

Office of the Public Advocate

Submission to
the Department
of Social Services
on the NDIS
Code of Conduct

June 2017

The role of the Public Advocate (Queensland)

The Public Advocate was established under the *Guardianship and Administration Act 2000* (Qld) to undertake systems advocacy on behalf of adults with impaired decision-making capacity who live in Queensland.

The primary role of the Public Advocate is to promote and protect the rights, autonomy and participation of Queensland adults with impaired decision-making capacity in all aspects of community life. More specifically, the Public Advocate has the following functions:

- promoting and protecting the rights of adults with impaired capacity for a matter;
- promoting the protection of the adults from neglect, exploitation or abuse;
- encouraging the development of programs to help the adults reach the greatest practicable degree of autonomy;
- promoting the provision of services and facilities for the adults; and
- monitoring and reviewing the delivery of services and facilities to the adults.¹

The Public Advocate's interest

The Public Advocate strongly supports the development of a *Code of Conduct* for the National Disability Insurance Scheme (NDIS).² A *Code of Conduct* (the Code) is a potentially powerful vehicle through which to strengthen the delivery of disability services for NDIS participants.

If developed and implemented well, the Code provides the Australian Government with an opportunity to:

- embed a consistent rights-based culture in disability services across national and state/territory jurisdictions;
- establish expectations regarding the ethical conduct of practitioners across multiple sectors and professions as they engage with NDIS participants;
- establish foundational principles upon which service delivery will be based and evaluated;
- establish principles to guide practitioner interventions in circumstances that could not reasonably have been foreseen and where there are no formal instructions about what would constitute an appropriate response; and

¹ *Guardianship and Administration Act 2000* (Qld) s 209(1).

² See this office's submission to the 2015 consultation on an NDIS quality and safeguarding framework: Office of the Public Advocate (Qld), *Submission to the National Disability Insurance Scheme: Proposal for a National Disability Insurance Scheme Quality and Safeguarding Framework*, April 2015, pp. 17-18, viewed 19 June 2017, <http://www.justice.qld.gov.au/__data/assets/pdf_file/0010/369397/submission-to-ndis-quality-safeguard-frmwrk.pdf>.

- assist the Australian Government meet its international obligations under the *United Nations Convention on the Rights of Persons with Disabilities* (UNCRPD) to “promote the training of professionals and staff working with disabilities in the rights recognised in the present Convention so as to better provide the assistance and services guaranteed by those rights”.³

This submission aims to assist the Australian Government develop and implement a Code that can help achieve the above-mentioned goals, particularly as they relate to adults with disability who have impaired decision-making capacity.

Strengthening the Code

Prioritising human rights of NDIS participants

Participants’ fundamental human rights should be prioritised as the first principle of the Code

While the *NDIS Quality and Safeguarding Framework* clearly states that “participant rights will be reflected in both the code of conduct and the practice standards”,⁴ the discussion paper makes only fleeting mention of “the rights, standards and principles underpinning the NDIS, and the United Nations *Convention on the Rights of Persons with Disabilities*.”⁵

It is my strongly held belief that promoting and protecting the dignity and human rights of NDIS participants, particularly as they are expressed in the UNCRPD, should be the first principle of the Code and should underpin and inform the whole document. The proposed themes of the Code that relate to NDIS participants’ human rights⁶ are too narrow and do not encapsulate the full range of rights that must be afforded to people with disabilities in Australia and NDIS participants.

While it is acknowledged that the right to freedom of expression, self-determination and decision-making are fundamental human rights that must be afforded to people with disability, the narrowing of the focus of the first major principle in the Code to these more limited rights may result in other, equally important human rights — that the Australian Government is bound to afford people with disabilities — not being given the consideration and emphasis they deserve in the Code.

To illustrate a broader approach, I draw the government’s attention to the Australian Association of Social Workers’ (AASW) *Code of Ethics*.⁷ The AASW *Code of Ethics* identifies a set of general ethical

³ United Nations, *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007 [2008] ATS 12 (entered into force 3 May 2008), art 4.1(i).

⁴ Australian Government Department of Social Services, *NDIS Quality and Safeguarding Framework*, 9 December 2016, p. 85, viewed 19 June 2017, <https://www.dss.gov.au/sites/default/files/documents/02_2017/ndis_quality_and_safeguarding_framework_final.pdf>.

⁵ Australian Government Department of Social Services, *National Disability Insurance Scheme (NDIS) – Code of Conduct: Discussion Paper*, p. 13, viewed 12 June 2017, <<https://engage.dss.gov.au/wp-content/uploads/2017/06/NDIS-Code-of-Conduct-Discussion-Paper-v3.pdf>>.

