30 April 2015

Department of Social Services

engage.dss.gov.au

**Submission: NDIS National Quality and Safeguards Framework**

I thank you for the opportunity to provide comment to the consultation into the *NDIS National Quality and Safeguards Framework*.

The role of the South Australian Commissioner for Equal Opportunity is to administer the *Equal Opportunity Act 1984* (SA) (**the Act**). I am able to accept complaints of discrimination in areas such as employment, goods and services, housing, and education for grounds such as sexuality, race, age, sex, disability and caring responsibilities. The Equal Opportunity Commission (**the Commission**) also has a role in providing equal opportunity training and education to the community.

Please find attached the Commission’s submission for your consideration.

If you would like any further information regarding the Submission, please do not hesitate to contact me on (08) 8207 1977 or at gale.anne@agd.sa.gov.au.

Yours sincerely,



**ANNE GALE**

**COMMISSIONER FOR EQUAL OPPORTUNITY**

**Submission by the Office of the Commissioner for Equal Opportunity, South Australia on the NDIS National Quality and Safeguards Framework.**

Firstly, it may be useful to provide an overview of some of the issues that are raised with the Commission in relation to disability services.

Disability discrimination is the most common type of discrimination reported to the Commission. In 2013-14, 37% of complaints related to disability discrimination.

In 2013-14, approximately 3% of enquiries and complaints related to disability services. Complaints and enquiries about disability service providers could be made on any of the grounds covered under the Equal Opportunity Act. Complaints and enquiries about disability service providers made in 2013-14 were mostly disability discrimination matters, but included allegations of sexual harassment, sex, sexuality and race discrimination, and victimisation. Allegations included unfair treatment in the areas of goods and services, housing, education, clubs and employment. The table below provides an overview of the issues raised.

The Commission notes that some of the organisations concerned may not provide services that fall within the scope of the NDIS.

|  |  |
| --- | --- |
| **Complaint** | **6** |
| access to Companion Card | 1 |
| assaulted in mental health facility | 1 |
| disability housing - evicted | 1 |
| failure of school to follow up therapist/s recommendations | 2 |
| lack of assistance/services | 1 |
| **Enquiry** | **37** |
| access cabs | 1 |
| access to education program | 2 |
| accessibility in public housing and other services | 1 |
| accommodation - eviction | 3 |
| accommodation in care facility | 1 |
| banned from using school bus | 1 |
| community treatment order | 2 |
| criteria for school-based assistance | 1 |
| cultural accommodation in care facility | 1 |
| does not meet criteria for assistance | 1 |
| enquiry by care worker re sexual harassment and race discrimination by clients | 1 |
| failure of school to follow up therapist/s recommendations | 2 |
| family member barred from residential care; issues with level of care provided | 1 |
| issue with service provider | 1 |
| issue with wheelchair criteria | 1 |
| issues with access to school/after school care/childcare for children with disability | 4 |
| lack of assistance/services | 5 |
| manner of provision of services | 1 |
| neglect in residential care | 1 |
| rights in disability housing | 1 |
| sexuality discrimination in care facility | 1 |
| treatment by carer / case manager | 2 |
| treatment in day program | 2 |

In respect to selected topic areas for the consultation, the Commission comments are provided on the following pages.

**Building participants’ capacity**

* *Supporting well-informed choices*

The Commission often hears about situations where people with disability are not provided with the same opportunities as others and we believe that, implemented well, the NDIS has the potential to greatly improve outcomes for those requiring services.

The Commission agrees that participants should be provided with sufficiently detailed information for them and/or their families to be able to make informed choices and to understand their rights. This information should be provided in accessible formats and due consideration should be given to information access for those living in rural and remote areas. Despite the popularity and expediency of web-based information, enquiries and complaints received at the Commission in relation to services indicate that, due to disability or other factors, some people still require telephone or in-person options in lieu of electronic or print materials.

