

Additional comments by Australian Labor Party Senators

1.1 Labor Senators recognise the need for a strong quality and safeguarding framework to be established as soon as possible. This is required to protect and prevent people with disability from experiencing harm arising from poor quality or unsafe supports or services under the National Disability Insurance Scheme (NDIS).

1.2 However through this Inquiry a range of significant issues have been raised by stakeholders, including disability organisations, providers, unions and States, that Labor Senators believe need to be addressed.

1.3 First, Labor Senators would like to note that some of the concern among stakeholders about the National Disability Insurance Scheme Amendment (Quality and Safeguards Commission and Other Measures) Bill 2017 (Bill) could have been avoided with a more transparent and earlier consultation process.

1.4 Labor Senators note that as part of this Inquiry, the Government released some of the draft NDIS rules, and that consultation processes with stakeholders have now begun. At the time that submissions were due and hearings held the majority of stakeholders had not seen the draft rules relevant to them. This is particularly important given many key issues are delegated to be resolved within these rules, rather than the primary legislation. As a result it was very difficult for stakeholders to be supportive of the Bill, given they had no visibility of how key objectives of the Bill were to be approached.

1.5 Labor Senators wish to note here concerns that should be addressed. The Government should work with stakeholders to resolve these issues, including through amendments to the Bill where necessary.

Advocacy

1.6 As noted in the Chair's report, several submissions to the Inquiry raised concern about the absence of the role for advocacy in the Bill itself, including those from Australian Federation of Disability Organisations (AFDO) and Disability Advocacy Network of Australia (DANA), Disabled People's Organisation Australia (DPO Australia) and Queensland Advocacy Incorporated.

1.7 Disability organisations have raised concern that independent advocacy is not well understood in the context of the NDIS, and there is confusion and marginalisation of this important role. In a number of situations, independent advocates are refused entry into closed settings, such as boarding houses and group homes and larger residential facilities despite the evidence that indicates higher risks of violence and abuse in these settings. Sometimes, independent advocates are the only trusted support for people with disability, and NDIS providers must acknowledge and facilitate access to independent advocacy.

Recommendation 1

Labor Senators support this view and therefore recommend that amendments be made to ensure that the Bill explicitly states that NDIS participants have the right to access independent advocacy and that provisions are made to define and protect this role.

1.8 The role of independent advocacy needs to be included in the Bill, not only the Rules.

1.9 Labor Senators would be supportive of amendments similar to those proposed by DPO Australia and AFDO and DANA in their submissions, along the lines of the following:

- At section 4(13), or in a new subsection within section 4, a specific statement that articulates the right of NDIS participants to independent advocacy for any NDIS engagement, including with the NDIS Quality and Safeguards Commission;
- At section 73W, an additional provision (c) that stipulates that NDIS providers acknowledge and facilitate access to the role of independent advocacy in complaints management and resolution systems;
- At section 73X(2)(b), independent advocates should be included along with people with disability, complainants, and NDIS providers;
- At section 73Z(3), an additional provision (c) that stipulates that action may include ensuring that the person with disability has access, or is referred to independent advocacy;
- At section 73ZA(d), include 'independent advocate' to the list of disclosures qualifying for protection under the law (this is particularly critical, as advocates should have the same protections as others, and currently do not have these protections);
- At section 181E(c), include providing advice on the right to complain and to access independent advocacy;
- At section 181D(4)(a), include a phrase similar to, 'including through recognising the support and role of independent advocacy';
- At section 181F(d), include a phrase similar to, 'including recognition of the role of independent advocacy in supporting people with disability';
- At section 181G(c), include a phrase similar to, 'including through recognising the support and role of independent advocacy'.

Procedural Fairness

1.10 Unions have raised concern about the absence of provisions in the Bill to ensure procedural fairness for NDIS workers who are subject to complaints or investigations.

1.11 The Government has argued that the general administrative law principles of procedural fairness apply to decisions made by the Commission and therefore no

further detail is required in the legislation or regulations. The Department of Social Services has also raised concern that by prescribing procedural fairness in legislation or regulation they could inadvertently limit procedural fairness.

1.12 Labor Senators note, however, that these same administrative law principles apply in relation to employment in the Australian Public Service (APS), and nonetheless there are comprehensive procedures for APS employees if they are subject to an investigation, which are underpinned in legislation and regulation.

