

Translating Vision into Reality - *Grounding the Code of Conduct*

This submission focuses attention on what the writers contend must be an acceptance and acknowledgment of the realities associated with introducing a Code of Conduct. While supporting an NDIS Code of Conduct, the writers nonetheless contend that particular views articulated in the NDIS Code of Conduct Discussion Paper create a certain unreality by one, contending that the Code of Conduct is preventative and two, by contending that the Code of Conduct should apply to anyone and everyone who provides a service or supports to an NDIS participant.

The submission argues that the Discussion Paper fails to acknowledge platform principles such as the right of people with disabilities to exercise unconditional choice and to be acknowledged as having the same rights and responsibilities as all other people in the community. As such, the writers contend that the Discussion Paper promotes an imbalance where protection predominates while choice and inclusion have conditions imposed on them.

The intent to capture anyone and any entity that has dealings with NDIS participants is argued to be a bridge too far and in effect kicks sand in the face of choice and people with disabilities being treated the same as all other consumers in the broader community. After all, we do not impose such requirements on providers who provide services and supports to others who receive government funding such as the aged pension, the disability support pension or indeed Centrelink payments. This unreal expectation provides clear evidence as to why there is a need to ground the Code of Conduct in reality in order to ensure its sustainability and workability.

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Part A: Introduction

Format of the submission

1. This submission is divided into seven parts including, this introductory section as Part A. The submission has been deliberately structured to address what the writers contend constitute key considerations in the development of the Code of Conduct, culminating in *Appendix 1* which details what the writers submit represents a model Code of Conduct for the National Disability Insurance Scheme (NDIS).
2. Part B of the submission promotes the necessity of determining what the writers call platform “musts”. They argue these represent what must be generally accepted concepts and principles. As such they submit these concepts and principles must therefore be recognised in the Code of Conduct. Significantly, this section highlights the much promoted principle of the right of people with disabilities to choose and to exercise control. It also emphasises the concept as articulated in the NDIS Act 2013 and Victoria’s Disability Act 2006 that people with disabilities have the same rights and responsibilities as all other members of our community.
3. Part C of the submission draws attention to quality and safeguarding from an historical perspective by addressing how the best of intentions have failed. By contrast, the writers then detail what they contend represent four process pillars that must be applied in activating a Code of Conduct. This section also emphasises the necessity of ensuring that the application of the Code of Conduct is workable and sustainable.
4. Part D questions whether or not the Code of Conduct will be applied to watchdog entities, funded advocacy organisations and the NDIA and NDIS Commission and their employees. They argue that it should.
5. Part E brings together a number of what the writers describe as inconvenient realities, in that although they must be applied in underpinning the establishment of the Code of Conduct they may nonetheless be seen as inconvenient by the Code’s architects in that they challenge a number of contradictions.
6. Part F provides a concluding comment and emphasises particular actions that must now occur.
7. As already noted above, *Attachment 1* details what the writers promote as a model Code of Conduct.

A word on focus

8. The readers are asked to note that the writers have deliberately not laboured over the finite detail of the *National Disability Insurance Scheme (NDIS) – Code of Conduct – Discussion Paper* (the Discussion Paper). Significantly this is because, as a general comment, the writers support the establishment of a Code of Conduct and as such they do not dispute particular commentary in the Discussion Paper.
9. Notwithstanding this position however, the writers do not agree with everything that is detailed in the Discussion Paper and indeed contend

that there are particular aspects that are either inconsistent with particular principles or represent an invalid position.

10. It would appear as though the approach that is being taken to quality and safeguarding, and hence the Code of Conduct, is one approach that might be described as “*pick and mix*”, whereby almost everything that has gone before has simply been considered and to some degree applied unthinkingly or regurgitated in another form.
11. While the writers acknowledge that it is necessary and desirable to consider what has gone before, nonetheless they submit that it is then very easy to become tied to history rather than rethink a new way of doing things. Ideally, given the significance of the NDIS and the significance of the need to ensure quality standards are met, and that people with disability are protected from violence, abuse, neglect and exploitation, the best approach would have been to consider quality and safeguarding and the Code of Conduct as being developed as though it were a *green fields* site.
12. Significantly, the two principal drivers underpinning the NDIS is the fact that people are now allocated their own funds and there is a requirement that they are able to exercise their choice in how they spend those funds on services and supports. The writers contend that much of what is being proposed tends to ignore these two important facts and instead there is a sense that they are over-ridden by a myopic approach to protectionism.
13. While the writers expect that the planning is now too far advanced to rethink and implement what may have been a better approach to quality and safeguarding, nonetheless they cast a word of warning: that unless individuals are given real choice in how they spend the funds allocated to them, and unless the concept of people with disabilities having the same rights and responsibilities as all others in the community applies, then there is a likelihood that there will be significant doubt as to whether the Code of Conduct can be truly effective.
14. Further elaboration as to the potential confusion and inconsistencies associated with some of the proposals in the Discussion Paper are detailed in Part B below.
15. The writers submit it is essential that these deficits are identified and addressed. Not to do so will ensure that ultimately the Code of Conduct, no matter how well intentioned, will fail people with disabilities and their families.

The authors

16. Jointly and individually the authors come to this consultation with a wealth of relevant direct experience and understanding of the issues associated with the abuse, neglect and exploitation of people with disabilities. Significantly, the authors also have extensive experience in the monitoring and evaluating the development of quality and safeguarding processes and practices and how these have generally failed.
17. As colleagues in a boutique business that specialises in investigations, mediations, facilitated discussion and advocacy for people with disabilities and their families, their activities have brought them into

- direct contact and involvement with activities and entities associated with quality and safeguarding.
18. Of particular import they have monitored and assessed the failure of systems and people to ensure quality services and supports and to address what can reasonably be concluded to be increasing abuse, neglect and exploitation of people with disabilities and their families .
19. Ms Ryan has been involved in the disability sector for 25 years. She has a background in research and analysis of public policy, submission writing on contemporary matters in the disability sector and a familial involvement in disability.
20. Mr Jackson has been involved in the disability sector for just over five decades. As a special education teacher, senior manager and consultant to the sector, he has had a front row seat to the failures which have occurred over the past three decades in authorities seeking to establish an effective, workable approach to quality and safeguarding. Direct involvement with Victoria's Department of Health and Human Services, Victoria's Disability Services Commissioner, Victoria's Public Advocate and Victoria's Ombudsman has highlighted how all these entities and individuals have either at times ignored their legislative mandates or failed to address head on the issues of abuse, neglect and exploitation of people with disabilities and their families.
21. The combination of the above has therefore led the writers to title their submission as one of translating the vision of a Code of Conduct into the reality of how it can be made to work. Significantly the writers contend in other parts of this submission that unless the Code of Conduct is grounded in reality then its sustainability and workability will be undermined. They urge that the architects of the Code of Conduct bear in mind that seeking perfection in the face of known realities makes perfection the enemy of effectiveness and efficiency.

Part B: Determining the Platform

Clarifying the platform

22. As is the case with any structure that is to carry a weighty load, the platform on which the structure is to be built must not only be solid but it must also fit together as an integrated whole. The writers submit therefore that while the Discussion Paper has identified (page 1) the functions that comprise the Quality and Safeguarding Framework, noting that a Code of Conduct is included as a function, for the Code to be fully understood as being part of the whole, reference must be made within the Code to each of the other functions of the Framework.
23. Further, despite the Discussion Paper listing the functions included in the Framework, and the writers' contention above that these should be referenced in the Code of Conduct, nonetheless the writers further contend that the Discussion Paper has neglected to identify the necessity of including other key elements in the Code of Conduct.

