



25 May 2015

NDIS Quality and Safeguards Framework Consultation Team
PO Box 7576
Canberra Business Centre ACT 2610
Via Email: ndisqualitysafeguards@dss.gov.au

Dear NDIS Quality and Safeguards Framework Consultation Team:

Submission: Consultation Paper – Proposal for a National Disability Insurance Scheme Quality and Safeguarding framework

Thank you for the opportunity to provide our submission to the Consultation Paper, *Proposal for a National Disability Insurance Scheme Quality and Safeguarding framework*, and for providing us with an extension of time to do so.

People with Disability Australia (PWDA) is the national, cross-disability rights and advocacy organisation made up of people with disability and organisations primarily constituted by people with disability. Women With Disabilities Australia (WWDA) is the national, cross-disability organisation for women with all types of disability and is run by women with disability, for women with disability.

Our organisations are both members of the Australian Cross Disability Alliance. Our work is underpinned by the human rights framework and articulates how the full range of civil, political, economic, social and cultural rights apply to people with disability, including how these rights specifically apply to women with disability.

We have worked independently and collaboratively for many years on projects, advocacy work and campaigns that address the issue of violence, exploitation and abuse of people with disability, and the specific dimensions and impacts of this violence on women with disability. Through this work we are well recognised for our significant expertise in this area, and are well placed to respond to the Consultation Paper.

Our submission is limited to our key overarching issues concerning a comprehensive and rigorous National Disability Insurance Scheme (NDIS) Quality and Safeguarding framework. We would be pleased to provide further information about the detail of the Quality and Safeguarding framework as the proposal is progressed.

We provide permission for this submission to be published online.

If you would like to discuss this submission with us, please contact Ms Therese Sands on email [REDACTED] or telephone 02 93703100.

Yours sincerely

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

1. Human Rights Framework

The National Disability Insurance Scheme (NDIS) Quality and Safeguarding Framework ('the Q&S Framework') must be embedded in a human rights framework.

Page 4 of the Consultation Paper contains one of the few references to human rights principles, with its reference to the United Nations (UN) Convention on the Rights of Persons with Disabilities (CRPD), and its reference to two rights based statements contained in the NDIS Act. However, the Consultation Paper does not fully elaborate if, or how the CRPD or the NDIS Act influences or underpins the Q&S Framework, which means that it is not clear if the six principles that follow these references are firmly based in human rights, or if they will be interpreted from a human rights perspective.

The NDIS is strongly embedded in human rights in two ways:

- The objects and principles outlined in Part 2 of the NDIS Act clearly state that the Act gives effect to Australia's obligations under the CRPD and certain obligations under the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Rights of the Child (CRC), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD). This strongly embeds the NDIS in human rights ensuring that NDIS implementation should be directed at assisting people with disability to achieve their human rights.
- The NDIS implements policy area 4, *Personal and community support* of the National Disability Strategy (NDS). The NDS is the strategy agreed by all Australian governments to implement and report to the UN against progress in achieving the CRPD.¹ The NDS "adopts the principles set out in Article 3 of the CRPD",² and the "six policy areas of the Strategy are aligned to the articles of the CRPD".³ This means that the design and implementation of the NDIS is an NDS measure aimed at progressing the human rights of people with disability.

Following from this, the Q&S Framework needs to contain strong human rights statements and references and be explicit that it aims to achieve the human rights of people with disability as set out in the NDIS Act and the NDS. It is therefore important that the Q&S Framework explicitly articulates, reflects, and is consistent with the international human rights treaties identified in the NDIS Act as underpinning the NDIS. These are:

¹ Council of Australian Governments, *National Disability Strategy 2010-2020*, Commonwealth of Australia 2011, pp. 16-17

² Ibid p. 22

³ Ibid p.17

- the Convention on the Rights of Persons with Disabilities ([2008] ATS 12);
- the International Covenant on Civil and Political Rights ([1980] ATS 23);
- the International Covenant on Economic, Social and Cultural Rights ([1976] ATS 5);
- the Convention on the Rights of the Child ([1991] ATS 4);
- the Convention on the Elimination of All Forms of Discrimination Against Women ([1983] ATS 9); and
- the International Convention on the Elimination of All Forms of Racial Discrimination ([1975] ATS 40).

As a minimum, we suggest that the Q&S Framework should explicitly state that it is underpinned by the CRPD, and at the very least make reference to the following Articles of key importance:

- Article 4 (3), *General Obligations*: requires active involvement of people with disability, including children with disability, through their representative organisations in the development and implementation of law and policy and decision-making processes that affect their lives.
- Article 5, *Equality and non-discrimination*
- Article 6, *Women with disabilities*
- Article 7, *Children with disabilities*
- Article 12, *Equal Recognition before the law*
- Article 14, *Liberty and security of person*
- Article 15, *Freedom from torture or cruel, inhuman or degrading treatment or punishment*
- Article 16, *Freedom from exploitation, violence and abuse*
- Article 17, *Protecting the integrity of the person*

Embedding the Q&S Framework in human rights enables a common understanding and basis for analysis of the principles, issues, options and regulatory impacts outlined in the Consultation Paper.

