

NDIS QUALITY AND SAFEGUARDING RIS

ABOUT THIS DOCUMENT

The purpose of this Decision Regulation Impact Statement (RIS) is to recommend preferred policy options for the regulatory components of the proposed NDIS Quality and Safeguarding Framework for consideration by the Disability Reform Council (DRC), namely:

- complaints and serious incident handling;
- worker screening;
- registration and code of conduct; and
- reduction and elimination of restrictive practices.

It has been prepared in accordance with the guidelines of the Council of Australian Governments (COAG) in the Best Practice Regulation Guide (2007).

A separate document setting out the full framework, including non-regulatory elements, has also been prepared for consideration by the DRC.

A range of regulatory and non-regulatory measures were canvassed in a Consultation Regulatory Impact Statement developed by Commonwealth, state and territory officials, and released early in 2015. Consultations on the paper took place between February and April 2015, and included public meetings, meetings and workshops with specific stakeholder groups, submissions, online questionnaires and an online discussion forum. In addition, an impact assessment was commissioned to assess the costs and benefits of the proposed options.

The proposals presented here also take into account the recommendations of a number of current inquiries into the child protection and disability sectors. This includes the royal commission into institutional responses to child abuse; the Victorian ombudsman; the family and community development committee of the Victorian parliament; and the federal senate community affairs references committee inquiry into abuse and neglect against people with disability in institutional and residential settings, including the gender and age related dimensions, and the particular situation of Aboriginal and Torres Strait Islander people with disability, and culturally and linguistically diverse people with disability.

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Section 1: Background and Consultation

Productivity Commission Report

In August 2011, the Productivity Commission released a major report on Disability Care and Support. The Commission found that it was unreasonable and impracticable to expect people to self-insure against disability, and that the lack of adequate support for people with disability had adverse impacts on both individuals and the economy. The Commission also found that the current disability support system is underfunded, unfair, fragmented, and inefficient, and gives people with a disability little choice and no certainty of access to appropriate supports. It found that investment in early intervention and appropriate supports could reduce longer-term disability support and income support costs.

The Productivity Commission also noted that it would be appropriate to put in place a range of safeguarding mechanisms, including information for consumers to reduce transactions costs, complaint mechanisms, registration requirements, standards providers must meet, regulation of restrictive practices, and effective monitoring and oversight. Because the NDIS would be a national system, the Productivity Commission argued that it is likely to be most efficient and effective if it is underpinned by a nationally consistent quality and safeguarding framework.

COAG Response

In response, on 19 August 2011 COAG agreed in principle on the need for major reform of disability services in Australia through a National Disability Insurance Scheme (NDIS).

In order to advance the implementation of the NDIS, on 13 April 2012, COAG agreed to a set of principles for the NDIS, and a consultation RIS was released on 7 December 2012. A final RIS was not considered by the DRC as the decision to transition to full scheme had already been agreed in Heads of Agreement between Commonwealth and state and territory governments. The National Disability Insurance Scheme Act 2013 received royal assent on 28 March 2013. The NDIS started in July 2013 as a trial in four locations. Implementation of the full scheme will commence from 1 July 2016, noting that discussions are underway regarding the future of disability services provision in Western Australia

The operation of the NDIS

The NDIS adopts a no-fault, needs based insurance approach to supporting people. It is intended to ensure that people with disability have access to reasonable and necessary supports they need to live an ordinary life.

The scheme recognises the right of people with disability to exercise choice and control over the planning and delivery of their supports. It is also designed to ensure that the chances of achieving the desired outcomes of its investment in terms of economic and social participation for people with disability are achieved.

The National Disability Insurance Agency (NDIA) administers the NDIS. In particular, it is responsible (amongst other things) for:

- assessing the eligibility of a person for the scheme;
- agreeing with the participant what supports are 'reasonable and necessary'. NDIS funding cannot be used for any other purpose;
- paying for reasonable and necessary supports available from the NDIS market;
- assessing the risks individuals face in participating in the NDIS, and for ensuring adequate safeguards are in place to manage these; and
- direct commissioning of supports where these would not otherwise be provided through the market.

The NDIA has a number of powers at its disposal to assist it in managing the NDIS market, including setting conditions through its terms of business agreements with suppliers, and power to set the prices of supports.

Under the NDIS, people with disability (or those acting for them) will:

- set their objectives through plans;
- have input into the process of deciding what supports and reasonable and necessary to achieve these objectives;
- choose their own suppliers of supports;
- negotiate with suppliers on how those supports will be delivered on a fee for service basis; and
- where they choose and are approved to do so, manage the payments for supports.

Quality and Safeguarding

At the time the scheme was initially legislated it was recognised that development of nationally consistent standards and appropriate safeguards to support and protect people with disability was an essential foundation for the scheme. As an interim measure it was agreed that state and territory regulatory systems would operate in conjunction with the NDIS while governments worked together on the design of a nationally consistent quality and safeguarding system, to be agreed by the DRC.

Current state and territory quality and safeguarding systems for the disability sector involve a mix of formal (legislation/regulation) and informal regulation (policy) exercised through management of funding agreements and contracts. While there are differences between jurisdictions, there is a high degree of consistency in current approaches, which typically involves five main elements:

- statutory complaints handling bodies;
- serious incident reporting and oversight;

- worker screening requirements (working with vulnerable person checks, excluded worker schemes, and/or requirements for police and referee checks);
- controls on the use of restrictive practices, consistent with the National Strategy to reduce and eliminate restrictive practices; and
- quality assurance requirements, consistent with the National Standards for Disability Services.

Competition Policy Review

The recent Harper Inquiry into Competition Policy also made a number of recommendations on human services delivery that were accepted by the Australian Government that are of relevance to this, including that in adopting choice and competition principles in the domain of human services, guiding principles should include:

- User choice should be placed at the heart of service delivery;
- Governments should retain a stewardship function, separating the interests of policy (including funding), regulation and service delivery;
- Governments commissioning human services should do so carefully, with a clear focus on outcomes;
- A diversity of providers should be encouraged, while taking care not to crowd out community and volunteer services; and
- Innovation in service provision should be stimulated, while ensuring minimum standards of quality and access in human services.¹

The Harper Inquiry noted that the stewardship function should have some similarities with the ongoing stewardship role of government in other sectors, such as the electricity market. Governments have established both an energy market operator to keep energy services delivered and a separate rule maker to change the way the energy market operates over time so that it continues to meet the long term interest of consumers. In reforming the electricity market, governments recognised the role of a strong consumer protection framework in building confidence in the market; good stewardship is important in human services since human services can be just as essential to many Australians, especially those facing disadvantage. The report noted that stewardship relates not just to governments' direct role in human services but also to policies and regulations that bear indirectly on services.

DRC decisions

On 12 December 2014 DRC agreed to a consultation paper and approach to the development of a nationally consistent, risk-based quality and safeguards framework for the NDIS noting that the paper will form the consultation element of a COAG RIS.

DRC consulted with interested parties during February to early May 2015 on a new quality and safeguarding framework that is consistent with the overall approach of the NDIS.

¹ Harper Report on Competition Policy Review, Chapter 12, 31 March 2015 ; Government response, November 2015.

The consultation involved the following activities between February and May 2015:

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

Officials from different jurisdictions also engaged in targeted stakeholder consultations.

In addition, an impact analysis was commissioned from the NOUS Group, and included collecting data from two surveys with responses from 289 providers, administrative data from governments, publically available sources, and expert opinion.

On 13 November 2015 DRC agreed to the broad directions of an NDIS quality and safeguarding framework and to publish a report on the outcomes of the 2015 public and stakeholder consultation process (report available at dss.gov.au).

A RIS on the transition to full scheme was released on 10 March 2016, and noted that in the context of managing the transition to an NDIS, governments need to reconsider protections for people with disability and arrangements to ensure supports are of a high quality. It pointed to four key reasons for this:

1. **Greater choice and control.** Existing arrangements for quality and safeguarding are based on funding agreements between governments and providers of supports. These funding agreements set quality expectations for participants and providers and aim to protect people with disability from harm. The NDIS, in contrast, provides the funding to individual participants who then make choices about their supports. This creates the need for a new quality and safeguarding framework because it is the person with disability, not government, who is able to make judgements and decisions about the quality of providers. It also means a different mix of providers will enter the market, requiring a new approach to quality and safeguarding.
2. **Governments will no longer be purchasing specialist disability services.** In the NDIS, the primary funding relationships will be between the person with disability and the provider of supports. This means the Commonwealth and states and territories will not continue to have funding agreements with providers. The current quality assurance arrangements, and some of the current safeguards, will therefore no longer apply.
3. **An opportunity exists to streamline requirements, reduce red tape and promote the market for supports.** The development of a new quality and safeguarding framework is an opportunity to simplify the rules and make them the same across jurisdictions. This should facilitate the start-up of new national providers and offer greater choice to people with disability in the scheme.

4. **There is a greater need for National consistency.** The NDIS is a national scheme and as such needs a consistent quality and safeguarding framework for all jurisdictions that it operates across.

On 4 March 2016 the DRC agreed in-principle to the key features of a new national quality and safeguards framework for the NDIS, noting it will be implemented for full scheme, noting that it expected to make a decision on the final framework and the respective roles of the Commonwealth, the states and territories and the NDIA by the end of May 2016.

DRC welcomed the Commonwealth's proposal to establish new national functions for provider quality and registration, as well as national functions for handling complaints, including investigating serious incidents, and overseeing the use of restrictive practices. DRC asked its officials to continue to work on finalising the framework and assessing the regulatory impacts, as well as doing more work on restrictive practices functions and worker screening.

Section 2: statement of the problem

The need for a quality and safety framework for the NDIS is dictated by several factors, including:

- the need to put in place measures to underpin the effective operation of the NDIS market to complement and operationalise the provisions already included in the NDIS legislation;
- to ensure that participants in the NDIS market are able to exercise choice and control;
- ensure that supports provided are of sufficient quality to achieve the participation and other objectives of the NDIS, and are delivered safely; and
- to provide protections for vulnerable people from the risk of violence, abuse, neglect and exploitation and other harms in the course of support provision.

The effective operation of the NDIS market

The NDIS involves creating a market for disability supports. This is a very significant change and brings with it new risks that need to be managed. Under the NDIS the amount of funding provided by governments for disability services and equipment is expected to expand rapidly, from an estimated \$14.9 billion in 2012 to \$22 billion in 2019-20. Under the NDIS, the number of individuals accessing disability supports is expected to increase from around 320,000 in 2012 to 480,000 in 2019-20. In order to meet the demand for supports, the workforce in the sector will need to double by full roll out in 2019-20.

This expansion poses considerable risks, particularly for participants with complex needs or who live in regional and remote locations. Some workers in the sector have limited formal qualifications, and often operate in settings such as the participant's home, with limited supervision. This expansion will also take place in a context of competition from related sectors such as aged care. There are also likely to be a large number of new entrants to the

market, generating new quality, safeguarding and other risks, particularly in the early years of the scheme.

The transition process for any sector undergoing significant change can be challenging. The experience of the home insulation scheme and reforms to vocational education, for example, suggest that a level of turbulence is likely to occur where a substantial amount of government funding is injected into a system using a market delivery approach.

These risks may be particularly high given that the market is likely to undergo significant restructuring as it grows, due to the shift to a fee for service system, privatisation, and the entry of a more diverse range of suppliers of supports, including increased number of for-profit organisations.

The NDIS legislation and associated regulation already makes provision for a number of measures to address these risks. Currently, however the NDIA is reliant on state and territory regulatory bodies for assessment of provider quality, and responses to serious incidents. Under full scheme this support will no longer be available, and so alternative arrangements need to be put in place to manage these processes.

It is important that these arrangements reflect best practice, are adapted to the new operating environment for the sector, and are as efficient and effective as possible. Currently, for example, providers operating across jurisdictions or sectors typically have to comply with several different sets of quality assurance requirements, each of which involve significant compliance costs. Indeed a survey conducted for the analysis found that 75% of those who responded complied with more than one quality assurance framework.² Similarly worker screening clearances, such as Working with Children Checks, Working with Vulnerable People Checks (or Police check requirements) are not portable moving between jurisdictions (or jobs in the case of police checks). The level of duplication and red tape under the current system increases costs for consumers, workers, suppliers of supports and government, and constitutes a potential barrier to entry in some cases.

The NDIS Quality and Safeguarding Framework also needs to take into account the major injection of funding that will occur in the sector, that is likely to see many new organisations, including for profit suppliers and sole traders, entering the market; the expansion of existing providers; and innovation in services. This provides an opportunity to explore what mechanisms are needed for a market-based system, and ensure the regulatory framework reflects best practice principles.

User choice

Prior to the NDIS people with disability typically had little choice over what supports they could access and how those supports are delivered. The Productivity Commission suggested that people with disability had little choice and no certainty of access to appropriate support, and so proposed that under the NDIS, there should be certainty of funding based on need,

² NOUS Group, NDIS quality and safeguarding framework: Impact analysis report, July 2015, pp 111.

and genuine choice over how their needs were met, including choice of provider. The Productivity Commission found strong evidence that where people with disability have a say in key decisions about their lives, outcomes are much better. Under previous arrangements, participants were not empowered to exercise choice and control in many circumstances, which in turn means less personalised services being provided, less innovation and a lack of diversity for support.

Providing for user choice will not happen automatically as the Commission made clear:

However, realising the gains from increased consumer choice will neither be automatic, nor immediate. While many participants in this inquiry are clearly well equipped to make good informed decisions about the support services they wish to use, to demand high quality services and to complain or switch providers when their expectations are not met (if given the opportunity to do so), this will not be the case for all. As discussed above, the vulnerability of many people with a disability increases the risks of harm or poor outcomes, even when consumer choice is greatly enhanced under the NDIS. As such, both service providers and consumers will require assistance in ensuring that a more market-based system can deliver good outcomes (as well preventing bad outcomes).³

Quality of services

Another key consideration in relation to the strength of the regulatory system is the risk that the supports provided under the NDIS are of such poor quality that participants do not achieve their life goals. This in turn would lead to poor quality of life and outcomes for participants, and prolong their reliance on the scheme and reduce its long term sustainability.

The Productivity Commission pointed out in its report on Disability Care that while ensuring that suppliers consistently deliver an acceptable standard of quality is relatively straightforward for physical goods, such as aids and appliances, it is considerably more difficult to observe and enforce quality standards in the provision of disability services, due to their intangible and highly varied and personalised nature.⁴ The Commission noted that as welfare of people with disabilities is the primary motivation for industry oversight, consumer outcomes represent the most direct form of observing service quality, and should be a key feature of an NDIS quality assurance framework, together with the primary (and interrelated) regulatory objective of protecting people from significant harm.

To this end, a pilot study of an NDIS Outcomes Framework, using a self-assessment approach, was released in December 2015.⁵ Nonetheless, there is currently little or no data on the extent to which services currently make a difference for people with disability, including in terms of achieving outcomes, as most measurement is currently input based, and

³ Productivity Commission, *Disability Care and Support Report*, pp 438.

⁴ Ibid, pp 434

⁵ <http://www.ndis.gov.au/document/outcomes-framework-pilot>

data on compliance against the National Standards for Disability Services is not currently systematically collected or assessed.

In the absence of other measures, one possible indication of levels of poor service is complaints rates, which are currently estimated to be made by around 3% of support clients.⁶ This is extremely high by comparison with other sectors, where rates are typically in the order of less than five per thousand clients.⁷ Moreover, while this figure has been used as a proxy for quality deficits in the cost-benefit analysis, it should be treated with extreme caution, as it may be a significant underestimate as at least one jurisdiction is currently experiencing a complaint rate in the order of 10%.⁸ In addition, experience in other industries suggests that complaints about service quality are likely to increase significantly in the transition to a market environment, both because inexperienced and/or unscrupulous service providers enter the market, and consumers are empowered to demand services that make a difference to them.

Ensuring that the system encourages the provision of innovative, high quality supports is important to achieving the participation and other outcomes expected for the NDIS and safeguarding taxpayer funds.

Safety

There are some support types that will come under the NDIS that are intrinsically risky. This includes supports where workers are providing hands-on personal care, and where a person is dependent on proper use of equipment that requires training (such as ventilators). Similarly some services, such as peg feeding and administration of prescription drugs can have serious adverse effects when not carried out correctly.

While some services can only be delivered by persons subject to professional registration requirements, in many cases this is not the case.

There is currently no national data on deaths, serious injuries or other harm as a result of inadequate safety in disability services. What data is available, however, suggests that there are significant issues that need to be addressed. A recent analysis of a sample of deaths of people with disability in care in Queensland, for example, suggested that over half were preventable. In NSW there were 239 reviewable deaths (of people in care) during 2012 and 2013, with a high proportion premature, and potentially preventable.⁹

⁶ See Appendix 1.

⁷ Telecommunications Consumer Protections Code – Regulation Impact Statement – Australian Communications and Media Authority, 11 July 2012.

⁸ The Victorian Parliamentary Inquiry noted that the complaint rate in Victoria, for example, which has actively promoted idea that it is 'alright to complain' is around 10%. [Other jurisdictions data]

⁹ Queensland Office of the Public Advocate, *Upholding the Right to Life and Health: a review of the deaths in care of people with disability in Queensland*, March 2016; NSW Ombudsman, Report of Reviewable Deaths in 2012 and 2013 volume 2: Deaths of people with disability in care, June 2015.

Safety regulation for many supports is currently managed through funding agreements and associated quality assurance requirements that will no longer apply under the NDIS. Accordingly, there is a need to put in place appropriate systems are in place to ensure that workers continue to be adequately trained and/or skilled to undertake particular tasks in order to avoid injury or other harm to participants.

Restrictive practices

Another key safety issue, with significant human rights implications, relates to the use of 'restrictive practices'. A relatively small proportion of people with disability may need additional supports to reduce the risk of harm where some behaviours may pose a risk to themselves or others. These are often described as challenging behaviours or behaviours of concern. They are behaviours of such intensity, frequency or duration that the physical safety of the person or others is likely to be placed in serious jeopardy. It also includes behaviour which is likely to seriously limit the use of, or result in, the person being denied access to services or ordinary community facilities.

Disability services often find it challenging to provide safe and therapeutic services for those with complex high support needs, as well as providing the safest possible work environment for staff. In the absence of adequate support and oversight, this can lead to both a reluctance to provide supports to those with high support needs, and a failure to uphold the rights of people with disability where they are used.

In the past, restrictive practices were often used as first line of response to behaviours of concern. Today the evidence is clear that such actions, taken routinely to control individuals' behaviour, have been harmful, often exacerbating the behaviours they sought to control. Restrictive practices can also have other undesired side-effects, as the box below illustrates.

Box 2.1 Use of restrictive practices

An estimated 10–15% of persons with disability will show 'behaviours of concern'. The majority of these are people with intellectual or cognitive disabilities or autism¹⁰.

Medication to control behaviour: It is estimated that between 44–80% of this group will be administered a form of 'chemical restraint' in response to the behaviour¹¹. A recent UK study found that 71% of people with disability prescribed antipsychotics had never been diagnosed with a mental illness; that such medications were no better than placebo in managing behaviour; and that these medications had potentially severe side-effects including diabetes and obesity.¹²

¹⁰ ALRC

¹¹ ALRC 124, chapter 8.

¹² <http://www.scientificamerican.com/article/antipsychotic-drugs-often-given-to-intellectually-disabled-in-absence-of-mental-illness/>

Physical Restraint: No systematic data is currently collected on deaths or serious events as a result of use of restraint, but a Harvard study estimated that between 50 and 150 deaths were occurring in the US each year due to asphyxia and cardiac complications resulting from the use of restraints.¹³

Seclusion: Solitary confinement in a room or area which they cannot leave has been linked to a high rate of assaults on staff (one study found that 70% of staff using physical restraint and/or seclusion have been assaulted).¹⁴

Current best practice assumes that, in the main, restrictive practices are a response to behaviours that have the potential to cause harm to the individual or others, and can and should be eliminated through positive behaviour strategies. In order to achieve this, all Governments committed to implementing the National Framework for Reducing and Eliminating the Use of Restrictive Practices in the Disability Service Sector (National Framework) in 2014. The National Framework establishes a national approach to reducing and eliminating the use of restrictive practices by providers across a range of disability service sector settings. It sets out six core strategies to achieve this. Jurisdictions have agreed to implement these by 2018 for all disability service providers for which they or the NDIA have funding responsibility. Despite this commitment, the rates at which such practices are used in Australia appears to be high compared to other countries such as the United Kingdom.¹⁵ It is estimated that around 20,000 people are currently subject to restrictive practices.¹⁶

Abuse, violence, neglect and exploitation

As the recent Senate Inquiry into Disability Abuse in Institutional settings has highlighted, there is currently no consistent and systematic collection of data on harm of people with disability by workers across Australia.¹⁷ It is also well established that there is significant under-reporting of abuse and other crimes against people with disability. Nonetheless, there are strong indicators that suggest the need for action.

Rates of assault and abuse: People with disability experience significantly higher rates of harm than others. It has been estimated that children with disability are 3.4 times more likely to be mistreated than children without disability. People with intellectual disability are three times more likely to be assaulted, ten times more likely to be sexually assaulted, and ten times more likely to be robbed than others. Women with intellectual disability are 50–90 per

¹³ See also Hartford Courant Investigative Report, 1999.

¹⁴ Wynn (2003), cited in <https://www.psychology.org.au/Assets/Files/Restrictive-Practices-Guidelines-for-Psychologists.pdf>

¹⁵ Australian Psychological Society paper "Evidence-based guidelines to reduce the need for restrictive practices in the disability sector".

¹⁶ The Discussion Paper suggested that the figure could be in the order of 8,000–9,000 individuals, based on data from the Victorian system. Subsequent audits of services suggests that this may be a significant underestimate.

