



Australian Government

Department of Social Services

Deputy Secretary

Ms Jeanette Radcliffe
Secretary
Community Affairs Legislation Committee
Parliament House
CANBERRA ACT 2600

Dear Ms Radcliffe

Thank you for your email of 26 June 2017 inviting the Department of Social Services to make a submission to the Community Affairs Legislation Committee's inquiry into the National Disability Insurance Scheme Amendment (Quality and Safeguards Commission and Other Measures) Bill 2017.

Please find attached the Department's submission. Officers of the Department would be available to attend hearings if the Committee determines that this would assist.

Yours sincerely

Michael Lye

24 July 2017



Australian Government
Department of Social Services

National Disability Insurance Scheme Amendment (Quality and Safeguards Commission and Other Measures) Bill 2017

Submission from the Department of Social Services



1 Introduction

The Department of Social Services (DSS) welcomes the opportunity to make a written submission to the Senate Community Affairs Legislation Committee on the *National Disability Insurance Scheme Amendment (Quality and Safeguards and Other Measures) Bill 2017* (the Bill).

In December 2016, the Council of Australian Governments (COAG) endorsed the National Disability Insurance Scheme (NDIS) Quality and Safeguarding Framework, setting out a new nationally consistent approach to regulation for the NDIS.

This Bill establishes an independent national NDIS Quality and Safeguards Commission and gives effect to the Commonwealth's responsibilities for regulatory functions under the Framework. The Commission will:

- register NDIS providers and oversee provider quality
- respond to complaints and manage reportable incidents such as abuse or neglect of a person with disability
- provide leadership to reduce and eliminate restrictive practices, such as the use of physical restraint
- monitor and oversee the NDIS market
- lead policy development for nationally consistent NDIS worker screening.

The Commission will replace quality and safeguards arrangements for the NDIS currently in place in each state and territory. It will bring together the different regulatory functions (complaints, reportable incidents, provider registration) into one organisation to deliver effective regulatory integration.

The introduction of the Bill is the result of over three years of consultation with people with disability, carers, providers and the states and territories on a new national regulatory and quality assurance system for the NDIS.

In response to an independent review of the National Disability Insurance Scheme Act 2013 (the Act) conducted in 2015 under section 208 of the Act, the Bill also makes administrative amendments to ensure the efficient and effective operation of the Act.

2 Why is change needed?

The NDIS represents a significant reform to the way supports and services are delivered to people with disability. A new approach to quality and safeguards is needed to:

- empower and support NDIS participants to make informed choices
- provide national consistency across jurisdictions and sectors, and reduce the duplication of requirements for providers
- replace existing quality and safeguarding measures

- support an effective and quality NDIS market
- address issues identified in current quality and safeguards systems.

2.1 Choice and control

Appropriate protections and safeguards are essential if the social and economic benefits of the NDIS are to be realised. They minimise service risks so that people with disability can access the support they need to pursue their goals, and promote the development of a strong and viable market of disability services and supports that offers people with disability genuine choice and control.

A new regulatory framework will also aim to build the capacity of people with disability, their families and carers as informed consumers. This includes raising awareness of the standards of quality and conduct that can be expected of providers and workers and empowering people with disability to hold them to account, change providers and pursue complaints where these standards are not met.

2.2 National consistency and streamlining regulation

The NDIS is a national scheme, requiring a nationally consistent quality and safeguarding framework for all jurisdictions that it operates across.

A national approach will replace the existing disparate state and territory quality and safeguards arrangements and would recognise equivalent standards, reducing duplication and red-tape for providers operating across jurisdictions or sectors. The Productivity Commission noted in its position paper on NDIS costs that increased regulatory consistency should result in lower costs for many providers.

2.3 Governments will no longer be purchasing specialist disability services

The NDIS is changing the funding and delivery of disability services provided by the Commonwealth and State and Territory governments. In the new market-based system, people with disability will choose their providers, rather than providers being contracted by government agencies. Many of the current quality and safeguards measures, which are managed through funding agreements with government agencies, will no longer apply.

Currently, the National Disability Insurance Agency (NDIA) is reliant on state and territory regulatory functions for the assessment of provider quality, and responses to incidents. Under full scheme, many of these arrangements will no longer exist and alternative arrangements will need to be put in place.

2.4 An effective NDIS market

By full scheme, the NDIS will be supporting around 460,000 Australians with disability, and injecting \$21 billion each year into the Australian economy. The NDIS market is expected to expand rapidly and the workforce in the sector will need to double to meet growing participant demand. Increased demand poses considerable risks, particularly for participants with complex needs, those who live in regional and remote locations, and those needing services from areas of the market that are not mature.

The NDIS market is also undergoing significant restructuring as it moves from a block-funded to a fee-for-service model. This will mean a different mix of providers, including increased numbers of for-profit organisations. A significant proportion will be sole traders, who are skilled at service delivery, but may need to build their governance and quality assurance capacity to manage risk effectively.

The breadth of supports and services on offer through the NDIS means that a 'one size fits all' approach to regulation will not work. Just as the NDIS seeks to make tailored services available to participants, NDIS regulation will need to be highly responsive and proportionate to both the provider context and the potential for harm.