2. Application of the Human Rights Framework

A human rights framework should act as an inherent quality and safeguarding element for the Q&S Framework. It enables key issues, actions and principles to be interpreted and applied in a way that is consistent with human rights. This will ensure human rights for people with disability is embedded in the structural design and implementation of the Q&S Framework, including in the three broad areas outlined in the Consultation Paper – developmental, preventative and corrective.

2.1. Key issues and actions

Based on the Articles from the CRPD mentioned above, application of human rights should include:

- *Ensuring active participation of people with disability through their representative organisations, or Disabled Peoples Organisations (DPOs)⁴ in all aspects of the design, implementation and evaluation of the Q&S Framework (see section 4 below);*
- *Recognising that women with disability face multiple and intersecting forms of discrimination that will require gender specific measures and actions to be incorporated throughout the design, implementation and evaluation of the Q&S Framework.*

While the proposed Q&S Framework does recognise that women with disability face greater risks of violence and harm,⁵ there is no discussion in the Consultation Paper of specific measures that might address the specific risks faced by women with disability. This omission maintains a number of failures of the current disability support system and existing protection mechanisms that are gender neutral and unable to address gendered disability violence.⁶

The Framework could be gendered by including specific measures such as:

- Co-designing gender specific information that is incorporated into the key types of information provided. For example, women with disability (and their nominees) may require information about supports relating to childcare and parenting supports, sexual and reproductive health supports and violence prevention and response services.
- Gender specific training for NDIA planners and local area coordinators (LACs) so that they can ensure they are responding to the specific gender related requirements of women and girls with disability. This includes identification of specific risks faced by women and girls with disability, and ensuring that these specific risks are addressed in NDIA planning and community linkages processes (see discussion on risks in section 2.2 below).
- Ensuring that funding of peer support capacity building projects is inclusive of peer support networks of and for women with disability.
- Ensuring that quality providers registered under the NDIS have gender inclusive governance, policies and procedures and a culture that addresses gender specific risks and issues.
- Ensuring that complaints handling and oversight mechanisms are competent in responding to gender specific issues and concerns.

⁴ DPOs are organisations made up and governed by people with disability for people with disability. PWDA and WWDA are examples of DPOs.

⁵ NDIS Senior Officials Working Group for the Disability Reform Council, *Consultation paper: Proposal for a National Disability Insurance Scheme Quality and Safeguarding framework*, page 56.

⁶ See e.g., Frohmader, C., Dowse, L., Didi, A., *Preventing Violence against Women and Girls with Disabilities: Integrating a Human Rights Perspective*, Women With Disabilities Australia, 2015.

- Ensuring the data collection processes and methodologies for the Q&S Framework are disaggregated by age, gender, ethnic, cultural and linguistic background and Indigenous status among other factors.
- *Recognising that the ‘best interests’ of the child⁷ is the primary consideration in actions concerning children with disability, that children with disability have a right to express their views and have these views considered in accordance with their age and maturity in the same way as other children, and to be provided with age-appropriate and disability support to express these views. Importantly, the ‘best interests’ concept should be understood within a human rights context, rather than understood simply as the views and decisions of the parent, guardian or plan nominee.*

The proposed Q&S Framework does not outline specific measures that would address these human rights principles, except in the context of working with children checks. Other important measures should include:

- Developing age appropriate information about the NDIS that also outlines child rights, including the right to participate and express views and have those views considered, as conceptualised and articulated in the United Nations Committee on the Rights of the Child *General Comment 12: ‘The right of the child to be heard’*.⁸
- Ensuring that funding of peer support capacity building projects is inclusive of peer support networks of children and / or young people with disability.
- Ensuring that NDIA planners and LACs are skilled in addressing conflicts that may arise between children and young people and their parents and families in relation to plan goals and specific age-appropriate supports.

For example, a sixteen year old young woman may wish to have support to independently participate in social activities with friends. However, parents may be over-protective and concerned about perceived risks of their daughter engaging independently in social activities, and are likely to influence the planning process to ensure that social activities are not supported (see also example in discussion on risks in section 2.2 below).

- Ensuring that NDIA planners, LACs, registered providers and complaints handling and oversight mechanisms are skilled in providing the disability and communication supports for children and young people to participate and express themselves.
- Designing mechanisms for children with disability to make complaints and raise concerns about providers or other issues.
- *Presuming that all people with disability are persons before the law and have the legal capacity to manage their own financial affairs, to make decisions and have those decisions respected and to exercise choice and control. To ensure that people with disability can exercise legal capacity, they will require supports, including decision-making supports that are appropriate to the individual.*

⁷ In line with the Convention on the Rights of the Child, the term ‘child’ refers to children and young people from birth to 18 years of age.

⁸ United Nations Committee on the Rights of the Child; General Comment 12: The right of the child to be heard; CRC/C/GC/12; 1 July 2009. Available at: <http://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC-C-GC-12.pdf>

While a critical principle of the proposed Q&S Framework is the presumption of capacity for people with disability to make decisions and exercise choice and control,⁹ the discussion in the Consultation Paper assumes that the current Australian legislative, policy and practice framework, including the provision for the appointment of nominees in the NDIS Act is consistent with Article 12 of the CRPD, *Equal recognition before the law*.