1.13 The procedural fairness framework for APS employees is as follows:

- Section 15(3) of the *Public Service Act 1999* (the Act) requires agency heads to develop written procedures for determining whether an employee has breach the APS Code of Conduct, and if so, what sanction should apply.
- Section 15(4) of the Act requires those written procedures to:
 - Comply with the procedural requirements set out in the APS Commissioner's Directions; and
 - Have due regard to procedural fairness.
- Sections 43 – 47 of the APS Commissioner's Directions 2016 (a legislative instrument) set out 'basic procedural requirements' that, in summary, require the following:
 - The agency must notify the employee of the details of the suspected breach of the Code of Conduct;
 - The employee must be given a reasonable opportunity to make a statement in relation to the suspected breach (before the agency makes a determination in relation to the suspected breach);
 - If a determination is made that an employee has breached the Code of Conduct the agency must inform the employee of:
 - The determination;
 - The sanction/s under consideration; and
 - The factors that are under consideration in determining the sanction;
 - The employee must be given a reasonable opportunity to make a statement in relation to the sanctions;
 - The decision maker must be independent and unbiased;
 - The process must be carried out with as little formality and as expeditiously as possible.
- In accordance with s 15(4) of the Act each agency must have written procedures that comply with the above requirements. By way of example the Secretary of the Department of Social Services has published a four page document (dated 21 December 2016) setting out the procedure to be followed in the event of an investigation into an employee. Those procedures are

consistent with the APS Commissioner's Directions, but go further, and include:

- A note that procedural fairness generally requires that the employee be informed of material that is before the decision maker that is adverse to the person or their interests;
- There should be logically probative evidence to support the making of adverse findings, on the balance of probabilities;
- That the decision maker must agree to a request by the employee to have a support person present in any meeting or interview (where the request is reasonable).

Recommendation 2

Labor Senators recommend that similar provisions must be included as part of the NDIS Quality and Safeguarding legislation.

1.14 This would include an amendment to the Bill to include new section stating that the Commissioner's Complaints Function must be exercised in accordance with the Complaints Rules and in accordance with procedural fairness; and amendments to the Complaints Rules to ensure the following:

- The Commission will generally exercise its powers in accordance with procedural fairness.
- That before making any decision in relation to conduct under investigation the Commission must:
 - notify the worker of the details of the complaint or investigation into their conduct;
 - provide the worker with any material before the Commission that is adverse to the worker or their interests;
 - provide the worker with a reasonable opportunity to make a statement in relation to the alleged conduct.
- If a determination is made that the worker has engaged in misconduct, before making any decision in relation to what sanction should apply the Commission must:
 - notify the worker of the determination, the sanctions under consideration and the factors that are under consideration in determining the sanction;
 - provide the worker with a reasonable opportunity to make a statement in relation to the proposed sanctions.
- The process should be carried out as expeditiously as possible and in a timely way.
- The Commission must agree to a request by the employee to have a representative present in any meeting or interview.

1.15 Both unions and disability organisations have noted the need for investigations to be carried out in a timely manner. While this is stated in the above proposed amendment to the rules, the inclusion of actual timeframes for each stage of the process is desirable and should be further considered.

Categorisation of rules for consultation with States

1.16 The Bill proposes that most of the rules that underpin the operation of the Commission and other regulatory matters are classified as 'Category D' meaning they only require consultation with member states rather than agreement. The Bill proposes that rules that relate to behaviour support and worker screening are classified as Category B, which require agreement from a majority of member states.

1.17 The Victorian Government and National Disability Services (NDS) have argued that rules are fundamental to the detailed design and implementation of the Framework and should require the agreement of all jurisdictions, at least during implementation phase and in the early years of the Framework's operation.

1.18 Labor Senators support this view. For the scheme to be nationally consistent it is important that, at least in the early years of establishment, States and Territories are properly consulted and agree on key elements of the quality and safeguarding framework.

1.19 Victoria has proposed to amend clause 79 to classify all rules as Category A, requiring agreement from all jurisdictions (excluding regulations made under section 9 (definition of NDIS provider)); and to insert a new section to provide that an absence of a response from a jurisdiction within 28 business days of receiving a request from the Commonwealth Minister to approve a rule or rules, will be deemed as an agreement by that state or territory to the rule or rules being proposed.

Recommendation 3

Labor Senators recommend that the Government work with Victoria and other concerned organisations to address this issue, including any necessary amendments to the Bill or rules.

Registration of providers and worker screening

1.20 Several submissions, including from the Australian Services Union (ASU), Health Services Union (HSU), United Voice and NDS, raised concern that the Bill does not require all providers to be registered NDIS providers.

