

DISABILITY & COMMUNITY SERVICES COMMISSIONER

ACT Human Rights Commission

Submission to Consultation paper about the proposal for a National Disability Insurance Scheme Quality and Safeguarding framework

The ACT Disability and Community Services Commissioner provides this submission in response to the consultation paper regarding the development of a national approach to quality and safeguarding under the National Disability Insurance Scheme. This submission primarily focuses on the aspects of the framework that deal with the handling of complaints and related issues of safeguarding in the corrective domain (while noting that Disability Complaints Commissioners also have a role in the developmental and preventative domains).

Executive summary

This submission discusses the following proposals for developing a robust and responsive safeguarding system:

- That a network of dedicated Disability Complaints Commissioners be available in each State and Territory with a visible profile to demonstrate to the community the importance that governments place on disability issues.
- The COAG *National Healthcare Agreement 2012* provides a model for ensuring that all States and Territories can provide independent and impartial complaint handling by Commissioners who have a local understanding of service providers and legislative frameworks. The immediacy of local resolution in small jurisdictions should not be lost.
- That complaint avenues need to be available for all people with disabilities and not just those who are eligible for the NDIS.

- That the reporting on, and investigation of, serious incidents appropriately sits within the domain of complaint handling authorities, as well as police.
- That service providers should be required to establish internal complaints handling mechanisms, and that external complaint handling should be undertaken by independent Disability Complaints Commissioners.
- The powers outlined for the proposed external complaints mechanism should include an emphasis on alternative dispute resolution as a means of resolving complaints.
- That Disability Community Visitors be established in each jurisdiction, who are able to work hand-in-hand with Disability Complaints Commissioners and refer matters that require investigation or the use of formal powers for resolution.
- That the national negative licensing scheme being developed by the Australian Health Ministers Council for barring persons who fail to comply with the Code of Conduct, be replicated for workers in the disability sector; and utilising the existing infrastructures of State and Territory based Health and Disability Complaints Commissions.
- That a robust system of authorisation, monitoring, and oversight of restrictive practices be implemented.
- That the recommendations in the submission from the ACT Children and Young People Commissioner be given serious consideration so that the NDIS appropriately addresses the unique needs of children and young people.

The role of the ACT Disability and Community Services Commissioner

The Commissioner is one of three Commissioners at the ACT Human Rights Commission. The mandate of the Commissioner is to consider complaints about the provision of services for people with disability and/or their carers. The Commissioner's role is also to promote:

- improvements in the provision of services for people with disability and their carers;
- the rights of users of services for people with disability and their carers; and

- an awareness of the rights and responsibilities of users and providers of disability services.

The Commissioner's Office thus provides a dedicated point of entry for people who have interaction with disability services. This enables the Commissioner to effectively and independently deal with individual matters, which is underpinned by a localized and comprehensive knowledge of the sector. In turn, the further knowledge gained from complaints enables her to advocate at a systemic level in relation to disability issues and to undertake community education in this field.

The Commissioner has a range of powers under the *ACT Human Rights Commission Act 2005* which enable the Commission to assist in resolving complaints in the most appropriate way relevant to any particular complaint. This flexibility is particularly important given the nature of disability service complaints and the barriers experienced by many complainants.

Conciliation is a primary mechanism used in the field of resolving disability service complaints, as ongoing relationships are generally at the core of disability complaints. The Commissioner has powers to compel parties to provide documents and attend interviews. The Commissioner can make recommendations to service providers to implement service improvements. Further powers include the ability to undertake Commission-initiated inquiries and to report to third parties on matters of public importance.

The ACT is a human rights jurisdiction and the Commissioner undertakes her work consistent with legislative obligations on all public authorities to take human rights into account in making decisions.

The Commissioner's Office complements and works collaboratively with other aspects of the ACT safeguarding framework, particularly Disability Official Visitors who provide an invaluable role in visiting places where people with disabilities may live and who raise concerns with the Commissioner that require investigation. The office of the Public Advocate must also refer matters of systemic concern in relation to people with disabilities to the Commissioner. The Discrimination Commissioner also handles complaints of unlawful discrimination from people who are treated unfavourably because of their disability.

Complaint handling under a national scheme

What is a complaint

The paper outlines elements of what comprises a complaint. In the Commissioner's view, the definition of a complaint should not be limited and should be broadly defined to include any concerns about the provision of services. Narrowing the scope of what constitutes a complaint can impose an unnecessary barrier for people with disabilities, some of whom can have difficulty articulating or framing their concerns within strict parameters.

