

Consumer policy response to the NDIS Review, “What we have heard” report.

This submission provides consumer policy considerations and recommendations in response to the paper, “What we have heard”, published by the NDIS Review on 30 June 2023 (the **NDIS Review Paper**). It focuses on questions relating market design, consumer protection, and safeguarding. It has been drafted by Gerard Brody¹ with input from disability representative organisations, including DANA.²

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KEY CONSUMER POLICY RECOMMENDATIONS

1. Establish and resource an independent consumer organisation to provide a consumer voice in relation to NDIS policy, particularly the technical aspects of NDIS market regulation.
2. Establish an Ombudsman to resolve NDIS complaints, separate from the market regulator.
3. Require the regulator to have a proactive regulatory posture that sends strong signals to the marketplace about the importance of compliance with good standards. It should be resourced sufficiently and maintain a simple register of all providers.
4. Establish and resource professional and independent intermediaries to support market navigation. These intermediaries need to be skilled, knowledgeable, and support participants to make effective choices and manage service providers (including contracts, payments etc).
5. Establish minimum standards for, or standard-form, contracts and/or service agreements for NDIS services. Standardisation should ensure terms are fair and balanced, and provide for clear rights for participants.

¹ Gerard Brody is chair of the Consumers Federation of Australia, former CEO of the Consumer Action Law Centre, and has worked in consumer advocacy and policy for over twenty years.

² Disability Advocacy Network Australia: <https://www.dana.org.au/>.

Market design

The role of “choice” in markets.

The *National Disability Insurance Scheme Act 2013* (Cth) (the Act) incorporates several objectives relevant to market design and safeguarding, including to:

- support the independence and social and economic participation of people with a disability;³
- promote the provision of high quality and innovative supports that enable people with disability to maximise independent lifestyles and full inclusion in the community⁴; and
- protect and prevent people with disability from experiencing harm arising from poor quality and unsafe support or services.⁵

The Act also seeks to enable people with disability to exercise choice and control in pursuit of their goals and planning and delivery of their supports.⁶

Effective choice is vital for any market, but it is not a market outcome in and of itself. Historically, there has been a tendency in consumer policy to consider that good market outcomes can be achieved by creating more ‘choice’. This overlooks what market choice seeks to deliver. Fundamentally, for people living with disabilities and their families, the goal of ‘choice and control’ should be about supporting independence and social and economic participation, through the provision of safe, high-quality, and innovative supports.

In the NDIS, the provision of safe, high-quality, and innovative supports is through a ‘market’—the market is supposed to deliver the supports that people with disability want and need. However, there are a range of circumstances where market dynamics are such that contestability between suppliers (or ‘choice’) is not capable of improving outcomes for service users. This is true of the NDIS.

First, service markets commonly involve information asymmetries. For example, it can be difficult to assess the quality of a service that will be delivered over a long-term. Even if the consumer perceives an ability to gain improved outcomes through a different service provider, there can be difficulties in switching due to long-term contracts, exit fees or other sunk costs. Information asymmetries can also affect disability products (as distinct from services), where consumers may not have the necessary expertise or means to fully evaluate the quality or efficacy of different disability supports.

Second, behavioural biases come into play; consumer choices can depend on a range of cognitive, social, and emotional factors. For example, people tend to stick with the ‘default option’ even when it is not the best option, or they may face administrative barriers to leaving providers. Staying with the same provider will be a rational response for many people including people with a disability, even if there are higher quality services elsewhere. Given disability services are relationship-based, and these relationships may take quite some time to become established, switching is by no means a simple decision.

Third, in competitive marketplaces, there is a tendency for firms to cherry-pick lower-risk or more profitable customers. Unfortunately, competition on its own may not deliver equitable market access for all and, in fact, can work in the opposite direction.⁷ Where services are essential—like NDIS

³ Section 1(c), *National Disability Insurance Scheme Act 2013* (Cth)

⁴ Section 1(g), *National Disability Insurance Scheme Act 2013* (Cth)

⁵ Section 1 (ga), *National Disability Insurance Scheme Act 2013* (Cth)

⁶ Section 1 (e), *National Disability Insurance Scheme Act 2013* (Cth).

⁷ For example, service providers can target lucrative or densely populated areas, neglecting underserved or rural communities.

supports to those who need them—policymakers and regulators need to ensure there is both access to supports and that all benefit from a decent standard of service provision.