However, significant reform is required to address the numerous State, Territory and Commonwealth laws, policies and practices that deny or diminish the right of a person to exercise their legal capacity. In particular, guardianship, estate management and mental health laws are inconsistent with, or fail to fulfil obligations under the CRPD.¹⁰

The NDIS Act contains clear reference to the CRPD and to supported decision-making principles. However, it also contains provisions for nominees, or substitute decision-makers to be appointed outside of State and Territory guardianship laws. A nominee is appointed on the initiative of the NDIS CEO and is permitted to act on behalf of the participant when they consider that the participant is “not capable of doing the act”.¹¹ What this means is not defined, and it is concerning that a scheme designed to put the individual at the centre of decision making also provides for them to be removed on the opinion of a third party who sits outside established State and Territory substitute decision making mechanisms.¹²

The above issues mean that the proposed Q&S Framework does not currently reflect Article 12 of the CRPD. In 2014, the Australian Law Reform Commission (ALRC) tabled in parliament the final report of its inquiry into barriers to equal recognition before the law and legal capacity for people with disability, *Equality, Capacity and Disability in Commonwealth Laws*. The report makes 55 recommendations for reform, and 5 of these recommendations relate specifically to the NDIS Act.¹³

Some State and Territory Governments are also undertaking pilot supported decision-making initiatives in an effort to move away from substitute decision-making,¹⁴ in an effort to comply with Article 12 of the CRPD.

Given the area of legal capacity for people with disability requires considerable legislative, policy and practice reform, we recommend that this reform is explicitly acknowledged in the Q&S Framework. This acknowledgement needs to commit to review and modification of the Q&S Framework as State, Territory and Commonwealth laws, policies and practices are reformed to comply with the CRPD.

We also recommend stronger measures be incorporated into the Q&S Framework that focus strongly and positively on promoting and supporting people to effectively assert and exercise legal capacity, and on safeguarding against abuse and exploitation in informal and formal supported decision-making arrangements. Stronger measures

⁹ NDIS Senior Officials Working Group for the Disability Reform Council, p.4.

¹⁰ Australian Civil Society CRPD Parallel Report Group, *Disability Rights Now*, Australian Civil Society CRPD Parallel Report Group, 2012 pp. 65-69; People with Disability Australia, *Submission: Consideration of the 4th and 5th Reports of Australia by the Committee to the Convention Against Torture*, 2014, pp. 14-17.

¹¹ NDIS ACT 2013, Part 5, Nominees, <http://www.comlaw.gov.au/Details/C2013A00020>

¹² People with Disability Australia, op. cit., p. 16.

¹³ Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (2014), Commonwealth of Australia, pp.129-157

¹⁴ The NSW, SA and ACT Governments are currently undertaking pilot supported decision-making initiatives.

should include specific criminal offences relating to the exploitation, abuse and neglect of people with disability subject to supported decision-making arrangements.

Supported decision-making must be integral to the Q&S Framework, and this will require, as a minimum, measures directed at NDIA planners, LACs, registered providers, complaints bodies and oversight mechanisms aimed at:

- Understanding the rights contained in Article 12 of the CRPD, the need for comprehensive legislative, policy and practice reform, and the need for continual review and modification of the Q&S Framework as reform occurs;
 - Building skills and competence in the application of supported decision-making supports and safeguards that focus strongly and positively on promoting and supporting people with disability to have choice and control, to make complaints and to be protected from exploitation;
 - Recognising the critical role of peer support networks, DPOs and independent advocacy and independent information in building skills and capacity for people with disability to assert and exercise their legal capacity, including in providing support for people with disability to make their own decisions (see section 4 below).
- *Ensuring that human rights terminology and interpretation is used in the Q&S Framework, particularly with regard to exploitation, violence and abuse; torture or cruel, inhuman or degrading treatment or punishment; liberty and security of the person; and protecting the integrity of the person.*

The proposed Q&S Framework retains disability service terminology and interpretation that has been shown to contribute to failures in the disability service system to protect people with disability, particularly women and children with disability from violence, exploitation and harmful practices (see discussion in section 3 below). We have specific concerns regarding the following:

- Use of the term ‘serious incidents’ to encapsulate and describe “events which threaten the safety of people or property”, including death and serious injury and sexual and physical assault.¹⁵

While the language of ‘serious incidents’ or ‘critical incidents’ is common within the disability service system, such language is a euphemism for what is understood in the broader community as violence, rape, sexual and physical assault, grievous bodily harm, domestic violence, gender-based violence etc.

Language that acts as a euphemism for such serious breaches of human rights 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 an service incident and only investigated internally; the situation is not referred to the police or it is not taken seriously by police; people with disability do not receive the appropriate or same supports that are available to others in the community, such as sexual assault and trauma counselling.

¹⁵ NDIS Senior Officials Working Group for the Disability Reform Council, *Consultation paper: Proposal for a National Disability Insurance Scheme Quality and Safeguarding framework*, page 23.

