Health Services Union

DISCUSSION PAPER SUBMISSION

Department of Social Services

National Disability Insurance Scheme (NDIS) – Code of Conduct

June 2017

About Us

The Health Services Union (HSU) is one of Australia's fastest growing unions with over 70,000 members working in the health and community services sector across the country.

Our members work in aged care, disability services, community health, mental health, alcohol and other drugs services, private practices and hospitals. Members are health professionals, paramedics, scientists, disability support workers, aged care workers, nurses, technicians, doctors, medical librarians, clerical and administrative staff, managers and other support staff.

We are the primary disability services union in Victoria and Tasmania, representing support workers at the frontline of service delivery. We also represent a number of support workers in New South Wales, Western Australia and the Australian Capital Territory, along with allied health professionals in every jurisdiction except Queensland. Our broad membership gives us a unique insight into the rollout of the National Disability Insurance Scheme (NDIS), how the scheme is interfacing with other mainstream services and the market and workforce issues critical to the scheme's success.

For questions regarding this submission, please contact:

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Introduction

The HSU welcomes the opportunity to provide input into the development of the NDIS Code of Conduct (the Code). However, we emphasize that it is difficult to fully engage with the consultation process given that the Code sits within a broader regulatory framework, the key components of which are currently unknown or under consideration (e.g., NDIS Practice Standards and the proposed *National Disability Insurance Scheme Amendment (Quality and Safeguards Commission and Other Measures) Bill 2017*). For this reason, the HSU reserves the right to make further comment on the proposed Code pending the finalization of other elements of the NDIS Quality and Safeguarding Framework.

This submission is structured into two parts. The first provides commentary on the application of the Code and other design principles, whilst the second deals with five of the nine proposed elements of the Code. The HSU's position is underpinned by a clear and enduring opposition to violence, abuse and neglect of people with disabilities in all forms. Further, we submit that the overwhelming majority of disability support workers are people of high integrity who do an incredible job making a positive difference to the lives of people with disabilities whom they support, even though they are poorly paid for the skills, knowledge and the emotional labour they bring to their work. For this reason, we say that the workforce and its legitimate representatives should have a much stronger role in shaping the way the NDIS Quality and Safeguarding Framework is operationalized.

We look forward to further opportunities to provide input into the development of the Code.

Part 1: Application of the Code and Other Design Issues

Coverage

The HSU has significant concerns that a single Code will apply to providers, paid workers and volunteers. By attempting to capture all three cohorts in a single Code there is likely to be confusion about which aspects of the Code applies to specific cohorts. The Discussion Paper reflects this confusion already. For example, Item 7 "Not engage in sexual misconduct" does not logically apply to a corporate entity. While it is true a corporate entity can create the preconditions for sexual misconduct to flourish (e.g., through inadequate policy and poor organisational culture), a corporate entity, by definition, cannot sexually abuse an individual.

Whilst the Discussion Paper states the Code has been developed with reference to other Codes of Conduct in adjacent sectors, these generally apply to workers exclusively, with separate regulatory standards for providers. For example, the Codes of Conduct for health professionals regulated under the National Registration and Accreditation Scheme (NRAS) apply exclusively to the specified practitioner. Additionally, the National Code of Conduct for unregistered health practitioners applies to both paid workers and volunteers, but not providers.

The HSU recommends that separate Codes be developed for providers, paid workers and volunteers, which reflect the different roles and responsibilities of these distinct cohorts.

Practicalities of Informing and Educating Workers

The NDIS will see an increasingly mobile workforce, with many supports delivered in private homes and within the community. Given this change, the HSU has concerns as to how the final Code and further changes will be practically communicated to individual workers. While the compulsory orientation module is a useful tool, what supports will be in place to ensure that workers absorb the content contained within this module? Additionally, given the likelihood that the definition of "reportable incidents" will change as the Minister and Commissioner issue further rulings, how will these changes be communicated?

