



**Psychiatric Disability Services**  
of Victoria (VICSERV)

Level 2, 22 Horne Street  
Elsternwick Victoria 3185  
T 03 9519 7000 F 03 9519 7022  
[www.vicserv.org.au](http://www.vicserv.org.au)

Submission on

## **NDIA: Proposal for a National Disability Insurance Scheme Quality and Safeguarding Framework**

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### **Contact details:**

Kim Koop, Chief Executive Officer  
Psychiatric Disability Services of Victoria (VICSERV)  
Level 2, 22 Horne Street, Elsternwick Victoria 3185, Australia  
T 03 9519 7000 F 03 9519 7022  
W [www.vicserv.org.au](http://www.vicserv.org.au) E [k.koop@vicserv.org.au](mailto:k.koop@vicserv.org.au)

## **Contents**

Psychiatric Disability Services of Victoria (VICSERV) .....	2
Safeguarding the rights of people living with mental illness.....	2
Key messages and recommendations .....	4
1. Developmental Domain and Natural Safeguards .....	4
Community capacity and education .....	4
Advocacy.....	4
Supports for Decision Making.....	4
Case Management .....	5
2. NDIA provider registration requirements.....	6
Highest regulation required .....	6
National Standards for Mental Health Services to inform national framework .....	6
3. Vetting Disability Staff .....	7
Minimum staff qualifications required.....	7
Maintain strong safeguards .....	7
Post-employment strategies .....	7
4. Complaints handling systems.....	8
Independent oversight by a statutory authority is required .....	8
Community visitors should play a role in oversight.....	8
5. Safeguards for self-managing consumers .....	8
Organisations must all be registered with the NDIA .....	8
6. Eliminating restrictive practices .....	9
National Standards for Mental Health Services should inform use of restrictive practices.....	9
Conclusion .....	9

## Psychiatric Disability Services of Victoria (VICSERV)

Psychiatric Disability Services Victoria (VICSERV) welcomes the opportunity to provide a submission on the National Disability Insurance Scheme (NDIS) Quality and Safeguarding Framework.

VICSERV is a membership-based organisation and the peak body representing community managed mental health services in Victoria. These services include housing support, home-based outreach, psychosocial and pre-vocational day programs, residential rehabilitation, mutual support and self-help, respite care and Prevention and Recovery Care (PARC) services. Many of our members also provide Commonwealth funded programs, including Personal Helpers and Mentors (PHAMs), Day to Day Living, and Family Support and Carer Respite.

VICSERV's submission focuses on the issues that impact people living with mental illness and psychosocial disability.

### Safeguarding the rights of people living with mental illness

VICSERV welcomes the principles that are guiding the development of the Quality and Safeguarding framework for the NDIS, in particular:

- Choice and control
- Risk-based and person-centred approach
- Presumption of capacity

However, the principles outlined place significant responsibility, and with it risk, on to the individual, without giving appropriate recognition of the difficulties for many people with psycho-social disability and those with cognitive impairment, in making decisions and managing their support arrangements.

People living with mental illness constitute a particularly vulnerable cohort. They experience higher mortality rates than the general population and poorer access to health, housing, education, employment and social inclusion. They also experience higher rates of physical and sexual victimisation than the general population. The Productivity Commission noted that the vulnerability of some people with a disability requires government to play a role in promoting safe high-quality disability support services.<sup>1</sup>

Furthermore, the effects of stigma and discrimination for having a mental illness restricts their exercise of political and civil rights, largely due to the false assumption that those affected by mental health cannot manage affairs and make decisions responsibly.

**In addition to the principles that support the rights of people with disability, the quality and safeguarding framework should contain a key guiding principle that people with disability should be protected from violence, abuse, neglect and exploitation.**

There are real concerns that people with psychosocial disability and cognitive impairment are at greater risk to financial, and other forms of abuse in an increasingly market-based service environment, without appropriate mechanisms for accountability and scrutiny.

