

3rd December 2020

Joint Standing Committee on the National Disability Insurance Scheme
P.O. Box 6100
Parliament House, Canberra, A.C.T. 2600
Phone: 02 6277 3083

Attention: Ms Bonnie Allan, Committee Secretary.

Re: Follow up 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.

We refer to our submissions dated 29th July 2020, and to our answers at the Public Hearing on the 13th October 2020.

Question on Notice.

In relation to a question on notice, IDRS does not have current statistics on the number of group homes in NSW, nor the number of people living in group homes. As the committee would have been made aware, there is a shortage of group homes, and many people who should be living in group homes are also living in aged care, nursing homes, family residences, and other types of accommodation.

In 2018 we noted an estimate from the Official Community Visitors under the NSW Ombudsman that there were 8,000 people with disability living in supported group accommodation in NSW, (see page 2 of the data from the NSW Official Community Visitor Scheme).

Explaining our answer about the public awareness of the Commission.

The writer said that 80% of the people who contact us are aware of the NDIS Q and S Commission. That statement is incorrect, because the writer was referring to the people with whom he has spoken, and because IDRS does not ask this question. Instead, the writer estimates, from the people he has spoken to, that 80% are aware of the NDIS Q and S Commission. Further, we wish to qualify that answer to note that often the people who support our clients to contact us are the staff from the service providers, advocates, co-ordinators of supports, family members

and carers, and therefore these people have experience of the disability sector. If, however, you asked our clients personally questions about the NDIS Q and S Commission, I do not think that many of them would be able to answer.

Explaining our answer about why the Commonwealth Government should give the Commission more powers, or alternatively, create an independent and impartial complaints resolution service, (resembling the AFCA model).

In our submission at pp2-3 we gave nineteen examples of individual complaints that were not being fixed. Also, we submitted at pp1,6,7 and 10 that “small problems, if left unfixed, rapidly escalate into big problems,” because our clients have challenging behaviours. As an example, we refer again to case 6 on p7 which showed how a small problem that is not fixed can lead to an Apprehended Violence Order, eviction, and gaol.

We also commented on the powers of the Commission to fix these kinds of individual complaints on pp3-4, and noted that its existing powers are not enough because of the six reasons, noted in point form, on p4, (including the fifth point which stated “the Commission does not have power to make service providers fix individual complaints”). No service provider has been prosecuted by the Commission for breaches of the Guidelines, Rules, or Code of Conduct in relation to any of the complaints that we have referred to, and therefore the Commission cannot show any successful prosecution to prove that it has adequate powers.

Instead, as we noted on pp3 and 9, the powers that the Commission has are only aimed at regulation, and to do that job the Commission uses auditors to check compliance with key performance indicators. This system, we submitted at p9, “is not sufficient to protect clients,” and we further say that it has failed to discover and fix any of the complaints referred to in our submission.

The Senate Committee commented on our submission, namely, “that there was a gap in the law because the NSW Government had not given the residents of group homes tenancy rights, nor consumer rights.” “Why should that be a matter for the Commonwealth,” the Senate Committee asked? We submit that it should, for at least five, reasons:

Firstly, because as we stated at p8 of our submission, “a service provider should not be legally allowed to terminate a service agreement when they know a vulnerable person will be left without support,” because it is abuse and neglect, and

Secondly, because as the nineteen examples of our clients’ complaints on p2-3 show, the “gap in the law” in relation to tenancy rights and consumer rights, is already causing complaints not to be fixed, and that triggers escalating behaviour from clients with challenging behaviours, often resulting in serious consequences for them, and

Thirdly, how can the Commission be credible if it does not even have the power to make a group home fix a resident’s toilet seat as an urgent repair? and

Fourthly, because the Commonwealth Government promised all people with a disability that no one would be worse off under the NDIS, and

Fifthly, because the Commonwealth Government decided to nationalise and privatise the disability sector based on an economic model of perfect competition. That model assumes that consumers are protected because they have consumer sovereignty, ie. that they have choice and control and are fully informed and can purchase alternative services from a free market

of other service providers all competing with each other for their business. In fact, group homes are in short supply, and expected to be in short supply for the next 10 years, and the group home service providers are concentrated amongst the few in each geographical area and therefore have market power, and all the residents with whom the writer has spoken were placed in their group homes without consultation, and they do not have choice and control, and also because, in fact, they cannot change group homes without the consent of the NDIA because it pays for their accommodation and SIL services. Therefore, residents of group homes will continue to be abused and neglected each day, until such time as they have real choice and control. Until then, the Commonwealth Government has a moral obligation to protect them because the disability sector does not resemble the free market model it chose.