24. The writers contend that the exclusion of these additional elements means that the platform on which the Code of Conduct is to be built is seriously weakened. Therefore, by their exclusion, the Code itself will be deficient.
25. This section of the submission therefore addresses three platform matters that are considered to be core to the Code of Conduct. These are:
 - Clarifying concepts and principles
 - Referencing each of the Framework elements in the Code of Conduct
 - The inclusion of other key concepts in the Code of Conduct

Clarifying concepts and principles

26. The Discussion Paper makes reference to what is proposed to be included in the NDIS Code of Conduct, and how the development of the Code of Conduct is to give consideration to broader policy, legislative and regulatory environments (page 8). However, the writers submit that the paper has generally failed to address two significant concepts. They therefore contend that it is essential that these two concepts must be acknowledged as constituting immutable principles in contemporary thinking about disability. The two concepts are the right of people with disabilities to choose balanced against the intent to protect them against deficiencies in the services and supports provided to them and the way such services and supports are delivered.

Balancing choice and protection

27. In essence, the long held principle of the dignity of risk is the fulcrum on which the right to choose is balanced against what might be seen as a natural instinct to protect and keep safe.
28. As detailed on page 8 of the Discussion Paper, the authors note a set of six overall objectives underpinning the NDIS Quality and Safeguarding Framework. The first of these objectives is to *"uphold the rights of people with disability, including their rights as consumers"*. While this objective is obviously clearly of significance, it fails to elaborate on a key principle that underpins the NDIS, that being the concept of choice. The authors argue that logic dictates that a right which we all have as consumers is that of the right to choose what we will consume by way of services and supports and from whom we will choose to purchase such services and supports.
29. The significance in highlighting this matter is that the Discussion Paper (page 1), in listing the functions that comprise the Framework and outlining each of the nine elements listed as forming the Code of Conduct (page 9), suggests an approach that, while protective and safeguarding in nature, tends to ignore the concept of choice and the freedom and the right to choose without having that choice subjected to an administrative constraint.
30. If it is that those responsible for the development of the Code of Conduct truly believe that choice and the right to choose is a platform issue, then the designers of the Code of Conduct must establish a balance between the protective and safeguarding intentions of the Code of Conduct and recognition and acknowledgement that the dignity of risk and the right to choose must not be denied.
31. The writers contend that it is reasonable to argue that when developing regulatory mechanisms, including as in this case a Code of Conduct, there

appears to be a tendency to err to the degree where the aim to protect restricts the rights that the Code is meant to uphold.

32. Given that this Code of Conduct relates to the provision of services and supports purchased by people with a disability and funded through the NDIS, a normalisation principle would dictate that the same principle that applies to the rest of the community when purchasing goods and services, as in "*caveat emptor*" or "*let the buyer beware*", must also be applied to people with disabilities who are purchasing goods and services. Associated with this of course is the relationship between rights and responsibilities. As applies to the rest of the community, there are a number of laws that underpin consumer rights, and processes where a breach of such rights can be challenged.
33. To further emphasise the balance between choice and protection, the NDIS Act 2013 (section 42(2)) in effect emphasises the significance of choice by providing an NDIS participant with four options in relation to the management of the individual's NDIS funds. Significantly, one of these is the participant electing to manage his or her own funds, while another is the participant nominating another person to manage his or her funds.
34. The approach to funding in the NDIS Act, as in the right to choose, is further highlighted in section 4(8) of the Act where it states that "*people with disability have the same right as other members of Australian society to be able to determine their own best interests, including the right to exercise choice and control ...*".
35. Yet despite the emphasis placed on choice and despite the acceptance that people with disabilities have the same right as other members of the Australian community to determine their own best interests, and further, despite concepts such as normalisation and inclusion, the Discussion Paper essentially denies this right.
36. When comparing and contrasting participants who receive NDIS funds which have been approved as meeting their identified reasonable and necessary support needs, with people on a Disability Support Pension who do not receive NDIS funding, Aged Pension recipients, Newstart recipients or other payments made to individuals by government through other programs, those recipients have the right to choose how and with whom they spend their money. By contrast, while a participant who has elected to self-manage or his or her nominee in effect managing his or her money for him or her, if the participant chooses to purchase a service or support from a non-registered service provider, the Code of Conduct comes into effect on the provider. If the provider then elects not to provide a service in effect the participant's choice thus is compromised.
37. This therefore raises the question as to what is the targeted intent of imposing the Code of Conduct on non-registered service providers who provide services and supports to clients who pay them through their NDIS funding. Is it really to simply monitor the funds expenditure or is it about protection? If it is about monitoring the expenditure of the funds, then the writers come back to the point made further above, that other recipients of funds provided through government have no such restrictions imposed on them.

38. If on the other hand it is about allegedly seeking to protect the participant, then equally there is a significant cohort of people with disabilities who have no such protections. For example, there are children with a disability who do not access NDIS funds and adults on a Disability Support Pension. Given the significance of the variable approach to how people with disabilities, including children, are supported and allegedly protected, the writers conclude that the Discussion Paper and its implications for the Code of Conduct very clearly wave the flag of protectionism to the degree where choice is compromised.

What is the difference between registered services and non-registered services?

39. Given the proposal as identified in the Discussion Paper (page 10) that “unregistered” providers who provide services and supports to NDIS participants are to be subject to the Code of Conduct, the obvious question is – What then is the difference between registered and non-registered providers when it comes to the Code of Conduct? The writers argue that given the way the Discussion Paper frames the commentary around registered and non-registered providers and their relationship with NDIS participants who choose to use the services of non-registered providers, then the answer must be “None”.
40. Further, the writers argue that there is no logic in the proposal to require non-registered providers to be subject to the Code of Conduct. And as detailed further below, they contend that the absence of logic is highlighted in three ways:
- Firstly, that the onus for providing information about the Code of Conduct and the obligations of non-registered providers is imposed on the NDIS participant who has chosen to self-manage his or her funds (page 10).
 - Secondly, the question of how non-registered services will be monitored.
 - Thirdly, the question of practicalities and sustainability.
41. It is important to note that currently in Victoria disability clients who receive funding via support packages but who elect to receive their services from a non-registered provider are advised that if they do so they will not be protected by the same mechanisms as apply to those clients who choose registered providers. For example, those who choose non-registered providers cannot have access to the Disability Services Commissioner complaint mechanisms.
42. One sure way to undermine the good intentions of quality and safeguarding mechanisms is to seek to impose a regime of regulation and process requirements that simply cannot be met. Efficient and effective quality and safeguarding, whether through a Code of Conduct or any other mechanism, will always fail if overburdened by unrealistic expectations and demands. The demand that non-registered providers who provide services and supports to NDIS participants be subject to the Code of Conduct constitutes an unrealistic expectation that the NDIS will be able to monitor these non-registered providers, and act on all cases of non-compliance.

