

29<sup>th</sup> July 2020

Joint Standing Committee on the National Disability Insurance Scheme  
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Attention: Ms Bonnie Allan, Committee Secretary.

**Re: Submissions for the Senate Inquiry into the NDIS Quality and Safeguards Commission.**

**About IDRS.**

The Intellectual Disability Rights Service (IDRS) is a not for profit organisation that works with and for people throughout NSW living with cognitive impairment. IDRS auspices the Ability Rights Centre, a community legal centre that provides legal and related services, including legal advice, representation and community legal education. IDRS also operates a separate non-legal criminal justice support service, the Justice Advocacy Service. IDRS engages in policy and law reform work with a view to advancing the rights of people with cognitive impairment.

**1. Clients of IDRS Services.**

Most clients of IDRS services have been assessed as eligible to receive disability services from service providers that are paid by the National Disability Insurance Agency, (NDIA), under the National Disability Insurance Scheme, (NDIS). They live independently, or with their parents, other family members, carers, or in Specialist Disability Accommodation, (hereinafter referred to as group homes), or in aged care accommodation because there are no group homes available. Our clients do not have individual case management, which was provided by the NSW government before the NDIS, because it is not available under the NDIS.

Some of our clients are high functioning, and therefore able to speak up for themselves, however, many cannot. For them, support is needed because they may not have legal capacity, or they may be non-verbal, or they may also have physical disabilities, or they may have related challenging behaviours, or because of a combination of these reasons. Support can be provided by their parents, other family members, carers, their support workers, if appropriate, and government funded advocates. Unfortunately, a significant number of our clients, who cannot speak up for themselves, do not have support, and we are contacted because someone has seen them being neglected and abused.

Also some of our clients have challenging behaviours which are linked to their disability, along with their rapid escalation. They need minimal changes to their daily routine in order to avoid any disruption escalating into property damage, threats of violence, assault, police action, and gaol. This scenario, namely that small problems, if left unfixed, rapidly escalate into big problems for our clients, is one of the most important facts that we ask the Senate Inquiry to keep in mind, because, we submit, it shows that a the NDIS Quality and Safeguards Commission needs to have the power to fix individual small problems quickly.

**2. Complaints about service providers.**

IDRS receives hundreds of complaints each year about service providers. It is likely that many more complaints are not reported because of the clients' disabilities, and that unresolved complaints may continue for years. Some service providers are frequent offenders, however, there are many others

that are not. Since we are more likely to hear about the complaints, it is therefore difficult for us to comment on our clients' overall satisfaction, or otherwise, with their service providers. Nevertheless, it is the writer's opinion that the majority of service providers, and their staff, provide satisfactory services to clients. Indeed, in many cases, we rely on their professionalism to help clients to receive advice and assistance from us in relation to their complaints. Here are examples of the complaints.

Complaints about criminal offences.

- Sexual assaults perpetrated by staff workers in group homes, other residents in group homes, as well as other disability support workers at day-care or during community access.
- An assault by day-care staff, seen to grab the client's hair, throw her/his head back and shake it from side to side, and heard to say, "you punch me, I'll show you crazy."
- A provisional apprehended domestic violence order is made after a minor incident to protect staff. The client then unknowingly breaches it, is arrested, bail refused, is not allowed to return to the group home, and then remains in gaol for two months because there was no other group home available.
- Unauthorised restrictive practices such as denying community access, denying visitation, isolation, using a cage, medication, etc.

Complaints about breaches of civil rights.

- Attempts to evict residents of group homes.
- Staff do not follow the resident's behaviour intervention support plan, (BISP).
- The staff do not organize health checks for residents.
- The staff attend medical appointments with the resident without taking copies of their medical records. (In one case the resident had a seizure and an ambulance was called to take him to the hospital, by himself, without any staff being sent with him. At hospital he was not physically able to tell the doctors about his condition, and the hospital did not have his medical records).
- The staff do not complete incident reports when a resident is injured, or assaulted.
- The resident is not allowed to have visitors at the group home.
- The group home cancels community access for months allegedly because the house bus needs repair, or because the majority of the other residents go to a different day-care, or for a similar pretext.
- The supported independent living, (SIL), service provider refuses to supply staff for the client to have community access until a new BISP plan is done.



