



**NDIS Quality
and Safeguards
Commission**

The Hon Kevin Andrews MP
Chair
Joint Standing Committee on the
National Disability Insurance Scheme
Parliament House
CANBERRA ACT 2601

Dear Mr Andrews

Thank you for your letter of 19 March 2021 in which you requested the NDIS Quality and Safeguards Commission (NDIS Commission) make a supplementary submission to the Committee's inquiry into the NDIS Commission, specifically in relation to people with disability detained under forensic orders.

I am pleased to enclose this submission for the Committee's consideration and I look forward to discussing these matters further at a future hearing, should Committee members have any questions.

Yours sincerely

Graeme Head AO
Commissioner

19 April 2021



NDIS Quality
and Safeguards
Commission

NDIS Quality and Safeguards Commission
Supplementary Submission

***People with disability detained under
forensic orders***

Joint Standing Committee on the
National Disability Insurance Scheme
Inquiry into the NDIS Quality and Safeguards Commission

Introduction

1. The NDIS Quality and Safeguards Commission (NDIS Commission) makes this submission in response to a written request by the Committee that it make a supplementary submission to this inquiry.
2. As requested by the Committee, this submission addresses the following matters:
 - The role of the NDIS Commission in relation to people with disability—including NDIS participants—detained under forensic orders, including whether the NDIS Commission is able to:
 - (a) monitor the conditions to which people detained under forensic orders are subject;
 - (b) investigate a complaint relating to the treatment of a person with disability detained under forensic orders;
 - (c) take action to address or mitigate concerns in relation to the treatment of a person with disability detained under forensic orders.
 - Complaints relating to people with disability—including NDIS participants—detained under forensic orders, including:
 - (a) whether people detained under forensic orders are able to make a complaint to the NDIS Commission—whether personally or via a third party such as an advocate;
 - (b) the number of complaints received by the NDIS Commission that relate to people with disability detained under forensic orders;
 - (c) key themes and issues raised in such complaints; and
 - (d) how the NDIS Commission deals with such complaints.
 - Any work that has been, is being or will be undertaken by the NDIS Commission relating to people with disability detained under forensic orders.
 - Any other matter relating to people with disability detained under forensic orders that the NDIS Commission considers relevant.
3. Before addressing the particular matters raised by the Committee this submission provides some relevant general observations.

General observations

4. The NDIS Commission and the office of Commissioner for the NDIS Commission were established by the *National Disability Insurance Scheme Act 2013* (Cth) (NDIS Act). They were established to implement a regulatory framework that aims to ensure the safety and quality of supports¹ provided to participants under the National Disability Insurance Scheme (NDIS). The NDIS Commission's primary submission in this inquiry (submission 42) includes information about the context in which it and the office of Commissioner were established and the Commission's regulatory approach. It also describes the Commissioner's substantial suite of functions and powers under the NDIS Act.
5. The Committee's request for this submission concerns people with disability who are 'detained under forensic orders'. The NDIS Commission has taken this to refer to the situation in which:
 - a person with disability is alleged to have committed a crime but has been deemed 'unfit to plead' or 'unfit to stand trial'; and
 - a court or other government authority has ordered that the person be detained in a prison, hospital, mental health care facility, prison hospital for mental health treatment or in a designated location in the community (depending on what is allowed in the jurisdiction concerned).
6. State and territory criminal justice systems are responsible for meeting the needs of people with disability detained under forensic orders, including their day-to-day care and support needs. They are also responsible for making reasonable adjustments for people with disability in accordance with the *Disability Discrimination Act 1992* (Cth) and relevant state or territory legislation. State and territory criminal justice systems are not NDIS providers and they do not provide NDIS supports or services to participants. The NDIS Commission may have a role in relation to issues arising in the interface between the provision of services by the criminal justice system and the provision of NDIS supports. But that role does not extend to overseeing or regulating forensic detention facilities or services, or monitoring the conditions of detention under forensic detention orders, even when a person detained under such an order is an NDIS participant.

Role of the NDIS Commission in relation to people with disability – including NDIS participants – detained under forensic orders

7. A person with disability who is detained under a forensic order can be an NDIS participant and therefore be receiving supports from NDIS providers. However, any NDIS supports that they receive while detained are likely to be affected by the supports that are or should be made available to them by the state or territory in which they are detained (as outlined in the Applied Principles and Tables of Support²).

¹ For ease of reference, this submission generally refers to NDIS supports rather than NDIS supports and services.