**As such, VICSERV believes that a quality NDIS management system must be guided by principles of protection for the most vulnerable while ensuring the rights of people with disabilities are upheld.**

VICSERV also maintains that it is important to recognise the need to maintain independent benchmarks in quality service provision and risk management in the current and future NDIS environments.

VICSERV notes that the provisions in the bilateral agreements between the Commonwealth Government and the state and territory governments provided assurance that the quality and safeguards within the NDIS would not reduce the safeguards currently available to consumers.

For example, the bilateral agreement between the Commonwealth Government and the Victorian Government stated:

The existing Victorian quality assurance and safeguards framework...will apply in the Barwon launch site as it applies to the relevant new and existing funded client support programs for the launch subject to further development of and transition to a nationally consistent risk-based

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<sup>1</sup> Productivity Commission, *Inquiry into Disability Care and Support* (2011) Report No 54, Vol 1

quality assurance approach in the longer term that does not diminish Victoria's existing quality assurance system and safeguards.<sup>2</sup>

Victoria has one of the most robust systems of safeguards around working with vulnerable consumers living with psychosocial or other disability, and it is paramount that this high standard is maintained and incorporated into the national framework.

In addition to these overarching comments, VICSERV's submission to the Proposal for a NDIS Quality and Safeguarding Framework will address the following aspects of the proposed framework:

1. Developmental domain and natural safeguards
2. NDIA provider registration requirements
3. Vetting NDIS employees
4. Complaints handling systems
5. Safeguards for self-managing consumers
6. Eliminating restrictive practices

VICSERV contends that effective risk management and consumer protection can only be achieved through:

- maintaining standards of the highest regulation of service providers and staff;
- investing in community capacity-building and education;
- growing a strong independent advocacy sector;
- ensuring independent oversight of the NDIA by a statutory authority; and
- ensuring that human rights principles and the Australian Government's National Standards for Mental Health Services (2010) are embedded into standards and practice for mental health.

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<sup>2</sup> *Schedule B: Bilateral Agreement for NDIS Launch between the Commonwealth and Victoria (2012)* [15], Appendix C, 11-13.

## Key messages and recommendations

### I. Developmental Domain and Natural Safeguards

There is an assumption in the focus on developmental safeguards that people with a disability have a “natural” support system that can be developed to support them in their navigation of the system and in making choices. For many people, particularly those living with mental illness, those who are homeless and have complex needs, this is not the case. Many experience isolation and do not have support networks to assist them.

#### *Community capacity and education*

VICSERV's engagement with consumers, carers and providers in the Barwon launch site, has shown that, currently, consumers have a poor understanding of how to navigate the NDIS system.

There needs to be greater community capacity building and education about accessing the NDIS and developing plans and available providers and their services, with information that is clear, up-to-date and user-friendly.

The system must be capable of providing different information relevant to the different stages of a consumer's disability and transition points in their NDIS experience. In particular, education initiatives must target CALD, illiterate and the many consumers who do not have access to internet resources and information.

Utilising mainstream services can be an effective way of ensuring information is disseminated. For example, the NDIA should ensure that organisations and natural access points such as GPs and other community based organisations are equipped to deliver NDIS information and training sessions in community languages.

#### *Advocacy*

VICSERV's work in the Barwon launch site has shown the importance of access to support and advocacy in NDIS access and planning processes.

The role of independent advocates is essential in ensuring genuine consumer participation and understanding in the NDIS process. It is also important to assist the many people who do not have supports through family and friends, and may benefit from the involvement of an advocate. The key to effective capacity-building is a strong and independent advocacy sector. This could include involving mentoring and peer support programs.