A Q&S Framework has a significant role to play in ensuring that exploitation, violence and abuse of people with disability is understood, recognised and addressed within the context of human rights.

- Discussion of the need to reduce and eliminate restrictive practices is focused on the incorporation of the *National Framework for Reducing and Eliminating the Use of Restrictive Practices in the Disability Service Sector* (the National Framework) into the Q&S framework.

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:¹⁶

- 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'.

For example, a person may be frustrated at living in a group home with people they have not chosen to live with, creating conflict in the household. However there may be no other housing options available, and the person is forced to remain in the group home regardless of their choice to move to another housing option. The person may express or communicate their frustration in ways that cause harm to themselves and others, and they are labelled as having 'challenging behaviour'. The response is to develop a behaviour support or modification plan that includes a range of restrictive practices, rather than address the underlying issues and wishes of the person.

The National Framework is not premised on changing services, systems and environments, but is focused on changing the person to 'fit' the service, system and environment.

- The National Framework will only apply to services providing supports to NDIS participants. However, there will be NDIS participants who will move between NDIS registered supports and other service settings that will not be covered by the National Framework, such as mental health facilities, hospitals and schools. There will also be people with disability who are not eligible for the NDIS but who will experience restrictive practices in a range of settings, such as in schools, prisons, boarding houses. The National Framework will not protect all people with disability from the range of practices that constitute serious human rights violations.
- Restrictive practices can constitute torture or cruel, inhuman or degrading treatment or punishment but the National Framework makes no reference to Australia's obligations under the Convention on Torture, Cruel, Inhuman or Degrading Treatment or Punishment (CAT). Understanding restrictive practices within the CAT Framework would ensure much greater protections that would include the enactment of nationally consistent legislation to criminalise cruel,

¹⁶ Discussion from this section has been drawn from People with Disability Australia, op. cit.

inhuman or degrading treatment or punishment, the provision for legal action to be taken to remedy a breach, the ratification of the Optional Protocol to CAT and the establishment of an independent national preventative mechanism to monitor places of detention, including mental health facilities, disability justice centres and prisons.

Understanding restrictive practices in a human rights framework means that the 4 options proposed for **authorisation** – rather than elimination - of restrictive practices outlined in the Consultation Paper are inadequate to safeguard people with disability. A Q&S Framework must be underpinned by a legislative framework that explicitly prohibits particular restrictive practices, criminalises the use of particular restrictive practices, that establishes an independent statutory office, such as an office of a Senior Practitioner with significant powers to protect and promote human rights of people with disability, provide approval, monitoring and review of positive behaviour support practices, enables research, policy, standards and guideline development in the area of positive behaviour support and initiate investigations into systemic issues.

2.1. Q&S Framework principles

Interpreting the 6 principles in the Q&S Framework from a human rights perspective is critical. The 6 principles outlined on page 4 of the Consultation Paper, and much of the discussion throughout the Consultation Paper is aimed at striking a balance between, on the one hand protecting the rights of people with disability and ensuring that they are safe from harm, and on the other hand reducing and minimising red tape, regulation and administrative requirements. Striking this balance poses significant risks for people with disability if the Q&S Framework is not firmly embedded in human rights.

PWDA and WWDA argue that the discussions in section 2.1 and in section 3 in this submission clearly demonstrate that people with disability should be afforded a significant level of quality and safeguards protection that fulfills human rights goals and that far outweighs concerns regarding red tape reduction, minimising regulation and streamlining administrative requirements.

To make this point explicit, we recommend including another principle, *Human Rights* that states that achieving human rights for people with disability is paramount in the implementation and evaluation of the NDIS and the Q&S Framework.

In relation to other principles, we make the following points:

- *Choice and control*: this is a fundamental principle for the NDIS, and to ensuring that the central focus is on people with disability making decisions about the supports they need to meet their life goals. However, a participant's choices will be limited by:
 - Their knowledge of choices and their capacity and skills to make choices (see section 4 below); and
 - The availability of quality choices within a market driven NDIS.

A market driven NDIS will not always stimulate greater choice and control for people with disability. There are a number of issues that are already being identified that negatively impact on choice and control:¹⁷

- Some jurisdictions, such as NSW are transferring all their disability service funding to the Commonwealth. Consequently, the services and funding streams provided in these jurisdictions are being wound down, associated assets are transferring to the non-government sector, and a number of services and supports will likely be provided by 'for profit' organisations. In the emerging and unregulated open market for disability supports, it is essential that the needs of all people with disability including those with the most complex requirements are met; that consumers are protected from exploitation, especially the vulnerable and marginalised; that the profit motive does not quash quality, diversity or innovation; and that the new environment serves to enhance rather than threaten the realisation of rights for people with disability.
- The transfer of state assets to large for-profit providers may undermine the emergence of a diverse, competitive and sustainable market for disability supports, and consequently limit the choice and control of consumers. Large for-profit providers moving into specialist disability support provision risk the creation of monopoly service providers motivated by profit rather than person centred service delivery. Monopoly service providers are a particular risk in rural and remote regions, where there may only be one service provider that is able to provide supports to people with disability.
- By 2018-19, approximately 10% of people with disability will receive funding under the NDIS to organise and pay for their disability support requirements. However, the remaining 90% of people with disability who do not meet the NDIS eligibility requirements may still have disability support needs. Their requirements may include support to attend medical appointments and participate in recreational activities, help with everyday tasks such as shopping, cooking, cleaning and personal care, or use of free community transport. Some jurisdictions are retaining a specialist disability support role and some are not, and it remains unclear how people with disability not eligible for an NDIS funding package will access and pay for the essential supports they need.
- With disability support provision shifting to a market driven model, there is a real risk that some people with disability will not have their needs met, and they will be left without essential supports. This is particularly the situation for people with disability who may be regarded by providers as 'too difficult', 'too complex' or 'too costly', and where the provider does not have specialist expertise to meet complex requirements, such as providing intensive, long-term support for those leaving the criminal justice system.