¹⁷ See Report, chapter 2:

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

cent more likely to be subjected to a sexual assault than women in the general population, and over 25 per cent of all sexual assault victims identified as having a disability. Only 4% of offenders are strangers, and around 80% of those abused are likely to endure multiple episodes over long periods of time.

Box 2.2: Risk factors for abuse, harm, neglect and exploitation

Research shows that people with disability are at an increased risk of abuse, harm, exploitation and neglect due to a range of factors that may include:

- . Dependence on others for care and support
- . Difficulties with communication that may hamper the person's ability to disclose experiences of abuse
- . Social isolation
- . Lack of access to support services
- . Cultural devaluation of people with disability
- . Disability service design that favours shared supported accommodation arrangements.

Australia's top three commonly reported primary disabilities by people who are support users are:

- . Intellectual (accounting for 30%)
- . Psychiatric (accounting for 20%); and
- . Physical (accounting for 17%)

Mistreatment comes in many forms and although the type of abuse perpetrated against people with disability varies according to particular circumstances and context, commonalities can be drawn from the literature. In general, people with disability are at increased risk of experiencing:

- . Physical violence
- . Sexual assault
- . Emotional and psychological abuse and neglect

Source: Australian Institute of Health and Welfare, *People using both Disability Services and Home and Community Care in 2010-11*.

Service context: The extent of violence, sexual assault, neglect and other abuse of people with disability in the context of the provision of supports, though, is extremely difficult to gauge. Studies into abuse of people with disability have, however, found a consistent pattern of abuse perpetrated by those who wield power within the relationship, especially where the person with disability is reliant on the assistance of the service provider for day-to-day support.¹⁸

¹⁸ See for example Sally Robinson and Leslie Chenoweth, *Understanding emotional and psychological harm of people with intellectual disability: an evolving framework*, http://www98.griffith.edu.au/dspace/bitstream/handle/10072/47425/80101_1.pdf?sequence=1; D. Woodlock, et al, 'Voices Against Violence: Paper 6: Raising Our Voices - Hearing from with Women with Disabilities.' *Women with Disabilities Victoria*, Office of the Public Advocate and Domestic Violence Resource Centre Victoria, 2014

The box below summarises the limited data that is available.

Box 2.3: Recognising crime and misconduct

Health Services Union Submission: Nearly half of members surveyed (46.79 per cent) reported that they had witnessed violence, abuse or neglect against people with a disability by other staff, either at their current workplace or when working for a previous employer. Furthermore, nearly 1 in 5 respondents (18.07 per cent) reported that while they had not personally witnessed abuse, they had been told about incidents by co-workers.

Victoria: Around 15% of all complaints made to the Victorian Disability Services Commissioner related to abuse, assault or neglect (Sub, Oct 2015). Some 18% of complaints made to the Victorian Disability Services Commissioner in 2014-15 were workforce related, with half relating to staff behaviour and attitude, the other half relating to skills and knowledge (Annual Report). Victorian Community Visitors identified 287 cases of violence, neglect or abuse in 2013-14.

NSW: 100 allegations of employee to client reportable incidents (59% of all reportable incidents) in relation to people with disability living in supported group accommodation. Of these 42 were allegations of physical assault, 28 were of sexual assault or misconduct, 25 related to alleged ill-treatment or neglect, and 5 related to fraud. (NSW Ombudsman).

Table 1 below sets out an estimate of the rate of cases of serious harm that occur currently that forms a key input to the cost-benefit analysis of the regulatory options contained in this paper.¹⁹ The rates are based on provider reports of incidents to governments from five jurisdictions, adjusted to take account of under-reporting. The rates are estimates only and should be treated as indicative only. Nonetheless, they lend weight to anecdotal and other evidence that the number of people affected by abuse from providers of supports, as well as by other residents, is significant.

¹⁹ For a discussion of the basis for the estimates and other key assumptions used in the cost-benefit analysis, see Appendix 1.

Table 1: Estimated current rates of serious adverse incidents, 2014, Australia

	Estimated rate of serious adverse incidents (% clients)
Physical Assault	2.5%
Sexual assault	0.5%
Neglect	1.25%
Theft	1.0%

These estimates do not take into account rates of other forms of abuse and exploitation, such as ongoing emotional and psychological abuse, which can have a major impact on victims.

The recent Senate Inquiry commented that:

“The committee is very disturbed by the significant body of evidence it has received which details the cruel, inappropriate and, in many cases, unlawful treatment of Australians with disability. The committee is equally disturbed by the largely inadequate responses that these cases have received when reported to authorities and people in positions of responsibility. The committee is also concerned by the fact that many more cases remain unreported, partly as a result of inadequate responses to reporting. This is clearly unacceptable.... Taken as a whole, the evidence shows a systemic failure to protect people with disability...”²⁰

Section 3: Objectives

The proposed NDIS Quality and Safeguarding Framework

Objectives of the NDIS Quality and Safeguarding Framework

In a complex system such as the disability sector, where risks arise from both demand and supply side factors, no single regulatory measure can hope to address the range of problems identified or even any one element of them in isolation. Some supports may be inherently risky, for example, or pose a higher risk, because they involve more direct contact between staff and participants or unsupervised contact (such as personal care in their home). People with disability themselves will have different levels of risk due to their capacity to make informed decisions as well as the level of involvement of their support networks, including carers, family and friends.

²⁰ Senate Report, ch 3

Accordingly, a suite of mutually supportive regulatory and non-regulatory measures, aimed at building system capacity and support systems (developmental); preventing harm and promoting service quality (preventative); and taking corrective action where necessary (corrective), has been developed for consideration. The proposed Framework proposes a risk-based and person-centred approach to quality and safeguarding, starting from the identification of risks and safeguards through individual planning and higher compliance requirements for staff and providers of supports considered to pose a higher risk.

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

- uphold the rights of people with disability including by ensuring supports are high quality to live their lives and achieve their goals;
- are focused on person-centred approaches to effectively achieve outcomes for people with disability in ways that support and reflect consumer preferences and expectations;
- are safe and fit for purpose;
- allow participants to live free from abuse, violence, neglect and exploitation, including by addressing systemic issues identified in recent reviews; and
- enable effective monitoring and responses to emerging issues as the NDIS develops.

The expectation is that most investment in the system will occur at the developmental and preventative levels, in order to minimise the need for formal regulatory, and particularly corrective action. Further details of the overarching framework, including the non-regulatory measures, are provided in a separate report prepared by officials for consideration by the DRC. A summary of the full Framework can be found at Appendix A.

Intermediate objectives for the regulatory measures

The proposed regulatory components of the framework. considered in this RIS relate to:

- A: Complaints and Serious Incidents management;
- B: Worker Screening;
- C: Registration and Code of Conduct requirements; and
- D: Use of Restrictive Practices.

For each component, a number of sub-options are explored. Intermediate objectives have been developed for each of these elements, and are set out below.

A Complaints and Serious Incident Management

In its Report on Consumer Policy in 2008, the Productivity Commission argued that over time, an effective consumer protection system can have a significant positive effect on the economy by:

- making it easier for consumers to get problems fixed or compensation from the supplier (redress);
- reducing the amount of effort they need to put into managing their choice of supports ('transactions costs');
- reduced legal, time and other costs for suppliers in dealing with problems;
- increased competition and innovation due to pressure from empowered consumers.

In addition the Harper Report on Competition Policy noted that successful structural change in human services provision is likely to require specific measures to support consumer participation and help manage the costs of complexity.²¹ In addition, a particular challenge in the disability context is the difficulty of identifying and acting to reduce consumer detriment due to under-reporting of crime and serious misconduct. Complaints and serious incident reporting requirements are a common mechanism to support user choice and drive quality improvement by addressing sources of consumer detriment.

For this reason it envisaged that the current system of statutory complaints systems or their equivalent would continue to be necessary under the NDIS. Accordingly, options for complaint handling and serious incident reporting requirements have been developed with the objectives of:

- putting in place a complaints and serious incident system that will assist in managing the transition to, and underpin the effective operation of the NDIS market by ensuring that consumer rights can be enforced;
- ensuring that participants in the NDIS market are able to exercise choice, including by ensuring complaints are responded to in a timely and effective way;
- ensuring that supports provided are of high quality to achieve the participation and other objectives of the NDIS, by providing incentives for suppliers to address sources of consumer detriment through effective complaints systems;
- operationalising the provisions already included in the NDIS legislation for serious incident reporting, including by providing a mechanism to identify and address systemic causes of harm by analysis of and action in relation to complaints and serious incidents; and
- preventing violence, abuse, neglect, exploitation and other safety issues and minimise the impact on participants when they occur by
 - ensuring suppliers have effective internal governance and accountability mechanisms for serious incidents in place;
 - that serious incidents and complaints are managed effectively, and that the safety and wellbeing of participants is the highest priority when a serious incident occurs;

B Worker Screening

²¹ Recommendation 2 and chapter 12.

A number of recent reports have pointed to the ability of individuals guilty of crimes or serious misconduct to operate within the system unchecked as a cause of abuse, neglect and exploitation of people with disability.²² While the primary responsibility for recruiting safe employees rests with employers, a number of options around worker screening have been developed which could supplement current requirements relating to children (including children with disability), as well as reinforce and assist employers in undertaking those responsibilities.

In that light, the objectives of the worker screening options are to reduce the occurrence of abuse, neglect and exploitation of people with disability by:

- deterring individuals who pose an unacceptable risk of harm from seeking work in the sector;
- reducing the potential for people who pose a risk to participants by ensuring that adequate and effective screening and background checks are undertaken on staff employed in the sector and that there is ongoing monitoring of their suitability to work in the sector;
- removing those proven to pose a risk to participants from continued employment in the sector; and
- sending a strong signal about the priority placed on the right of people with disability to be safe.

²² See especially Report of the *Senate Inquiry into Violence, Abuse and Neglect against People with Disability*, esp ch 8; Victorian Disability Services Commissioner, *Beyond doubt: the experiences of people with disabilities reporting crime*, July 2014; Victorian Parliament, *Inquiry into Disability Services*, Interim Report, July 2015.

C Registration and Code of Conduct

The Productivity Commission Report on Disability Care stated that in order to ensure the quality of supports and safety of participants, there need to be rules set by government that must be complied with by suppliers of supports as a necessary supplement to the direct discipline and reward that results from consumer choices. The recent Harper Inquiry also recommended licensing requirements to ensure minimum standards in human services delivery, noting that care needed to be taken to ensure that these did not raise artificial barriers to entry and inhibit innovation unduly.²³

The National Standards for Disability Services provide an agreed basis for addressing supply-side risks under the NDIS, and a number of options to operationalise them, including a range of conditions for registration under the NDIS Act, as well as an NDIS Code of Conduct, have been developed. The objectives of these measures are to:

- put in place measures to underpin the effective operation of the NDIS market by operationalising the provisions in the NDIS Act for supplier registration and ensuring continuity of supply;
- ensure individual rights are upheld
- encourage consumers to exercise choice by providing confidence that services will meet minimum safety and quality standards;
- ensuring the supports provided are of sufficient quality to meet NDIS objectives; and
- safeguard vulnerable people from serious safety failures and other harms.

D Reducing and eliminating Restrictive Practices

The National Framework for Reducing and Eliminating the Use of Restrictive Practices, agreed by Governments in March 2014, recognises that use of restrictive practices can be significantly reduced and in many cases, eliminated, consistent with Australia's obligations under the UN Convention on the Rights of Persons with Disabilities.

Governments also agreed that as part of the NDIS, a quality assurance and safeguards system will be implemented and will include responsibilities for oversight of and reporting on the use of restrictive practices by services providing supports to participants. The Framework identifies a number of core strategies to reduce and eliminate use of restrictive practices, including overarching principles to govern the use of restrictive practices, development and regular review of individual positive behaviour support plans, competency standards for providers and their staff, and regular review and reporting on the use of restrictive practices in order to improve future practice.

²³ Recommendation 2; Chapter 12.

A number of sub-options to implement these strategies have been developed in order to meet the objectives of:

- ensuring restrictive practices are not used unnecessarily or excessively, and that their usage declines over time;
- upholding the rights of people with disability, including by allowing cases of inappropriate use or abuse to be identified and responded to; and
- promoting an adequate supply of supports to participants with high support needs.

Section 4: Statement of Options

The table below summarises the elements of the problem statement that each set of sub-options is intended to address. As noted above, most of the proposed regulatory components address a number of the problem elements described in Sections 2 and 3 above.

Problem element/Sub-option category	A Complaints and serious incidents	B Worker Screening	C Registration & Code of Practice	D Restrictive Practices
Effective operation of the NDIS market	•		•	•
User choice	•		•	•
Quality	•		•	•
Safety	•			•
Abuse, neglect, violence and exploitation	•	•	•	•

The table below summarises the sub-options for each component. In each area, Option 1 is to maintain the current arrangements that apply in each jurisdiction currently (noting that this will generally require legislative amendments due to the shift of funding responsibility from state and territory governments to the NDIA). Option 2 in each case represents a no regulation scenario (ie voluntary or self-regulatory approaches). Options 3 to 5 (where applicable) consider alternative regulatory mechanisms (including co-regulation where applicable) and levels of requirement that could be adopted.

	Option 1 (status quo)	Option 2 (no regulation)	Option 3	Option 4	Option 5
A Complaints and Serious Incidents	A1: Maintain current requirements in each jurisdiction	A2 No regulatory requirements	A3: Internal and external complaint handling requirements	A4: Statutory authority overseeing complaints and serious incidents	Na
B Worker screening	B1: Maintain current requirements	B2 Risk management by employers	B3: Require employers to conduct referee and	B4: Require referee checks + independent	B5: Barred person's list

	Option 1 (status quo)	Option 2 (no regulation)	Option 3	Option 4	Option 5
			police checks	risk-based screening (Working with vulnerable people check)	
C Registration and Code of Conduct	C1: Maintain current requirements	C2: Voluntary Certification	C3: Additional certification	C4: Quality evaluation	C5: Quality Assurance
D Use of Restrictive Practices	D1: Maintain current arrangements	D2:Registration requirements only	D3: Prohibit use of restrictive practices outside approved Positive behaviour support plans, and require providers to report use against them	na	na

The content of the options is set out in more detail below.

A Complaints and Serious Incident Management

A number of sub-options around complaint and serious incident management have been developed in order to address the issues identified in the problem section, including promoting the effective operation of the NDIS market and user choice, as well as addressing cases of consumer detriment arising from poor service quality, safety failures and cases of abuse, neglect, violence and exploitation under the NDIS.

The options range from moving to a voluntary approach, maintaining the different arrangements currently in place in each jurisdiction (status quo), to options for a nationally consistent regulatory approach. The options canvass both requirements for suppliers to have internal complaints and serious incident managements systems, as well as external dispute resolution and oversight mechanisms.

Option A1: Maintain current arrangements.

Currently arrangements vary between states and territories, but can include requirements in funding contracts that suppliers have effective internal complaints handling and serious incident recording mechanisms in place; complaints and serious incident reporting systems administered by some departments that fund disability suppliers; telephone hotlines for reporting abuse; and independent complaints-handling bodies such as Ombudsmen or Disability Commissioners.

Option A2: No regulation

Under this option, suppliers of supports would develop and operate their own complaints management and feedback systems. However, there would be no formal requirement to do so. They would be encouraged and assisted to establish best practice internal complaints processes through industry associations, and for many this would be a sensible and commercially beneficial part of their business model. Suppliers could also be encouraged (but not required) to subscribe to an external disputes resolution service where an independent perspective would help to resolve concerns.

Participants would also have recourse to state or territory fair trading departments, the health complaints system, or professional registration bodies.

Option A3: Internal and external complaints handling requirements (co-regulation)

Under this option, suppliers seeking registration to provide supports under the NDIS would need to meet prescribed standards for their internal complaints systems, as well as subscribe to an external complaints resolution body.

Option A4: Independent statutory complaints function in conjunction with serious incident reporting

Under this option suppliers with higher risk scopes of operation would be required, as a condition of registration, to demonstrate that they have effective internal complaints and serious incident management systems in place. Where participants are unable to resolve an issue directly with their supplier of supports, they could go to the statutory complaints body for assistance. In addition, in order to ensure that serious cases, particularly where participants are unable or unwilling to complain are addressed appropriately, providers would be required to report serious incidents, including allegations of sexual assault or

violence, and unauthorised use of restrictive practices, to the complaints body (in addition to police where a crime is alleged to have occurred).

The key functions of the complaints body would include complaints handling, referral, providing information, education and advice and supporting best practice. It would also have powers to act on concerns relating to systemic problems or risks with suppliers. The complaints function would operate in conjunction with a serious incident reporting scheme broadly modelled on the current NSW Reportable Incidents Scheme, which includes reporting and oversight arrangements for allegations of abuse and other specified types of serious incidents.

Options not pursued: The Consultation RIS also included an option for the NDIA to handle complaints about suppliers. Most stakeholders felt that this would represent a conflict of interest given the role of the NDIA in directing participants to suppliers of supports, and contracting arrangements with suppliers for certain types of supports. They also suggested that the NDIA should be focused on other priorities. A number of stakeholders pointed to the need to separate the complaints function from the body responsible for funding, consistent with the principles recently endorsed by the Commonwealth Government in response to the Competition Policy Review (Harper Report). Accordingly the sub-option placing the function in the NDIA was not pursued.

B Worker Screening

A number of options in relation to worker screening have been developed in order to address the issues raised in the problem section in relation to the risk posed by workers to participant safety. Screening of workers is one of a number of standard tools used in recruitment processes in deciding whether someone might pose a risk to participants. Worker screening systems are aimed at assessing whether someone poses an unacceptable risk to people with disability based on past history and/or identified risk factors. In particular, a common perpetrator characteristic for disability abuse is previous offences, especially where a person with disability or other vulnerable person was a victim; misconduct, particularly within the disability sector, is another indicator of risk. The human resources literature across a range of sectors, including adult disability services, strongly supports the use of worker screening, using as broad a range of information as possible as part of the recruitment process.

There are a variety of approaches that can be adopted in relation to who does the primary screening and what information is taken into account in the assessment. All jurisdictions already require that those working with children with disabilities pass Working with Children Checks.

Options for screening of those working with adults with disability provide for an increasing range of types of information to be taken into account in the screening, ranging from the information that is typically available to an employer (or commercial screening agency), to a wider range of information that could only be considered by a government screening unit due to privacy considerations. The sub-options consider maintenance of current jurisdiction

based requirements (status quo), a no regulation option, and then alternative regulatory mechanisms aimed at excluding workers who pose a risk to people with disability from the sector.

Option B1: Maintain current arrangements

Under Option B1, suppliers of supports would be required to comply with worker screening requirements equivalent to those currently in place in each jurisdiction as a condition of registration. This would mean that requirements would differ between jurisdictions, ranging from requirements to undertake referee and police checks of various types; provide information to and check excluded worker lists; or ensure workers have working with vulnerable person clearances.

Option B2: Risk management by employers (no regulation)

Under Option B2, suppliers of supports would be encouraged - rather than required - to have appropriate recruitment practices in place through industry based initiatives such as the NDIS 'Zero Tolerance Program'. Government would promote best practice approaches, but leave the decision about whether to use them to employers. This option would represent a substantial reduction of regulation over current requirements.

Option B3: Require employers to conduct referee and/or national police checks

Option B3 would require employers to undertake referee checks and/or national police checks for potential employees for certain roles. This requirement could be embedded in registration/accreditation standards and processes.

Option B4: Worker registration (working with vulnerable people checks for disability workers)

Option B4 is the development of a nationally consistent system of background checking (screening) for those working with people with disability who are in vulnerable situations. Under this option employers would continue to be required to undertake referee checks, but there would also be:

- an independent risk-based assessment of whether a potential employee poses a risk, by an expert government screening unit;
- assessment of a wider range of information about the person than an individual employer (or private sector screening agency) can access and ongoing monitoring to ensure any new information about the person is acted on;
- registration (licensing) of the person linked with online verification of the person's current status; and
- ongoing monitoring of people on the register against police records, employer reporting of misconduct and other available information.

Option B5: Barred persons list

An approach with more limited scope than Option 4 would be to create an excluded or barred persons list and require employers to:

- notify the holder of the list of certain types of events involving a worker or volunteer where the worker has placed the participant at an unacceptable risk of harm; and
- consult the excluded persons list prior to any appointment of a worker or engagement of a volunteer in a role where they will undertake defined activities.

The key difference between a 'working with check' (positive licensing) and a barred persons list (negative licensing) is that a working with children or vulnerable persons check assesses all of the available information about a person before they can be employed in order to assess whether they appear to pose a risk to clients, as well as responding to any new information that comes to light. Barring, by contrast, occurs only after a particular adverse event (serious misconduct or a crime) has occurred and is reported. Employers are required to verify that the person has not been barred.

C Registration and Code of Conduct

A number of options have been developed in relation to registration requirements under the NDIS Act to address the issues identified in the problem statement. In particular, the Productivity Commission Report on Disability Care argued that there need to be rules set by government that suppliers of supports would have to comply with in order for the market to operate effectively. It said that these should be backed up by monitoring and action to address breaches, including possible punitive measures, as a necessary supplement to the 'direct discipline and reward' that results from consumer choices.

For this reason, the NDIS Act requires suppliers providing supports to participants (other than those who are self-managing) are required to be registered with the NDIA. Those supplying supports to self-managing participants can opt not to seek registration.

Registration and Code of Conduct sub-options consider a range of ways of operationalising the National Standards for Disability Services under the NDIS in order to promote the safety and quality of supports. A key issue is what type of requirements suppliers should be

required to meet as a condition of registration. The options set out below range from voluntary quality certification arrangements, verification of compliance with basic obligations, additional standards for higher risk suppliers, quality evaluation processes and a quality assurance scheme.