VICSERV supports the Productivity Commission's recommendation around advocacy that the Commonwealth “should continue to provide funding for general advocacy by non-government organisations, with no involvement by the National Disability Insurance Agency in this funding role. State and territory funding of disability advocacy groups should continue.”<sup>3</sup>

#### *Supports for Decision Making*

There is little discussion in the consultation about the importance of support for decision making, While there is a focus on the building the capacity of the individual to make decisions about their supports and goal, this is largely concerned with the planning process and the role of the planner, who will ‘facilitate supported decision-making in the planning process and gain an understanding of the needs of families and carers in supporting the participant.’<sup>4</sup> We consider the capacity of planners to adequately facilitate supported decision making, without appropriate training and resourcing, as a potential concern.

Provisions for supported and substitute decision making are essential legal safeguards for people with impaired decision making ability, but the consultation paper does not discuss how these provisions will interact, or be incorporated into the NDIS framework.

The Australian Guardianship and Administrative Council (AGAC) have raised concerns about the complexity of the decision making environment created by the addition of ‘plan nominees’ who have substitute decision-making powers under the NDIS Act. They have found that in the operation of the NDIS trial sites the role of, and need for, substitute decision-making in relation to NDIS decisions is quite

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<sup>3</sup> Ibid, rec [10.4]

<sup>4</sup> *Proposal for a National Disability Insurance Scheme Quality and Safeguarding framework consultation paper* (2015) p 97

unclear. In the AGAC submission to the Australian Law Reform Commission (ALRC) inquiry into *Equality, Capacity and Disability in Commonwealth Laws* they noted:

Where the NDIA is managing the plan on a participant's behalf, and the person has no capacity to provide a view and no family or friends to advocate on his or her behalf, the decisions being made by the NDIA are in the nature of substitute decisions with no independent monitoring or scrutiny.<sup>5</sup>

VICSERV draws attention to the ALRC's recommendations in relation to decision-making arrangements under the NDIS:

The ALRC recommends that Commonwealth decision-making model be applied to the NDIS, which already incorporated elements of supported decision-making.

The ALRC also recommends that the Chief Executive Officer (CEO) of the NDIA should retain the power to appoint a 'representative' for a participant as a measure of last resort. There are circumstances where the exercise of this power is necessary – in the absence of a Commonwealth guardianship tribunal or equivalent body – to ensure that people with a disability are properly supported in relation to the NDIS

There should be presumption that an existing state or territory appointed decision-maker with comparable powers and responsibilities should be appointed as an NDIS representative. Amendments to the legislation governing state and territory decision-makers may be necessary to facilitate this.

In the light of the shift towards a supported decision-making model, the ALRC also recommends that the Australian Government provide guidance and training in relation to decision-making and the NDIS.<sup>6</sup>

The Victorian Office of the Public Advocate has produced a discussion paper – *Guardianship and the National Disability Insurance Scheme*<sup>7</sup> which discusses the interaction between state appointments of substitute decision makers (guardians) and Commonwealth appointments of plan nominees. This paper considers the need to examine less restrictive alternatives to resolving matters than by appointing guardians. It also proposes that usage of the NDIS nominee provisions needs to be closely monitored and evaluated.

### *Case Management*

VICSERV is concerned that there is no model for case management built into the NDIS. Vulnerable consumers require more than a mere broker around their care, they require a case manager who will work directly with them, advocate for their interests and ensure they are receiving quality and effective services.

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<sup>5</sup> Australian Guardianship and Administrative Council, *Submission to Australian Law Reform Commission Inquiry Equality, Capacity and Disability in Commonwealth Laws: Discussion Paper 81* (2014) p 6

<sup>6</sup> Australian Law Reform Commission *Equality, Capacity, and Disability in Commonwealth Laws, Final Report* (2014), pp129-130

<sup>7</sup> Office of the Public Advocate (Victoria) *Guardianship and the National Disability Insurance Scheme: Discussion Paper* (2014) available at <http://www.publicadvocate.vic.gov.au/research/132/>