The negative impacts of a market driven NDIS are highly likely to limit or deny the human rights of people with disability. In order to ensure a market that provides quality,

¹⁷ The discussion in this section is drawn from, People with Disability Australia, *2015 NSW State Election Platform* (2015), <http://www.pwd.org.au/issues/voting.html>

choice and safeguards in line with human rights, the Q&S Framework needs to include a market regulation function, such as an independent market regulation body.

Focused on the human rights of people with disability, a market regulation body should monitor the NDIS market and its interactions with other markets, and regulate market development in order to increase 'thick' markets, avoid market failure and eliminate markets that are not in line with human rights. This body should be independent of the NDIS and include diverse representation of people with disability through representative organisations, and foster close networks with independent advocacy organisations that can provide 'on the ground' information about market development and failure issues (also see section 4).

- *Risk-based and person centred approach*: the identification and mitigation of risks is vital to the quality of NDIS supports and the safety of NDIS participants. However, unless a risk-based and person centred approach is consistent with human rights, the Q&S Framework will not provide the safeguards necessary to protect people with disability:
 - In the Consultation Paper, risk to an individual is described in a number of ways, such as "[r]isk to participants is principally about the potential of supports to cause harm or be unsafe in some way";¹⁸ "[s]afeguards under the NDIS should relate to the actual level of risk faced by a person";¹⁹ and people should be able "to take reasonable risks to achieve their goals".²⁰

While there is no disagreement with these descriptions, we are concerned that the concept of 'risk' when applied to people with disability has often meant the denial or limiting of the most basic human rights. Managing 'perceived risks' for people with disability often leads to, for example, the application of restrictive practices that constitute inhuman, cruel or degrading treatment; forced sterilisation of women and girls with disability; removal of babies from mothers with disability; and requirements to live in institutional environments. In this sense, many of the actual risks for people with disability are contained within the legislative, policy and practice frameworks that underpin the specialist disability service system (also see discussion in section 3 below).

It is critical then, that the concept of 'risk' within the Q&S Framework is clearly understood within a human rights framework. This means ensuring that NDIA planners, LACs, registered providers, complaints and oversight bodies are competent in recognising and applying human rights when assessing and responding to 'risks' faced by NDIS participants.

For example, a parent who is a plan nominee for their daughter may express concerns about their daughter becoming sexually active and that this will lead to pregnancy. The parent suggests that a sterilisation procedure would alleviate this 'risk' and contribute to a better quality of life for their daughter. A NDIA planner identifies the 'actual risk' to the bodily integrity of the daughter, and discusses other supports and

¹⁸ NDIS Senior Officials Working Group for the Disability Reform Council, op. cit., p. vi

¹⁹ Ibid., p. 4.

²⁰ Ibid., p. 10.

skills building which has not been provided before, such as support that will assist the daughter learn about relationships, sexuality and contraception, and supports that will assist the parent understand the implications of and alternatives to sterilisation procedures.

- Many people with disability will be best placed to identify potential risks as well as solutions to these risks during the NDIA planning process. People with disability understand what makes them feel safe. This should be recognised in the Q&S Framework, built into the NDIA planning process and viewed as complementing other system level safeguards, such as provider registration and staff background checking processes.

This would mean that a planning process would need to include discussions about what potential risks may exist and what strategies would be best to safeguard the individual. This should include addressing issues relating to self-management, such as financial management, recruitment of staff, selection of providers as well as consider the circumstances of the person, such as living arrangements, connections to peer support, advocacy and other networks, requirements for communication assistance and access to the community.

The potential risks and safeguards identified by people with disability should be incorporated into their NDIS plan. Plan reviews should support people with disability to evaluate risks and safeguards in order to continually monitor and address ongoing or emerging risks.

- The Q&S Framework focuses safeguards on “providers of support types where there is potentially greater risk to participants”,²¹ such as those that have “more direct staff participant contact or which lack supervision such as personal care support, respite or supported residential services”.²² While supports that require more direct staff contact with participants are potentially high risk, this does not mean that other supports such as home handyman services can be assumed to be low risk.²³

The identification of risk needs to be connected to the circumstances of the person, their interaction with different providers of support and the evidence regarding how, where and what creates risks for people with disability. The assumption that a home handyman is of low risk to a person with disability because the support is provided without personal contact is misplaced. People with disability, particularly women with disability who live independently, require communication supports, have no constant support person etc are potentially at greater risk of a home handyman than someone who lives with their family. The potential risks and safeguards should be tailored to the individual person with disability, as discussed above regarding the NDIA planning process.