Alternatively, if the Senate is considering an alternative to giving more powers to the Commission to adjudicate complaints, then we submit that it consider an independent and impartial complaints resolution service, resembling the Australian Financial Complaints Authority, (AFCA), model. The AFCA web-page describes AFCA as: *"Our AFCA role is to assist consumers and small businesses to reach agreements with financial firms about how to resolve their complaints. We are impartial and independent. We do not act for either party to advocate their position. If a complaint does not resolve between the parties, we will decide an appropriate outcome.*

Decisions we make can be binding on the financial firm involved in a complaint. We can award compensation for losses suffered because of a financial firm's error or inappropriate conduct. There are other remedies we can also provide for superannuation complaints. We do not, however, award compensation to punish financial firms or impose fines.

AFCA is not a government department or agency, and we are not a regulator of the financial services industry. We are a not-for-profit company, limited by guarantee that is governed by a Board of Directors, which includes equal numbers of industry and consumer representatives. AFCA's Chief Ombudsman is responsible for the management of the organisation".

We ask the Senate to consider a similar model for the disability sector.

Further information about Case 1: Unenforceable recommendations, (referred to at page 5 of our original submission). An update.

When the client's mother spoke to us, we advised her to take the complaint back to the Commission on the grounds that the service provider had reneged on following the recommendation to give up the group home, and that the eviction was in breach of the NDIA Terms of Business for SDA accommodation, and in breach of the occupation agreement which also required the service provider to work with the NDIA to find alternative suitable accommodation, and that the threats and actions being taken by the service provider will result in abuse and neglect to the client, and that the client is being victimised because of the complaints

against the service provider. We also advised her to complain to politicians, and the media, and to consult a personal injuries lawyer about the history of bruising and abuse.

Afterwards mum was helped by an advocacy service. The injuries were becoming more obvious and so she called in the NSW police. The police visited the home. The police officer talked to her about a criminal prosecution. The NSW Health Department was also contacted. Mum went on the local radio station and spoke passionately for 45 minutes about how the client was being abused. Mum also complained again to the Commission and spoke to senior personnel at the Commission. Arrangements were then made for the client to live in the group home alone with a new service provider. Mum and the client are now satisfied with these arrangements. Mum said that part of the agreement for these new arrangements to be put in place was that she had to agree that no legal action would be taken against the service provider or the Commission.

This case required mum to be tireless and determined in going to the police, and to the media, and back to the Commission, for more than a year before the abuse and neglect ended.

Some further cases.

We provided a number of case studies in our original submission. The following 3 case studies again highlight the shortcomings of a gap in the law because the NSW Government has not given the residents of group homes tenancy rights, nor consumer rights.

Case 7: (cases 1-6 were in our original submission). Failure to follow the BISP Plan and disagreements between the service provider and the NDIA cause the client to be evicted, charged by police, end up costing the taxpayer an extra \$200,000- per year, and cause family devastation.

The client lived in short-term group home accommodation. The service provider claimed the NDIA were in arrears in paying his accommodation fees and for that reason its lawyers sent an eviction notice to the client. We drafted letters for his mother to send to the lawyers and to the Commission noting that he was not at fault and that the eviction would leave him homeless. Mum also contacted Legal Aid.

A meeting was held between the service provider and its lawyers, the client, his mother, Legal Aid, and the Commission. It was agreed that the client needed stable accommodation and the service provider agreed for the client to stay at the group home, and that it would provide experienced staff to monitor him. A short time thereafter these arrangements fell apart again. This happened again because the service provider again claimed that the NDIA was not paying its fees, and also casual agency staff were employed and they failed to monitor the client and to follow his behaviour intervention support plan, (BISP). The client's complex behaviours were triggered, and escalated, and he was evicted on 31/12 2019. He went to stay in an air-bnb. As a result of his reactions to the loss of accommodation he was charged with assault and spent 3 days in court earlier this year defending the assault charges. He was supported by our service in court. Finally, the charges were dismissed on condition that he continue to receive

disability supports. His mother told us that over the past 18 months the client has had 8 NDIS plans, and 8 accommodations including living in a car and in a hotel.

