



Dr David Caudrey and Ms Kelly Vincent
Co-Chairs
Safeguarding Taskforce
Government of South Australia

via email: disability.advocate@sa.gov.au

Dear Dr Caudrey and Ms Vincent

I am writing in relation to a number of matters you have commented upon in the interim report of the South Australian (SA) Government Safeguarding Taskforce (the Taskforce). While the Taskforce has not sought any input from the NDIS Quality and Safeguards Commission (NDIS Commission), I nevertheless wish to assist the Taskforce in its important work. To that end, I thought it would be helpful to provide you with some observations in relation to the matters you identify as safeguarding gaps that relate directly to the NDIS Commission's work (numbered '6', '7' and '8' in the interim report) as well as those in which the NDIS Commission has a significant role ('11' and '12').

In commenting on the matters contained in your report I will touch upon the ways in which various of the NDIS Commission's functions and powers operate under the *National Disability Insurance Scheme Act 2013* (NDIS Act) and its Rules (NDIS Rules). I will also make reference to the NDIS Quality and Safeguarding Framework (the Framework) agreed by the Council of Australian Governments in 2016 following a comprehensive design and public consultation process.

Complaints

The Commissioner's complaints functions are set out in section 181G of the NDIS Act and the associated *NDIS (Complaints Management and Resolution) Rules 2018*. In summary, the regulatory arrangements set out in these instruments do the following in respect of the provision of NDIS supports by providers:

- require registered providers to have a system for managing complaints;
- establish a framework for the NDIS Commission to receive and respond to complaints about either registered or unregistered providers;
- place obligations on the NDIS Commission as to the actions it must take when a complaint is made to it; and
- provide for anyone to make a complaint and to be advised of the outcome of that complaint.

The Taskforce makes comments on page 22 of its interim report (reiterated by Dr Caudrey in the evidence he gave to the Hon Alan Robertson SC during public hearings for Mr Robertson's independent review on 21 July 2020) that suggest that the NDIS Commission does not take complaints other than from NDIS participants and their nominees.

This is not correct – anyone is able to make a complaint to the NDIS Commission about an NDIS provider, registered or unregistered. Indeed, the Rules specifically provide for complaints to be made by any person, and for them to be made anonymously if the complainant wishes.

Since its establishment in 2018, the NDIS Commission has put considerable effort into educating people about its complaints function. This work has included:

- direct communication with participants and the provision of information resources (in multiple formats and multiple languages);
- the social media “If you need to speak up, speak to us” campaign;
- The Worker Orientation Module (which deals with the NDIS, the NDIS Commission and the NDIS Code of Conduct), now completed by more than 250,000 workers and others in the sector;
- significant work with advocacy organisations; and
- establishing a ‘no wrong door’ approach with others who may receive complaints that are within the NDIS Commission’s jurisdiction.

I understand that under the arrangements that pre-dated the NDIS Commission operating in SA, complaints from across all community services received by both the SA Department of Human Services and the SA Health and Community Services Complaints Commissioner totalled around 450 in 2017-18. I do not know how many of these were specifically complaints related to disability service provision but it is encouraging that in the first two years of its operation in SA, the NDIS Commission has at least increased the opportunity being taken by people to raise their issues. In our first year, we received 175 in-scope complaints and, noting that quality assurance of data is still underway, it appears that the figure for the year just finished will be 510.

The complainants include: people with disability, friends and family members, guardians, advocates, disability support workers, members of the public and others. A breakdown will be included in the NDIS Commission’s activity report for 2019-20 when it is published in the coming months. Given that the NDIS Commission has been actively promoting its complaints function in the ways set out above, this year-to-year increase is also encouraging.

Of course, the NDIS Commission recognises that there is almost certainly a long history of people with disability being prevented or discouraged from complaining. This is why we have an ongoing campaign to encourage people to speak up when they are experiencing problems. We will also continue to promote the complaints process broadly so that people other than people with disability are also encouraged to raise issues with us when they are concerned that the wrong thing is happening. In our handling of a complaint, irrespective of who makes it, the affected person with disability is at the centre of the process.

Unregistered Providers

The Taskforce interim report makes reference to the NDIS Commission needing to “consider the risk factors associated with unregistered providers of personal support, particularly for vulnerable participants”.

Firstly, all NDIS providers, as defined by the NDIS Act, are regulated by the NDIS Commission. There are two classes of regulated providers: registered and unregistered. Both classes of providers have obligations and both are subject to monitoring and enforcement provisions established by the NDIS Act and the *Regulatory Powers Act 2014*. Complaints may be received about both classes of provider and the NDIS Commission must act in accordance with the NDIS Rules in respect of managing a complaint, whether the complaint pertains to a registered or unregistered provider.

A provider must be registered if they are delivering supports to participants with Agency-managed plans. In addition, the delivery of certain classes of supports triggers mandatory registration. For a provider to be registered, they must:

- be assessed by the NDIS Commission as suitable to operate in the NDIS market against the relevant heads of consideration in the NDIS Rules;
- be audited against the NDIS Practice Standards that form a part of the NDIS Rules and comply with those standards;
- comply with the conditions of their registration;
- have in place their own complaints management system;
- have in place their own incident management system;
- report certain incidents to the NDIS Commission; and
- comply with the NDIS Code of Conduct, as set out in the NDIS Rules.