1.21 Under the current National Disability Insurance Scheme Act 2013 (the Act), if funding under a participant's plan is managed by the National Disability Insurance Agency (the Agency), supports can only be provided by a registered NDIS provider (subsection 33(6) of the Act). Plan managers must also be registered providers because of section 42 of the Act.

1.22 Therefore providers can only be unregistered where they are providing supports to a self-managed participant.

1.23 Under subsection 35(2) of the current Act, the NDIS rules may provide for the manner in which supports are to be funded or provided. This rule making power has

been used to require Specialist Disability Accommodation providers to be registered (under the current NDIS (Specialist Disability Accommodation) Rules).

1.24 The Bill as currently proposed provides for rules to be made requiring providers of specified classes of supports to be registered. The Registration and Practice Standards Rules, on which consultation is ongoing, will confirm the classes of support for which providers must be registered. These will apply even to providers providing supports in these classes to self-managed participants.

1.25 In addition, there are mechanisms available in the Bill for the Commission to require individual providers to be registered in order to provide supports, for example by placing a conditional ban on a provider or imposing a condition of registration that it can only provide a particular category of supports (outside its registration group) if it is registered for that category of supports.

1.26 There is a general consensus across disability organisations that any further requirement for providers to be registered would impinge on the choice and control of participants, by limiting their ability to manage their own risk and choose their own providers. Labor Senators also see this side of the argument, and appreciate that this is contentious issue.

1.27 Unions have also raised concern the Bill does not call for universal worker screening, as unregistered providers are not required to be screened. Similarly many in the disability community believe that universal screening would compromise choice and control.

Recommendation 4

Labor Senators recommend that further work is required to address these issues.

1.28 Children and Young People with Disability Australia (CYDA) have also raised concern that the registration process should include specific safeguards for children, for example including that the rules should specify requirements that must be met for providers to be considered child-safe.

Recommendation 5

Labor Senators recommend that the Government work with CYDA and other stakeholders to address issues specific to children in the framework, including any necessary amendments to the Bill and rules.

Workforce Training

1.29 Unions, including the ASU, HSU and United Voice, are concerned that workers will not get access to adequate training and support to understand the Framework, the Bill, and the associated Code and Practice Standards, and to consistently meet their obligations under the regulatory regime.

1.30 They have argued that the Commission should have an additional responsibility for workforce development and training to proactively focus on the quality of supports and the skills of the workforce, and should be resourced to fulfil this responsibility.

1.31 Further, training is not covered under the NDIS pricing framework, therefore employers are not supported to ensure employees are provided with adequate training. This leaves a risk that employees will not receive adequate training, or will be forced to undertake in their own time and at their own expense.

Recommendation 6

Labor Senators recommend that further work is required to address this issue and recommend that the Government work with unions and other stakeholders to resolve it, including any necessary amendments to the Bill and rules.

Restrictive Practices

1.32 The Explanatory Memorandum states that the Commission will have responsibility for 'national oversight and policy setting in relation to behaviour support and monitoring the use of restrictive practices, within the NDIS with the aim of reducing and eliminating such practices'.

1.33 Disability organisations including DPO Australia, AFDO and DANA, NDS and CYDA, have raised particular concern that the Bill does not include regulatory powers to enable the NDIS Commissioner to prohibit certain restrictive practices.

1.34 As DPO Australia states, current mechanisms for restrictive practice oversight at State and Territory level are varied and inconsistent, with some consisting of relatively weak policy functions within government departments and others having established regulatory bodies and mechanisms. This already creates inequity in protection from practices that have been found to constitute torture and ill-treatment, and this Bill should be providing the highest level of protections equally across Australia.

1.35 The Government has argued that its regulatory power in this area is limited by the need for the Commonwealth to rely on section 51(xxix) of the Constitution, the external affairs power, to draw on Convention on the Rights of People with Disability commitments.

1.36 The Government's advice is that the Commonwealth cannot directly authorise restrictive practices; therefore it is necessary for States and Territories to remain responsible for regulating the authorisation of restrictive practices.

1.37 The Government has also argued that the Bill provides for a number of powers of the Commission which have a very strong regulatory effect in relation to restrictive practices – particularly through the registration powers:

- Unregistered providers will not be able to use restrictive practices
- Registered providers will not be able to use restrictive practices unless they:
 - Have approval in the jurisdiction, consistent with that jurisdiction's requirements; and
 - Have been developed as part of a positive behaviour support plan which has been developed by an approved behaviour support practitioner.
- Behaviour support practitioners will need to be approved by the Commission and will be subject to standards set out by the Commission.

- All uses of restrictive practices will need to be reported to the Commission and the use of unauthorised restrictive practices will be reportable incidents.
- The combination of these powers will mean that there will be tight controls and national transparency around the use of restrictive practices in the NDIS.