Serious incidents

The paper proposes that serious incidents not be dealt with by the complaints system. While it is true that many serious incidents should be investigated by police (and Disability Complaints Commissioners regularly refer matters to the police that appropriately fall within the criminal domain), many issues dealt with by Commissioners are about serious incidents. A serious incident will often involve Commissioners investigating the incident to not only determine whether or not it occurred and recommend appropriate action, but also to investigate a provider's handling of the incident, the adequacy of its policies and procedures, its reporting mechanisms, and the training and oversight of staff. Separating different types of issues into, or out of, a complaints jurisdiction will only serve to fragment the system of oversight and the ability to gather data on the performance of service providers. In the ACT, the Commissioner works closely with the police to ensure that systemic issues that a criminal investigation would not identify, are picked up.

A requirement that serious incidents be reported to independent complaint authorities deserves significant consideration. Such authorities can then report to the NDIA if they have concerns that the incident indicates the provider is non-compliant with the Agency's Terms of Business. This also provides the Agency with an independent evidence base on which to base decisions regarding registration status, while removing potential for perceptions of bias or conflict of interest in this regard.

Options

The paper discusses three options that have been put forward for complaints handling under the NDIS. In the Commissioner's view these options confuse the elements of external

and independent complaints handling. They also do not seek to maximise opportunities for local and swift resolution of matters by authorities who are familiar with local service providers and local legislation (such as guardianship, human rights, and mental health legislation).

Option 1: Self regulation

The paper proposes a self-regulation option but without any formal requirement for service providers to establish complaint handling mechanisms or use external services. If there is no formal requirement to do so, service providers that fail to meet acceptable standards will not cooperate with such a regime.

The self-regulation option effectively comes down to service providers dealing with complaints, without any independent oversight. This has proven to be ineffective – hence the establishment of Disability Complaints Commissioners in the majority of jurisdictions. As the paper notes, it would lead to a loss of confidence in the system.

An independent external complaint handling body is essential for public confidence in the oversight system.

Options 2: Internal and external complaint handling requirements

While internal and external complaint handling requirements are needed, the options discussed in the paper are not appropriate for establishing a robust oversight system.

The Commissioner agrees that service providers should be required to meet a set of prescribed minimum standards for provider level complaints handling. The Commissioner's Office regularly refers complainants back to service providers to attempt to resolve issues at the provider level in the first instance. The Commissioner also works with service providers to improve their complaint handling.

If providers are unable to resolve complaints, the options discussed in the paper as "independent" do not appear to have the hallmarks of independence.

It is unlikely that an industry initiated complaints body would be perceived by the public as truly independent. Further, providers under the NDIS will comprise at one end well-resourced private national organisations, to NGOs with more limited resources, to small

boutique operators at the other end who may only provide services to a few people. Many of these providers would not necessarily have the funding to contribute to the establishment of a regulatory body.

Option 3: Independent statutory complaints function

Under this option, as under option 2, service providers would be required as a condition of registration to have an effective internal complaints handling process. This is supported.

Government would establish a formal external complaints body or bodies which would assist providers in the management of complaints and participants in complaints resolution.

The Commissioner agrees that an independent complaints mechanism should include all of the functions described in option 3, which are:

- Provide information, education, training and advice relating to complaints handling;
- Receive, investigate and resolve individual complaints that escalate beyond the provider level, with discretion to refer cases to other appropriate authorities, or not investigate further in certain circumstances;
- Review the pattern and causes of complaints, identifying systemic issues for service improvement and make recommendations for the improved handling and resolution of complaints;
- Instigate inquiries and investigations where it considers they are warranted; and
- Monitor and report publicly on the effectiveness of complaints handling in the sector.

The Commissioner considers that a particular focus should be on the powers of complaints bodies to adopt alternative dispute resolution mechanisms in resolving complaints.

Complaints from people with disabilities, who often rely on service providers for basic needs such as assistance to get out of bed and shower, for transport, or for communication, generally involve complex relationship issues between service providers and the recipients of those services. The “market” concept that individuals will simply move services if they are dissatisfied is unlikely to occur in practice. The majority of people do not change

telecommunications providers or banks if they are annoyed – it is only when they have exhausted all options that they are likely to move elsewhere. The same considerations apply to people with disabilities who would experience significant disruption if they seek to move to alternative providers. The ability, therefore, to get the parties together to resolve matters quickly is an important component of a responsive complaint handling scheme. Particularly in small jurisdictions like the ACT, this immediacy should not be lost.