This is critical in considerations regarding providers that should be registered and meet quality evaluation requirements. Rather than exempt whole classes of businesses that operate in the general marketplace, these businesses should be

²¹ Ibid., p. 10

²² Ibid., p. 37

²³ Ibid., p. 10

encouraged to choose to have a higher class of registration so that people with disability have the option of choosing a provider that has met higher standards. This would mean that a person who identified risks with employing a home handyperson would have the option of identifying someone who met higher standards as a way to mitigate this risk.

Businesses, such as taxi drivers that are contracted to work specifically or largely with people with disability must meet the highest standards possible. This would respond to evidence that has found that some business types are particularly risky for people with disability, particularly women and girls with disability.²⁴

3. Comprehensive, Rigorous Framework

PWDA and WWDA support the proposal for a nationally consistent Q&S Framework,²⁵ but we are concerned that the proposed Q&S Framework will only apply to supports funded under the NDIS.²⁶

The intention appears to be for the framework to harmonise the current State and Territory specialist disability service system oversight policies and mechanisms, and to work in conjunction with existing mainstream or universal quality and safeguarding systems, such as consumer protection agencies, police and justice systems and complaints commissioners.

We hold serious concerns in relation to this approach:

- It is now well-established that the current specialist disability and mainstream service systems largely fail to protect people with disability, particularly women and children with disability from violence, exploitation and harmful practices.²⁷

The Q&S Framework should be designed to address this failure by being particularly rigorous and broad in its coverage. It must not simply include existing frameworks, but should create an overarching national protection framework that can address current failures in disability and mainstream systems, build human rights capacity and disability expertise, incorporate nationally, consistent disaggregated data collection mechanisms, undertake research for evidence-based quality improvements and play a broad oversight role to ensure people with disability are comprehensively protected.

²⁴ See WA conviction of taxi driver, <http://www.abc.net.au/news/2014-02-04/taxi-driver-charged-with-sexually-assaulting-disabled-woman/5237800>; SA conviction of taxi driver, <http://www.abc.net.au/news/2014-03-07/taxi-driver-jailed-for-assaulting-disabled-adelaide-woman/5304874>; recent conviction of Sydney taxi driver who regularly sexually assaulted a deaf schoolgirl when he drove her to and from her school <http://www.abc.net.au/news/2015-05-28/osman-chamseddine-taxi-driver-guilty-indecent-assault-charge/6487470>

²⁵ NDIS Senior Officials Working Group for the Disability Reform Council, op. cit., p. 10.

²⁶ Ibid., p. 11.

²⁷ See eg., Australian Human Rights Commission, *Equal before the law – Towards Disability Justice Strategies*, Australian Human Rights Commission, 2014; Frohmader, C. & Cadwallader, J., *Joint Submission to the Senate Inquiry into Domestic Violence in Australia*, Australian Cross Disability Alliance, 2014; Robinson, S., *Preventing Abuse of Children and Young People with Disability under the National Disability Insurance Scheme: A brave New World?*, Southern Cross University, 2014; Dowse, L., Soldatic, K., Didi, A., Frohmader, C., van Toorn, G., *Stop the Violence: Addressing Violence Against Women and Girls with Disabilities in Australia – Background Paper*, Women With Disabilities Australia, 2013; French, P., Dardel, J., & Price-Kelly, S., *Rights Denied: Towards a national policy agenda about abuse, neglect and exploitation of person with cognitive impairment*, People with Disability Australia, 2010.

Developing an overarching national protection framework offers a significant opportunity to 'fix' current failings and ensure comprehensive and rigorous protection for people with disability, including gender and age specific measures.

This issue of the failure of past and present disability and mainstream service systems is currently the subject of investigation by the Senate Standing Committee on Community Affairs through its Inquiry into *Violence, 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.*²⁸

This Inquiry has a broad definition of institutional and residential settings that enables it to cover disability-specific and mainstream settings. The Inquiry terms of reference are broad ranging and explore issues that will be directly relevant in informing the design of a Q&S Framework.

We recommend that the design of an overarching national protection framework be informed by the final report from this Senate Inquiry.

- The NDIS is a significant reform and needs strong action through the NDS for its success. People with disability will be engaged in the NDIS by managing their own supports through receipt of individualised funding (Tier 3), by engaging in information, linkages and capacity building (ILC) supports (formerly Tier 2), or by receiving a combination of NDIS funding and ILC support. Other people with disability will move between the NDIS and mainstream service systems or only interact with mainstream supports. The overall aim of the NDIS reform is to ensure that people with disability receive the supports they require to assist with economic participation, educational goals and community and social participation.

However, the assumption, which appears to underpin the Q&S Framework is that disability and mainstream supports are robust, and the interaction between these systems is seamless. This is far from reality.