His mother then complained to her local MP who helped her to escalate his complaint, and also the hospital made representations on his behalf. The NDIA then provided more funding in his plan so that he could live independently in a private rental with supported independent living, (SIL), services with properly trained carers. These arrangements have continued for the past 6 months without incidents.

His mother said she has zero faith in the Commission. She said she has wasted her time in the past and would not waste time contacting the Commission again. She said that the Commission did not follow up to check that the service provider was taking the action it promised. She is a member of a carers group who try to support each other when disability issues arise. She said that all a service provider has to show is that it is working with the Commission. She said that no action was taken against the service provider. She said that the experience has had a devastating impact on the rest of her family.

Mum said that it now costs the taxpayer \$200,000.00 extra per year for accommodation for the client, and that this extra money would have been saved if the problem had been fixed sooner.

Case 8. The failure of the service provider to follow the BISP causes injury, hospitalisation, and loss of accommodation, to the client, and family devastation.

The client is an adult with autism who had lived in a group home for more than 8 years. His parents were appointed as his guardians with functions including services, medical, and health. He is on the DSP and receives funding under the NDIS. The residents were not compatible, and he has challenging behaviours.

After a new service provider began at the group home the former house manager was removed. His removal caused problems. His father then complained that his behaviour intervention support plan, (BISP), was not being followed. His behaviours then escalated. He injured himself and attacked a worker in May 2019. He was taken to Sutherland Hospital then St George Hospital and was not allowed to return to the group home for 118 days. During that time, his father and mother alternated sleeping in the same hospital room as the client, and his mother and father implemented their own community activities for him during the daytime. As a result, his behaviours became unproblematic again. He had to stay in St George Hospital whilst the service provider took time to get their administrative role correct. On the 26th of August he then tried to return to the group home, however the service provider against documented protocols imposed a 6.30pm curfew and put him in bed when he was supposed to go out for activities. He was unable to endure the curfew and their restricted activities and his challenging behaviours started to return very quickly.

His father also complained that his toilet seat had not been fixed for weeks, and that loud sounds, like slamming doors, caused stress to him, and that he was too active to be made to go to bed at 6.30pm. His father complained to the NDIS Q and S Commission. The service provider responded that a new BISP was being prepared and that a new toilet seat had been approved. The Commission took no action and closed the complaint.

There were many other issues at the house.

His parents removed him from the group home after 18 days. Then for a time, he lived with his mother, and then with his father (they are divorced with 2 houses on the same block of land). They shared providing him with an active daily program of exercise and community engagement. They arranged for his NDIS Plan to be self-managed by his father and mother and they found him a private rental all under the Family Governance model. Since May of 2020 he has lived alone, with supported independent living, (SIL), services supporting him in his private rental home. His behaviours are being managed and there have been very limited minor further incidents.

His father has had to change his employment and to use up his own funds to support his son as it is his highest moral imperative.

His father said that all of the problems arose because the service provider refused to follow the BISP. The service provider just made “we’ll get it right next time responses” and his complaints were closed.

(His father made two short videos about these events).

<https://www.youtube.com/watch?v=7YwQKE1s7Gg&feature=youtu.be>

<https://www.youtube.com/watch?v=bbM--cGrnY&feature=youtu.be>

Case 9. Closing an injury complaint on the grounds that it was an “unexplained injury”, leaves the client unprotected against it happening again. There should have been a more comprehensive investigation.

The client is an adult living in a group home. She has disabilities including cerebral palsy, intellectual disability, epilepsy, and mental illness. She is on the DSP, and she receives funding under the NDIS.

About 6 months ago she suffered groin injuries. The police and paramedics attended. She was taken to hospital where she stayed 3 weeks before discharge, and then stayed another 6 weeks in recovering with her family, before returning to the group home. The

incident was reported to the NDIS Q and S Commission. Her sister said that neither she, nor her relatives, were contacted by the Commission, to discuss the client's injuries. Therefore, they had no input into suggesting the circumstances that may have possibly explained the cause of her injuries. After 6 months the only information was that the client was injured due to an "unexplained fall." No action was taken against the service provider.