Option C1 - Maintain current requirements

Currently the NDIS provider registration rules require providers to meet specified requirements depending on the type of support they offer, as well as comply with individual state and territory quality assurance requirements.

Option C2 – Voluntary certification

Option C2 is essentially a self-regulation approach, and would be a significant reduction from what individuals and organisations wanting to provide disability services must currently do to meet the NDIS registration requirements. Under this option, individuals and organisations or businesses who want to offer NDIS supports would confirm in their applications that they comply with any Commonwealth, state or territory legislation, including legislation that is relevant to their profession or business.

Providers who wished to obtain an independent certification that they meet the national disability service standards could elect to participate in an independent quality certification scheme. This would be voluntary under this option.

Option C3 - Additional conditions

Under this option, support providers would be expected to meet a limited number of specified conditions, involving certification that they meet certain basic NDIS quality assurance standards. The conditions required for registration would vary according to the type of supports the supplier offers. While there are a number of factors that determine the risk to any single individual, there are some types of supports where risk is always greater because of the circumstances in which the support is typically offered, for example, when supports are provided in a private or closed setting. In general, most suppliers would be expected to have some form of complaints handling system, recruitment practices which ensure that participants are not exposed to workers who may cause harm and systems to protect the privacy of clients.

Option C4 - Mandated independent quality evaluation

Under this option some suppliers of supports would be required to participate in an independent evaluation of their organisation and the supports it provides, including how they contribute to meeting planned outcomes for participants. The focus would be on the participants' experiences of the supports they receive. The assessment would be independent of both the NDIA and the organisation.

Continuing registration of a supplier would be subject to the supplier behaving safely and ethically. In particular, suppliers would be required to comply with the NDIS Code of Conduct, which would also operate as a negative licensing scheme for unregistered suppliers (i.e. suppliers to self-managing participants who choose not to seek registration).

Quality evaluations would be undertaken by an independent evaluator who would assess against indicators of effectiveness through observation and in-depth interviews with individuals and families who use the supports. The evaluator would be looking for views on the culture of the supplier as it is reflected in support delivery, in particular whether participants are supported to realise their goals, enabled to make choices, treated with respect and supported to participate. Other indicators could be assessed by reviewing systems and records.

Option C5 – A quality assurance scheme.

Under this option, all providers, whether registered with the NDIA or not, will be required to comply with applicable Commonwealth, state and territory laws, the NDIS Code of Conduct, the NDIS complaints resolution and serious incident reporting requirements (Options A1-4 above).

Additional requirements would apply for providers that wish to:

- deliver supports that involve direct staff–participant contact, lack supervision (such as personal care support, respite or supported residential services), or require specialist expertise; and/or
- support participants who are at heightened risk of abuse and neglect (for example, people with cognitive disability, people who are non-verbal and people requiring behaviour support).

These requirements would be set out in a modular set of NDIS Practice Standards. There would be a core module for all providers, and a number of specific modules targeted at high risk supports. Both the Code of Conduct and the Practice Standards would be aligned with the National Standards for Disability Services and would also reflect the National Standards for Mental Health Services (for providers specialising in mental health services).

All providers delivering higher-risk supports or supporting participants at heightened risk will be required to gain third party quality assurance certification against the core Practice Standards covering risk management, complaints systems, and effective governance.

There would also be provision to monitor difficult-to-replace supports with a view to managing continuity of supply issues.

D Reducing and Eliminating Restrictive Practices

A number of options have been developed to address the safety and human rights issues (particularly freedom from abuse, violence, neglect and exploitation) raised in the problem statement around restrictive practices. The canvass maintaining existing state and territory regulatory regimes; relying on registration requirements only, without a specific regulatory framework; and implementing a national regulatory framework to give effect to the National Framework on Reducing and Eliminating Restrictive Practices previously agreed by governments.

Option D1: Maintain current arrangements in place each jurisdiction.

As an interim measure, pending the development of the NDIS Quality and Safeguarding Framework, governments agreed to continue to implement laws and policies in their jurisdiction to give effect to the National Framework. These arrangements could continue to operate under the NDIS in conjunction with registration requirements for providers whose clients have Positive behaviour support plans and/or may be subject to restrictive practices.

Option D2: Registration requirements only

Instead of legislation or policies, the National Framework could be given effect through registration requirements for providers of supports to participants who require Positive behaviour support plans.

Under this approach, the NDIA would assess which people with disability were at risk of being subjected to restrictive practices, and include preparation of a Positive behaviour support plan by a specialist practitioner in their NDIS package. Behavioural support practitioners and providers charged with implementing them would be subject to requirements reflecting the high risk associated with the use of restrictive practices, consistent with whichever of the sub-options set out in C1-5 above is adopted. Providers would be subject to normal audit arrangements for registration purposes, but there would be no other formal reporting or other requirements.

Option D3: Prohibit use of most restrictive practices

Under this option, in addition to registration requirements, a legislative framework would be put in place which would:

- set out the key principles around the use of restrictive practices, requirements to undertake a positive behaviour support plan and to use the intervention is the least restrictive response available, that the risk posed by a particular intervention is in proportion to the risk of harm posed by the behaviour;
- define the practices that are covered by the rules and explicitly prohibit certain practices;
- require approval to be obtained for any restrictive practices included in Positive Behaviour Support Plans, consistent with relevant state and territory legislation;
- require decision-makers to ensure that the wishes of affected individuals are understood and reflected in positive behaviour support plans;

Jurisdictions would continue to be responsible for approval processes around decisions to include a restrictive practice in positive behaviour support plan, but the overarching framework would ensure a professional independent assessment was undertaken by a positive behaviour support practitioner and a positive behaviour support plan was developed with a view to avoiding their use. Providers would be required to report monthly on the use of restrictive practices in Positive Behaviour Support Plans and a statutory oversight mechanism would include powers to investigate incidents and intervene where necessary.

Options not pursued for approval and reporting

The Consultation RIS canvassed a range of options aimed at reducing and eliminating the use of restrictive practices relating to the decision making process for obtaining approval, or other forms of approval to include a restrictive practice in a participant's positive behaviour support plan, as well as frequency of reporting on the use of restrictive practices.

In the consultation process, however, many stakeholders said that, while accountability was very important, they thought that the emphasis in the consultation paper on who could make decisions was misplaced and instead the discussion should be about how to build a quality services system that makes the use of restrictive practices unnecessary. In addition, given the highly complex interactions between Commonwealth, state and territory legislation and the coverage of this legislation in terms of other service sectors in jurisdictions in relation to approval arrangements, it became clear that developing a nationally consistent approach in this component of the proposals was unlikely to be achievable in the timeframe required for full scheme.

Accordingly, a more comprehensive and holistic approach, setting out key overarching principles was developed to take account of stakeholder views, reflected in the options described above, and the options set out in the Consultation paper were not pursued.

Section 5: Impact Analysis

A Complaints and Serious Incident Handling

Option A1: Maintain complaints handling requirements currently in place in each jurisdiction.

Most states and territories (the exceptions are Tasmania and Queensland) have statutory complaints handling bodies for disability service issues in place, as well as serious incident reporting systems which can supplement these by operating where NDIS participants may be unable to communicate a complaint for themselves, or where providers may need external assistance to handle allegations of abuse, neglect and exploitation. All states and territories except Tasmania also require providers to have an internal complaints handling process in place that is accessible to the people using their services.

The table below summarises current arrangements for disability service complaints (note that elements of systems are not mutually exclusive).

Table 5.1.1: Current complaints handling systems and requirements

Complaints systems and requirements	Jurisdiction
Internal complaints system requirements for service suppliers	NSW, Vic, Qld, WA, SA, Tas, NT
Contracted external complaints handling	Commonwealth
Departmental complaints review/assistance for participants	NSW, Vic, Qld, Tas, SA
Independent disability complaint handling body	NSW, Vic, SA, ACT, NT, WA

As the above table illustrates, current arrangements vary to some degree between states and territories.

In practice, however, the mix of formal statutory and informal regulation and oversight (primarily through management of funding agreements and contracts) means that differences between systems is likely to be more apparent than real in terms of their overall regulatory impact. While Queensland does not have an independent statutory complaints body for example, the Queensland Disability Act 2006 does establish a formal complaints mechanism administered by the funding Department.

Similar issues apply to serious incident management systems and reporting. In general, jurisdictions require serious incident reporting either through their ownership of providers, and/or as a requirement in funding agreements or contracts with disability services providers. While each jurisdiction has different rules about what types of incidents need to be reported,

the most onerous requirements typically applied to higher risk services such as accommodation services, many of which have been operated by Government owned providers (most of which are now in the process of being privatised).

With the exception of NSW, serious incidents are generally managed separately from complaints, within funding agencies, but in some cases (such as Victoria) with independent review of incidents with a view to identifying causes and prevention.

The NDIS business rules for transition also requires registered providers to report serious incidents to the NDIA.

Mechanics of maintaining the 'status quo'

In general current complaints and serious incident reporting schemes are conditional on the supplier being a state or territory owned or funded service.²⁴ However, these requirements will cease to have effect as supports are funded through the NDIS instead. Accordingly, maintaining the 'status quo' under the NDIS would require all states and territories to pass (where schemes are managed through funding agreements and contracts) or amend legislation.

It would mean that:

- jurisdictions with legislative complaints schemes would need to amend their legislation to ensure coverage of NDIS funded services (if they haven't already done so);
- those without legislative schemes (Tasmania) would need to put in place powers to deal with them; and
- the NDIA terms of business (or NDIS Act) would need to be changed to require reporting of serious incidents to the relevant state or territory department.

System fragmentation

A series of recent reports have highlighted serious weaknesses in some current complaints management and serious incident management systems. The Victorian Ombudsman, for example, found that although Victoria is generally regarded as having one of the strongest oversight regimes in Australia, current arrangements are "fragmented, complicated and confusing, even to those who work in the field", making it difficult to work out who to make a complaint to.²⁵ The recent Senate Inquiry into Institutional Abuse of people with disability documented similar issues across Australia.²⁶

²⁴ Although some jurisdictions have already or are in the process of amending their enabling legislation for the purposes of managing the period of transition to the NDIS.

²⁵ Phase 1 Report, 24 June 2015.

²⁶ Senate Community Affairs Committee, *Violence, abuse and neglect against people with disability in institutional and residential settings, including the gender and age related dimensions, and the particular*

Continuation of multiple state-based systems that do not share information is likely to perpetuate this fragmentation, and make it more difficult to identify emerging systemic issues or issues relating to suppliers operating across jurisdictions that may require compliance responses. Experience in the Home Insulation and Vocational Education sectors suggests that this could potentially impact both on sector safety as well as the financial integrity of the NDIS.

Efficiency and effectiveness

Several recent reports have pointed to lack of consistency between systems on who can complain, what they can complain about, lack of integration with serious incident management, lack of appropriate powers to respond and investigate complaints and incidents, lack of whistle-blower protections and more. The reports have found that has had the effect of both discouraging reporting meaning cases of abuse go unreported, as well as reducing the efficacy of investigations. As a result the Senate Inquiry concluded that:

“It is clear from the range of evidence presented to this inquiry from multiple submitters in different jurisdictions across Australia, that no single state or territory has yet devised an acceptable system of disability service complaints reporting.”²⁷

In addition, current complaints mechanisms have not been developed in the context of a market based system, and are likely to be inadequate to address the range of issues that might arise under the NDIS. The use of a Code of Conduct (see Options C5 below) as the primary basis for assessment of complaints would help educate both providers and participants on reasonable expectations of performance, and could drive a greater focus on the more important types of complaints.

A series of reports have suggested that there is scope to streamline and simplify serious incident reporting requirements, and make more effective use of serious incident reports, by managing the function in conjunction with complaints in order to avoid fragmentation of the system, duplication and overlap, and ensure that appropriate action is taken in response to reports.²⁸

In addition, maintenance of current arrangements could lead to the imposition of differential costs on suppliers of supports in the context of a national system. Because the current system relies on a mix of informal regulation (through management of funding agreements) and formal regulation, it is not possible to quantify the extent of the differential that might result if these arrangements were translated to the NDIS. Nonetheless, the differences could inhibit suppliers from operating across jurisdictions or lead to disincentives for new entrants in some jurisdictions. In many cases it would also require suppliers to meet requirements

situation of Aboriginal and Torres Strait Islander people with disability, and culturally and linguistically diverse people with disability, 25 November 2015, chapter 5.

²⁷ Senate inquiry Report, chapter 5.31

²⁸ See in particular the Victorian Ombudsman’s Phase 2 Report, and the Senate Inquiry Report.

that may be unnecessary to a market environment (red tape), such as reporting on internal complaints.

For these reasons maintenance of current systems is not considered tenable under the NDIS.

Option A2: No regulatory requirements

This option would represent a substantial reduction in the regulation of the sector in all jurisdictions, as well as in the level of investment in disability complaint resolution over the current system. It would mean that:

- suppliers would no longer need to demonstrate that they have adequate complaint management and serious incident reporting systems in place;
- suppliers would no longer be able to seek assistance on responding to serious incidents, or be required to report serious incidents externally;
- consumers would no longer be able to seek the assistance of Departmental officers or disability-specific complaints bodies in resolving issues;
- disability specific complaints bodies (which currently exist in all jurisdictions, except Queensland and Tasmania) would be abolished.

As a result, suppliers would not face any compliance costs under this option.

Effectiveness

Currently some disability related services, for example mainstream services purchased directly by the person with disability, are covered by the Australian Consumer Guarantees, and this coverage is likely to expand significantly under the NDIS. The level of assistance that can be provided to consumers by the Australian Competition and Consumer Commission and state and territory consumer protection bodies, such as fair trading offices, however, varies.

In most cases the emphasis is on providing people with information about their rights, including how to make and resolve a complaint. They may also be able to assist consumers in trying to negotiate a solution with traders (conciliation) depending on resources and priorities but if this is not successful, the consumer will normally need to pursue their claim themselves. This normally means going through a small claims court, tribunal or Magistrates court. The processes for pursuing claims under \$10,000 in value are usually informal (lawyers usually cannot participate). Consumers are normally required to pay an application fee, though, and costs are typically range from around \$50 to \$700 depending on the size of the claim.

The need to go to a court or tribunal, and pay a fee, can be a significant disincentive for consumers, and would represent a particular challenge for many people with disability. A reluctance or inability to complain or pursue matters is likely to lead to less feedback to providers and the potential to fail to take action to prevent future problems, leading to

significant increase in serious adverse incidents as well as the persistence of less serious quality issues.

In recognition of these issues, Governments have typically put in place additional protections for consumers when moving to more market oriented delivery arrangements, including complaints resolution bodies.

In addition, Fair Trading Offices do not have appropriate powers or jurisdiction to invest many of the issues currently handled by disability complaints bodies such as allegations of violence, abuse, neglect or exploitation. While some matters need to be referred directly to police, difficulties in establishing the levels of evidence required for a formal prosecution (for example where witnesses are deemed unable to give evidence) could mean that a large number of cases are unable to be pursued.²⁹

Distribution effects

Participants: This option is likely to lead to a substantial increase in consumer detriment because consumers may be reluctant or unable to complain, allowing inappropriate behaviour to escalate, or allowing perpetrators to continue to offend so that they are detected much later than would occur under a more robust complaints system. This could be compounded by suppliers attempting to cover up problems to protect their reputation. In addition, there will be less scope for regulators to identify emerging problems at the supplier and systemic level, and take appropriate preventative action.

Impact on suppliers of supports: Under this option suppliers would no longer have to meet specified standards in relation to their internal complaints mechanism, or report on these to funding or oversight bodies. Accordingly, the option would involve very low compliance costs for internal systems, as suppliers of supports would have full flexibility as to the complaints system they implemented.

For suppliers, effective internal complaints systems that encourage feedback, advice and complaints can be a source of value, driving innovation and quality improvement: A high level of complaints can mean that the supplier encourages feedback, and acts on it, in turn encouraging more feedback:

- They can mean that systemic problems are identified and acted on early, reducing adverse impacts on clients. It can also lead to cost reductions and service quality improvement - even small productivity gains are cumulative and can be large in terms of the overall impact on the system
- Customers who complain tend to be more satisfied than customers who are unhappy with the service but don't speak up

²⁹ See for example ALRC, DP 81, Equality, Capacity and Disability in Commonwealth Laws; Victorian Equal Opportunity and Human Rights Commission, Beyond doubt: the experiences of people with disabilities reporting crime, July 2014.

- There is strong evidence that complaints well-handled can turn disgruntled customers into very loyal, highly satisfied ones. And word of mouth recommendations can then lead to additional business.

However, numerous studies attest that market failure typically leads to underinvestment in internal complaints functions, particularly where the cost of changing providers is high or there is a lack of competition.³⁰ In addition, suppliers concerned with making only a short-term profit and then exiting the market, as well as those with considerable market power (especially, for example, in regional and remote areas), may significantly under-invest in complaints resolution systems. This could have adverse impacts on productivity for the system as a whole, as suppliers lack the feedback necessary to make service improvements.

Experience in other sectors and overseas suggests that, in the absence of an effective external complaints resolution mechanism, suppliers' overall costs could actually increase significantly. Where consumers do pursue their cases, they will have to do so through mechanisms with higher costs, such as tribunals and the courts, so that suppliers may incur both legal and time costs. Alternatively consumers may choose to make their case through social media and other mechanisms, exposing suppliers to the potential for reputational damage and lost custom.³¹

The lack of quick resolution and redress avenues could undermine consumer confidence and make participants reluctant to try new entrants to the market. This could undermine competition, making it difficult for new entrants to gain market share.

Impact on government: This option could generate a substantial additional workload, and hence resource pressures, for state and territory fair trading offices (assuming they had or were given jurisdiction), even before any additional issues generated by the shift to a market system are taken into account. It is also likely to lead to increased pressure for funding of advocacy support.

In addition, in the absence of a statutory function it can be expected that:

- consumers (families and advocates) will have increased time and other costs in pursuing complaints;

³⁰ See for example ACCC Submission to the Harper Inquiry; Patrick Xavier, Behavioural Economics and Customer Complaints in the Communications Industry, A Report prepared for ACMA, 2011; UK Legal Ombudsman, The Business Case for good Complaints Handling in Legal Services, Report, 2013; Claes Fornell and Birger Wernerfelt, A Model for Customer Complaint Management, Marketing Science, vol 7 (3), Summer 1988, 297-298; Piangham Liang, Exit and Voice: An Economic Theory of Complaint Management, SSRN, 2010.

³¹ In Australia the Telecommunications Ombudsman function was introduced in response to the Industry's own recognition of this: https://www2.le.ac.uk/departments/law/research/cces/documents/Complainthandling-PrinciplesandBestPractice-April2007_000.pdf. Similar mechanisms have been introduced in a number of other industries. See also UK Department of Business Innovation and Skills, Alternative Dispute Resolution for Customers, March 2014.

- Offices of Fair Trading/ACCC will face a new and large workload, since the shift to a market based system will bring many disability services under Australian Consumer Law (ACL) for the first time;
- more civil cases may go the courts as private actions (small claims/magistrates for ACL, plus cases outside the purview of consumer law); and
- some consumer issues that impact on the scheme may have to be pursued by the NDIA itself (eg overcharging, services not delivered) to protect scheme sustainability.

Consultation

There was almost no support for this option in the Consultation process. The overwhelming majority of stakeholders felt that suppliers' internal complaints systems would, in isolation, be inadequate to safeguard the rights of people with disability because there is often a severe power imbalance between suppliers and participants. This is likely to result in some suppliers of supports having insufficient incentives to resolve complaints satisfactorily. Stakeholders also noted that people are often reluctant to complain because of fear of retribution or negative past experiences with internal complaints processes. These concerns are backed up by numerous case studies in the various recent inquiries into the sector.

Overall impact

This option could seriously jeopardise consumer trust in the shift to a market based system and is not considered tenable.

Option A3: Internal and external complaints handling requirements

Under this option, suppliers could be required to comply with the Australian Standard on Complaints Handling or equivalent requirements.³² This could involve:

- informing participants of their right to complain, and to lodge a complaint, including who to appeal to if they are not satisfied with the response
- providing assistance to customers to formulate, lodge and progress a complaint
- specifying the response times for individual steps in its complaints-handling process.
- responding to complaints within a specific timeframe
- analysing complaints regularly to identify recurring problems.

In addition, there would be an independent complaint review process under this option. This could take the form of an industry-initiated complaints body, such as the Telecommunications Industry Ombudsman. The telecommunications scheme is run by a

³² AS ISO 10002-2006. An example of specific requirements based on it can be found in the Telecommunications Consumer Protections Code, 2015:
http://www.commsalliance.com.au/_data/assets/pdf_file/0019/50914/TCP-C628_2015-FINAL.pdf

private, industry-backed company, but supported by legislation that requires all telecommunications suppliers to be members of the scheme, and gives the Ombudsman powers to collect any documents or information necessary, and make binding decisions on claims up to \$50,000, and recommendations to the statutory regulator on larger ones.³³

Effectiveness

While this option could potentially provide an effective dispute resolution mechanism for service quality related matters, which is the main focus of most of the current complaint bodies, it would not be a suitable mechanism for overseeing the handling of more serious adverse incidents such as allegations of abuse due to the privacy and other legal issues these can raise, and the types of powers necessary to address them. The lack of an adequate focus on responses to allegations of sexual assault and violence in current complaints bodies has been the subject of considerable criticism by recent reviews, including the Final Report of the Victoria Parliament's Inquiry into Disability Services.³⁴ This option would also fail to address criticisms of fragmentation in the disability oversight system.

Compliance costs

Obtaining the appropriate certification and audit against the requirements would be a part of the requirements for registration process, and so is included in the costs for registration options (Option C1-5 below).