Option 3a: Complaints office in the NDIA

The NDIA is not an independent body as it is the decision maker in relation to registration of service providers, and the broker of services on behalf of participants in the majority of cases. It is, in fact, a service provider itself in relation to fund management, planning, brokerage, local area coordination etc. If the NDIA were to deal with complaints, conflicts of interest and perceptions of bias would arise.

The NDIA should be appropriately informed by independent complaints authorities about service providers that fail to meet standards so that consideration can be given to their registration status, but the NDIA cannot be independent and impartial in relation to complaints about service providers.

Option 3b Disability complaints office

The concept of establishing a disability complaints mechanism to deal with those complaints that cannot be resolved between the provider and participants without assistance (and to deal with complaints in the first instance where appropriate) is supported. The issue arises of what is the best model for delivering on this – establishing a new national agency at considerable cost, or building on current infrastructures.

There is currently no agency at a national level that has the experience and expertise in dealing with service level complaints. The Australian Human Rights Commission (AHRC) deals with discrimination complaints in relation to disability issues and its staff are well trained and experienced in alternative dispute resolution. They do not, however, have experience in service complaints or a national network of offices. Similarly, the Commonwealth Ombudsman has a number of state and territory offices but not in every jurisdiction. Handling disability service complaints would be a significant departure from the

Ombudsman's current jurisdiction, which primarily focuses on conducting paper-based investigations and identifying administrative deficiencies in relation to the government sector, rather than the private and non-government sectors. Resolving complaints through alternative dispute resolution techniques would be a new area of expertise that would need to be developed.

In the ACT jurisdiction it has been recognised that service complaints require a different set of skills and approach. The *Ombudsman Act 1989* provides that the Ombudsman has no jurisdiction in relation to complaints about disability services, health services, services for children and young people, and services for older people. A separate statutory authority has been established with dedicated Commissioners to undertake the oversight of service provision.

To use existing national frameworks such as the AHRC or the Ombudsman, many adjustments would need to be made in relation to scope of authority (private and NGO reach), methods of resolving complaints, local knowledge and expertise, and understanding of local legislation (e.g. application of ACT Human Rights legislation.) A question also arises whether or not the Commonwealth would have authority under the Constitution to establish such a body, without a referral of powers from the States.

A national body would also need to have jurisdiction in relation to disability services for people who are not eligible for the NDIS. If it does not have such coverage, State and Territory authorities would need to continue in operation to provide a complaint service for ineligible people (I note that in the ACT around 5-7,000 people will be eligible for the NDIS but that Australian Bureau of Statistics data indicates that almost 60,000 people identify as having a disability). Having both a national body and local authorities would lead to overlaps in jurisdiction, replication of resources and additional overall cost, and confusion for the public.

An alternative and demonstrably effective option is available. The COAG *National HealthCare Agreement 2012* provides a model for establishing a network of local Health Complaints Commissioners who manage complaints in a similar fashion, have a regional presence, and have knowledge and understanding of local providers and legislative frameworks. A similar approach is worthy of consideration – using and expanding on

existing State and Territory infrastructure. Some minimum standards could be set requiring consistency in powers, reporting etc. In this way, service providers, whether they are national or locally based, will have the same experience in dealing with complaint authorities.

QUESTIONS

How important is it to have an NDIS complaints system that is independent from providers of services?

If public trust and confidence is to be maintained it is essential to have an independent complaints system, separate from service providers. A reliable independent mechanism for resolving complaints is an important protection to support choice and control in a developing free market.

Should an NDIS complaints system apply only to disability related supports funded by the NDIS, to all funded supports, or to all disability services regardless of whether they are funded by the NDIS?

If all people with disabilities are to have access to a service that provides investigation and resolution of complaints, the complaints system needs to apply to all disability services. Most people with disabilities will not be eligible for direct funding under the NDIS but will still require an avenue for resolving complaints about disability services.

What powers should a complaints body have?

The powers outlined at page 46 of the Consultation paper are required, with an additional emphasis on alternative dispute resolution and the ability to deal with complaints in the first instance i.e. not just by escalation from failed service provider efforts. There are many reasons why people with disabilities are reluctant to complain – some participants may have little or no capacity to complain, could be intimidated by the provider, or have limited support networks.

Should there be community visitors schemes in the NDIS and, if so, what should be their role?