A Code of Conduct of itself does not prevent and protect

43. Further on the matter of balance, the writers submit that it is also necessary to acknowledge that of itself a Code of Conduct does not protect and safeguard individuals from being wronged. Therefore, of itself a Code

- of Conduct does not prevent wrongdoing by service providers and therefore does not of itself protect individuals from wrongdoing.
44. While the writers acknowledge, as articulated on page 7 of the Discussion Paper, that a Code of Conduct “*can have both a preventative effect ... and a corrective effect*” the writers contend that in the absence of explanation this contention is misleading. Certainly it may well be that the Code of Conduct may stimulate a provider to adhere to its mandates and therefore this can be argued to function as a “*preventative effect*”. However, where a provider either ignores or deliberately establishes actions that contradict the mandates of the Code, then the Code is not preventative. On this matter, the writers submit that any suggestion that of itself the Code of Conduct is preventative is wrong and misleading.
 45. Similarly, while it may well be that a provider who has breached the Code of Conduct may take action to correct the breach, again of itself the mandates of the Code do not automatically act as having a corrective effect. Correction is more likely to relate to the activation of a regulatory action requiring the transgressor to implement corrective action. Therefore, again the writers submit that any suggestion that of itself the Code of Conduct is corrective is wrong and misleading.
 46. Consequently, as part of the platform, it is essential that as part of the introduction to the Code of Conduct it is clearly stated that in the first instance the Code of Conduct provides a set of requirements by which providers can be judged as to whether or not, in the delivery of their services and supports, they have met the Code or they have breached it. Thus in terms of balance, a Code of Conduct will only be truly effective if the investigative and assessment processes are undertaken in a thorough and timely way, and, where wrong is proven, regulatory and penalty actions are instigated.
 47. In order to emphasise how it is misleading to suggest that of itself a Code of Conduct is preventative and corrective, it is interesting to note the writers’ awareness of the Code of Conduct established for Victoria’s public sector (VPS) employees. Victoria’s public sector has now had a Code of Conduct for all public sector employees for several years. The writers’ experience in undertaking assignments in the public sector stands as indisputable evidence that Victoria’s VPS Code of Conduct has not functioned as a preventative mechanism. Also evidenced through their work, the writers contend that the Code has not functioned as a corrective mechanism. Any corrective acts associated with findings that the Code of Conduct has been breached have only come about by respective managers having implemented corrective actions including particular penalties. As such, it was not the Code of Conduct that operated as a corrective function, but instead it was management’s actions.
 48. To further emphasise the nature of regulations, Codes of Conduct and indeed laws as defined in legislation, if it were that these mechanisms were truly protective and corrective, then it is reasonable to suggest that we would have no crime, we would have no breaches of the road traffic laws and there would be no breaches of the Ten Commandments by Christian people.

Sorting out the jigsaw

49. Over recent years there has been an avalanche of legislation, policy statements, practice requirements and quality and safeguarding mechanisms, all allegedly aimed at recognising the rights of people with disabilities and enhancing the quality of service provided to them and seeking to ensure their protection. The Discussion Paper pays tribute to this avalanche by its mention of "*broader policy, legislative and regulatory environments*"(page 8).
50. In many ways it seems to be that because there is now so much written into policy, legislation, regulatory and practice requirements, those charged with the responsibility of developing an NDIS Code of Conduct feel obliged to amalgamate all of these things to become part of the regulatory framework, including a Code of Conduct.
51. The writers argue that if you want to kill off a good idea, simply weigh it down with a multitude of references, high-sounding statements and rhetoric. So it is that in terms of the Discussion Paper and associated references, there seems to be an attempt to make the Code of Conduct and the Quality and Safeguarding Framework a catch-all net. And therefore in catching all, in order to make sense of the Code of Conduct and the Quality and Safeguarding Framework, those responsible for the application of both have not only to hunt for the individual pieces of the jigsaw, but also then have to attempt to fit them together in a logical order.
52. The writers submit that a practical challenge for the architects of the Code of Conduct is two-fold: one, to determine what goes in to the Code of Conduct and what is left out; two, to ensure that where references are made to other elements of the Framework, then there is clear cross-referencing and accuracy.

The National Standards for Disability Services (NSDS) and NDIS Practice Standards

53. A set of National Standards came into being around 1991 as part of the Commonwealth's involvement in the disability sector and the then Commonwealth State Disability Agreement (CSDA) regime. These were updated in 2013. It appears from the Discussion Paper that the National Standards are now to apply to non-registered disability providers.
54. As a result of the introduction of the NDIS Quality and Safeguards Framework it is proposed that additional sets of standards, to be known as Practice Standards, will be developed, comprising a core set and other sets. The writers acknowledge that quality standards, however defined, provide a mechanism by which to assess the delivery of services and supports by registered disability providers. Clearly the service standards provide the basis by which assessment of service provision can be made and as such there is a basis on which to make a determination as to whether or not a service provider has or has not met the standards.
55. Given the proposed existence of more than one set of standards, the writers contend that unless it is clearly identified how these various standards are to operate and to whom they are to apply, then confusion is likely to reign supreme and the standards are likely not to fully meet their intended purpose. Thus, apart from of course ensuring that the standards are published and written in a way that supports their effective application, in

the context of the Code of Conduct it is necessary to recognise the requirement that the NDIS standards be met.

56. To again emphasise how confusion can occur unless the platform is clearly defined, then clarification is required in relation to the application of each of the sets of standards, as in the National Standards for Disability Services and the NDIS core and additional Practice Standards. By reference to the comments made about non-registered providers further above, if it is to say, (albeit the writers oppose this) that non-registered providers will be subject to the Code of Conduct in those circumstances where they provide services and supports to NDIS participants, then the question arises: Will the NDIS Practice Standards apply or will the NSDS apply? Further if the NDIS Practice Standards are to apply, will it be the core or additional standards which apply?
57. As a comment on the NDIS Practice Standards, as in core and additional, the writers note these Standards are to be part of the registration requirements but their particular application is dependent on a determination as to the complexity and risk of the service being delivered and/or the needs of the person with a disability in receipt of the service. In the absence of the standards being published, the writers challenge the concept of having what appears to be a tiered system of standards, where the complexity of the service and the vulnerability of the client will seemingly dictate or determine which aspects of the standards will be applied. The writers submit that not only is confusion likely to occur, but that it is somewhat dangerous to establish a set of standards where conditionality is tied to their application. The writers argue that quality and service standards should simply be that – a single set of standards.
58. Again, they further argue that to seek to division the standards, as is the case in the Quality and Safeguarding Framework (page 88) is nonsense. They further contend that it is this type of example that again undermines the workability of a Code of Conduct and leads to confusion and a divergence from the practicalities required in addressing quality and safeguarding practices.

The relationship of the Code of Conduct to Investigation and Enforcement

59. The authors note that the schematic diagram entitled “*Process of Code of Conduct Investigation and Enforcement*” on page 36 of the Discussion Paper identifies two entry points – the Code of Conduct and Practice Standards - through which the complaints processes, the notification of reportable incidents and the monitoring of restrictive practices can be initiated.
60. Given that the Discussion Paper is about the Code of Conduct the authors query why the Practice Standards would be identified as a separate entry point to that of the Code of Conduct. They argue that given the significance of the Practice Standards as a requirement to be met and as an assessment tool, the requirement to adhere to the Standards must be included in the mandated elements of the Code. They argue that the identification of two entry points, as in Practice Standards and the Code of Conduct, is confusing and unnecessary. This problem is of course easily addressed by simply including adherence to the Practice Standards as part of the Code of Conduct.
61. On this matter, and as commented on elsewhere in this paper, the writers emphasise that the tendency to overly complicate protective mechanisms within the disability sector has become an alarming trend.

