levels.

More broadly, this approach should help participants to exercise their rights as consumers within the NDIS market. It should give participants greater confidence to switch to another provider if they are unhappy; thereby increasing the incentive for providers to be responsive to participants and improving the efficacy and effectiveness of the NDIS market.

The Productivity Commission's 2008 [Review of Australia's Consumer Policy Framework](#) suggested, for example, that creating a market in which consumers are willing and able to switch providers and have access to effective redress mechanisms, can contribute to innovation and productivity. Additionally, an effective consumer protection system can have a significant positive effect on the economy over time by:

- making it easier for consumers to get problems fixed or compensation from the provider
- reducing the amount of time and effort consumers need to put into managing their choice of supports
- reducing legal and other costs for providers dealing with problems, and
- increasing competition and innovation due to pressure from empowered consumers.

Giving the independent complaints body for the NDIS responsibility for managing serious incident reporting and complaints, as well as the ability to share information with other relevant bodies, will ensure effective coordination within the NDIS regulatory system and a 'no wrong door' approach for complaints. This reflects the need—identified in recent

inquiries—to avoid fragmentation in the system by adopting an integrated, rights-based and person centred approach.<sup>24</sup>

### Illustrative quotes from the consultation

*Having an independent body will mean that this body is unlikely to be accused of protecting workers from within the NDIA, service providers etc. People with disabilities, their families/advocates will be more likely to come forward and complain if they feel that their support will not be threatened. [Provider, SA, questionnaire]*

*There is a perception when you have an ABI [acquired brain injury] that the ABI accounts for everything – it's the ABI's fault that you have made these things up... We would need an independent specialist service to be believed. [Women With Disabilities Victoria, submission<sup>25</sup>]*

### How it will work

The system for responding to complaints in the NDIS will include individual provider complaints processes, an NDIS complaints commissioner, and access to universal complaints systems that all members of the public are able to access, such as Fair Trading bodies.

**Provider requirements:** registered providers will be required to have effective internal complaints arrangements. Requirements will be proportionate to the size of provider and the risks inherent within their service model.

Providers will be required to keep accurate records of complaints received and how they were responded to, so these can be made available to the complaints commissioner, or other relevant parties, as required. For example, providers subject to third-party quality assurance will need to be able to demonstrate to auditors that their internal complaints resolution process is operating effectively. This could be verified by auditors reviewing complaints documentation and conducting short interviews with participants.

**NDIS complaints commissioner:** in addition to providers' internal complaints systems and universal systems, the Commonwealth Government will establish an independent statutory NDIS complaints commissioner.

**Scope:** the main focus of the NDIS complaints commissioner will be on complaints suggesting that an individual worker or provider has breached the NDIS code of conduct. However, people will be able to raise broader issues about service quality—as well as concerns about safety, abuse and neglect—with the commissioner. This will enable the

<sup>24</sup> The Victorian Ombudsman's (2015) [Reporting and Investigation of Allegations of Abuse in the Disability Sector: Phase 1 - The Effectiveness of Statutory Oversight](#) and [Phase 2 – Incident Reporting](#); Parliament of Victoria's Family and Community Development Committee's (2015) [Interim Report on the Inquiry into Abuse in Disability Services](#); and Parliament of Australia's Senate Standing Committee on Community Affairs (2015) [Report on the Inquiry into Abuse and Neglect Against People with Disability in Institutional and Residential Settings](#).

<sup>25</sup> Women with Disabilities Victoria submission to NDIS Quality and Safeguarding Framework consultation, 2015. Available online at <https://engage.dss.gov.au/ndis-qsf-submissions/1431658324/>

commissioner to identify emerging issues in the NDIS market and make recommendations to government.

The commissioner will receive complaints about all providers of NDIS-funded supports, regardless of whether they are registered, as well as complaints about providers of *information, linkages and capacity building* supports and government-funded advocacy services. The commissioner will not cover complaints about the NDIA, or NDIA-funded local area coordinators, because these can be addressed through existing regulation such as the Administrative Appeals Tribunal and the Commonwealth Ombudsman. The commissioner will refer any complaints received about the NDIA to the relevant authority. The commissioner will also be responsible for receiving and acting upon serious incident reports from NDIS providers (see Part 2.3.2).

**Who can complain:** anyone may raise a complaint with the commissioner about a provider of NDIS-funded supports. This may include a participant, a family member, an individual worker or provider, an advocate or community visitor, a professional or a member of the community.

**Accessibility:** complainants will be encouraged to raise issues with their provider in the first instance. However, complainants will not be required to raise a complaint with their provider before raising it with the commissioner. Complaints will be accepted in various formats to meet the communication needs of people with disability.

**Protections:** whistle-blower protections will be included in legislation to protect both participants and employees when reporting concerns or raising complaints about providers. Specific provision will need to be made to protect public interest disclosures (for example, by an employee about an employer) and allow feedback to a complainant, subject to appropriate privacy protections (such as the permission of the participant to disclose the information, when this is possible).

**Functions:** the key functions of the NDIS complaints commissioner will be:

- receiving and responding to complaints and referring matters to other relevant authorities when required
- providing information and advice about complaints processes to NDIS participants
- providing information and training about complaints handling to providers and advice related to the requirement that providers have adequate internal complaints systems
- reviewing complaints data to identify systemic issues to be addressed
- reporting publicly on the number, types and causes of complaints and the outcomes of complaints handling processes
- receiving, responding to and reporting on serious incident reports from providers, and referring matters to other relevant authorities when required, and
- investigating potential breaches of the NDIS code of conduct and coordinating the response where there are implications for registration or other regulatory bodies.

**Powers:** the commissioner, taking a risk-responsive approach, will have discretion as to whether to investigate a complaint, suggest the complainant attempt to resolve the issue with the provider as a first step, refer the complaint to another body, decide that the matter was vexatious, or decide that there is insufficient information with which to take action. The commissioner will also have the authority to:

- obtain information and internal provider records when investigating a complaint
- provide conciliation between parties when required
- share information with the registrar, senior practitioner and worker screening units, and
- conduct own motion investigations, reviews or inquiries into a particular provider or group of providers.

**Universal and other complaints systems:** universal complaints and redress mechanisms – including Fair Trading, professional and industry bodies – will continue to be available to participants. These bodies are responsible for ensuring their complaints processes are accessible to people with disability, as required under the [National Disability Strategy 2010-2020](#). Anti-discrimination and human rights legislation overseen by the Disability Discrimination and Human Rights Commissioners will provide additional avenues for raising a complaint.

Other protections that may come into play when concerns arise include services provided by public advocates, disability advocates and guardianship tribunals. The NDIS complaints system will not replace existing functions in the states and territories with a broader scope (such as an ombudsman, a Human Rights Commission or a public advocate). The NDIS complaints system will also need to interact with industry complaints bodies.

Any complaints about the commissioner would be handled by the Commonwealth Ombudsman.

**Linkages:** local area coordinators, peer networks, advocates and community visitors will continue to support participants to understand their rights and raise issues when they encounter them.

The commissioner will establish relationships and referral pathways with other relevant complaints bodies and elements of the NDIS regulatory system to ensure there is 'no wrong door' for making complaints about providers of NDIS-funded supports.

The commissioner will have the authority to refer:

- matters relating to non-compliance with the NDIS code of conduct or provider quality assurance to the NDIS registrar
- serious incidents relating to inappropriate or unauthorised use of a restrictive practice, or that indicate unmet behaviour support needs to the NDIS senior practitioner
- matters relating to individual workers to the screening function, and
- other matters to relevant authorities (such as the police, consumer affairs agencies and other regulatory bodies) as needed.

When the commissioner refers a matter to another authority, the commissioner will be responsible for tracking progress in resolving the complaint and ensuring it has been resolved before closing the case. In some cases, responses may be required from multiple authorities (e.g. the NDIS registrar, police and worker screening units). In these situations, it will be the responsibility of the complaints commissioner to lead and coordinate a cross-authority response. Arrangements will be in place to ensure information is handled appropriately.

### **2.3.2 Responding to serious incidents**

#### ***The context***

Serious incidents can be defined as events that disrupt service provision or threaten the safety of people or property.

Serious incident reporting systems are in place in many sectors in which there are significant safety risks associated with products (for example adverse drug reactions and therapeutic devices) or the positions of power that staff hold (for example registered health professionals and staff working with children). Serious incidents can have a significant impact on participants, workers, family, carers, community members and providers. Serious incident reporting requirements recognise the need for:

- provider responsibility to prevent serious incidents wherever possible
- provider capability building to ensure serious incidents are prevented where possible, handled effectively and reflected on when they occur so they can be avoided in future
- specific requirements around reporting to capture incidents that would not likely be raised through the complaints systems because of the barriers people with disability face to making complaints
- external oversight to encourage timely and effective responses
- cross-agency collaboration to provide an effective response to incidents
- corrective action to be taken when necessary, and
- data to enable systemic issues to be identified and addressed.

Oversight—combined with effective provider practice and regular analysis of data—can reduce preventable deaths, serious injuries and other serious adverse incidents through early intervention and provider capability building.

Serious incident reporting systems typically recognise that not all serious incidents are avoidable. They can occur due to external factors or reasons that are not under an organisation's control. In these cases, the issue is not that the incident occurred, but how well the response was managed.

### **Current policy**

Current serious incident reporting requirements for funded disability services are generally managed through funding agreements, except in Western Australia, New South Wales and the Australian Capital Territory where there are requirements in legislation. Definitions of serious incidents that must be reported differ between jurisdictions. Most systems focus on the most serious types of incidents. However, some take the view that less serious incidents can escalate rapidly if not managed effectively, and that patterns of less serious incidents can highlight broader systemic issues.

### **What's needed to prevent and effectively respond to serious incidents**

Recent inquiries into abuse in institutional settings have emphasised the need for providers to have effective internal processes to prevent and respond to serious incidents. System-level oversight is required to ensure serious incidents are thoroughly investigated, responses are coordinated, and systemic issues are identified and addressed. Similarly, in the consultation there was strong support for both internal processes for handling serious incidents and external reporting and oversight.

In the course of consultation, some stakeholders said the term 'serious incident' was misleading and tended to downplay the significance of these kinds of events. It was suggested that the term serious incident:

*...dilutes the reality of violence and harmful practices and often leads to different, and often highly inappropriate, responses for people with disability – the situation is "written-off" as a service incident and only investigated internally. The situation is not referred to the police or is not taken seriously by the police; people with disability do not receive the appropriate or same supports that are available to others in the community, such as sexual assault or trauma counselling.<sup>26</sup>*

The term 'serious incidents' is used in many different sectors and reflects the fact that serious incident reporting has several different purposes. The scope of the term covers events, such

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<sup>26</sup> Women With Disabilities Australia and People with Disabilities Australia submission to NDIS Quality and Safeguarding Framework consultation, 2015. Available online at <https://engage.dss.gov.au/ndis-qsf-submissions/1435277763/>. This was also a recommendation in the *Inquiry into abuse in disability services: final report*, by the Family and Community Development Committee of the Parliament of Victoria, Chapter 2.

as deaths in care, which are required to be reported regardless of cause and which are not necessarily the result of abuse.

It is important that the NDIS Quality and Safeguarding Framework recognises the serious nature of these incidents by providing a means to prevent them when possible, manage them effectively when they occur, and ensure corrective action is taken when necessary. A serious incident should trigger a response that seeks to address the wellbeing and immediate safety of the people involved, and takes the opportunity to review and improve operational practices as appropriate to reduce the risk of further harm. Both the response and evaluation should focus on the impact of the incident on the client, and the outcome (in terms of client wellbeing) that was achieved as a result of any remedial action.

Input from Ombudsmen into the Senate Standing Committee on Community Affairs (2015) *Inquiry into abuse and neglect against people with disability in institutional and residential settings* emphasises the need for capability building, encouraging a strong reporting culture, and ongoing monitoring to address serious incidents. The New South Wales Ombudsman's submission to the inquiry flagged a long history of concerns with the sector's capacity to effectively manage serious incidents. These included inconsistent processes and systems, ongoing failures to address key risk factors, inadequate training for staff to recognise when serious incidents have occurred, inadequate responses to incidents including failure to report suspected crimes to the police, and failure or significant delays in advising family members of incidents. The Victorian Ombudsman identified similar issues and noted that there appears to be substantial under-reporting of serious incidents. The New South Wales experience suggests that legislative requirements around serious incident reporting<sup>27</sup> can increase reporting. Early evidence from the New South Wales experience also indicates that many more cases of abuse, violence and neglect have been identified through serious incident reporting than through the complaints system.<sup>28</sup>

A shared definition of serious incidents is needed. While using a broad definition could enable information about lower-level events to be used as a warning system, employing a narrower definition will ensure that the new system is not overloaded with reports and the most serious incidents can be investigated.

### Illustrative quotes from the consultation

*When women report violence their concerns aren't always taken seriously, they aren't believed and it rarely goes to court. We need some kind of balance to ensure that we are safe, without necessarily going to court. [Woman with disability, workshop]*

*I am concerned that a lot of incidents get managed in house and the investigation aspects might be less than perfect or dubious, or just internal. So I think having an impartial external body for serious incidents is quite an important aspect. [Provider, Sydney, provider meeting]*

<sup>27</sup> Refer to Part 3c of the *NSW Ombudsman Act 1974* – amended.

<sup>28</sup> The NSW Ombudsman's Annual Report 2014–15 noted that between 3 December 2014 and 30 June 2015, the Ombudsman received 350 reports of disability serious incidents, and 21 complaints relating to reportable serious incidents.

### **How it will work**

**Internal processes:** providers have primary responsibility for preventing and managing serious incidents, so they are expected to have processes for this as part of their risk management system. Registered providers will need to demonstrate that they have internal investigation and reporting arrangements to ensure that serious incidents are recorded and management takes corrective actions to prevent recurrence. As not all serious incidents will be avoidable, providers will need to ensure that their employees understand what constitutes a serious incident and what to do if one occurs. When an incident does occur, providers need to be ready to take immediate action to ensure the safety of the people in their care and their employees (including providing first aid or calling an ambulance). Depending on the nature of the incident, they may also need to notify the police and other appropriate authorities. In all cases, they will need to assess the impact on the client, whether the incident could have been prevented, how well they managed the response, and what, if any, changes they need to make to prevent further similar events occurring or minimise their impact. Providers will be required to make records available to auditors as part of the quality assurance process and to contribute to investigations relating to serious incidents.

**Who will report:** in the NDIS, all registered providers will be required to report serious incidents to the NDIS complaints commissioner. This will not replace obligations to report suspected crimes to the police and other relevant authorities. Reporting requirements would be introduced in stages, starting with higher risk providers.

**Scope of reporting:** serious incidents will be broadly defined as:

- incidents involving fraud
- incidents of alleged physical or sexual assault of a participant committed by an employee
- incidents of alleged physical or sexual assault of a participant committed by another participant while in the care of the provider
- culpable neglect
- serious unexplained injury
- death of a participant (irrespective of cause), and
- unauthorised use of restrictive practices.

**Reporting systems:** an online reporting system will be developed which will be managed by the complaints commissioner and, subject to compliance with privacy laws, be accessible at different levels to different stakeholders. For example, when a serious incident suggests issues with behaviour support or unauthorised use of restrictive practices, the senior practitioner should have access to the report. The commissioner will therefore need capacity to share information and coordinate responses with other elements of the NDIS regulatory system and with relevant external authorities.

