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Monday 20 July 2020

Hon Kevin Andrews MP
Chair, Joint Standing Committee on the National Disability Insurance Scheme
PO Box 6100
Parliament House
Canberra ACT 2600

RE: Your Inquiry into the NDIS Quality and Safeguards Commission

Dear Mr Andrews,

Thank-you for the invitation to make a submission to the Joint Standing Committee on the National Disability Insurance Scheme (NDIS) to facilitate their inquiry into the NDIS Quality and Safeguards Commission (NQSC). We are very keen to see changes made to the NQSC's legislative authority its structure and its resources so that it can effectively fulfil part of its purpose: to "to uphold the rights of, and promote the health, safety and wellbeing of, people with disability receiving supports or services, including those received under the NDIS."¹

With regard to the inquiry's particular interests:

a. *The monitoring, investigation and enforcement powers available to the Commission, and how those powers are exercised in practice;*

PDA is generally satisfied with the legislative scope of the powers the *NDIS Act 2013* grants to the Commissioner and his staff. However, given the small number of banning orders and registration suspensions and cancellations performed by the NQSC since its commencement on 1 July 2018 (as elucidated below), we are concerned that the evidence requirements necessary to make these determinations are too high to meet with its current resources.

b. *The effectiveness of the Commission in responding to concerns, complaints and reportable incidents – including allegations of abuse and neglect of NDIS participants;*

Not with standing our response to interest **a.** above, we cannot agree that the NQSC is particularly effective when it comes to responding to complaints and reports of quality and safety breaches. Its 6 month report for 1 July to 31 December 2019² states the NQSC received 2,022 complaints regarding:

- Provider practice (51%);
- Provider policies and procedures (20%);
- Worker conduct or capability (17%); and
- Alleged abuse or neglect (11%).

The same document also stated that registered providers had notified the NQSC of 69,397 'reportable incidents' including:

¹ *NDIS Act 2013*, s 181E (a) - <https://www.legislation.gov.au/Details/C2019C00332>

² <https://www.ndiscommission.gov.au/sites/default/files/documents/2020-06/11591-ndis-6-month-activity-report-jul-dec-2019-june-2020.pdf>

- 1,704 allegations of abuse and neglect;
- 779 allegation of unlawful physical / sexual contact; and
- 65,398 unauthorised uses of restrictive practices.

Despite these alarming statistics, there is no mention in the report of how many of these complaints and reports resulted in disciplinary action against workers or service providers.

We were able to find a list of people and organisations who had been subject to sanctions³ but it required an extensive search of the NQSC's website to find it. The 12 page document lists:

- 22 people subject to 'banning orders' that prohibits them from providing disability supports for periods ranging from 12 months to permanently;
- 4 service providers subject to 'compliance notices' requiring them to take certain actions to address non-compliances with parts of the NDIS Code of Conduct;
- 1 service provider subject to an 'infringement notice' for a contravention of the *NDIS Act 2013*;
- 5 service providers subject to 'suspensions of registration' for varying numbers of 30 day blocks;
- 3 service providers subject to 'revocations of registration ... as NDIS providers on the basis of assessments of their (un)suitability to provide supports and services to people with disability; and
- 3 organisations which received 'refusals to re-register' notices similarly based on assessments of their (un)suitability to provide supports and services under the NDIS.

This list, if it documents all disciplinary actions carried out by the NQSC since it's commencement on 1 July 2018 is woefully short and lacks details regarding why these actions were taken. It in no way suggests it is effectively pursuing the rigorous enforcement of the NDIS practice standards that Participants should expect.

c. *The adequacy and effectiveness of the NDIS Code of Conduct and the NDIS Practice Standards;*

PDA has been concerned about the NDIS Code of Conduct (NCoC) since a preliminary draft was published by Department of Social Services (DSS) in June 2017. In our submission to the DSS consultation about it⁴, PDA criticised:

- Its scope – applying to all people involved in delivering NDIS funded supports regardless of their registration status and whether or not they were aware of the NCoC and that it applied to them; and
- Its overuse of nebulous terms such that it is unclear if breaches have occurred or not.

