

Discussion Paper

NDIS Review: Quality and Safety



DANA Disability Advocacy
Network Australia

Foreword

DANA has commissioned a series of four discussion papers as part of our contribution to the National Disability Insurance Scheme (NDIS) Review.

Disability advocates across the country spend close to half their time on NDIS related matters. This means advocates have a wide range of expertise and experiences about what is, and isn't, working in the Scheme.

The NDIS Review is interested in learning from this expertise, and to hear about how to make sure the Scheme is delivering for people with disability, their families and supporters.

DANA has considered what is important for the NDIS Review to understand, both now and into the future.

In addition to these discussion papers, DANA will hold workshops and survey advocates and people with disability. The feedback will be delivered to the NDIS Review.

We want to ask for your big ideas on the following key ideas:

- Fires, floods and COVID-19
- Tier 2 and mainstream supports outside the NDIS
- Quality and safety
- Support for decision making for advocacy

DANA is also working with Inclusion Australia on issues that particularly impact on people with an intellectual disability.

Please get in touch if you have any questions or comments and we look forward to hearing from you.

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Introduction

How can people with disability be safe from violence and abuse, while having the freedom to take risks and live their lives, particularly when using vital disability services?

The NDIS Review is looking at the quality and safety of services within the NDIS and the safety of people with disability in other places. The Disability Royal Commission has looked at harm and neglect in the NDIS but also in schools, family homes, hospitals, and correctional facilities.

The Government has also implemented the NDIS Quality and Safeguards Framework 2016 (the Framework) and the NDIS Quality and Safeguards Commission 2018 (the Commission). The Framework aims to ensure the quality and safety of NDIS services, empower and support participants, and provide consistent regulation of service providers to address reports of harm to service users. The Commission acts as an independent watchdog, responsible for implementing the Framework, developing national service standards, registering service providers, regulating restrictive practices, and addressing complaints from service users, including people with disability and their families and supporters.

However, there are ongoing concerns within the disability advocacy community about the capability of the Framework and the NDIS Commission to resolve quality concerns, and prevent and respond to violence, abuse, and neglect of people with disability. There are also significant concerns about inadequate safeguards for people with disabilities who do not use the NDIS.

We adopt a definition of quality and safety that recognises that safety means more than just freedom from violence and abuse, and also encompasses respect, high quality and personalised support, interpersonal, community and cultural connections, and personal autonomy over health and wellbeing. Safeguards can take the form of natural support systems, including effective communication skills and strong familial and community support, as well as formal mechanisms, including services provided by paid supports and government-mandated rules for providers and workers. This definition is drawn from the NDIS Review Participant Safeguarding Proposals Paper and is well supported by academic and other literature.¹

¹ Robinson, 2015; Commonwealth of Australia, 2023a.

What does the evidence say?

This discussion paper is informed by evidence from scholarly articles, research reports, NDIS-related inquiry reports, and stakeholder submissions on quality and safeguarding issues in the Australian context. There is clear evidence available on the problems identified in the discussion paper. The broad themes explored in the solutions selection are also well supported by evidence. Specific policy and programmatic suggestions canvassed in the solutions section are proposals and recommendations drawn from articles, reports and submissions, that may require further research, consultation and feasibility testing. A comprehensive bibliography is at the end of this paper.

What are the problems?

Violence, abuse, neglect, and exploitation of people with disability is widespread.² Expert evidence to the Royal Commission confirms that people with disability experience significantly higher rates of violence, abuse, and neglect compared to those without disability, and that the violence they experience is often repetitive and prolonged.³

1. How safe are NDIS services?

Many of the quality and safeguarding challenges in the NDIS come from the design and operation of the Scheme itself.⁴ As a market-based service system, the NDIS positions people with disability as consumers who are responsible for managing their personalised budgets. However, many people with disability find it extremely difficult to understand and navigate NDIA processes and the NDIS market.⁵ They require support to exercise informed choice and take reasonable risks, but this does not exist.⁶ This has resulted in unequal outcomes for people with disability: well-educated, native English-speaking, and assertive individuals and families are able to negotiate far better supports than those from more disadvantaged backgrounds.⁷

Other significant structural issues within the NDIS include:

- the limited flexibility of NDIS funding may divert participants away from natural safeguards, such as trusted communities, friends and family, and towards services;
- thin markets can limit access to high-quality and safe services, and render a single service provider responsible for multiple supports⁸ and
- arduous registration processes may deter service providers from registering with the Commission and thus being subject to screening and audit, although registration itself is not necessarily protective.