The Code of Conduct and the Explanatory Memorandum

62. Elsewhere in this submission the writers have expressed concern at the misuse of particular words in relation to the Code of Conduct and the assumptions that are made without any particular rationale behind them. A paragraph on page 157 of the Explanatory Memorandum which accompanied the *National Disability Insurance Scheme Amendment (Quality and Safeguards Commission and Other Measures) Bill 2017* represents a further example of presenting information that not only requires interpretation but when interpreted raises questions as to the legitimacy of what has been stated.
63. It is stated that *"The NDIS Code of conduct would set out basic participant rights consistent with the National Standards for Disability Services, effectively acting as a negative licensing scheme."* The writers challenge the contention that the Code *"would set out basic participant rights"*. This statement is inconsistent with the nine elements proposed to be included in the Code of Conduct and as identified on page 9 of the Discussion Paper. As demonstrated by those nine statements, while participant rights are inherent in some of them, of themselves each of the statements and the composite of them represents a set of rules or requirements imposed on service providers. To emphasise, the Code of Conduct is intended to act as a set of Commandments for providers, and not as a set of rights statements for participants.
64. In relation to the rest of the statement suggesting that the Code is to be *"consistent with the National Standards for Disability Services"* the writers contend that the Code should not be subservient to the Standards but by including reference to the Standards in the Code, the Code must be seen as being the set of rules that underpin the application of the Standards.
65. Again as noted elsewhere, reference is made to the Code of Conduct *"effectively acting as a negative licensing scheme."* This stand-alone statement provides no explanation as to the definition of a *"negative licensing system"*. The writers cannot understand this reference, not simply because there is no explanation provided, but just as significantly, it tends to fly in the face of the intent of the Code of Conduct as a set of requirements, the intent of provider registration, and the intent of the Standards. These all being positive requirements and hence reference to the concept of *"negative licensing"* seems inappropriate.
66. Further to the statement on page 157 of the Explanatory Memorandum, it is stated that the NDIS Code of Conduct *"would operate through, rather than separately from, the complaints system"*. The writers submit that in fact it should be the other way around, where the application of a complaints system is invoked as a result of alleged non-compliance with the Code of Conduct.

Part C: Quality and Safeguarding and the Code of Conduct

Pondering the lessons of history

67. The recent history, as in the past three decades or so, in relation to disability has gone from one of almost nil recognition and ignoring rights through to a gradual acceptance and acknowledgement that people with disabilities have the same rights and responsibilities as all others in the community. Over the period of this emerging greater recognition there have been many positive

actions taken which have targeted the promotion and protection of the rights of people with disabilities.

68. Legislation specific to people with disabilities has been promulgated, reviewed and enhanced. As an offshoot of the legislation the disability sector has seen the introduction of a myriad of standards, principles, and well-meaning statements about supports and protections. Alongside these high-sounding pronouncements has also been the establishment of entities responsible for monitoring the performance of the sector as well as dealing with complaints lodged by people with disabilities or people representing them.
69. An incident reporting system has now been in vogue in Victoria for in excess of 30 years, modified and modified again. For almost two years now the Department of Health and Human Services in Victoria has been working on a total revision of the Client Incident Management System (CIMS) yet the most recent advice (early June 2017) is that the final policy is yet to be finalised – this being despite its advertised implementation date of 1 July 2017.
70. Yet despite the developments over the past three decades or so, the focus on rights and protection of people with disabilities and the myriad of policy statements, strategies, and practice standards, abuse and neglect of people with disabilities appears to have gone unabated. This was evidenced in a Victorian Parliamentary Committee inquiry into abuse in disability, a Federal Senate inquiry into abuse in disability, an investigation by Victoria's Ombudsman into incident reporting, significant concerns being expressed by Victoria's Office of the Public Advocate in relation to abuse of people with disabilities in successive annual reports, and significant media attention to the matter of abuse.
71. Despite all of the promotional activities there has been continued abuse and neglect. There has been the failure of service providers to meet the published standards. There has been the failure of the protectors to protect and the failure of the authorities to penalise. It is therefore legitimate to ask: *What is it that a Code of Conduct associated with the NDIS Quality and Safeguarding Framework will be able to do where all previous activity has failed?*
72. While the authors of this submission fully support the introduction of a Code of Conduct and generally support the nine listed intentions of the Code as articulated on page 9 of the Discussion Paper, they submit that there is a serious danger of all associated with the development of the Code of Conduct to become caught up in the hype, good intentions and the unbridled sense that if it is stated it will happen. Therefore, the principle purpose of this submission is not to simply applaud the introduction of the Code of Conduct, but to signal a word of warning as to what the authors see as significant deficits associated with some of the commentary in relation to the Code.

The four pillars of quality and safeguarding

73. The writers submit that if a single National Code of Conduct is to be effective it is essential that it be based on what the writers describe as four action pillars.
74. While it may be that the concept of quality can be relatively easily defined by way of the Quality Standards, the writers submit that it is also essential to establish a clear definition or define what constitutes safeguards. On this

matter the writers recognise that although different interpretations may exist as to what is meant by safeguards, in the context of people with disabilities they argue that safeguards must include the application of measures and actions aimed at protecting the rights of people with disabilities, as in protecting them from harm and preventing something undesirable happening to them as required by the legal concept of duty of care.

75. The writers therefore further contend that if the principal objective of safeguards is to protect people with disabilities from neglect, abuse, violence and exploitation, then it is essential to acknowledge that neglect, abuse, violence and exploitation come in many forms. In particular, a person or entity charged with providing a duty of care to persons with a disability can perpetrate abuse and neglect either as a direct action or as inaction.
76. Therefore, in terms of the Four Pillars, the writers submit that these must reflect a continuum, with prevention as the first and essential target action. The following diagram represents the continuum.

The Four Pillars of Quality and Safeguards and the Code of Conduct



77. **Pillar 1: Prevention:** It should almost go without saying that it is far better to prevent an act of abuse, neglect, violence or exploitation than to have to deal with such acts when they occur.
78. The writers acknowledge, as suggested in the Discussion Paper (page 7), that the Code of Conduct can have “a preventative” effect. Nonetheless, this cannot be taken to suggest that it will. Thus, while prevention may occur as a result of providers and individual becoming more aware of what they must do and what they cannot do, of itself increased awareness does not necessarily translate into prevention.
79. Therefore, in terms of the Code of Conduct the writers contend that written into the Code of Conduct it would be desirable to make reference to prevention of abuse, neglect, violence and exploitation as being driven by enhanced service and support monitoring, guidance and education.
80. **Pillar 2: Reporting:** Victoria has long had an incident reporting system established under the authority of the now Department of Health and Human Services (DHHS) and as applied to services managed by DHHS as well as agencies funded by that department. In terms of complaint mechanisms, the creation of the Disability Services Commissioner (DSC) under the Disability Act 2006 established a complaints process managed by that office. This was extended to what might be called ‘internal complaints’ within service agencies, whereby all registered service providers are required to have a complaints mechanism and are required to report annually to the DSC in relation to the complaints managed by them.