Regrettably, our criticisms were not fully realised in the final enacted NCoC⁵.

To our first point, we feel it is inappropriate for the NCoC to apply to unregistered service providers and their employees. This is because, Codes of Conduct, generally, are known and committed to by those they bind. All registered allied health providers, for example, are members of relevant professional registration bodies that

³ <https://www.ndiscommission.gov.au/sites/default/files/documents/2020-07/ndis-provider-register-part-2.pdf>

⁴ https://engage.dss.gov.au/ndis_code_of_conduct_may17-submissions/1499659377/

⁵ <https://www.legislation.gov.au/Details/F2018L00629>

have their own Codes of Conduct and the mechanisms to hold members to them, and the most important of these is informed consent.

Unregistered providers, especially sole traders who provide services to the general community, often have no idea they are bound by the NCoC when their invoices are being paid with NDIS funds. This is a regrettable situation that could lead to these service providers being unwilling to work for people with disability generally. Given that state, territory and federal consumer and criminal laws adequately protect Australians without disability with regard to service quality and safety, and the behaviour of service providers, we feel the application of the NCoC to unregistered service providers assaults the dignity of people with disability.

To our second point, whilst our advice that the NCoC should focus on requiring workers and service providers to ‘respond’ to quality and safety threats rather than ‘actively prevent’ them has been partially realised in the enacted version, we are concerned that the language used in some of its clauses is still nebulous.

Clauses (f) and (g) require ‘Code-covered’ people to “take all reasonable steps to prevent and respond to”: “all forms of violence against, and exploitation, neglect and abuse of, people with disability”; and “sexual misconduct” respectively. The ‘prevention’ aspect of these clauses potentially work against clauses (a) and (b), requiring ‘Code-covered’ people to “respect” the “individual rights to freedom of expression, self-determination and decision-making” capacity; and “privacy” of people with disability respectively.

In certain social situations, for example, a support worker may feel obliged to intervene if he or she feels the NDIS Participant they are working for is in danger and act in accordance with clauses (f) and/or (g) of the NCoC. Meanwhile the NDIS Participant may feel clauses (a) and/or (b) are being violated. This conflict should not exist and it could be avoided if PDA’s advice – that NCoC’s clauses use concise directive language – was accepted in full.

PDA is satisfied that the NDIS Practice Standards are adequate to ensure registered service providers have appropriate quality systems in place.

d. *The adequacy and effectiveness of provider registration and worker screening arrangements, including the level of transparency and public access to information regarding the decisions and actions taken by the Commission;*

PDA is concerned that worker and provider screening processes still reside with state and territory authorities and that these are of variable cognisance. Ideally, we would like to see a nationwide worker screening protocol that includes:

- Comprehensive cross-jurisdictional criminal history checks for all employees of registered service providers including those with no direct contact with Participants;
- Comprehensive probity checks on all Directors of organisations looking to become registered service providers to build consumer confidence and mitigate against insolvency and breaches of contract; and
- Mechanisms for members of the public (including Participants, their families and supporters) to provide intelligence to the NQSC regarding would-be registered service providers and workers.

That the current arrangements for worker screening are inadequate is indicated by the Victorian Government’s establishment of the Victorian Disability Worker

Commission (VDWC)⁶, and while we cannot be sure of that parliament's reasoning in setting up this body was, it seems to us that there is a lack of confidence in the NQSC's jurisdiction and/or capacity to adequately protect Victorians with disability. Significantly, the VDWC can investigate all concerns regarding disability supports and services, not just those funded by the NDIS.

e. *The effectiveness of communication and engagement between the Commission and state and territory authorities;*

PDA is not aware of the NQSC's engagement with jurisdictional authorities however, we understand they have entered into an agreement with National Disability Services to raise the awareness of their work with service providers and the new reporting requirements⁷. This is appropriate as the implementation of the NQSC (along with full implementation of the NDIS) has brought about significant changes to the way service providers interact with regulatory authorities. However, we are not aware of any similar engagement with the disability community.