⁶ Promote individual rights to freedom of expression, self-determination and decision-making; actively prevent all forms of violence, exploitation, neglect and abuse; respect the privacy of people with disability; and not engage in sexual misconduct (with NDIS participants).

⁷ Australian Association of Social Workers, *Code of Ethics*, 2010, viewed 13 June 2017, <<http://www.aasw.asn.au/document/item/1201>>.

principles that include “respect for human dignity and worth” (5.1.1)⁸ and “commitment to social justice and human rights” (5.1.3).⁹ These principles focus social workers on the broader landscape of intrinsic human worth, dignity, human rights and justice as the foundation for their ongoing professional and ethical practice. Honouring the dignity and full range of human rights of people with disability needs to be similarly prioritised within the Code.

The first principle of the NDIS Code of Conduct should require that providers and workers must be committed to valuing the dignity and intrinsic worth of NDIS participants and upholding the rights of people with disability as outlined in the UNCRPD.

Enhancing the right to freedom of expression, self-determination and decision-making.

The development of the Code provides the Australian Government with an opportunity to apply the national decision-making model proposed by the Australian Law Reform Commission (ALRC) in the report *Equality, Capacity and Disability in Commonwealth Laws*.¹⁰ In this report, the ALRC recommended that the proposed national decision-making model be applied to the NDIS, particularly because the NDIS already incorporates elements of ‘supported decision-making’.¹¹

The ALRC’s recommendation reflects increasing national and international recognition for people with disability to be treated equally under the law and exercise their right to make decisions for themselves. For the most part, this paradigm shift originates from the UNCRPD.¹²

Part 2.1 of the discussion paper – *Promote individual rights to freedom of expression, self-determination and decision-making* – should therefore be strengthened by embedding the expectations outlined in the ALRC’s *National Decision-Making Principles*.¹³ This Part of the Code may be further strengthened by requiring that NDIS participants be provided with the supports they need to make decisions for themselves and exercise their legal capacity.

The NDIS Code of Conduct should expressly include relevant elements of the national decision-making model recommended by the Australian Law Reform Commission. This Part of the Code should also require that NDIS participant decision-making be supported by providers and workers in a manner consistent with the *National Decision-Making Principles*.

There is an opportunity for the Australian Government to show true leadership in the disability sector by better aligning the Code with contemporary decision-making support theory and practice and the NDIS principles of choice and control.

⁸ Ibid p. 17.

⁹ Ibid pp. 19-20.

¹⁰ Australian Government Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws: Final Report*, August 2014, p. 25, viewed 19 June 2017, <https://www.alrc.gov.au/sites/default/files/pdfs/publications/alrc_124_whole_pdf_file.pdf>.

¹¹ Ibid.

¹² United Nations, *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007 [2008] ATS 12 (entered into force 3 May 2008), art 12; Office of the Public Advocate (Vic), *Supported Decision-Making: Background and Discussion Paper*, November 2009, pp. 11-12, <<http://www.publicadvocate.vic.gov.au/our-services/publications-forms/research-reports/supported-decision-making/58-supported-decision-making-background-and-discussion-paper/file>>.

¹³ Australian Government Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws: Final Report*, August 2014, p. 24, viewed 19 June 2017, <https://www.alrc.gov.au/sites/default/files/pdfs/publications/alrc_124_whole_pdf_file.pdf>.

Valuing communication

While the inclusion of appropriate communication in Part 2.1 of the discussion paper is very important, it warrants inclusion as a key aspect of the Code rather than an element under “*Promote individual rights to freedom of expression, self-determination and decision-making*”.¹⁴ The ability to communicate preferences is central to the concept of capacity and is essential for NDIS participants to express their preferences, aspirations and decisions.

Further, those covered by the Code should be obligated to optimise the communication of NDIS participants using appropriate tools and strategies. In order to exercise choice and control, NDIS participants who experience communication difficulties must be given appropriate supports to enable them to clearly convey their preferences, goals and aspirations to others, particularly their direct support staff.

The NDIS *Code of Conduct* should require that any NDIS participant who experiences difficulty communicating their preferences and decisions be provided with the necessary opportunities, supports and technologies to ensure their optimal communication, particularly with the individuals and organisations who provide them with services under the NDIS.

Applying the Code to unregistered providers and workers

Page 10 of the discussion paper proposes that the Code will apply to all NDIS-funded providers and workers irrespective of whether they are registered with the NDIS or are working under sub-contractual arrangements.