81. Essentially, incident reporting to DHHS and complaints made to the DSC are both forms of reporting. In effect, incident reporting is primarily an internal process, whereas the making of complaints, as applying to the DSC, is an external process.
82. Despite incident reporting having been in place for over a quarter of a century, and the DSC having operated since mid-2007, there is clear evidence to suggest these processes have not been effective in stemming the tide of neglect, abuse, exploitation and violence in the disability sector in Victoria. Evidence of this in part resides in articles in The Age newspaper and an ABC Four Corners program (24/11/2014), which highlighted significant abuse, including rapes, in one of Victoria's largest disability service providers and the inquiries referenced further above.
83. Therefore, while it is important to acknowledge the existence of incident reporting and complaints management, given this indisputable evidence it is equally important to acknowledge that the current arrangements have not been effective.
84. In terms of the Code of Conduct, the writers submit that the requirement to report incidents must be included, as a mandated '*must*' in the Code of Conduct.
85. **Pillar 3: Investigation:** Having the power and authority to investigate is not enough. As an example, although investigative powers exist for Victoria's DSC, as evidenced through his Annual Reports over a number of years, he failed to implement even one single investigation between 2008 and 2013. Equally, although DHHS also has the power to investigate allegations of, for example, abuse and neglect or other types of complaints as applying to its own service provision as well as those funded through the department, DHHS has failed to always exercise this authority or has exercised their authority with a low degree of effectiveness and integrity.
86. The importance of the investigative process is to provide opportunity to the complainant as well as the respondent to state their case, and also to seek to determine whether or not the allegations can be substantiated. Therefore, not to investigate clearly denies the complainant his or her right to have a complaint addressed in a way that has a greater chance in determining the efficacy or otherwise of the complaint as well as denying the respondent his or her right to natural justice.
87. As such, it is essential that investigations be identified as a crucial element of the Code of Conduct.
88. **Pillar 4: Consequences:** Although a range of consequences can be applied to individuals and entities that fail to meet their service and legislative obligations, in the writers' experience it is rare for any significant consequences to be applied to individuals and entities that transgress, in a significant way, their service and legislative obligations.
89. A glaring example of this failure was related to the Yooralla rapes in Victoria. While it is true that a rapist was jailed as a consequence of horrendous behaviour towards people with disabilities in their care, this action did not come about as a result of the Yooralla Board, Chief Executive Officer or indeed DHHS taking the initiative to bring these matters to the attention of the police.

90. The writers are also aware of a number of other cases where Victoria's DHHS and particular funded agencies have failed, and in some cases refused, to mete out appropriate consequences to staff that failed their duty of care towards those people with a disability in their care.
91. In the case of Victoria's Disability Services Commissioner, he has also failed to make any such recommendations and rather than "name and shame" instead has sought to conciliate outcomes, even where abuse, neglect, exploitation and violence have been shown to have occurred.
92. In terms of individuals who transgress significantly against people with disabilities, a range of options is available to managers. While acknowledging industrial agreements and Fair Work requirements may have some import, nonetheless, again it is reasonable to suggest that rarely have significant consequences been applied.
93. The writers submit that if the Code of Conduct is to be taken seriously and be effective, then it must include a section detailing penalties and sanctions.

Investigative demands, workability and sustainability

94. The Explanatory Memorandum recently presented to Federal Parliament identified a figure of 3 per cent as the number of participants who could possibly be expected to make complaints as related to the Quality and Safeguarding Framework and the Code of Conduct. Based on the projected figure of, in round figures, approximately 500,000 participants, this means around 15,000 complaints are likely to be received by the Commission on an annual basis. While it is not possible to assess the efficacy of the 3 per cent figure at this stage, nonetheless the writers contend this figure does not address the total of the alleged breaches or potential breaches of the Code of Conduct.
95. The diagram on page 36 of the Discussion Paper unambiguously identifies three conduits through which issues may arise and hence lead to investigations. As already noted, the 3 per cent figure as identified above, relates exclusively to the complaints process as in complaints made by NDIS participants. As well, as identified in the Quality and Safeguarding Framework (page 18), complaints can come a range of other sources. Therefore it needs to be noted that the number of complaints made to the Commission can reasonably be expected to be significantly higher.
96. As also identified in the diagram on page 36, reportable incident notification also represents a set of matters that can lead to investigation. While there are no figures available to give any indication whatsoever as to the number of reportable incidents which may be received by the Commission on an annual basis, the writers submit that it is reasonable to conclude that the figure is likely to be in the thousands. This conclusion is based on the fact that the Code of Conduct is intended to cover the broadest range of expectations and requirements. Hence, given that the Code represents a set of mandated requirements, it stands to reason that where a mandated requirement has been breached or allegedly breached, as per a reportable incident, then these matters will constitute matters for investigation.
97. While the writers acknowledge there is yet to be a definitive statement as to how the incident reporting model will look and operate, again however the writers contend that if there is any attempt or suggestion to exclude the

reporting of any breach of the Code, then this brings into question the efficacy of the Code.

98. The third box identified in the diagram on page 36 of the Discussion Paper which details what else can lead to an investigation is that of the monitoring of restrictive practices. While the writers acknowledge that this area of responsibility is primarily under the jurisdiction of the Senior Practitioner, nonetheless given the Senior Practitioner represents part of the structure of the NDIS Commission, then clearly the activities undertaken by the Senior Practitioner must by definition come within the parameters of the Code of Conduct. The writers argue that a number of the elements as identified on page 9 of the Discussion Paper can very much be addressed within the concept of restrictive practices.
99. The significance of the commentary as detailed above is to highlight that the likelihood of the Commission being required to respond via the investigative process is overwhelming. This challenges the ability of the Commission to meet the demands that arise from the complaints process, the reporting of incidents and the outcomes of monitoring restrictive practices. Therefore, while it is not possible at this stage, because there is no legitimate benchmark to act as a guide, to make a definitive figure as to matters to be investigated, nonetheless the writers contend that the figure is likely to be many thousands more than the projected 15,000.
100. Given the above, this therefore raises the question of what the writers have defined as workability and sustainability. On the matter of workability, the writers suggest that this relates to the processes associated with investigation and assessment against the Code of Conduct. The writers' significant experience in investigative processes, and as associated with alleged breaches of workplace requirements, provides them with a thorough understanding of the intricacies that can arise with regard to investigations.
101. Significantly, it is rare for an investigation to achieve the timeline originally set for it. Many variables can come into play, including the availability of key personnel involved in the investigation, the requirement to give the alleged offender the opportunity to have a support person or be represented by their union, the requirement to give the alleged offender a fair and reasonable amount of time to prepare their response, the gathering of relevant documentation, and simply the movement of the necessary paperwork associated with the investigation. From a practical point of view this suggests that the multiplier effect of potentially many thousands of matters to be investigated cannot ignore the practical realities that impose themselves on the investigative and assessment process.
102. The concept of workability must also be considered in the context of the processes, practices and legislative authorities of the NDIS Commission operating within the broader service delivery and employment environments. The writers contend that it is reasonable to conclude that no matter what powers might be given to the NDIS Commission in terms of investigation and proposed regulatory actions, those alleged to have breached the Code of Conduct, and therefore potentially to be subject to regulatory actions, whether they be entities or individuals, have particular legal and industrial rights.