It is important that the new quality and safeguards arrangements are efficient and effective, and support the development of the emerging NDIS market. Stakeholder submissions to the Productivity Commission inquiry on NDIS costs have noted that the level of duplication and red tape under existing quality and safeguards arrangements increases costs for providers and workers, and can be a potential barrier to entry into the marketplace. The regulatory framework governing the NDIS market will need to strike an appropriate balance between encouraging innovation and supporting the growth of the NDIS market, and meeting the Government's commitment to ensuring safe and effective supports and services are available under the NDIS.

2.5 Address systemic issues identified in recent inquiries

A series of recent inquiries and reports have documented the weaknesses of the current safeguards arrangements for disability services, many of which result from fragmentation of quality assurance and oversight regulatory functions. These inquiries found systemic failures to uncover, report and respond to abuse, and called for a new nationally consistent approach to regulating the disability services sector.

The Australian Senate Standing Committee on Community Affairs (2015) Report on the Inquiry into abuse and neglect against people with disability in institutional and residential settings made a number of key recommendations, including:

- a national body to protect, investigate and enforce findings of violence, abuse and neglect of people with disability
- a nationally consistent provider accreditation scheme
- the use of behaviour support strategies that do not involve restrictive practices to reduce challenging behaviour
- a national disability worker registration system to undertake screening.

Findings from the Victorian Ombudsman's (2015) Reporting and Investigation of Allegations of Abuse in the Disability Sector concluded that '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 made a number of recommendations about the design of the NDIS Quality and Safeguarding Framework. It called for 'a single, independent oversight body' with responsibilities for

handling complaints, managing and investigating reportable serious incidents, and oversight of restrictive practices.

The findings from these inquiries and the other drivers of change have been central to the development of the NDIS Quality and Safeguarding Framework and the establishment of the NDIS Quality and Safeguards Commission through the Bill.

3 NDIS Quality and Safeguarding Framework

At the time of the NDIS launch, governments agreed that a nationally consistent approach to quality and safeguards would be a critical component of the NDIS. Officials from all jurisdictions began work on the elements of a national framework in 2014.

In February 2015, the Council of Australian Governments (COAG) Disability Reform Council released a consultation paper canvassing options for a nationally consistent quality and safeguards system for the NDIS.

Public consultation on the options occurred between February and May 2015, and included public meetings in each state and territory, provider meetings in locations around Australia, workshops with specific stakeholder groups, and an online discussion forum. DSS received 220 submissions and 585 questionnaire responses about particular quality and safeguards measures. The full report on the consultation findings is available on the [DSS website](#).

Over the following year, governments worked together to finalise elements of the framework. Officials considered the views of stakeholders and the findings of recent inquiries into the abuse of people with disability and children in institutional settings. There was a common view that the framework should provide consistent quality and safeguards across jurisdictions, have strong regulatory powers, and a greater degree of integration across the different quality and safeguards functions.

In September 2016, the Disability Reform Council signed off on the [NDIS Quality and Safeguarding Framework](#). The Framework was endorsed by all jurisdictions at COAG in December last year and was publicly released in February 2017.

Consistent with Australia's commitment to the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD), the Framework seeks to maximise opportunities for people with disability to make informed decisions about their supports, while also enabling them to live free from abuse, neglect and exploitation. The Framework also seeks to promote innovation, continuous improvement and best practice in the provision of supports.

The Framework includes:

- developmental measures to build the capability of people with disability, workers and providers, which includes providing participants information for decision-making, and building provider capacity and best practice
- preventative measures to ensure quality services, which includes having formal safeguards in the NDIA's planning, implementation and review processes;

advocacy services; enforcing provider quality standards; market oversight; worker screening; reducing and eliminating restrictive practices

- corrective measures to respond to any issues that emerge, including responding to complaints and reportable incidents; community visitors; monitoring worker conduct; and investigating breaches of the Code of Conduct and taking appropriate enforcement action.

The Framework outlines the roles and responsibilities of the Commonwealth and state and territory governments. The Commonwealth will be responsible for provider registration and regulation; investigation and enforcement; responding to complaints and reportable incidents including abuse or neglect of a person with disability; and national oversight in relation to behaviour support and monitoring the use of restrictive practices. States and territories would be responsible for the authorisation of restrictive practices and the operation of worker screening units in their own jurisdiction.

A [Regulatory Impact Statement \(RIS\) for the Framework](#) was prepared and published in March 2017 in line with COAG requirements for best practice regulation. It concluded that the benefits of an improved regulatory system in reducing harm to participants would outweigh the costs to providers.

4 NDIS Quality and Safeguards Commission

As part of the 2017-18 Budget, the Government announced the establishment of the NDIS Quality and Safeguards Commission and allocated \$209 million over four years for its establishment. The Commission will be responsible for the registration and regulation of NDIS providers, including practice standards and a Code of Conduct; complaints and reportable incidents; and national oversight and policy setting in relation to worker screening, behaviour support, and monitoring the use of restrictive practices within the NDIS with the aim of reducing and eliminating such practices. The Bill establishes the Commission and implements the Commonwealth's commitments under the Framework.