The discussion paper states:

Information about the Code of Conduct, and how to comply, will be available to all participants. Self-managing participants will be strongly encouraged to provide information about the Code of Conduct and its obligations to any unregistered providers they engage.¹⁵

It is unclear how unregistered NDIS providers and workers will be informed about their obligations to comply with the Code. The above paragraph seems to impose responsibility for informing unregistered providers and workers about their obligations to comply with the Code on the NDIS participants who engage them. It is not clear from the discussion paper whether it is proposed to legislate for these obligations to apply to unregistered providers or the onus is on participants to make compliance with the Code a term of their service agreements with the unregistered providers and workers. However, it is understood that the legislation will impose broad obligations on anyone providing services to a person funded under the NDIS to comply with the Code. While the provisions protecting the rights and interests of NDIS participants are welcomed, there may be significant practical difficulties with the operation of these provisions.

¹⁴ Australian Government Department of Social Services, *National Disability Insurance Scheme (NDIS) – Code of Conduct: Discussion Paper*, p. 13, viewed 12 June 2017, <<https://engage.dss.gov.au/wp-content/uploads/2017/06/NDIS-Code-of-Conduct-Discussion-Paper-v3.pdf>>.

¹⁵ Ibid p. 10.

The discussion paper does not make it clear what powers the *NDIS Quality and Safeguards Commission* (the Commission) will have to take action with respect to breaches of the Code by unregistered providers of NDIS services, workers or practitioners from other sectors.

Again, it is understood that the draft legislation for quality and safeguards under the NDIS will give the Commission power to require compliance and to enforce sanctions against both registered and unregistered providers. However, it is unclear how this will work in practice in relation to unregistered providers, especially when the NDIS is unlikely to have any verified identifying information for unregistered providers in its data systems. If there is no power or ability to enforce sanctions against unregistered providers and workers there will be little incentive for this group to abide by the Code.

Another issue that is not clearly outlined in the discussion paper is whether, or how, breaches of the Code by this group of providers and workers will be recorded by the National Disability Insurance Agency (NDIA) or the Complaints Commissioner and can be accessed by future employers, including people with disability who employ their own staff, to inform provider choice and employment decisions. Again, if the NDIS does not have essential identifying information about a provider or worker because they are unregistered, it is difficult to envisage how the Commission or the Complaints Commissioner will be able to accurately and reliably record complaints information against them for future reference and use. The discussion paper states that all providers will be required to have complaints management systems but it is not clear if this includes unregistered providers and workers, and how the NDIS could enforce these requirements against unregistered providers if they did not have such systems in place.

Overall, the government needs to provide much greater clarity about how the Code of Conduct will apply to unregistered NDIS providers and workers and how it will be operationalised as an effective safeguard in service provision in relation to unregistered providers.

The Australian Government must provide much greater clarity and detail about how the Code of Conduct and complaints processes will apply to unregistered NDIS providers and workers.

The government should develop a comprehensive information package and communication strategy directed at unregistered providers and workers providing services directly to people under the NDIS to inform them about their obligations under the NDIS, the Code of Conduct and the practice standards with which they are expected to comply.

A comprehensive information package and communication strategy should be developed for NDIS participants to inform them of the risks of engaging unregistered NDIS providers and workers. A guide should be developed to inform them about what steps they could take to protect their interests and ensure that their service providers and workers comply with their obligations under the Code of Conduct, the practice standards, and other requirements under the quality and safeguarding framework.

While this submission highlights some of the challenges associated with enforcing the Code in relation to unregistered providers and workers, it is also acknowledged that the employment of unregistered providers and workers may be necessary, even preferred, in certain circumstances. It may be appropriate, for instance, for family members of people with disability living in remote

Aboriginal or Torres Strait Islander communities to be employed in support roles to compensate for the absence of culturally competent providers that can deliver essential supports.¹⁶

It is recognised that these types of scenarios may pose some difficulties for government in ensuring that services provided to NDIS participants meet the standards set by the Code and under the Quality and Safeguarding Framework. Tensions are likely to emerge out of enacting “the proper way”¹⁷ and enforcing the Code, with strict application of the Code and other NDIS regulatory mechanisms potentially undermining efforts by Local Area Coordinators and providers to successfully enter into Indigenous communities, strengthen communities of support around Indigenous people with disability, and deliver culturally competent services that effectively enact participants’ plans. The NDIS will need a nuanced approach to reconciling the NDIA’s guidelines on engaging with Indigenous participants and their communities and regulatory mechanisms like the Code, practice standards, and the quality and safeguarding framework. Strict enforcement of these mechanisms may undermine the Aboriginal and Torres Strait Islander Strategy and attempts to provide culturally competent supports to participants living in Indigenous communities.