## Recommendations

1. In addition to the principles that support the rights of people with disability, the quality and safeguarding framework should contain a key guiding principle that people with disability should be protected from violence, abuse, neglect and exploitation.
2. Substitute decision making and supported decision making need to be viewed as key National Disability Insurance Scheme (NDIS) safeguarding mechanisms for people with significant cognitive impairments or psycho-social disability.
3. Clarity needs to be provided about the various overlapping powers and different appointment processes for substitute decision makers under federal, state and territory laws, who currently include NDIS nominees, guardians, administrators (financial managers), and representatives appointed under enduring powers of attorney.
4. The Commonwealth Government should implement Recommendations 5–1 to 5–5 contained in the Australian Law Reform Commission's *Equality, Capacity and Disability in Commonwealth Laws Final Report*, which specifically relate to the NDIS.
5. Substitute decision making, in the context of NDIS-related decisions, should be restricted to situations of absolute necessity, and supported decision-making should be promoted and utilised wherever possible.
6. Engage mainstream services to deliver information and community education about the NDIS offering, ensuring that inform and training is provided in community languages.
7. Resource and grow the independent advocacy sector, with dedicated NDIS advocacy programs.
8. Build a dedicated case management role into the NDIS.

## 2. NDIA provider registration requirements

### *Highest regulation required*

Protection of vulnerable groups needs to be a guiding principle of the NDIS Quality and Safeguarding Framework. With this in mind, the highest regulation is required to ensure vulnerable groups remain safe. Victoria currently has one of the highest levels of regulation around working with vulnerable groups, yet there are still cases of abuse reported. Only a robust approach to regulation can effectively manage risk and protect people within the framework.

All providers whether individuals, organisations or private providers must be registered and accredited by the NDIA at minimum and an independent accreditor to ensure that base standards of safety and quality are monitored and maintained. This enables consumers to have a level of confidence as they choose providers to undertake their services.

Therefore, VICSERV stresses the importance of maintaining at a minimum the current Victorian standards of protection and regulation, with a view to building upon them.

### *National Standards for Mental Health Services to inform national framework*

VICSERV supports establishing a consistent national registration framework, as currently service providers have multiple accreditation and registration requirements. Standards for a national registration framework must take into account the National Standards for Mental Health Services, to ensure that mental health is covered adequately.

**Preferred Option:**

**Option 4:** Mandated participation in an external quality assurance system for certain providers of supports.

**Recommendations:**

9. Ensure that the quality and safeguards within the NDIS would not reduce the safeguards currently available to consumers, by building upon, and incorporating into the national framework, the high regulatory standards applied to disability service providers currently in place in Victoria, and other jurisdictions.

10. Develop a consistent national registration framework, informed by the National Standards for Mental Health Services.

### 3. Vetting Disability Staff

#### *Minimum staff qualifications required*

A necessary tool in risk-prevention is to employ staff who have a proven fundamental baseline of skills. NDIA should require providers to employ staff who meet minimum qualification and experience standards.

For example, mental health workers who have completed a Certificate IV in Mental Health already have knowledge and skills around legal and ethical obligations to consumers, assessing risk of suicide and responding to consumer complex needs. Therefore, a qualification is a primary signal that the worker is safe to work with consumers.

This may also prevent inexperienced providers, who offer cheap services through appealing marketing, from placing consumers at risk of harm due to their lack of professional expertise.

#### *Maintain strong safeguards*

Recruitment staff must set high standards for a quality system that is governed by principles of natural justice.

Reference and police checks are fundamental safeguards which must be required as a minimum for staff employment. It is prudent to have other additional safeguards as well, including a requirement for clearance to work with vulnerable people and a barred persons list. Both a clearance system and an exclusion scheme must be centralised, to avoid discrepancies in standards across states.

#### *Post-employment strategies*

Vetting of staff should not be limited to recruitment, but should continue after employment commences. Induction processes are needed that introduce new employees to a workplace culture of zero tolerance for abuse and educate them about what constitutes unsafe practices. There should also be continued training for staff to refresh and maintain their understanding of responsible and safe practice.

These ongoing practices could be required of services through NDIA guidelines and Codes of Conduct around continued risk prevention and management in the workplace.