4.1 Consultation on the Bill

The Bill has been subject to consultation with state and territory government officials and through the Disability Reform Council. Over May 2017, DSS also consulted on an Exposure Draft of the Bill with peak bodies representing people with disability and the sector, including Carers Australia, Disabled Peoples Organisations Australia, National Disability Services, Children and Young People with Disability Australia, New South Wales Council for Intellectual Disability, Disability Advocacy Network Australia and Mental Health Australia.

DSS has valued the constructive feedback of stakeholders through the consultation process on the Bill and will continue to consult on the ongoing development of the NDIS rules and the policies and guidelines under which the Commission will operate.

4.2 Objects of the Bill

The *National Disability Insurance Scheme Act 2013* (the Act) sets out the objects and principles under which the NDIS operates, including giving people with disability choice

and control over the care and support they receive, and giving effect in part to Australia's obligations under the UNCRPD. These will also apply to the Commission.

The Bill introduces a further object to 'protect and prevent people with disability from experiencing harm arising from poor quality or unsafe supports or services provided under the National Disability Insurance Scheme'.

4.3 Establishment of a single independent statutory body

The Bill establishes a statutory position of the NDIS Quality and Safeguards Commissioner to head the NDIS Quality and Safeguards Commission.

Consistent with the Framework's proposal for an independent statutory Commissioner to oversee the national complaints function, the Commissioner will be an independent statutory position and have responsibility for the national complaints system, as well as for serious incident reporting and the registration of providers.

The Productivity Commission in the Caring for Older Australians Report argued that the creation of a single regulatory body with the full range of regulatory functions enables effective information sharing and 'responsive regulation', wherein regulatory responses can move up and down the regulatory pyramid (see page 15) quickly and easily as required by different cases and changing circumstances. This approach would 'limit potential confusion and increase the efficiency of regulation' by reducing duplication and overlap between regulatory bodies. The Productivity Commission found:

Many features of best practice 'responsive regulation'... are difficult to achieve when one aspect of regulatory responsibility (that is, accreditation and the assessment of performance against Quality Standards) is structurally separated from compliance investigations and enforcement decisions surrounding quality. Regulatory behaviour would be enhanced by locating quality assessment within the same organisation that receives consumer complaints, monitors compliance, provides information on ways that providers could improve the quality of their care services and makes the enforcement decisions.

The Commissioner will be responsible for the leadership and management of the Commission and for implementing the Commission's overall strategic direction. Consistent with the Framework, the Commissioner will be supported by a senior leadership team:

- an NDIS Registrar will be responsible for managing the Commissioner's registration function
- a Complaints Commissioner will be responsible for managing the Commissioner's complaints functions and will also receive reports of incidents
- a Senior Practitioner with appropriate clinical experience will be responsible for managing the Commissioner's behaviour support function.

The Commissioner will oversee the seamless integration of these functions, and the comprehensive range of investigation, enforcement and information powers that underpin them.

This integrated approach responds to the Senate Committee recommendation for 'the establishment of a national, independent, statutory protection watchdog that has

broad functions and powers to protect, investigate and enforce findings related to situations of violence, abuse and neglect of people with disability'. It is also consistent with the findings of the Victorian Inquiry, which recommended 'a single, independent oversight body'.

The proposed single statutory body responds to one of the challenges of existing state and territory safeguards for people with a disability: that siloed approaches to compliance and oversight have created a fragmented system that is unable to respond quickly and effectively to abuse and neglect of people with disability.

The proposed integrated arrangements are appropriate and are consistent with existing arrangements in other sectors, including:

- State and territory regulatory authorities for early childhood education, which approve childcare providers, receive complaints about them, and take compliance action as appropriate
- Australian Skills Quality Authority, which approves providers to be on the Commonwealth Register of Institutions and Courses for Overseas Students, and receives complaints about those providers
- Australian Securities and Investment Commission, which registers companies and has oversight of them
- Civil Aviation Safety Authority, which combines registration, complaints and compliance functions for air safety.

4.4 Independence of the Commissioner

The Commission will be independent from the NDIA and from service delivery.

The Commission will be accountable to Parliament through the Minister. There are strong reporting requirements in place to ensure transparency and accountability. The Commission must fulfil the standard reporting obligations of Commonwealth entities under the *Public Governance, Performance and Accountability Act 2013* (the PGPA Act). This includes the provision of an annual report, which will be presented by the Minister to Parliament.

The Minister is expressly prohibited from giving directions to the Commission in relation to specific individuals or providers. The Minister can only give general direction within the parameters of the legislative functions and powers of the Commission. All directions given by the Minister are legislative instruments and are subject to Parliamentary and public scrutiny. This is a common governance arrangement for Commonwealth independent authorities, and appropriate to the scope and role of the Commission.

4.5 NDIS Code of Conduct

The Commission will oversee an NDIS Code of Conduct as an essential foundation for the safe and ethical delivery of supports and services in the NDIS. The NDIS Code of Conduct sets out the expectations of providers and workers delivering NDIS supports and service.

The NDIS Code of Conduct will apply to all providers and workers who are funded under the NDIS, regardless of whether they are registered, and to persons employed or otherwise engaged by NDIS providers. This includes volunteers and key personnel, such as any person with responsibility or influence over planning, directing or decisions, including board members and other stakeholders of significance.