While at the same time, Indigenous NDIS participants are entitled to expect the same standards of service and regulatory compliance as other participants. There will be no simple answers for ensuring compliance with regulatory mechanisms in complex service provision arrangements that must be delivered in culturally competent ways: the application of the Code (along with the associated systems responses) needs to reflect this reality.

The application of the NDIS *Code of Conduct* and other regulatory mechanisms in the NDIS must occur in culturally sensitive ways and in accordance with the *Aboriginal and Torres Strait Island Engagement Strategy*,¹⁸ the *NDIS Rural and Remote Strategy*,¹⁹ and the (soon-to-be-released) NDIS CALD strategy to optimise cultural sensitivity and non-discrimination in the delivery of NDIS services.

Scenarios must reflect contemporary real-world contexts

The scenarios in the discussion paper describe a range of situations where the application of the Code identified inappropriate actions by service providers or practitioners and frequently triggered an intervention by the Commission. While the reference to the scenarios being “illustrative rather

¹⁶ The NDIA allows for family members to act in support roles in exceptional circumstances. See: National Disability Insurance Agency, *Operational Guideline – Planning and Assessment – Supports in the Plan – Personal Care Supports*, p. 5, viewed 20 June 2017, <https://www.ndis.gov.au/html/sites/default/files/documents/og_plan_assess_supports_personal_care.pdf>. The NDIA also acknowledges the lack of services in rural and remote areas and the need to respond creatively and flexibly. See NDIS trial site initiatives in the National Disability Insurance Agency, *Rural and Remote Strategy 2016-2019*, February 2016, pp. 41-49, viewed 20 June 2017, <<https://www.ndis.gov.au/medias/documents/h2c/hb0/8800389824542/Rural-and-Remote-Strategy-991-KB-PDF-.pdf>>.

¹⁷ The “proper way” refers to the use of processes that are acceptable to the Indigenous community. The process must be acceptable before the business being proposed is considered. See National Disability Insurance Agency, *Aboriginal and Torres Strait Islander Engagement Strategy*, 2017, pp. 9-14, viewed 6 June 2017, <<https://www.ndis.gov.au/medias/documents/hcb/h31/8800389759006/Aboriginal-and-Torres-Strait-Islander-Strategy-3MB-PDF-.pdf>>.

¹⁸ See, for example, 4. *Engaging in the ‘proper way’*: National Disability Insurance Agency, *Aboriginal and Torres Strait Islander Engagement Strategy*, 2017, pp. 9-14, viewed 6 June 2017, <<https://www.ndis.gov.au/medias/documents/hcb/h31/8800389759006/Aboriginal-and-Torres-Strait-Islander-Strategy-3MB-PDF-.pdf>>.

¹⁹ See, for example, 6. *Towards a positive engagement approach* which emphasises building and nurturing relationships to facilitate co-design of services. This approach is used by NDIA staff and we consider it would be appropriate for broader adoption within the sector. See: National Disability Insurance Agency, *Rural and Remote Strategy 2016-2019*, February 2016, pp. 14-15, viewed 6 June 2017, <<https://www.ndis.gov.au/medias/documents/h2c/hb0/8800389824542/Rural-and-Remote-Strategy-991-KB-PDF-.pdf>>.

than exhaustive”²⁰ is noted, a number of the scenarios are not realistic representations of how matters may occur in the real world of NDIS service provision and may generate confusion among participants, providers, workers and/or advocates. Additionally, some scenarios lack congruence with broader NDIS systems.

The following discussion about some of the scenarios has been included to further illustrate some of the concerns about the current scenarios.

Scenario 2.2.1

This scenario describes a service where the staffing contingent was insufficient and workers were unable to provide appropriate levels of behavioural support to participants. The scenario indicates that the Commission will have powers to direct the service provider to increase staffing arrangements in circumstances where poor practice is a direct result of under-resourcing.

Achieving an increase in supports by increasing staffing is not as straightforward as depicted in the scenario. First, most disability services do not operate in surplus. On the contrary, the change of business model under the NDIS – where providers will only be paid after support has been delivered and only for pre-approved activities – is likely to put many service providers under considerable financial pressure. Requiring service providers to hire additional staff and ensure all staff are fully trained in the required areas when they are not funded to do so may threaten the financial viability of the service and result in service closure. Thus, where the Commission has issued a directive to increase staffing, the service provider may subsequently appeal the decision to a higher authority (such as the Commonwealth Ombudsman) on the basis that the directive will compromise financial viability or may choose to withdraw services (and perhaps accommodation) from one or more of the residents. This outcome could be disastrous for the participants concerned.