The NDIS Commission's Own Motion Inquiry into Aspects of Supported Accommodation in the NDIS also highlighted the violence and abuse experienced by many people living in group homes and other Supported Independent Living (SIL) facilities,⁹ particularly those who had transitioned from government provided supported accommodation.

So far, there has been no reduction of violence and abuse against people with disability through the current systems.

2. Access to disability advocacy

² Disability Advocacy Network Australia and The Australian Federation of Disability Organisations, 2017; Commonwealth of Australia, 2020; Disability Advocacy Network Australia, 2023.

³ Centre of Research Excellence in Disability and Health, 2021.

⁴ Minister for Social Services, the Honourable Christian Porter MP, 2017; Malbon, Carey and Meltzer, 2019.

⁵ David and West, 2017; Carey, Malbon and Blackwell, 2021.

⁶ Commonwealth of Australia, 2023b.

⁷ Carey et al., 2017; Heneker et al., 2017; Mavromaras et al., 2018; Yates et al., 2021.

⁸ Malbon, Carey and Meltzer, 2019; Vincent and Caudrey, 2020.

⁹ NDIS Quality and Safeguards Commission, 2023.

Advocacy organisations and advocates play crucial and varied roles in safeguarding people with disability, by supporting them to know their rights, exercise choice and control, and access high-quality support.¹⁰ All kinds of advocacy are essential to helping participants to navigate the NDIS and other service systems,¹¹ playing a particularly crucial role in individualised funding systems by “provid[ing] collective voice and uniting requests for change.”¹² Through information provision, one-on-one advocacy, peer support, and systemic advocacy, advocacy groups act as market stewards of the NDIS, facilitating its functioning.¹³ They also play a critical role in providing informed and expert advice to government.¹⁴

However, the availability and continuity of disability advocacy is challenged by fragmented and inadequate funding across states and territories.¹⁵ Recent growth in disability services has not been accompanied by proportional funding for advocacy organisations.¹⁶ This shortfall has negative effects on the safeguarding role played by these organisations, hindering individuals’ access to quality services and their ability to uphold their rights and make complaints when necessary.

3. Access to natural safeguards

Natural safeguards are trusted relationships, networks and community connections that have a protective effect in people’s lives. Positive relationships with people like family members and friends are determining factors towards people’s ability to exercise choice and control and negotiate the service and funding system.¹⁷ However, many people with disability have limited access to natural safeguards, in particular people living in closed environments such as boarding houses, institutional and corrective settings, and people without a robust interpersonal network of support.¹⁸

4. Accessibility, responsiveness, and accountability of existing formal quality and safeguarding mechanisms

Information and access

The current formal reporting and safeguarding environment is complex and has significant gaps. Inadequate mainstream and NDIS complaints mechanisms have a negative impact on both people with disability that use the NDIS and other people with disability, failing to provide consistent access to quality services or sufficient remedies and redress for breaches of rights.¹⁹ Many people with disability are unaware of their rights in the context of service provision and lack knowledge about how and where to make complaints or who can support

¹⁰ Simpson and Chan, 2021.

¹¹ Yates et al., 2021.

¹² Malbon, Carey and Dickinson, 2017.

¹³ Green, Carey and Malbon, 2022.

¹⁴ Green, Carey and Malbon, 2022.

¹⁵ Chesterman and Bedson, 2021; Yates et al., 2021.

¹⁶ Disability Advocacy Network Australia, 2022a.

¹⁷ Mitchell, 2015; Williams and Porter, 2017; Meltzer and Davy, 2019.

¹⁸ Hutchison and Stenfert Kroese, 2015; Robinson, 2015.

¹⁹ Wadiwel, Spivakovsky and Steele, 2022.

them to navigate choices and complaints about services.

There is a general lack of community awareness and understanding regarding the role of the NDIS Commission. For instance, the NDIS Quality and Safeguarding Framework Issues Paper²⁰ recognises that the expected implementation of comprehensive consumer information about the Commission has fallen short.

Focus of the NDIS Commission

The NDIS Commission has primary responsibility for implementing the NDIS Quality and Safeguarding Framework. Its remit encompasses various “developmental, preventative, and corrective” activities,²¹ such as addressing complaints from people with disability, empowering them to access quality services as informed consumers, regulating and registering service providers, and overseeing the NDIS Code of Conduct and NDIS Practice Standards.