- The co-ordinator of services, the service provider, and the clinicians sometimes all work for the same organisation which is a conflict of interest and has caused clients to suffer unreasonable restrictive practices, to lose their “choice and control” for services, and to have their NDIS funds depleted because of over servicing profiteering practices.
- The staff decide to punish the client for ripping her clothes off by cancelling her daily community access.
- The staff fail to account for the resident's money that they have been taking from the resident's pension.
- The support workers make the client pay for the worker's coffee and cakes when they take them to a café for community access.
- The group home does not provide the 1:1 support that the resident's NDIS plan is paying for but continues to invoice the NDIA as though they were supplying the 1:1 support.
- The resident's NDIS funds are not used because the resident does not have the capacity to know what the funds are for.
- The service provider sends invoices to the client to pay because the NDIA has not paid the service provider for the services.

### 3. Commentary on the powers of the Commission in relation to individual complaints.

(The Commission has published its “Compliance and Enforcement Policy” in June 2018, and the following notes include my summary of some of the information in that publication).

The NDIS Act 2013 at Chapter 6A establishes the NDIS Quality and Safeguards Commission, (the Commission). The Act authorises the making of Rules and Guidelines. These have been made, and in relation to service providers they include Practice Standards and a Code of Conduct.

Registered service providers are required to “undergo a periodic audit that assesses their performance against the NDIS Practice standards.”

Registered service providers are required to have a complaints procedure for responding directly to individual complaints. (There are no time limits for service providers to respond to complaints, and they are not required to provide mediation).

The Commission has “the power to investigate any matters relating to registered and unregistered providers and workers.”

The Commission may refer any complaint it receives back to the service provider for review, or offer mediation, or make a recommendation, or decline the complaint for various reasons, (ie. because it should be referred to a more appropriate authority, or it requires legal action, or because it lacks merit; etc).

If the Commission decides that it should take action against the service provider it can:

- Provide education
- Investigate
- Issue compliance notices
- Issue infringement notices
- Apply to the Court for an injunction
- Apply to the court for a civil penalty
- Revoke the service provider's registration
- Make a banning order against the service provider

The Commission indicates, (at page 4), that it aims to work co-operatively with service providers and that more serious enforcement measures, (in the above list), will be a last resort.

The Commission started on the 1<sup>st</sup> July 2018.

We submit that the existing powers of the Commission are not enough for our clients to get satisfactory outcomes for their complaints. In particular:

- The Commission does not have an Official Community Visitor Scheme.
- The Commission does not provide advocacy services for people with disabilities.
- None of the Practice Standards, the Code of Conduct, nor the National Disability Standards; give our clients enforceable legal rights.
- The Commission does not adjudicate individual complaints.
- The Commission does not have power to make service providers fix individual complaints.
- The Commission must apply to the court before it takes serious enforcement action for civil penalties and injunctions against service providers. The service providers may defend any action being taken against them. Also, the Commission's decisions in relation to de-registration, and banning orders are able to be defended by service providers by applying for a review of the decision to the Commonwealth Administrative Appeals Tribunal. . (My point is that these powers are expensive to enforce because of legal costs, and therefore the Commission is unlikely to take this action in relation to an individual complaint).

#### 4. Commentary on our clients' experiences with the NDIS Quality and Safeguards Commission.



In the past 12 months 25 of our clients had experiences with the NDIS Quality and Safeguards Commission. In all cases they reported dissatisfaction, and had nothing positive to say about the Commission.

One reason is because the Commission lacks powers.

Another reason is because the Commission has adopted a “hands-off” approach to regulation. (Ignorance of the law, or of the safeguards, should not be a defence exclusively available to service providers in the disability sector. As the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry has shown, a “hands-off” approach by a regulator is unsatisfactory. The Commission should be instead, a pro-active and effective regulator).

A third reason is because some of our clients feel they do not have “choice and control”, (either because of their disability, or the shortage of group homes, or because some of the larger service providers, particularly in group homes, have larger financial resources than the Commission).

We provide the following case studies and comments from our clients.

#### Case 1. Unenforceable recommendations.

After years of complaints to the service provider, our client’s mother complained to the NDIS Quality and Safeguards Commission about the significant bruising being suffered by our client, and the misuse of medication by the service provider.