Since being injured the client cries more often, does not talk as much, and she has not talked about her injuries.

Her sister is not satisfied with the Commission's actions, because she was not consulted, also because the cause of the injuries remain unexplained, and because no evidence was provided to reject other explanations such as dangerous objects, self-harm, dangerous premises, other resident behaviours, the number of supervising staff on duty, etc.. **She fears that the real cause of the injury has still not been addressed.**

Discussions between the Commission and IDRS.

Since we talked to the Senate Committee in October, the Commission has contacted us to discuss some of our client's complaints. We have had one meeting with them, and another will occur soon. We found the first meeting very useful because it allowed us to discuss some of the problems on behalf of our clients. Going forward we hope to discuss some of our suggestions about how the Commission can:

- More effectively reach out to our clients, especially those who cannot speak out, and support them, and
- Pressure service providers to respond to complaints sooner and follow the recommended complaints procedure, (including genuinely attempting to fix complaints), and
- Pressure service providers to comply with the NDIS Guidelines, Rules, and Code of Conduct, and
- Meet clients and visit their residences when complaints are made about serious urgent matters, (including threats of eviction, withdrawal of SIL services, , not following the BISP Plan, Apprehended Domestic Violence Orders being taken out by staff against residents, acts of retaliation by the service provider, etc), and
- Be more compassionate to residents and carers in relation to complaints about abuse and neglect of residents of group homes, and more pro-active in holding service providers to account, and prosecuting them for breaches of the Guidelines, Rules, or Code of Conduct, and
- Provide more information to clients in closing letters, and to follow up on any assurances or undertakings given by the service providers, and
- Consider appointing a designated serious matters complaints officer, who would be in a senior position at the Commission, so that Community Legal Centres, like ours, and Legal Aid, can directly contact them if we are reasonably satisfied that the client's complaint shows a real risk of serious abuse and neglect by the service provider.

Recommendations.

At the end of our original submission, we made 5 recommendations, which I repeated and added to in our opening statement on the 13th October 2020. We repeat them again here adding the suggestion about the Senate Committee also considering the AFCA model for complaint resolution:

1. The Commission should have its own Official Community Visitors Scheme, (because residents of group homes may not be able to speak up, also they may not have an advocate, and also it cannot rely on information sharing from other government departments, Commonwealth or State, as the Ruby Princess Inquiry has recently shown).
2. The Commission should have power to **stop group home evictions**, (in NSW because the NSW government has not legislated for group home residents to have tenancy rights), and the Commission should also have the power to **stop the withdrawal of any service**, where it is known that a vulnerable person will be left without support.
3. The Commission should have power to adjudicate individual tenancy law and consumer law and contract law complaints against group home service providers, (because in practise, for the reasons given in section 5 of our original submission, residents of group homes in NSW have no legal remedies in these matters).
4. The Commission should have power to make legally enforceable orders and directions against group home service providers, (in relation to tenancy law and consumer law and contract law complaints involving the day to day living arrangements and comforts of residents). For example, it should have the power to make a group home service provider fix a resident's toilet seat as an urgent repair.
5. The Commission should change its approach to regulation so that it is proactive and effective in fixing individual resident's complaints in group homes. We suggested seven changes of approach in the previous section, including being more compassionate to the resident, and also being more willing to view their complaints, where appropriate, as involving abuse and neglect, instead of viewing them as legal disputes and referring them elsewhere.
6. If the Senate Committee is considering an alternative to giving the Commission more powers to adjudicate complaints, and make legally enforceable orders and directions, then we submit that the Senate should

consider recommending that an independent and impartial complaints resolution service be established resembling the AFCA model.

We submit these recommendations would give residents enforceable residential rights. It would also give them enforceable consumer rights. As a result it would cause service providers to be more willing to fix complaints and mediate, and it would help to stop day to day living problems building up into big problems, like a pressure cooker, and also it would help to reduce the onerous work, frustration, and stress caused by the existing complaints procedures, which resemble those of the past 30 years in NSW, and which have proved to be lengthy and useless for residents of group homes, and finally it may also save the taxpayer a lot of money as case 7 shows.

Thank you.

Tim Chate, solicitor.

Janene Cootes, C.E.O.

Intellectual Disability Rights Service