**Preferred Option:**

**Options 3 & 4:**

- Requirement for referee, police and 'working with vulnerable people' checks.
- Create a barred persons list.

**Recommendations:**

11. Introduce minimum professional qualification standards, such as a requirement to hold a Certificate IV in Mental Health for working with consumers affected by mental illness.

12. Maintain a strong level of recruitment safeguards that are managed nationally and uphold the principles of natural justice.

13. Develop guidelines for services around continued risk-prevention HR practices in the workplace.

#### 4. Complaints handling systems

*Independent oversight by a statutory authority is required*

VICSERV recognises the importance of a complaints process that is independent, informed by human rights and easy to use. In the interests of fairness and appearance of justice, any complaints body must be external to the NDIA and maintain its independence.

Current state oversight bodies – such as the Office of the Public Advocate, the Disability Services Commissioner and the Mental Health Complaints Commissioner – are effective and important elements of a safeguarding framework. As such, these bodies and their powers should be replicated in the new NDIS system.

The complaints system should be two-fold: firstly it should be able to field complaints against a service provider, and secondly it should handle complaints against the NDIA. The system must be capable of addressing market inefficiencies, such as the risk of inequity for rural consumers who may be forced to pay a higher premium due to low market competition in regional areas.

*Community visitors should play a role in oversight*

Community visitor schemes are valuable and should be continued under the NDIS, but must be properly resourced. Their role should be to make enquiries, assess risk and follow up with complaints.

**Preferred Option:**

**Option 3b:** Disability complaints office.

**Recommendations:**

**14.** The role of a national Disability Services Complaints Commissioner should be established whose jurisdiction covers complaints about NDIS-funded services. The office should be independent of the National Disability Insurance Agency and could be modelled on existing state and territory disability complaints commissioners and their equivalents. Functions should include:

- a. resolving complaints
- b. collecting data about complaints and reporting publicly
- c. identifying and reporting on systemic abuse, neglect and exploitation
- d. raising public awareness about the rights of persons with disability
- e. educating service providers about the benefits of effective complaints mechanisms.

**15.** In addition, an independent statutory authority should be empowered to conduct investigations where there are allegations or concerns about people with disability being abused, neglected or exploited. This function could sit with the proposed national Disability Services Complaints Commissioner, or with state and territory-based statutory authorities.

**16.** A community visitor scheme should be resourced and utilised to investigate and escalate complaints.

#### 5. Safeguards for self-managing consumers

*Organisations must all be registered with the NDIA*

Individuals should not be responsible for risk management, regardless of whether they choose to self-manage their plans; there is a duty of care upon the NDIA to ensure that vulnerable consumers are provided the utmost protection. As such, there should be a standardised registration process through the NDIA, to ensure consistent quality of care and reduce the risk of opportunistic predators.

**Preferred Option:**

**Option 3b:** Self-managing participants must be required to choose from universally registered providers.

## 6. Eliminating restrictive practices

### *National Standards for Mental Health Services should inform use of restrictive practices*

The current Victorian model should be upheld, where an authorised program officer is responsible for authorising the use of restrictive practices for any particular case, guided by the principles of the National Standards for Mental Health Services

VICSERV would also support the introduction of an independent inter-disciplinary panel to authorise use of restraint, informed by the principles of the National Standards for Mental Health Services.

**Preferred Option:**

**Option 3:** Providers would be authorised to make decisions under specific conditions.

**Recommendations:**

17. National Standards for Mental Health Services must inform any decision to use restrictive practices.

## Conclusion

The guiding principle for a quality and safeguarding framework must be protection for the most vulnerable. With protection at the forefront of the framework, it follows that effective risk management can only be achieved through maintaining the highest regulatory standards that are overseen independently and that are bolstered by community education and advocacy.

Consumers should not be subject to lower quality and safeguards than is currently provided.

In this manner, people living with psychosocial and/or other disabilities may be afforded the protection they require and be able to participate fully in the NDIS safely.