The objective would be to ensure that most complaints are resolved by the supplier and the complainant themselves, without external aid, by requiring suppliers to have best practice internal systems in place to receive and respond to feedback. The external complaints body could operate on a fee per complaint received basis (as the Telecommunications Ombudsman does), making its costs potentially avoidable if the matter is effectively managed by the supplier.

Disability related complaints handling is likely to be more expensive to manage than other industries as many complainants will need extra help to access systems and be supported through any external process. Nonetheless, an indication of the likely size of costs can be gained from the Telecommunications Industry Scheme, where fees range from \$44 to \$3,100 per complaint (as at July 2015) depending on the level of complexity of the complaint, payable by the supplier. This would represent a new cost to suppliers, since most jurisdictions currently have statutory complaints functions that operate at no cost to suppliers or complainants.

Distribution analysis

³³ <https://www.tio.com.au/about-us>

³⁴ May 2016, see especially Chapter 7.

Impact on Participants: The Telecommunications model has the advantage of providing a free and quick resolution service for typical customer complaints in a market environment, and has been successful in identifying and suggesting ways of tackling systemic service issues, leading to a reduction in complaint numbers over time.³⁵ This type of approach would not, however, adequately address the serious concerns raised by people with disability in the series of recent inquiries on the handling of serious incidents such as cases of abuse and violence.

Impact on Suppliers of supports: This option would require suppliers to have internal complaints systems in place. As this is a requirement under current arrangements this element would not increase compliance costs over the status quo. New entrants would need to invest in appropriate systems, but the cost would be low, and would almost certainly be more than offset by the value of the customer intelligence received from the feedback process.

Option A3 would also involve establishing an external disputes resolution mechanism, presumably on a cost recovery basis. This could involve a fee per complaint and/or some upfront contribution paid by suppliers. While the fee would constitute a barrier to entry, it would likely be very low. Moreover if the fee is only incurred if a complaint is lodged (as under the Telecommunications scheme at present), it would provide an incentive for suppliers to resolve complaints effectively with their clients, and so could be pro-competitive in impact. Suppliers would, however, still be exposed to the risk of reputational damage arising from inappropriate handling and investigation of more serious complaints.

Consultation

As for Option A2, this option received little support. Stakeholders did not feel that an industry body would have sufficient credibility in the current environment. Stakeholders almost universally felt that an organisation with stronger powers than typical industry schemes was needed to address and oversight the handling of complaints about abuse, violence, exploitation and neglect in particular. Stakeholders were also concerned that creation of a multi-level structure, for example with an oversight body supervising an industry-based scheme, would perpetuate the fragmentation of regulation in the sector, and lead to complaints 'falling through the cracks'.

Overall assessment

This option would not provide an adequate mechanism for addressing serious allegations of adverse incidents, and is unlikely to achieve the other objectives of a complaints system in the NDIS environment.

³⁵ New complaint numbers fell from 193,702 in 2011-12 to 124,417 in 2014-15, TIO Annual Report.

Option A4: Independent statutory complaints function (in conjunction with serious incident reporting).

Efficiency

Complaints and serious incidents are closely linked. While the assessment processes for complaints and serious incidents will differ, the content of the two sources of information about participants and their suppliers are likely to overlap substantially. In particular, serious incidents are likely to give rise to formal complaints, particularly where they are handled badly. Conversely, serious incident reports may uncover an incident where a participant was not able to make a complaint or take action themselves, for example because of barriers to communication, isolation and/or dependence on the person who may have abused them.

Accordingly, this option would promote the adoption of an integrated approach to managing sources of consumer detriment, broadly following the NSW model where the Ombudsman has responsibility both for managing complaints and serious incidents, but adapted as necessary to reflect the NDIS environment.

Box: NSW Ombudsman Act Part 3C

NSW Reportable Incidents Scheme was introduced in 2014. It was designed to address common criticisms of serious incident oversight processes repeated in a stream of recent reports, including during the consultation process for the NSW Disability Inclusion Act 2014 and is generally regarded as best practice.

In NSW, in addition to the role in monitoring serious incidents played by the Department of Families and Community, there is a disability reportable incident legislation which allows the NSW Ombudsman to:

- receive and assess notifications concerning reportable allegations or convictions;
- scrutinise provider systems for preventing reportable incidents, and for handling and responding to allegations of reportable incidents;
- monitor and oversight provider investigations of reportable incidents
- respond to complaints about inappropriate handling of any reportable allegation or conviction;
- conduct direct investigations concerning reportable allegations or convictions, or any inappropriate handling of, or response to, a reportable incident or conviction;
- conduct audits and education and training activities to improve the understanding of, and responses to, reportable incidents, and
- report on trends and issues in connection with reportable incident matters.

Effectiveness

Responsibility for resolving complaints should rest primarily with the supplier and the participant. It is important that both parties are aware of their rights and obligations, and that the system encourages the parties to resolve matters between themselves where possible. However, power imbalances and other factors can create significant barriers to resolution. As such, there will need to be capacity for people to get advice and support from others, including informal and formal advocates. An independent statutory complaints function was identified by an overwhelming majority of stakeholders as the best way of overcoming barriers to resolution of complaints.

Abuse, violence and neglect: Where complaints or allegation of abuse, neglect, violence and exploitation, or other extremely serious matters such as unauthorised use of restrictive practices arise, this option would provide capacity for a quick and effective response that is well co-ordinated with other safeguards in the system.

Other sources of consumer detriment: In the consultation process some people with disability and advocates were concerned that some people would feel too intimidated or fearful to raise even relatively minor issues with their suppliers of supports. An independent complaints commissioner could play a key role in providing education and support for participants to understand their rights, and help them negotiate with suppliers of supports. Public reporting on complaints could also help increase the confidence of participants in the system, as well as provide information for them to take into account when choosing suppliers.

Suppliers of supports: External scrutiny of complaints unable to be resolved by suppliers, as well as serious incidents, is likely to lead to a more optimal investment in management of these processes. The costs involved in establishing appropriate systems are likely to be minimal and so should not constitute a barrier to entry as this option does not represent a significant change from current requirements overall [1], but could reduce compliance costs to some degree through the adoption of an approach more targeted to risk.

As at present, providers would need to establish effective internal systems. The requirements would be consistent with their size and level of risk, assessed as part of the registration process (see Options C1-5), and the effectiveness of their internal systems would be judged through quality assurance audits (in conjunction with any other registration requirements). In some cases this would lead to a reduction in costs, as providers will not need to undergo multiple certifications where they operate across jurisdictions or sectors.

While providers could incur time costs associated with complaints lodged with the complaints body, this would provide an appropriate incentive to manage complaints effectively internally, in order to prevent them being escalated.

There is also scope to reduce the compliance burden on employers by making reporting systems faster and easier to use by adopting a 'report once/use many times' model for serious incident reporting, and utilising a more efficient reporting system (such as simple online reporting application along the lines used by Worksafe Australia) rather than current outdated systems highlighted by recent inquiries. Accordingly, to minimise the regulatory burden of reporting, the plan is for an online reporting system to be developed, building on

the work that NSW has already undertaken on this. The system would, subject to compliance with privacy laws, be accessible at different levels to different stakeholders.

Government: Under this option existing jurisdiction disability specific complaints bodies would be replaced by a single national complaints function, potentially generating efficiencies. In addition, this option has benefits for Government in dealing with complaints earlier, reducing the flow-on costs to courts and other complaints handling bodies such as the ACCC.

The NSW experience suggests that formal legislative requirements for reporting of serious incidents is likely to lead to a significant increase in the number of serious incidents reported.³⁶ Early experience of the New South Wales reportable incident system, for example, has found that reporting increased substantially over past levels, and identified ten times more cases of abuse, violence and neglect have been identified through serious incident reporting than through the complaints system.³⁷ This suggests that there is considerable scope to improve the handling of incidents, and prevent them from occurring by identifying root causes. As mishandled serious incidents - including failure to report crimes, to take appropriate action to ameliorate the effect of the incident on the victim, or to ensure injuries are properly treated - can be a source of serious detriment to participants, as well as increase the risk of the type of incident recurring, any additional costs (which are expected to be negligible see below) due to increased compliance are likely to be easily offset by the benefits of improved management of serious incidents and early compliance action.

Compliance costs

This option does not represent a significant change from current requirements overall, but could reduce compliance costs to some degree through the adoption of an approach more targeted to risk.

As at present, providers would need to establish effective internal systems. The requirements would be consistent with their size and level of risk, assessed as part of the registration process (see Options C1-5), and the effectiveness of their internal systems would be judged through quality assurance audits (in conjunction with any other registration requirements). In some cases this would lead to a reduction in costs, as providers will not need to undergo multiple certifications where they operate across jurisdictions or sectors.

While providers could incur time costs associated with complaints lodged with the complaints body, this would provide an appropriate incentive to manage complaints effectively internally, in order to prevent them being escalated.

There is also scope to reduce the compliance burden on employers by making reporting systems faster and easier to use by adopting a 'report once/use many times' model for

³⁶ Oral advice, 22 March 2016.

³⁷ The NSW Ombudsman's Annual Report 2014-15 noted that between 3 December 2014 and 30 June 2015, the Ombudsman received 350 reports of disability serious incidents, and 21 complaints relating to reportable serious incidents.

serious incident reporting, and utilising a more efficient reporting system (such as simple online reporting application along the lines used by Worksafe Australia) rather than current outdated systems highlighted by recent inquiries. Accordingly, to minimise the regulatory burden of reporting, the plan is for an online reporting system to be developed, building on the work that NSW has already undertaken on this. The system would, subject to compliance with privacy laws, be accessible at different levels to different stakeholders.

Consultation

The majority of stakeholders identified a need for an independent complaints body. Most jurisdictions already have independent statutory complaints bodies in place, and with the development of a quasi-market, the need for effective dispute resolution mechanisms is likely to become more acute. Independence, it was suggested, would give people confidence in the system, provide assurance of unbiased assessment, and support transparency and accountability. Many stakeholders suggested that an independent body was best placed to help protect whistle-blowers.

In the Consultation process the reasons given for this view included that suppliers' internal complaints systems are inadequate because there is a power imbalance between suppliers and people with disability, and people are often reluctant to complain because of fear of retribution or negative past experiences with suppliers' internal complaints processes. These concerns are backed up by numerous case studies in the various recent inquiries into the sector.

There was also wide agreement on the functions it should include. A key theme, however, was the importance of serious incident reporting as a component of the oversight system. A number of Submissions to the Consultation process, as well as recent reports have raised concerns about the capacity of some providers to recognise, respond to and effectively manage serious incidents, including abuse, neglect and unexplained injuries.³⁸ The NSW Ombudsman, for example, found that there was a need to provide more education, training, guidance materials and ongoing monitoring for providers, for example on the handling of client-to-client assaults and decisions on reporting to police. Similar issues have been documented by the Victorian Ombudsman, who also noted that there appeared to be substantial under-reporting of incidents. The Senate Inquiry Report endorsed these concerns, including the need for substantial culture change around the reporting of serious incidents.

Stakeholders in the consultation process argued that a reporting and independent oversight system for serious incidents is an important and necessary component of a comprehensive framework for preventing, and effectively responding to, abuse, neglect and exploitation of people with disability. Rationales for this included:

- ensuring that organisations have effective internal governance and accountability mechanisms for serious incidents, including incidents or allegations of violence, abuse and neglect, in place;

³⁸ Senate Submission, pg 8 -9

- ensuring that the safety and wellbeing of participants is the highest priority when a serious incident occurs;
- ensuring serious incidents involving people with disability are identified and responded to in a timely and appropriate way; and
- preventing serious incidents occurring in future, including by identifying systemic issues for prevention and developing a comprehensive picture of the extent of violence, abuse, neglect and exploitation of participants.

The Submission from the NSW Ombudsman noted that common problems relating to the handling of serious incidents included:

- inconsistent processes and systems;
- ongoing failures to address key risk factors;
- inadequate training for staff in recognising when serious incidents have occurred;
- inadequate responses to incidents, including failure to report suspected crimes to the police; and
- failure or significant delays in advising family members of incidents.

A number of stakeholders also stressed the importance of analysing serious incidents with the aim of mitigation and prevention. Several stakeholders argued that the lack of consistent national collection and analysis of data on serious adverse incidents is a critical weakness in the current system. They also noted that without it, it will be impossible to assess the effectiveness of, and ongoing need for, the quality and safeguarding system as a whole. They argued that serious incident reporting also has an important role to play in ensuring that the system as a whole is genuinely focused on the needs of people with disability.

B Worker Screening

Option B1: Maintain current arrangements

Currently all Australian jurisdictions require disability providers to undertake some form of worker screening for disability services:

- **Children with disability:** All jurisdictions require those working with children to undergo risk-based assessments by a government screening agency (Working With Children Check); and
- **Adults with disability:** All jurisdictions also have requirements that apply to those who work with adults with disability in the services they fund. The content of requirements, however, varies considerably.

Historically most jurisdictions have relied on requirements to undertake a combination of referee reports and police checks. However, a series of recent official reports, as well as a number of other studies, have highlighted inadequacies in some of the current staff

recruitment requirements for those working with people with disability.³⁹ In response to these concerns, as the Table below illustrates, four jurisdictions have now put in place requirements for the centralised screening of adult disability workers:

- Victoria has introduced a register of barred people for state-funded disability accommodation services, based on convictions and/or past work history;
- Queensland’s yellow card system excludes some persons from the sector on the basis of their criminal and other history.
- South Australia and the ACT have adopted risk assessment based disability worker screening.

Table 5.2.1: Screening requirements for those working with people with disability*

Requirement(s)	Jurisdictions
Pre-employment	
(state/territory) Police check before employment	Vic, NT, Clth
National police check before employment	WA, NSW
International police check	Vic
Referee checks	Vic, NSW
Fit and proper person test (includes referee and police check)	Tas**
Working with Children checks for child related disability supports	Vic, WA, NSW, SA, ACT
Excluded persons list (accommodation services only)	Vic
Independent assessment of criminal history (including spent convictions)	Qld
Disability worker screening (independent risk assessment of police and range of other information held about the person)	SA, ACT
Ongoing monitoring	
Requirements to undertake fresh police checks/renew clearance	NSW, ACT, SA, Qld

³⁹ Report of the NSW Ombudsman, *More than board and lodging: the need for boarding house reform — Special report to Parliament*, October 2011; Disability Services Commissioner (Vic), *Safeguarding people’s right to be free from abuse: key considerations for preventing and responding to alleged staff to client abuse in disability services*, Learning from Complaints Occasional Paper No. 1, June 2012; Victorian Equal Opportunity and Human Rights Commission, *Beyond doubt: the experience of people with disabilities reporting crime — Research findings*, July 2014; SA Health and Community Complaints Commissioner, *Report on HCSCC’s role in contributing to improving the safety and quality of disability services provided to vulnerable people*, March 2013; The Royal Commission into Institutional Responses to Child Sexual Abuse, Interim report, July 2014; Victorian Ombudsman, Reporting and investigation of allegations of abuse in the disability sector: Phase 1 - the effectiveness of statutory oversight, June 2015; Parliament of Victoria, *Inquiry into Abuse in Disability Services, Interim Report*, August 2015; Australian Senate, *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*, November 2015.

*Jurisdictions with more than one requirement are listed in italics.

**Legislation makes provision for a risk-based assessment, but this has not yet been implemented.

Effectiveness

The differing systems between states and territories result in significantly different levels of protection of people with disability across Australia. The Victorian Parliamentary Inquiry, for example, highlighted a case where a provider complied with a requirement to conduct a (state) police check, which showed no convictions for the worker and so hired him as a carer. When the person was subsequently arrested for alleged abuse, it emerged he had been previously been convicted of violence and sex offences in New South Wales. A requirement to undertake a national police check or a working with vulnerable persons check (as required in some other jurisdictions) would have identified the convictions and potentially prevented the subsequent offences.⁴⁰

A particular issue in the disability sector arises when police find credible evidence of abuse, but are unable to prosecute because of issues relating to the ability of victims to give evidence to a standard acceptable to the court. In this situation, referee reports and police checks will generally not be sufficient to identify the risks associated with the person, resulting in potentially preventable cases of abuse and violence occurring (see Option 3 below).

Distribution and competition effects

The differing requirements mean that supplier costs differ by jurisdiction. This could lead to distortions in the market given that prices for NDIS supports are generally set on a national basis.

In addition, because there are significant differences in requirements (including in the way that the central screening systems work), there is no mutual recognition between systems. This means that suppliers and/or workers may need to obtain clearances in two or more jurisdictions where they operate across state borders or move between jurisdictions, pushing up costs further and acting as a disincentive to operate on a national basis.

There would also be an impact on Government. In most cases current requirements for those working with adults with disability are tied to funding agreements and contractual arrangements. It would be possible in theory at least, to translate these into conditions for registration, and audit them in conjunction with other quality assurance requirements. It would however require states and territories with central assessment systems (Victoria, Queensland, South Australia and ACT) to maintain their existing systems beyond the

⁴⁰ Vic Parliamentary Report, pg 13. Victoria subsequently introduced a worker exclusion scheme for accommodation services.

transition period currently agreed. In the case of the three latter jurisdictions, screening arrangements operate under legislative systems on a (partial) cost recovery basis and so this would be feasible. Victoria's Worker Exclusion Scheme however currently operates on an administrative basis tied to contractual agreements and there would be costs and practical difficulties associated with translating it into a legislative scheme.

Accordingly, for both efficiency and effectiveness reasons, a system that maintains the status quo is unlikely to be sustainable.

Option B2: Risk management by employers (self-regulation)

This option would represent a substantial reduction of regulation over current requirements.

Under this option, there would be no formal compliance costs, however, in the absence of formal requirements, many suppliers of supports would be likely to undertake police and other checks themselves as part of their risk management strategy in any case. Not all will do so though, and in some cases the checks undertaken may be inadequate.⁴¹ A survey of existing providers undertaken for the impact analysis suggests that as many as 20-50% of employers might decide not to continue to do police and referee checks in a voluntary system.

The risk that many employers will fail to do adequate checks is supported by a literature review of employment screening practices as a prevention measure for child abuse commissioned by the Royal Commission on Institutional Responses to Child Abuse. It found that criminal background checks are universally considered to be a necessary, but not sufficient, component of pre-employment screening.⁴² It also pointed to many cases where failure to adopt such practices led to unsuitable people gaining employment and abusing the children in their care.

In addition, the evidence suggests that employers may over-estimate their capacity to identify and deal with predatory behaviour, or avoid abuse through action on organisational culture. The Royal Commission on Institutional Responses to Child Abuse, for example, has found that perpetrators deliberately seek out positions of power over those least able to speak up for themselves, and go to great lengths to cover their tracks in the process. While an employer may feel they know the person well enough to make a judgment without the need to do checks, the consensus of studies on the subject generally suggests that assessment of past criminal history is a relevant indicator of risk.⁴³

Distribution effects

⁴¹ NOUS Group, Impact Analysis Report.

⁴² Literature review prepared for the Royal Commission on Institutional Responses to Child Abuse, Parenting Research Centre and University of Melbourne, *Scoping Review: Evaluations of Pre-employment Screening Practices*, February 2015.

⁴³ Parenting Research Centre, *Scoping Review*, *op cit*.

Under Option B2, it is assumed that most employers would no longer be able to rely on checks managed centrally by governments for those working with adults (where these currently occur) but would instead generally establish individual risk assessment systems. They would also incur the costs of obtaining police and referee checks and reviewing them. Nonetheless the option would allow employers to maximise their flexibility, eliminate mandated compliance costs, and allow suppliers to develop their own low cost systems. It would also provide more flexibility to employ those with a criminal history with a prospect of rehabilitation (including those who may have lived experience of disability).⁴⁴

This option would, however, expose participants to a significantly greater risk of serious adverse incidents where providers chose not to implement robust systems.

The costs of promoting best practice by Government are expected to be nominal under this option. There could however be indirect costs as anecdotal evidence suggests that in those states where Working with Vulnerable People's checks are not required, many employers are requiring staff to obtain Working with Children clearances instead as a proxy. These costs have not been included in the analysis however.

Competition effects

A risk in this option is that some suppliers of supports may adopt a higher risk approach to recruitment to expedite the process and reduce their costs, putting pressure on other suppliers to follow suit in order to remain competitive, and potentially undercutting suppliers with a lower risk threshold.

Consultation

Stakeholders overwhelmingly (and all but unanimously) thought that Option B3 was inadequate in this sector, and would send the wrong signal to suppliers of supports about the importance of good recruitment and selection practices.

Overall impact

The option would be likely to result in a substantial increase in the number of serious adverse incidents over current levels. In comparison, other options centralise the risk management function and afford significant cost savings.

⁴⁴ B Naylor, Living Down the past...2012 cited by NOUS, pg 92.

Option B3: Require employers to conduct referee and/or national police checks

Effectiveness

Currently use of referee and police checks as a screening device by employers is generally mandatory (except in ACT, Queensland and SA which have central screening systems) and is regarded as an essential element of good practice, and an important part of the recruitment and selection process.

Referee and police reports do, however, suffer from a number of key limitations. In particular, employers:

- may not be able to access the information necessary to make good judgments for privacy, security or legal reasons
- may not have the expertise to make good judgments on the information they do have
- may choose to disregard the adverse information about the person for inappropriate reasons.

Lack of access to critical information is perhaps the most important of these issues. Even where adverse information about the person is known to a previous employer or to police, employers may not be able to access it, because of privacy protections and other constraints.