A related problem is that dishonest traders can target people perceived as ‘profitable’ because they have access to money (i.e., NDIS funds) or are particularly vulnerable. Policymakers need to ensure that the NDIS market does not create a ‘honeypot’ which attracts predatory traders. Anecdotal evidence from advocacy organisations suggests this is occurring already, though it is difficult to determine the prevalence.

Given these factors, there is an economic, moral and policy case for far more robust regulatory arrangements that promote safe, high-quality, and innovative supports, and to not rely solely on consumer choice to deliver good market outcomes.

Information alone unlikely to help.

The NDIS Review Paper asks questions about how to make it easier to navigate the marketplace, including to make informed choices, manage funding and pay providers. While simple and useful information is essential, it is unlikely that more or different information will make these tasks easier on its own.

The ability to make informed choices requires a high level of agency, capability, time, among other considerations. The 2016 Competition Policy Review noted ‘not everyone is a confident, engaged and capable consumer’.⁸ Importantly, informing or education consumers is not always going to deliver a level of capability that enables effective navigation of market. This is because an important factor influencing whether someone can make an informed choice is the characteristics of the market, product, or transaction itself. As described above, there are a range of market factors that make choice difficult.

Even where consumers are not vulnerable, information (consumer guides, mandated disclosure etc) does not necessarily drive ‘good’ decisions and effective competition. A report from the Australian Securities and Investments Commission⁹, focusing on the real-world context in which disclosure operates, has found that information and warnings can be less effective than expected, or even ineffective, in influencing consumer behaviour. In some instances, information can backfire, contributing to consumer harm. The report finds:

- disclosure does not solve for complexity—contextual and emotional dimensions of decision-making, both at the point of purchase and over time, mean that people can take less notice of information than may be expected.
- disclosure must compete for consumer attention—information from regulators or mandated to be provided by providers competes with a range of other information and advertising that drives decision-making.
- one size does not fit all—the effects of disclosure are different from person to person and situation to situation.
- disclosure can backfire—for example, disclosure that a provider is conflicted can increase trust because a view that the provider is being honest, rather than driving circumspection as may be intended.

⁸ Competition Policy Review Final Report, March 2015, <https://treasury.gov.au/publication/p2015-cpr-final-report>

⁹ ASIC, Disclosure: Why it shouldn’t be the default, October 2019: <https://asic.gov.au/regulatory-resources/find-a-document/reports/rep-632-disclosure-why-it-shouldn-t-be-the-default/>

While simple and useful information will be important, it is not sufficient on its own. A particular focus should also be upon the support participants need to make decisions and undertake key tasks (e.g., through mechanisms including supported decision-making approaches and intermediaries) and a robust safeguarding framework that ensures products and services are safe, high-quality, and fair, before they reach the market.

Professional intermediaries with clear duties.

In complex markets, it is common to promote the role of intermediaries who play a role in navigating and interpreting information to assist users to make quality assessments and choices. In the NDIS, there appear to be several different intermediaries whose roles and functions interact. These include:

- local area coordinators—community services funded by the NDIA to help people plan, organise and access disability services and supports;
- support coordinators—funded through NDIS plans, support coordinators broker supports and services, monitor plan budgets, and build capacity and capability of participants to navigate the NDIS and make decisions;
- plan managers—funded NDIS-services which help participants manage plan budgets, invoicing and financial reporting;
- NDIS planners—who among other things help some participants link with support coordinators; and
- plan nominees—persons appointed to act on a NDIS participant’s behalf and make decisions where they are unable to, commonly a family member.

There are also other roles such as community connectors, recovery coaches, as well as hospital and justice liaison officers.

There is a level of confusion caused by the various intermediaries and overlap in their roles and functions, particularly on issues like managing plan budgets and monitoring outcomes of supports. This can be exacerbated where intermediaries are funded NDIS supports in and of themselves; such service providers rely on service agreements which may limit or only vaguely describe the level of support.

There is a need to reconsider the role of intermediaries in human services markets such as the NDIS. In particular, an independent professional that is skilled, knowledgeable, focused on market navigation, support to make effective choices,¹⁰ and the management of service providers (including contracts, payments etc) is needed. As a professional, they should have a primary duty to act in the interest of people with disability, including upholding their will and preference—this is important in the context of services where there are power imbalances.