**Functions and powers of the complaints commissioner:** for serious incidents, the complaints commissioner will:

- receive and assess serious incident reports
- work with providers to develop a positive reporting culture
- build provider capability to prevent and respond to serious incidents, including working with providers to develop a service response to incidents if necessary
- recommend compliance action to the NDIS registrar when required
- refer matters to worker screening units, the NDIS registrar, the NDIS senior practitioner or other relevant authorities, and coordinate the response
- review serious incident reporting data to identify systemic issues to be addressed, and
- report publically on the level of serious incidents and prevention strategies.

**Linkages:** as well as the capability building role of the commissioner, developmental measures, such as the National Disability Services Zero Tolerance Project, will help providers develop positive organisational cultures that do not tolerate abuse, neglect and exploitation. Providers' recruitment, training and supervision processes—as well as worker screening requirements—will help to prevent serious incidents from occurring. Registered providers' internal processes for handling serious incidents will be audited or verified through quality assurance processes.

The NDIS complaints commissioner will be able to refer matters to, and share information with, the worker screening function, the NDIS registrar, the NDIS senior practitioner or other relevant authorities, and will follow up to ensure matters have been responded to.

### 2.3.3 Community visitors

#### ***The context***

Community visitors can play an important role in promoting and protecting the rights and wellbeing of people with disability, identifying issues that people with disability may not otherwise raise, providing an early warning system to prevent abuse and neglect, and providing an escalation pathway for issues to be addressed. The value of the community visitor role arises from their ability to visit services (that are within the scope) without advance notice and enquire into conditions, often on the basis of concerns they have been alerted to by residents' families, friends or workers. Importantly, visitors are able to identify problems that have *not* been reported by families, friends or workers.

#### ***Current policy***

Community visitors are generally statutory appointees who make in-person visits to prescribed disability and mental health services. However, existing state and territory schemes have varying scope. Additionally, some have paid staff and others use volunteers.

### ***What's needed to support participants in the changing NDIS environment***

There was considerable support in the consultations for a community visitor type function within the NDIS Quality and Safeguarding Framework. The majority of providers were generally supportive of community visitors, indicating their assistance had been helpful in resolving complaints. Providers also indicated that the additional workload associated with their visits was minor.

However, the consultation also raised questions about how community visitors will fit within the changing disability system, and which of the existing state and territory models are most appropriate. As large residential services become less common and new national quality and safeguarding measures are introduced, there is a need to consider the scope of the community visitor function and how it integrates with other escalation pathways and oversight mechanisms. There is also a need to confirm whether community visitors should be volunteers or paid visitors, what training community visitors need, and the resourcing levels required.

### ***How it will work***

Existing state and territory community visitor schemes will continue during the transition to the NDIS, and an independent evaluation of the schemes will be undertaken during this period. The results of the evaluation will be used by the Disability Reform Council to inform decisions about the role of community visitors in the NDIS.

## 3. Workforce

The following developmental, preventative and corrective measures are designed to promote a safe and competent workforce and ensure people who are unsafe are not able to support NDIS participants.

### 3.1 Developmental

#### 3.1.1 Building a skilled and safe workforce

##### *The context*

In 2015, it was estimated that about 74,000 full-time equivalent workers were employed in the disability sector. About 38% were casual employees, 35% permanent part-time employees, 23% full-time permanent employees, and 4% on fixed term contracts.<sup>29</sup> Over 80% of the disability service workforce has a Certificate III or higher qualification, although not necessarily in disability. The majority (83%) of the workforce was female and 50% were aged 45 or older.<sup>30</sup> On the whole, workers were older and more highly educated, and less likely to be from an Aboriginal and Torres Strait Islander or non-English speaking background than the participants they support.<sup>31</sup>

To meet the growth in demand under an NDIS, the workforce will need to more than double (to an estimated 162,000 full-time equivalent workers) by full scheme in 2019–20. Roles are likely to change and require more flexibility under the NDIS. Workers from diverse backgrounds will also need to be attracted to the sector to help address the barriers for people from particular groups. For example, people from Aboriginal and Torres Strait Islander and culturally and linguistically diverse backgrounds can face specific barriers to accessing appropriate supports.

As the workforce grows and changes, it will be important for employers to ensure workers have the right attitudes, knowledge and skills to effectively support participants, and to prevent and detect abuse and neglect.

##### **Current activities**

Governments and the NDIA have already begun working with the sector to support growth and capability development, recognising that recruiting and training staff is predominantly an employer's responsibility.

<sup>29</sup> NDS (2015), [State of the Disability Sector Report](#).

<sup>30</sup> Martin, B. and Healy, J. (2010), *Who Works in Community Services? A Profile of Australian Workforces in Child Protection, Juvenile Justice, Disability Services and General Community Services*, NILS, pp. 126–127

<sup>31</sup> NDS (2014), *Roadmap to a Sustainable Workforce – A National Disability Services Report prepared for the Australian Government Department of Social Services*, unpublished.

**What's needed to build a safe and skilled workforce**

In the consultation, stakeholders expressed divergent views about how to best build a safe and skilled workforce. Some thought all workers, or workers in certain roles (who are not already subject to professional registration requirements by law), should meet minimum qualification or training requirements, demonstrate continuing professional development and/or register with a professional association. The Parliament of Australia's Senate Standing Committee on Community Affairs (2015) [Report on the Inquiry into abuse and neglect against people with disability in institutional and residential settings](#) also recommended that consideration be given to establishing a disability worker registration scheme that would include a stepped system of training and skills requirements. On the other hand, many stakeholders emphasised the importance of workers' attitudes over their qualifications, as they did in consultations on the development of the NDIS. These stakeholders did not think that a person with qualifications would necessarily provide quality supports, but a person with the right attitude could develop the necessary capabilities. They also identified the potential barriers that minimum qualification requirements could pose to recruiting sufficient job seekers to the NDIS workforce and referred to a lack of agreement about what requirements would apply to all roles in the sector. In particular, questions were raised about the effectiveness of existing qualifications and training for ensuring the delivery of safe, high quality supports.

In this context, introducing mandatory qualification requirements for all workers would not reflect the views of many participants and their families and would likely inhibit the growth of the sector. It is more appropriate to introduce requirements for specific supports. All workers would complete an orientation module, which would ensure that these workers are familiar with the principles underpinning the NDIS and the risks of providing supports, including issues related to abuse and neglect. At the same time, other strategies can support further capability building in the sector.

Providers will also need to ensure their recruitment and selection processes (including referee checks) are effective. Some stakeholders, including people with disability and advocates, identified involving people with disability in these processes and providing participants with the opportunity to choose or refuse a support worker as an important quality and safeguarding measure. The Parliament of Australia's Senate Standing Committee on Community Affairs (2015) [Report on abuse and neglect against people with disability in disability services](#) noted the importance of ensuring that staff are gender-appropriate to manage risk and respond to participant preferences (for example, ensuring that intimate personal care of women is provided by female workers).

Providers will also need preventative processes and internal training to develop positive work cultures. Recent reports and inquiries into abuse in institutional settings<sup>32</sup> suggest a number of systemic issues in the sector to be addressed, including:

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<sup>32</sup> These include Victorian Equal Opportunity and Human Rights Commission (2014) [Beyond Doubt: The Experiences of People with Disabilities Reporting Crime](#); Victorian Ombudsman's (2015) [Reporting and Investigation of Allegations of Abuse in the](#)

- a lack of clarity and shared understanding of the definitions of assault and abuse
- the importance of effective worker training for delivering safe, high quality supports
- workers not knowing how to report abuse
- managers covering up rather than addressing problems when they are reported
- ineffective processes for investigating serious incidents and coordinating with police, and
- violence becoming normalised because it occurs frequently or is justified as an appropriate way to manage people with challenging behaviours.

In the consultation, stakeholders emphasised the need for leadership, management accountability, ongoing training and supervision processes to ensure the workforce respects the rights of people with disability, aims to prevent harm and is able to respond appropriately if harm occurs.

#### Illustrative quotes from the consultation

*...it is imperative that the disability sector pursues value based and role based employment, rather than more qualifications, if people are to be assisted to lead normal lives. Value based employment means that people with disability will be supported to lead ordinary lives by those with appropriate skills and values. People with these skills and values may be better sourced from the full diversity of people in the community, perhaps through family or school networks, rather than solely from the pool of those with disability or medical qualifications. Role based employment means that support staff may be selected partially based on roles they fill in the community that may directly benefit a person with a disability due to that person's interests or goals. [Family Advocacy, submission<sup>33</sup>]*

*[I have] gone through the interviews with new staff in a service provider who provides support to me and that was very interesting because I could quite easily see during the interview those who would be good for people may not necessarily be for me but for others, and a person who just didn't sit well and really who should not have been in the industry ... I think that should be more prevalent ... because we're the ones who have to live with them, therefore we have a right as a group of people to say well, that person is not going to be okay, but I can see that will work with them. Or I love that person, they will work with them very well, because that in itself is a level of safeguarding that no one has been talking about. [Person with disability, Newcastle, public meeting]*

#### How it will work

**Strategies to grow the workforce and increase diversity:** the [Integrated Market, Sector and Workforce Strategy](#) sets out actions to support the development of the NDIS workforce.

These include:

- governments working with the sector, education authorities and professional bodies to ensure that professional education adequately prepares workers for the NDIS
- encouraging allied health professionals and others to choose a career in the disability sector (for example, through initiatives such as [Carecareers](#) and [ProjectABLE](#)), and
- supporting workforce retention.

The strategy includes a focus on fostering workforce diversity.

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[Disability Sector: Phase 1 - The Effectiveness of Statutory Oversight](#); Parliament of Victoria's Family and Community Development Committee's (2015) [Interim Report on the Inquiry into Abuse in Disability Services](#)

<sup>33</sup> Family Advocacy submission to NDIS Quality and Safeguarding Framework consultation, 2015. Available online at <https://engage.dss.gov.au/ndis-qsf-submissions/1431915116/>

**Orientation module:** a compulsory orientation module will be introduced for registered providers delivering supports, including registered sole traders and all employees of registered providers engaged in the delivery of supports. This extends to allied health professionals providing NDIS-funded supports (who could undertake this as part of their continuing professional development requirements). Registered providers will need to demonstrate that their workers have undertaken or are scheduled to complete the module, whether as an e-learning module or as part of their induction and training procedures. Unregistered providers will be able to choose to have their employees complete the induction module to differentiate them from other providers in the market.

The induction module will be made available online as well as in other formats. It could build on existing materials. For example, SkillsIQ has registered a skillset for induction to disability that includes four units, one of which references abuse and neglect. The orientation could cover:

- principles and values underpinning the NDIS, including choice and control
- obligations of providers and workers under the NDIS code of conduct
- basic legal obligations for workers, including those relating to safeguards (including abuse and neglect), and
- how to recognise and promote healthy body functioning, including equipping workers with basic awareness to recognise signs of distress or poor health requiring referral (an alternative to first aid training).

**Training and capability building:** the [Integrated Market, Sector and Workforce Strategy](#) includes supports to ensure the workforce has the right skills for the NDIS environment, for example, through the [Sector Development Fund](#).

**Provider practices and organisational cultures:** providers will need to develop effective recruitment, ongoing training and supervision processes to effectively manage risk and respond to participants. There are already some projects in place to support the development of organisational cultures that prevent abuse and neglect, including the NDS Zero Tolerance Project (see Box 4).

#### **Box 4: Zero Tolerance Project**

The Zero Tolerance Project, led by National Disability Services in partnership with the disability sector, gives providers evidence-based guidance on prevention, early intervention and responses to abuse, neglect and violence towards people with disability.

The project provides a curriculum of safeguarding topics for CEOs, boards and senior managers to address. It also includes practical tools and resources for frontline staff and supervisors. Tools developed to date include practice sheets on safer recruitment and screening, and the role of supervision in developing safer organisational cultures that are focused on service excellence.

More information about the project and project resources can be access from the [NDS website](#).

**Child safe organisations:** the [National Guidelines for Building the Capacity of Child-Safe Organisations](#) encourage organisations to demonstrate their commitment to creating and maintaining child safe environments by adopting particular policies, procedures, practices and strategies. Providers offering supports to children will be expected to comply with relevant child safety arrangements operating within their jurisdiction, including the *2005 National Framework: Creating Safe Environments for Children – Organisations, Employees and Volunteers*.

**Linkages:** worker screening will supplement provider recruitment processes. Local area coordinators, peer networks and independent advocacy services will have a key role in helping participants to assess information and make decisions.

## 3.2 Preventative

### 3.2.1 Screening workers

#### ***The context***

While the primary responsibility for recruiting and monitoring safe employees rests with employers, governments can support and assist providers delivering services under the NDIS to fulfil this responsibility.

Screening is one of a number of standard tools used in recruitment processes to inform whether someone will pose an unacceptable risk to people using a service. On its own, screening is insufficient for preventing abuse and neglect, but it is a necessary element in safeguarding.

Screening focuses on known and probable risk-factors, such as:

- a previous history of violence, abuse or neglect against others, particularly against people with disability, children or the aged, indicated, for example, by charges, convictions or Apprehended Violence Orders, and
- a history of non-disability related crimes or behaviours that suggest they may pose a serious risk.

Screening can operate:

- before the person is employed—for example, by requiring potential employees to undergo a Working with Children Check or employers to check they are not on a 'barred persons list' to prevent those who pose a high risk from working in the sector or in a particular role
- *while the person is employed*—for example, by requiring employees to undergo regular police checks or live monitoring of criminal history and other information, or
- *by excluding a person from future employment in the industry*—for example, when they have been dismissed from their job for misconduct.

In principle, risk-based screening can be undertaken by individual employers, commercial screening agencies or government screening bodies. However who does the screening

affects what information is taken into account, the process and the way the result is used. In particular, enhanced police information is not made available to individual employers or commercial screening agencies for security and privacy reasons. Government-managed screening processes are more effective than employer-managed screening processes because they can take into account a wider range of information, providing a better indication of the potential risk a person poses. The human resources literature across a range of sectors, including disability and children's services, strongly supports the use of worker screening that takes into account as broad a range of information as possible.<sup>34</sup>

### **Current policy**

All jurisdictions currently require those working in funded disability service providers, as well as those working with children, to undergo some form of screening. Requirements for disability service providers are generally contained in provider funding agreements.

Screening processes for disability workers currently range from criminal history checks conducted by employers to risk-based worker screening. Risk-based screening involves collecting a broad range of information from police and courts about the worker and conducting a risk assessment to evaluate the level of harm posed by a worker. Anecdotal evidence suggests that Working with Children Checks are being used as de facto requirements for all workers in the disability sector by many providers in jurisdictions that don't yet have a government-managed, risk-based system for screening these workers. Some jurisdictions, such as the Australian Capital Territory, have established Working with Vulnerable Persons Checks that extend beyond the disability sector.

A number of recent inquiries, including the current Royal Commission into Institutional Responses to Sexual Child Abuse,<sup>35</sup> have identified inconsistencies, inadequate information sharing and lack of portability of worker clearances across jurisdictions.