However, the evidence indicates that the Commission primarily engages with service providers, neglecting the more developmental and preventative activities that fall within its remit.²² This provider-centric approach has led to diminished institutional trust from the disability community and worries that the Commission prioritizes regulatory matters over proactive measures to reduce risks for people with disability. The Commission appears reluctant to enforce consequences for service providers, with some commentators describing it as a ‘toothless’ or ‘laissez-faire’ regulator.²³

Further, the Commission’s reliance on the individual complaints process as the primary means of engagement with people with disability has inherent flaws. This approach places the onus on people with disability to raise issues with their providers, often commencing with mediation as the initial step. This approach is highly problematic in cases involving abuse, violence, neglect, and exploitation. Sometimes complaints will not be raised at all because of the risk of adverse consequences for the complainant.²⁴ Additionally, this focus on individual complaints disregards the valuable role that the Commission and other entities, such as advocacy organisations, could play in proactively initiating complaints and investigations.

Inaccessibility of NDIS Commission complaints processes

The Joint Standing Committee on the NDIS (2021) highlighted various issues with the Commission's complaints process, describing it as inaccessible, opaque, complex, and overly formal. Advocates argue that the Commission’s under-resourcing further exacerbates these problems, as it is unable to effectively respond to the volume of complaints received. Insufficient resources have also hindered the Commission’s ability to invest in protective and proactive strategies in collaboration with stakeholders such as people with disability,

²⁰ Commonwealth of Australia, 2023b.

²¹ Commonwealth of Australia, 2023b.

²² Cortis and Van Toorn, 2021; Joint Standing Committee on the National Disability Insurance Scheme, 2021; Disability Advocacy Network Australia, 2023.

²³ Cortis and Van Toorn, 2021; Disability Advocacy Network Australia, 2021.

²⁴ Wadiwel, Spivakovsky and Steele, 2022.

advocates, and service providers.²⁵

Interface between NDIS and mainstream quality and safeguarding bodies

The NDIS Framework and Commission play an important role in quality and safeguarding; however, other institutions and actors across the government and community sectors also have a responsibility to protect the rights and safety of people with disability. Evidence suggests that there is a lack of effective coordination and communication between the NDIS and mainstream quality and safeguarding actors, which include legal and justice systems, consumer protection agencies, social assistance, education and healthcare providers.²⁶ This leads to uncertainty for people with disability about which organisation to approach when faced with quality and safeguarding issues.

Even when complaints are made, there can be a lack of appropriate mechanisms to ensure that serious matters of violence and abuse are promptly referred to appropriate agencies, such as the police, leaving people with disability without adequate safeguarding supports and interventions. For instance, many forms of violence perpetrated against people with disability “are not subject to routine sanction from the criminal justice system”,²⁷ with a key example being the unauthorised use of restrictive practices, which the NDIS Commission received over a million reports of in the 2021 – 2022 reporting year. On the other hand, mainstream agencies such as the police may perpetuate violence towards people with disability, including First Nations people with disability. Consequently, referral mechanisms between NDIS and mainstream quality and safeguarding bodies which are not survivor-centric, culturally appropriate, and directed by the complainant may inflict further harm.²⁸

Access to mainstream safeguarding systems

People with disability have the same right to report concerns about their safety or the quality of the services they are receiving, as other members of the community, and for this report to be taken seriously and investigated. However, many people with disability face barriers in accessing mainstream safeguarding systems, such as the police and consumer protection agencies, due to discriminatory practices, lack of awareness about disability rights, and inadequate support for navigating the complaint process.²⁹ Lack of disability-inclusive knowledge, attitudes and practices leads to under-utilisation of these systems and reluctance amongst people with disability to engage with mainstream safeguarding institutions.

²⁵ Joint Standing Committee on the National Disability Insurance Scheme, 2021; Disability Advocacy Network Australia, 2022b.

²⁶ Yates et al., 2021.

²⁷ Wadiwel, Spivakovsky and Steele, 2022.

²⁸ Dowse et al., 2021.

²⁹ Australian Council of Learned Academies, 2022; Wadiwel, Spivakovsky and Steele, 2022.

What is the solution?

This section presents key areas and proposals for improvement. Many, if not all, of the solutions canvassed here could be led by people with disability and/or implemented in partnership with people with disability and advocacy organisations, to ensure fit for purpose.

