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Health & Community Services Complaints Commissioner

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Dear Program Manager

As South Australia's Health and Community Services Complaints Commissioner (HCSCC), I respond to the consultation paper concerning the proposal for a Quality and Safeguarding Framework for the National Disability Insurance Scheme. My response is meant to be sympathetic to the need of the collation and analysis process to be undertaken.

The significant additional investment for people living with disability and their carers has rightly been well received and it is also right to focus on the quality and safety framework that will apply for the full roll out. In the interim period, HCSCC has responsibility for complaints for trial participants and all other disability complaints involving public, private and non-government organisations. Over the past ten years, HCSCC has gathered considerable knowledge around changing service demands and the challenges that are presented for people living with multiple and complex requirements.

As Commissioner, my attention is both drawn and deliberately focussed on those who face heightened vulnerability. Those with multiple and complex requirements who have relatively small networks of friends and family, who have impaired communication capacity, and whose aspirations have been shaped to be low by traditional service models. For HCSCC the basic indicator of success of any disability reforms will be how lives have improved for the most vulnerable with multiple and complex requirements. My greatest fear is that they will be worse off because of the lack of advocacy on their behalf which will be overwhelmed by those more able to put their cases.

In this regard my office has undertaken a program of Supported Decision Making for vulnerable people living with disability. This program allows people with disability to explore options in life, to build networks of supporters in relevant communities, and assists them to experience outcomes beyond those provided by traditional service practices.

A harsh reality is that every enquiry involving vulnerable people whether they be aged, children or disabled indicates that they become targeted for abuse and are abused and traditional justice measures have not served them well, with few cases being prosecuted. This coupled with an increased clarity confirming alarming rates of domestic violence and child abuse generally can paint a bleak contrast to the optimism the scheme's pilot presence has generated.

The scheme must acknowledge this environment and have a battery of measures to combat the reality.

The context is important and the blind faith that market will match service demands must be challenged. There is no evidence to my knowledge that supports the market responding to the needs of vulnerable people but plenty of examples of market failure. The provision of health and community services in rural remote areas, the provision of private mental health

services outside of leafy, affluent suburbs and the jobs network are reminders of market failure.

In summary HCSCCs view of a quality and safeguarding framework must include the following elements:

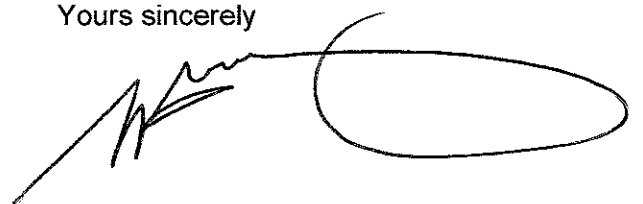
- A progressive training program for all service providers that aims to direct service culture towards client needs and increase the skills of those providing services, including NDIS staff.
- A rigorous program for accrediting service providers and for screening individual workers.
- The development of a culture that encourages and values the reporting of inappropriate behaviour and rights abuse of clients.
- The development of plans for individuals that clearly articulate how that individual's life will be improved and a monitoring regime that robustly evaluates improvements.
- The development of a system of reporting (not necessarily mandatory reporting) incidents that cause harm.
- Broader community involvement and support for people living with disability. The more people involved generally the safer they are.
- The development of a Charter of Responsibilities for Service Providers.
- The development of a Charter of Rights for Service Users.
- The establishment of community visitation programs that can deal with many matters on the spot.
- The provision of reasonably funded and well skilled advocacy services.
- A recognition that markets will fail in particular geographic locations and for particular individuals, and that a safety net provider needs to be established to respond to such situations.
- A recognition that funding for the most vulnerable must include provision for services such as supported decision making and advocacy, outside of traditional funding packages.
- A complaint mechanism that provides adequate protection for those complaining in terms of retribution and reprisal.
- Protection from financial exploitation and complex contractual arrangements.

In South Australia many of the above elements are in place in some form and shortfalls exist because of underfunding (that has now been recognised), the current scheme provides the opportunity to address the gaps.

In terms of the discussion paper which has been prepared in a manner to focus attention on certain matters, and I suspect to assist in the collation of results, I respond in the format of the consultation framework, with the preferred option in bold. This response forms Appendix A.

I would be delighted to further assist with the safeguarding program.

Yours sincerely



Steve Tully
Health and Community Services Complaints Commissioner

Enc: Appendix A

Appendix A

Submission on the NDIS Proposal for a National Disability Insurance Scheme Quality and Safeguarding framework

Policy Direction 4 - People with disability to be safe from violence, exploitation and neglect.

There is a range of evidence which suggests that people with disability are more vulnerable to violence, exploitation and neglect. People with disability fare worse in institutional contexts where violence may be more common. People with disability are more likely to be victims of crime and there are also indications that women face increased risk.

- States Parties shall take all appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities, both within and outside the home, from all forms of exploitation, violence and abuse, including their gender-based aspects (Article 16 CRPD).