In reality, a fair direction from the Commission to a service provider would require a parallel direction to the NDIA to undertake an urgent review of the participants’ plans with a view to increasing support for those individuals who require additional funded support. This approach is reflected in scenario 2.5.2 where the Commission worked with both the service provider and the NDIA to ensure adequate funding for behaviour support interventions. In the case of scenario 2.2.1, the review should consider what funding is necessary to provide all reasonable and necessary supports and services related to behaviour management. One action (the direction to increase supports) should not occur without the other (funding the additional supports). Therefore the scenario is neither realistic nor fair, and – as a result – may generate misleading expectations about service provider obligations and the Commission’s powers, and fail to recognise the NDIA’s responsibilities and limitations in such situations.

Scenario 2.5.2

This scenario describes a situation where service leadership directed support staff to ignore a participant’s behavioural expressions of frustration. One of the workers in the service then decides to make an anonymous report to the Commission. The Commission then works with the provider and the NDIA to develop appropriate behaviour support responses with the person.

²⁰ Australian Government Department of Social Services, *National Disability Insurance Scheme (NDIS) – Code of Conduct: Discussion Paper*, p. 13, viewed 12 June 2017, <<https://engage.dss.gov.au/wp-content/uploads/2017/06/NDIS-Code-of-Conduct-Discussion-Paper-v3.pdf>>.

It is unclear why the Commission would not have referred the matter to the NDIS Senior Practitioner as the agency with expertise in behaviour support and the use of restrictive practices. The *NDIS Quality and Safeguarding Framework* states that serious matters relating to unmet behavioural support needs will be referred to the Senior Practitioner.²¹ As such, this scenario does not align with other NDIA-generated information and is likely to create confusion about the functions of key safeguarding agencies (“which agency does what?”) and how they might be expected to work together in the new regime.

Scenario 2.7.1

This scenario describes events surrounding the suspected inappropriate sexual behaviour of a worker towards participants. It also raises questions about how the Commission will navigate the considerable tension that exists between industrial relations legislation that supports worker rights versus the rights of people with disability to live lives free from violence, abuse and neglect. In doing so, it identifies some of the most complex barriers to keeping people with disability safe from criminal and negligent acts by support workers: meeting standards of evidence to prosecute offenders; adhering to industrial relations legislative protections for workers; and dealing with the threat of legal action where workers are accused of illegal behaviour without sufficient evidence to substantiate claims.

It is agreed that the Commission would need to take immediate action to ensure that all at-risk participants in the service are safe. However, de-registration of a service provider is an extreme response and the consequences of such an action might result in negative outcomes for participants who are not assessed as being ‘at risk’ and who face having their services disrupted and positive worker-participant relationships lost as a result of service closure. This scenario also fails to acknowledge that the process of deregistration would take considerably longer than the scenario suggests. The process would have to comply with natural justice requirements, so there would be a process of presenting the allegations to the service provider in detail and requiring the service provider to respond to the allegations and to show cause why they should not be deregistered. This process would likely take some months. Even after a decision is taken to deregister a service provider, there may be an appeal or review process that the service provider might also use. The outcome of the police investigation and any subsequent prosecution of the alleged offender would not determine the outcome but should also be considered as part of the process.

There is also the question of whether actions or omissions of the service provider prior to the commencement of the NDIS, e.g. having a history of moving workers about whom a complaint has been made and not complying with regulations under the quality and safeguarding framework, can be taken into account for the purposes of disciplining the provider, when those regulations did not exist until after commencement of the NDIS.

A less disruptive response might involve directing the provider to stand down executive personnel and replace them temporarily with NDIA-approved appointments until the outcome of the investigations process are known and recruitment can be appropriately undertaken. At the same time, the NDIA could initiate investigations to identify poor practice and potentially abusive workers,

²¹ Australian Government Department of Social Services, *NDIS Quality and Safeguarding Framework*, 9 December 2016, p. 16, viewed 19 June 2017, <https://www.dss.gov.au/sites/default/files/documents/02_2017/ndis_quality_and_safeguarding_framework_final.pdf>.

and take appropriate action (with attention to worker rights under industrial relations law and standards of evidence).