### **What's needed to protect participants from workers who pose an unacceptable risk**

The need to replace current requirements contained in funding agreements provides an opportunity to develop a nationally consistent approach to worker screening and consider the findings and recommendations of recent reviews into the issue. These inquiries and other literature have identified a need for a broad range of information to be included in worker screening, including referee checks; criminal convictions; criminal or civil charges not pursued; quashed and spent convictions and other information held by courts, police and child protection agencies; international police checks; allegations of workplace misconduct; and professional disciplinary proceedings. Information gathered should identify and exclude staff who have committed an offence, but do not have a conviction record (because of the barriers people with disability face in accessing the justice system) or a record of formal

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<sup>34</sup> See for example the literature review prepared for the Royal Commission into Institutional Responses to Child Abuse – Parenting Research Centre and University of Melbourne (2015) [Scoping Review: Evaluations of Pre-employment Screening Practices](#). See also Powers, L.E. and Oswald, M. (2004) [Violence and abuse against people with disabilities: experiences, barriers and prevention strategies](#) Oregon Health and Science University; Colaprete, F.A., (2012) *Pre-employment Background Investigations for Public Safety Professionals*, CRC Press.

<sup>35</sup> The Royal Commission into Institutional Responses to Sexual Child Abuse was established in January 2013 and its final report is due 15 December 2017. However, on 17 August 2015 it released a *Working with children checks report* that makes several recommendations that should be considered in the NDIS worker screening context.

workplace proceedings (because they left their role before their employer could start or finish an investigation). However, consideration is needed to ensure that people are not excluded from working in the sector on the basis of an offence committed many years ago that has no bearing on their ability to safely support a person with disability. Additionally, the employee screening system will need to include appropriate privacy provisions.

A nationally consistent system taking into account a range of factors will strengthen protections for people with disability. Evidence suggests most current screening processes are efficient (with results provided in two to 10 days), so the process should not create substantial recruitment delays (except when a person has a significant criminal history). Additionally, having checks that are portable between organisations will reduce red tape.

Consultation on the NDIS Quality and Safeguarding Framework also supported robust risk-based worker screening in the disability sector that is portable across jurisdictions.

#### Illustrative quotes from the consultation

*Employers should be required to obtain referee and police checks for all staff who will have client contact. However, these are minimal safeguards in view of the vulnerability of people with intellectual disability and the various reasons why mistreatment of people with intellectual disability seldom lead to criminal convictions. We support a requirement for working with vulnerable people clearances at least in relation to staff who have client contact. [Council for Intellectual Disability NSW, submission<sup>36</sup>]*

*The more safeguards in place the better. Regular, thorough screening is essential. Predators will look for areas to exploit vulnerable people. The more rigorous the screening the more an inappropriate person will be deterred from seeking this out as an area of employment. [Questionnaire, Disability support provider, South Australia]*

*Employers have varied levels of knowledge and understanding about issues such as domestic violence and sexual assault (e.g. grooming dynamics etc.), and may not always have the competencies to make the judgement in such situations. A specialist organisation like [sic] operates for the New South Wales Working With Children Check is a better option. [Questionnaire, Family member of a person with disability, New South Wales]*

#### How it will work

**A nationally consistent screening process** will be developed: the results of the screening process for an applicant will be valid throughout Australia, regardless of the state or territory in which it was issued.

**Who will be risk-based screened:** workers, including employees, agents, volunteers, contractors, and sub-contractors engaged by NDIS providers and the National Disability Insurance Agency (NDIA) that have significant contact with people with disability as a part of their work or role. Those engaged by NDIS providers or the NDIA who only have incidental contact with people with disability will not be required to undertake risk-based screening. Those who have already undergone equivalent checks through other systems will also be exempted.

<sup>36</sup> Council for Intellectual Disability NSW submission to NDIS Quality and Safeguarding Framework consultation, 2015. Available online at <https://engage.dss.gov.au/ndis-qsf-submissions/1430724703/>

**Who will run the screening process:** NDIS risk-based worker screening will be operated under a shared approach with defined roles and responsibilities. The Commonwealth through the NDIS registrar will have broad design responsibility, including determining scope, information to be considered, and a decision-making framework. States and territories will maintain operational responsibility for worker screening including managing and operating worker screening units.

**How will the decision be made:** the screening process will assess whether or not, on the balance of probabilities, a person would pose an unacceptable risk. It will take into account information such as convictions, including spent and quashed convictions; other police/ court information, such as current or pending charges; Apprehended Violence Orders, Child Protection Orders and child protection information; international police checks for those who have worked overseas, when feasible; and workplace misconduct, which comes to light through complaints and serious incident reporting. The assessment of risk will ensure that people who have committed offences in the past that have no bearing on their current ability to safely support a person with disability will not be excluded from the workforce.

**Appeals:** those who do not receive clearance will be able to apply to have the decision reviewed, firstly through the screening unit they used to apply for the clearance and, if unsuccessful, then through the relevant state/territory administrative appeals tribunal.

**Linkages:** providers will need to develop effective recruitment and selection processes to ensure they hire workers with the right attitudes and capabilities for particular roles, as well as effective ongoing management and supervision. Referee checking will remain a core responsibility of employers.

### **3.3 Corrective**

#### **3.3.1 Monitoring worker conduct**

##### ***The context***

To prevent harm to participants, it will be important that workers proven to have harmed in the past are identified and can be excluded from the workforce when necessary. To achieve this, stakeholders emphasised the need for ongoing monitoring of workers as a part of the design of worker screening.

##### ***How it will work***

Information from the NDIS registrar and the complaints body—such as employer reports of serious incidents, complaints and potential breaches of the code of conduct—will flow through to the screening units for continuous monitoring of workers holding clearances. Additionally, arrangements will be in place for monitoring police information and as much other information as possible. If new information on a worker holding a clearance comes to light, it may trigger a new risk assessment.

**Appeals:** workers who believe that they have been wrongly excluded will be able to apply to have the decision reviewed, firstly through the screening unit that excluded them, and, if unsuccessful, then through the relevant state/territory administrative appeals tribunal.

**Linkages:** complaints and serious incident reporting systems will provide a source of information to inform a worker's ongoing clearance status, as will potential breaches of the code of conduct.

## 4. Providers

The following developmental, preventative and corrective measures are designed to encourage safe, innovative, high-quality support provision and ensure providers that do not meet acceptable safety and quality standards are not able to support NDIS participants.

### 4.1 Developmental

#### 4.1.1 Building provider capacity and best practice

##### *The context*

In 2012–13 there were 2,141 organisations in Australia working through 15,659 service-type outlets that assisted people with disability on employment, accommodation, independent living, education and social participation.<sup>37</sup> In 2015, not-for-profit organisations made up about 78% of the sector, government services 12% and for-profit providers about 10%.<sup>38</sup> The number and types of providers will need to grow substantially to meet demand in the NDIS. As some state and territory governments have indicated that they will move out of direct service provision,<sup>39</sup> it will be important to support existing providers to transition and grow their organisations, as well as enable new providers to enter the market. In market segments in which government services have been the dominant provider, transitions will need to be effectively managed.

Existing funded disability service providers have many strengths but may face some challenges in transitioning from a block funding model (in which they are paid upfront to provide supports to a certain number of people with disability) to a market-based system (in which people with disability choose their provider and providers are paid for supports delivered). They will need to transform their business models to manage this change, successfully attract and retain participants, and manage fluctuations in demand and requests for more flexible support models.

To ensure the safety and quality of supports for participants, it will be important that all providers (existing and new) have positive organisational cultures in which participants and their families feel comfortable raising issues. Staff and managers will be expected to be responsive to these issues, and committed to continuous improvement.

<sup>37</sup> Australian Institute of Health and Welfare (2014) [Disability Support Services: Services Provided under the National Disability Agreement 2012–13](#), p. 11.

<sup>38</sup> NDS (2015) [State of the Disability Sector Report](#).

<sup>39</sup> To date New South Wales and Victoria have announced plans to transfer services to non-government providers.

### **Current activities**

Governments have already begun supporting existing providers to reform their practice, so they can successfully transition to the NDIS environment. Additionally, new providers have emerged in trial sites, which bring opportunities for innovation and improvements in outcomes for participants. It will be important for the NDIS that the market develops in a way which supports these opportunities, and that the Framework is designed to:

- build the capability of participants and providers
- encourage high quality support delivery
- monitor the market as it develops, and
- provide a timely response to emerging issues.

Encouraging diversity among providers and recognising the important role that both not-for-profit and for-profit sectors can play in human services markets is consistent with the principles outlined in the recent Harper [Competition Policy Review Report](#), which the Commonwealth Government has endorsed.

### **How it will work**

The [Integrated Market, Sector and Workforce Strategy](#) sets out actions to support development of a diverse and sustainable range of providers. These include:

- supporting existing providers to transition their business models
- attracting new providers by providing information on demand
- monitoring the market to identify any gaps
- supporting the development of innovative business models, and
- ensuring service options in rural and remote areas and other thin markets.

Initiatives are being supported through the [Sector Development Fund](#) and state and territory transition plans.

In future, the NDIA, industry bodies and non-government organisations, including academic institutions and centres of best practice, will also potentially play a role in market capacity building. The NDIS regulatory system will also help build provider capability to deliver safe and effective supports.

**Linkages:** the NDIS complaints commissioner will support best practice approaches to complaints handling. The NDIS senior practitioner will support delivery of best practice behaviour support. Quality assurance requirements will assist registered providers to identify weaknesses, build capability and drive continuous improvement.

The NDIS registrar will also have an important role in monitoring market capacity, diversity and maturity, and working collaboratively with providers to build market capability. The emphasis will be on identifying thin markets and gaps in geographic and support type coverage to ensure that participants in all locations and with all types of needs are able to access supports.

## 4.2 Preventative

### 4.2.1 Reducing restrictive practices

#### ***The context***

A relatively small proportion of people with disability may need additional supports to reduce the risk of harm when some of their behaviours pose a risk to themselves or others. These are often described as challenging behaviours or behaviours of concern. They are of such intensity, frequency or duration that the physical safety of the person or others is likely to be placed in serious jeopardy. They also include behaviour that is likely to seriously limit the use of, or result in, the person being denied access to services or ordinary community facilities.<sup>40</sup>

In these circumstances, providers, families and carers involved in the person's life need to understand the function of the behaviour and implement positive support strategies to substitute the harmful behaviour with a positive one. Often the behaviour arise when an individual's needs have not been met. It can typically be reduced or eliminated by identifying more productive, less harmful ways for the person to have their needs met. However, in some cases, the planned strategies will not work or the situation will escalate to a point at which the best and safest approach is to use interventions that restrict the person in some way. These are usually described as 'restrictive practices'.

Restrictive practices are any intervention that has the effect of restricting the rights or freedom of movement of a person with disability, with the primary purpose of protecting the person or others from harm. They include the use of seclusion, as well as chemical, mechanical and physical restraint (see Box 5).<sup>41</sup>

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<sup>40</sup> Emerson, E. (1995) *Challenging behaviour: analysis and intervention in people with learning difficulties*, Cambridge University Press, Cambridge.

<sup>41</sup> Department of Social Services (2014) *National Framework for Reducing and Eliminating the use of Restrictive Practices in the Disability Service Sector*, Commonwealth of Australia.

### Box 5: restrictive practices

- **Seclusion:** the sole confinement of a person with disability in a room or physical space at any hour of the day or night where voluntary exit is prevented, impeded or not facilitated.
- **Chemical restraint:** the use of medication or chemical substance for the primary purpose of influencing a person's behaviour or movement. It does not include the use of medication prescribed by a medical practitioner for the treatment of, or to enable treatment of, a diagnosed mental disorder, a physical illness or physical condition.
- **Mechanical restraint:** the use of a device<sup>42</sup> to prevent, restrict or subdue a person's movement for the primary purpose of influencing their behaviour. It does not include the use of devices for therapeutic or non-behavioural purposes. For example, it may include the use of a device to assist a person with functional activities as part of occupational therapy, or to allow for safe transportation.
- **Physical restraint:** the sustained or prolonged<sup>43</sup> use or action of physical force to prevent, restrict or subdue movement of a person's body, or part of their body, for the primary purpose of influencing a person's behaviour. Physical restraint is distinct from the use of a hands-on technique in a reflexive<sup>44</sup> way to guide or redirect a person away from potential harm/injury, consistent with what could reasonably be considered the exercise of care towards a person.
- **Psycho-social restraints:** usually involves the use of 'power-control' strategies.
- **Environmental restraints:** restrict a person's free access to all parts of their environment.
- **Consequence driven practices:** usually involve withdrawing activities or items.

In the past, restrictive practices were often used as a first line of response for people with behaviours of concern. It is now recognised that restrictive practices can represent serious human rights infringements. For example, the Parliament of Australia's Senate Standing Committee on Community Affairs (2015) [Report on the Inquiry into Violence, Abuse and Neglect Against People with Disability in Institutional and Residential Settings](#) found that 'in many cases what is deemed to be a necessary therapeutic or personal safety intervention is in fact, assault and unlawful deprivation of liberty'.

There is now also clear evidence that the routine use of restrictive practices to control individuals' behaviour has often been harmful and exacerbated the behaviours they were intended to control.

For the vast majority of people with behaviours of concern, it should be possible to eliminate the use of restrictive practices over time by understanding and responding to the issues underlying the behaviours. However, for a small number of people, it may be unrealistic to completely eliminate the use of restrictive practices, and there may be some cases in which restrictions are put in place for other reasons. An example could be a person with Prader-Willi syndrome who, in some situations, may require restrictions placed on access to food in their home due to behaviours arising from their medical condition that could cause harm, such as overeating or eating foods that have not been prepared properly and may cause food poisoning. This is an environmental restriction that could be a longer-term intervention to address these behaviours, while positive behaviour support interventions, such as behavioural therapy, are being implemented.

<sup>42</sup> A device may include any mechanical material, appliance or equipment.

<sup>43</sup> For example, a physical force or action lasting longer than approximately 30 seconds, that is not a reflexive manual restraint (McVilly, 2008).

<sup>44</sup> For example, momentary contact to guide or redirect a person, lasting for no more than approximately 30 seconds (McVilly, 2008).

While the goal should always be to move towards the reduction and elimination of restrictive practices, there should also be recognition that there may be some emergency situations or extenuating circumstances when a restriction is the most appropriate response. The NDIS should move toward a system in which the use of restrictive practices in response to behaviours of concern occurs by exception and is underpinned by a positive behaviour support framework. The NDIS Quality and Safeguarding Framework is based on a person centred approach, recognising that it is services, systems and environments that need to change to address the needs of the participant, rather than the participant needing to change to fit the system.

### **Current policy**

Consistent with the [UN Convention on the Rights of Persons with Disabilities](#), the Commonwealth, State and Territory Governments have committed to reducing and eliminating the use of restrictive practices through the [National Framework for Reducing and Eliminating the use of Restrictive Practices in the Disability Service Sector](#). The Framework, which was agreed in 2014, sets out six core strategies to be implemented by 2018 (see Box 6).

#### **Box 6: Core strategies for reducing and eliminating the use of restrictive practices**

**Person-centred focus:** including the perspectives and experiences of people with disability and their families, carers, guardians and advocates during restrictive practice incident debriefing, individualised positive behaviour support planning, staff education and training, and policy and practice development.

**Leadership towards organisational change:** leaders need to make the goal of reducing use of restrictive practices a high priority, and provide support to their staff to achieve it.