² www.coag.gov.au/sites/default/files/communique/NDIS-Principles-to-Determine-Responsibilities-NDIS-and-Other-Service.pdf

8. The NDIS Act expresses most of the NDIS Commission's functions and powers in such a way that they are exercisable only in relation to any one or a combination of the following: people with disability who are NDIS participants; the providers of NDIS supports to NDIS participants; the provision of NDIS supports to NDIS participants.
9. All NDIS providers (whether registered with the NDIS Commission or not) are obliged by the NDIS Act to comply with the requirements of the NDIS Code of Conduct³. The people they engage to provide supports to people with disability are also obliged to comply with the Code. A registered NDIS provider has additional obligations under their conditions of registration⁴. The NDIS Commission has a range of powers to address non-compliance with these obligations, as outlined in the NDIS Commission's primary submission. If the person is an NDIS participant receiving supports from an NDIS provider, the NDIS Commission has powers it can use to monitor the provider's compliance with its obligations as an NDIS provider in relation to the delivery of those supports and to encourage or enforce compliance with those obligations.
10. In summary, if a person with disability detained under a forensic order is an NDIS participant, the NDIS Commission's jurisdiction with respect to the provision of NDIS supports to that person is the same as if the person were not detained under a forensic order. If in providing the supports the NDIS provider breaches their obligations as an NDIS provider, the NDIS Commission's jurisdiction extends to taking necessary action to address the breach, including taking compliance or enforcement action under the NDIS Act. However, state and territory authorities administering criminal justice systems are not NDIS providers and they do not provide NDIS supports or services to participants.

Complaints relating to people with disability – including NDIS participants – detained under forensic orders

11. The NDIS Commission's complaints functions apply to complaints arising out of, or in connection with, the provision of supports to NDIS participants by NDIS providers⁵. Under the *National Disability Insurance Scheme (Complaints Management and Resolution) Rules 2018* (Cth) anyone, whether detained under a forensic order or not, can make a complaint to the NDIS Commission in relation to an issue arising out of, or in connection with, the provision of supports by an NDIS provider and have their complaint dealt with under those rules.
12. The NDIS Commission does not have jurisdiction to respond to complaints about forensic detention facilities or services and anticipates that many of the concerns of participants detained under forensic orders would be outside its jurisdiction, relating to the nature or conditions of participants' detention rather than to what are likely to be quite limited NDIS supports they might receive while in detention.

³ The NDIS Code of Conduct comprises the *National Disability Insurance Scheme (Code of Conduct) Rules 2018*.

⁴ See section 78F of the NDIS Act.

⁵ See section 181G of the NDIS Act.

13. However, the NDIS Commission's policy is to adopt a 'no wrong door' approach for all complaints. Under this approach, when it receives a complaint that is outside its jurisdiction or that it considers may be better dealt with by another body, the NDIS Commission's general practice is to discuss this with the complainant and offer to refer their complaint to a more appropriate complaints body or assist the complainant to take their complaint there. The NDIS Commission would apply this approach if it were to receive a complaint about the treatment of a person with disability detained under a forensic order where the complaint did not arise out of, or in connection with, the provision of NDIS supports to the person.
14. The NDIS Commission's operating system does not record data indicating directly whether a complaint is one that relates to a person with disability detained under a forensic order. However, the relevant branch of the NDIS Commission has conducted a search of the complaints data using relevant key words. The results of this search suggest that the NDIS Commission has received very few complaints in which circumstances of forensic detention have been mentioned.

Work undertaken by the NDIS Commission relating to people with disability detained under forensic orders

15. The NDIS Commission's primary submission provided an overview of its education and engagement activities as at the date of that submission. The focus of those activities continues to be NDIS participants, including those detained under forensic orders, and NDIS providers. Through its extensive education and communication activity, the NDIS Commission reaches people with disability in general as well as disability advocates. For example, the 2021 Disability Advocacy Forum will be an opportunity for disability advocates to meet with the NDIS Commission to discuss quality and safeguarding, to identify possible areas of improvement and reaffirm the ways in which advocates and the NDIS Commission can continue to work together to improve the quality and safety of NDIS supports and services for people with disability.

Any other matters relating to people with disability detained under forensic orders that the NDIS Commission considers relevant

16. The Committee's request that the NDIS Commission make a supplementary submission refers to regulation of the use of restrictive practices.
17. A registered NDIS provider's use of a regulated restrictive practice in relation to a participant, whether detained under a forensic order or not, is subject to conditions under the NDIS Act⁶. However, if the use is by someone other than a registered NDIS provider, the use is not subject to those conditions. This situation is not unique to the criminal justice system. For example, the use of restrictive practices in relation to participants within education or health systems by persons who are not registered NDIS providers is not regulated under the NDIS quality and safeguarding arrangements. Similarly, the use of restrictive practices in relation to participants by their parents or guardians is not regulated under the NDIS quality and safeguarding arrangements.

⁶ Some conditions are prescribed by the *National Disability Insurance Scheme (Restrictive Practices and Behaviour Support) Rules 2018* and others by the *National Disability Insurance Scheme (Incident Management and Reportable Incidents) Rules 2018*.

18. The NDIS Commission understands that the readership of the behaviour support practice alerts and guides that it publishes is not confined to NDIS providers but includes government authorities to whom they are relevant. The NDIS Commission's behaviour support teams also provide advice and guidance to relevant government authorities in relation to behaviour supports and reduction and elimination of the use of restrictive practices.