The NDIS Code of Conduct is a key mechanism for the Commission to oversee, investigate and enforce compliance of providers—including unregistered providers—who engage in unacceptable conduct in the NDIS market.

Participants will be empowered through the NDIS Code of Conduct to enforce standards of conduct and services. Contravening the NDIS Code of Conduct will attract civil penalties and the Commission's full range of enforcement action and sanctions.

The NDIS Code of Conduct will be established through the NDIS rules. A public consultation process from 10 May to 21 June 2017 on a [NDIS Code of Conduct Discussion Paper](#) will inform the drafting of the NDIS Code of Conduct. During the consultation, DSS received over 100 submissions and over 530 survey responses, and is currently collating and analysing feedback to inform the drafting of the rule.

5 Key functions and responsibilities

The Commonwealth, through the NDIS Quality and Safeguards Commission, will assume national responsibility for the following functions in relation to the provision of NDIS supports and services including Information, Linkages and Capacity building:

- registration of NDIS providers
- complaints about providers, workers and NDIS funded supports and services
- a national reportable incidents scheme for registered providers
- oversight of the use of restrictive practices in the NDIS
- compliance and enforcement action related to these functions
- leading the broad policy design of nationally consistent NDIS worker screening.

In undertaking these functions, the Commissioner must act in accordance with the principles set out in new subsection 181D(4) of the Bill to:

- provide opportunities for people with disability to participate in matters that relate to them and to take into account the wishes and views of people with disability
- conduct compliance and enforcement activities in a risk responsive and proportionate matter
- support and maintain a diverse and sustainable NDIS market.

This is intended to ensure the Commission strikes the appropriate balance between supporting an innovative NDIS market and ensuring quality and safe supports and services are available to people with disability under the NDIS.

5.1 Provider registration

Registration and NDIS Practice Standards

The Commission will manage the registration and quality assurance of NDIS providers under a rigorous national framework. The new arrangements will replace existing quality and assurance checks under state and territory safeguards systems.

A person or organisation that wishes to be registered with the Commission will undergo an audit against the NDIS Practice Standards, which will form an NDIS rule. These audits will be conducted by independent third-party auditors, similar to current arrangements for disability and other human service providers in some jurisdictions.

The new regulatory requirements for providers and their workers will be tailored to ensure registration is proportionate to the level of risk associated with the supports and services provided:

- Providers of lower-risk supports will follow a simple, periodic verification process. This includes providers of everyday services used by the general public, such as gardeners or domestic cleaners. Verification will place the least burden on providers and make use of existing regulatory requirements, such as allied health professional registration. Providers undergoing verification will need to supply information including insurance details, worker credentials, appropriate qualifications or competencies, and membership of appropriate professional bodies.
- Providers of higher-risk supports will be required to gain third-party quality assurance certification against the NDIS Practice Standards. These standards will benchmark expectations in relation to the quality of support delivery, participants' rights, the management of organisational and operational risk, continuous improvement, legal obligations and workforce competencies. Specific practice standard modules will apply to providers of more complex supports.

The development of the NDIS Practice Standards is being overseen by a Technical Reference Group with representation from each of the states and territories, the Commonwealth Department of Health, the NDIA, and stakeholders from Disabled People's Organisations Australia, National Disability Services, Children and Young People with Disability Australia. The NDIS Practice Standards have been developed in partnership with the Attendant Care Industry Association.

Not all providers will need to be registered. However, providers who wish to provide higher-risk supports and services (such as behaviour supports including restrictive practices), or supports under plans managed by the NDIA, will need to be registered. This arrangement is intended to strike the right balance between providing protections for people with disability and, consistent with the NDIS principles of choice and control, building NDIS participants' capacity to make decisions, including in relation to taking reasonable risks in the pursuit of their goals and the planning and delivery of their supports.

Obligations of registered providers

To maintain their registration, a provider must:

- comply with the NDIS Code of Conduct
- comply with the NDIS Practice Standards applicable to the categories of support they deliver
- comply with any conditions of registration imposed by the Commissioner, for example, supports or services which can or cannot be provided
- implement and maintain internal complaints management and incidents management systems
- comply with reportable incident reporting requirements and notify the Commission of the use of restrictive practices
- comply with record-keeping requirements and the Commission's requests for information
- comply with all applicable requirements imposed by a law of the Commonwealth or a law of the state or territory of operation
- comply with the NDIS complaints resolution process.

All workers engaged by registered providers must undertake a compulsory orientation module that will cover the principles of human rights, respect and risk enablement, and the roles and responsibilities of NDIS workers.

For some providers in some jurisdictions, there will be small increases in the level of regulation (such as requirements to notify the Commission of reportable incidents and the use of restrictive practices). For others, these regulatory requirements will be a more streamlined version of their existing responsibilities. The COAG Regulatory Impact Statement found that overall regulatory impact on providers will decrease as a result of national streamlining of quality standards and mutual recognition for the purposes of registration.

All providers, both registered and unregistered, must comply with the NDIS Code of Conduct and will be subject to the NDIS complaints resolution process.