- 18 per cent of people with a disability report being victims of physical or threatened violence compared to 10 per cent without (ABS, 2006)

- The National Police Research Unit at Flinders University studied 174 people with an intellectual disability and found that they were 10 times more likely to have experienced abuse than non-disabled people (Llewelyn Scorey, 1998)

- A recent US study found that women with disabilities were 37.3 per cent more likely than women without a disability (20.6 per cent) to report experiencing some form of intimate partner violence. 19.7 per cent of women with disabilities reported a history of unwanted sex compared to 8.2 per cent of women without a disability (Time for Action, 2009).

Areas for future action

2.1 Promote awareness and acceptance of the rights of people with disability.
2.2 Monitor and ensure compliance with international human rights obligations.
2.3 Develop strategies to reduce violence, abuse and neglect of people with disability.
2.4 Review restrictive legislation and practices from a human rights perspective.
2.6 Improve the reach and effectiveness of all complaint mechanisms.
2.7 Provide greater support for people with disability with heightened vulnerabilities to participate in legal processes on an equal basis with others.
2.9 Support people with disability with heightened vulnerabilities in any contacts with the criminal justice system, with an emphasis on early identification, diversion and support.
2.10 Ensure that people with disability leaving custodial facilities have improved access to support in order to reduce recidivism. This may include income and accommodation support and education, pre-employment, training and employment services.
2.11 Support independent advocacy to protect the rights of people with disability.
2.12 Ensure supported decision-making safeguards for those people who need them are in place, including accountability of guardianship and substitute decision-makers.

Proposed Quality and Safeguarding framework for the NDIS - Part 2

NDIA provider registration. Pages 30 – 43

Options 1: Basic & 2 – Additional, are seen as 'light touch' and do not have enough safeguarding rigour.

Option 3: Mandated independent quality evaluation requirements for certain providers of supports.

- This incorporates the requirements of Option 2 with Police and referee checks required with the added independent review which is made available to the public.
- This Option would not be compulsory for all support providers only 'certain providers' based on the type of support being provided. It does not make the assessment of perceived level of vulnerability of the person being supported as a prompter for an evaluation e.g. a single woman living alone with home handypersons coming into their home. This is a concern.
- It is important to emphasise that this not be a tick the box type of evaluation so prevalent in Aged Care but having one on one conversations with the person with disability and those close to them.
- Public access to critical information gleaned in the evaluations has significant merit.

Option 4: Mandated external, involves 'more rigour', certification and costs which some providers will baulk at. There is a suggestion that some providers may opt for this as a selling point for their service but overall the benefits over Option 3 are not great.

Systems for handling complaints. Pages 45 – 55

Option 1: Self-regulation with no formal requirement to refer to external complaints services. Access to Fair Trading departments, health complaints system and professional registration bodies. Not suitable for many people living with disability who have compromised capacity. Lack of independence from providers - not acceptable.

Option 2: Internal and external requirements – a set of minimum standards. Concerns re access for people with heightened vulnerability - not acceptable.

Option 3: Independent statutory complaints function

3a – within the NDIA. Potential conflict of interest if complaint about the Agency.
3b – Disability complaints office independent from the NDIA.

- Better option with an MOU with NDIA to alert on any significant issues.
- Continuation of Community Visitor schemes as a proactive way of resolving issues before they become complaints and for actively monitoring progress of service plans.
- Complaint handling needs to be customised and agile. A special skill set to handle complaints is required. Understanding local, cultural and community contexts is vital and the skill set required is often over-simplified by policy makers. A complaint handling focus purely based on legal perspectives will miss the mark.
- The jurisdiction for the complaint handling body needs to be broad and cover the government, private for profit and non-government sectors.
- The complaint handling body requires broad powers to collect information (including seizure of material), to take statements under oath and to publish reports.

Ensuring staff are safe to work with participants. Pages 56 – 66

This is a key area of concern, requiring considerable efforts and safeguards to protect people living with a disability, especially those who do not have natural safeguards i.e. loving family, partner and/or friends or advocates; who have lived marginal or institutional lives; been 'captive' in a service system for most of their life etc.
With the opening up of the 'market' any complacency that existing frameworks are adequate must be challenged.
A national approach to safety is necessary to avoid the movement across jurisdictions of abusers and paedophiles.

Our aim

Our aim is to:

- *reduce the potential for people who pose a risk to participants being employed in supports funded through the NDIS*
- *remove those proven to pose a risk to participants*
- *send a strong signal about the priority placed on the right of people with disability to be safe.*

Proposal for a NDIS Quality & Safeguarding Framework Feb 2015 p60

Option 1: Risk management by employers – not acceptable as outlined.

Option 2: Requirement for referee checks for all roles and police checks for certain employee roles – asks for less requirements than are currently undertaken in some jurisdictions – not acceptable as outlined.

Option 3: Working with vulnerable people clearances – has more comprehensiveness about it and needs to incorporate knowledge about the potential support person/worker from all domains of life across all reporting/assessment mechanisms. This can only work if employers also conduct rigorous referee checks and actively supervise, including actively seeking feedback from people being supported.