The HSU recommends that workers, providers and advocates are consulted to build a robust system that ensures the principles in the Code and other elements of the Quality and Safeguarding Framework are communicated in a reasonable, fair and timely manner to all affected stakeholders.

Application to Unregistered Providers

The HSU has serious concerns with the practicality and fairness of applying the Code to unregistered providers and their employees given that self-managing NDIS participants are not required to provide information about the Code and its obligations to unregistered providers they engage. This creates an untenable situation, whereby an unregistered provider and its employees are subject to penalties for activities that they had no reasonable way of knowing were funded by the NDIS.

The HSU recommends that if the Code is to apply to unregistered NDIS providers and their employees that self-managing participants are obligated to notify the provider or worker they engage that they are purchasing services with their NDIS package.

Part 2: Proposed Elements of the Code

Promoting Individual Rights (1)

The HSU strongly supports this principle; however, the Code implies that people with disabilities will be able to discriminate against workers on the basis of their "values, culture, beliefs and identity" in the course of their employment.

The HSU recommends that the principle of freedom from discrimination in employment not be diminished in the course of upholding the individual rights of people with disabilities.

Preventing Violence, Exploitation, Neglect and Abuse (2)

The HSU fundamentally opposes violence, abuse and neglect against people with disabilities and strongly supports the inclusion of this principle in the Code. However, we have concerns about operationalizing this requirement. Firstly, the Code makes reference to workers needing to familiarize themselves with provider policies and guidelines on abuse identification and prevention. However, how will this be paid given that NDIS pricing provides workers with limited non-client facing time to complete essential activities such as training and inductions. It is imperative that the time and cost involved in understanding provider policies and procedures regarding abuse prevention are not borne by individual, low-paid workers.

The HSU is also concerned by the reference to "appropriate" supervision in the Code. Currently, NDIS pricing only allows for supervision ratios of 1:15 (FTE), which the sector broadly views as too high. Pricing models therefore dictate that "appropriate" supervision cannot be lower than 1:15. In Scenario 2.2.1, the Discussion Paper notes that the provider is directed to immediately increase the staffing levels in the group home and to adequately train all their staff. Yet how will this be direction be operationalized if there is no change to a participant's NDIS funding package? While the HSU supports the Quality and Safeguards Commission making these kinds of directions, unless there is a corresponding increase in funding to pay for increased staffing levels providers will simply seek to do more with less, increasing work intensification or withdrawing services from more complex clients.

The HSU recommends that the Quality and Safeguards Commission consider the cost ramifications of orders to improve training, staffing levels and other associated business costs when making a binding direction under the Code. Where there is a substantial increase in costs as a consequence of binding directions, the Commission must be authorized to seek an expedited plan review for affected participants.

Providing Supports in a Safe Manner (4)

The HSU has significant concerns with the concept of "necessary competence" in the Code as it is completely arbitrary. The HSU's view on competence and pre-entry requirements is that the principle to test is "can the actions of an untrained practitioner cause harm" and in the case of disability support work, particularly when supporting people with complex needs and multiple complex conditions this is certainly the case. We have encountered cases where workers who didn't have medication training for a client who constantly suffered from epileptic seizures, the response was that the worker had to call an ambulance every time the client suffered a seizure. How would the concept of necessary competence apply in this scenario? Would it be medication training or would it be the capacity to contact a paramedic? Disability support workers deploy a range of skills in the course of the working day, applying their knowledge across a wide spectrum of advanced skills, including knowing how to respond to complex health needs such as epilepsy, PEG feeding, calming people with dementia; responding to medical emergencies or violence; managing demanding workloads under time pressure including accommodating unforeseeable events; deploying negotiation and strategic skills to achieve the best for their clients; and working across agencies. We believe the Code fails to recognise these important skills and by applying the arbitrary concept of "necessary competence" it further devalues the work performed by disability support workers.

