



To whom it may concern;

The First Peoples Disability Network Australia (FPDN) is a national organisation of and for Australia's First Peoples with disability, their families and communities. Our purpose is to promote respect for human rights, secure social justice, and empower First Peoples with disability to participate in Australian society on an equal basis with others.

The FPDN welcomes the opportunity to provide input to the Joint Standing Committee on the National Disability Insurance Scheme inquiry into the NDIS Quality and Safeguards Commission (the Commission). As the only peak representative organisation for First People with disability we have primarily focused this submission on specific issues relating to our community, whilst raising some overarching concerns about the structure and mandate of the Commission.

We are also in the process of preparing a submission to the current Committee inquiry into *General issues around the implementation and performance of the NDIS*. This submission will discuss in more detail the fundamental issues with governance, design and implementation of the National Disability Insurance Scheme (NDIS), which, regrettably, prevent First People with disability from accessing, and utilising the disability support to which they are entitled. Given that the NDIS remains largely inaccessible to First People with disability, so too will be the protection and oversight function the Commission is meant to afford.

### **The structure and mandate of the Commission**

Disability peak organisations, including FPDN, have consistently raised concerns that the Commission does not provide the independent, national statutory mechanism that has the robust power and legislated functions that are needed to protect, prevent and respond to the violence, abuse, neglect and exploitation of people with disability<sup>1</sup>.

The Commission only has the remit to regulate, and respond to complaints related to, registered NDIS service providers<sup>2</sup>. Unregistered providers are not required to adhere to all of the Commission requirements, and the Commission has no mandate in relation to participant interactions with mainstream service systems, nor does it provide oversight for those people with disability who are not NDIS participants. Oversight outside the remit of the Commission falls to different jurisdiction regulatory and monitoring bodies, leading to gaps and inconsistencies. Most recently the South Australian Safeguarding Taskforce Report points to critical failures between state mechanisms, and the Commission oversight function.<sup>3</sup>

Currently the Commission functions as a passive regulatory body focused on service quality, rather than proactively initiating rights based monitoring and outreach, taking assertive action relating to unlawful practice, and challenging the systemic drivers of abuse and violence. When complaints are

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<sup>1</sup> Disabled People's Organisations Australia (DPO Australia) Submission to the Senate Community Affairs Legislation Committee Inquiry: National Disability Insurance Scheme Amendment (Quality and Safeguards Commission and Other Measures) Bill 2017 <https://dpoa.org.au/tag/national-disability-insurance-scheme-ndis/page/3/>

<sup>2</sup> The Commission provides details of the oversight function in terms of unregistered providers <https://www.ndiscommission.gov.au/providers/unregistered-providers#:~:text=Unregistered%20providers%20must%20be%20able,registered%20or%20unregistered%20NDIS%20provider.>

<sup>3</sup> The Safeguarding Taskforce was established by the South Australian Government to examine gaps in oversight and safeguarding for people with disability living in south Australia. The Safeguarding Taskforce Report was released 31 July 2020 <https://dhs.sa.gov.au/latest-news/safeguarding-taskforce/safeguarding-task-force-report-july-2020>

made to the Commission, they are dealt with from a service quality and regulatory perspective, rather than the Commission using the extent of its power to take affirmative action to initiate investigations and ban service providers where instances of abuse, neglect and violence are found. The onus for making complaints lies with people with disability, their families and carers, and it is unclear whether the Commission even conducts outreach to people with disability where a provider may be subject to an investigation. Of the 69,397 reportable incidents received by the Commission in the period July-December 2019, only 1,102 were reported to police. This is despite 1,704 alleged incidences of abuse and neglect, 779 allegations of unlawful physical/sexual contact, and 182 alleged sexual misconducts<sup>4</sup>.