Option 4: Create a barred persons list – provided there is certainty that natural justice has been accorded people who are found to have placed a person they support at risk. This has some merit but could have pitfalls of excluding people who have learned from their experiences and can offer a lived experience perspective. On balance such a list could cause more problems than it solves particularly if it is publicly available.

Safeguards for participants who manage their own plans. Pages 67 – 74

The safeguarding issues in self managed scenarios are diverse. At the Adelaide consultation, two parents of a child with disability who 'self manage' their child's support were very clear at the consultation that they wanted government out of the way in the manner they recruit and manage support workers or service providers. Another family member of a person with disability was of the opinion that siblings of the person with disability could be paid to provide the support.

Overall and at this time, the notion that only screened or accredited providers should be able to provide support has appeal. This would not prohibit the accreditation of new service providers or individual workers.

Option 1: Building the capacity of participants to manage their own risks.

- This will work for some people but requires significant confidence in recruiting, training and supervising workers that is not always present in service user's day to day experience.
- It also carries risks of harm being done to someone by exploitative / manipulative workers. It would require the NDIS to exert vigilance in keeping contact with service users especially in the earlier stages of self management.
- It is clearly something that a significant number of people with disability and their families want.

Option 2: Prohibiting certain providers from offering supports – centralised source of information about individuals or organisations that should not be used. NDIS specifies which support services come under this option.

2a: Negative licensing scheme – adhering to an NDIS Code of Conduct as prerequisite for all providers.

2b: Creation of an excluded persons or barred persons scheme – also suggested under the **Ensuring staff are safe to work with participants** discussion. Requirement for employers to report an employee who has endangered someone.

This is a potentially vexed area and will need regular review by the NDIS to ensure people who have a strong desire to self manage are not left isolated and more vulnerable.

Reducing & eliminating restrictive practices in NDIS funded supports. Pages 75 – 87

A laudable aim is outlined.

Consistent with the United Nations Convention on the Rights of Persons with Disabilities, all Australian governments have committed to reducing and eliminating the use of restrictive practices in services for people with disability.

The National Framework for Reducing and Eliminating the Use of Restrictive Practices in the Disability Service Sector (National Framework)33 establishes a national approach to reducing and eliminating the use of restrictive practices by providers across a range of disability service sector settings.

Proposal for a NDIS Quality & Safeguarding Framework Feb 2015 p75

Our aim

The approach to restrictive practices in the NDIS will involve continuing to implement Australian governments' commitment to the reduction and elimination of restrictive practices in services for people with disability.

Proposal for a NDIS Quality & Safeguarding Framework Feb 2015 p78

It is known that restrictive practices can be the screen for having violence inflicted on people with disability, in particular those with communication restrictions, cognitive disability or with no natural safeguards by way of family/loved ones to look out for them.

Option 1: A voluntary code of practice – not acceptable as no protections for people with disability or indeed the people working with them.

Option 2: Substitute decision makers must be formally appointed guardians – not acceptable, not strong enough protections

Option 3: Providers would be authorised to make decisions under specific conditions – a specific person or panel of people who work for the provider make the decision – large potential for conflict of interest despite proviso that external authorisation of physical restraint is required.

Option 4: Restrictive practices could only be authorised by an independent decision maker – clarity of separation from providers and more accountability

Monitoring and reporting (of restrictive practices) p 83

Consultations undertaken during the development of the National Framework identified a need for accountability and transparency in the use of restrictive practices. While legislation alone will not reduce the use of restrictive practices38, evidence suggests that monitoring and reporting on the use of restrictive practices is an essential component of a reduction and elimination strategy because it makes decision makers (or providers of supports) more accountable.

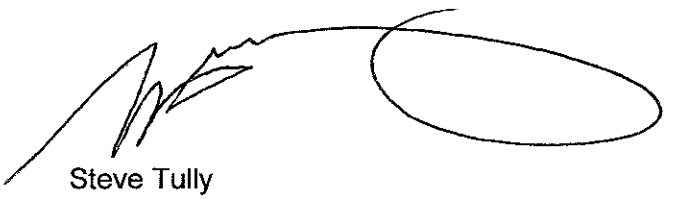
It has been suggested that 'unauthorised' practices are more likely to be implemented by staff and under-reporting is more likely to occur in organisations where there is no active monitoring of use at the individual level.40 Monitoring and reporting on the individual use of restrictive practices means that cases of inappropriate use or abuse can be identified and responded to appropriately.

Proposal for a NDIS Quality & Safeguarding Framework
Feb 2015 p83

Option 1: Reporting would be mandatory for emergency use only – not acceptable as only reporting because of pervasive nature of day to day restrictions.

Option 2: All positive behaviour plans which include a restrictive practice must be reported – better

Option 3: Providers must report on each occasion where a restrictive practice is used (for physical, chemical, mechanical restraint and seclusion)
Option 3 allows for the most light to be shone on systemic use of restrictive practices across the country. To reduce/eliminate restrictive practices requires the most comprehensive information possible at this time to see the extent of the task ahead. Combined with Option 2 it could also allow for an analysis of the effectiveness of positive behaviour support plans.



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