* *Supporting the capacity of providers*

The consultation fact sheet for this topic states:

*A quality provider will usually have strong governance, policies and procedures and a corporate culture that fosters respect and openness.*

*Quality providers will also have effective practices for hiring and supervising staff.*

*They train staff and invest in their continuous education and improvement.*

These statements align with the Commission’s experience in assisting in the resolution of discrimination complaints. Conciliation agreements will often include commitment to developing or improving policies and procedures and/or training of staff, for example, to reduce discrimination and harassment and improve equal opportunity for both customers and staff.

Complaints seen by the Commission highlight the fact that many organisations, regardless of size and experience, do not meet the above criteria. The Commission also notes that smaller organisations (service providers, suppliers, employers) often have fewer resources for ‘checks and balances’, fewer policies and procedures, and less understanding of quality and compliance frameworks. Such organisations may also have less sophisticated systems, knowledge and resources to adhere to best practice. Common ‘gaps’ in practice include:

* Lack of policy and procedures;
* Lack of training and education;
* Lack of understanding of legislation and best practice; and
* Lack of complaint systems.

To ensure quality services (even if simple services), support will be essential for small providers. This includes, but is not limited to, support regarding how to measure client satisfaction and outcomes and how to implement effective complaint mechanisms.

The Commission believes that service providers should be required to measure client outcomes to ensure that their services are safe and high-quality. Guidelines should be available to ensure that evaluation is rigorous but not onerous. Measures should be taken, not just of inputs and activity, but of client outcomes such as satisfaction and effects on health, personal development, independence, etc.

As part of the rollout of the NDIS, the Commission supports the idea of training staff in provider organisations to increase their understanding of the NDIS while building their responsiveness to individual needs and respect for the rights of participants.

 **Monitoring and oversight**

* *Is there a need for an external oversight body?*

The consultation fact sheet for this topic states that the NDIS will require measures to respond to incidents when they do occur and to deal with issues that cannot be resolved between people with disabilities and providers. The Commission’s experience is that, even when providers have good internal complaint systems, complaints cannot always be resolved between customers and service providers (note that additional comment on complaints is provided later in this submission).

As well as offering an additional option for resolving complaints, independent oversight bodies can also play a key role in ensuring quality and compliance, providing training, education and resources, and developing policy. As mentioned in the fact sheet, an independent oversight body could also provide market oversight functions.

* *Community visitors*

The consultation fact sheet also asks if there should be community visitor schemes in the NDIS. In South Australia, a community visitor scheme in the area of mental health began in July 2011. This was extended to include people living in state-funded Disability Accommodation Services or Supported Residential Facilities, with a Disability Community Visitor Scheme becoming fully operational in 2013. The Disability Community Visitor Scheme provides a visiting, advocacy and inspection service for people in order to protect their rights and wellbeing. An overview of issues found by community visitors can be found in the Principal Community Visitor Annual Reports (see [www.sa.gov.au/topics/citizens-and-your-rights/feedback-and-complaints/community-visitor-scheme](http://www.sa.gov.au/topics/citizens-and-your-rights/feedback-and-complaints/community-visitor-scheme)).

The Commission believes that a community visitor scheme would play a valuable role in protecting the rights and safety of NDIS participants. As well as providing advocacy for participants in relation to issues, community visitor schemes can also provide a reporting and recommendation mechanism.

**NDIA provider registration**

* *NDIS code of conduct and safe practice*

The Commission believes that all employees of providers working with vulnerable people, including simple services, should be vetted to ensure protection (for provider and consumer) and that the NDIA should be notified if there is a serious incident. All providers should be able to demonstrate that they have suitable screening mechanisms in place when recruiting staff and it seems appropriate that organisations providing higher risk support should have higher regulation requirements.

The Commission also supports the implementation of a comprehensive NDIS Code of Conduct that explicitly lists behaviours that are unacceptable such as those outlined in the fact sheet. A Code of Conduct would not only provide a basis for determining whether a penalty should be applied if a complaint is lodged but would provide a reference point for service providers in terms of educating and managing their staff. Again, this could be particularly useful for small providers that may not have extensive policies and procedures in place.