NDIS Provider Register

The Commission will establish and maintain an NDIS Provider Register, and may publish the Register in whole or in part. The types of information that may be published on the NDIS Provider Register include:

- a list of registered providers, for example, registered behaviour support practitioners
- whether a provider of supports or services has been subject to any enforcement action or sanction by the Commission, for example a compliance notice, enforceable undertakings or a banning order
- a service provider's compliance with legislative requirements

- other compliance actions taken by the Commissioner against a provider.

This will be a key mechanism for the Commission to support people with disability to exercise choice and control and make informed decisions about the providers of their supports. At present, there are limited mechanisms for governments and regulators to provide information about a provider to the public or other persons who may be affected. This amendment significantly improves the public visibility of quality and safeguards.

Financial assistance

Providers seeking registration will need to engage an independent auditor. The Commission may grant financial assistance where the cost of audit would be a barrier to entry including where there is a limited market in regional or very remote locations. It is anticipated that the Commission would make a payment to an approved third-party auditor on behalf of a provider to cover the costs of an audit (either fully or partially). This arrangement is similar to the audit subsidy arrangements available for aged care providers and enables the entry of new providers into the NDIS market. While providers may receive a subsidy, they will still be required to meet the same standards as other providers, therefore maintaining the integrity of the quality assurance process.

5.2 Complaints

The Commission will have a broad remit in relation to complaints regarding NDIS providers. Anyone will be able to raise a complaint about NDIS supports and services and report incidents that impact on the quality and safety of supports. This includes participants, family members, individual workers or providers, advocates or community visitors, professionals and members of the community. A complaint can be made about all NDIS providers and their workers, whether or not they are registered with the Commission.

The Commission will operate on a 'no wrong door' approach, and will support the appropriate 'warm referral' of complaints to other bodies where necessary. The Commission will also provide information and advice about complaints processes to NDIS participants, and build the capacity of people with disability to pursue complaints.

Registered providers will be required to have effective internal complaint management systems in place, proportionate to the size of the provider and the risks of their services. The Commission will provide guidance to providers and to auditors undertaking provider quality assurance to support best practice in the handling of complaints, and enable a culture of learning and innovation.

The Bill also introduces strong whistleblower protections for certain persons who make a complaint or disclose information to the Commission or key personnel of an NDIS provider. Persons protected include a person with disability receiving a support or service from an NDIS provider and their families, and employees of an NDIS provider. This is intended to respond to concerns raised in the Framework consultation and in recent inquiries into the sector that people are reluctant to report allegations and incidents of abuse out of fear of retribution. These provisions ensure that protected

persons are not victimised because they have made a disclosure about an NDIS provider.

5.3 Reportable incidents

Registered providers must have in place internal management and reporting arrangements to ensure that incidents are recorded, and that actions are taken to prevent recurrence.

Registered providers will also be required to report defined reportable incidents (as set out in new subsection 73Z) to the Commission, noting this does not replace obligations to report suspected crimes to police and other relevant authorities. The Commission will build provider capacity to prevent and respond to reportable incidents, including working with providers and people with disability to develop a response to incidents if necessary, and develop a culture of learning and innovation to deliver quality supports, prevent incidents and respond to complaints. The Commission will also review reportable incident data to identify systemic issues to be addressed, and report publicly on the trends and patterns in reportable incidents, and best practice strategies to improve the quality of supports and services and prevent harm to people with disability.

5.4 Behaviour support and restrictive practices

Restrictive practices are broadly defined as any practice or intervention that has the effect of restricting the rights or freedom of movement of a person with disability. They include the use of seclusion, as well as chemical, mechanical and physical restraint, psycho-social and environmental restraints.

Restrictive practices can represent a human rights infringement. The UNCRPD has expressed concern about the unregulated use of restrictive practices. It is well-recognised that the routine use of restrictive practices to control individuals' behaviours of concern has often been harmful and exacerbated those behaviours, and creates potential for abuse. The recent Senate Inquiry in Australia 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'.

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.

The Bill aligns with the commitment of all Australian governments to reduce and eliminate the use of restrictive practices in disability services, and will greatly assist Australia in meeting its obligations under the UNCRPD.

Key elements in the Bill are:

- A national Senior Practitioner will have a senior leadership role in the Commission and have responsibility for providing leadership in behaviour support and in the reduction and elimination of the use of restrictive practices in the NDIS.
- Registered providers will not be able to use restrictive practices unless the restrictive practice has been developed as part of a behaviour support plan by an

approved behaviour support practitioner, and the restrictive practice has been authorised through the state or territory process.

- Unregistered providers will be prohibited from using authorised restrictive practices. Participants self-managing their plans will need to choose a registered provider for any support that requires either the use of an authorised restrictive practice or the development of a behaviour support plan.
- Behaviour support practitioners will be required to meet the competency assessment standards developed by the Commissioner. As part of the registration process, the NDIS Practice Standards will require providers to ensure workers are appropriately trained to deliver the supports in line with a behaviour support plan. The development of a competency assessment allows suitably skilled and experienced individuals to be included in the NDIS, while recognising it will take time for the workforce and tertiary education sector to develop formal professional training and qualifications in behaviour support.
- Providers are required to report on all instances of an authorised restrictive practice.
- Any unauthorised use of a restrictive practice, including emergency use, must be reported to the Commission as a reportable incident.