**Use of data to inform practice:** mechanisms—such as periodic review of behaviour support plans containing a restrictive practice, provider reporting on use of restrictive practices, reporting client assessments and individual/positive behaviour support plans—should be used to assess whether restrictive practices are still needed, and consider possible alternatives. Data is also important to determine what factors are effective in reducing or eliminating the use of restrictive practices.

**Workforce development:** key needs include understanding positive behaviour support and functional behaviour assessment, and skills for trauma informed practice, risk assessment, de-escalation, and alternatives to restrictive practices.

**Use within disability services of restraint and seclusion reduction tools:** use of evidence-based assessment tools, emergency management plans and other strategies integrated into each individual's positive behaviour support plan.

**Debriefing and practice review:** disability service providers should undertake regular review processes of their use of restrictive practices to identify areas for practice and systemic improvement.

While jurisdictions have all agreed to the national framework, they have different approaches to regulating the use of restrictive practices and use different definitions. Some have included provisions to regulate the use of restrictive practices in their disability services legislation (Queensland, Victoria, Tasmania, the Northern Territory and South Australia<sup>45</sup>). Others set out high-level principles and objectives in legislation, which are relevant to but do not specifically address the use of restrictive practices (Australian Capital Territory, New South Wales and Western Australia), and include specific requirements in policy (New South Wales) or a code

<sup>45</sup> In South Australia, the use of restrictive practices for people with mental incapacity is regulated by the Guardianship and Administration Act and the Disability Services Act provides that relevant funded providers must have in place appropriate safeguarding policies and procedures, including for the use of restrictive practices.

of practice (Western Australia).<sup>46</sup> Aside from authorisation arrangements, Queensland, Victoria and Tasmania have introduced reporting requirements around the use of restrictive practices and South Australia is in the process of developing reporting guidelines. Victoria, Queensland and Tasmania also have senior practitioners with statutory functions that include developing guidelines and investigating the use of restrictive practices. Government officials with statutory powers perform a similar role in Queensland.

***What's needed to ensure the reduction and elimination of restrictive practices and uphold the human rights of people with disability***

A range of protections will be available to safeguard the rights of participants with behaviours of concern. These requirements will ensure that restrictive practices are used only as a last resort, are the least restrictive option available and are in proportion to the risk posed by the behaviour. They will require NDIS registered providers to ensure the delivery of supports to people at risk of requiring the use of a restrictive practice aligns with current best practice and meets all registration requirements. Relevant registration requirements would include obtaining approval to include a restrictive practice in a behaviour support plan (consistent with state or territory law), working collaboratively with the person with disability, their guardian and positive behaviour support practitioners, and reporting on the use of restrictive practices to the senior practitioner.

While approval arrangements for including a restrictive practice in a behaviour support plan can have an important role in managing potential conflicts of interest, there are varying views about how this could be best achieved. In line with the national Framework, approaches for reducing the use of restrictive practices need to focus on how people with complex behavioural needs can be supported in a way that makes the use of restrictive practices unnecessary.

The Parliament of Victoria's Family and Community Development Committee's (2016) [Final Report on the Inquiry into Abuse in Disability Services](#) suggested there should be national oversight of restrictive practices by a senior practitioner function, but recommended this function sit within an independent oversight body. The Committee's interim report (2015) recommended that guardianship powers, including those relating to consent and substitute decision-making, should continue to be administered at the state and territory level. The Parliament of Australia's Senate Standing Committee on Community Affairs (2015) [Report on the Inquiry into Abuse and Neglect against People with Disability in Institutional and Residential Settings](#) also identified the need for national oversight and regulation.

While most people are not intending to cause people with disability harm or distress, there are differing levels of understanding of restrictive practices and the quality of behavioural assessments and positive behaviour support plans is inconsistent. Workplace culture can also be a significant factor when an organisation does not frequently review its use of restrictive practices to evaluate whether their use is appropriate for the situation, the opportunity is

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<sup>46</sup> In jurisdictions where the use of a restrictive practice for a person with disability is not regulated by disability services legislation, other laws—such as mental health legislation, guardianship and administration legislation, the criminal law and the common law—may apply in relation to the use of restrictive practices.

missed for workers to learn more effective strategies and feel supported in their role. External oversight of restrictive practices and the development of a national reporting system will give providers feedback on the areas they should focus on improving. This will help identify how they can better support staff to improve outcomes for participants with behaviours of concern.

Available data suggests that the use of restrictive practices in Australia remains high when compared with rates reported internationally, such as in the United Kingdom.<sup>47</sup> Regulation is important to work towards the goal of reduction and elimination of restrictive practices, but will need to be complemented by investment in education and prevention by senior clinicians.

A comprehensive approach to achieve the goal of reducing and eliminating restrictive practices would include:

- addressing the underlying causes of behaviours of concern by understanding the function of the behaviour, including by ensuring that participants are given the opportunity and support they need to exercise genuine choice and control
- ensuring that the will and preferences of participants are taken into account in decisions that affect them, including through supported decision-making
- a legislative framework that governs the use of restrictive practices
- building a skilled positive behaviour support workforce to conduct behavioural assessments, develop behaviour support plans in consultation with the person and others who know them well, and work with participants, families and providers to implement plans
- supporting providers to adopt best practice approaches to positive behaviour support and ensuring they have access to specialist expertise, guidance and educational resources when needed
- overseeing providers supporting people with a positive behaviour support plan, when it includes the use of a restrictive practice
- overseeing the use of restrictive practices through provider reporting, and
- regularly analysing data on use to identify and address systemic issues and assess the success of strategies to reduce use of restrictive practices.

This comprehensive approach will best ensure that Australia meets its commitments under the [UN Convention on the Rights of Persons with Disabilities](#) and that the rights of people with disability are protected.

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<sup>47</sup> Emerson, E. (2002) 'The prevalence of use of reactive management strategies in community-based services in the UK' in D. Allen (Ed.), *Ethical approaches to physical interventions* (pp. 15-28). Kidderminster: BILD. As referenced in Australian Psychological Society's [Evidence-based guidelines to reduce the need for restrictive practices in the disability sector](#).

### Illustrative quotes from the consultation

*While the national Framework references and outlines the importance of protecting the human rights of people with disability in line with the CRPD, there are limitations. There is still a focus on when and how to authorise restrictive practices rather than seeking to prevent their use, or identify and address the environmental factors that may cause an individual to behave in ways that are considered 'challenging'. [Women with Disabilities Australia and People with Disability Australia, submission]*

*One key need is a strong workforce of behaviour support practitioners. The NDIS should establish clear criteria for what professional qualifications and competencies are required to be a behaviour support practitioner and a workforce development plan to ensure that there is an adequate supply of competent practitioners. One of the required competencies should be in person centred active support. [NSW Council for Intellectual Disability, submission]*

*As a manager (reporting on use) it then gave me legitimacy to ask those questions of my staff to enhance their practice...I can go to the data and I can say this house or this particular shift or this particular worker seems to have an overuse of this particular restrictive practice compared to when a different worker is on. [Provider, Brisbane, meeting]*

*Mandatory reporting is required but the key element is education and training because reporting doesn't necessarily reflect use. You shouldn't create a deterrent for reporting but use it as way of identifying the need for education and training. [Provider, Australian Capital Territory, meeting]*

### How it will work

The approach to reducing and eliminating the use of restrictive practices in the NDIS through functional behaviour assessment and positive behaviour support will have specific requirements for:

- positive behaviour support practitioners (who conduct functional behavioural assessments, develop the positive behaviour support plan, provide guidance and training to other providers to implement participants' positive behaviour support plans and monitor the implementation of those plans), and
- other providers who indicate their scope of service is likely to include participants with behaviours of concern. These participants require a functional behavioural assessment and the development of a positive behaviour support plan containing a restrictive practice.

**Legislative framework:** the NDIS Quality and Safeguarding Framework will include a legislative framework which:

- defines the practices that are covered by the rules and explicitly prohibits certain practices
- sets out circumstances and conditions that must be met before a provider can use a restrictive practice, including obtaining approval, and ensures that the wishes of affected individuals are understood and reflected in positive behaviour support plans
- establishes an NDIS senior practitioner with statutory powers to provide practice leadership; follow-up with the relevant positive behaviour support practitioner and the registrar in response to incidents or concerns; make directions and recommendations; and has the power to proactively examine current practice in behaviour support and the use of restrictive practices

- sets competency standards for practitioners who will undertake positive behaviour support assessments, develop positive behaviour support plans, and provide positive behaviour support advice and training to underscore the implementation of these plans
- sets standards and other requirements for providers offering supports to individuals who require a positive behaviour support plan that includes a restrictive practice
- mandates transparency and accountability through provider reporting on the use of restrictive practices, and monitoring and review of this data by the provider, the relevant positive behaviour support practitioner and the NDIS senior practitioner
- prohibits any NDIS-funded provider from using a restriction contrary to the legislation, and
- enables necessary information sharing.

**Identifying participants who need positive behaviour support:** local area coordinators, NDIA planners and support coordinators will have a role in identifying participants with complex behaviour support needs and referring them to a positive behaviour support practitioner for assessment. Behaviour support needs may be identified at any point during the plan development, implementation or review stage. The senior practitioner will have a role in educating and providing guidance to local area coordinators, NDIA planners and support coordinators. This will assist those in planning and coordination roles to identify participants with complex behaviour support needs (or changing behaviour support needs) and appropriately refer them to a positive behaviour support practitioner for assessment or review.

**Authorisation:** Commonwealth legislation will set out the key principles around the use of restrictive practices, including that the intervention is the least restrictive response available, is used only as a last resort, and that the risk posed by the proposed intervention is in proportion to the risk of harm posed by the behaviour of concern. Relevant state and territory legislation will specify the conditions that must be met for the use of a restrictive practice to be approved in a positive behaviour support plan. This means that at a minimum, a decision to include a restrictive practice in a positive behaviour support plan must be consistent with state and territory legislation around the approval process. States and territories may enact (or amend) separate laws that provide mechanisms for seeking approval to include restrictive practices in a behaviour support plan. As states and territories have differing laws around what constitutes approval to include restrictive practices in a behaviour support plan when an individual is unable to consent on their own behalf, the requirement could include approval given by a:

- person who has been granted general legal guardianship or enduring power of attorney by a state or territory guardianship body for a participant
- person who has been specifically appointed as a guardian in respect to restrictive practice matters, for example, the public guardian (or equivalent)
- state or territory administrative tribunal, or
- a legally authorised person with responsibility for approving the inclusion of a restrictive practice in a positive behaviour support plan.

National consistency is a key element of the NDIS Quality and Safeguarding Framework and is something that should also apply across jurisdictions' approval arrangements. However, given the highly complex interactions between Commonwealth, state and territory legislation and the coverage of this legislation in terms of other service sectors in jurisdictions, it is unlikely this will be achievable in the timeframe required for full scheme. Instead, the aim will be for jurisdictions to continue (and make amendments as necessary), or review their current arrangements for full scheme, with a view to working towards national consistency over time.

Irrespective of the method for seeking approval to include a restrictive practice in a behaviour support plan, Commonwealth legislation will require that:

- a functional behaviour assessment has been undertaken by a positive behaviour support practitioner, and a positive behaviour support plan has been developed (with the exception of certain environmental restrictions)
- any restriction is clearly intended to assure the wellbeing and safety of the participant and others around them (for example, restrictions such as the routine use of medication to control behaviour, prescribed in the absence of any identified/diagnosed medical illness or condition for which that medication is typically prescribed), will be closely monitored. Monitoring this type of restraint is necessary, as it can be detrimental to reducing and eliminating use of restrictive practices. This is because it can remove the incentive for a provider to implement positive behaviour support strategies to address the behaviours of concern, since the behaviours become masked by ongoing chemical restraint
- alternative strategies have been considered and the proposed restriction is the least restrictive option, and is evidence-based and proportionate in terms of the behaviour of concern it is seeking to address
- approval to include a restrictive practice in a behaviour support plan has been obtained. It is likely the senior practitioner will provide guidance on what constitutes approval under state and territory law, and
- a review of the positive behaviour support plan has been scheduled for no more than 12 months after its development, with additional review points as required in response to changing needs.

**NDIS senior practitioner:** an NDIS senior practitioner will be established to provide clinical leadership in positive behaviour support, and reducing and eliminating the use of restrictive practices in the NDIS by:

- building registered providers' capability in positive behaviour support
- developing and updating policy and guidance materials that reflect current best practice
- working with the registrar to specify the requirements to become a registered provider in behaviour support, or a registered positive behaviour support practitioner
- implementing a framework for evaluating and building the competency of positive behaviour support practitioners and providing clinical governance and leadership to registered positive behaviour support practitioners
- receiving provider reports on instances of use and types of restrictive practices, and using this to inform actions to improve practice and reduce the use of restrictive practices

- reviewing serious incident reports involving the unplanned or unapproved use of a restrictive practice or that suggest unmet behaviour support needs
- following up on reports of inappropriate use of a restrictive practice
- developing and implementing a systemic approach to early intervention and prevention in behaviour support
- reporting annually to disability ministers on the use of restrictive practices, including policy issues and recommendations, and
- providing regular advice, reports and briefings recommendations to the NDIA on operational matters.

**Positive behaviour support practitioners:** an approved positive behaviour support practitioner, funded through participants’ plans, will assess participants identified as having complex behaviour support needs. The practitioner will then use the information from the assessment, together with information from other sources (including the participant, family and key providers), to develop a positive behaviour support plan. They will also have a monitoring role to ensure that the positive behaviour support plan is being implemented correctly and is achieving its intended outcomes.

Positive behaviour support practitioners will have a critical role in improving outcomes for participants with complex behaviour support needs, and helping to reduce or eliminate the use of restrictive practices. The senior practitioner will maintain a competency framework for positive behaviour support practitioners and provide clinical leadership and oversight to ensure practitioners have the appropriate skills and knowledge to perform their role effectively and consistently across the system.

Tables 1 sets out the possible competency requirements for positive behaviour support practitioners.<sup>48</sup>

**Table 1. Three key elements of positive behaviour competency**

Element	Positive behaviour support practitioners: summary of competencies
<b>Facilitation and development of a high-quality support environment that is responsive to individual needs</b>	<ul style="list-style-type: none"> <li>▪ <b>The practitioner’s role is to conduct a functional behavioural assessment and to develop a positive behaviour support plan. As well, they will oversee and support the plan’s implementation and advise on what changes the provider could make to better meet the participant’s needs (see description of subsequent elements below).</b></li> </ul>

<sup>48</sup> Paley, Nankervis & Lambrick (2015), *Competency framework for delivering positive behaviour support planning*. Provided to the Department of Social Services in March 2016 as part of work towards reducing and eliminating restrictive practices in the NDIS. Adapted from the work of the Positive Behavioural Support Coalition UK (2015). *Positive behavioural support: a competence framework*, (still under development).

**Conducting functional behavioural assessment and developing positive behaviour support plans (context, triggers, risk assessment, identification of potential strategies for responding etc.)**

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- Practitioner is able to demonstrate knowledge, experience and skills to conduct person-centred behavioural assessments, behavioural risk assessments, functional analysis, systems analysis, develop positive behaviour support plans and provide oversight, advice and feedback to provider staff and families with responsibility for implementing the strategies contained in positive behaviour support plans.
- Practitioner seeks input from the participant, family members and other important parties, and has skills to assess and evaluate level of risk relative to response, and quality of life (including quality of family life).