Table 5.2.3: Screening information strengths and weaknesses

Information type	Importance	Accessible to employers?	Problems with usefulness
Referee reports	High - past behaviour is often a good guide to future behaviour, and employer feedback can be a better predictor than interview performance	Subject to limitations	<p>Applicant may omit the name of a person who will give an unfavourable report.</p> <p>Applicant can provide the name of a friend or other person, who might represent themselves as a former employer.</p> <p>Privacy protections under the Fair Work Act mean the employer cannot normally give a referee report unless the employee agrees.⁴⁵</p>

⁴⁵ The Fair Work Ombudsman's guidance to employers in relation to referees, for example, suggests that workplace privacy protections mean that generally, a former employer should not disclose information about the former employee without the person's consent. <https://www.fairwork.gov.au/about-us/policies-and-guides/best-practice-guides/workplace-privacy#bestpractice>

			<p>Employers may have entered a binding agreement not to disclose past misconduct as part of a FWA conciliation process.</p> <p>Employers may give a positive report even where misconduct had occurred.</p>
Criminal convictions	High – while a relatively small proportion of applicants are likely to have convictions, they may be extremely important in assessing risk	In part	<p>Excludes spent and quashed convictions, juvenile offences, etc.</p> <p>Assessing relevance of a conviction to the job requires good judgment – people who know the employee may unwisely choose to discount past history, while other employers may be unduly risk averse</p>
'Enhanced' police information – – for offences alleged to have been committed, regardless of the outcome of those charges, such as acquittals, dismissed, withdrawn and pending charges convictions,	High - experience with working with children checks suggests that a small but significant number of people with adverse information that would not be disclosed in a standard police check will apply for clearance	No	Protected for privacy reasons, may only be accessed by approved Government screening agencies.
Workplace misconduct reports	High, as many cases of misconduct may not be able to be proved to a	No – unless a person has been deregistered or is subject to public	Key issue is capturing the information - mandatory reporting provisions exist for children, but not generally for adults with disability. Information on workplace

	criminal standard	restrictions on practice through a professional association	misconduct could also be captured through serious incident reports and complaints (Part II).
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Distribution analysis

Option B3 is expected to generate substantial benefits compared to Option B2, as it would be expected to reduce serious incidents rates by requiring all employers to undertake checks of workers, including paying for police checks. It generates positive benefits for employers (in costs avoided from redress), government and participants.

Impact on compliance costs

Under this option employers would need to obtain police checks (which cost in the order of \$50 per person) and referee checks. However, these costs are arguably a normal part of doing business that most employers would undertake in the absence of regulation. Compliance would be verified through the registration process (see Options C1-5 below).

To the extent that Working with Vulnerable People Checks/Yellow Card costs are generally paid by employees rather than covered by employers, it could involve an increase in the compliance costs borne by employers in the ACT and Queensland jurisdictions (though employers may choose to undertake these checks in addition to the clearance).⁴⁶

As all employers would be subject to the same requirements, this option is unlikely to impact on competition.

Consultation

Overall there was little support from stakeholders for this option except in combination with other options. The overwhelming majority of stakeholders felt that while referee and police checks were essential and should be required, additional mechanisms were also needed to stop workers who are guilty of malpractice moving between services and jurisdictions to avoid detection.

⁴⁶ Many employers surveyed as part of the Impact Analysis said they would seek Police Checks even if Working with Vulnerable People Checks were in place, NOUS Report.

Option B4: Worker registration (working with vulnerable people checks for disability workers)

A literature review of employment screening practices as a prevention measure for child abuse commissioned by the Royal Commission on Institutional Responses to Child Abuse found that there was strong agreement that comprehensive checks, including referee checks, other sources of information about suspected abuse, disciplinary body proceedings and other material were needed. Much of this information is not, however, accessible to employers for privacy and security reasons. In order to address the information gaps for employers, as well as provide objective and skilled assessment of risk information, a third option is to introduce a nationally consistent system of risk based screening of workers for those working with adults with disability. The effect of this option is to create a system of worker registration or 'positive licensing'.

The information that would be used under this approach would include:

- criminal convictions (from national police checks)
- criminal or civil charges not pursued, quashed and spent convictions and other information held by courts, police and child protection agencies, such as domestic violence and child protection orders, and broader child protection information
- workplace misconduct reports about the person.

Some jurisdictions already operate centralised risk based screening systems for those working with adults with disability. However, there are significant differences in the way that these operate. As a result, if a worker moves, or works across state boundaries they must apply for separate clearances in each jurisdiction.

The Working With Children Checks Report by the Royal Commission on Institutional Responses to Child Sexual Abuse, for example, found that the system is not working as well as it could.⁴⁷ The report argued that complexity, lack of consistency, inadequate information sharing and lack of portability of clearances between jurisdictions have created a number of weaknesses in current systems. It has recommended a national model for Working with Children Checks, by introducing consistent standards and establishing a centralised database to facilitate cross-border information sharing.

Under this option, it is proposed that jurisdictions agree in principle to a nationally consistent system of worker screening for those working with adults with disability, including the following features to facilitate mutual recognition of clearances and minimise costs:

- the standards and design of the system(s) would be aligned with the most rigorous Working with Children Checks system as far as possible in order to maximise consistency and minimise administrative costs;
- a Working with Vulnerable People Check would be valid throughout Australia, regardless of where it was issued (through mutual recognition arrangements);

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- workers could apply for registration before applying for jobs in order to minimise or eliminate delay costs for employers;
- clearances would be portable between employers and employers would be able to verify their validity online. Consideration would also be given to ways of providing additional information (beyond cleared/not cleared) to employers in order to eliminate the need for employers to undertake a separate police check);
- the system would provide for ongoing monitoring of the person's clearance against police information system and employer misconduct reports (from the serious incident system);
- the assessment would consider convictions (including past, spent and quashed convictions); non-conviction information held by police and other agencies (such as charges not proceeded with, AVOs and Child Protection Orders); international police checks where feasible and relevant; and workplace history (including any allegations or findings of workplace or professional misconduct) and/or professional disciplinary proceedings;
- workers would be able to provide any supplementary or explanatory material relevant, and would be able to appeal any decision not to provide clearance.

Under this option:

- Victoria, NSW, WA and the Northern Territory would need to introduce legislation to introduce worker screening requirements;
- Tasmania, SA, ACT and Queensland would need to amend their existing schemes in order to achieve sufficient consistency to permit mutual recognition of adult clearances.

Compliance costs

Under this option the compliance costs faced by employers would fall in all jurisdictions other than the ACT and Queensland (which already have WWVPC or equivalent systems) since:

- employers would no longer be required to obtain police checks or, in the face of SA, pay for screening of the worker; and
- in Victoria, accommodation service providers would no longer be required to report any adverse findings from referee or police checks and check the excluded persons list.

Instead, those wishing to work in the sector would be required to apply for clearance, and would be charged a fee for the clearance. Employers would be able to verify the validity of the clearance online and enter a code to indicate that they were employing the person (so they could be advised in the event that the clearance is suspended or revoked).

Effectiveness

The Working with Vulnerable People Checks approach is based on using evidence about risk factors that predict the likelihood of offending to identify those who pose an unacceptable

risk, and ensuring they do not work in the sector. Government screening agencies can take into account a wider range of information than would be accessible to employers (or private sector screening agencies), including convictions, spent convictions, charges not proceeded with, AVOs and other information. There are strong indications that this kind of information can provide a better indication of risk than criminal convictions alone.⁴⁸

In addition, the system would allow workers to be excluded from the sector by having their clearance suspended or revoked where new information, such as a finding of serious workforce misconduct or criminal charges being laid against them.

The primary effect of a Working with Vulnerable People Check system is likely to be deterrence: anecdotal evidence from Working with Children Checks suggests that a substantial proportion of those with a history that may be uncovered by a check will exit from the sector or not apply for jobs in it.

A nationally consistent approach could also reduce the likelihood of some people slipping through the screening net by moving interstate.

The other key benefit of a pre-employment screening system is that it is preventative: the early identification and exclusion of those who pose a risk should lead to a cumulative reduction in the incidence of abuse, violence and exploitation over time.

That said, the number of people who would ultimately be excluded from working in the sector upfront is likely to be relatively small. Some people with a history that may suggest a risk will, however, apply, and would be afforded an opportunity to make their case. Over time, though, employer reports of serious misconduct will lead to an additional number of cases being assessed. Experience with existing systems based on assessment of police records suggests that around 1% of applicants are likely to have adverse information known about them that will lead to their application being rejected. Workforce misconduct reports will lead to an additional number of workers being refused clearance, or having their clearance revoked.

The combination of these factors means that a Working with Vulnerable Person's Check approach, particularly if implemented in conjunction with a system of employer reporting of workplace misconduct, is likely to have a substantial impact in reducing the risk of serious adverse incidents because:

- potential workers are assessed for risk before they start work in the sector (rather than being excluded after being found to have committed misconduct, or not excluded at all)
- the assessment is independent and undertaken by skilled analysts against objective criteria

⁴⁸ PRC, Scoping Review, op cit, pg 41, 46. According to media reports, one of five alleged sexual offenders employed by a large Victorian disability provider worked 32 shifts while being investigated by police on suspicion of repeatedly raping a disabled woman at another disability provider. The report suggests that one of the alleged abusers was hired after he was sacked by the other provider in early 2013 over his alleged repeated rape of an intellectually disabled woman. In that case police investigated but the evidence was deemed insufficient to prosecute the case.

- it can take into account a wider range of information than other approaches.
- There is ongoing monitoring of an employee's suitability to work with people with disability

Impact on employers/competition

Depending on the final model adopted, there are two other possible direct costs for employers. First, if a potential worker does not currently hold a clearance, and has a criminal record or other adverse information is known about them, there could be costs associated with delays while they seek clearance. Secondly, if the system allowed for organisation/job specific clearances to be negotiated with employers (who would need to put in place appropriate risk management arrangements), this would involve some administrative costs. The number of cases is likely to be very small however. If a system of mandatory or voluntary employer reporting of worker misconduct was put in place, this would require employers to document the misconduct to a level that could be assessed by the screening unit.

Effect on potential workers

For the great majority of applicants, the check would be a simple data-matching exercise that would establish that no relevant information was held about the person. Experience with existing systems suggests that clearances could be granted within 2-10 days without the need for further assessment.⁴⁹ Where a person's past history does suggest the need for a full risk assessment, the assessment process may stretch out for an extended period of time given the need to provide the applicant with opportunities to exercise their right to make submissions on their case and respond to any material of which they may not have been aware.⁵⁰

A few respondents in the consultation process expressed reservations about people being excluded altogether from working in the sector on the basis of a risk assessment that included past convictions (including spent convictions). The majority, however, felt that the risk to vulnerable people clearly outweighed the rights of the small number of people who might be excluded from working in the sector. People do not have a right to a job in a particular sector, and 'fit and proper person' checks are common in high risk jobs. Many also pointed to the problems of making complaints and obtaining convictions as a rationale for a more comprehensive approach, including as a way of reducing potential employer liability.

Consultation

⁴⁹ The most recent data on Working with Children Checks in NSW shows that 78 per cent of applications were processed within 2 days and 98 per cent within 10 days.

⁵⁰ In NSW, 84 per cent of full risk assessments were completed within 16 weeks in 2012–13.

In the consultation process, stakeholders almost universally supported the introduction of Working with Vulnerable People's checks. Some stakeholders argued however, that over-reliance on checks can be detrimental to safety as they can provide a false sense of security, and lead to complacency. They stressed that the measure should not replace the need for employers to put in place effective recruitment, selection and management systems for staff. Stakeholders strongly agreed, though, that a nationally consistent and portable system of Working with Vulnerable People Checks should be the most effective means of preventing people with a history of criminal and exploitative behaviour from moving interstate to take up a new position.

The Consultation report noted that the reasons for majority support for Option B4 include that:

- governments have a duty of care to protect NDIS participants from people with a history of criminal, predatory or exploitative behaviour
- self-regulation and referee checks would be inadequate as they may not be carried out properly or the staff member may provide an incomplete employment history
- police checks would be inadequate because not everyone who has committed abuse receives a conviction (in part because of the criminal standard of evidence requirement)
- these clearances will prevent the need for multiple screening processes (unless working with children) if they draw on real-time information and move with the worker.

There was strong support for a nationally consistent approach to staff screening to prevent people with a history of misconduct from moving interstate to take up new positions. Stakeholders also saw scope for the development of a consistent approach across sectors such as children and aged care sectors.

The main drawback of Vulnerable People's Checks is that they could make it difficult to recruit staff in some regional and remote areas. All 'working with' systems, however, provide potential workers an opportunity to make their case for clearance to the screening agency, providing fairness and some flexibility.

Some employers were also concerned over the potential for delays in allowing staff to commence work. This may be an unfounded concern, particularly given the proposed design of the system which would allow potential employees to obtain clearances prior to applying for a job with an employer. One employer organisation argued that while screening systems are needed, they should be delivered by private sector screening agencies rather than Government in order to reduce costs and delays. An employer survey undertaken by NOUS Group for the Impact Analysis also reported concern over delays in obtaining clearances. Providers claimed that they lose, or would expect to lose, on average 3.1 potential workers each year due to delays in obtaining pre-screening information, at an average cost to the provider of \$2,600. In practice most state screening systems provide outcomes for the majority of applicants very quickly. Administrative data reported by the Productivity Commission on the ACT scheme found that:

- 87% of WWVP checks in the ACT, where the applicant had no criminal history, require an average of 2 days to process

- 12% of checks, where the applicant had a minor offence recorded, require an average of 5 days to process
- 1% of checks involve applicants with significant criminal history, and require an average of 28 days to process.⁵¹

Option B5: Barred list

A barred workers list system currently operates in only one jurisdiction, Victoria, and there on a non-legislative basis in relation to accommodations services. Accordingly, all jurisdictions (and/or the Commonwealth) would need to introduce legislation to implement this approach under the NDIS.

The key difference between a 'working with check' (positive licensing) and a barred persons list (negative licensing) is that a working with children or vulnerable persons check assesses all of the available information about a person before they can be employed in order to assess whether they appear to pose a risk to clients, as well as responding to any new information that comes to light. Barring, by contrast, occurs only after a particular adverse event (serious misconduct or a crime) has occurred and is reported. Employers are required to verify that the person has not been barred.

A barring scheme potentially could help prevent people who commit misconduct from simply moving to a new job with another provider, or across jurisdictions.

Consultation

There was somewhat less support for Option 5 (a barred persons list) than for Option 3 in the Consultation process, and most of those who supported this option suggested that it be introduced in conjunction with Option 4, and the design of Option 4 has been modified to reflect this. National Disability Services recommended Option 5 combined with Option 2 (referee and police checks).

Lower rates of support for this option may in part be because people have had limited experience with this model (a limited form of it has only been in place for Victorian for a short time). The majority of respondents, however, felt a more comprehensive system of worker screening was needed in the sector. In addition, some of those who had experienced the Victorian scheme had strong reservations about it.

Effectiveness

⁵¹ NOUS pg 92

A barred list has the advantage of preventing workers found to have engaged in workplace misconduct from moving to another job in the sector. However, as the table below illustrates, it is a more limited approach than Option 4.

First, it is corrective only. Some workers who would have been excluded from the sector under a working with vulnerable people checks will be able to obtain jobs; some proportion of these are likely to harm clients. It is only after they have actually been found to have committed the misconduct that they can be excluded from the sector. Moreover, not all of those who commit misconduct will be detected, at least in the short term.

Secondly, there is a risk that even where a person is dismissed by one employer and barred on the basis of that misconduct, they could continue to be employed, for example because they held more than one job, and employers are only required to consult with the holder of the barred person list at the time they employ an individual.

Table 5.2.5: Key differences between a barred list and 'working with' check

	Working with check	Barred list
Pre-employment assessment of risk	Independent clearance agency	Employer, as under Option 2. List is maintained by independent agency who makes assessment of information available
Information considered	Includes conviction, non-conviction and other police information held about a person as well as employer reports and complaints	Criminal records where this becomes known. Employer reports on serious misconduct, complaints where misconduct was found to have occurred.
Notification to employer	Employer informed if clearance suspended	If person held several jobs, other employers may not become aware of barred status

A barred persons scheme would also require that a level of evidence to support the barring decision exists - it would be difficult to justify barring someone from further work in the sector based on suspicion alone.

Some stakeholders also were concerned that employers could misuse the system to target whistle-blowers, or people they had personal conflicts with.

Would require review mechanism for worker.

Compliance costs

Employers: The difference in compliance costs for employers between Option 4 and Option 5 is likely to be insignificant. Under either system, an employer would need to verify whether

the person has a clearance or is on the barred list. Under Option 5, however, if the barred person list was private, the potential worker would need to give their consent to a check being made (in order to prevent other parties from finding out that a person is on the list).

Under both options employers would be required to report serious incidents including those involving misconduct.

Table 5.2.6: Barring vs Working with Check - Administrative impact

	Working with check	Barred list
Employees	Need to apply (and pay) for clearance in order to be employed in the sector	Consent to check against barred list
Employers	<p>Verify worker has clearance (ideally online)</p> <p>Report that they have employed person (database entry) to enable ongoing monitoring.</p> <p>Report serious misconduct</p>	<p>Verify not on barred list. (online).</p> <p>Would also need to verify police record check & Working with Children check (if required)</p> <p>Report serious misconduct impacting on clients</p> <p>Report any adverse findings from police record / working with children check</p>
Misconduct reports	<p>Placed on database</p> <p>If hold clearance, triggers suspension/possible cancellation of clearance (through new risk assessment) and employer notified</p>	Triggers consideration of barring.

Government: A system to assess employer reports and decide whether barring action was warranted would need to be established.

C Registration and Code of Conduct

Option C1 - Maintain state and territory based quality assurance requirements.

Currently the NDIS provider registration rules require providers to meet specified requirements depending on the type of support they offer, as well as comply with state and territory quality assurance requirements.

NDIS transition arrangements: Under the current NDIS legislation, responsibility for registration lies with the Chief Executive Officer (CEO) of the NDIA. The NDIS Act provides flexibility about who can be a registered supplier. Except where a person is providing a support for which they must by law have certain qualifications (such as a psychologist or physiotherapist) or some other form of license, anyone can register if they can prove to the NDIA that they have the capacity and experience to provide the supports.

Under the arrangements for trial and transition, the CEO must take into account state or territory government approval requirements. These arrangements could, in principle, be continued.

BOX: NDIS Supplier Registration assessment process

Currently suppliers are required to submit an application form through the NDIS Supplier Portal. The application needs to include:

- . the supports they wish to provide;
- . the geographical areas the supplier can deliver supports to;
- . qualifications held;
- . relevant professional registrations or accreditations;
- . experience; and
- . details of processes in place to ensure high quality service.

Supplier are required to comply with all laws that apply in the jurisdiction they operate in, including requirements for employees to hold Working With Children and/or Vulnerable People Checks, Occupational Health and Safety requirements. This also includes compliance with state and territory quality assurance/management systems requirements.

A Provider Registration Guide to Suitability Requirements sets out the criteria used to assess suitability to provide supports. The Guide sets out the professions, evidence of experience and capacity requirements evidence necessary to offer different types of NDIS supports. Depending on the type of support offered, this can include providing evidence of financial viability, National Police Checks, Risk Management, Facilities and Equipment, Complaints, Insurance, Relevant licences, compliance with relevant standards, as well as appropriately qualified staff.

Under the transition arrangements, additional requirements apply in some states and the CEO must take into account state or territory government approvals. In most states this involves a quality management and "due diligence" checking of suppliers. Arrangements are in place to allow state and territory regulators to provide advice on registration to the NDIA.

Once providers are registered, they are required to comply with the NDIA's Terms of Business. The terms of business say, for example, that suppliers must protect participants'

privacy. Suppliers are not allowed to discriminate between people because of gender, marital status, pregnancy, age, ethnic or national origin, disability, sexual preference, religious or political belief. They also say that suppliers must have a complaints system.

There is a high degree of commonality in the elements of the quality assurance systems currently used by states and territories. In particular, all jurisdictions have either included the National Standards for Disability Services which were agreed between governments in 2013 (summarised in the box below) in their disability and other relevant legislation, or mapped these to existing standards to ensure each standard has the same meaning across Australia. Notwithstanding this, in practice stakeholders suggested that the National Disability Service Standards are understood and assessed differently in each jurisdiction.

Box 5.3: The National Standards for Disability Services

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

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

The table below summarises the differences in assessment methods, which can involve a process of self-assessment, independent validation, independent assessment, audits/random inspections, and performance reporting requirements.

Table 5.3.1: Elements of the quality assurance system*

Key element*	Jurisdiction
Legislative principles (promote continuous improvement, person-centred, etc)	Cw, ACT, NSW, SA, Tas, Vic, WA
Linked to National Disability Services Standards	All
Self-assessment	All
Third party assessment	Cw, NSW, Qld, SA, Tas, Vic, WA
Performance measures reporting	Cw, NSW, NT, Qld, SA, Vic, WA

Source: Based on KPMG 2012.

Efficiency

In practice, because of the mix of formal, informal (including through contract and funding agreement management processes) and third-party regulation currently employed it is not possible to accurately assess the extent to which compliance costs differ between jurisdictions under current arrangements.

It is clear, however, that there is no nationally consistent system in which a provider who has met the standards in one jurisdiction can have this recognised in another. This means that suppliers operating across several sectors and/or jurisdictions have to comply with multiple sets of requirements, adding to costs. A survey of providers undertaken by the NOUS Group found that only 25% of suppliers currently only comply with one quality assurance framework. Just under half were required to participate in three or more quality assurance assessments, and around 8% with 5 or more.⁵² A significant proportion of these may be operating across several jurisdictions, as well as in related markets such as aged care or other community services.

Accordingly, this option would be administratively inefficient. Moreover these costs can put small businesses at a particular disadvantage since the costs of them may more readily be absorbed by large organisations which may also obtain commercial advantage or prestige in gaining certification against recognised industry standards.

Effectiveness

Current quality systems have not been designed with the NDIS in mind.