The Commission remit in terms of regulation and authorisation means that it does not challenge or move to eliminate the systemic drivers of significant human rights breaches. Of the total reportable incidents for the period July-December 2019, 65,398 were unauthorised use of restricted practices<sup>5</sup> – practices which can constitute torture, cruel, inhuman or degrading treatment or punishment<sup>5</sup>. The Commission's role monitors compliance of practices whereby state and territories continue to authorise these practices under each jurisdiction's legislation and policy, despite consistent international calls for these practices to be eliminated<sup>6</sup>.

### The Commission and First People with disability

An estimated 10% of people with disability in Australia will receive disability support provision through the NDIS. According to the most recent NDIA Quarterly Report (March 2020), 22,749 NDIS participants identify as Aboriginal and Torres Strait Islander<sup>7</sup> (to note, this indicates participants with active plans, and does not accurately represent utilisation of these plans<sup>8</sup>). These are the individuals who are meant to benefit from the oversight and protection the Commission provides.

As noted above, in the six months, July-December 2019, the Commission received 2,022 complaints, and 69,397 notification of reportable incidents<sup>9</sup>. This data is ambiguous, and not disaggregated. It is not known how many, if any of these issues were raised by, or in relation to First Nations people with disability.

Pervasive ableism and deep rooted discrimination means that people with disability are often not believed<sup>10</sup>, or their concerns dismissed or trivialised when raising issues of neglect, abuse and violence<sup>10</sup>. Intersecting with racial discrimination and the legacy of injustice against Australia's First Nations people means that our community have a well-founded fear, and lack of trust in authorities, government institutions and justice systems.

<sup>4</sup> NDIS Quality and Safeguards Commission Activity Report: 1 July 2019 to 31 December 2019  
<https://www.ndiscommission.gov.au/document/1921>

<sup>5</sup> For more in relation to restrictive practices see: Juan E. Mendez, Special Rapporteur, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, 22<sup>nd</sup> sess, UN Doc A/HRC/22/53 (1 February 2013)  
[https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.53\\_English.pdf](https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.53_English.pdf)

<sup>6</sup> Recommendation 30(a), Committee on the Rights of Persons with Disabilities (2019) *Concluding observations on the combined second and third reports of Australia*, CRPD/C/AUS/CO/2-3, September 2019, 8, adopted by the Committee at its twenty-second session (26 August – 20 September 2019)  
[https://tbinternet.ohchr.org/\\_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD/C/AUS/CO/2-3&Lang=En](https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRPD/C/AUS/CO/2-3&Lang=En)

<sup>7</sup> National Disability Insurance Agency Report to the COAG Disability Reform Council for Q3 of Y7 March 2020  
<https://www.ndis.gov.au/about-us/publications/quarterly-reports>

<sup>8</sup> FPDN has misgivings around data collected relating to active participants. This reports only those individuals who have an active plan, but does not reflect the quality or utilisation of this plan by participants. This is an issue we cover in more detail in our forthcoming submission to the Committee inquiry into 'General issues around the implementation and performance of the NDIS'.

<sup>9</sup> NDIS Quality and Safeguards Commission Activity Report: 1 July 2019 to 31 December 2019  
<https://www.ndiscommission.gov.au/document/1921>

<sup>10</sup> See the report from the Senate Community Affairs References Committee. *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* (2015) Canberra, Australian Capital Territory: Commonwealth of Australia  
[https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Community\\_Affairs/Violence\\_abuse\\_neglect/Report](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Violence_abuse_neglect/Report)

In 2013 the FPDN released a 10-point plan<sup>11</sup>, for the implementation of the NDIS for Aboriginal and Torres Strait Islander people with disability. We continue to argue that for the NDIS to benefit our community, the implementation needs a different approach and to the same end; the Commission will never be able to provide prevention and oversight, or appropriately respond in times of crisis unless they are informed by and responsive to our community.