Many people with disability face significant barriers in engaging in the life of the community due to negative attitudes, inaccessibility, discrimination in employment, transport, education, justice, housing etc.

This means that a comprehensive and rigorous Q&S Framework should also have broad oversight of the implementation of the NDS. This would ensure that people with disability do not have different levels of quality and protection depending on what supports they receive, whether they are NDIS eligible or in receipt of an NDIS funding package. This oversight role should include research and policy development, development and sharing of good practice models and initiatives, preparing report cards on NDS implementation, identification of issues that impede or support NDIS implementation.

Importantly, a comprehensive and rigorous framework should act as a 'no wrong door' mechanism that would encourage and enable people with disability to raise issues and make complaints regardless of where and how supports are funded. This would recognise that people with disability do not 'fit' neatly into one system or another but

²⁸ http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Violence_abuse_neglect

have multi-faceted lives, and are likely to interact with a range of service systems, including a combination of NDIS funded, mainstream and other supports.

4. Critical role for DPOs, independent advocacy and disability support organisations

The Consultation Paper discusses the importance of information provision, building natural safeguards, capacity building and peer support as critical for people with disability to build “natural safeguards”,²⁹ but the focus for these functions is either within the NDIS system, such as with NDIA planners and LACs, or with family members and service providers.

The proposed framework does not focus on the critical role of DPOs, independent advocacy or disability support organisations (DSOs) in ensuring quality and safeguarding for people with disability. Yet, NDIS participants as well as those who are not NDIS eligible will need increasing support to navigate and adapt to the new service environment; government will still need consultation mechanisms to develop and implement effective policy; and independent voices will be needed to ensure that the market for disability supports grows in a way which promotes human rights.

In addition, all people with disability will continue to require improved access to mainstream supports and services; an increase in the supply of accessible and affordable housing and public transport; more inclusive education, training and job opportunities; access to participate in community life; and the freedom to live their lives free from violence, abuse and neglect.

DPOs, independent advocates and DSOs already participate in aspects of these roles in varying ways and explicitly do so within a human rights framework:

- DPOs and independent advocacy are critical to a comprehensive, rigorous Q&S Framework. They are low cost and high value, playing an independent role in identifying disability and mainstream systemic risks and gaps, resolving complex situations for people with disability across multiple agencies and providing a voice for people with disability in decision-making processes including legislative, policy and program design, implementation and evaluation.

Many of the failures of the disability and mainstream support systems that result in significant human rights violations are only brought to the attention of specialist and mainstream complaints and oversight bodies by DPOs and independent advocates, and despite inaction from these systems, justice for people with disability is strongly pursued.

For example, large numbers of men and women with intellectual, psychosocial and multiple impairments reside in boarding houses where they are extremely vulnerable to violence and all forms of abuse. In one boarding house, a number of advocates, ex-staff, ex-residents and family members made complaints to police, the State Government department and the Ombudsman regarding the culture of

²⁹ NDIS Senior Officials Working Group for the Disability Reform Council, op. cit., pp. 11-18.

violence and abuse within the boarding house. Allegations included that both male and female residents were repeatedly raped by the boarding house proprietor and other residents; many were placed in solitary confinement or physically beaten as punishment; residents were given non-prescribed medication to sedate them, and residents had their money restricted to control 'comfort' spending or their money was stolen by the proprietor. Allegations also included that the proprietor used another property to 'hide' residents until they recovered from beatings, and that the proprietor targeted particular female residents who he raped repeatedly over many years. Family members allege that they were threatened by the proprietor and that he interfered with the will-making of residents so that the wills favoured him. Despite repeated reports to authorities, it took almost 2 years before concerted action was taken to close this boarding house and move the residents to safety. A police investigation is still ongoing but to date no charges have been laid in relation to these criminal offences.

Some DPOs provide one of the only sources of specialist expertise, advice and advocacy for members and constituents.

For example, WWDA is the only national organisation of and for women with disability and one of only a few that exist in the world. Issues and concerns for women with disability, such as forced sterilisation and violence and exploitation have largely been put on the agenda within the disability and women's sectors through tireless representation and advocacy. WWDA also acts as a peer support network for women with disability.

- DSOs have recently been established by the National Disability Insurance Agency (NDIA) to establish local peer support groups that are able to build natural safeguards, a trusted source of independent information, provide capacity building support and skills building in self-advocacy to address problems and issues within disability and mainstream service systems. Many DSOs are also DPOs or independent advocacy organisations, and this means they can facilitate a channel of support from a local peer support group to advocacy support and a representative voice.

Critically, some DSOs are assisting people with disability who do not have families or any support systems, and who are at greater risk of violence and exploitation to establish peer support groups.³⁰ Other peer support groups are being established in recognition that some people with disability, such as those from the Lesbian, Gay, Bisexual, Transgender, Intersex and Queer (LGBTIQ) communities, want support from their family of choice – friends, networks, partners – as opposed to their biological family of origin.³¹

³⁰ For example, PWDA is establishing a peer support group for people who reside in a local boarding house in the NDIS Hunter trial site.

³¹ PWDA and People with Disabilities WA are establishing peer support groups of people with disability who are part of LGBTIQ communities.