**Implementing, monitoring and reviewing positive behaviour support plan and evaluating its effectiveness**

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- Practitioner has the ability and skills to interpret behavioural information from provider's reporting and recording and is able to monitor, provide feedback and guidance and review and make adjustments to positive behaviour support plans in accordance with the most current evidence-based practice. This will include amending risk assessments to reflect any increase or decrease in risk posed by the behaviours of concern.
  - Practitioner has the ability to contribute to short-term and long-term planning as part of a whole-team approach and can provide specialist advice and training in behaviour support to staff (and families) responsible for implementing the strategies contained in the positive behaviour support plan.
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State and territory experts have indicated there is a shortage of positive behaviour support practitioners with both the relevant formal qualifications and the subject matter expertise to meet the competency standards. It is likely there will be a need for transitional arrangements until formal qualifications in behaviour support become more common. These arrangements are likely to be necessary both in the lead up to and, for some time beyond, full scheme implementation.

Transitional arrangements would, for example, allow suitably skilled and experienced individuals without formal qualifications in behaviour support to be included on an interim register of positive behaviour support practitioners. All individuals (with or without formal qualifications) wishing to be included on an interim register of positive behaviour support practitioners would need to demonstrate an appropriate level of skill, knowledge, experience and expertise in behavioural assessment, and the development and implementation of positive behaviour support plans (for example, through on-the-job experience and training). There would be an expectation that approved practitioners engage in ongoing professional development opportunities, and practitioners would be encouraged to enrol in formal professional training and tertiary courses in behaviour support as these become more available.

**Providers:** providers have a key role in developing plans that include restrictive practice, as this can help to support the appropriate implementation of a behaviour support plan, which is key to the reduction of restrictive practice over time. To be registered to provide

behaviour support, NDIS funded providers with a role in implementing the strategies contained in positive behaviour support plans that are likely to include the use of a restrictive practice will need to meet quality assurance requirements and be certified against an additional NDIS practice standard module that includes the provision of behaviour support.

Table 2 sets out possible competency requirements for providers.

**Table 2. Three key elements of positive behaviour support competency**

Element	Provider staff (support workers, supervisors and managers): summary of competencies
<p><b>Facilitation and development of a high-quality support environment (responsive to individual needs)</b></p>	<ul style="list-style-type: none"> <li>▪ <b>Social factors are being addressed. Provider is implementing strategies to increase community participation, expand the participant’s social network, and address any complex dynamics in the home environment etc.</b></li> <li>▪ <b>Health needs that may be contributing to behaviours of concern are appropriately managed (underlying mental health needs, such as anxiety or depression are addressed, medications provided on time, participants supported to attend medical appointments and timely advice sought from health professionals when required).</b></li> <li>▪ <b>Environmental factors are addressed wherever possible:</b> <ul style="list-style-type: none"> <li>– <b>Participants feel safe and the physical environment promotes good physical and mental health and wellbeing.</b></li> <li>– <b>Staff ratios are appropriate for the level of support required to meet the individual needs of the participants in the service.</b></li> <li>– <b>Restrictive practices are only used as a least restrictive, last resort intervention.</b></li> </ul> </li> </ul>
<p><b>Contributing to the functional behavioural assessment and development of positive behaviour support plans (context, triggers, risk assessment, identification of potential strategies for responding etc.)</b></p>	<ul style="list-style-type: none"> <li>▪ <b>Staff have the knowledge to work effectively with the practitioner (whether the practitioner is external to the service or directly employed by the service), including to provide relevant information and insights to inform the assessment process and development of a positive behaviour support plan, and encourages input from the participant, family members and other important parties.</b></li> </ul>
<p><b>Implementation, monitoring and review of positive behaviour support plan and evaluation of its effectiveness</b></p>	<ul style="list-style-type: none"> <li>▪ <b>Support workers responsible for implementing the strategies in the positive behaviour support plan are provided with the knowledge and skills to perform this role effectively and are supported by management and co-workers to implement positive behaviour support plans and to support participants developing positive behaviours.</b></li> <li>▪ <b>Skills are developed and maintained for providing appropriate oversight, management and supervision of teams of support workers implementing positive behaviour support plans.</b></li> <li>▪ <b>Staffing levels are consistent with the level of support</b></li> </ul>

Element	Provider staff (support workers, supervisors and managers): summary of competencies
	<p><b>required by the people accessing the service and adjusted when necessary to support implementation of the strategies contained in the positive behaviour support plan.</b></p> <ul style="list-style-type: none"> <li>▪ <b>The organisation implements relevant governance systems for practice oversight, monitoring and continuous improvement in behaviour support service provision.</b></li> </ul>

Information indicating provider non-compliance with the law and associated registration requirements regarding positive behaviour support and the use of restrictive practices may suggest a need for an educative or regulatory response. This information may be obtained through:

- provider reporting on their use of restrictive practices
- quality assurance audits
- reports or concerns raised by a participant’s behaviour support practitioner
- complaints and serious incident reporting
- community visitor scheme reports
- reports of concern from advocates and others, and
- linkages with state or territory arrangements for approving the use of a restrictive practice in a behaviour support plan.

There will be a risk management strategy for providers in this segment of the market that are granted provisional registration while they are working towards full certification. The senior practitioner or the registrar could more proactively oversee providers that have no previous experience providing positive behaviour support, or intervene if evidence emerges that the provider may be using questionable practices. Positive behaviour support practitioners could follow up more regularly with the participants whose behaviour support plans they oversee, until the provider gained full certification. The senior practitioner could also contact positive behaviour support practitioners working with these providers, so any issues that arise during this provisional period can be promptly addressed.

**Reporting:** providers supporting participants with a positive behaviour support plan that is likely to include the use of a restrictive practice will need to report on the use of those practices. Reporting will be at the end of each month through an online reporting system. Providers may be required to report:

- *Restrictive practices that are ongoing* (e.g. chemical restraint with a daily fixed dose). These will only need to be reported once when approved in a behaviour support plan and will not need to be re-entered as part of the monthly reporting unless there has been a change (e.g. dosage change, or the restrictive practice is no longer needed).
- *Restrictive practices that are ‘unscheduled’*—that is, where there is no set timeframe for when a situation will arise that requires the use of the restrictive practice. These will need to be reported as part of the monthly reporting on a per-occasion basis (e.g. physical restraint, seclusion, chemical restraint prescribed on an ‘as needed’ basis, also known as PRN medication).

- *Occasions when the use of an unauthorised restrictive practice is defined as a serious incident* because it was not part of the participant's behaviour support plan, because there is no plan in place, or because the intervention itself was dangerous or inconsistent with the conditions specified in the participant's plan and in the legislation and registration requirements. These would also need to be reported as part of serious incident reporting.

To enable the data to be used to support a reduction in the use of restrictive practices and improve practice, the reporting system would be developed to provide the:

- provider with access to aggregated site or organisational level and individual (participant) data reports relating to their use of restrictive practices
- positive behaviour support practitioner with access to individual level information for the individuals they are supporting
- senior practitioner with access to information on use from the individual level through to the systemic level.

### **Self-managing participants:**

The majority of participants at risk of being subject to restrictive practices are unlikely to be assessed as able to manage their own plan. However, risks may arise for these participants when someone (for example, a family member) is appointed to manage the plan on their behalf. The most significant risk lies with unregistered providers being used that are not subject to the proposed registration and oversight arrangements for positive behaviour support and restrictive practices, and who may not have the right skills to support people with complex behaviour support needs. Participants at risk of being subject to restrictive practices are likely to have limited ability to raise concerns about their treatment and will be reliant on others for support to assert their rights, yet they will be the people impacted most severely if things go wrong.

On this basis, providers will be required to be registered where the supports they offer are directly relevant to the implementation of the positive behaviour support plan and associated legislative requirements. Where the supports are not related to the behaviour supports (e.g. transport), or are regulated by other means (e.g. registered allied health professionals), it will remain the decision of the participant, their family and the NDIA about whether to self-manage those supports or if additional supports may be needed for a participant to safely engage with a range of providers (registered and unregistered) and implement their plan (for example, decision-making supports).

**Linkages:** while the senior practitioner will have access to serious incident reports relating to the use of a restrictive practice via the data information system, the NDIS complaints commissioner will also be able to refer other serious incidents that relate to inappropriate or unauthorised use of a restrictive practice, or that indicate unmet behaviour support needs to the NDIS senior practitioner. Additionally, the NDIS registrar will be able to refer issues relating to the quality of behaviour support to the senior practitioner.

In cases of serious non-compliance, or failure to address identified issues, the senior practitioner can recommend that the NDIS registrar take compliance action, including to suspend or revoke a behaviour support practitioner's (or another relevant provider's) registration when there are sufficient concerns about their competency or adherence to the legislation.

Information sharing and collaboration between the NDIA and the senior practitioner will also assist in driving best practice in positive behaviour support with the aim of reducing and eliminating the use of restrictive practices for participants in the NDIS.

**Intersection with mental health:** in the mental health system, there is a distinguishable separation between community and clinical (acute and sub-acute) services. If a person cannot be adequately supported in a community setting, they will be stepped up into a clinical setting. Because of this approach, seclusion and restraint is viewed in mental health as a clinical intervention that should therefore only occur in a clinical setting. As a result, the use of restrictive practices in a community setting typically only occurs in an emergency situation and would usually trigger a review by a mental health clinician about whether the person should be moved into a sub-acute or acute clinical support setting. A provider supporting people with psychosocial disability under the NDIS will still be expected to meet all requirements that are relevant to their service scope. There may be a number of isolated cases involving participants with high behaviour support needs in which the interaction between the NDIS and the mental health system becomes more complex, requiring clear coordination and agreement on roles and responsibilities.

Currently state and territory-funded mental health services have a range of documented policies and protocols for use of restrictive practices. State and territory mental health legislation includes specific requirements related to use of these interventions. The Model Mental Health Legislation, funded under the National Mental Health Strategy for use by states and territories when reviewing their mental health legislation, includes model clauses on seclusion and restraint.<sup>49</sup>

**Use of positive behaviour support for children, and the intersection with education:** the proposed assessment, positive behaviour support planning and oversight arrangements would only apply to children in situations where the child (participant) is being provided with supports funded through the NDIS. This means that a personal care worker funded by the NDIS to support a child who requires assistance with mealtimes and continence at school, for example, would be considered in-scope for the purposes of the proposed arrangements for reporting and monitoring positive behaviour support. However, the education system is responsible for regulating the use of restraint in schools. This means that teachers employed by the school and teacher's aids employed to support the child's educational needs would only be subject to regulatory arrangements prescribed by the relevant education department.

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<sup>49</sup> The *National safety priorities in mental health: a national plan for reducing harm*, accessed 7 April 2016 <http://www.health.gov.au/internet/publications/publishing.nsf/Content/mental-pubs-n-safety-toc~mental-pubs-n-safety-3~mental-pubs-n-safety-3-use>

A 'respite' or community access service funded by the NDIA to support a child participant would be in-scope for the proposed assessment, positive behaviour support planning and oversight arrangements. However, education providers are responsible for implementing state-based regulation governing the use of restraint in schools. This means that teachers employed by a school and teacher's aids employed to support the child's educational needs while at school are subject to regulatory arrangements prescribed by the relevant state legislation. In addition, jurisdictions have separate (including legislative) requirements relating to behaviour management for children accessing disability supports to ensure compliance with child protection and child services legislation. It will be the responsibility of the senior practitioner to ensure the quality and safeguarding arrangements for which they hold statutory responsibility are consistent with state and territory child protection and child services legislation.

State and territory regulation usually specifies when and how restraint should and should not be used, as well as what action should be taken following use of a restraint (e.g. debrief and reporting). State and territory governments are in the process of examining the information provided from recent inquiries covering the use of restrictive practices on children with disability in schools.

**Intersection with the justice system:** the justice system regulates the use of restraint and containment in accordance with criminal law and other legislation, and guidelines developed within each jurisdiction. Authorisation for the use of restrictive practices in this context may fall under Supreme Court Orders (via the justice system) where the person is unfit to plead under the Criminal Code and requires full-time supervision. Working arrangements are in place between the justice system and the NDIA to address the majority of intersection issues. However, there may be a number of cases involving participants with high behaviour support needs in which the interaction between the two systems becomes more complex. This may require coordination involvement and advice of experts from both systems.

**Intersection with health:** the health system has its own requirements relating to the use of a restraint that may be necessary to provide treatment. Health practitioners are required to adhere to practice requirements that are set by their relevant professional boards, as well as the operational requirements in relevant Commonwealth, state and territory legislation. It is possible that intersections may arise, for example, when an NDIS funded worker is required to take a participant to a medical appointment and that support worker may be expected to use a form of restraint for the treatment to be provided. However, these intersections should be adequately managed through participants' positive behaviour support plans and the provision of guidance by the senior practitioner on how NDIS funded workers should respond in such situations.

#### **4.2.2 Ensuring provider safety and quality**

##### ***The context***

The rights of participants to choose and move between providers will help to drive quality improvement and innovation in the market. However, this will not be sufficient to ensure the

safety and quality of supports and meet governments' duty of care obligations. This is why the Productivity Commission's inquiry into [Disability Care and Support](#) identified the need for rules for providers, monitoring of compliance and action to address breaches, including possible punitive measures.

A number of factors point to the need for a robust system of provider regulation, particularly as the NDIS market is still developing. These include:

- risks associated with any substantial injection of government funding into a system
- variations in providers' capability in terms of quality and safeguards
- the limited competition and likely capacity shortages given the system needs to expand rapidly
- the need for participants to develop the skills, capability and experience to take control of their supports and become 'active consumers
- the need for information about provider quality to inform decision-making
- a power imbalance that can exist between providers and people with disability
- heightened risk of abuse, neglect and exploitation faced by some people with disability
- the inherent risk involved in some types of supports (due to the effects of the support, the personal contact involved of the environment in which the support occurs), and
- dependence on certain types of supports for daily living.

As a broader range of providers are likely to enter the NDIS market, there is a need to consider what regulation requirements should apply to providers of different types of supports, to take account of provider size and to recognise the other forms of regulation that certain types of providers must already comply with. There is also a need to focus on capability building and continuous improvement. The bar for entry into the market should not be set so high that it would prevent growth and create unnecessary red tape, nor so low that it would enable workers and providers who would pose an unacceptable risk to participants to enter and operate.

### ***Current policy***

In most jurisdictions, quality and safeguarding requirements for providers of specialist disability supports are managed through the terms and conditions in funding agreements. Some additional requirements are also set out in state and territory legislation.

All jurisdictions require that funded providers comply with the [National Standards for Disability Services](#) or state-specific standards that have been mapped to these (see box 7).

### Box 7: The National Standards for Disability Services

The National Standards for Disability Services, agreed by governments in 2013, are intended to promote a nationally consistent approach to improving the quality of services. They focus on rights and outcomes for people with disability. There are six standards.

1. **Rights:** the service promotes individual rights to choice and control, freedom of expression and decision-making, and actively prevents abuse, harm, neglect and violence.
2. **Participation and inclusion:** the service works with individuals and families, friends and carers to promote opportunities for meaningful participation and active inclusion in society.
3. **Individual outcomes:** services and supports are assessed, planned, delivered and reviewed to build on individual strengths and enable individuals to reach their goals.
4. **Feedback and complaints:** regular feedback is sought and used to inform individual and organisation-wide service reviews and improvement.
5. **Service access:** the service manages access, commencement and leaving a service in a transparent, fair, equal and responsive way.
6. **Service management:** the service has effective and accountable service management and leadership to maximise outcomes for individuals.