Consistent with our longstanding position, the HSU believes that code-regulation is an inadequate response to ensuring that people with disabilities receive safe, high-quality supports. Rather, we believe a mandatory risk-based Disability Worker Registration and Accreditation Scheme is better suited to this purpose. Such a scheme should be risk-based, in that a worker's level of accreditation is dependent on the complexity of participant needs and the types of supports they require. A national scheme should be modelled on the work currently being undertaken by the State of Victoria to implement its own scheme.

The Code also requires providers to take "reasonable steps" to ensure workers are competent. The HSU is concerned that this may be used by providers to shift the cost of mandatory training onto workers.

The HSU submits that protections be embedded into the Code to clarify that workers who are expected to maintain currency of mandatory training (e.g., first aid, CPR, etc.) will have that training paid for them by their employer in paid-time.

Raise and Act on Concerns (5)

Raising and acting on concerns is critical, but without the necessary supporting infrastructure to ensure workers are empowered to speak out, this principle will likely never be enacted. A 2015 survey of over 500 HSU members working in the disability sector found that the vast majority (91%) of respondents indicated their current employer had a formal system in place for staff to report instances of violence, abuse or neglect against people with disabilities, members questioned the efficacy of these systems. In a follow-up question, respondents were asked if they believed their employer's reporting system was adequate and fewer than half (42%) answered in the affirmative. While various reasons were provided for the lack of confidence in employer-based reporting schemes, the most common reason for concern was that staff reports are regularly met with bullying and intimidation. From a sample of 198 workers, over half (58%) stated they had been bullied or felt targeted by their employer after reporting cases of violence, abuse or neglect. This fear of persecution is captured in the member responses below:

> *"I work for [EMPLOYER NAME WITHELD] and my experience has been that they persecute the whistle blowers, not the guilty party. I know of a recent case of massive neglect and all the [EMPLOYER NAME WITHELD] did was shift the house supervisor."*
>
> *"As a casual I'd be ostracised which would in turn result in less shifts offered to a dobber."*

"Staff are at times too scared to report abuse or neglect as it is either not acted on or you become a victim yourself by being bullied by supervisors or team leaders."

"As I work as a casual, I often find examples of neglect and when I report it I am not asked to come back and work at the same house."

"When you report concerns, you are either ignored or made feel that you are in the wrong. You are victimised for speaking out about rights and policies and procedures."

"I continued to report the staff member for at least a year prior to any abuse occurring, but management dismissed my claims stating it was merely a personality clash. As a result I was, disciplined threatened and bullied by [EMPLOYER NAME WITHELD] disability managers, sector manager and program managers."

"I have reported things in the past and I was the one treated like a criminal."

"Crucified if you report. Especially casuals."

The comments about casual employment are particularly concerning given that changes in funding and service delivery models under the NDIS are leading to increasing levels of casualisation.

The HSU is concerned by the fact that whistleblowing protections in the Discussion Paper only refer to anonymity for the worker making a report to the Commission. In Case Study 2.5.2, the Discussion Paper notes that the worker, Lachlan, made a complaint to his manager who ignored it in the first instance before making a report to the Commission who then acted. This timeline makes it easy for the employer to suspect it was Lachlan's actions that led to the complaint, with attendant risks for his job security, particularly if he is casually employed. If anonymity is the only protection afforded to workers (rather than protection from targeted termination) it is unlikely that workers will speak out about bad practices.

The HSU submits that mandatory reporting requirements be implemented alongside meaningful whistleblower protections for individual workers, with serious penalties for providers subverting these protections. Further safeguards also need to be in place to protect workers from vexatious complaints and which uphold the principles of natural justice in any subsequent investigation.

Insurance (9)

The HSU is concerned by the assumption that workers will automatically be covered by their employer's insurance arrangements. In instances where a worker is directly employed by a self-managing NDIS participant, a worker cannot assume that they will be automatically covered.

The HSU recommends that further clarification be included in the Code for workers engaged in direct employment.