For many people with disability, families will not be a natural safeguard. While many families can be very supportive, families can also be a site of violence, exploitation and abuse for people with disability. This means that DPOs and peer support groups, along with advocacy support act as the preferred safeguard for people with disability.

DPOs, independent advocacy and DSOs should continue to be block funded and receive increased recognition that they remain fundamental to quality and safeguarding for people with disability.

5. Recommendations

5.1 The Q&S Framework must be embedded in a human rights framework. It should explicitly articulate, reflect, and be consistent with the international human rights treaties identified in the NDIS Act as underpinning the NDIS. As an absolute minimum, the Q&S Framework should explicitly state that it is underpinned by the CRPD, and at the very least incorporate measures to address the following Articles of key importance:

- Article 4 (3), *General Obligations*
- Article 5, *Equality and non-discrimination*
- Article 6, *Women with disabilities*
- Article 7, *Children with disabilities*
- Article 12, *Equal Recognition before the law*
- Article 14, *Liberty and security of person*
- Article 15, *Freedom from torture or cruel, inhuman or degrading treatment or punishment*
- Article 16, *Freedom from exploitation, violence and abuse*
- Article 17, *Protecting the integrity of the person*

5.2 The Q&S Framework must explicitly acknowledge ongoing legislative, policy and practice reform regarding the exercise of legal capacity for people with disability. This acknowledgement should commit to review and modification of the Q&S Framework as State, Territory and Commonwealth laws, policies and practices are reformed to comply with the CRPD.

5.3 Stronger measures must be incorporated into the Q&S Framework that focus strongly and positively on promoting and supporting people to effectively assert and exercise legal capacity, and on safeguarding against abuse and exploitation in informal and formal supported decision-making arrangements. Stronger measures should include specific criminal offences relating to the exploitation, abuse and neglect of people with disability subject to supported decision-making arrangements.

5.4 Supported decision-making must be integral to the Q&S Framework, and this will require, as a minimum, measures directed at NDIA planners, LACs, registered providers, complaints bodies and oversight mechanisms aimed at:

- Understanding the rights contained in Article 12 of the CRPD, the need for comprehensive legislative, policy and practice reform, and the need for continual review and modification of the Q&S Framework as reform occurs;
- Building skills and competence in the application of supported decision-making supports and safeguards that focus strongly and positively on promoting and supporting people with disability to have choice and control, to make complaints and to be protected from exploitation;
- Recognising the critical role of peer support networks, DPOs and independent advocacy and independent information in building skills and capacity for people with disability to assert and exercise their legal capacity, including in providing support for people with disability to make their own decisions.

5.5 The Q&S Framework should include a principle, '*Human Rights*' that states that achieving human rights for people with disability is paramount in the implementation and evaluation of the NDIS and the Q&S Framework.

5.6 An independent market regulation body focused on human rights should be established to monitor the NDIS market and its interactions with other markets, and regulate market development in order to increase 'thick' markets, avoid market failure and eliminate markets that are not in line with human rights. This body should include diverse representation of people with disability through their representative organisations, and foster close networks with independent advocacy organisations that can provide 'on the ground' information about market development and failure issues.

5.7 The concept of 'risk' within the Q&S Framework must be clearly understood within a human rights framework. This means ensuring that NDIA planners, LACs, registered providers, complaints and oversight bodies are competent in recognising and applying human rights when assessing and responding to 'risks' faced by NDIS participants; and recognising that people with disability are best placed to identify potential risks and solutions.

5.8 The identification of high risk providers of support needs to be connected to the circumstances of the person, their interaction with different providers of support and the evidence regarding how, where and what creates risks for people with disability.

5.9 DPOs, independent advocacy and DSOs should continue to be block funded and receive increased recognition that they remain fundamental to quality and safeguarding for people with disability.

5.10 Establish an independent, statutory, national protection mechanism that has broad functions and powers to protect, investigate and enforce findings related to situations of exploitation, violence and abuse experienced by people with disability, and that addresses the multiple and aggravated forms of violence and abuse that result from the intersection of 'disability' with other characteristics, such as gender, age,

indigenous status and racial, cultural or linguistic status. An independent, statutory, national protection mechanism should:

- explicitly recognise and apply human rights in the performance of its functions;
- include in its legislative framework, provisions to address restrictive practices, including the prohibition of particular practices and the establishment of an office of a Senior Practitioner with significant powers to protect and promote the human rights of people with disability, including approval, monitoring and review of positive behaviour support practices, research, policy, standards and guideline development in the area of positive behaviour support and investigations into systemic issues.
- act as a 'no wrong door' mechanism that would encourage and enable people with disability to raise issues and make complaints regardless of where and how supports are funded;
- have broad oversight of the implementation of the NDS, including developing and sharing good practice models and initiatives, preparing report cards on NDS implementation, identification of issues that impede and support NDIS implementation, research and policy development;
- initiate 'own motion' complaints;
- undertake own motion enquiries into systemic issues relating to violence, exploitation and abuse;
- publicly report on the outcomes of systemic enquiries and group, policy and program reviews or audits;
- collect and publicly report disaggregated data.