

31 August 2020

Joint Standing Committee on the National Disability Insurance Scheme
PO Box 6100
Parliament House
Canberra ACT 2600
Via email: ndis.sen@aph.gov.au

Dear Committee Members

I write to make a submission to the Inquiry into the NDIS Quality and Safeguards Commission. Thank you for extending the deadline for this submission to 31 August 2020.

As the Public Advocate for Queensland, I am appointed under the *Guardianship and Administration Act 2000* to undertake systemic advocacy to promote and protect the rights and interests of Queensland adults with impaired decision-making capacity.

Since the introduction of the NDIS, more than 67,000 Queenslanders have become NDIS participants, with significant growth in numbers still expected between now and 2023, when Queensland is projected to have more than 110,000 active participants.¹

The introduction of the NDIS has triggered fundamental changes to the disability service system. These changes include the transition from a State to a Commonwealth funding model and a range of new market entrants, both as providers and consumers. The new legislative framework is comprised of State and Commonwealth laws, and compliance and regulatory bodies, including the NDIS Quality and Safeguards Commission (the Commission), which oversee regulation and standards to ensure the rights and wellbeing of NDIS participants.

The Commission commenced operations in Queensland from 1 July 2019. Since that time, it has focussed on the registration of NDIS service providers and the development of compliance processes associated with incident reporting, particularly in relation to the use of restrictive practices.

The onset of the COVID-19 pandemic in 2020 has meant, however, that the Commission has had to shift its focus to responding to the health emergency. Given the Commission only had around six months of operations in Queensland before the COVID-19 outbreak, it may be somewhat premature to undertake an Inquiry into its operations, including its efficiency. Could I suggest the Committee consider recommending a further inquiry in 2023, which will coincide with Queensland projections of reaching its participation targets, and the Commission will have had time to fully establish itself and its processes in all Australian jurisdictions.

¹ Queensland Productivity Commission, *Issues Paper – Inquiry into the National Disability Insurance Scheme Market in Queensland*, June 2020 <<https://qpc.blob.core.windows.net/wordpress/2020/06/NDIS-Issues-Paper.pdf>>

While a later inquiry is recommended to assess the operations of the Commission in Queensland, I do wish to draw the Committee's attention to the death of Ms Ann-Marie Smith, a South Australian resident and NDIS participant. I would like to suggest some changes to the operation of the Commission that, if implemented, may prevent similar tragedies in the future.

The death of Ms Smith was a terrible reminder of the importance of effective monitoring and oversight to ensure the safety and well-being of all NDIS participants.

I wrote to Mr Graeme Head, NDIS Quality and Safeguards Commissioner who recommended I make a submission to Mr Alan Robertson SC, who is leading the inquiry into Ms Smith's death for the Commission. I have attached both documents for your information.

My correspondence and submission highlight the systemic issues associated with the monitoring of services and safeguarding of NDIS participants that I hope will be addressed in this Inquiry in regard to the Commission's operations.

It is vital that the Commission and the NDIS take a proactive and preventative approach to the provision of safeguards and monitoring for NDIS participants. This approach needs to find an appropriate balance between supporting participant autonomy to the greatest extent, while monitoring service quality and participant health and wellbeing.

I offer the following observations and suggestions to the Inquiry for consideration.

Identifying vulnerable individuals

The Government of South Australia's Safeguarding Task Force, Interim Report,² noted that it is critical that the NDIA has a clear concept of 'vulnerability' for its participants and has processes in place to identify vulnerable participants for which appropriate safeguards can be put in place to prevent abuse, exploitation or neglect. While it is important to avoid being overprotective, and recognise that not all people with disability are vulnerable and need protection, it is critically important that the NDIS has systems of monitoring and oversight that will identify risks to vulnerable participants, and act on them before a participant suffers harm from abuse or neglect.

Changes to improve the responsiveness of the NDIS Incident Management System

The Commission requires service providers to report the deaths of participants to the Commission and other serious incidents, including the alleged abuse and neglect of participants. It also requires NDIS service providers to have an incident management system, including procedures for identifying, assessing, recording, managing, resolving, and reporting incidents. While this system, once fully embedded into the Scheme, will provide a great deal of information that will assist in safeguarding NDIS participants, it lacks any 'red flags' for risk that may have triggered an intervention that could potentially save lives like that of Ms Smith.

Rather than focusing on just reportable 'incidents', Ms Smith's case highlights the need for the auditing and monitoring processes of the NDIS to be reviewed to identify particular issues that might be indicators of risk or 'red flags' that trigger NDIS responses or interventions. Some of the ways these indicators of risk could be identified and monitored include:

- monitoring the person's access to health services
- requiring service providers to introduce their own systems of oversight and reporting of incidents of neglect or harm.

² Government of South Australia Safeguarding Task Force, *Interim Report*, 15 June 2020.