Yes. Community visitors are, in the Commissioner's view, more effective than many self-reporting mechanisms e.g. around restrictive practices or complaints, which can fail to pick up real issues of concern that service providers may wish to keep hidden. Disability community visitors in the ACT have provided an invaluable "eyes and ears on the ground" addition to the disability safeguarding framework.

Ensuring staff are safe to work with participants

Safeguards for participants who manage their own plans

In the Commissioner's view, many of the options for ensuring that staff are safe to work with participants, are no different for people who manage their own plans or for those who choose to have a third party undertake this role.

Negative licensing

The options discussed at page 61 in the section for safeguarding participants who manage their own plans – negative licensing schemes and barring certain providers from working in the sector – are equally applicable to the whole workforce.

In essence, there does not appear to be any significant difference between Option 2a, negative licensing scheme and Option 2b which proposes creating an excluded person or barred persons' scheme.

The negative licensing scheme being developed in relation to non-registered practitioners by the Australian Health Ministers Council incorporates the concept of a barred persons' scheme. In essence, if a Health Complaints Commissioner investigates a person and considers they have failed to meet the Code of Conduct they would become a barred person under the scheme, or have conditions placed on their practice by the Commissioner or local Tribunal. A national register of barred persons would enable any provider to check the register prior to employing a prospective worker. Similarly, reporting to the NDIA would enable that office to consider the continuing registration of individual service providers who may not be employed by a registered organisation.

The paper is silent under Option 2b regarding who would undertake investigations into employees who are reported by employers as having behaved in such a way as to endanger participants. Establishing a regulatory body to run such a scheme would appear to have significant resourcing implications.

The use of current infrastructures i.e. State and Territory based Complaints Commissioners, would again appear to be appropriate. In many jurisdictions, Health Complaints Commissioners and Disability Complaints Commissioners are based in the same statutory offices. If Health Complaints Commissioners are going to be undertaking this work in all

jurisdictions (noting that schemes have already been established in New South Wales, Queensland and South Australia), it makes sense to utilise the already available infrastructure and expertise to extend this role to Disability Complaints Commissioners.

Reducing and eliminating restrictive practices

There is no requirement in the ACT for the approval of, or reporting on, restrictive practices, except in certain circumstances under mental health legislation. The Commissioner does not, therefore, have first-hand experience with mechanisms in other jurisdictions that seek to eliminate or reduce restrictive practices outside that context. The ACT Human Rights Act does, however, place an obligation on certain organisations to act and make decisions in accordance with human rights, including the rights to liberty and movement.

Reporting on restrictive practices may be considerably useful but it also may lead to complacency, with unreported restrictive practices being implemented and with no appropriate oversight body having the opportunity to discover that they are in place.

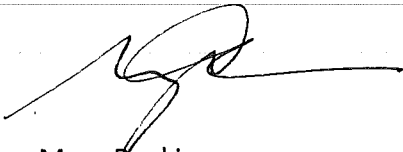
While, in general, restrictive practices should be used only as a last resort and be authorised by law, there are many occasions when restrictive practices are put in place (e.g putting things out of reach, or locking the fridge) and people do not even consider that they are implementing restrictive practices. As with earlier discussions in relation to Disability Community Visitors, a model that includes “eyes and ears on the ground” would in the Commissioner’s view be an important component of oversight in relation to restrictive practices.

The proposal that guardians can authorise restrictive practices is not supported. There are many guardians who, with the best of intentions, would agree to proposals put forward by service providers in the interests only of keeping their sons or daughters safe, and because they have not been informed about alternatives that might exist. They may agree without adequate appreciation for the harm that can accompany well-intentioned un-monitored restriction. Such restrictions may be more intrusive than those that might be duly authorised by a court/tribunal, or considered reasonable by an oversight body.

Authorisation of restrictive practices by an independent decision maker would provide a degree of reassurance but would still not pick up the many restrictive practices that occur

without staff or managers considering that they are restrictive practices. Adoption of a model like the Restrictive Intervention Data System in Victoria, with expert advice provided by the Senior Practitioner, appears worthy of consideration. However, the Commissioner suggests that such a model is only effective if both individual plans, and overall systemic trends, are being actively monitored and addressed.

The Commissioner considers that robust approval, monitoring and oversight mechanisms are required in relation to restrictive practices. The Commissioner also recommends that the findings of the recently established ACT Expert Panel, which has commenced inquiring into restrictive practices following the reported construction of a cage in an ACT school to manage a child with autism, be taken into account when available.



Mary Durkin
ACT Disability and Community Services Commissioner

4 May 2015