A registered provider is subject to sanctions relating to the operation and status of their registration in addition to the civil penalties and other enforcement provisions that apply to both classes.

An unregistered provider cannot provide supports to people with disability who have Agency-managed plans. Nor can an unregistered provider provide supports within the classes of NDIS supports that can only be provided by a registered provider. In delivering NDIS supports, unregistered providers, and any persons employed or otherwise engaged by them, must abide by the NDIS Code of Conduct. Action may be taken against an unregistered provider or worker for breaches of the NDIS Code of Conduct, including the application of civil penalties or a banning order.

The operation of unregistered providers in the NDIS market is a feature of the NDIS Quality and Safeguarding Framework. It was considered in the detailed consultation that informed the final design of the Framework. It was considered during the debate on the NDIS Act. It is seen by many people with disability and others, including many advocates, as a key element of the principle of choice and control that underpins the NDIS.

Risk is dealt with in the model through the following features:

- the determination through the National Disability Insurance Agency (NDIA) planning process as to when a person is to be Agency-managed, plan-managed or are fully self-managing;
- active education by the NDIS Commission and the NDIA about the importance of self-managing participants making use of the NDIS Commission's complaints function when things are not working for them; and
- the ability to take enforcement action against unregistered providers, including banning them from the NDIS market (banning orders have been made against unregistered providers already).

Noting that there will be ongoing interest in the issue of the regulation of this class of provider, the NDIS Commission will continue to consider the operation of this part of the market, including the effectiveness of our complaints mechanism for self-managing participants who are using unregistered providers.

Requirements relating to minimum numbers of support workers

The NDIS Practice Standards already place a range of requirements on registered providers to provide a safe support-provision environment for participants, and to have appropriate human resource management arrangements in place, including the requirement for timely supervision and the management of worker performance. The NDIS Code of Conduct and Rules also create specific obligations for providers, whether registered or unregistered.

However, the NDIS Commission is currently undertaking a detailed assessment of the arrangements that are in place for participants who receive assistance with daily living in their homes to determine whether any requirements for registered providers should be made more explicit in either the NDIS Practice Standards or in the related Quality Indicators. Any such change to the Rules will be the subject of consultation with people with disability, service providers, advocates and, as required by the NDIS Act, state and territory governments.

Worker screening

The interim report focuses on a perceived safeguarding gap related to information sharing between the NDIS Commission and the SA Department of Human Services regarding worker screening.

As you are aware, from 1 February 2021 the new national NDIS worker screening arrangements come into force. Under these arrangements, state and territory screening units determine whether a worker is cleared or excluded based on the parameters agreed by all governments. Providers and self-managing participants will be able to associate with a prospective or existing employee in the database and will be alerted if something in their clearance status changes, including when the NDIS Commission bans a worker. Until those arrangements come into effect, transitional arrangements set out in the NDIS Rules (and determined for each state by that state) continue to apply.

Very detailed information sharing protocols are currently being finalised between the NDIS Commission and each state and territory to ensure the proper operation of this new safeguard.

Community Visitors

The NDIS Commission supports the work of community visitor schemes in each state or territory, where they exist. We regard community visitors as expert complainants and very valuable sources of information and insights. The Framework acknowledges the important role of community visitors.

The Commonwealth position remains that the quality and safeguarding arrangements set out in the NDIS Act are able to operate concurrently with those arrangements that were in place in SA before the NDIS Commission had jurisdiction. Indeed, the arrangements in the five other jurisdictions with such schemes operate concurrently with the NDIS Commission's arrangements, as does a complementary worker registration scheme in one other jurisdiction.

Your interim report indicates that this matter will be the subject of further examination and analysis as part of finalising your report. I am not aware that this has been discussed with anyone from the NDIS Commission as yet.

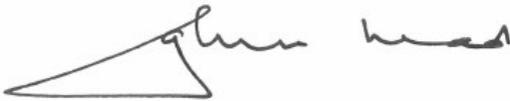
In closing, there are some opinions represented in the interim report as fact. Notably, the report states that “to be registered with the NDIA [sic] they [providers] must go through a lengthy and somewhat costly process”. In fact, there are two pathways for providers, a full certification audit or a verification audit process. The former applies to those providing more complex supports, the latter to those providing less complex, lower risk supports. Many sole traders, particularly allied health professionals, are audited under a verification audit at an average cost of approximately \$1,000 every three years. Audit timeframes vary, depending on the size and scope of a business, the appropriate sampling of participants, and the range of support types provided.

To the extent that there have been concerns about audit costs, most related to the automatic triggering of certification audits based on organisation type irrespective of the types of support provided. Following consultation with people with disability and providers, the NDIS Rules were amended (effective 1 January 2020) to deal with this issue. There have been very few complaints about audit costs since this change.

I hope that these comments are of assistance to the Taskforce. I look forward to seeing your report on its completion and considering any matters that relate to the work of the NDIS Commission.

I have provided a copy of this letter to the Minister for Human Services, the Hon Michelle Lensink MLC, and the acting Chief Executive of the Department of Human Services, Ms Lois Boswell, for their reference.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Graeme Head', with a large, sweeping flourish at the end.

Graeme Head AO
Commissioner

24 July 2020

Copy: The Hon Michelle Lensink MLC
Minister for Human Services

Ms Lois Boswell
A/g Chief Executive
Department of Human Services