The Commission advised that there had been abuse and neglect, and that the relationship between the client and the service provider had broken down to such an extent that it was the Commission’s recommendation to have a new service provider at the group home. The manager of the group home at the time agreed that this would be done.

About two months later a new manager held a meeting with the client’s mother and told her that the same service provider would stay at the group home, and that the client would have to move to a granny flat attached to the group home, or find somewhere else to live. The client’s mother was given five days to decide.

We note that the client lived in regional NSW and the client’s mother was unable to find an alternative group home, and further, that the client’s room had been purpose built by the NSW government, (ie. by the Department of Aging Disability and Home Care, ADHC), for the client and it had also been further fitted out using the client’s NDIA money, and therefore it is difficult to replace.

The client is still in the same group home, with the same service provider, and the problems have not been fixed.

#### Case 2. Summary of 8 eviction cases that have not been resolved.

During the past year IDRS has received at least eight (8) complaints about group homes trying to evict their residents. In all of these cases the resident was not at fault. In most of these cases the group home sent a written termination notice, and in the others it was given verbally,

In six cases this action was taken following the supporter’s complaints of abuse and neglect by the service provider, for example, not following the behaviour intervention support plan, not supplying medication, not providing the 1:1 support that was paid for in the resident’s NDIS plan, and not releasing health records to the guardian to get medical treatment for the resident. None of these complaints, about abuse and neglect, were fixed. In the other two cases, which may not amount to abuse and neglect, one service provider, alleged the resident had not paid for services, even though the mix up was known to be caused by the service provider, and in the other case the service provider alleged that the resident had not been accepted in the home despite having lived there for 6 months.



We provided advice and casework to the residents and their family supporters, and we also referred them to the NDIS Quality and Safeguards Commission. The residents have not been evicted, however, their complaints have still not been fixed.

Recently, I made a note of the comments made by the mother of another client about the Commission. They state, "... she said they are useless, she complained about the eviction of (xxxxxx) and was told it was a contractual matter and they could not do anything, the Commission also said, we educate rather than regulate, and when asked for a hypothetical example to show what it would take for the Commission to take action, was told I cannot think of an example where we would. She said the Commission too readily refers problems away."

### Case 3. Mediation.

One supporter made care complaints about the service provider including that 5 residents were sharing a home that was only legally able to house 4 residents. She said, *I resented being told by the Commission that it was a matter for mediation. As if I had not been talking to (the service provider) for months about it. Mediation implies it is a failure of communication, or, that my brother can negotiate. Firstly, it is not a failure of communication but a failure to provide proper care, which is a factual issue, not a misunderstanding, and (the service provider) refuses to do it. Secondly, how can you negotiate without having legally enforceable rights against (the service provider). The Commission just listened to me and then nothing was done.*

### Case 4. Complaints procedures.

Another supporter's experience of a group home complaints procedure was that, *the overall culture within the service provider when it comes to complaints is concerning in that they (CEO and some others) are very sensitive to criticism and won't take it constructively. The first response is defensiveness which really flies in the face of all their advertising on complaints management. Sometimes, situations just need a bit of reassurance and commitment to working on an on-going issue. Some staff do this well, but I have also seen some pretty awful responses. My sister's OT put in a complaint about finding batteries in the grass in the back yard and asked they check it regularly as my sister has hyperphagia from her PWS and will eat them if she finds them. The response? NOT "I'm very sorry, we'll remind the staff". The regional manager at the time, said "Not our fault, someone must have thrown it over the fence!"*

*During mediation, which was subject to a confidentiality agreement, the General Manager, was dismissive of my concerns, refused to sign the mediated agreement and stood behind the staff member as a nice guy whom according to her, my sister liked.*

Generally our clients, and their supporters, have found that complaints procedures cause them to work on detailed written evidence and submissions, and to become angry, frustrated, and depressed, and without anything being done to fix the problems. In many, many cases the inaction caused the problems to escalate and create other problems that led to residents of



group homes being subjected to restrictive practices, abuse, ADVOs, accommodation transfers, police arrest, and gaol.