103. From an individual perspective, the role of an individual's industrial body cannot be ignored, nor can the potential of an individual to exercise his or her right to take the matter to Fair Work. Thus while it is all very well to infer, as per the diagram on page 36 of the Discussion Paper, that there is an automatic flow of action from the investigation of issues to the assessment against the Code of Conduct through to a range of potential actions being invoked against an entity or an individual, the reality is that in the world of service delivery, service monitoring, investigations, and entity and employee rights do not exist in isolation from each other.
104. While the writers appreciate that the main driver of the Code of Conduct and the associated actions of investigation, assessment and action outcomes is aimed at promoting quality and safeguarding, as in the protection of people with disabilities, these admirable objectives do not automatically override the rights of an accused, be it an entity or an individual.
105. Given the significant role and authority of the NDIS Commission, and the reality that the NDIS when fully rolled out as expected in 2019 will become a significant part of the disability sector in Australia, it is reasonable that there will be an expected growth in the requirements to be met by the NDIS Commission. As is the case in any organisation, sustainability of effort is a major consideration that is always hovering. While a figure of 300 employees of the Commission has been mentioned in the Second Reading Speech associated with the Quality and Safeguards Bill, not only does this not give any indication as to how those employees will be distributed in the Commission, but it also gives no indication as to how many employees will be assigned to dealing with complaints, dealing with reportable incident notification, monitoring restrictive practices and undertaking investigations and following through on one of the many regulatory actions identified in the diagram on page 36 of the Discussion Paper.
106. In addition, of course, as is the case with any employee in any organisation, Commission employees have employee entitlements, including annual leave, sick leave, various other types of leave, and limitations on the number of hours they work each week. Therefore a total complement of staff, as in the proposed 300 for the NDIS Commission, never at any point in time operates as the total. Indeed the writers argue that it is reasonable to suggest that an operational figure of 75 to 80 per cent is likely to be more near the mark.
107. What the above adds up to is the very real challenge of being able to sustain effort in monitoring all aspects associated with the Code of Conduct and as identified on page 36 of the Discussion Paper.
108. Further above in this submission, reference has been made to registered and non-registered service providers. As already noted, the Discussion Paper (page 10, 1.3) identifies "*unregistered NDIS providers*" as being subject to the Code of Conduct. As also noted in this submission, the writers have challenged this inclusion. While in part the challenge has been based on the issue of choice, and asking the question - *What then is the real difference between registered and unregistered providers?* - Of equal significance is the matter of practicalities and sustainability.
109. To illustrate this point, the writers address two matters relevant to the proposal to include non-registered providers. Firstly, there is the issue, as

previously discussed, of placing the onus on the NDIS participant to make their non-registered service provider aware of the Code of Conduct. The writers challenge this intent from two perspectives. Firstly, the wrongness of requiring a participant to articulate to a provider the rules imposed by the NDIS. Secondly, despite, as is the case, a participant electing to manage his own funds, it cannot be automatically assumed that person has the necessary ability and expertise or indeed understanding to take up the issue of the Code of Conduct with his or her chosen service provider.

110. The second issue of course is that of the willingness of the non-registered service provider to acknowledge or accept the Code of Conduct and all this entails. Associated with this is the question: If not accepted, what does the NDIS Commission do? While it may be that an organisation may elect not to abide by the Code of Conduct and therefore elect not to provide a service to the NDIS participant who chose them in the first place, this again raises the question of whether or not the NDIS participant has been able to exercise real choice.
111. To illustrate what the writers contend is utter stupidity in seeking to capture non-registered providers under the NDIS Code of Conduct, the following four scenarios are provided.
112. **Scenario 1:** One or a number of NDIS participants, who are each self-managing their funds, as part of their agreed reasonable and necessary supports choose to have part of their service needs met through a non-registered sports and aquatic facility to perhaps attend the centre's gymnasium, water based facilities or any one of the other activities provided by the facility. Given this scenario, the question therefore arises as to how the facility would be monitored in terms of its services to the participant, if indeed it did accept the Code of Conduct. In the case of multiple participants, as in individuals choosing to attend the facility, the question arises as to whether acceptance of the Code of Conduct is required for each person individually.
113. **Scenario 2:** An individual NDIS participant who self-manages funding has as part of her funding support agreement that grooming is a reasonable and necessary support. The individual therefore chooses to have her needs attended to at a local hair and beauty salon close to her home, which may be in any suburb in any city across Australia, or in any town across Australia. Again, the same issues as above arise in this case.
114. **Scenario 3:** An individual NDIS participant who self-manages his funding attends a larger town some kilometres from his home. This transport has been assessed as a reasonable and necessary support associated with the participant's independence. Travel to the larger centre is via a public bus company, where the bus drivers operate on rostered shifts. Under the proposal is it that each of the bus drivers who may be driving at a time when the participant uses the bus service, and the bus company, are each required to accept and adhere to the NDIS Code of Conduct? If however, the drivers and the company decline to accept the Code of Conduct, does this therefore mean that the participant cannot use his NDIS funds to pay for the trip?
115. **Scenario 4:** An individual NDIS participant who self-manages his funding approaches a non-registered service provider requesting services, and advises that the Code of Conduct will apply when services are provided.

- The potential service provider has previously considered becoming registered but on investigation of the compliance requirements decided that it was not a good business decision. The potential service provider advised the participant that the service provider does not accept the Code of Conduct and therefore is not in a position to provide the service. Hence the participant's choice is denied.
116. The above four scenarios are examples of possibly thousands that could be identified in relation to NDIS participants choosing non-registered providers, where the providers elect not to abide by the Code of Conduct and hence the choice of all of those participants is denied.
117. The details included in this section of the submission clearly highlight the many pitfalls associated with the proposal to include under the Code of Conduct non-registered services which are chosen by an NDIS participant for access by him or her. The writers can see no logical or practical solution to including non-registered providers under the Code of Conduct. Practically, the proposal to include non-registered providers is argued to be not sustainable and therefore should be excluded.
118. The writers of this submission express concern that the Explanatory Memorandum has sought to ignore the pitfalls of including non-registered providers in the Code of Conduct. The writers submit in the strongest way possible that the rationalisation promoting the inclusion of non-registered providers can only be described as gobbledygook.
119. Before commenting further on this matter, the writers take issue with the use of the word "*unregistered*" as used on page 75 of the Explanatory Memorandum. They contend that the clear inference of the word "*unregistered*" is that there is something illegal or not in accordance with the law as in, for example, an unregistered vehicle. Or, as in a medical doctor who although not registered with the relevant authority is practising in contravention of the legal requirement to be registered. Therefore, by the use of the word "*unregistered*" the inference is that service providers who are legitimate in their own right are somehow not operating legally if they do not register with the NDIS. This is not only a naïve notion but is misleading. Therefore the writers contend that there needs to be a rethink as to the word used to describe service providers who are not registered with the NDIS. The obvious solution to this is to simply refer to them as "non-registered service providers".
120. To add to the confusion, the writers also note that the language used in the Quality and Safeguarding Bill is that of "*NDIS provider*". By seeking to delineate service providers who elect to register with the NDIS and calling them "*registered service providers*" but then referring to non-registered providers as simply "*NDIS providers*" is confusing and misleading. The obvious dichotomy if there is to be the category "*registered provider*" then the alternative is for a provider to be "*non-registered*". In its own way this misuse of language and the variations applied are illustrative of the confusion and complexity that is allowed to unnecessarily find its way into what ought to be a straightforward activity.
121. Also on page 75 of the Explanatory Memorandum, there is reference to the possibility of the Code operating "*as a negative licensing system*". This stand-alone statement provides no explanation as to the definition of a

“negative licensing system” and simply seems to have been inserted in an attempt to add weight to the proposition following in the same paragraph.