1.38 DPO Australia has suggested that at the very least, section 181H should include provision for the Commissioner to the work with States and Territories to design and implement a nationally consistent regulatory framework for eliminating restrictive practices and authorising positive behaviour support. This framework should be mandatory, reviewable and enforceable, and include mandatory requirements for the use of positive behaviour supports. A nationally, consistent regulatory framework should be co-designed with people with disability and their representative organisations.

Recommendation 7

Labor Senators recommend that the Government work with DPO Australia and other concerned organisations to address this issue, including any necessary amendments to the Bill or rules.

Independent Complaints Commissioner

1.39 Several submissions, including those from the Victorian Government, AFDO and NDS, raised concern about the independence of the Commissioner with regard to his or her complaints role. In particular, there was concern about the proposed structure of the Commission and that there could be perceived or actual conflict between its three key roles of provider registration, practice standards and complaints. Concern was also raised about the Commissioner being subject to Ministerial direction with regards to complaints.

1.40 In response to these concerns the Government has explained that structuring the Commission as one agency is based on recommendations by the Productivity Commission in the context of aged care in the *Caring for Older Australians Inquiry* (2011). The rationale is that combining the functions in one organisation will lead to better efficiency, information sharing and continuous improvement of processes across functions. For example the Productivity Commission Inquiry report states:

To limit the potential for confusion and overlapping regulation, to increase the efficiency of regulation and to facilitate best practice regulation, a single organisation should administer the regulation of quality, and investigations of noncompliance. (p. 404)

Second, the current governance arrangements for accreditation need to be reconsidered within the context of an enhanced consumer-oriented and outcomes focussed approach to assessing the quality of care. Moreover, many features of best practice 'responsive regulation' (appendix F) are difficult to achieve when one aspect of regulatory responsibility (that is, accreditation and the assessment of performance against Quality Standards) is structurally separated from compliance investigations and enforcement decisions surrounding quality. Regulatory behaviour would be enhanced by locating quality assessment within the same organisation that receives consumer complaints, monitors compliance, provides information on ways

that providers could improve the quality of their care services and makes the enforcement decisions. (p. 402)

1.41 Labor Senators also note that the Government has confirmed that a Deputy Commissioner will be appointed with responsibility for complaints and reportable incidents. The Minister's directions will be to the Commissioner (as opposed to the Deputy Commissioner) about the performance of functions under the Bill which includes the complaints function. As set out in Section 181K of the Bill, these directions must be of a general nature only and cannot, for example, relate to a specific complaint, individual or NDIS provider.

1.42 Labor Senators believe that this does address concerns about the Commission's complaints role, but that these are issues that should be monitored once the Commission is established including as part of the review process.

People with disability outside the scope of the Commission

1.43 There is concern among stakeholders, including AFDO and DANA, DPO Australia and NDS, that the Commission will only cover NDIS participants, and therefore that people with disability who receive supports outside of the NDIS will not be covered.

1.44 The Government's response to this has been that people receiving supports through other systems, such as the health, education and justice systems, will continue to be covered by the quality and safeguards arrangements of those systems; and that the Commission will not replace existing functions in the states and territories that have a broader scope (such as an ombudsman, a human rights commission or a public advocate).

1.45 Disability organisations remain concerned about people falling through the cracks and not being covered by a disability-specific quality and safeguarding framework.

Recommendation 8

Labor Senators recommend that the Government work with stakeholders and States and Territories to address this issue, and ensure that people with disability are sufficiently covered in all jurisdictions.

1.46 Labor Senators also wish to again note that NDIS Quality and Safeguarding Framework certainly does not negate the need for a Royal Commission into violence and abuse against people with disability as the Government claims. Labor again calls on the Government to establish a Royal Commission as soon as possible.

Review

1.47 Labor Senators note that the Explanatory Memorandum states that a review of the NDIS quality and safeguarding framework will commence in mid-2021 (three years after commencement), with a report to be provided to the Council of Australian Governments Disability Reform Council by mid-2022, covering 'the efficiency and effectiveness of the framework in meeting its objectives, any unintended consequences arising from their implementation, and any identify any weaknesses in the regulatory framework'.

1.48 This review will be an important opportunity to reassess areas of concern and address any issues that have arisen through the early operation of the Commission and Framework. It is vital that this review is an open, transparent and consultative process and that the review itself is made publicly available.

Recommendation 9

Labor Senators recommend that the review make particular reference to the issues that have been raised here.

Senator Murray Watt