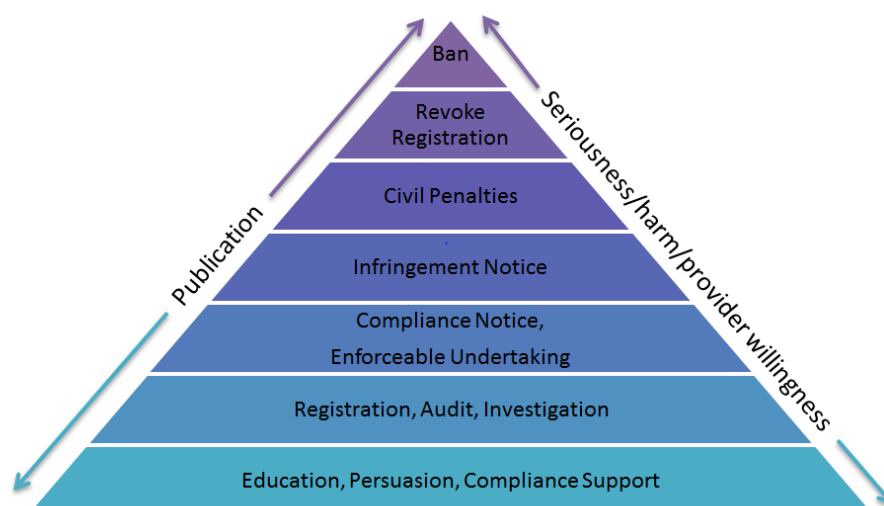
The combination of these powers will greatly enhance national transparency and control over the use of restrictive practices in the NDIS.

The Commission will collect and analyse information on behaviour supports and restrictive practices to identify patterns, trends and anomalies, and report on the use of restrictive practices to the Ministerial Council, including policy issues and recommendations. The Commission will have an important leadership role in working with states and territories to progress efforts to reduce and eliminate such practices.

5.5 Investigative powers and enforcement action

The Bill provides the Commission with extensive compliance and enforcement powers, commensurate to the vulnerability of some participants within the NDIS, and the community's expectations about the protection of people with disability.

The Commission will use a responsive approach to enforcement and compliance, ranging from lower level responses designed to support providers to achieve compliance to the highest level of response for the most serious contraventions, including deregistration, banning orders and seeking the application of civil or criminal penalties. This is illustrated in the following regulatory pyramid from the Explanatory Memorandum:



The Bill creates offences and civil penalties, including for the following:

- providing a support under a participant's plan for which they are required to be registered if they are not registered
- knowingly providing false or misleading information in an application for registration
- failing to comply with a condition of registration
- contravening the NDIS Code of Conduct
- causing detriment or threatening to cause detriment to another person because of disclosing information where it is protected, for example, an allegation of abuse
- failing to comply with a compliance notice
- breaching a banning order.

The Commission will have a broader range of sanctions than is available under current quality and safeguards systems. These include varying conditions of registration, compliance notices, suspension, de-registration, ban orders, civil penalties, injunctions and enforceable undertakings.

If a registered NDIS provider poses an immediate danger to the health, safety or wellbeing of a person with disability, the Commissioner will be able to suspend the registration of the provider pending consideration of whether the provider's registration should be revoked. The Commissioner may also issue a compliance notice preventing the provider from providing any NDIS supports or services.

The Commission will have appropriate monitoring and investigative powers to assist the Commission to determine whether the provisions of the legislation are being met. These include:

- powers of entry and inspection to monitor compliance with the Bill
- search and seizure in relation to civil penalty or offence provisions in the Bill.

The Commission may also authorise an investigation on his or her own initiative. These are sometimes known as ‘own motion’ investigations. Division 5 and Division 6 of the Bill set out the Commissioner’s inquiry functions in relation to complaints and reportable incidents. The Commissioner may commence an inquiry to seek further information about a matter, including broader systemic issues, that may be connected with supports or services provided under the NDIS.

The purpose of an inquiry will be subject to terms of reference developed by the Commissioner in consultation with other persons, organisations and governments. The Commissioner may use his or her information gathering powers, and may invite interested people to provide information or submissions, consistent with his or her function to provide opportunities for people with disability to participate in matters that relate to them.

The Commissioner is empowered to report on their findings and make recommendations to assist in the resolution of issues and as part of their role in promoting and protecting the rights, health, safety and wellbeing of people with disability.

This reporting, along with other reporting capabilities of the Commission, meets a transparency and accountability principle for government regulation. It will also provide valuable information at a market level about issues and trends in the delivery of NDIS supports, enabling providers and participants to benchmark performance against national data.

The Commission’s compliance, investigation and enforcement powers are proportionate and comparable to other Commonwealth regulators. These powers are consistent with the Regulatory Powers Act which applies uniform regulatory powers and arrangements for Commonwealth bodies.

The Bill contains appropriate safeguards on the Commission’s exercise of its investigation and enforcement powers. In exercising its powers, the Commissioner must act in accordance with the principles set out in new subsection 181D(4) of the Bill, which includes conducting compliance and enforcement activities in a risk responsive and proportionate matter. The Commission is not able to exercise entry, search or seizure powers unless it has obtained the consent of the occupier of the premises or obtained a warrant.