First, they have been designed with specialist disability services in mind, whereas the NDIS will cover a much wider range of supports, many of which are low risk. Alongside traditional specialist disability suppliers of supports there will be greater numbers of registered health professionals and suppliers of transport, household cleaning and gardening services. Requiring mainstream services to undergo full quality evaluation or quality assurance processes would pose considerable costs and could be a serious disincentive to provide

⁵² Nous Report, pg 111

supports to participants. Accordingly, there is a risk that unless the NDIS quality system arrangements are also sensitive to the market, smaller suppliers may be driven out and others deterred from entering, while entrenching the advantage of existing larger suppliers.

Secondly, even in relation to specialist disability providers, in the consultation process it was suggested that they often adopt too much of a 'tick the box' approach to assessing an organisation's compliance with contracted standards rather than focusing on sustained quality and compliance. In part this is because current funding arrangements give funding bodies capacity to address quality issues through contract management processes which will no longer exist under the NDIS.

Thirdly, a particular concern raised in the consultation process was that not all of the National Standards for Disability Services readily lend themselves to be assessed through quality assurance mechanisms. Currently these matters can be dealt with through informal regulation, in the context of management of funding agreements and contracts. IN the NDIS environment, other approaches, such as a Code of Conduct, may be needed to supplement this approach. A voluntary Code is unlikely to be viable in an emerging and transitional market situation however.

Conclusion

As this approach is not likely to be efficient or effective in the NDIS environment where state and territory governments no longer have contractual relationships with providers, it is not recommended.

Option 2 – Voluntary certification

For the purposes of registration suppliers would need to comply with all applicable laws (such as ensuring workers hold relevant clearances). They could apply for a quality certification on a voluntary basis. .

Option 2 is essentially a self-regulation approach, and would be a significant reduction from what individuals and organisations wanting to provide disability services must currently do to meet the NDIS registration requirements. .

This option would significantly reduce suppliers' mandatory compliance costs in all jurisdictions. Currently, all jurisdictions require suppliers to undertake a more comprehensive approval process than would be required by this option. Essentially the internal administrative cost would amount to completing and submitting an 'application to register', which is already required in some form under current arrangements. This option would be a reduction in requirements for suppliers in all jurisdictions currently delivering specialist disability services.

Consultation

There was very limited support for this option in the stakeholder feedback. Those who did support it argued that it would provide a balance between choice and assurance, and that quality assessments are not a guarantee of quality. The majority of stakeholders however felt that it would be likely to lead to a significant increase in the number of serious adverse incidents, and that this was not an acceptable outcome.

Distribution effects

Suppliers would benefit from not being required to undergo the more rigorous requirements they are currently subject to under existing systems, and governments, who would no longer need to undertake the same level of regulatory oversight of the sector. Accordingly the regulatory burden would be very low.

This comes at the cost of participants, however, who could experience an estimated 100% increase in serious adverse incidents.⁵³

Conclusion

As this option could be expected to lead to a substantial increase in serious adverse incidents, it is not recommended. This option has a high risk of compromising the integrity of the NDIS through poor quality supports that do not achieve participant outcomes, and is arguably inconsistent with the intent of the legislation requiring that suppliers be registered.

Option C3 - Additional conditions

Effectiveness

While there are a number of factors that determine the risk to any single individual, there are some types of supports where risk is always greater because of the circumstances in which the support is typically offered, for example, when supports are provided in a private or closed setting. In general, most suppliers would be expected to have some form of complaints handling system, recruitment practices which ensure that participants are not exposed to workers who may cause harm and systems to protect the privacy of clients. They would also be required to notify the NDIS complaints body of serious incidents.

This option would represent a substantial reduction in the overall level of regulation compared to current requirements, which generally apply to all specialist disability providers.

⁵³ NOUS Group estimate.

Accordingly there is a danger that the relatively low barriers to entry could create rapid turnover because suppliers who were not committed to their long-term sustainability could enter, offer unsafe or poor quality supports and then move out of the market again. Moreover, those with a questionable history could find it relatively easy to re-establish themselves in a new setting. This could lead to exploitation and rorting of the system, as well as leave participants without essential supports.

There would be no mandated external auditing of service quality, and so participants would largely rely on word of mouth and publicly available information in order to assess the safety and quality of a supplier.

Distribution effects

Suppliers: For existing specialist disability services this would be a reduction in the regulatory burden compared to current requirements (Option 1), but an increase in costs compared to Option 2. New suppliers may need to invest in establishing new systems to meet conditions, but as the requirements would be equivalent to appropriate business practice for the type of support, the costs of this are expected to be relatively low.

This option would allow suppliers of supports to register and enter the market quickly while ensuring some critical standards, such as, the qualifications of the supplier to undertake a particular service safely and competently have been checked.

Participants: As this would be a significant reduction in oversight over current requirements, it is estimated that it could lead to an increase in serious adverse incidents of around 50% over current levels.

Consultation

There was only limited support for this option in the consultation process.

Conclusion

This option would not provide an adequate level of quality and safeguards for supplier offering support in the higher risk service clusters.

Option C4 - Mandated independent quality evaluation of suppliers of supports considered higher risk

Under this option, where a provider was judged higher risk, a quality evaluation process would be required. The evaluation would assess information based on participants'

experiences of the organisation in assisting them to access supports and meet their individual needs and goals. The evaluation assessments would be descriptive and made public. The assessment would also consider other aspects of a supplier's business, such as safety, staff management, timeliness and responsiveness to user feedback. The aim would be to inform future and current participants about the relative strengths and areas of improvement of suppliers. A supplier would not be excluded from registration on the basis of a below average assessment, provided they continued to meet all other registration conditions.

The majority of businesses operating in the general marketplace, for example, general gardening or household supports, taxi services, and suppliers of aids and equipment, would be exempt. These types of supports are used widely across the population and information on people's experience of these supports is becoming increasingly available online.

Only suppliers delivering supports of a type likely to create a greater risk to participants (that is, supports that involve more direct staff-participant contact; or which lack supervision such as personal care support, respite or supported residential services) would be required to participate in a quality assessment under this option.

Effectiveness

The focus of this approach is client experience rather than objective measures that focus on systems to promote safety. This could help reinforce user choice as a driver for a more client centred approach.

Because it provides less focus on safety processes than most current systems, Option 4 could, though, be expected to lead to a modest increase in serious incident levels.

The evaluation assessments would be descriptive and made public. The assessment would also consider other aspects of a supplier's business, such as safety, staff management, timeliness and responsiveness to user feedback. The aim would be to inform future and current participants about the relative strengths and areas of improvement of suppliers. It is questionable how effective this information would be in driving participant choice for many participants however. In addition, there would still be major information asymmetries given that safety defects may not be evident to participants.

The operation of the Code of Conduct would provide a mechanism to exclude suppliers engaging in the most serious forms of misconduct from the market, but reliance on complaints would mean that it would represent a very light touch approach. Many consumers in the NDIS market may not be in a position to make a complaint themselves, or may fear retribution if they do. For this reason, it could be important that the trigger for consideration of whether a breach of the Code of Conduct had occurred not depend on complaints alone, as is the case for many other Codes. Instead the process could potentially be triggered by intelligence from a range of sources, including serious incident reports; advice from advocates; family and friends; Community visitors; health or educational professionals and media reports. Regardless of the source of information, an appropriate investigation would then need to occur to verify the relevant allegation.

Distribution effects

Participants: The most significant benefit of this option is that participants would be provided with independent outcomes-based quality information to help them make choices between suppliers in the market. This means that the quality evaluation will describe a range of attributes of a particular supplier, and participants will be able to make their own decisions based on what is most important to them and choose from a potentially wider range of suppliers. The approach focus on the participants' experiences of the supports they receive.

Suppliers: The majority of businesses operating in the general marketplace, for example, general gardening or household supports, taxi services, and suppliers of aids and equipment, would be exempt. These types of supports are used widely across the population and information on people's experience of these supports is becoming increasingly available online.

Only suppliers delivering supports of a type likely to create a greater risk to participants (that is, supports that involve more direct staff-participant contact; or which lack supervision such as personal care support, respite or supported residential services) would be required to participate in a quality assessment under this option. It is estimated that this could amount to around 20% of suppliers of supports.⁵⁴ Suppliers offering lower risk supports would be asked to additional requirements as described under Option C3.

The compliance costs for business associated with this option represent a reduction in cost for most suppliers compared to the certification processes most are currently required to undergo, since requirements would be more closely calibrated to risk, and equivalent standards would be recognised, eliminating the need to undergo multiple certification processes in order to operate across jurisdictions or sectors. Nonetheless, it does involve a substantial cost which could deter entry, particularly in thin markets.

Consultation

There was some support for this approach among stakeholder groups and from National Disability Services. The reasons given for this were that:

- the focus of quality assessment should be on the perspectives of people with disability and the outcomes for people with disability, not processes; and
- quality assurance systems are not a guarantee of quality and they are costly.

Some stakeholders, however, expressed concern that it could lead to less of a focus on achieving outcomes, and result in a cultivation of dependency on suppliers.

Suggestions on the possible content of a code of conduct were generally in line with the National Standards for Disability Services, including prohibiting behaviours that may cause

⁵⁴ NOUS Group estimate.

harm, respecting people with disability, listening to and being guided by what a person wants, and respecting people’s right to privacy. Stakeholders also noted, however, the need for organisations to have effective recruitment, training and supervision practices, effective complaints and serious incident management processes, and accountable governance arrangements, which would not be tested under this option.

Option C5 – A quality assurance scheme.

Under this option all providers will be required to meet certain basic requirements including complying with an NDIS Code of Conduct, and complying with other elements of the framework such as complaints mechanisms (if agreed).

A key element of this option would be an assessment of the proposed scope of a suppliers practice in order to decide what requirements should apply, having regard to the inherent riskiness of the support type, and expected client profiles. The diagram below illustrates how these would be tiered.

Tiered provider requirements

	Lower-risk supports	Higher-risk supports
Larger providers	<p>Provider types: e.g. cleaning company (more than 5 employees).</p> <p>Requirements: Can choose verification of individual employees, or certification of organisation. The latter will be more efficient (lower cost and address employee turnover).</p>	<p>Provider types: large organisation undertaking range of higher risk supports, including personal care, behaviour support, accommodation.</p> <p>Requirements: Quality assurance certification; focused on compliance with practice standards and management of risks, including governance, internal quality systems. Requirements tailored to scope of supports offered.</p>
Smaller providers	<p>Provider types: e.g. sole operator doing gardening, cleaning; allied health professionals registered with AHPRA or that have full membership of a recognised professional association, where relevant to their scope of practice.</p> <p>Requirements: Verification of insurance, qualifications, employee screening.</p>	<p>Provider types: e.g. sole operator offering higher risk supports.</p> <p>Requirements: Proportionate quality assurance certification tailored to scope of supports. Includes: competence, training, experience and understanding of risks. Certification evidence requirements proportionate to the size of the organisation.</p>

Under this option a simple verification process would confirm a supplier's identity, professional qualifications or licensing (where these are required by law), check that the supplier has adequate insurance for scope of the nature of the service being offered and that in the case of an individual, they have a current national police check or working with children or vulnerable person's clearance. In the case of an organisation, verification would involve checking that the organisation undertakes this verification of staff itself. Suppliers offering personal supports would also need to demonstrate that their workers had completed an orientation to the NDIS that ensured they had a basic awareness of the principles and values underpinning the scheme, including issues relating to abuse and neglect.

There would be a third party quality assurance certification in which suppliers would apply for a certification against the NDIS practice standards (which step out the National Standards for Disability Services in more detail) for the scope of services they intend to provide. The quality assurance scheme would be established as the NDIS Practice Standards Scheme. The scheme and practice standards will be owned by the NDIS Registrar and managed and maintained in line with best practice standards set out by an accrediting body, such as JAZ-ANZ. The methodology for assessment will ensure a much greater focus on supplier performance against standards using the lived experience of the participant, captured through observation and conversation with the participant and families, compared to current quality assurance systems.

Under this approach a scheme would be created which would instruct auditing bodies on the methodology for assessment to ensure the requirements are proportionate to risk. The scheme would have a set of core practice standards which address suppliers' governance and risk management. How these are assessed and what the auditor will require as evidence would depend on the size of the supplier, its turnover, and its governance structures.

Additional practice standards would be prepared as modules, with the scope of services that a supplier proposes to offer determining which modules they will need to be audited against. Some suppliers would be audited against only one or two modules. For example, a supplier who is offering clinical would be subject to a standards which require them to demonstrate they and their staff have the skills and training to achieve outcomes for this cohort and they understand and comply with the NDIS and state and territory laws regarding the use of restrictive practices and NDIS reporting and accountability requirements.

Suppliers offering personal care or community access for individuals who could have clinical needs would be required to meet standards that address their competency and risk management for providing safe and quality services to that cohort. This would include requiring workers providing personal supports to complete an induction module to ensure that these workers are familiar with the principles underpinning the NDIS and the risks of providing supports, including issues related to abuse and neglect.

There will also need to be a standards module for Specialist Disability Accommodation to ensure that registered suppliers of housing are meeting and maintaining standards, including practice standards which ensure safeguards for participants accessing this type of housing in the market.

The diagram over illustrates how the requirements would operate.

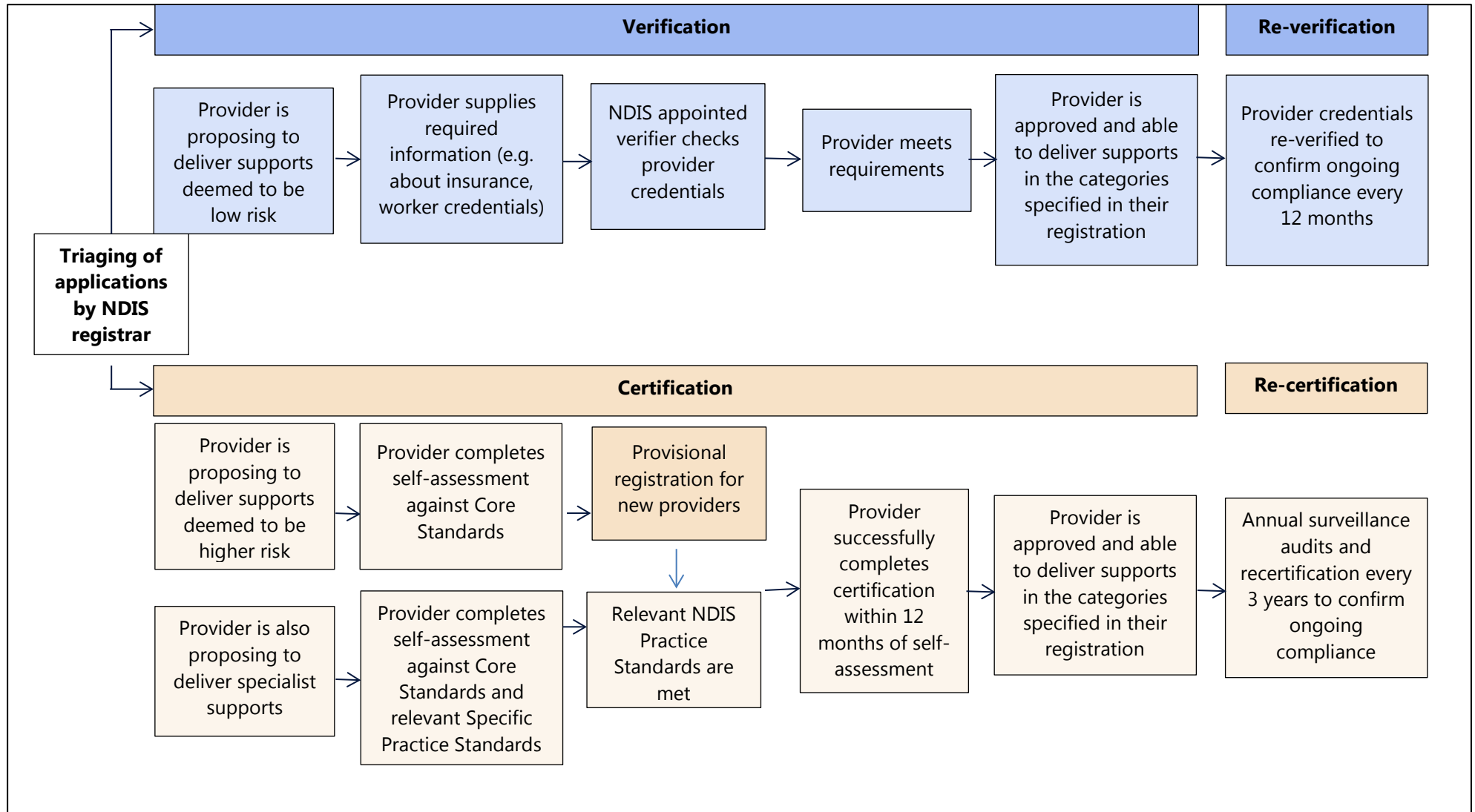
Under this option, suppliers would also need to comply with report on standard information, consistent with requirements already commonly in place under contractual funding arrangements and/or the NDIS Act, including serious incident reports. Depending on the nature and size of the organisation involved this may include financial reporting and/or reporting on significant governance changes, for example where continuity of service arrangements might need to be put in place if the organisation fails. For those suppliers that fall within the market monitoring risk threshold, the NDIS Registrar will assess their financial viability and governance arrangements and may require a plan for continuity of service to be put in place if the organisation fails.

Code of Conduct

The Code of Conduct would complement these requirements and operate in a similar way to current codes such as that applying to allied health workers, and would also apply to unregistered suppliers (ie suppliers who choose not to register and provide supports to self-managed participants).

The NDIS Code of Conduct would set out basic participant rights consistent with the National Standards for Disability Services, effectively acting as a negative licensing scheme. From the participants' perspective, it would operate through, rather than separately from the complaints system. A NDIS Code of Conduct could supplement the system of standards by articulating and enforcing expectations for both suppliers of supports and individual workers.

Provider registration, verification and certification processes



The Code would help operationalise the National Standards for Disability Services by:

- setting expectations for organisations and workers in the sector;
- shaping the behaviour and culture of organisations and workers;
- empowering consumers in relation to their rights; and
- providing a basis for the regulator to take regulatory action where the supplier of supports or an individual has breached the Code.

The following possible elements are intended to provide an indication of the nature and scope of the Code, but would be the subject of a further targeted consultation process.

Workers and suppliers should:

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

The Code would be given legislative effect and would apply to individuals and organisations. Providers would not have to demonstrate compliance against it, instead potential breaches of it identified from complaints, serious incident reporting, quality assurance and other sources would be investigated;

Effectiveness

Quality assurance requirements represent a continuation of existing requirements for many government-funded specialist disability services. As for Option 4, Option 5 would provide information of participant experience of the support, but it would have an additional focus on governance, operations and the quality system to ensure a viable and well-functioning organisation. Suppliers who

do not meet standards would be directed to make improvements, and if they fail to do so, they may be deregistered or precluded from entering the market.

This option proposes that low risk supports would be required to comply with a minimum set of conditions to assure the Registrar that the supplier is competent and able to comply with all legal requirements. For a smaller group of higher risk suppliers, including those who work in closed environments with people who have limited communication capacity or have a cognitive disability, there should be comprehensive independent system for quality assurance. This is different to an evaluation approach as it brings a greater level of objectivity, consistency and professionalism to the assessment process.

That said, experience has shown that quality assurance systems are never perfect and by its nature, human services delivery will always carry some risk. For these reasons quality assurance systems must work alongside effective complaints schemes and a regulatory approach that enables early identification of risk and builds natural safeguards as much as possible.

Continuing registration of a supplier would, however, be subject to the supplier behaving safely and ethically. In the consultations, stakeholders identified the need to address a number of behaviours set out in the national standards, including prohibiting behaviours that may cause harm; ensuring that workers respect people with disability, including listening to and being guided by what a person wants; and respecting people's right to privacy. They were particularly concerned at the need to address the possibility of behaviours that may not technically constitute a crime, but which should never be acceptable in the NDIS, such as harsh, rough, exploitative or otherwise unethical treatment, depriving a person of food, sleep or basic needs, bullying, intimidation, vengeful, or deceptive behaviour in response to a complaint or incident. They considered that an enforceable code of conduct would be an appropriate mechanism for this purpose.

The vast majority of suppliers of supports and workers are likely to operate in a safe, competent and ethical manner. A small proportion, however, may prove to present a serious risk to the public, or may operate outside the boundaries of acceptable conduct one would reasonably expect within the NDIS.

A NDIS Code of Conduct could supplement the system of standards by articulating and enforcing expectations for both suppliers of supports and individual workers.

Efficiency

The Consultation RIS proposed a system potentially with four tiers of requirements depending on level of risk. Stakeholders suggested that a more nuanced and streamlined approach would be preferable, and Option 5 has been designed to reflect this. It would provide a more targeted approach, with requirements tiered according to risk. In addition, by moving to a single national system, with recognition of common components of other certification systems, supplier compliance costs could be expected to at least halve compared to current levels without any impact on outcomes.

For most social care suppliers, the essential ingredients of quality person-centred service delivery can be distilled into a relatively small number of core competencies. Many of these competencies, however,

are hard to measure in concrete ways, and so funding bodies have not been able to collectively agree on what particular competencies or attributes should be assessed or how. This has resulted in multiple quality assurance standards and systems which, effectively measure the same capabilities and client outcomes. For suppliers this imposes significant costs, diverting resources from improving quality to proving quality. For suppliers who have a wide scope of services and client groups and/or a national services footprint, this may mean they have to demonstrate adherence to a number of quality certification systems. The creation of a national supplier registration system for the NDIS is an opportunity for purchasers across a range of program areas and jurisdictions to recognise one system of quality assurance. This would significantly reduce the cost burden on social care suppliers.