Investment in individual and systemic advocacy

Advocacy organisations play multiple roles in supporting NDIS participants and the functioning of the Scheme, including by providing accessible, independent information and advice, and by advocating for systemic change to harmful or ineffective policies and processes.³⁰ Numerous reports and inquiries stress that well-resourced individual and systemic advocacy services are critical components of the safeguarding environment.³¹ Specific measures to address urgent need for investment in advocacy services include:

- The development of a new, sustainable disability advocacy funding model that addresses client and service environment complexity, meets current unmet and future advocacy needs, and supports organisational development and sustainability.³²
- Allocated funding for advocacy organisations to conduct disability rights education and capacity building work in congregate and closed settings,³³ including self-advocacy training to assist people with disability to identify abuse and inappropriate behaviour.³⁴
- Allocated funding (in addition to NDAP funding allocations) to assist NDIS participants in dealing with the NDIS Commission.³⁵
- Support for advocacy organisations to provide dedicated ‘safeguarding advocacy’ for people with disability who are identified as experiencing elevated risk of violence, abuse, neglect and exploitation. This might include new legislation providing right of entry for disability advocates to closed, congregate or institutional settings.³⁶
- Explicit reference within the NDIS Quality and Safety Framework and the NDIS legislation related to the functions of the NDIS Commissioner to:
 - The role of independent advocacy in safeguarding;
 - The NDIS Commission’s responsibility for promoting access to advocacy and supported decision-making for NDIS participants;
 - The entitlement of NDIS participants to independent support including independent advocacy support for any dealings that they may have with or related to the NDIS.

³⁰ Wadiwel, Spivakovsky and Steele, 2022.

³¹ Robertson, 2020; Vincent and Caudrey, 2020; Joint Standing Committee on the National Disability Insurance Scheme, 2021.

³² Disability Advocacy Network Australia, 2023.

³³ Disability Advocacy Network Australia, 2022b.

³⁴ Disability Advocacy Network Australia, 2022b.

³⁵ Joint Standing Committee on the National Disability Insurance Scheme, 2021.

³⁶ Disability Advocacy Network Australia and The Australian Federation of Disability Organisations, 2017.

Reform of the NDIS Quality and Safety Framework and NDIS Commission

Clarifying the Commission's role, expanding its investigative and preventative functions, and considering other mechanisms for promoting quality and safeguarding are key priorities. This could involve:

- Creating separate arms within the Commission with separate funding streams and staffing, to focus on core functions such as provider regulation, complaints and investigations, preventative measures and campaigns, and improving the interface between specialised disability and mainstream safeguarding services.³⁷
- Establishing a new national, independent body to respond to and investigate complaints from people with disability and refer matters to justice, health and other systems where necessary.³⁸ This would be accessible by all people with disability, no matter the services they use.
- Legislative reform aimed at improving the transparency of the Commission's complaints responses, and which clarifies and strengthens the Commission's approach to enforcement.³⁹
- Proactive risk monitoring, through a structured and systematic program of regular site visits to residential settings, conducted by advocacy organisations, Commission staff, or community visitor schemes.⁴⁰
- Specific regulation of group home, SIL and SDA settings to enhance the quality and safety of these services.⁴¹

Stronger preventative approaches

The NDIS Commission has been criticised for a lack of focus on proactive approaches to promoting quality and safety services. Proposals to strengthen the preventative and developmental functions of the Commission centre on provision of accessible information and advice, promoting natural safeguards and community connection, and capacity building for service providers.

1. Accessible, independent information and advice

Submissions, reports and inquiries into the experiences of people using the NDIS consistently highlight the need for accessible and independent information to guide choices and complaints. Measures to improve the availability of information and advice could involve:

- Funding in individual plans for decision making and capacity building training and courses for people with disability, carers and supporters.

³⁷ Disability Advocacy Network Australia, 2023.

³⁸ Wadiwel, Spivakovsky and Steele, 2022.

³⁹ Disability Advocacy Network Australia, 2023.

⁴⁰ Robertson, 2020; Vincent and Caudrey, 2020.

⁴¹ NDIS Quality and Safeguards Commission, 2023.

- A public information and awareness campaign about the Commission’s role, with targeted engagement with people with disability, particularly communities who are most impacted by the NDIS, such as Culturally and Linguistically Diverse Communities (CALD), Young People (below the age of 35) and First Nations People.⁴²
- Co-designing a revised Participant Information Pack with people with disability that covers topics such as rights in the NDIS; how NDIS supports, providers and workers are regulated; what to expect from providers, workers and intermediaries (such as support coordinators and plan managers); how to raise concerns and make complaints; how to access advocacy support; and how to access and use the Disability Gateway and Carer Gateway.⁴³
- Making information about the quality and safety of services, such as the banned providers and banned person’s list and information about the number of reports, incidents and complaints a service provider has accrued publicly available and accessible through the Commission website.
- Developing a publicly owned and operated ratings and review system for NDIS service providers, where consumers can share their experiences and providers are encouraged to maintain consistently high service quality to attract clients.
- Protocols within planning meetings and planning review meetings for addressing conflict of interest and service capture issues. For example, where the same provider is providing both core supports and support coordination services to a person with disability, or both housing and core supports, the NDIA planner could flag potential conflict of interest issues with the person with disability and initiate a conversation about alternative providers.