The Bill provides additional rights under the Act for review of decisions in relation to NDIS providers. These additional reviewable decisions include a decision to refuse to register a person as a registered NDIS provider; a decision to vary, suspend or revoke the registration of a registered NDIS provider; a decision to make a banning order; and a decision to impose a compliance notice on a NDIS provider. This ensures that decisions are made fairly and reasonably.

5.6 Worker screening

All governments agree that a nationally consistent and recognised approach to worker screening is a vital component of ensuring a safe and trusted workforce and minimising the risk of harm to people with disability. Worker screening has a preventative effect in deterring individuals who pose a high risk of harm from seeking work in the sector, and reducing the potential for providers to employ workers who

pose a high risk of harm to people with disability. Worker screening also has a corrective effect in prohibiting those persons who pose a high risk or are proven to have harmed vulnerable people from working in the sector.

It is intended that the design and policy for the screening of workers in the NDIS align as much as possible with the recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse, Working with Children Checks Report.

Under the national policy for NDIS worker screening, people who provide NDIS supports that entail more than incidental contact with a participant would be required to undergo worker screening to be able to deliver supports under the NDIS.

A nationally consistent approach to screening NDIS workers will be implemented under a combination of Commonwealth and state and territory legislation and policy.

The Bill explicitly states that the Commissioner's core functions include the development and oversight of the broad policy design for the screening of NDIS workers, to be jointly agreed with the states and territories. As part of the new registration process set out in the Bill, an NDIS provider delivering supports or services requiring worker screening would need to provide evidence that its workers were screened in accordance with the national policy.

States and territories will remain responsible for the operational aspects of worker screening including worker screening units. States and territories are responsible for enacting or amending legislation to establish NDIS worker screening units where it is required. This recognises that states and territories are best placed to operate worker screening as the majority of information used in screening is drawn from state and territory police and justice systems. States and territories already operate risk-based screening systems for people working with children, and in some jurisdictions, people working with people with disability.

In addition, the Bill allows the Commissioner to make a banning order that prohibits or restricts an NDIS provider or worker from providing any, or a type of support or service, or to a particular participant. A banning order can be applied to a volunteer, a person providing supports directly to self-managing participants, or a person who is part of the management structure of a provider. This provision complements the national policy on NDIS worker screening and enables the Commission to ban individuals engaging in unacceptable conduct from working in self-managed or lower-risk areas where there are significant concerns about the risk they present.

The provisions in the Bill are a reasonable and necessary approach to ensure people with disability have access to quality and safe supports and services under the NDIS. They aim to respond to evidence presented to the Senate Inquiry that 'the lack of sector-wide workforce regulation in the disability services industry has exacerbated the ability of predatory abusers to enter and remain in the disability workforce'.

6 Interface of the Commission with other systems

6.1 Scope of the Commission

The Commission will be responsible for overseeing quality and safeguards for the full implementation of the NDIS, including Information, Linkages and Capacity building supports for people with disability. In addition, the Commission will also oversee quality and safeguards in relation to other programs prescribed under the NDIS rules about the definition of an NDIS provider. It is anticipated that this will operate for people aged 65 and over who are receiving Continuity of Support under the Commonwealth Continuity of Support Programme – Specialist Disability Services for Older People, and for Commonwealth-funded advocacy services.

The Commission will not replace existing functions in the states and territories that have a broader scope (such as an ombudsman, a human rights commission or a public advocate). Services and supports for people with disability that are delivered through other systems, such as the health, education and justice systems, will continue to be covered by the quality and safeguards arrangements of those systems.

Mainstream complaints and redress mechanisms, including police, Fair Trading, and professional and industry bodies, will continue to be available to both NDIS participants and people with disability outside of the NDIS. Consumer guarantees in the Australian Consumer Law will cover disability-related supports and services. Anti-discrimination and human rights legislation overseen by the Disability Discrimination and Human Rights Commissioners will provide additional avenues for raising a complaint.

For the NDIS Quality and Safeguarding Framework and the Commission to work effectively and efficiently, the Commission and broader mainstream protections and safeguards need to interface seamlessly together to support people with disability.

Recent inquiries into abuse, in particular, have emphasised the need to build linkages between systems to ensure reports of abuse, violence and neglect of a person with disability are thoroughly investigated, responses are coordinated and systemic issues are identified and addressed.

This Bill ensures that the Commission can share information with other bodies (such as child protection agencies in the states and territories, other complaints schemes and industry complaints bodies) to enable the thorough investigation and coordination of regulatory and other responses, especially where vulnerable people may be at risk of harm.

The Commission will also have jurisdiction to investigate any matters that may impact on NDIS funded supports or services, including through its own motion investigation and compliance powers in relation to NDIS providers. Information about an NDIS provider, even if it was received in relation to a non-NDIS participant, could be investigated and enforcement action could be taken against the provider.

It is important to note that people with disability, their families and carers rely on a wide range of services outside of the NDIS, including mainstream supports, specialist disability services, and community supports to pursue their goals and

maintain their quality of life. The responsibility to provide services to people with disability, including people who are not eligible to become NDIS participants, is a shared responsibility between all levels of government. The Commission will not replace the obligations of mainstream services and other systems to improve the lives of people with disability in line with the National Disability Strategy.