Currently suppliers are generally required to undergo certification and submit to ongoing audit requirements as a condition of their funding agreements. This approach is intended to place the least burden on suppliers of services where risk to participants and the NDIS scheme are small.

Under this option low risk services such as everyday type services which are used by the general public, for example a gardeners or domestic cleaning service or a taxi company would only be subject to simple verification requirements. These suppliers, if they are operating as a business with multiple employees could choose to seek a quality assurance certification under the NDIS Practice Standards Scheme, but it would be voluntary.

Where suppliers are applying to register as individuals who propose to offer equivalent low risk supports, a simple verification process would apply to check evidence of profession and public liability insurance and police records and/or relevant "working with" checks. This would be a largely automated and rapid process for people with no criminal history.

Similarly, where suppliers offered supports whose scope of service are covered by already regulated by existing schemes, simplified registration would apply. This would mean that registered allied health professionals (registered with the Allied Health Professionals Registration Authority or have full membership of a recognised professional association as prescribed in Schedule 1 of the Health Insurance (Allied Health Services) Determination 2014), for example, would simply have to establish that their registration is current and that they have appropriate professional indemnity insurance. There would however be some exceptions, for example where allied health professionals are intending to provide a service type that requires highly specialised skills and experience, such as early intervention services for children, and behaviour supports practitioners who would need to meet professional competency standards.

In addition, suppliers of supports who meet quality assurance requirements deemed equivalent to those applying under the NDIS would not need to undergo a separate assurance process.

Higher risk suppliers would be required to obtain certification under the NDIS Practice Standards (including the subset of allied health professionals described above).

A Code of Conduct would not represent an additional impost for registered suppliers of supports; rather it would simply be another means of articulating and enforcing the standards that applied to them. From the participants' perspective, it would operate through, rather than separately from the complaints system. For unregistered suppliers of supports providing services and products to self-

managing participants, the Code could operate as a negative licensing system. Assuming that the number of self-managing participants stabilises at 6%, business compliance costs would be minimal since they only arise when a serious case of misconduct occurs, and the existence of the scheme will act as a deterrent.

Managing market risk

Arrangements for reporting of key performance information would provide a mechanism to identify and manage the risk of failure of a very large supplier that would be difficult for the market to absorb, a key risk identified by a number of stakeholders.

Distribution and competition effects

Notwithstanding the benefits that suppliers identified from participation in them, quality assurance requirements involve significant costs (estimated at around \$20,000 per annum). This represents a significant barrier to entry for those delivering relatively high risk supports, and potentially increasing costs to government of arranging supplier of last resort services.

These factors, however, needs to be weighed, however, against the potential harms to participants from unsafe services, and risks to taxpayer funds of services that do not deliver the desired outcomes.

Consultation

In the consultation process, mandating quality assurance requirements received the strongest support of any option. Stakeholders from a range of groups, including people with disability and their families, suppliers, peak bodies, professional associations, statutory bodies and academics, supported this approach on the basis that it was the most likely to ensure high quality supports and manage risks.

The stakeholder consultations found broad support for an independent quality verification system, with strongest support for mandated participation in an external quality assurance system for suppliers of supports considered higher risk. The arguments for this approach included:

- lower-level requirements would not provide sufficient assurance of quality, for example, a Code of Conduct alone would be insufficient without auditing;
- it would provide an independent, objective and professional assessment of quality;
- it would provide the best assurance of quality supports;
- it has supported and would continue to support continuous service improvement;
- communities expect some level of quality assurance for government-funded services;
- it should ensure that services have appropriate risk-management processes and governance;
- it would help to ensure that services are sustainable; and
- it would build on developments in quality management in the disability sector and not reduce current safeguards.

In a provider survey, the majority of respondents were positive about the benefits of quality assurance frameworks⁵⁵, having found them valuable in building rigour in their governance and risk management capability.

Stakeholders had mixed views about translating qualification requirements for workers into the NDIS. Some thought all workers or workers in certain roles (who are not already subject to professional registration requirements by law) should be required to meet minimum qualification or training requirements and meet continuing professional development obligations. Most stakeholders, however, emphasised the importance of workers' attitudes over their qualifications, and were concerned that minimum qualification requirements could make it difficult to recruit sufficient workers, and favoured a more targeted approach (for example through practice standards for particular types of supports).

D Reducing and Eliminating Restrictive Practices in NDIS Funded Supports

Background

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

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

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

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

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

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

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

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

⁵⁵ Nous Group Report, pg 110.

Effective strategies to reduce the use of restrictive practices have clear benefits for participants in terms of quality of life and quality of care. Their use is also estimated to increase costs to service providers compared to other interventions, with the estimated staff time amounting to some \$250-350 per use.⁵⁶ Use of alternative strategies is also likely to reduce indirect costs, since 11.4% of providers using restrictive practices reported having a client or staff member seriously injured in the process.⁵⁷

Option D1: Maintain current arrangements in place each jurisdiction.

While jurisdictions have all agreed to the National Framework for reducing and eliminating the use of restrictive practices, they currently have different approaches to regulating the use of restrictive practices and use different definitions. This reflects the fact that current mechanisms were intended to be interim measures pending the development of the NDIS Quality and Safeguarding Framework.

All states and territories have systems of guardians, which are aimed at protecting the rights of people who are deemed not able to consent themselves. In addition, some have included provisions to regulate the use of policy in their disability services legislation (Queensland, Victoria, Tasmania, NT and SA). Others set out high-level principles and objectives in legislation, which are relevant to but do not specifically address the use of restrictive practices (ACT, NSW and WA), and include specific requirements in policy (NSW) or a code of practice (WA).

Aside from approval arrangements for decisions to include a restrictive practice in a positive behaviour support plan, Queensland, Victoria and Tasmania have introduced reporting requirements around the use of restrictive practices and South Australia is currently developing reporting guidelines. Victoria and Tasmania also have Senior Practitioners with statutory functions that include developing guidelines and investigating the use of restrictive practices.

In order for these provisions to continue to operate in full scheme, states using policy mechanisms applying to funded providers to give effect to the Framework (such as NSW) would need to move to a legislative framework, while others may need to amend legislation to ensure that current provisions continue to apply to NDIS funded services.

Efficiency and effectiveness

Current arrangements do not fully implement the National Framework, and so are unlikely to be fully effective in achieving the desired objective of moving away from the use of restrictive practices to an approach focused on understanding causes of behaviour, and preventative action. In addition, current arrangements have been developed around the former system of funding agreements and contracts which will no longer apply. Accordingly, substantial changes would need to be made to current legislative and other policies in order to reflect the new operational environment.

⁵⁶ Nous Group Impact Analysis, pg 120.

⁵⁷ *ibid*

For these reasons, Option D1 is unlikely to meet efficiency and effectiveness objectives.

This approach could also lead to substantial differences in compliance costs between jurisdictions which would be difficult to sustain under a national system (including price setting).

Accordingly this option is not considered further.

Option D2: Registration requirements only

Currently all jurisdictions have legislation in place that either directly regulates the use of restrictive practices or sets out high level principles and objectives which are relevant to their use, while several all regulate their use and impose reporting requirements.

In the consultation, some stakeholders expressed concern about the concept of 'approval' of restrictive practices in the NDIS Quality and Safeguards Framework because they represent an infringement of human rights and should be prohibited outright. A system based on regulation of providers through registration requirements only could address this concern, but may not necessarily provide the strong legislative basis required to protect the rights of people with disability at risk of being subject to restrictive practices.

This approach would represent a substantial reduction over the current system.

Consultation

While some argued against regulation of the use of restrictive practices, comments from many others identified regulation as necessary to protect participant rights by ensuring that restrictive practices are used only as a last resort and that the least restrictive option is used. Many identified the need for legislative requirements that set out conditions that must be met before a restrictive practice can be used if the person has impaired decision-making capacity (where these are not already in place in state or territory legislation).

For the vast majority of people with behaviours of concern, stakeholders generally agreed that it is reasonable to assume that elimination of restrictive practices over time should be attainable. However, it was also noted that there needed to be recognition that there may be some emergency situations or extenuating circumstances that arise where a restriction is the only available response. They also noted that for a small minority, it may not be possible to avoid the use of restrictive practices, even where a positive behaviour support plan is in place and being implemented effectively. A person with Prader-Willi syndrome, for example, may require restrictions placed on their access to food in their home due to behaviours arising from their medical condition that could cause harm, such as overeating or eating foods that have not been prepared properly and may cause food poisoning.

Effectiveness

Under the NDIS, suppliers who offer supports to individuals who require positive behaviour support would generally be subject to particular requirements, consistent with the registration options agreed. Research has demonstrated that appropriate staff training on the use of positive behaviour support Plans can improve the safe application of restrictive practices as well as significantly reduce usage rates (with some studies suggesting a reduction of up to 80%.⁵⁸ Accordingly, appropriate registration requirements, combined with access to support from a behavioural support practitioner and workplace culture could have a significant impact on usage rates.

However, while this would include audit requirements and serious incident reporting there would be no effective mechanism to detect and take appropriate action where restrictive practices were used inappropriately. The NOUS Group's report indicated that reporting of the emergency use of restrictive practices, for example, enables regulators to monitor trends at the system level and provide advice to individual service providers on how they can reduce their use of restrictive practices.⁵⁹ The absence of a robust accountability mechanism, as well as the other strategies set out in the National Framework is accordingly likely to undermine any gains from a more targeted registration system, and provide inadequate protections for people with disability who are not in a position to make a complaint.

Efficiency

A key risk is that in the absence of a robust regulatory structure, providers will be unwilling to offer supports to high risk participants because of the costs involved. Uncertainties about the legality of the use of restrictive practices in particular circumstances could be a significant disincentive, particularly in a more market based system.

Conclusion

While appropriate registration requirements are a necessary condition for reducing the use of restrictive practices, they are unlikely to be a sufficient one. This option would not adequately implement the agreed framework for reduction and elimination of restrictive practices.

Option D3: Prohibit use of restrictive practices outside approved Positive behaviour support plans, and require providers to report use against them

Effectiveness

⁵⁸ Nous Group Impact Assessment, pg 120

⁵⁹ Nous Group Impact Assessment, pg 137.

The overarching legislative framework proposed would provide a clear focus on reducing and eliminating restrictive practices, both by placing obligations on decision-makers aimed at avoiding their use, putting in place monitoring and oversight arrangements to ensure progress is being achieved.

It would provide a strong focus on accountability by requiring plans to be reviewed regularly, and for providers to report monthly against the plan. Reports would be monitored so that appropriate interventions could be put in place if it appeared they were being overused or other problems arose. Monitoring of trends would also provide a mechanism for identifying strategies to assist providers to reduce the use of restrictive practices on a systemic basis.

This is likely to significantly reduce the use of restrictive practices over time, with major gains for participants in terms of quality of life.

Efficiency

A nationally consistent approach would most effectively support the national focus of the NDIS, minimise the costs associated with different jurisdictional requirements, and enable reported differences in the usage rates to be investigated and addressed through education and awareness as well as other preventative strategies.

Compliance costs

Reporting requirements: The key compliance cost for providers would be reporting costs. The consultation process canvassed a range of options for frequency of reporting. Reporting on each use of restrictive practices was generally felt to be too onerous, while reporting against emergency use of restrictive practices received very little support from stakeholders, on the basis that while it would minimise compliance costs, it would not provide accountability and transparency of situations where participants have restrictive practices approved as part of the positive behaviour support plan, or whether each use of a restrictive practice was appropriate in the situation. A requirement to report once a month, with systems to minimise the reporting burden, so that, for example ongoing restrictive practices would only need to be entered into the system once unless something changed, was recommended as striking a reasonable balance.

Consultation

The design of this option (and associated non-regulatory measures) reflects input from the consultation processes on options canvassed in the consultation process, as well as subsequent expert workshops suggesting that it was important to focus on addressing the causes of behavioural issues, including by ensuring that providers have access to appropriate expertise and guidelines, and have appropriate skills and systems in place, as well as accountability measures.

Section 6: Evaluation and Conclusion

As noted above, maintaining current arrangements (Option 1 for each component) is inconsistent with policy directions agreed for the NDIS to date and would:

- not address documented weaknesses in the current systems;
- likely be ineffective given the new operating environment; and
- lead to unnecessary complexity and inefficiencies.

For these reasons it is not considered viable under the NDIS.

Similarly, a voluntary approach to quality and safety requirements on the part of suppliers (Option 2 for each component) is not considered appropriate given that this market is created by Government fiat, entirely dependent on government funding, and could lead to a substantial increase in already unacceptable levels of serious harm to participants.

The remaining sub-options are evaluated below.

Complaints and Serious Incident Management

Option A3 (internal and external complaints handling requirements) could provide an effective mechanism for ensuring providers have appropriate internal systems in place and for external resolution of less serious service quality issues. However, it would not be practical or appropriate for more serious complaints or overlooking serious incidents such as allegations of sexual assault, violence, neglect; or investigating deaths to be dealt with by a non-statutory body. Accordingly, a separate body would be required to undertake these functions, resulting in a continuation of the fragmentation in the oversight system that has been criticised by several recent inquiries.

Although complaints about abuse, neglect and violence are likely to constitute a relatively low proportion of overall complaints, it is expected that these would warrant a more intensive role in many cases. It would also be sensible for the complaints body to have responsibility for oversight of serious incidents in order to maximise the efficiency and effectiveness of the system. Oversight of serious incidents, combined with regular systematic analysis of the data accumulated, could be expected to lead to a reduction in preventable deaths, serious injuries and other serious adverse incidents through early intervention and support for suppliers.

Accordingly, Option A4 (statutory complaints and serious incident function) would provide for an integrated approach to complaints and serious incident management, and would take a risk-based approach to ensuring that organisations have effective internal governance and accountability mechanisms for complaints and serious incidents in place, and appropriate incentives to manage them effectively.

Option A3 also assumes a contractual relationship between the external complaints resolution body and suppliers, which may be perceived as a conflict of interest, reducing the confidence of participants in it and potentially the shift to a market environment more generally. By contrast, an independent statutory body (Option A4) is likely to significantly increase participants' awareness of and confidence in the complaints and serious incident handling processes.

Option A4 is also likely to have a greater impact on improving supplier processes and procedures than Option A3, both through stronger enforcement powers in response to individual complaints, and through its work in identifying and addressing systemic issues.

Overall, a statutory complaints function could be expected to reduce consumer detriment by providing cheaper and faster resolution of complaints. This in turn is likely to empower participants to be more 'demanding customers', driving positive change in the system to make it more responsive to their needs. It should also lead to earlier corrective action by suppliers that will help them retain existing customers and grow their client base without significantly impacting on compliance costs.

Accordingly Option A4, a statutory complaints and serious incidents function, is the preferred approach.

Worker screening

Option B3 (referee and police checks only) represents a reduction in the current level of regulation that applies in several jurisdictions and so is likely to result in a significant increase in serious adverse incidents. While it represents a better approach than Option B2, its overall benefits, while positive, would be less than those of Option B4, and in the order of a quarter of those of options B5. Accordingly it is not recommended.

Option B5 would be less effective in reducing harm and is unlikely to have a significant deterrent effect.

Option B4 (independent risk-based screening) represents the most efficient and effective approach to worker screening as it would have a strong deterrence effect, would reduce the potential for people who pose a risk to enter the sector through upfront rigorous screening, as well as provide a mechanism to remove those proven to pose a risk. This approach would reduce compliance costs for providers while sending a strong signal about the priority placed on the right of people with disability to be safe.

Registration and Code of Conduct

Options C1, C2 and C3 provide large gains for suppliers from reduced compliance costs, but at the cost of participant safety.

They also provide 'benefits' to Government under these options from the reduction in regulatory workload compared to current systems. In reality, however, this would be more than likely offset by the costs of dealing with complaints and other impacts of the expected 100% increase in serious adverse

incidents that would occur (the primary burden of which falls on participants). This is regarded as unacceptable.

Option C4 would go further in ensuring adequate levels of service quality, but was felt not to provide sufficient safeguards in relation to safety.

Under Option C5, the National Standards for Disability Services would be given effect through a combination of quality assurance requirements proportionate to risk of the supplier (a function of the supports they provide and the client group they serve), and a code of conduct which would come into play when a complaint is made, or other information such as a serious incident suggests investigation is needed. The tiered requirements that would apply under this option would provide the most effective approach to safeguarding vulnerable people from harm while also promoting the effective operation of the market, including by giving consumers greater confidence that supports will meet minimum standards.

Overall this option could be expected to provide a reduction in serious adverse incidents due to the combination of increased requirements in some jurisdictions, and gains from national consistency which means suppliers do not need to undergo separate certification processes in each jurisdiction. It also provides significant efficiency gains compared to the current system due to the proposed streamlining of requirements and recognition of equivalent system. The Code of Conduct would provide an educative mechanism and a safety net for participants in relation to quality and safety, helping to ensure that NDIS objectives are achieved.

Option C5 (Quality assurance requirements for some suppliers) is the preferred option.

Restrictive Practices

Arrangements for NDIS participants who may exhibit behaviours of concern are needed in order to reduce or eliminate the harms these practices can cause participants, as well as ensure an effective market that offers choices to participants.

The preferred option, D3, would put in place a legislative framework that implements the Framework for Reducing and Eliminating Restrictive Practices previously agreed between governments in order to provide greater transparency and accountability. The legislation would create an office of the Senior Practitioner (or equivalent) to provide practice leadership and clinical governance, promote best practice, and with powers to investigate and make directions. Suppliers of supports to individuals who require positive behaviour support would be subject to appropriate practice standards in accordance with registration requirements.

This approach would provide transparency and accountability on the use of restrictive practices, consistent with the requirements of the National Framework. Requirements to report regularly on the use of restrictive practices, and scrutiny of reports by Positive behaviour support plan practitioners and the Senior Practitioner would provide a disincentive for inappropriate use of restrictive practices.

Accordingly, over time, this option could lead to a significant reduction in the use of restrictive practices, reducing the risk of harm to both participants and workers, and improving the quality of life of participants.

Overall impact

	Option 1 (status quo)	Option 2 (no regulation)	Option 3	Option 4	Option 5
A Complaints and Serious Incidents	A1: Maintain current requirements in each jurisdiction	A2 No regulatory requirements	A3: Internal and external complaint handling requirements	A4: Statutory authority overseeing complaints and serious incidents	na
B Worker screening	B1: Maintain current requirements	B2 Risk management by employers	B3: Require employers to conduct referee and police checks	B4: Require referee checks + independent risk-based screening (Working with vulnerable people check)	B5: Barred person's list
C Registration and Code of Conduct	C1: Maintain current requirements	C2: Voluntary Certification	C3: Additional certification	C4: Quality evaluation	C5: Quality Assurance
D Use of Restrictive Practices	D1: Maintain current arrangements	D2: Registration requirements only	D3: Prohibit use of restrictive practices outside approved Positive behaviour support plans, and require providers to report use against them	na	na

States and territories have already implemented substantial regulatory regimes with which providers must comply. Moving to a national regime based on best practice approaches allows for the potential elimination and consolidation of existing regulation where possible, and adoption of more efficient and cost-effective approaches.

Indicative cost benefit modelling of the measures, summarised in Appendix 2, shows that:

- the preferred package represents the options with the highest net present value in each case;
- the preferred options are likely to have the biggest impact in reducing serious adverse incidents and other harms in each case; and
- overall, the cost burden on providers and government of an improved regulatory system are outweighed by the benefits of avoiding harm as a result of the proposals.

In particular, the analysis found that reducing serious cases of harm by one per cent would deliver benefits totalling \$199 million in Net Present Value terms over 20 years (see Appendix 2). As the options have subsequently been modified to reduce compliance costs for business and improve effectiveness, the final options are likely to yield significantly higher net benefits.

Section 7: Implementation and Review

The RIS should provide information on how the preferred option would be implemented, monitored and reviewed, COAG Best Practice Guidelines, pg 13

The diagram below outlines where it is envisaged the regulatory components of the Framework sit and how they are connected.

A Complaints and serious incidents

Under the preferred approach, internal complaints and serious incident handling system requirements would be assessed as part of the registration process (Option C5 below).

The key powers for a statutory complaints body powers would be to:

- receive, investigate and resolve complaints about supports provided to NDIS participants (including self-managing participants using non-registered suppliers);
- oversight serious incidents, adopting a risk management approach, including providing feedback to suppliers of supports on individual incidents
 - this would include all cases involving fraud; serious unexplained injury; death; allegations of physical or sexual assault of a participant committed by an employee or another participant; and culpable neglect;

- refer complaints and serious incidents to other agencies for action, including police, other complaints bodies, worker screening units and the NDIS registrar;
- provide information, education, training and advice about matters relating to complaints and serious incident handling to suppliers of supports and participants;
- identify and address systemic problems; and
- report publicly on the number, types and causes of complaints and serious incidents, including prevention strategies.

The main focus could be on complaints suggesting that a provider (registered or unregistered) or an individual worker has breached the proposed NDIS Code of Conduct (see Options C5 below). However, people would be able to raise broader issues about service quality, as well as concerns about safety and abuse and neglect.

It is proposed that an NDIS Complaints Commissioner will receive and support the resolution of complaints about providers of NDIS-funded supports, receive and investigate serious incident reports, and investigate potential breaches of the NDIS Code of Conduct. The Commissioner will refer matters related to non-compliance with provider standards to the NDIS Registrar, serious incidents related to unmet behaviour support needs to the Senior Practitioner, matters relating to individual staff to worker screening units, and other matters to relevant authorities (such as the police, consumer affairs agencies and other regulatory bodies) as needed.

State and territory governments are continuing to operate their existing complaints schemes in transition, but the new system will need to be operational for the full scheme. New South Wales, South Australia and the ACT will reach full scheme in 2018-19, with the remaining jurisdictions reaching full scheme in 2019-20, noting that discussions are still underway regarding the future of disability services provision in Western Australia.