#### Case 5. Unsatisfactory outcomes.

The client was funded by the NDIA. He/she had no support network, nor an advocate at the time. He/she had cognitive impairment which caused behaviour problems in accessing the community with support workers. The service provider was also the client's co-ordinator of services. It decided to do a BISP. The client objected. The service provider then refused to provide staff for the client to have community access until a BISP was done. That decision did not stop the client from going outside the house, however, the client lived in a remote area, did not have transport, and found it lonely not having anyone to share experiences with. The client could not go to another service provider because the co-ordinator of services was not independent. The service provider's decision caused the client not to have shared community access for over 2 years, and not to use his/her NDIS funding.

The NSW Ombudsman took 9 months to review the case. It condemned the actions of the service provider. It then recommended only that the same service provider review its policies and procedures, and then closed its review.

Although this case occurred during the transition period to the NDIS in 2018 we submit the outcome would have been similar if the Commission had reviewed the complaint. It is another example of the unsatisfactory outcomes that are experienced by our clients from the regulating authority and it highlights the lack of regulatory powers in the disability sector to change the status quo and actually fix individual complaints.

#### Case 6. Small problems, if left unfixed, may rapidly escalate into big problems.

A young woman with moderate intellectual disability, autism, ADHD, generalised anxiety disorder, post-traumatic stress disorder and chronic adjustment disorder lived in a group home with one other resident with intellectual disability. She also had a significant history of emotional and sexual abuse by her family.

One day she became upset and started ripping her clothes off. As a result the staff decided that they would not take her out for her usual day trip to access the community. She then became very upset and started yelling at staff and kicking cars in the driveway, (There was no damage done to the cars). She also tried to kick a staff member.

The staff that day were from an agency and had not worked with her before. They did not follow the behaviour intervention strategies. Instead they called the police. The police arrested her, charged her with assault, and made a Provisional ADVO protecting the staff. She had to go to court. She had no knowledge or understanding of the ADVO She did not know that if she breached it she would be arrested again, charged, that bail would likely be refused, and that she may have a criminal conviction.

Challenging behaviour, along with its rapid escalation, is linked with intellectual disability in many cases. If a resident is likely to become unhappy about something, an experienced disability worker will try to anticipate this and will use the strategies in the Behaviour Intervention Support Plan, (BISP), to minimise any disruption to the resident's routine. So hopefully there is no incident. If however, the disability worker is untrained, casual, and unfamiliar with the resident, there is a risk of challenging behaviour by the resident, escalation, a threat to the worker, the police being called in, the resident being arrested, taken to the police station, being put on an ADVO, being in police custody overnight, and being sent to gaol the following morning by the court because the group home doesn't want



them back, and they have nowhere else to live. Therefore, the resident ends up in gaol because the worker was inexperienced, untrained, or incompetent.

This case occurred before the NDIS, however, it remains relevant now because residents in group homes need consistency and predictability in their daily routines. Also, because for most clients, when the NDIS was introduced, the transition of residents into new group homes, and the transition from ADHC management of group homes to the privatised service providers, was carried out without the clients being given any choices. And further it remains relevant because in most cases there were no compatibility assessments for residents before they started living in their group homes under the NDIS, and compatibility and choice should be the prime considerations in shared housing for people with disability.

Despite the need for consistency and predictability, compatibility, and choice; the Commission does not have the power to fix individual complaints in group homes.

#### 5. Are other legal remedies available to fix the clients' complaints?

(Note that the clients' disability may prevent them from being able to speak up, therefore, if a legal remedy is available they must first overcome that obstacle).

For criminal complaints the police are available.

For discrimination complaints a tribunal is available.

For personal injury complaints seeking damages, lawyers may be available.

For property damage complaints seeking damages, lawyers may be available.

For group home eviction complaints, neither the Residential Tenancies Act NSW 2010 nor the Boarding Houses Act 2012 apply to group homes. Therefore, **group home residents have no legal remedy against eviction.**

For consumer law and contract law complaints of less than \$40,000.00 the NSW Civil and Administrative Tribunal, (NCAT), is available. (The limit in relation to consumer claims is where the amount paid for the services does not exceed \$40,000.00, (see section 79S of the Fair Trading Act NSW 1987).