Regardless, managing the competing rights and legislative protections for both participants and workers is rarely a straightforward activity; nor are such scenarios so neatly dealt with in real life. The work of the Commission will inevitably reflect this complexity as it manages the tensions between acting fairly and in accordance with all relevant legislation, while simultaneously protecting highly vulnerable participants from harm. Scenarios that depict simplicity are likely to generate misleading expectations about the powers and operations of the Commission and create unrealistic perceptions about participant safety in the NDIS.

The scenarios and examples in the NDIS *Code of Conduct* should provide an accurate and realistic depiction of the most reasonable and likely responses by the NDIA. Scenario outcomes must accurately reflect the NDIS-service delivery context. Scenarios presented in the Code must therefore: reflect the way existing systems operate and their limitations; demonstrate best practice across multiple domains; reflect the complex reality of service provision and the disability system; be fair to all parties; and demonstrate consistency between directions given in the Code, other NDIS frameworks, and with other mainstream systems frameworks.

Additional comment on the application of the Code to service provision

In addition to the scenarios, there are further indications that the Code may not reflect the way in which the sector actually works. For example, “2.4 Provide supports in a safe and ethical manner with care and skill”²² states that providers must not deliver supports that are outside workers’ expertise and training. While this statement depicts the ideal support scenario, in reality disability support workers are frequently called upon to provide supports that go beyond their current capabilities and level of professional development. For example, a service provider may train workers to provide supports to people with disability. The same provider may also provide supports to a participant with Down syndrome who also has undiagnosed dementia. Disability support workers do not routinely receive training in the specialised area of supporting people with dementia as part of their induction and professional development and would, in this situation, be supporting participants in breach of the Code.

Additionally, it is widely known that providers are not funded to train workers in every aspect of support and care. Even if they were, the breadth and quality of training required to ensure workers are fully knowledgeable and skilled in all possible aspects of support is not available throughout Australia. It is, in effect, rare that workers are fully knowledgeable and skilled in relation to all of the needs they support or may encounter.

Further, requiring providers to deliver services with complete expertise will act as a barrier to employing staff who are new to the disability sector²³ and may well drive up the demand for

²² Australian Government Department of Social Services, *National Disability Insurance Scheme (NDIS) – Code of Conduct: Discussion Paper*, p. 22, viewed 12 June 2017, <<https://engage.dss.gov.au/wp-content/uploads/2017/06/NDIS-Code-of-Conduct-Discussion-Paper-v3.pdf>>.

²³ Australia is likely to experience a critical shortage of disability support workers as the NDIS rolls out. See Dan Conifer, *NDIS: Report Warns Workforce Understaffed in Major Cities, Raises Concerns Over Readiness*, ABC News, 25 February 2017, viewed 20 June 2017, <<http://www.abc.net.au/news/2017-02-25/ndis-report-warns-major-cities-not-prepared-for-implementation/8303276>>.

qualifications (and thus wages and NDIS prices) as a condition of employment. Further, changes in participant circumstances may result in the provider refusing to provide supports to some participants on the basis that workers cannot do so safely and with a complete body of knowledge and skills on the basis that specialised training cannot be sourced. This would be disastrous for vulnerable NDIS participants with unidentified, unexplored or emerging complex support needs, and/or whose conditions are changing on an on-going basis.

Accordingly, the Code needs to be amended to reflect the on-going nature of professional learning and development in the support context.

The NDIS *Code of Conduct* should require workers and providers to identify where there is, or may be, a lack of knowledge or worker skill in an area of support that is likely to be ongoing, that may generate risk to the person, or that compromises the delivery of supports under the person's NDIS plan. It should also require that steps are taken to source professional development opportunities to upskill relevant staff in the identified areas. Where certified evidence-based training is unavailable, providers/workers should seek out other relevant professional development mechanisms such as expert mentoring, evidence-based literature and authorised frameworks.

Frameworks that have informed the Code

Part 1.2 of the discussion paper identifies a range of authoritative sources and frameworks that informed the development of the Code. Those listed are appropriate for shaping the content of the Code, however consideration should be given to referencing additional frameworks, such as:

- The *National Framework for Reducing and Eliminating the Use of Restrictive Practices in the Disability Service Sector*²⁴ (the National Framework for Reducing Restrictive Practices), which was endorsed by Commonwealth, State and Territory Disability Ministers in 2014.²⁵ This framework aims to “deliver leadership towards reduction of the use of restrictive practices” in the NDIS. It is therefore appropriate that the Code be used to guide the activities of the NDIS Senior Practitioner and the conduct of NDIS workers in relation to the delivery of behavioural supports.
- Other NDIS-specific frameworks should inform the Code and practice standards to ensure maximum congruence between NDIS philosophy and practice. The Code should therefore reflect, or at least refer to, the NDIS *Aboriginal and Torres Strait Islander Engagement Strategy*, NDIS *Rural and Remote Strategy*, and the soon-to-be-released culturally and linguistically diverse strategy. The integration of relevant aspects of these strategies would strengthen the Code and may convey a greater importance to appropriately supporting NDIS participants.
- The *National Decision-Making Principles* and national decision-making model proposed by the Australian Law Reform Commission. As discussed earlier, incorporating the National Decision-Making Principles will set the expectation that participants are to be provided with the supports they need to make decisions about the NDIS. This will demonstrate a commitment to supporting people with disability to be treated as equal under the law and exercise their legal capacity.

²⁴ Australian Government Department of Social Services (Disability and Carers), *National Framework for Reducing and Eliminating the Use of Restrictive Practices in the Disability Service Sector*, no date, viewed 20 June 2017, <https://www.dss.gov.au/sites/default/files/documents/04_2014/national_framework_restrictive_practices_0.pdf>.

²⁵ Australian Government Department of Social Services (Disability and Carers), *National Framework for Reducing and Eliminating the Use of Restrictive Practices in the Disability Service Sector*, updated 7 November 2014, viewed 20 June 2017, <<https://www.dss.gov.au/our-responsibilities/disability-and-carers/publications-articles/policy-research/national-framework-for-reducing-and-eliminating-the-use-of-restrictive-practices-in-the-disability-service-sector>>.

It would also be appropriate to add explicit comment in the Code about the core principle of ‘least restrictive practice’ (as identified in the National Framework for Reducing Restrictive Practices), the concepts of ‘culturally-sensitive practice’ and/or ‘cultural competence’, and the practice of ‘supported decision-making’. Ideally these principles would be also be included in the NDIS practice standards.

The NDIS *Code of Conduct* should be informed by, and specifically refer to, a range of additional authoritative frameworks including: the *National Framework for Reducing and Eliminating the Use of Restrictive Practices in the Disability Service Sector*, the NDIS *Aboriginal and Torres Strait Islander Engagement Strategy*, the *NDIS Rural and Remote Strategy*, the (soon to be released) culturally and linguistically diverse strategy, and the *National Decision-Making Principles* and national decision-making model.

Alignment of the Code and NDIS practice standards

It is noted that the Code will be augmented by a set of practice standards.²⁶ Practice standards are frequently developed by professional bodies to promote the systemic adoption of best practice within the workforce. Practice standards are typically based on the relevant association’s code of ethics/code of conduct. The AASW *Code of Ethics*, for example, constitutes the foundation of the AASW practice standards.²⁷

Given what should be an integral relationship between the NDIS *Code of Conduct* and practice standards, it would be appropriate for both documents to cross-reference each other. Doing this may assist participants, as well as unregistered providers and free-lance workers, to easily identify all relevant regulatory documents and use them to guide service delivery.

The NDIS *Code of Conduct*, must reflect the practice standards, and other key NDIS documents that inform service delivery and engagement with participants and their communities to increase the likelihood of compliance with all key NDIS safeguarding mechanisms.

Clarifying overlapping functions of reporting agencies

One of the key barriers to making complaints generally is not knowing where to lodge a complaint. Existing mainstream and disability complaints management systems are already highly complex, and submitting complaints to the wrong agency can result in a merry-go-round of referrals, delays in addressing urgent matters, frustration on the part of the complainant, and eventual abandonment of the complaint.

The Australian Government’s proposed system for regulating providers of NDIS services potentially adds to this confusion. In Queensland, the abuse of people with decision-making disability may be appropriately reported to the service provider, Queensland Police, the Office of the Public Guardian (including its Community Visitor Program), or the Queensland Government funding body (which will

²⁶ Australian Government Department of Social Services, *NDIS Quality and Safeguarding Framework*, 9 December 2016, p. 85, viewed 9 June 2017, <https://www.dss.gov.au/sites/default/files/documents/02_2017/ndis_quality_and_safeguarding_framework_final.pdf>.

²⁷ Australian Association of Social Workers, *Practice Standards*, 2013, p. 4, viewed 9 June 2017, <<http://www.aasw.asn.au/document/item/4551>>.

eventually be phased out). Under the NDIS system, and depending on the nature of the issue, complaints may also be made to the NDIS Complaints Commissioner, the NDIS Registrar, and the Senior Practitioner. Depending on the context and jurisdiction, a complaint about professional practice may be reported to the healthcare provider, the Health Ombudsman (and, through this office, to the Australian Health Practitioner Regulation Agency), the Queensland Ombudsman, the Commonwealth Ombudsman, the Queensland Anti-Discrimination Commission, and a range of other complaint management agencies.

