



31 August 2020

The Hon Kevin Andrews MP
Chair of the Joint Standing Committee on the National Disability
Insurance Scheme
PO Box 6100
Parliament House
Canberra ACT 2600
By email: ndis.sen@aph.gov.au

Dear Committee Chair, the Hon Kevin Andrews MP

Submission to the *Inquiry into the NDIS Quality and Safeguards Commission*

Thank you for the opportunity to provide our submission to the *Inquiry into the NDIS Quality and Safeguards Commission* and for providing us with an extension of time to do so.

People with Disability Australia (PWDA) is a leading disability rights, advocacy and representative organisation of and for all people with disability. We are the only national, cross-disability organisation – we represent the interests of people with all kinds of disability. We are a non-profit, non-government organisation.

We welcome the current efforts to improve the NDIS Quality and Safeguards Commission. However, we strongly believe that a broader oversight and safety mechanism is needed, that is not limited to the NDIS.

As such, our submission will firstly propose the creation of a national independent protection mechanism for all people with disability. Such a mechanism would be in addition to, or would incorporate, the functions of the NDIS Quality and Safeguards Commission. Our submission will secondly outline the changes that should be made to the NDIS Quality and Safeguards Commission in its current form to strengthen safeguards and protections for people with disability and prevent violence, abuse, neglect and exploitation of people with disability.

Postal address:

PO Box 666
Strawberry Hills NSW 2012

Street address:

Level 8
418a Elizabeth Street
Surry Hills NSW 2010

Phone: 02 9370 3100

Fax: 02 9318 1372

Toll Free: 1800 422 015

NRS: 1800 555 677

TTY: 02 9318 2138

TTY Toll Free: 1800 422 016

TIS: 13 14 50

ACN: 621 720 143



1. A National Independent Protection Mechanism for all People with Disability

Terms of Reference A: The monitoring, investigation and enforcement powers available to the Commission, and how those powers are exercised in practice

Article 16(3) of the *Convention on the Rights of Persons with Disabilities* requires parties to 'ensure that all facilities and programmes designed to serve persons with disabilities are effectively monitored by independent authorities.'¹ However, the NDIS Quality and Safeguards Commission only provides oversight and safeguarding for people who access NDIS supports. This cohort constitutes a mere 11 per cent of all people with disability in Australia.² The remaining 89 per cent of people with disability receive protection through existing regulatory and policy frameworks - which, as we have seen through the *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* - are often woefully inadequate.

This concern was raised by the United Nations Committee on the Rights of Persons with Disabilities (the UN Committee) in their *Concluding Observations on the Combined Second and Third Periodic Reports of Australia*.³ To promote Australia's compliance with Article 16 of the CPRD, the UN Committee recommended the establishment of a:

*...national accessible oversight, complaint and redress mechanism for persons with disabilities who have experienced violence, abuse, exploitation and neglect in all settings, including all those not eligible for the National Disability Insurance Scheme and, particularly, older women with disabilities.*⁴

We agree with the UN Committee's recommendation and make the following recommendations, which were originally detailed in Disabled People's Organisations Australia's submission to the Independent Review into Circumstances Relating to the Death of Ms Ann-Marie Smith (**attached**):

Recommendation 1: The Australian Government establishes a national independent mechanism under specific purpose legislation with broad functions and powers to protect, investigate and enforce findings in relation to violence, abuse and neglect of people with disability.

The statutory protection mechanism should operate within a human rights framework and include the following core functions at a minimum:

- a 'no wrong door' complaint handling function – the ability to receive, investigate, determine, and make recommendations in relation to complaints raised

¹ *Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008) art 16(3).

² Australian Institute of Health and Welfare, *People with Disability in Australia* (Report, 2019) 2, 6.

³ Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Combined Second and Third Periodic Reports of Australia*, UN Doc CPRD/C/AUS/CO/2-3 (15 October 2019) [32].

⁴ *Ibid.*



- the ability to initiate ‘own motion’ complaints and to undertake own motion enquiries into systemic issues
- the power to make recommendations to relevant respondents, including Commonwealth and State and territory governments, for remedial action
- the ability to conduct policy and programme reviews and ‘audits’
- the ability to publicly report on the outcomes of systemic enquiries and group, policy and programme reviews, or audits, including through the tabling of an Annual Report to Parliament
- the ability to develop and publish policy recommendations, guidelines, and standards to promote service quality improvement
- the ability to collect, develop and publish information, and conduct professional and public educational programs, and
- the power to enable enforcement of its recommendations, including for redress and reparation for harms perpetrated.⁵

In addition, we note that the National Disability Abuse and Neglect Hotline currently provides a service for reporting abuse and neglect of people with disability. To assist with funding the proposed national mechanism, we recommend that:

Recommendation 2: The National Disability Abuse and Neglect Hotline be reviewed and these functions be incorporated into the proposed national independent protection mechanism.

2. Changes to the NDIS Quality and Safeguards Commission

As discussed earlier, the proposed national independent protection mechanism would incorporate or be created in addition to the NDIS Quality and Safeguards Commission. As such, while work must commence immediately to establish the proposed mechanism, a number of improvements must simultaneously be made to strengthen the NDIS Quality and Safeguards Commission.