All providers, even if they are not required to be registered, should be subject to minimum standards and should have access to resources and guidance to prevent poor service and abuse and to assist in compliance with standards.

**Systems for handling complaints**

The consultation fact sheet for this topic states:

*Usually, a customer who is unhappy with their product or service would raise their concern with the provider and expect a remedy that both parties can agree on.*

*An appropriate response from the provider may depend on the extent to which consumers are empowered to negotiate their needs with their providers, and the strength of the regulatory framework to compel providers to act appropriately.*

The fact sheet also raises concerns about the ability of NDIS participants to make complaints due to:

* power imbalances between participants and providers of supports.
* limited capacity to raise concerns without assistance from others
* fear of retribution from their provider or someone who works for them

It is the experience of the Commission that independent complaint bodies play a critical role in service, employment, accommodation and education sectors for a number of reasons including:

* Small providers will often not have appropriate complaint handling mechanisms.
* Internal complaint processes may not be impartial.
* If unhappy with the outcome of a complaint raised with a provider, clients should have further complaint options which are independent of the provider.
* Conciliation by an independent body can help to avoid conflicts that can occur when consumers liaise directly with providers to try to resolve complaints. This is particularly important where the consumers are vulnerable and where continuation of service is required.
* Independent complaint bodies may be able to determine where complaints are frivolous or vexatious.
* Independent complaint bodies are able to collect data which can provide useful information for policy development.

Although NDIS participants will have some coverage under existing consumer law and under legislation such as equal opportunity legislation, it is the Commission’s experience that unfair treatment can often sit outside of legislation for a number of reasons. Having a dedicated complaint management system for the NDIS means that it would be far less likely for genuine complaints to ‘slip through the cracks’.

The Commission supports *Option 3: independent statutory complaints function*. The Commission recommends that, if an independent body is set up for the NDIS, it does have enforcement powers. This is a known shortcoming with legislation supporting many statutory authorities and one which could result in putting vulnerable people at risk should complaint agreements not be acted upon.

The Commission notes that the use of alternative dispute resolution methods, such as conciliation (widely used by the Commission), can provide low/no cost options for parties. It also provides an opportunity for both parties to hear, learn and become educated about better practice.

Independent statutory bodies can also play a key role in identifying and addressing systemic issues based on complaints and enquiries received. The Commission’ view is that this is further enhanced if the body has powers of investigation and own motion powers to pursue issues outside of individual complaints.

 **Case study:**

*Caller has a brain injury. He has number of complaints against disability organisations and community organisations in the regional town he lives in for failing to provide him with services or allowing him to participate in activities at their organisations. Caller believes he is being treated this way because he has made complaints about these organisations and/or people who are connected with them. He has a social worker assisting him with trying to access services and with making these complaints. Complaint forms were sent to him.*

**Ensuring staff are safe to work with participants**

It is paramount that staff of agencies working with vulnerable people, irrespective of whether they are registered with NDIA, are vetted to ensure protection, both for provider and consumer. No vetting or screening can guarantee protection, but all steps should be taken to reduce the risk of abuse and ill treatment. Screening requirements should extend to providers not registered with NDIA (e.g., simple service providers), as they may have fewer checks and balances.

The Commission’s view is that police checks alone would be insufficient to determine whether or not someone may pose a risk to participants and that a system requiring working with vulnerable people clearances would be preferable. The Commission also favours the creation of a barred persons list where employees or volunteers have been involved in a serious incident.

The Commission notes, however, that excluding applicants based on *irrelevant* criminal record may be unlawful under federal anti-discrimination legislation. Applicants should be assessed on an individual basis, taking into account the nature of any past convictions or non-conviction information and the nature of the work they will be cleared for.