The complaints management landscape is clearly convoluted and confusing and, with the new complaints bodies being established under the NDIS, is likely to become more so. Reports of malpractice, abuse, neglect and exploitation will very probably be made to many, if not all, of these agencies. Obviously if reports of malpractice or abuse are made to mainstream agencies instead of NDIS regulatory agencies, and do not meet the threshold for legal action, these likely breaches of the Code may not be passed on to the appropriate NDIS regulatory bodies and worker screening agencies, and records about substandard providers and workers will be partial at best.

Reporting criteria are not clear with respect to the NDIS agencies. As demonstrated in scenario 2.5.2 and discussed earlier in this submission, there is already a lack of clarity about which agency should deal with certain matters. While the Senior Practitioner is expected to oversee matters related to behaviour support, it is quite possible that poor practice in this area may instead be reported to the NDIS Complaints Commissioner. If the practice standards give direction regarding behaviour support and the use of restrictive practices, the matter may also be reported to the NDIS Registrar. So potentially a complaint about behaviour support could be reported to any one of these agencies, as well as a number of external bodies, exacerbating the likelihood that complaints ‘get lost in the system’ or that NDIS participants, particularly those with impaired decision-making capacity become confused by the process and give up. The potential for confusion among complainants is considerable and even with a “no wrong door”²⁸ approach, which is welcomed and supported, it needs to be remembered that people generally have very low rates of complaint-making (around four per cent).²⁹ It is very likely that any uncertainty or confusion will reduce those rates among people with disability even further.

There is a need for the Australian Government to review how the current, highly divergent complaints regime for NDIS participants can be made as simple, accessible, fair, responsive and efficient as possible, particularly for participants with impaired decision-making capacity. It is imperative that the “no wrong door” approach to NDIS complaints handling becomes a reality: that is, complaints handling staff across all NDIS regulatory agencies must have a full understanding of which agency should receive which complaints and are able to promptly initiate complaints referrals to the correct agency to avoid delays in processing participant matters.

²⁸ Australian Government Department of Social Services, *National Disability Insurance Scheme (NDIS) – Code of Conduct: Discussion Paper*, p. 12, viewed 12 June 2017, <<https://engage.dss.gov.au/wp-content/uploads/2017/06/NDIS-Code-of-Conduct-Discussion-Paper-v3.pdf>>.

²⁹ Sarah Cook, *Complaint Management Excellence: Creating Customer Loyalty Through Service Recovery* (electronic version), 2012, Kogan Page.

Conclusion

An NDIS *Code of Conduct* has great potential to generate a positive cultural shift in the way disability services are delivered across Australia. I am therefore pleased to support the introduction of the *Code of Conduct*, however respectfully suggest that the rights of NDIS participants be given greater prominence in the Code. Prioritising human rights as the first principle of the Code and aligning the Code with the National Decision-Making Principles are examples of how fundamental participant rights could be strengthened.

Further information about how the Code will apply to unregistered NDIS providers and workers is urgently needed. It is unclear from the discussion paper how unregistered NDIS providers and workers will be informed about their obligations to comply with the Code and what powers the *NDIS Quality and Safeguards Commission* will have to act in response to breaches of the Code by unregistered providers/workers.

A clear understanding of the Code by all those who interact with the NDIS is integral to the Code being an effective safeguard. The use of scenarios can provide guidance in relation to the application of the Code, however it is critical that the scenarios reflect the reality of the NDIS. Some of the scenarios presented in the discussion paper lack congruence with broader NDIS systems and are likely to generate misleading expectations. In addition to enhancing the scenarios, the Code of Conduct should be supported by a comprehensive information package and communication strategy to ensure all NDIS participants, providers and workers are well-informed about their rights and obligations.

Finally, the Code must be supported by an accessible, fair, responsive and efficient complaints management regime. The new complaints bodies being established under the NDIS will add to the myriad of mainstream and disability complaints management systems accessed by people with disability. It is important to explore how the complaints systems used by people with disability can be made as accessible, responsive, fair and efficient as possible.

I thank the Department of Social Services for the opportunity to provide feedback about the content of the proposed NDIS *Code of Conduct*. Should the opportunity arise, I would be pleased to be part of further discussions in relation to these reforms or any of the matters raised in this submission.

Yours sincerely



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