We make the following recommendations, which were originally contained in Disabled People’s Organisations Australia’s submission to the Senate Community Affairs Legislation Committee’s Inquiry into the *National Disability Insurance Scheme Amendment (Quality and Safeguards Commission and Other Measures) Bill 2017*, but are yet to be implemented. Please find the original submission **attached** for further details.

Terms of Reference E: The effectiveness of communication and engagement between the Commission and state and territory authorities

⁵ See Australian Cross Disability Alliance, *Submission to the Senate Community Affairs Reference Committee Inquiry into Violence, Abuse and Neglect against People with Disability in Institutional and Residential Settings* (Submission, 2015) 12-13.



- **Recommendation 3:** States and Territories should establish nationally consistent regulatory mechanisms for the authorisation of behaviour support plans.
- **Recommendation 4:** Section 181K(1) of the *National Disability Insurance Scheme Act 2013* (Cth) should be limited by a provision that ensures that States and Territories are consulted about and provide agreement for directions proposed by the Commonwealth Minister for the NDIS Commissioner.

Terms of Reference H: Any related matters

- **Recommendation 5:** That a clause be added after subsection 4(9) of the *National Disability Insurance Scheme Act 2013* (Cth) stating that people with disability are central to the NDIS and should be included in a co-design capacity.
- **Recommendation 6:** The NDIS Quality and Safeguarding Commission Rules should be developed with people with disability and their representative and advocacy organisations in line with the principle that people with disability are central to the NDIS and should be included in a co-design capacity.
- **Recommendation 7:** The *National Disability Insurance Scheme Act 2013* (Cth) should be amended to include legislative powers that enable the NDIS Commissioner to prohibit certain restrictive practices and impose criminal penalties.
- **Recommendation 8:** The NDIS Commissioner should be engaged in the establishment of an independent national preventative mechanism under the *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, to ensure the mechanism is inclusive of people with disability and interfaces with the NDIS Quality and Safeguards Commission.

Funding to enable own-motion investigations

Terms of Reference F: The human and financial resources available to the Commission, and whether these resources are adequate for the Commission to properly execute its functions

In addition to the above recommendations, we are concerned that the NDIS Quality and Safeguards Commission lacks funding to carry out 'own-motion' investigations. This leaves the NDIS Quality and Safeguards Commission heavily reliant on complaints to alert them to possible breaches. This is problematic as many people with disability live in closed settings where it is difficult and often frightening to make a complaint.

The NDIS Quality and Safeguards Commission's reactive rather than proactive approach has come to light during the COVID-19 pandemic, where people with disability told us that their service providers had breached their obligation to provide continuity of supports. To address this issue, the NDIS Quality and Safeguards Commission encouraged individuals to make complaints, rather than launching own-motion investigations. Relying on complaints is particularly problematic during the pandemic as people with disability have reduced access to visitors, including advocates who can help them make a complaint.



Further, people with disability may not be in a safe situation to risk making a complaint when they may be reliant on this same person for supports.

The problematic nature of relying on complaints to trigger investigations was also recently highlighted by the tragic death of Ann Marie Smith. Ms Smith was an NDIS participant with a plan that provided support from a carer for six hours a day.⁶ This support was provided by a sole carer, meaning that if Ms Smith wanted to make a complaint to the NDIS Quality and Safeguarding Commission, in the absence of other visitors, it would need to be done through the very person who would be subject of the complaint.⁷ Clearly, the NDIS Quality and Safeguards Commission must enhance its own-motion investigation function to properly protect people with disability.

As such, we recommend that:

Recommendation 9: The Australian Government provides sufficient funding to the NDIS Quality and Safeguards Commission to enable it to carry out own-motion investigations.

We thank you again for the opportunity to make this submission and hope it will assist in improving quality and safeguards for all people with disability.

If you would like to discuss this submission further, please contact me by email at

Yours sincerely

Romola Hollywood

Director Policy and Advocacy, People with Disability Australia

This submission was prepared by Lisa Ira, Senior Policy Officer at People with Disability Australia.

Attachments:

- Disabled People's Organisations Australia's submission to the Senate Community Affairs Legislation Committee's Inquiry into the *National Disability Insurance Scheme Amendment (Quality and Safeguards Commission and Other Measures) Bill 2017*
- Letter to the Independent Review into Ann Marie Smith's death

⁶ Leah MacLennan, 'Ann Marie Smith Taskforce Finds Crucial Gaps in NDIS Oversight of Disability Care', ABC News (online, 16 June 2020) < <https://www.abc.net.au/news/2020-06-16/ann-marie-smith-taskforce-disability-interim-report-released/12361006>>.

⁷ 'Former Federal Court Judge to Chair Ann Marie Smith Independent Inquiry', ABC News (online, 26 May 2020) < <https://www.abc.net.au/news/2020-05-26/former-federal-court-judge-to-chair-ann-marie-smith-inquiry/12286054>>.