To avoid a situation where two complaints systems are operating in parallel, it is proposed that the national complaints handling function would commence in NSW, SA and the ACT in 2018-19 and in other jurisdictions in 2019-20. Work would also be required in 2017-18 to recruit staff and establish a system for collating complaints and serious incidents.

The Commonwealth is giving further consideration to institutional governance options for a complaints handling body. Regardless of the institutional model that is selected, the complaints body will have a presence in each jurisdiction to facilitate local investigation of complaints, however, information will be collated and analysed at a national level in a national office.

Worker screening

Worker screening unit(s) will have responsibility for screening staff before they enter the workforce and for continuing to monitor whether staff are safe to work with people with disability. Where relevant, this would include information from the serious incident reporting system (Option A4).

The NDIS Registrar will have broad responsibility for design, including determining scope, information to be considered and a decision making framework, and states and territories will maintain operational responsibility for worker screening including the management and operation of worker screening units.

Registration

NDIS Registrar

The proposed approach would involve establishing an independent NDIS Registrar (or equivalent) function. A key responsibility of the Registrar would be overseeing a quality assurance scheme to determine whether providers of supports meet the NDIS Practice Standards.

The NDIS Registrar will have responsibility for registering providers, managing the NDIS Practice Standards and certification scheme, monitoring provider compliance with quality and competency standards, and taking action as required. The Registrar will also monitor, review and report on the effectiveness of the NDIS market of supports, including anti-competitive conduct and early indicators of risk of thin markets and market failure.

A key responsibility of the Registrar would be ownership of a quality assurance scheme to determine whether providers of supports meet the scheme quality and competency standards (the NDIS Practice Standards) for registration purposes.

Where a supplier is in breach of the NDIS Code of Conduct, or there is a concern brought to the attention of the Registrar of a serious non-compliance issue, the Registrar will have powers to obtain information from a number of sources and decide the appropriate action. The Registrar may impose conditions on a supplier's registration, impose penalties or as a last resort registration could be revoked.

The Registrar would have a range of other roles in order to drive quality improvement and promote safety in the disability sector. Consistent with good regulatory practice, it would inform and empower consumers through awareness of the standards and Code of Conduct. It would also educate suppliers on their obligations and assist them to comply.

It would gather intelligence on the performance of the sector through the accreditation scheme and based on patterns of complaints and serious incidents. There would also be a market oversight role for the Registrar, including scrutiny powers in respect of organisations that are providing 'difficult to replace' supports, or that have a dominant share of the market in a particular location, or service type.

National Standards for Disability Services

The National Standards for Disability Services could be included in the legislation or as a regulatory instrument, and would apply to all registered suppliers of supports under the NDIS.

NDIS Practice Standards

Practice Standards will be the benchmark for quality certification of providers. The certification requirements will depend on the scope of the service the provider wishes to offer and the potential risks that may need to be managed to ensure that the supports are both safe and good quality modular and be consistent with the National Standards for Disability Services. The development of the Practice Standards will be oversighted by a group with representation from states and territories, industry groups and representatives of people with disability.

Code of Conduct

There will need to be further consultation around the development of the Code.

Transition

Suppliers who are already certified under an existing scheme (including state schemes) would not be required to seek certification under the NDIS Practice Standards Scheme until their existing certification expires.

Training and accrediting auditors in the Scheme would commence in late 2016. The scheme will be open to all auditors accredited by JAZ-ANZ or other body. This will ensure there is a competitive market for auditors which will help to manage the cost impact on suppliers.

The supplier will have up to 12 months to obtain certification through a full third party audit. This certification would be valid for three years, during which time the auditors will perform surveillance audits. At the end of the three year period, suppliers would be required to renew their certification.

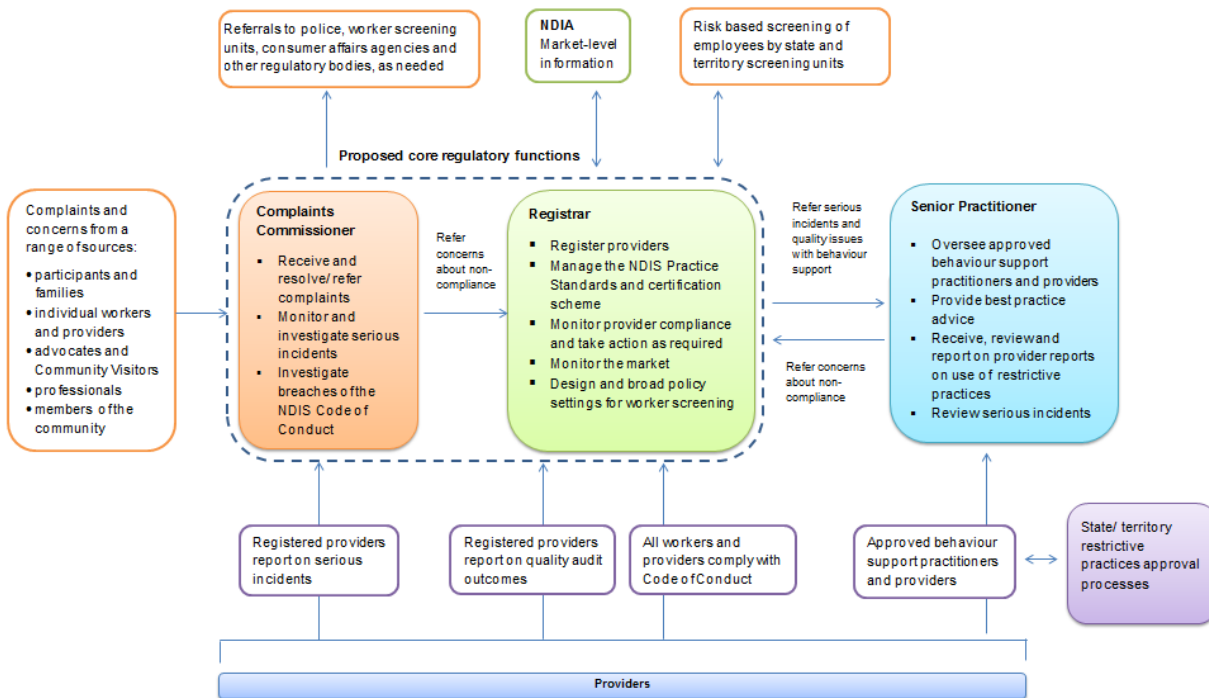
Restrictive Practices

Under the preferred option, registration requirements for those dealing with high risk clients would apply, and the Senior Practitioner would receive, review and report on provider reports on use of restrictive practices; and follow-up on serious incidents that suggest unmet behaviour support needs. The Senior Practitioner will refer concerns about individual worker or provider non-compliance to the Registrar (Option C5). Participants with identified complex behaviour support needs will be assessed by an approved positive behaviour support practitioner, funded through their plans, who will then use the information from the assessment, together with information from other sources (including the participant, family and key providers), to develop a positive behaviour support plan for the participant. Approval to include a restrictive practice in a behaviour support plan will continue to be managed through current state and territory approval processes.

The NDIS Complaints body would be responsible for determining if there has been a breach. Depending on the circumstances it may refer the incident to the Senior Practitioner who may investigate or appoint a Behaviour Support Practitioner to work with the provider to improve practice in

implementing participants' positive behaviour support plans. If it is found that there is a persistent concern about a provider the NDIS registrar could, on advice from the Senior Practitioner or complaints commissioner, revoke the provider's registration.

Work Flows for an NDIS Complaints Body



Review

A review of the NDIS quality and safeguarding framework would commence in mid-2021 (three years after commencement), with a report to be provided to the DRC by mid-2022. The review will cover the efficiency and effectiveness of the framework in meeting its objectives, any unintended consequences arising from their implementation, and any identify any weaknesses in the regulatory framework.

Appendix 1: Proposed NDIS Quality and Safeguarding Framework

The measures described in this RIS are part of a larger proposed framework, summarised in the table below.

The NDIS Quality and Safeguards Framework
 UN Convention on rights of persons with disabilities;
 National Disability Insurance Scheme Act 2013
 National Disability Strategy 2010-20

	DEVELOPMENTAL Building capability and support systems	PREVENTATIVE Preventing harm and promoting quality	CORRECTIVE Responding if things go wrong
INDIVIDUAL Supporting and empowering people with disability	Building individual capability and decision supports – skills and knowledge Strengthening relationships – families and other support networks Information for participants – Accessible information on how the system works, rights, support types and service quality Links to: Information, Linkages & Capacity Building	Individual formal safeguards including NDIA risk assessment and management. Links to: Supported and substitute decision-making (Guardianship systems) Advocacy services – externally funded Links to: National Disability Advocacy Framework Supports for self-managing participants - to effectively and safely select and manage their supports.	Universal protections – Protections outside the NDIS (eg. justice) Responding to complaints Serious incident reporting – gathering information and investigating dangerous situations Community Visitors – responding to reports
WORKFORCE Promoting a safe and competent workforce	Building a skilled workforce	Best practice recruitment/supervision Links to: National Framework for Protecting	Code of Conduct for individual workers (including monitoring through complaints and serious incident

Links to: Integrated Market, Sector and Workforce Strategy

Australia's Children

Worker screening – ensuring staff are safe to work with people with disability

reporting systems)

SUPPLIERS OF SUPPORTS

Encouraging safe, innovative, high quality support provision

Capacity building & best practice

Links to: Sector Development Fund

Reducing restrictive practices – transparency and reporting

- Links to: National Framework for Reducing and Eliminating Restrictive Practices

National Standards for Disability Services, NDIS Practice Standards.

Quality Assurance, Regulation and Compliance – proportionate risk-based requirements

Code of conduct - reporting and investigations

Appendix 2: Summary of Cost Benefit Results

In order to assess the net social benefits of the proposed regulatory measures in the NDIS Quality and Safeguarding Framework, DSS commissioned the NOUS Group to undertake an Impact Analysis of the proposals set out in the Consultation RIS. The options modelled were those set out in the Consultation RIS.

The data was not included in the text of the RIS as it should be regarded as broadly indicative only, given the poor quality of the base data it relies on, and the difficulty of estimating likely impacts of measures in a dynamic and unpredictable environment. In addition, it is questionable whether translating serious adverse incidents into monetary terms is appropriate given that this can downplay the real impact of crimes on victims. Nonetheless, the results can provide an indication of the possible scale of impacts of the measures. Accordingly, some indicative results, reworked to reflect changes in the design of the options made in the light of the consultation and policy development processes, are included here for illustrative purposes.

How the impact analysis was undertaken

The Impact Analysis involved:

- **Collecting and analysing data sources necessary for the impact analysis.** Data used included two surveys with responses from 289 providers, administrative data from governments, publically available sources, and expert opinion.
- **Developing a base case of the current regulatory frameworks** in each jurisdiction as a yardstick against which the impact of each option can be compared.
- **Conducting a cost-benefit analysis** to systematically evaluate the net benefit of each regulatory option. A dollar value for each safeguard or quality-control mechanism was calculated, and translated into a net present value figure. Where dollar values could not sensibly be calculated, the cost benefit analysis takes this into account. In each case a distribution analysis was undertaken to show how the costs and benefits are distributed among participants, providers and government.
- **A regulatory burden analysis** to quantify the costs of current and proposed regulation that fall primarily on businesses. This quantification allows calculations of the degree to which new regulation adds to the regulatory burden, or is offset by reductions in existing regulation.
- **A risk analysis**, looking at the likelihood of harm occurring, the consequences of it, and the cost of reducing or eliminating the risk in order to put the proposals into perspective.
- **A competition analysis** to assess the degree to which the options would be likely to restrict competition, and therefore to restrict efforts to achieve efficiency and innovation.

Overall the impact analysis found that:

- The cost burden on suppliers and government of an improved regulatory system are outweighed by the benefits of avoiding harm as a result of the proposals. In particular, the

analysis found that reducing serious cases of harm by one per cent would deliver benefits totalling \$199 million in Net Present Value terms over 20 years.

- Each of the states and territories has already implemented substantial regulatory regimes with which providers must comply. Moving to an alternative national regime allows for the potential elimination and consolidation of existing regulation, which in turn provides a clear opportunity to offset some or the entire regulatory burden that the Framework might create.
- In some cases there is scope to combine several elements of the options in order to deliver higher net benefits.

Key assumptions and methodology

The analysis is primarily based on:

- administrative data provided by jurisdictions and employer surveys;
- expert consensus on expected impacts of options, combined with analysis of the research literature.

Serious adverse incident data: Administrative data for 2014 calendar year or 2013-14 financial year from five jurisdictions (which ones is not specified) have been used to construct an assumed level of serious adverse incidents.⁶⁰ The adverse events included for this purpose are:

- assault;
- sexual assault;
- neglect - defined as failure to attend to a participants basic needs (food, warmth, cleanliness and health) over a sustained period to an extent that significantly endangers the participant's physical or mental health;
- Theft;
- unsatisfactory service - based on complaints rates.

The cost of serious adverse incidents is based on Institute of Criminology cost of crime figures, summarised in the table below.

SAE type	Assumed cost	Redress
Assault	\$5,265	\$7,200
Sexual assault	\$12,450	\$15,000
Neglect	\$5,265	\$13,200
Theft	\$2,553	\$7,200
Unsatisfactory service	\$400	\$720

Base case (Option 1): In each case the effect of the options is compared to a 'base case' (ie do nothing) of the regulation that currently applies. That is, the base case assumes that current state and territory regimes will continue to operate. As each jurisdiction currently has different regimes in place, this means that there are in effect eight different base cases. In order to produce the model it has been assumed that:

- the combination of formal and informal regulation across jurisdictions has similar impacts overall; and
- variation across jurisdictions enables an assessment of an assumed 'unregulated state'.

⁶⁰ Data provided is set out on page 23 of the Report

The theoretical unregulated state was developed by iteratively increasing the rate of serious adverse incidents to generate a net present value of zero, on the assumption that governments would not have regulated unless the measure created a positive NPV.

Costs: The key costs included in the modelling are administration costs (for government), extrapolated from data provided by jurisdictions, and compliance costs (costs for suppliers of undertaking training, putting in place systems, providing data etc).

Benefits: For each option, the expected impact on each type of serious adverse incidents included in the data has been estimated. The modelling does not generally capture lesser harms or indirect benefits of options.

Other key assumptions: For the purposes of the analysis it has been assumed that the full impact of the options is realised in year 0 (2018), and that the number of participants is 460,000. The assumption is that the combination of formal and informal regulation currently employed means that current regulatory regimes are sufficiently similar to allow analysis using all jurisdictions data. The dollar benefits and costs of each option over 20 years are discounted to take account of the time in which they occur (ie benefits down the track are worth less than those that occur in early years) and converted into a one year current dollar value. The discount rate used is 7%.

Sensitivity analysis

In each case the robustness of the results have been tested by varying the key assumptions, namely:

- instead of a discount rate of 7%, use 3% and 10%
- vary the assumed rate of change in adverse incidents by plus and minus 5%
- market flux - variation in number of providers
- construct a best case scenario based on a 20% higher level of benefits and a 20% lower level of costs
- construct a worst case scenario based on 10% lower benefits and 20% higher costs.

Summary of results

In each case NOUS Group estimates have been revised in order to take up suggestions on combinations of options that would maximise Net Present Value, reflect stakeholder suggestions in the consultation process, and the policy development process. The revised estimates should be regarded as indicative only.

Complaints

It has not proved possible to adequately quantify the cost and benefits of the complaints function since many of the effects (including deterrence, and productivity gains) are likely to be indirect. The final design of the measures has been significantly revised in order to ensure cost effectiveness.

Worker screening

Note: Results for options 4&5 have been revised significantly from NOUS Group estimates in the light of further analysis and changes in the design in the options. In particular, Option 4 includes ongoing monitoring.

Option	Net present value to employers	Net present value to participants	Net present value to government	Overall impact
Option 1: Current regimes	\$1,692.9m	\$656.9m	\$1,094.8m	[\$3.44b]
Option 2 (Voluntary)	-\$159.8m	0	0	-\$159.8m
Option 3 (Mandated referee and police checks)	\$586.7m	\$270.4m	\$453m	+\$1.31b
Option 4 (WWVP checks)	\$2.269m	\$1.622.5m	\$2716.5m	+\$6.25b
Option 5 ⁶¹ (mandatory reporting & barring)	na	na	na	\$1.850

Registration and Code of Conduct (including serious incident reporting)

Note: In most cases the 'benefits' and 'costs' are notional changes only.

The analysis assumes that under option 1 suppliers 'voluntarily' undertake quality evaluation or assurance requirements, and under Options 4 and 5 businesses face additional costs to comply with registration requirements. This is a notional change only, as suppliers are currently required to meet these costs in order to obtain government funding under existing agreements.

⁶¹ This is a revised estimate. The original NOUS modelling assumed a higher figure, but subsequent work has found that it significantly underestimated compliance costs to employers, and significantly over-estimated the likely impacts. It should be noted though that the actual impacts of this option depend heavily on the effectiveness of the worker exclusion scheme adopted: complaints-based worker exclusion schemes (such as code of conduct schemes) are significantly less effective than a Working with Vulnerable People's check system which pro-actively vet potential workers because of the difficulty of detection of malfeasance and underreporting; schemes based on mandated reporting of misconduct and alleged crimes are likely to have stronger impacts, albeit still less than a Working With Vulnerable People check that includes both pre-employment screening and assessment of any subsequent misconduct.

In addition, it is assumed that where business compliance costs lead to a lack of service provision in thin markets, the government accrues a 'benefit' in terms of avoided costs from not having to pay for participants' care. In reality, however, under the NDIS in these cases the NDIA would be required to pay a higher price for services under direct contracting or other arrangements in order to ensure that participants could access the required services. The analysis assumed that 20% of providers would be required to undertake a quality evaluation or assurance.

Indicative costs and impacts per year

Option	Net present value to suppliers	Net present value to participants	Net present value to government ⁶²	Net present value
Option 1: Base case (Current regimes)				\$1.82b
Option 2: with Code of Conduct applying to unregistered suppliers	\$927m	\$324.9m	566.4mm	\$1.82b
Option 3: Additional conditions tailored to service type	\$139.9m	\$72m	\$66m	\$277.8m
Option 4: Independent quality evaluation for certain supplier types	\$308.7m	\$269m	\$233.6m	\$811.3m
Option 5: Also require certain suppliers to participate in a quality assurance system	\$981m	\$403.3m	\$844.4m	\$2228.7b

Source: NOUS Report, pp 114-115 (Note, Option 4 as now specified combines options 3&4 as recommended in report, plus Code of Conduct for unregistered suppliers, from self-managing options), pg 147-15

Appendix 3: Regulatory Costings

Regulatory costings for the National Disability Insurance Scheme Quality and Safeguarding Framework are set out in the table below. It is estimated there will be a regulatory saving of \$23.185m per annum. This is largely derived from the Provider Registration and Code of Conduct (\$16.91m regulatory saving per annum), where the main regulatory saving identified is lower fees for service providers resulting from a streamlined national system where service providers will no longer be required to undergo multiple third-party verification processes. In addition to this, further savings are identified under the Worker Screening option (\$10.465m regulatory saving per annum) where the proposed working with vulnerable people checks for disability workers will allow for a nationally consistent system of worker screening that will shift the responsibility for undertaking these checks onto worker screening units as opposed to requiring service providers to obtain and assess police checks themselves. This option would also provide for improved portability of clearances between jurisdictions and hence lead to regulatory savings in contrast to existing arrangements where service providers have to apply for separate clearances in each jurisdiction.

These regulatory savings are partially offset by some additional regulatory costs for Complaints and Serious Incident Management (\$1.28m regulatory cost per annum) resulting from more stringent serious incident reporting requirements, as well as for Restrictive Practices (\$2.91m regulatory cost per annum) resulting from a requirement for all support providers to report each use of restrictive practices (this currently happens only in Victoria and Queensland).

NATIONAL DISABILITY INSURANCE SCHEME (NDIS) QUALITY AND SAFEGUARDING RIS: FINAL REGULATORY COSTINGS' IMPACT ON BUSINESS

* denotes preferred option

Annualised Regulatory Cost/Save (\$m) (when compared to current/ 'base case' arrangements)

A: Complaints and Serious Incident Management

Business

A1: Status Quo	\$10
A2: Zero regulatory requirements	\$0
A3: Providers to meet prescribed standards for internal and external complaints handling requirements:	\$12.63
A4: Establishment of a Disability Complaints Office:	\$11.09

Total regulatory impact of preferred approach: \$1.28m regulatory COST per annum

B: Worker Screening

Business

B1: Maintain current requirements	\$12
B2: Risk management by employers:	\$0.00
B3: Requirement for Police and Record Checks	\$17.62
B4: Working with Vulnerable People Clearances	\$1.85
B5: Creation of a 'Barred Persons' List	\$4

Total regulatory impact of preferred approach: \$10.465m regulatory SAVE per annum

C: Provider Registration and Code of Conduct

Business

C1: Implementation of a Basic Registration Scheme	\$45.89
C2: Voluntary Certification	\$0.00
C3: Additional Registration Conditions tailored to service type	\$1.71
C4: Mandated independent quality evaluation requirements for certain provider types	\$16.98
C5: Requirement for certain providers to participate in a Quality Assurance system	\$28.98

Total regulatory impact of preferred approach: \$16.91m regulatory SAVE per annum

D: Reduction and Elimination of Restrictive Practices (authorisation model)

Business

D1: Maintain current arrangements	\$2.39
D2: Registration requirements only	\$0.00
D3: Prohibit use of restrictive practices outside of approved Behavioural Support Plans	\$5

Total regulatory impact of preferred approach: \$2.91m regulatory COST per annum

TOTAL REGULATORY SAVE ACROSS PACKAGE: \$23.185m