 **Case study:**

*Enquirer worked for a nursing home for schizophrenics and alcohol abuse two years ago. A resident accused him of hitting him. He went to court and lost but it is listed on his record as no conviction or penalty. Presents problems on his police clearance when he applies for jobs. No irrelevant criminal record ground under SA legislation - referred to Australian Human Rights Commission.*

 **Case study:**

*Enquirer has completed a certificate 4 to become a support worker. She had to provide her criminal record to get placements. Now her training provider won't help her get a placement because her criminal record has some activity from 18 years ago, which she feels is irrelevant to the role. Referred to Australian Human Rights Commission.*

**Safeguards for participants who manage their own plans**

In the Commission’s view, the NDIS does have a duty of care to ensure that providers are safe and competent. While it may be too limiting to require self-managed participants to only use providers registered with the NDIA, measures must be in place to stop unscrupulous providers emerging.

Requiring all providers to adhere to a NDIS Code of Conduct and requiring checks for all workers in certain support areas would appear to be a necessary baseline to ensure the safety of participants who wish to self-manage. Again, having suitable complaint avenues should issues arise is also critical.

**Reducing and eliminating restrictive practices in NDIS funded supports.**

The Commission receives a small number of enquiries and complaints in relation to use of restrictive practices although these generally fall outside of the Commission’s jurisdiction. Use of restrictive practices may, however, be viewed as infringing on a person’s human rights.

In addition to State and Federal anti-discrimination legislation, the *Convention on the Rights of Persons with Disabilities* (CRPD) sets out the human rights of people with a disability. Australia ratified the convention in 2008. In doing so Australia undertook to ensure and promote the full realisation of all human rights and fundamental freedoms for all people with a disability without discrimination of any kind on the basis of disability, including taking all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with a disability.

Rights under the CRPD include the rights:

* to equal protection and equal recognition before the law.
* to have the same legal rights and obligations as people without a disability.
* not to be deprived of their liberty unlawfully or arbitrarily, and not simply because they have a disability.
* to be provided with the support and adjustments necessary to allow people with disabilities to enjoy their other human rights where their freedom is restricted or taken away (for example by incarceration).

In the *Concluding observations on the initial report of Australia* (distributed October 2013), concerns and recommendations made by the Committee on the Rights of Persons with Disabilities included:

* that laws that allow for the deprivation of liberty on the basis of disability, including psychosocial or intellectual disabilities, are reviewed and provisions that authorize involuntary internment linked to an apparent or diagnosed disability are repealed. (32c)
* that immediate steps are taken to end unregulated behaviour modification or restrictive practices such as chemical, mechanical and physical restraint and seclusion, in environments including schools, mental health facilities and hospitals, by establishing an independent national preventative mechanism to monitor places of detention including mental health facilities, special schools, hospitals, disability justice centres and prisons, to ensure that persons with disabilities including those with psychosocial disabilities are not subjected to intrusive medical interventions. (36)

In the view of the Commission, and in light of human rights law, it is essential that the NDIS require providers to limit the use of restrictive practices where possible. Checks should in place such as review and appeal processes and access to community visitors. The Commission believes that some level of mandatory reporting should be in place to reduce unnecessary use of restrictive practices and provide transparency. Further, providers should be required to report on more than just emergency use of restrictive practices.

***Conclusion***

In summary, it is important that the NDIS system is supported to mature as quickly as possible and a quality framework is essential. The Commission hears on a regular basis about issues faced by people with disability and their families and for many the NDIS is, or will become, a critical part of their daily lives.

The aim of providing greater choice and independence in service provision and decisions for people with disability is key to self-determination and person centred care. In the Commission’s view, however, relying on market forces to ensure quality will be insufficient. Market force service provision and competition should assist in reducing price structures, however, quality cannot be guaranteed unless it is required and monitored and, hence, built into cost structures. This is even more relevant where there is limited choice for participants, such as in regional and remote areas, and for limited but specialised services.

Both participants and providers will require access to information and resources to ensure good outcomes, and risk needs to be minimised. Provision of appropriate risk management mechanisms is even more important for small providers and for regional and remote services. Availability of suitable complaint systems is also a need that must be addressed. While it is always desirable to minimise red tape and bureaucracy, vulnerable people must not be put at risk of poor quality services, exploitation or abuse whilst a service system evolves.