6.2 State and territory regulatory responsibilities

The NDIS is a shared responsibility of the Commonwealth and state and territory governments.

In addition to the national functions of the NDIS Quality and Safeguards Commission, the states and territories will be responsible for a number of key elements identified under the Framework:

- the operation of NDIS worker screening in their jurisdiction, including the operation of worker screening units, in line with the national NDIS worker screening policy
- the authorisation arrangements for restrictive practices in their jurisdiction
- quality and safeguards for mainstream services provided to people with disability such as in the education, justice and health systems.

The Bill gives the Commissioner the power to disclose information, including protected Commission information, in certain circumstances, to a Department of state or territory, or an authority that has responsibility for matters relating to people with disability. This power reflects that the Commissioner must work effectively with other bodies and other jurisdictions to promote and protect the rights of people with disability. Matters that come to the Commissioner's attention through complaints and reportable incidents may have wide ranging implications that are broader than the NDIS. At times there will be a need to disclose information to relevant state, territory and Commonwealth bodies for further action, investigation or information.

DSS is working with the states and territories to understand the extent of state and territory legislative change that may be required to support the implementation of the Commission.

6.3 NDIA regulatory responsibilities

The NDIA and the Commission have complementary roles and will work together to jointly promote and protect the rights of people with disability, and manage the risks associated with the NDIS.

The NDIA will continue to oversee systems for detecting fraud and related issues associated with the responsibility for paying providers and verifying that supports have been delivered.

As part of its market oversight role, the Commissioner will monitor the market for emerging or systemic issues in provider practice. This role complements the NDIA's market stewardship role in monitoring and intervening to address local and individual market issues. The Commission will work closely with the NDIA where these roles and functions overlap.

The Bill provides the legislative framework required to support a co-regulatory relationship. One of the Commissioner's core functions is to provide advice or recommendations to the NDIA or the Board in relation to the performance of the NDIA's functions. This provision enables the NDIA to consider and respond to issues raised by the Commission in delivering its responsibilities for participant support and market stewardship, including reviewing supports for individuals in the event of an incident. Where a Commission investigation extends to actions taken by the NDIA, those findings will also be made available to the NDIA.

Complaints about the NDIA or its staff will generally be handled through existing complaints management arrangements within the NDIA or by the Commonwealth Ombudsman. To have the Commission regulating the NDIA may compromise this co-regulatory arrangement.

7 Review of the Act and future reviews

The Bill also makes minor amendments to the Act in response to an independent review of the Act undertaken in 2015, in accordance with section 208 of the Act. The amendments are intended to provide greater clarity to the legislative framework of the Act, and are consistent with the COAG response to the review tabled in the House of Representatives on 1 March 2017 and the Senate on 20 March 2017.

As part of its response to the independent Review, COAG agreed in principle to a future review of the Act, with the timing of the review to be considered by Disability Reform Council. This review of the Act would be able to consider the operation of the quality and safeguards amendments in this Bill. The COAG response to the independent Review is available on the [DSS website](#).

8 Next steps – Consultation on the NDIS rules

The Bill sets out the core functions and framework for the Commission, with the NDIS rules providing the detail necessary to support the evolving nature of the Commission's regulatory activities.

DSS will consult with the states and territories and peak bodies representing people with disability, providers and the workforce in developing the NDIS rules. The draft NDIS Code of Conduct and the draft NDIS Practice Standards are being developed in consultation with the states and territories and peak bodies, and the draft NDIS Code of Conduct was subject to a six-week public consultation process in addition to state and peak body consultation. This approach has proven to be effective and appropriate.

The Government has also committed to consulting with the states and territories on all rules under the Act, and in the design and implementation of the Commission's functions. In addition, rules for nationally consistent NDIS worker screening and the reduction and elimination of restrictive practices, which are the responsibility of state and territory governments, will require their agreement. This proposed approach to the rules ensures that policy development and decision-making authority is commensurate with financial and operational roles and responsibilities.

These arrangements will enable the timely sign-off and agile governance needed to stand-up the Commission by July 2018. Previous experience in the NDIS has shown that a requirement for unanimous agreement by the states and territories can be protracted, with two recent NDIS Rules each taking over nine months of consultation. Given the compressed timeframe to establish the Commission, a requirement for unanimous agreement by the states and territories may jeopardise the establishment of the Commission by 1 July 2018.

The consultation requirements for the rules are consistent with the views of the Productivity Commission in its Position Paper on NDIS Costs. The Productivity Commission noted the benefits of requiring unanimous agreement on NDIS rules have been outweighed by the resulting delays in the implementation, and has impeded the ability for governments to adapt to emerging risks in the NDIS. In addition, the Productivity Commission noted the importance of the timeline for implementing the Framework to ensure quality and safety for NDIS participants, and to provide clarity and reduce regulatory burden for providers.

The Bill also provides for the Commissioner to consult and cooperate with a broad range of organisations and persons in relation to his or her functions and the NDIS, including in the course of making legislative instruments. This includes people with disability and organisations or people representing people with disability.

DSS has welcomed the constructive input from stakeholders throughout the development of the NDIS Quality and Safeguarding Framework and the Bill and continuing development of the rules.