For consumer law and contract law complaints that exceed \$40,000.00 legal action may be taken in the courts, however, in practice the NSW courts and the Federal Circuit Court of Australia are usually inaccessible to our clients because of legal incapacity, the fact that it is difficult to find tutors to manage the proceedings for them because the tutors can be made to pay the legal costs, and because our clients cannot pay the legal costs. We also note that the value of the services provided by a group home, which include accommodation and SIL services paid for by the NDIA, is likely to be at least \$40,000.00, and probably far exceeds \$100,000.00, and therefore, any legal action against the service provider can only be made in a court. We submit, for the reasons given in this paragraph, that in practice there is **no legal remedy for group home residents for consumer law and contract law complaints against their group home service provider.**



## 6. Further reasons for giving more powers to the Commission.

Many clients in group homes are unable to speak up. There is no longer individual case management. There is a shortage of group homes everywhere in NSW, but especially in regional, rural, and remote areas. This shortage is expected to last for up to 10 years. The NDIA often provides the clients' group home as a stated support in the clients' NDIS plan. Therefore, **many clients in a group homes do not have choice and control.**

The Commission **should have an Official Community Visitors Scheme** which could inspect group homes, meet residents, and report. The Official Community Visitors Scheme has now been taken over by the Aging and Disability Commission in NSW. There are now 40 OCV's who still visit group homes in NSW, but they also visit other accommodation too. Therefore, it seems to us that their resources have been spread more thinly and that in future they will visit fewer group homes. We submit this arrangement is not satisfactory because there is an unnecessary information barrier between the Commission and the people it should be protecting against abuse and neglect, many of whom cannot speak out. Although the periodic external audit of registered service providers should continue, never-the-less it is not sufficient to protect clients. (That is because the audit applies to only registered service providers, and also because they know in advance and can prepare records to show compliance with NDIS Practice Standards. For example, although the service provider may satisfy the auditor that it has a complaints policy, never-the-less in practice the service provider may choose to deny complaints, tell lies, refuse to mediate, not make incident reports, not follow recommendations, etc. The service provider's motives may include cost-cutting, fear of litigation or prosecution, revenge against the client for making a complaint, etc).

The NDIS has created a new environment for our clients, including residents of group homes, because it assumes that they have the capacity for choice and control, and therefore, for the first time, it requires them to negotiate directly with service providers for all the services they require. Typically they must now negotiate at least four complex contracts relating to Specialist Disability Accommodation, Supported Independent Living Services, (SIL), the Co-ordination of Supports, and to access the community (for example day care programmes). The service providers for group homes are often large companies with assets of several hundreds of millions of dollars to manage, (which the writer knows from personally reading his brother-in-laws' group home and SIL service prospectus'), and that requires them to maximize profit if they are to keep their market share. They prepare the standard form service agreements and they advise the majority of our clients that the conditions in these agreements cannot be negotiated or changed. **These conditions may be unfair to the client.** (Examples of unfair conditions that we have seen include, increasing the client's board payments on giving 14 days' notice, making the client pay for property damage, a condition that allows them to terminate the accommodation and/or SIL agreement at any time for no reason, a condition that allows them to terminate the agreement if the NDIA has not paid their invoices, etc).

A service provider should **not be legally allowed to terminate a service agreement when they know a vulnerable person will be left without support.** (For example, evicting a client from a

group home, or withdrawing SIL services, are both actions that are likely to cause serious abuse and neglect, and yet the Commission has no power to protect the client).

There is a **need for a quick and inexpensive complaint resolution authority** with power to order the fixing of day to day consumer problems in group homes, (such as fixing wheel chairs, serving hot nutritious meals, making the house bus available to the residents, reviewing curfews imposed by staff, not isolating residents, fixing the TV, going on day trips, etc), and to impose fines and penalties on the service provider if it is not fixed within a specified time. It is hoped that this may prevent escalating behaviours that are caused by complaints being ignored.

7. We submit, with respect, that the following changes should be made to the Commission.

- The Commission should have its own Official Community Visitors scheme.
- The Commission should have power to stop group home evictions.
- The Commission should have power to adjudicate individual consumer law and contract law complaints against group home service providers.
- The Commission should have power to make legally enforceable orders and directions to group home service providers.
- The Commission should change its approach to regulation so that it is pro-active and effective in fixing individual resident's complaints in group homes.

Thank you.

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Tim Chate, solicitor.

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