Given that the Royal Commission into Violence, Abuse, Neglect and Exploitation has entered into an agreement with the Australian Federation of Disability Organisations⁸ to promote the engagement of people with disability in their inquiries, it would be good to see the NQSC similarly engage with the representative peak organisations of their principal stakeholders.

f. *The human and financial resources available to the Commission, and whether these resources are adequate for the Commission to properly execute its functions;*

Given our comments in relation to inquiry interest **b.** above, and assuming the staff of the NQSC are doing the best they can, PDA would like to see greater financial and human resources provided to the NQSC. It is noteworthy that information regarding the corporate structure and staffing levels is not easy to find either on the NQSC website or the Australian Government's transparency portal.

The NQSC Annual Report 2018-2019⁹ includes an organisational chart, but not (projected or current) staffing numbers nor their distribution in relevant state and territory offices. Without these details, and the lack of detail lamented above, it is difficult to assess the overall adequacy of the NQSC's resources beyond feeling it should be significantly boosted.

g. *Management of the transition period, including impacts on other commonwealth and state-based oversight, safeguarding, and community engagement programs; and*

PDA is concerned that the NQSC has limited jurisdiction over state and territory health department facilities that continue to be disability service providers under state or territory / federal bilateral in-kind arrangements. The facilities run by these authorities tend to be archaic, institutions who residents have been long-term recipients of support under pre-NDIS arrangements. We understand that there are no reporting requirements with regard to reportable incidents and limited capacity for these service recipients to access the NQSC's complaints processes.

⁶ <https://www.vdwc.vic.gov.au/>

⁷ <https://rdas.org.au/ndia-ndis-quality-and-safeguards-commission-and-nds-to-deliver-forums-for-full-roll-out/>

⁸ <https://www.afdo.org.au/royal-commission/>

⁹ <https://www.ndiscommission.gov.au/sites/default/files/documents/2019-10/ndis-commission-annual-report-2018-2019-accessible-2.pdf>

We would like to see the NQSC take an active role in facilitating the transition of people with disability in these settings to full NDIS Participant status where they can be assured of access to all reasonable and necessary supports to enable them to live an ordinary life.

h. Any related matters.

The only additional matter PDA would like to raise is that we are disappointed the NQSCs' jurisdiction is restricted to those people and organisations providing supports that are funded by the NDIS, and that as such, it only covers less than 30% of the over 4 million Australians who live with disability¹⁰. People with disability who are over 65 and those who don't meet NDIS eligibility requirements still require services of appropriate quality and safety and it should not matter who pays the service providers invoice.

About us

Physical Disability Australia (PDA) is a national peak membership-based representative organisation run by people with physical disability for people with physical disability. PDA was founded 21 years ago and we have over 1,000 members from all Australian states and territories. Our purpose is to:

- Encourage all levels of government to enable and provide every Australian living with a physical disability with opportunities to realise their full potential;
- Embrace and promote difference and diversity for an inclusive society; and
- Work with governments, industry and the community to promote the rights, responsibilities, issues and participation of people with physical disability.

In conclusion

Preparing this submission has been quite tricky given the timing of your inquiry. As of the end of July 2020, there are a very limited number of official NQSC reports with data from which assessments of its performance can be made. Indeed, there is only 1 annual report that has been published (2018-2019) and this reflects a time when the NQSC was only operating in a few jurisdictions. Nevertheless, we hope this information is of assistance and will lead to improvements in the NQSC's effectiveness and reach.

Yours Sincerely,

Liz Reid
President and Director (NT)
Physical Disability Australia

Simon Burchill
Manager
Physical Disability Australia

¹⁰ <https://www.aihw.gov.au/reports/disability/people-with-disability-in-australia-in-brief/contents/how-many-people-have-disability>