2. Promoting natural safeguards

Natural safeguards are identified in the Framework but are largely absent from the Commission’s work to date. Examples of supports that could build natural safeguards for participants include:

- Assisting people with disability to build community connections through the planning process, through referrals to disability advocacy and representative organisations, mainstream social and community activities in local areas, and groups that support the establishment of Circles of Support, Community Circles and Microboards.
- Reform of state and territory community visitor programs to allow community visitors to visit any site where NDIS-funded services are provided and promote greater national consistency in legislative settings, approaches and coverage across jurisdictions.
- Appointing an independent advocate where people with disability in high-risk service settings do not have access to natural supports, and to people with disability who file a complaint with the Commission. This will provide oversight and support to improve safeguarding.⁴⁴

⁴² Vincent and Caudrey, 2020.

⁴³ Commonwealth of Australia, 2023a.

⁴⁴ Robertson, 2020.

- Supporting Local Area Coordinators (LACs) to better educate people with disability, provide quality referrals, and routinely check-in with their clients, to minimise social isolation. This will necessarily involve increased funding for LACs to reduce the number of NDIS plans being managed per LAC and allow for more personalised support.

3. Capacity building for service providers

Service providers are responsible for providing high quality supports to people with disability. Capacity building to help service management and staff understand the nature of these obligations and how to deliver them is needed, but ‘developmental’ work by the Commission has been limited so far, particularly in the case of unregistered providers, which are the majority of NDIS service providers.⁴⁵ Capacity building for providers is also important in reducing the onus on people with disability to ‘complain’ about quality concerns and rights-breaches. Specific measures could involve:

- Enhanced training and professional development for service staff, particularly those working with SIL clients, First Nations people with disability, and culturally and linguistically diverse people with disability, with topics to include guidance for promoting supported decision-making and reporting pathways for violence, abuse, neglect, and exploitation.
- Requirements for service providers to implement regular formal feedback processes to engage with people with disability about service quality and the way supports are delivered, particularly when a single provider is responsible for most of a person with disability’s core supports.
- Requirements for providers to demonstrate improvement in the quality and safety of their services and improved engagement with people with disability after receiving complaints and serious incident reports.
- Further engagement from the Commission with Specialist Disability Accommodation (SDA) and Supported Independent Living (SIL) providers to address service capture and ensure people with disability have choice and control over how and by who their supports are delivered.

Addressing interface with and accessibility of mainstream safeguarding systems

To improve the interface between disability-specific and mainstream safeguarding systems, it is necessary to improve referral-processes, information sharing and partnership arrangements between agencies. Mainstream systems must also embrace their role in safeguarding people with disability. Specific measures to address interface issues and improve accessibility could involve:

- Closer engagement with the Australian Competition and Consumer Commission (ACCC) and state and territory agencies to inform people with disability who use the NDIS about their rights under Australian consumer protection law and how consumer

⁴⁵ Commonwealth of Australia, 2023b.

protection bodies can assist with making a complaint and provide advice about negotiating service agreements.

- Disability-responsiveness education and training for people working in key areas of the justice system such as police officers and correctional officers that includes information about recognising and responding to violence, abuse, neglect and exploitation of people with disability.
- Ensuring that staff in key disability-facing roles within the NDIS, such as local area coordinators, planners and service coordinators, receive information and training about recognising and responding to violence, abuse, neglect and exploitation of people with disability.
- Development of clear protocols and procedures for information sharing and referral between the NDIS Quality and Safety Commission and mainstream safeguarding agencies, to ensure that reports of serious incidents are promptly and effectively escalated, and ensure that these protocols are transparent and easily accessible to people with disability whilst noting that reporting pathways must be survivor-centric. One way of ensuring prompt and effective escalation of reports of serious incidents would be to adopt a “no wrong door” approach to referrals, imposing a duty on relevant agencies to take reasonable steps to assist the person to refer a matter to the appropriate agency.⁴⁶

⁴⁶ See, for example, (CTH) Freedom of Information Act 1982 s 15(4).

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