122. The following paragraph on page 75 of the Explanatory Memorandum articulates an assumption that *“the number of self-managing participants”* will stabilise at 6 per cent. While the writers acknowledge that it is desirable to seek to predict a figure, which may have some import for future planning, nonetheless even at 6 per cent, based on the projection that around 500,000 people will participate in the NDIS, this equates to around 30,000 participants electing to self-manage their NDIS funds – no small number.
123. Of even greater concern however, is the statement on page 75 that *“business compliance costs would be minimal since they only arise when a serious case of misconduct occurs and the existence of the scheme will act as a deterrent.”* The writers contend that this statement is open to significant criticism and challenge from three perspectives.
124. Firstly, that *“compliance costs would be minimal”*. In the absence of any indicators as to what might comprise *“business compliance costs”* and how they might accrue, this statement must be taken as having no reasonable basis. The writers do note, however, that the use of the words *“business compliance costs”* is used in the context of them arising only *“when a serious case of misconduct occurs”*. This must be taken to suggest that misconduct is deemed to occur on a sliding scale and that certain cases of misconduct should not be subject to investigation. The writers again make the comment as made elsewhere in this submission that misconduct is misconduct and that non-compliance is non-compliance. Therefore, in the context of the Code of Conduct, any case of misconduct and non-compliance is a case that must be investigated and therefore will invoke business compliance costs.
125. To suggest that compliance should only apply to cases of serious misconduct not only demeans the intent of the Code of Conduct but places it as a selective instrument depending on whether a matter is considered to be serious or not. If this is the case then the writers argue that there seems little point in establishing a Code of Conduct.
126. The final part of the statement is also open to challenge where it is stated, *“the existence of the scheme will act as a deterrent”*. On this matter, such a categorical statement cannot be made in the absence of any benchmarking; and benchmarking cannot occur until the full roll out of the NDIS is achieved and the application of the Code of Conduct is invoked. By the use of the word *“scheme”* the writers assume that what is meant relates to the NDIS in its entirety, as in the broader application of the Quality and Safeguards Framework, the various Standards and the Code of Conduct.
127. It seems to the writers that unfortunately there is a need to remind the authors of the Explanatory Memorandum that, despite a raft of legislation, a myriad of watchdog entities and the existence of National Standards since 2001 as well as legislative and regulatory mandates associated with quality services and safeguarding, the call for a Royal Commission into abuse in disability has not come about because all is well in the disability sector. The call has come about because of the expose of many cases of serious abuse, neglect, exploitation and violence, including that of a sexual nature, and a failure of the various authorities and service providers to meet their

mandates to provide quality services and to safeguard those people with a disability who receive services. To therefore suggest that the “scheme” however defined “will act as a deterrent” is a statement of hope rather than a statement of fact.

128. Therefore the intent to include non-registered service providers as coming under the umbrella of the Code of Conduct provides no guarantees of service quality and safeguards. As detailed elsewhere, this also represents a transgression of an NDIS participant’s right to choose his or her service provider and to be able to receive his or her services from that provider without NDIS imposing rules and requirements that impact on the individual’s choice.
129. The proposition to include non-registered service providers as coming under the Code of Conduct goes to the very heart of denying choice, transgressing an individual’s rights, failing to recognise the concept of people with disabilities having the same rights and responsibilities as other members of the community, and the concept of mainstream service providers operating in a much broader commercial world than that of the NDIS. If those proposing the inclusion of non-registered providers as coming under the Code of Conduct want to provide a disincentive to generic service providers who are engaged by self-managed NDIS participants, then this is the way to do it. Rather than expand choice and options, it will potentially deny the broadest range of choice and options. It is a totally stupid and unthinking inclusion.

The Code of Conduct and Funded Advocacy Organisations

130. While the writers note that at this stage there is no proposal to fund advocacy organisations from NDIS funding, this suggests that there would be no requirement for them to be deemed to be a registered service provider for advocacy. Yet, the reality is that any organisation that provides advocacy support to a person with a disability who is an NDIS participant and where advocacy is funded as a reasonable and necessary support, the question then becomes, will there be a requirement for such advocacy organisations to be registered under the NDIS? The writers contend that advocacy organisations operating in the disability sector should be required to be registered with the NDIS for their advocacy services.

Part D: Authorities and the Code of Conduct

Who watches the watchdogs?

131. Prior to the Federal Government’s intention to establish the NDIS Commission and its authority commencing in 2018, various watchdog entities have been established and have been operating in the disability sector for sometime.
132. While various views will abound as to the effectiveness of the various watchdog entities, the writers’ direct dealings with particular entities in Victoria leave them in no doubt that as a general outcome particular watchdog entities have largely failed to adequately address complaints and known issues associated with abuse, neglect, exploitation and violence. This being despite significant criticisms and findings through a Senate Committee, the findings of a Parliamentary Committee in Victoria and a

succession of television and other media exposes over the last four or five years.

133. As an example already noted above, despite Victoria's Disability Services Commissioner failing to instigate investigation into abuse complaints, instead he sought to conciliate an outcome rather than '*name and shame*' the offending entity or individual worker even when the case was proven.
134. To add salt to the wounds of the persons with a disability and their representatives, when appeals were made to the Ombudsman or even initially to the Department of Health and Human Services or even the Minister, the ranks closed and none would criticise or take the other to task.

Current watchdog entities and their role in the future

135. In part, the significance of the above is two-fold.
136. Firstly, is it likely that current State and Territory watchdogs such as the Ombudsman, the Public Advocate and the Disability Services Commissioner in Victoria will continue to operate post the full roll out of the NDIS?
137. Secondly, if such entities do continue to operate will they be subject to the Code of Conduct? The writers contend that they must be subject to the Code of Conduct as is the case for any other provider of a service directly involved in the disability sector. It is essential to acknowledge that abuse and neglect can not only occur as a result of a direct service provider failing to meet their mandated obligations, but in the case of a watchdog entity abuse and neglect can occur as a result of the watchdog entity failing to find against an entity or individual who has transgressed against person with a disability who has lodged a complaint with the watchdog entity.
138. It is essential to fully acknowledge that transgressions associated with abuse, neglect, exploitation and violence are not matters for mediation or conciliation, and as such a talkfest is not appropriate in such circumstances.

The NDIA and the NDIS Commission

139. The writers contend that notwithstanding their particular roles and functions, the NDIA and the NDIS Commission constitute providers of services to people with disability who are funded by the NDIS.
140. Given the above, the writers therefore submit that each of the entities and their employees must also be subject to the Code of Conduct. It is somewhat naive to ever think that simply because an entity has been established to monitor quality and safeguarding of people with disabilities or to distribute funds that people employed in such entities are beyond reproach.
141. Therefore, the Code of Conduct must apply to the NDIA and the NDIS Commissioner and their employees. In the event of a claim being made about a transgression of the Code, an independent entity must then be contracted to undertake the investigation.