In most cases, providers must demonstrate compliance through an independent quality assurance or quality evaluation process. This generally involves self-assessment, independent assessment and performance reporting. As assessments differ, providers who work across different jurisdictions must demonstrate compliance with requirements in each jurisdiction. Additionally, providers who work across sectors (for example, child care or aged care) must demonstrate compliance with multiple sets of quality standards, which have overlapping elements.

Currently, providers must apply to the NDIA to become registered providers of NDIS supports. Their application needs to explain the types of support they wish to provide, the areas in which they wish to provide them, their experience, qualifications or professional registrations (where relevant), and details of the processes they have in place to ensure a quality service. The chief executive officer of the NDIA (or delegate) then assesses whether the provider meets the criteria set out in the [NDIS Act 2013](#) and NDIS Rules. For the types of supports that must, by law, be provided by a person with certain qualifications (such as a psychologist or physiotherapist) or some other form of license, providers must demonstrate workers have this qualification or license. Depending on the type of support they plan to offer, providers may also need to provide evidence that they are financially viable, their workers have undergone national police checks, that they have risk management and complaints processes in place, suitable facilities and equipment, insurance and relevant licences, and that they comply with relevant practice standards.

As the NDIS market develops, new services and supports will emerge. In the case of specialist disability accommodation, work is underway to develop rules and policy for this type of support. The NDIS Quality and Safeguards Framework will need to consider the risks and opportunities of this segment of the market, including appropriate quality assurance mechanisms described below.

Registered providers must comply with all laws that apply in the jurisdictions in which they operate and in line with the NDIA [Terms of Business for Registered Support Providers](#) (which

include having a complaints process and reporting serious incidents). During the transition period, registered providers must also comply with state and territory quality requirements.

***What's needed to ensure a range of quality services for participants?***

There is a need for providers of more complex supports to demonstrate compliance with the [National Standards for Disability Services](#) through independent quality assurance arrangements based on NDIS practice standards. This would give a level of assurance that providers deliver supports in line with the standards principles of the NDIS, have effective risk management and governance processes, are sustainable, and commit to continuous improvement. A national system could also help to reduce compliance costs for providers working across multiple jurisdictions, while mutual recognition of compliance with equivalent standards (wherever possible), could reduce compliance costs for providers working across multiple sectors. Additionally, the development of a national system would provide an opportunity to strengthen the focus on understanding participant outcomes in quality assurance systems.

It will be necessary to tier registration requirements in proportion to the potential risks posed by the supports the provider offers and the needs of the participants they support. Targeting the highest requirements to the highest risk situations will provide the right balance. It will prevent unscrupulous providers from entering the market, but will not hinder the development of a diverse provider market or increase the cost of delivering supports to an unsustainable level.

A registrar will also be needed with the power to enter and inspect premises, access relevant documents, commence inquiries and investigations when it considers they are warranted, and to make binding decisions and impose sanctions and fines. A market monitoring role would also help to identify and address issues with thin markets, market failure or predatory pricing.

Experience in other market-based systems suggests the market monitoring role should include providers of difficult-to-replace supports and those with a dominant market share. When the UK moved to a market-based system for social services, the failure of a large provider created significant difficulties for service users and government authorities. In the Australian early childhood education and care sector, the failure of a large provider had a similar effect. The purpose of the monitoring role would not be to protect failing businesses, but to ensure that providers of key supports are operating with prudent governance and not putting participants at risk of unplanned service withdrawal.

The registrar would also need to have a role in ensuring that the NDIS workforce has the right attitudes, knowledge and skills (through provider registration and quality assurance) to deliver services in an increasingly client centred and market driven environment.

### Illustrative quotes from the consultation

*...probably in the last 10 years I think there's been improvement in the sector and that's because we've had legislation which has had a strong human rights framework and we've also had external quality accreditation, so I think that has pushed people to actually review what they do and to have transparency. I think in terms of our quality auditing there's a big focus on talking to our consumers and looking at our consumer feedback. So it's about how that quality process is done. But I think we've made really important gains in the last 10 years and there is a risk that we're actually going to lose that".*  
*[Supplier, Geelong, supplier meeting]*

*[What would be a low risk situation?] Taking someone to the gym, because you're in the community, there are people there. Particularly if you don't have really severe disabilities, it's not like you're going to be there on your own. However, if you were providing personal care to someone or you are a specialised driving instructor and you are on your own, then there should be a higher level of regulation and stuff involved because there is that higher level of risk. I also think that police checks and stuff should be mandatory, particularly if you're going to be on your own, just to provide that safety net.* *[Person with disability, Newcastle, public meeting]*

### How it will work

To ensure the provision of safe and quality services and the development of an effective NDIS market, an NDIS registrar will be established, all providers will be required to comply with an NDIS code of conduct, and providers of certain types of supports will be required to meet additional quality and competency standards. Registration requirements will be proportionate to both the risk inherent in the service delivery model, and the scale of the organisation. This is described in Box 8.

**NDIS registrar:** the NDIS registrar will be responsible for:

- informing participants about the NDIS code of conduct and provider quality and competency standards (including worker competency for specific types of services)
- informing providers of their obligations and assisting them to comply
- registering providers
- designing broad policy settings for worker screening including determining scope, information to be considered and a decision making framework (see 3.2.1)
- reporting to the Minister and publically on their priorities and activities
- managing the NDIS practice standards and certification scheme and reviewing these with input from participants, industry stakeholders, the NDIA and other government partners
- monitoring compliance and taking action when providers fail to meet requirements
- referring matters to other relevant authorities, when required
- monitoring market capacity, diversity and maturity, and working collaboratively with providers to build market capability, and
- identifying and monitoring providers carrying significant risk in terms of their financial viability and governance (prudential) arrangements to prevent providers of difficult-to-replace supports from putting participants at risk of unplanned service withdrawal.

**Tiered requirements for providers:** all providers, whether registered or not, will be required to comply with applicable Commonwealth, state and territory laws, the NDIS code of conduct, and the NDIS complaints resolution process. All providers wishing to become registered will be required to participate in a verification or certification process.

Certification requirements will apply for providers who wish to deliver higher risk support types, as outlined in Figure 3. These requirements will be set out in a modular set of NDIS practice standards with core practice standards and specific practice standards. There will be a clear line of sight between the NDIS code of conduct, the NDIS practice standards and the [National Standards for Disability Services](#). Key standards, such as participant rights, will be reflected in both the code of conduct and the practice standards. The practice standards will also reflect the [National Standards for Mental Health Services](#) for providers specialising in mental health services.

All providers delivering higher-risk supports will be required to gain third party quality assurance certification against the core practice standards. These will cover risk management, expected qualifications and competencies for employees, complaints systems, and effective and inclusive governance.

Specific practice standard modules will apply to providers of more complex supports, including:

- positive behaviour support for practitioners responsible for conducting behavioural assessments and *developing* positive behaviour support plans
- providers responsible for *implementing* positive behaviour support plans that are likely to include the use of a restrictive practice
- providers delivering complex support plan coordination
- early childhood supports
- providers delivering high intensity daily personal activities
- providers delivering supports for people with complex needs, including health needs, and
- providers of specialist disability accommodation.

Figure 3 sets out how registration requirements would be tiered.

**Figure 3 Tiered provider requirements**

	Lower-risk supports	Higher-risk supports
<b>Larger providers</b>	<p><b>Provider types:</b> e.g. cleaning company (more than five employees).</p> <p><b>Requirements:</b> can choose verification of individual employees or certification of organisation. The latter will be more efficient (lower cost and address employee turnover).</p>	<p><b>Provider types:</b> large organisation undertaking range of higher risk supports, including personal care, behaviour support or accommodation.</p> <p><b>Requirements:</b> quality assurance certification focused on compliance with practice standards and management of risks, including governance and internal quality systems. Requirements tailored to scope of supports offered.</p>
<b>Smaller providers</b>	<p><b>Provider types:</b> e.g. sole operator doing gardening, cleaning; allied health professionals registered with AHPRA or that have full membership of a recognised professional association, where relevant to their scope of practice.</p> <p><b>Requirements:</b> verification of insurance, qualifications, employee screening.</p>	<p><b>Provider types:</b> e.g. sole operator offering higher risk supports.</p> <p><b>Requirements:</b> proportionate quality assurance certification tailored to scope of supports. Includes: competence, training, experience and understanding of risks. Certification evidence requirements proportionate to the size of the organisation.</p>

**Mutual recognition:** requirements will be streamlined for providers that can demonstrate compliance with existing comparable standards. Providers that are registered with AHPRA or have full membership of a recognised professional association (including those in [Schedule 1 of the Health Insurance \(Allied Health Services\) Determination 2014](#)) will not need to meet additional certification requirements unless they are intending to provide one of the types of support that require highly specialised skills and experience.

There will also be mutual recognition of similar accreditation arrangements (such as for aged care and other community services), which will streamline requirements for providers working across different sectors.

**Verification process:** registered providers whose service model is deemed to be low risk will only undergo a simple, periodic verification process. Typically, providers of everyday services that are used by the general public—such as a gardening or domestic cleaning service—will fall into this category.

An NDIS appointed verifier will be responsible for checking provider credentials.

The verification process will confirm:

- the provider’s identity (ABN, personal identity and/or identity of legal entity)
- that workers delivering supports for which they are required by law to have professional qualifications, registration or licensing, meet these requirements

- when an allied health professional's qualifications are not directly linked to the service, testing of recency of practice
- that the provider has adequate insurance for the scope and nature of the service they are offering
- that there is an internal complaints and serious incident reporting management system in place, and
- that workers have undergone relevant screening.

This approach is intended to place the least burden on providers of supports that pose a lesser risk for participants and to the NDIS as a whole. Providers of these of these types of services can choose to undergo quality assurance certification if they view it as beneficial for marketing their service as NDIS certified.

**Quality assurance certification process:** providers delivering higher-risk supports or supporting participants at heightened risk will undergo quality assurance certification.

Audits against the NDIS practice standards will be undertaken by trained third party auditors, accredited by an auditing body. The audit process will include a range of techniques to assess compliance, including document reviews, observations during site visits, and assessing performance based on the lived experience of participants (captured through conversations with participants and families and observation). The audit methodology will be tailored to the size of the provider—a smaller sample of participants will be involved in smaller providers. The NDIS registrar will have overall responsibility for ensuring that assessment methods used are not unduly onerous, that they focus on real risk, and that they incorporate participant perspectives on quality and outcomes.

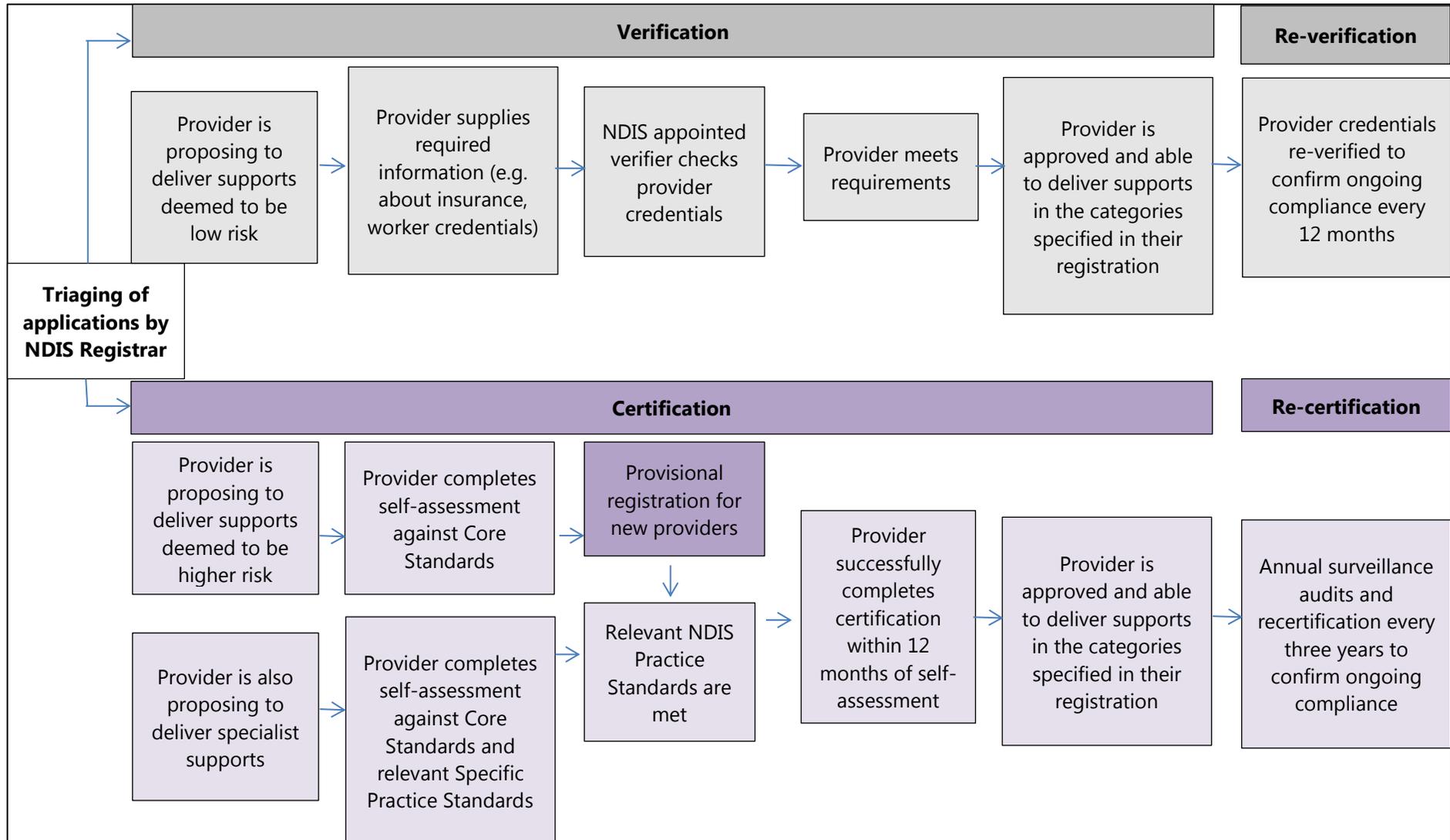
Providers will select an auditor from the approved list. Auditors will be required to notify the NDIS registrar of any major non-compliance concerns discovered in the audit so that these can be addressed and systemic issues identified. For minor matters, the auditor will work with providers to develop an improvement plan that sets timeframes for addressing gaps appropriate to the risk posed by non-compliance.

Providers will generally need to be re-certified every three years. However, the review cycle can be shortened for providers with a history of serious non-compliance. Conversely, it can be extended if the NDIS registrar is satisfied that a provider has an established track record in effectively managing quality and safety.

**Overview of provider registration:** Figure 4 sets out how provider registration will be applied in full scheme. It shows how providers will be triaged into the verification or certification process and the requirements they will need to meet.

Providers that are already certified under an existing scheme (including state and territory schemes) will not be required to seek certification until their existing certification expires. New providers that are required to undergo certification will receive provisional registration pending their full certification within 12 months, unless their initial self-assessment identifies that they pose an unacceptable risk to participants.

**Figure 4. Provider registration, verification and certification processes**



The scenarios in Box 8 illustrate how the requirements will apply to different types of providers.