Existing intermediaries such as support coordinators and plan managers appear to have a range of duties, and currently these functions can be delivered through organisations providing other services to participants, which can lead to conflicts of interest. Rather than being incentivised to assist participants access and use services that work towards their independence, there may be an incentive to promote reliance and dependence on ongoing and less cost-effective services.

¹⁰ Professional intermediaries could make use of the NDIA supported-decision making policy: <https://www.ndis.gov.au/about-us/policies/supported-decision-making-policy>

Price regulation.

Given the limitations of choice as a market discipline, and other market factors, the NDIA regulates aspects of pricing of providers. The price control arrangements apply, however, only to supports purchased by agency-managed and plan-managed participants, and not self-managed participants.

The annual price review typically includes consultation, for example through a consultation paper. However, the consultation appears to occur primarily with industry interests. In the last price review, only 12 out of 304 submissions came from participants and their representatives.¹¹

In other markets, funded consumer voices or organisations participate in price setting processes. For example, the Australian Energy Regulator funds its Consumer Challenge panel to challenge the regulator's decision making when it comes to pricing and to ensure consumer views have been accounted for to the fullest extent.¹² Independent reviews of the challenge panel have demonstrated that these arrangements have made positive contributions to regulatory decisions, and in some cases made a substantial difference.¹³

More broadly, there are resourced consumer organisations across many essential services markets—Energy Consumers Australia, Australian Communications and Consumer Assistance Network, Super Consumers Australia are all resourced through market levies and represent consumers in the development and review of market regulation and outcomes.

A resourced and capable consumer voice is required to participate in the technical aspects of NDIS market regulation, to balance provider interests.

Safeguarding

Protecting and preventing people with disability from experiencing harm arising from poor quality and unsafe support or services is a key goal of the NDIS. However, the NDIS has not worked well enough to safeguard all participants.¹⁴

Safety and dignity are more important than 'choice and control'.

As described above, choice is not an end in and of itself. Rather, it is a means to which broader policy goals are sought. These include that people with disability have access to reasonable and necessary supports to ensure their independence and social and economic participation.

The policy dialogue around the NDIS regularly refers to the need to 'balance' safety with the exercise of choice and control. For example, the NDIS Review Paper notes 'it is challenging to balance ensuring participants an exercise choice and control, recognise the importance of dignity of risk, while also having the rights regulations in place to keep people safe'.¹⁵

'Dignity of risk' clearly requires informed choice, for example, through access to supported decision-making. However, as described above, there commonly isn't the market conditions for informed choice, particularly in the absence of professional support. Moreover, 'dignity of risk' does not mean

¹¹ See: <https://www.ndis.gov.au/providers/pricing-arrangements/making-pricing-decisions/pricing-review-archive>

¹² See: <https://www.aer.gov.au/about-us/stakeholder-engagement/consumer-challenge-panel>

¹³ See: <https://www.aer.gov.au/about-us/stakeholder-engagement/consumer-challenge-panel/independent-reviews>

¹⁴ NDIS Review Paper, page 24.

¹⁵ As above.

that participants should be bearing risk that can be reasonably borne elsewhere in the system, or that there aren't effective systems of redress where harm is incurred.

Given this, there does need to be a robust safeguarding system promoting minimum standards, robust complaints and redress systems, and active compliance and regulation. The design of safeguards needs to be based on the voice and experiences of people with disabilities and their families.

Minimum standards can promote choice and control.

In most essential services markets, there are regulated minimum standards of conduct for providers at both a principles and rules level, in addition to requirements of the Australian Consumer Law. Principles are useful to describe outcomes expected of providers, while detailed rules support certainty in understanding what is required for both providers and service users.

The NDIS safeguarding arrangements includes the NDIS Code of Conduct which regulates all providers of NDIS services (whether registered or not), while there are also NDIS practice standards that address quality of services. These are largely principles-based requirements, with little description about standards when it comes to consumer matters like marketing, contracts, and payment.

It is curious that the practice standard relating to 'Service Agreements with Participants' says that the outcome is 'each participant has a clear understanding of the supports they have chosen and how they will be provided' and that this is to be demonstrate by 'each participant [being] supported to understand their service agreement and conditions using the language, mode of communication and terms that the participant is most likely to understand'.¹⁶ While this sounds nice, it flies in the face of general consumer contracting, where it is understood that consumers do not read the fine print,¹⁷ and have no scope to negotiate.