Yet, the Commission does not have an established mechanism to engage with First People with disability, or a strategy to increase this engagement based on an understanding of disability within an Aboriginal context. The Commission Disability Consultative Committee, of which FPDN is a member, has met once and is not appropriate for this purpose<sup>12</sup>. The 2019 Annual Report recorded 2 Aboriginal or Torres Strait Islander staff members at the Commission, out of a total of 194 employees. It is unclear if these staff members were First People with disability<sup>13</sup>.

The Commission 2019-20 corporate plan includes the following performance measures; 'Participant experiences with us are positive' and 'NDIS participants are increasingly confident to complain'.<sup>14</sup> There is, however, no measure which demonstrates a commitment to outreach and education to ensure people with disability understand, and can access the protection, safeguarding and (culturally appropriate) response functions the Commission is meant to provide.

The terminology of the Commission is both confusing and inaccessible, and to date no funding has been provided to disability peak organisations to provide culturally appropriate community outreach and education about rights, the role and purpose of the Commission and where, and how people can seek help. The 'Speak-Up' resources<sup>15</sup>, including the 'Talk-up' version for Aboriginal and Torres Strait Islander people, were not, to our knowledge, developed in consultation with representative organisations or community. The Commission relies heavily on phone and email communication which is inaccessible for many First Nations people with disability.

A significant proportion of our community live in remote and regional areas of the country, where there is little to no choice of quality disability service provision. In fact, even for those First People with disability located in metropolitan areas, there is a lack of culturally appropriate disability support. Where services may be limited, and in some cases potentially available from only one provider, making a complaint may risk ongoing service for an individual or create service issues within the wider community. For many First People with disability, the NDIS may be the first time they have had access to any form of formal disability support, leading to a reluctance to raise issues or concern for fear of losing what they may only recently have gained.

We understand that during the COVID19 pandemic the NDIA initiated a 'vulnerability strategy' with welfare checks conducted by the NDIA. This included individuals in 'indigenous communities'.<sup>16</sup> First Nations people with disability are not inherently 'vulnerable', in fact cultural strengths in our communities protect people with disability and this needs to be recognised and respected by the NDIA and the Commission. However, our community is made more vulnerable by; intersectional discrimination, poverty and disadvantage; the lack of investment in culturally appropriate support; and the design of services and oversight systems that are implemented without the time and resources committed to community partnership.

<sup>11</sup> First People Disability Network (2013) Ten Point Plan for the Implementation of the National Disability Insurance Scheme in Aboriginal and Torres Strait Islands communities <https://fpdn.org.au/ten-priorities-to-address-disability-inequity/>

<sup>12</sup> The Disability Consultative Committee commenced in November 2019 for a three year term. The Committee is scheduled to meet three times per year <https://www.ndiscommission.gov.au/about/consultative-committees>

<sup>13</sup> The Quality and Safeguards Commission Annual Report 2018-19 <https://www.ndiscommission.gov.au/document/1771>. The Annual Report for 2019-2020 is yet to be made available on the Commission website.

<sup>14</sup> The NDIS Quality and Safeguards Commission Corporate Plan 2019-2020 'sets out how the NDIS Commission will uphold the rights and promote the health, safety and wellbeing of NDIS participants. It outlines the NDIS Commission's vision, purpose, future activities and performance measures, and also details its environmental, risk oversight, management and capability functions' <https://www.ndiscommission.gov.au/document/1726>

<sup>15</sup> The resources can be found on the Commission website <https://www.ndiscommission.gov.au/resources/speakup>

<sup>16</sup> This was referred to in the South Australian Safeguarding Taskforce report [https://dhs.sa.gov.au/\\_data/assets/pdf\\_file/0004/90832/Safeguarding-Task-Force-Report-31-July-2020.pdf](https://dhs.sa.gov.au/_data/assets/pdf_file/0004/90832/Safeguarding-Task-Force-Report-31-July-2020.pdf)

We would welcome the opportunity to provide more evidence to the Committee at a public hearing for this inquiry. Please do not hesitate to contact me should you require further information.

Yours sincerely

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