### Box 8: Provider scenarios

#### Scenario 1: the online intermediary

**Proposed scope of practice:** I run a website that links people who require social care with people in their local area. If they claim certain qualifications (for example, that they are a registered nurse, have a first aid certificate or a driver's license) I will verify that before I put them up on the site. I also verify identity and check that workers have obtained a police check or a working with vulnerable people check, depending on what is required in the state they live. Workers can charge what they like; my share is 10 per cent of what they are paid. All financial transactions operate through the website.

**Assessment:** you are a non-financial intermediary, although money moves through your website from the people you match to workers, you are not a funds holder and do not directly supervise the quality or competency of workers on your website. In this case, the NDIS registrar will not register your organisation. Workers on your website have the option of registering in their own right. If they do so, they have the right to be paid directly by the NDIA when their client has agreed that the NDIA will hold his or her plan funds. Otherwise, your organisation and the affiliate workers are unable to register, but will be able to offer services for participants who self-manage their plan or have hired a financial manager to do so on their behalf.

The non-financial intermediary and all individually registered workers will be subject to the NDIS code of conduct and the individually registered workers will be expected to report serious incidents to the complaints commissioner. If the non-financial intermediary or any individually registered workers breach the code, the NDIS complaints commissioner could issue an order prohibiting the worker (or the non-financial intermediary as an organisation) from direct or indirect receipt of income through the NDIS.

#### Scenario 2: general self-employed disability worker

**Proposed scope of practice:** I provide domestic and social participation services and will also help with personal care depending on the person and their needs. I have registered with an online site.

**Assessment:** if you wish to be a registered provider you will need meet the verification requirements, e.g. to have your own ABN, provide evidence of your insurances, and undergo background checking (working with children checks or working with vulnerable persons checks).

You will also be required to comply with the NDIS code of conduct.

#### Scenario 3: Allied health professional (AHPRA registered)

**Proposed scope of practice:** I'm a registered physiotherapist and will be applying to practice as a sole trader to provide general physiotherapy services.

**Assessment:** you are providing a service that is already regulated by AHPRA and the Physiotherapy Board of Australia. You will need to provide the NDIS registrar with your AHPRA registration number, a copy of your professional indemnity insurance and personal liability insurance and a copy of your working with children check (or number) or working with vulnerable persons check. These credentials and your identity will be verified. Every 12 months you will be asked to re-verify your insurance and provide evidence that your AHPRA membership remains current. You will also be required to comply with the NDIS code of conduct. This will not diminish your responsibilities under state and territory child protection legislative requirements if providing supports to children.

**Scenario 4: Allied health professional (non-APHRA registered)**

**Proposed scope of practice:** I'm a university trained speech therapist and a full member of Speech Pathology Australia. I will be practicing as a sole trader.

**Assessment:** you are providing a service that is already self-regulated by a recognised industry body. You will need to provide the NDIS registrar with details of your membership of Speech Pathology Australia, a copy of your professional indemnity insurance and personal liability insurance, and a copy of working with children check (or number) or working with vulnerable persons check.

The NDIS appointed verifier will check your identity and matching credentials then issue advice to the registrar.

Every 12 months you will be asked to re-verify your insurance and provide evidence that your membership of Speech Pathology Australia remains current. You will also be required to comply with the NDIS code of conduct. This will not diminish your responsibilities under state and territory child protection legislative requirements, or legal obligations relating to professionals, such as requirements for health practitioners registered with the Allied Health Practitioner Regulation Agency and requirements to meet the code of conduct for unregistered health practitioners.

**Scenario 5: an organisation with a broad scope of service, including personal care, which may require clinical skills**

**Proposed scope of practice:** I run a medium-sized service. I employ a mix of disability workers who we train in house and some nurses and allied health practitioners. We support people who have severe physical disabilities and require high levels of personal care, at home or while accessing activities in the community. Our workers will also help with some housework, but we sub-contract garden maintenance and cleaning services. When we do that we take responsibility for supervision of the sub-contractors.

**Assessment:** there are two steps to registration in this scenario. You are providing a complex service in which you are employing others to undertake tasks of a personal or high-risk nature in an unsupervised context or the participant's home. Some of the people you support may be vulnerable because of physical or social reasons or both.

The first step is that the owner or CEO would conduct a self-assessment in a form approved by the NDIS registrar, which will confirm which modules your organisation needs certification against. You can choose your own auditor from a panel of auditors trained in the NDIS practice standards. Your auditor will check your self-assessment to ensure you have necessary systems in place for planning and controlling for the risks that you routinely encounter and that you are providing participants with the quality of outcomes they expect. You will also need to demonstrate that you assess potential vulnerability and work with participants to appropriately manage risks. The auditor will advise the NDIS registrar if they consider that you are meeting the standards. If you are not meeting one or more of the standards, the auditor will advise whether this can be remedied over the course of the certification process or whether there is too high a risk and this must be remedied before you are given provisional registration.

You will receive a copy of the NDIS code of conduct, which you are required to discuss with your workers. Both your organisation and your workers will be required to comply with the NDIS code of conduct and all other Commonwealth, state and territory legislative requirements relevant to your service.

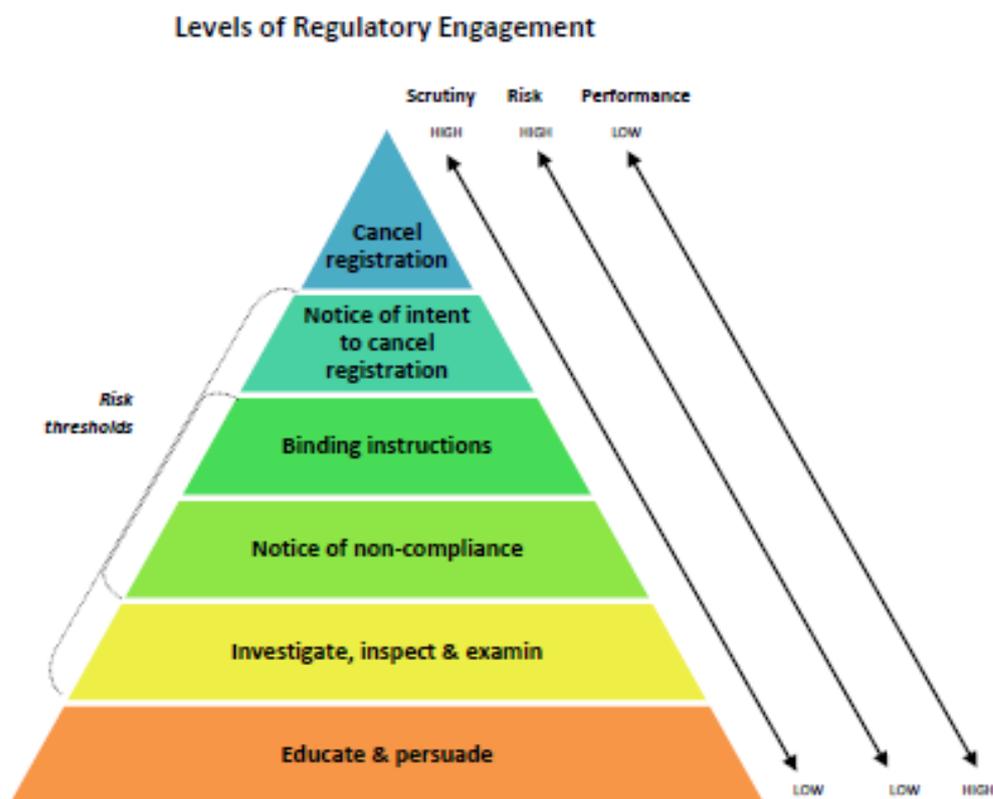
If the auditor recommends that you receive provisional registration, the NDIS registrar may include you on the panel of approved providers to undertake the activities specified in your scope of service. You will then have 12 months to achieve certification against the NDIS practice standards relevant to your scope of service. Because you are providing a broad range of services, including personal care, and your workers are in a position of significant responsibility, you will be assessed against the core

standards and additional specific practice standard modules. As part of the independent assessment process, the auditor will talk to your workers and interview a sample of participants (and their families, if appropriate) to ask them about their experiences. The number of people they need to talk to will depend on how many participants you support. The auditor will also check with the NDIS complaints commissioner to see if there have been complaints or serious incident reports about your organisation and what has happened as a result of those complaints and incidents.

Once you have been certified, there will be two 12-monthly follow-up audits (in years two and three. At the end of the three-year period, you will need to start the certification cycle again.

**What happens when an issue with a provider is identified:** risk-responsive regulatory systems for disability services typically include the kinds of regulatory responses set out in Figure 5.

**Figure 5. Levels of regulatory engagement**



Source: ACT Human Services Registrar.

The NDIS registrar will have a range of compliance powers to use in response to the information it receives, including from the complaints commissioner and senior practitioner. The response will depend on the seriousness of the issue, the appropriateness of the provider's response and the degree of future risk the situation poses. Deregistration will be the last resort.

- *Educate and persuade*: the primary approach will be to educate, advise and encourage providers to improve practice. This may include general provision of best practice guides and training, including publishing guidance materials that include examples of good and poor practice.
- *Investigate, inspect, conciliate and examine*: when a specific problem arises, for example in relation to an audit finding or a serious incident report, the registrar will be able to take more targeted action. This may include requiring compliance reporting proportionate to risk or one-off regulatory action, such as a formal investigation or audit of compliance.
- *Notice of non-compliance/infringement, compensation and enforceable undertakings*: when the registrar identifies non-compliance with a relevant NDIS practice standard, they may give the provider a written warning. Depending on the nature of the issue, the provider may then commit to complying in future, undertake training or implement a system to remedy the situation, make restitution/pay compensation, or take other appropriate action.
- *Binding instructions and public warnings*: when the situation is more serious, a provider will be required to comply with instructions and could be suspended or 'named and shamed'.
- *Cancellation of registration/exclusion notice*: when the situation warrants it, the registrar will be able to formally notify the provider of the intent to cancel their registration or, in the case of unregistered providers found to have breached the code of conduct, issue an exclusion notice that would preclude them providing NDIS funded supports. The provider would be able to make representations before a final decision was made. The Productivity Commission's inquiry into [Disability Care and Support](#) suggested that consideration should be given to a range of other penalties, including redress orders and fines. The ACCC for example, can seek civil and criminal penalties as well as injunctions.
- *Civil pecuniary penalties*: a civil penalty is a financial penalty and is designed to deter the person and others from breaching the law. A penalty may only be imposed by the court once it has found that the organisation has breached the law at the civil standard of proof (i.e. on the balance of probabilities). Under Australian Consumer Law for example, a person who is found to have made false or misleading representations may be liable to pay a civil penalty of up to \$1.1 million for companies and \$220,000 for individuals. In the NDIS context, civil penalties might be appropriate, for example, for failure to report a serious incident or engaging in retribution against a whistle-blower.
- *Criminal convictions and fines*: referral pathways for criminal action, for example, if a provider seriously harmed a participant in ways amounting to assault or criminal negligence, or engaged in fraud.

The registrar's powers would also extend to prohibiting specific practices, such as commissions paid by providers for new business, as well as powers to examine practices already prohibited. This could include for example anti-competitive practices prohibited under the Australian Consumer Law.

**Market oversight:** the registrar will gather intelligence on the capacity and performance of the market through provider registration, quality assurance and NDIA market data. The patterns of complaints and serious incidents reported to the NDIS complaints

commissioner will also be considered. The registrar's market oversight role will also include scrutiny powers relating to providers of difficult-to-replace supports, and providers with a dominant share of the market in a particular location or service type. Rapid expansion or contraction of market share will be tracked as an indicator of changing risk.

The registrar will base the decision that a provider of difficult-to-replace supports needs to be monitored on a range of criteria, including the providers' scope, speciality of supports provided, geographical reach and risk of the support type. When monitoring is required, the registrar will develop compliance requirements proportionate to the risks the provider is managing. In most cases, this will include provision of standard reporting information already commonly required under contractual funding arrangements. Depending on the nature of the risks involved, this may include financial reporting, reporting on significant governance changes and developing a plan for continuity of service if the provider fails.

**Linkages:** provider registration will work alongside other elements of the regulatory system. The NDIS complaints commissioner will be able to notify the NDIS registrar of provider non-compliance with the code of conduct. The registrar will be able to refer issues related to the quality of behaviour supports and the use of restrictive practices to the NDIS senior practitioner. The registrar will also be able to make referrals to the Australian Competition and Consumer Commission when it identifies issues related to competition and compliance with Australian Consumer Law and to other state-based bodies as appropriate.

## 4.3 Corrective

### 4.3.1 Investigating non-compliance with the code of conduct

#### ***The context***

The vast majority of providers and workers operate in a safe, competent and ethical manner. However, a small proportion may present a serious risk to participants or may operate outside the boundaries of acceptable conduct. To ensure the safety and quality of supports within the emerging NDIS market, it will be important that minimum expectations are set and providers and workers who are not able to meet these are excluded from the NDIS market.

A statutory code of conduct is a mechanism used in some sectors to promote safe and ethical service delivery. It can have both a preventative effect (by clearly setting out expectations of providers) and a corrective effect (by providing a mechanism for excluding providers who engage in unacceptable conduct from the NDIS market). Most codes include a mix of positive statements about duties of practitioners, obligations and prohibitions and positive statements of rights.

### **Current policy**

There is not currently a code of conduct for funded disability services or workers in the sector. Instead, as noted above, all jurisdictions require that funded providers comply with the [National Standards for Disability Services](#) or state-specific standards that have been mapped to these.

Some professionals working with people with disability (for example, allied health professionals) also need to comply with a code of conduct for their profession. In some sectors, codes of conduct supplement professional registration requirements. In others, individuals do not need to demonstrate compliance upfront: the code comes into play when a complaint is made or when other evidence indicates a possible breach of the code.

The National code of conduct for (unregistered) Health Workers, agreed by the Council of Australian Governments in April 2015, provides an example of a negative licensing model targeted at individual workers. Box 9 summarises the main provisions of the code. Anyone can make a complaint about a breach of the code. Health complaints entities that administer the code regulation regime have 'own motion' powers to initiate an investigation of a possible breach, with or without a complaint. State and territory complaints bodies can issue prohibition orders that bar people who have breached the code. Failure to comply with a prohibition order is a criminal offence.

#### **Box 9: Key provisions in the [National Code of Conduct for \(unregistered\) Health Workers](#)**

The code covers the following topics:

1. Health care workers to provide services in a safe and ethical manner.
2. Health care workers to obtain consent.
3. Appropriate conduct in relation to treatment advice.
4. Health care workers to report concerns about the conduct of other health care workers.
5. Health care workers to take appropriate action in response to adverse events.
6. Health care workers to adopt standard precautions for infection control.
7. Health care workers diagnosed with infectious medical conditions.
8. Health care workers not to make claims to cure certain serious illnesses.
9. Health care workers not to misinform their clients.
10. Health care workers not to practise under the influence of alcohol or unlawful substances.
11. Health care workers with certain mental or physical impairment (that could place clients at risk of harm).
12. Health care workers not to financially exploit clients.
13. Health care workers not to engage in sexual misconduct.
14. Health care workers to comply with relevant privacy laws.
15. Health care workers to keep appropriate records.
16. Health care workers to be covered by appropriate insurance.
17. Health care workers to display code and other information.