It would be far more effective, and support participants' choice and control, should there be minimum standards or standard-form contracts and service agreements. This would ease the burden on participants when choosing providers, enabling them to focus on key aspects of the service provider (perception of quality, price, length of arrangement) rather than the fine print which commonly regulates requirements that are unforeseen, i.e., what happens where payments are not made or services are interrupted, additional fees or charges etc. This would improve participant ability to make choices in the market, knowing that the standard form agreement has been assessed for fairness. Standard form service agreements could cover the following key aspects:

- template description of services for key service types (including ensuring services are limited to what is funded in NDIS plans, removing risks around over-servicing)
- provider obligations
- participant rights and responsibilities
- service interruptions and cancellations
- costs and payments
- termination of agreements
- privacy and information security

¹⁶ NDIS Practice Standards and Quality Indicators, see <https://www.ndiscommission.gov.au/providers/registered-ndis-providers/provider-obligations-and-requirements/ndis-practice-standards-0>.

¹⁷ Research has shown that only 1 or 2 of every 1000 consumers read contractual agreements.

Standardisation will make it easier for participants to enforce their rights, and alleviate the administrative burden and system navigation challenges for people with disabilities and their families.

Registration of providers.

The NDIS does not require that all providers of NDIS supports be registered. While there are types of providers that do have to be registered, not all providers must be. Registration is with the NDIS Safeguards and Quality Commission, the agency that is also responsible for complaints handling, ensuring registered providers are compliant with relevant standards, and other key areas like behaviour support and worker screening.

It appears that ‘some unregistered providers are providing high quality and very innovative supports’.¹⁸ It is unclear, however, whether registration inhibits the development of innovation. Moreover, from a consumer protection perspective, there are strong benefits associated with mandatory registration. These include enabling effective market monitoring, enabling market bodies to communicate effectively with its provider population, facilitating higher industry standards and ability to sanction negligent and wilful behaviour through de-registration. These are important (but not sufficient) aspects to promote consumer protection.

It is widely reported that existing registration processes are too onerous. To address this, a tiered and staged approach to registration might be useful. For low-risk service providers, registration might be as simple as registering the service provider’s name and contact details.

Complaint systems.

As noted, the NDIS Safeguards and Quality Commission is responsible for resolving complaints about providers.

The NDIS Complaints Management and Resolution Rules¹⁹ requires the Commission to give assistance and undertake a resolution process. However, it may refuse to accept or close a complaint if it ‘is better dealt with by another body’ or ‘having regard to all the circumstances, further action in relation to the complaint issue is not appropriate or warranted’. This gives the Commission wide discretion not to resolve a complaint.

Unfortunately, there is limited transparency as to the reliance of the Commission on these provisions not to advance a complaint, and there is limited transparency about complaints generally (for example, there is no data about which providers complaints are made against, or the outcomes of complaints). It is understood that many consumer complaints are closed because it is considered it is more appropriately dealt with by a consumer affairs agency. This is despite these agencies generally not having a binding complaint resolution role.

People living with disabilities who have made complaints to the Commission have reported limited follow-up and a lack of transparency (e.g., just getting a phone call to say that the complaint has been resolved without further explanation; not even being sent a case number etc). It has also been reported that, in refusing to accept or in closing a complaint, the Commission sometimes says a complaint ‘is an issue of practice, not quality’. Given the Commission is also focused on its broader regulatory remit, it seems to be treating complaints as intelligence for its broader action rather than being focused on complaint resolution to the satisfaction of the complainant.

¹⁸ NDIS Review Paper, page 24.

¹⁹ NDIS Complaints Management and Resolution Rules <https://www.legislation.gov.au/Details/F2018L00634>

It is common in other markets for the responsibility for complaints resolution to be housed in a different agency to the agency responsible for setting standards and ensuring compliance with standards. Complaints handling and compliance activities are related but separate activities. Separating these functions may be advantageous for the following reasons:

- *Independence and impartiality:* By having a separate agency responsible for complaints handling, there is a greater likelihood of independence and impartiality in the process. This separation helps avoid conflicts of interest that may arise when the same agency or division is responsible for both investigating complaints and enforcing compliance. It allows for a fair and unbiased assessment of complaints without any potential influence or bias from the enforcement side.
- *Accessibility and trust:* A separate complaints handling agency can foster greater accessibility and build trust among stakeholders. Individuals or organisations making complaints may feel more comfortable coming forward if they believe their concerns will be handled independently and transparently. Separating the complaints process can enhance public confidence in the system and encourage broader engagement in reporting non-compliance or issues.
- *Focus on resolution:* A dedicated complaints handling agency can prioritise the resolution of complaints in a timely and effective manner. By having a distinct focus on addressing complainants' concerns, the agency can work towards finding resolutions, mediating disputes, or facilitating appropriate remedies. This emphasis on resolving complaints rather than solely enforcing penalties can contribute to more meaningful outcomes for affected parties.
- *Expertise and specialised knowledge:* Establishing a separate agency for complaints handling allows for the development of specialised expertise in managing complaint processes. Staff members can receive specific training and acquire the necessary skills to effectively investigate, analyse, and address complaints. This specialisation can result in more accessible, efficient, trauma informed and fair complaint handling procedures.
- *Transparency and accountability:* Separating complaints handling from compliance and enforcement functions contributes to greater transparency and accountability in the overall regulatory process. It enables clearer delineation of roles and responsibilities, allowing for better oversight and scrutiny. The independent complaints agency can report on complaint trends, outcomes, and systemic issues, which can inform policy improvements and enhance the accountability of all stakeholders involved.

In other markets, such as financial services, energy, or telecommunications, there is a separate complaint handling body, such as an Ombudsman.²⁰ A particular benefit of these offices is that they are generally funded by the industry and there is a relationship between the number of complaints and the amount a provider is charged. This creates an incentive for a provider to resolve a complaint before it is escalated to a higher office. The dedicated focus on complaints resolution also ensures a 'customer service' mindset, with mechanisms to ensure the complainant is kept up to date and kept abreast during the complaint investigation process.

²⁰ These offices meet the Benchmarks for Industry-based Customer Dispute Resolution, commonly required by legislation, see: <https://treasury.gov.au/publication/benchmarks-for-industry-based-customer-dispute-resolution>.

Resourced and active regulator.

The NDIS Quality and Safeguards Commission has a very large regulatory role, beyond complaints. It is responsible for more than 17,000 registered providers as well as an unknown number of other providers which are not registered.

It helpfully publishes a Regulatory Approach, which describes the range of levels and approaches through which it works. However, this does not specifically describe an enforcement policy (i.e., when or under what conditions it would use various levers) or does it identify compliance and enforcement priorities.²¹

Amid reports that the resources of the NDIS Commission are stretched,²² it must admit that all enforcement agencies have limited budgets and must ensure their resources are targeted. At the same time, they have duties to respond to breaches in standards in ways that are effective. It is my observation that in this environment, agencies can too easily shy away from more intensive action like litigation (and, where they don't undertake it regularly, may well have difficulty in undertaking action effectively). It is noted that in the last twelve months, the Commission's reporting only identifies one civil enforcement action, and limited other actions like registration revocation, or infringement notices.²³

It would be more effective if the NDIS Commission were transparent with when it would use its different regulatory tools, rather than use vague language such as 'when necessary'. Given its large regulatory population, it would also be more valuable to be regularly using its more interventionist tools to send a strong signal to the marketplace about the importance of compliance with good standards.

Recommendations.

1. Establish and resource an independent consumer organisation to provide a consumer voice in relation to NDIS policy, particularly the technical aspects of NDIS market regulation.
2. Establish an Ombudsman to resolve NDIS complaints, separate from the market regulator.
3. Require the regulator to have a proactive regulatory posture that sends strong signals to the marketplace about the importance of compliance with good standards. It should be resourced sufficiently, and maintain a simple register of all providers.
4. Establish and resource professional and independent intermediaries to support market navigation. These intermediaries need to be skilled, knowledgeable, and support participants to make effective choices and manage service providers (including contracts, payments etc).
5. Establish minimum standards for, or standard-form, contracts and/or service agreements for NDIS services. Standardisation should ensure terms are fair and balanced, and provide for clear rights for participants.

²¹ Clear enforcement policies and priorities, based on consultation, are community expectations of regulators, see Consumer Action, Regulator Watch, p 23-24, <https://consumeraction.org.au/report-regulator-watch/>

²² 'Overstretched NDIS regulator in crisis', The Saturday Paper, 10-16 June 2023, see <https://www.thesaturdaypaper.com.au/news/politics/2023/06/10/overstretched-ndis-regulator-crisis>

²³ NDIS Commission Activity Reports: <https://www.ndiscommission.gov.au/resources/reports-policies-and-frameworks/ndis-commission-activity-reports>