Supporting and monitoring access to health services

Numerous reports over the past decade have identified that many people with disability have complex health issues, including one by my predecessor in 2016, *Upholding the Right to life and health: A review of deaths in care of people with disability*.³ To ensure their health is maintained, this cohort should have annual health assessments prepared by their GP that should be used to develop an annual health plan, documenting the various doctors and medical specialists the person should see, the frequency of those visits and so on.

While the provision of mainstream health services is outside of the responsibility of the NDIS, the NDIS should still be aware of the health needs of its participants, especially when complex medical conditions are involved. The NDIS plans of this group of participants should acknowledge their health needs and make provision for the necessary disability supports to manage conditions on a daily basis and implement annual health plans, including booking and attending medical appointments. There are significant risks for the NDIS to be funding disability supports for very vulnerable people with complex health conditions without acknowledging those conditions and understanding the disability supports required to manage them and keep people well. A siloed approach to the provision of NDIS services, and disregard of their reliance on mainstream health system services, may lead to poor health outcomes or death for some participants.

To address these risks, there needs to be a critical 'point of contact' established between the NDIS, State-based health services and Primary Health Networks to allow the NDIS to follow up on whether its participants are accessing the health services they need. For instance, NDIS-funded Support Coordinators could be authorised and required as part of their role to coordinate the implementation of participants' annual health plans.

Additionally, the NDIS could set up a 'risk flag' with Medicare to identify any NDIS participant who has not made a Medicare claim for a medical appointment in the past 12 months. Based on information from media reports, such a reporting requirement would have alerted the NDIS to the circumstances of Ms Smith, as it seems she had not seen a doctor in over five years prior to her death. It is critical to the safety and wellbeing of NDIS participants who are funded for high levels of personal care on which they are completely dependent for day to day wellbeing, that the NDIS takes an active interest in their health needs and monitors these identified flags for risk.

Requiring service providers to have their own systems of oversight

Another potential method of monitoring and oversight could be to require service providers to institute regular, independent 'health and wellbeing' checks of their NDIS clients. The checks could also involve monitoring the standards of care and support provided by their workers to those clients. The checks could be introduced as a component of the regulatory and registration system for NDIS service providers.

For example, service providers could be required to undertake their own 'inspections' of their workers 'in the field' and to obtain feedback from clients on their satisfaction with their services at least annually. This could entail the supervisor/inspector observing the worker delivering care services to the client and assessing their skills, satisfying themselves that the worker is delivering services to a requisite standard. This inspection would also allow for the supervisor to observe the client and their wellbeing. The supervisor/inspector could also obtain feedback from the client, although this may be difficult for the NDIS participant to do with confidence, with the worker present. In any event, some form of internal inspection process could ensure that someone independent of the direct care worker has 'eyes on' the

³ The Public Advocate Qld, *Upholding the right to life and health: A review of deaths in care of people with disability in Queensland*, 2016 <https://www.justice.qld.gov.au/__data/assets/pdf_file/0008/460088/final-systemic-advocacy-report-deaths-in-care-of-people-with-disability-in-Queensland-February-2016.pdf>

person with disability at regular intervals that could be set according to the NDIS participant's level of vulnerability.

It is acknowledged that such a regime would not work for sole disability support workers or smaller support providers. An alternative scheme may need to be considered in these circumstances, including a requirement for these service providers to organise their own independent inspections.

Another issue that must be addressed to minimise neglect and exploitation of vulnerable NDIS participants is to ensure that participants do not receive services from a sole worker for an extended period. Instead, workers should be assigned on a rostered basis, which would enable peer monitoring to operate informally.

Many people with disability develop quite close relationships with their support workers and may want to use the services of one person exclusively. While this can often be a positive outcome for the person with disability, it needs to be balanced with appropriate safeguards and monitoring to minimise the risk of any neglect or abuse that may go undetected.

Provision of advocacy supports for vulnerable clients

Another method to ensure the safety and wellbeing of vulnerable NDIS participants is to fund advocacy supports for them. For particularly vulnerable participants, with high support needs and few informal supports, an advocate could provide a valuable link into the community and a level of independent oversight of the quality of the services provided to the person, while empowering them to express their views and exercise choice and control in their lives.

The role of a funded independent advocate would need to be recognised within the NDIS, and the advocate should be able to readily see the NDIS participant alone, free from the influence or intrusion of support workers. Where this access is denied or interfered with, it should also be regarded as a risk flag for the NDIS participant that should be reported by the advocate to the Commission.

I have recently discussed these issues with Mr Ben Gauntlett, Disability Discrimination Commissioner with the Australian Human Rights Commission. The next National Disability Strategy, currently under development, provides an opportunity to include a national safeguarding framework to ensure that people with disability can achieve maximum independence while maintaining their wellbeing. That safeguarding framework could include the elements and actions outlined in this submission.

Thank you again for the opportunity to make this submission. The NDIS Quality and Safeguards Commission plays a key role safeguarding and protecting NDIS participants. My suggestions for additional safeguards should not be interpreted as a criticism of the Commission and its performance, but are intended to promote discussion and consideration of a range of options to improve health and wellbeing outcomes for all NDIS participants.

Yours sincerely



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