### **What's needed to ensure safe and quality supports for NDIS participants**

In the consultation, many stakeholders noted a need to set out minimum expectations for all providers of NDIS-funded supports. As it would not be appropriate to require all providers to

undergo quality assurance, a code of conduct that applies to all providers and workers delivering NDIS-funded supports will help to ensure the quality and safety of all NDIS-funded supports. The code would provide a means of ensuring that sole traders are required to meet standards that will be dealt with by the employer in a larger organisation (for example, a requirement to come to work in a fit state, not impaired by drugs or alcohol). It could also assist self-managing participants using unregistered providers to take action if something goes wrong.

A code of conduct will help to set expectations for providers and individual workers, shape the behaviour and culture of organisations and workers, and empower consumers in relation to their rights. It will also enable providers and workers who commit an unacceptable breach of the code to be excluded from the NDIS market.

Stakeholders' suggestions for what should be included in a code of conduct were generally consistent with the [National Standards for Disability Services](#). These included prohibiting behaviours that may cause harm, respecting people with disability, listening to and being guided by what a person wants, and respecting people's right to privacy. Stakeholders also identified the need to address the possibility of behaviours that may not constitute a crime, but which should never be acceptable in the NDIS, such as harsh, rough, exploitative or otherwise unethical treatment; depriving a person of food, sleep or basic needs; bullying, intimidation, or vengeful or deceptive behaviour in response to a complaint or incident.

How it will work: the NDIS code of conduct will be enacted in legislation.

**Who must comply:** it will apply to all providers, whether or not they are registered with the NDIS registrar, and all workers delivering NDIS-funded supports, whether they are operating as sole traders or employed by registered providers, including contractors, sub-contractors or agents.

Workers who are required to comply with an existing professional code of conduct (for example, the [National Code of Conduct for Health Care Workers](#)) will also be required to comply with the NDIS code of conduct, but cooperative arrangements will be developed with other relevant bodies in relation to enforcement. This will ensure a consistent definition of acceptable practice in the NDIS, with minimum additional burden on workers.

**What will it cover:** there will be a clear line of sight between the code of conduct, the NDIS practice standards and the [National Standards for Disability Services](#). The code of conduct (to be developed) will cover:

- *the rights of people with disability* to be treated with respect; to freedom from discrimination, coercion, harassment and exploitation; to dignity and independence; to be consulted on all matters affecting them; to give informed consent; and to privacy
- *unacceptable behaviour by organisations*, including prohibiting providers making false or misleading claims, or claiming to be authorised to provide supports that are outside of

their approved scope of practice, or support for which there is no evidence of effectiveness, and

- *unacceptable behaviour by individuals* such as neglect, financial or sexual exploitation, harsh or rough treatment, depriving a person of food, sleep or basic needs, bullying, intimidation, vengeful behaviour in response to a complaint, or coming to work affected by drugs or alcohol.

Box 10 provides an indication of the statements an NDIS code of conduct could include. There will be a need for further consultation around the development of the code.

#### **Box 10: Indicative elements of an NDIS code of conduct**

Workers and providers should:

1. Respect the rights and dignity of all NDIS participants, including their right to choice and control and to take reasonable risks.
2. Provide supports in a safe and ethical manner with reasonable care and skill.
3. Not make false or misleading claims or misinform participants.
4. Respect the privacy of participants and comply with relevant privacy laws.
5. Take into account the needs, values, and beliefs of different cultural, religious and ethnic groups.
6. Communicate in a form, language and manner that enables the participant to understand the information provided and make known their preferences.
7. Provide an accessible, fair and impartial complaints and disputes process that allows grievances concerning the support to be raised and resolved.
8. Not practise under the influence of alcohol or unlawful substances.
9. Not financially exploit clients in any way.
10. Not engage in sexual activity, consensual or non-consensual, with a participant to whom you are providing supports.
11. Keep appropriate records and implement reporting and investigation procedures for serious incidents.
12. Offer reasonable supervision and take reasonable steps to ensure staff are competent and supported to perform their role.
13. Maintain adequate personal and professional liability insurance appropriate to the risks associated with your practice.
14. Display the code of conduct or make it available to participants.

**How non-compliance will be identified:** providers will not be required to demonstrate compliance with the code of conduct, instead potential breaches of the code of conduct will be investigated. As participants may not feel confident to use the complaints process, breaches may also be identified through a range of other avenues including serious incident reporting; the quality assurance process; advice from advocates, community visitors or health professionals; or other public reports.

**How non-compliance would be addressed:** generally, the NDIS complaints commissioner will be responsible for triaging cases, but both the commissioner and the registrar will be able to identify breaches, initiate their own motion investigations, obtain information from a number of sources and refer cases to each other. Coordination between the commissioner and registrar will ensure their efforts are not duplicated.

When a potential breach of the code is identified, an initial assessment will determine the appropriate response (see table 3).

**Table 3. Triaging approach**

<b>Initial triage</b>	<b>Regulator role</b>
<b>TIER 1:</b> inquiries able to be resolved at initial contact.	Provide information or advice, referral to appropriate help.
<b>TIER 2:</b> issues that should be referred back to providers or to an alternative regulatory agency to handle (professional registration body etc.).	Tracking to ensure issues are successfully resolved and take action if necessary.
<b>TIER 3:</b> quick resolution of one-off service related issues (including minor breaches) unable to be resolved between participant and provider. Primarily issues related to service quality.	Complaints commissioner will handle. May need some investigation or other intervention to help resolve.
<b>TIER 4:</b> service related issues that may raise wider issues, for example, common complaints across the sector, provider with a high number of complaints/ incidents.	Complaints commissioner will handle. A more in-depth investigation may be needed to provide best practice guidance to the sector, develop a new practice measure, etc.
<b>TIER 5:</b> possible serious breach of the code of conduct.	The complaints commissioner will handle initial assessment.
<b>TIER 6:</b> cases where deregistration, exclusion from sector or other serious penalties may be warranted, including binding instructions to ensure issues are satisfactorily addressed.	The complaints commissioner will refer the matter to the registrar for appropriate action or to the worker screening function and employers.

When a provider or worker is found to have breached the code, the NDIS registrar will be able to take a range of actions as appropriate to the breach, including education, advice and, if necessary, imposing conditions on their operation, issuing public warnings, or prohibiting them from providing NDIS-funded supports. It will be an offence to continue to operate despite being deregistered or subject to an exclusion order.

**Linkages:** the orientation module (which certain workers will need to undertake) will cover the NDIS code of conduct.

Information on individual worker misconduct relevant to working with children or people with disability will be passed from the complaints commissioner to the relevant screening unit for consideration.

## 5. Glossary of key terms

<b>Agency</b>	The National Disability Insurance Scheme Launch Transition Agency (also NDIA)
<b>Approved restrictive practice</b>	A restrictive practice that is used by a provider in relation to a participant, following a process through which the provider has sought, and obtained, formal permission to have the restrictive practice included in the participant's positive behaviour support plan, through the relevant state or territory approval process. (See also 'restrictive practice'; 'unapproved restrictive practice').
<b>Behaviours of concern</b>	Behaviours of such intensity, frequency or duration that the physical safety of the person or others is likely to be placed in serious jeopardy, or behaviour which is likely to seriously limit the use of, or result in, the person being denied access to ordinary community facilities.
<b>Binding instructions</b>	An order issued by a relevant regulatory entity with statutory power that requires a provider to undertake particular actions. Actions could involve orders that staff complete training, through to suspension of service delivery while a range of other required actions are being implemented.
<b>Capability (individual)</b>	Understanding, skills and knowledge which enable individuals to exercise choice and control, and to participate in the community.
<b>Continuous improvement</b>	Ongoing, conscious efforts to identify opportunities to improve service provision, learn from problems that arise, and implement positive changes to operational and governance processes. The aim is to enhance safe, high quality provision of supports to participants.
<b>Corrective measures</b>	Actions under the NDIS Quality and Safeguarding Framework that providers and governments need to take to respond to incidents or service failures after these have occurred.
<b>Decision making supports</b>	Activities, strategies and other supports (such as appropriate use of communication supports) designed to maximise participants' ability to exercise

choice and control and to facilitate more opportunities for a participant to engage in decision-making in their everyday lives.

**Developmental measures**

Actions which enable people to use their own judgement and resources, and contribute to building credible, robust information and exchange systems that allow NDIS participants to seek and share knowledge.

**Disability-aware communities**

Communities that accept, value and support the participation of people with disability.

**Disability Reform Council**

The Council of Australian Governments Disability Reform Council oversees the trial and implementation of the NDIS. It consists of Commonwealth, state and territory ministers with responsibility for disability policy and supports.

**NDIS participant plan**

The plan approved by the agency CEO which contains the participant's statement of goals and aspirations and statement of participant supports.

**Local area coordinators**

Local area coordinator roles work with people with disability to improve participation and inclusion. They can be directly employed by NDIA or contracted such as in Tasmania.

**Mainstream services**

Goods, services supports and assistance available for the general community which lie outside funding in the NDIS, including, for example, hospitals, doctors, schools, housing, transport and aged-care services.

**Mutual recognition (of quality standards)**

Aims to identify opportunities for reducing inefficiencies and market-entry barriers by recognising areas where a provider has already demonstrated meeting standards through another service system, where those particular standards (and the methodology for assessing against them) have been formally recognised as satisfactorily aligning with the NDIS Practice Standards.

**NDIA**

The National Disability Insurance Scheme Launch Transition Agency (NDIA) is an independent statutory agency established under the *National Disability Insurance Scheme Act 2013* whose role is to implement the National Disability Insurance

Scheme.

**NDIS**

National Disability Insurance Scheme.

**NDIS funded supports**

Products and services which are funded by the NDIA (the Agency) under a NDIS participant plan.

**NDIS Market**

The competitive marketplace that aims to be responsive to participants' needs and facilitates participants being able to seek and receive high quality supports from providers through the NDIS.

**Participant**

A person with a disability who has been assessed by the NDIA as meeting the eligibility criteria to become a participant in the NDIS.

**Plan Intermediary**

A role which provides support to a participant to implement one or more components of their plan.

**Planner**

A person employed by the NDIA to assist a person with disability through the planning process and in the development of an individual support plan.

**Plan Nominee**

A person approved by the NDIA to undertake all activities that a participant would undertake under the NDIS, including the preparation, review or replacement of the participant's plan; and/or the management of the funding for supports in the participant's plan; with the exception of any acts relating to the plan for which the NDIA has ruled must be done by the participant personally.

**Positive behaviour support**

A range of proactive strategies implemented to identify and address the underlying causes of behaviours of concern through an individual functional behavioural assessment and development of a positive behaviour support plan. Positive behaviour support strategies may include implementing changes to the environment and psychological interventions such as cognitive behavioural therapy.

**Positive behaviour support plan (PBSP)**

A positive behaviour support plan for a person with an intellectual or cognitive disability is a plan that describes the strategies to be used to:

- (a) meet that person's needs
- (b) support that person's development of skills
- (c) maximise opportunities through which that person can improve their quality of life
- (d) reduce the intensity, frequency and duration of behaviour that causes harm to the person or others.

The plan should also specify the conditions under which restrictive practices (if required) may be used.

**Positive behaviour support practitioner**

Someone who has been approved as an NDIS registered provider to provide complex behaviour supports to NDIS participants. Will have to demonstrate the ability to meet competency requirements relating to the development, implementation, review and monitoring of the positive behaviour support plan.

**Preventative measures**

Actions under the NDIS Quality and Safeguarding Framework designed to prevent harm being caused to people with disability.

**Proportionate to risk**

This means any regulatory arrangements implemented under the NDIS Quality and Safeguarding Framework that are appropriate based on the risk to participants associated with the service or support type.

**Provider**

See 'registered' and 'unregistered' provider definitions.

**Quality**

The extent to which a support being delivered by a provider is able to meet or exceed a participant's needs and expectations; and the extent to which that provider is meeting or exceeding the relevant NDIS requirements as implemented under the scheme's quality and safeguarding arrangements.

**Quality certification**

Involves a formal recognition from an independent auditing body (certified in accordance with the relevant NDIS requirements) that a provider has demonstrated the ability to meet or exceed specified standards.

<b>Registered provider</b>	A person or organisation registered with the NDIS to provide supports to participants or to manage the funding for supports for participants.
<b>Registration</b>	Providers of supports need to apply and be approved by the chief executive officer of the NDIA to be registered with the NDIA, in accordance with the requirements set out in the <i>National Disability Insurance Scheme Act 2013</i> .
<b>Regulatory arrangements</b>	Requirements designed to improve the safety and quality of support delivery that may include a combination of policies, registration, legislation, worker screening, supervision and development and monitoring and reporting.
<b>Responsive regulation</b>	An approach to regulation that applies a regulatory response to an incident or issue that is in proportion to its impact on participants and implications for the NDIS market. Typically involves a hierarchy of responses, ranging from education and advice, through to deregistration and sanctions.
<b>Restrictive practice</b>	Any intervention which restricts the rights or freedom of movement of a person with disability who displays behaviours of concern, where the primary purpose of that intervention is to protect them, or others, from harm. It is a last resort intervention that occurs in the context of a positive behaviour support plan and should be used in proportion to the risk posed by the behaviour it is intended to address (see also 'approved restrictive practice' and 'unapproved restrictive practice').
<b>Risk-based</b>	See 'Proportionate to risk'.
<b>Risk to participants</b>	Risk to participants is principally about the potential of supports to cause harm or be unsafe in some way.
<b>Safeguarding</b>	Actions designed to protect the rights of people to be safe from the risk of harm, abuse and neglect, while maximising the choice and control they have over their lives.

<b>Scheme</b>	The National Disability Insurance Scheme
<b>Self-managing</b>	Refers to a participant who chooses to be responsible for finding and arranging their supports, making payments to their chosen providers and managing their plan expenditure in accordance with the provisions of the <i>National Disability Insurance Scheme Act 2013</i> .
<b>Serious incident</b>	An event which threatens the safety of participants or others, or that involves an act of fraud. Some jurisdictions use the term 'client incident' or 'critical incident'.
<b>Support coordinator</b>	A role providing participants with more targeted support to coordinate, implement and manage their NDIS plan, where this has been identified as a need for the individual participant and approved by the NDIA.
<b>Supported decision-making</b>	A range of processes to support individuals to exercise their legal capacity and make their will and preferences known – see also "Decision making supports".
<b>Supports</b>	Different forms of assistance offered to a person with disability to enhance their quality of life and assist them to meet their goals. Supports can include, for example, personal care or transport, as well as activities of the NDIA provided in relation to a participant such as local coordination and referral.
<b>Unapproved restrictive practice</b>	A restrictive practice that is used by a provider in relation to a participant when approval (through the relevant state or territory approval process) has not been obtained to include it in the participant's positive behaviour support plan. This is classified as a serious incident for reporting purposes.
<b>Unregistered provider</b>	A provider supports an NDIS participant, but is not registered as an NDIS provider.
<b>Verification</b>	Involves an independent check that a provider seeking to obtain or retain registration meets the defined criteria relevant to their scope of service. May include, for example, verifying that insurance is current and appropriate to the service offering;

and that staff have appropriate qualifications pertaining to their intended service offering, where professional qualifications are required.

**Worker screening**

Involves arrangements for deciding whether an individual worker (or prospective worker) will pose an unacceptable risk to people receiving a service.