Part E: Inconvenient Realities

Do not ignore these realities

142. This submission has identified and explored what the writers contend represent a number of significant issues relating to the Code of Conduct and its relationship to the Quality and Safeguarding Framework.
143. The writers emphasise yet again that the architects of the Code of Conduct and those charged with the responsibility of finalising its implementation must confront the following realities, no matter how inconvenient this may be for them. Therefore, although these inconvenient realities have been addressed in the body of the submission, they are again emphasised in this part of the submission.
144. **The Code of Conduct is not preventative** – It provides a blueprint that details requirements to be met by nominated entities and individuals. Therefore it is misleading to promote the Code as a preventative action. It is a benchmark set of requirements.
145. **Choice and control must be acknowledged in the Code of Conduct** – Given choice and control constitute a platform requirement of the NDIS, the right of each NDIS participant to choose how his or her money will be managed, to exercise choice in selecting a provider and being able to exercise choice in selecting a non-registered provider must be included and acknowledged in the Code of Control.
146. **Registered and non-registered providers** – The proposal to make non-registered providers subject to the Code of Conduct raises the question of Why register some providers and not others? The inconvenient reality is that the reality of non-registered providers electing not to provide a service therefore denies the participant who selected them in the first place his or her choice. This seems to have been ignored or dismissed.
147. **Workability, sustainability and the practicalities** – The effectiveness of the Code of Conduct will significantly be determined by its workability and sustainability in the context a number of practicalities. While it is all very well to promote the Code of Conduct, along with its action outcomes of investigations and regulatory provisions, no matter what power is assigned to the NDIS Commission the inconvenient reality is that the NDIS does not operate in isolation from the wider environment and therefore penalties that may be imposed by the NDIS Commission cannot ignore this reality.
148. **It is people who commit acts of abuse, neglect, exploitation and violence** – Almost as though there is an intent to seek to rationalise acts of abuse, neglect, exploitation and violence, commentary about such matters often tends to refer to 'systems' issues or failures. Certainly, while there may be gaps, inefficiencies or levels of ineffectiveness in systems, it is essential to acknowledge that systems however designed, do not commit acts of abuse, neglect, exploitation and violence - people do. It is the failure of people in senior management positions, in supervisory positions and in positions providing direct care or support, who commit acts of abuse, neglect, exploitation or violence. And, it is people charged with monitoring and protective functions who often allow such acts to occur by either turning a blind eye or failing to meet their mandated obligations, such as people on Boards and Committees of Management, people such as

Disability Services Commissioners, Ombudsmen, Public Advocates and funded advocacy organisations. Protection of the 'system' and protecting cosy relationships can often take precedence

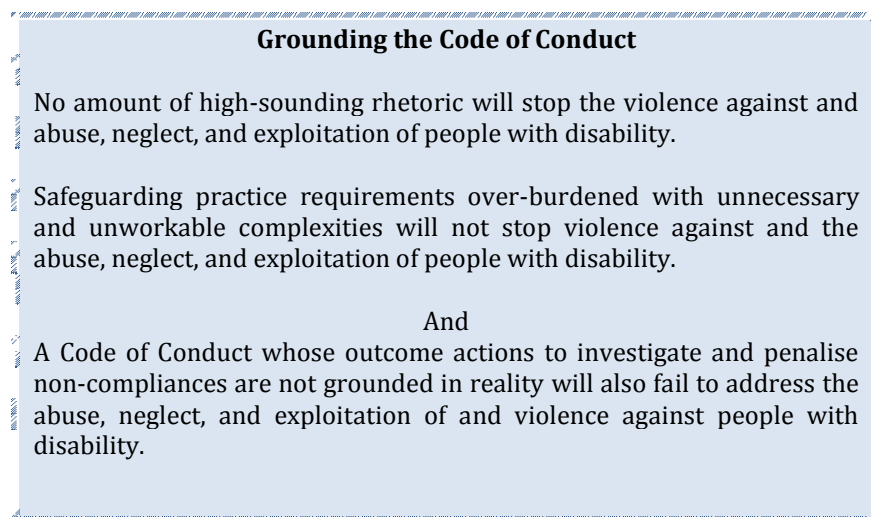
149. **Non-compliance is non-compliance** – Elsewhere in this submission the authors have expressed serious concern at attempts to rationalise and promote that there be differing levels of assessment as related to the Standards and the Code of Conduct. This nonsense must be road-blocked and reversed. The logical truth is that compliance is not hierarchical in the sense that it can be assessed on a sliding scale where there are degrees of compliance and non-compliance. Compliance requires full compliance and any failure to meet full compliance must be deemed to be non-compliance.
150. **Regulatory actions and sanctions must be an outcome of non-compliance – whatever the nature of such non-compliance** – Given the Code of Conduct is to represent a set of mandated requirements any failure to adhere to such requirements must attract a penalty. Not to penalise non-compliance in effect reduces the effectiveness of the Code of Conduct. No matter how inconvenient it might seem, the reality is that all acts of non-compliance must be penalised.

Part F: A Concluding Comment

What now needs to happen?

151. There must be an acceptance that true consultation is based on a willingness to acknowledge, accept and apply principled, informed arguments, even when such arguments challenge the propositions which underpin the consultation documentation.
152. Section E of this submission emphasises a set of principled, informed arguments. These must now be applied in finalising the development of the Code of Conduct.
153. There can be no debate or compromise in relation to accepting that non-compliance equals non-compliance.
154. All alleged acts of non-compliance must be investigated and, where proven, regulatory and/or other sanctions must be applied.
155. The Code of Conduct and any resultant investigative actions associated with non-compliance with the Code must be workable and sustainable.
156. To meet the challenge of workability and sustainability, while at the same time adhering to the principle of choice, non-registered providers must not be deemed as being subject to the Code of Conduct.
157. In order to ensure compatibility and consistency in terms of the use of concepts and principles that are promoted as underpinning the new directions for the delivery of quality services and the safeguarding of people with a disability who have been allocated NDIS funds, there must be a thorough review in relation to what has been articulated in the Discussion Paper, the Standards, and the Explanatory Memorandum.

158. Therefore the true intent and the concepts of choice, of having the same rights and responsibilities as all others in the community, and of allowing the dignity of risk must be accepted as being immutable.
159. As a final comment, it must be that while seeking to safeguard people with disabilities such actions must not seek to control the person. Instead, the person's choice, opportunities and rights must be protected.



Appendix 1: A Model Code of Conduct

This section of the submission outlines what the writers submit represents a model Code of Conduct. In developing this model, the writers have included elements outlined in the Discussion Paper. However, they have also incorporated proposals detailed in the body of the their submission.

The writers submit that it is critical to point out the following:

- Acknowledgment that the Code dictates requirements for a broad range of entities and individuals and that among the many individual who work with people with disability are those who have English as a second language, are new entrants to Australia and who may not necessarily have significant experience or qualifications in the disability sector. As such, these factors suggest that the Code must be user friendly, limited in length and not cluttered with high-sounding rhetoric.
- That it is neither desirable nor potentially possible to cover everyone who provides any type of services or supports to people with disabilities funded through the NDIS. Hence the entities and individuals listed under the section identifying those responsible for meeting the requirements of the Code. Noting that this section excludes non-registered providers and individuals that provide mainstream services.
- Included in the Rights Value is the right to choose and the concept of choice, noting that choice is a platform principle identified by the NDIS.
- The need to recognise families as being key participants in the lives of people with disability and hence their right to also be treated with respect.
- The importance of requiring good governance and administrative management.
- The necessity of including in the Code reference to penalties and sanctions for proven breaches of the Code.

The outline

The following provides an outline of the proposed model Code of Conduct.

The NDIS Code of Conduct

Foreword

This Code of Conduct (the Code) has been created as an integral part of the Quality and Safeguarding Framework for the National Disability Insurance Scheme (NDIS). The Code sets out a set of mandated requirements to be met by the nominated service providers and individuals who provide services and supports to people with a disability who have been funded by the NDIS.

The Code of Conduct applies to the following entities and individuals:

- Registered NDIS providers;
- All employees employed by the NDIS Commission and the NDIA;
- Providers delivering partners in community services, including local area coordinators (LAC) not employed by the NDIA and early childhood early intervention (ECEI) services;
- Providers delivering information, linkages and capacity building (ILC) activities;
- Providers delivering Commonwealth Continuity of Support (CoS) Programme services;

- All individuals with responsibility or influence over planning, directing or decisions, including Board members and other stakeholders of significance, and as associated with a registered NDIS provider or any of the providers as listed above; and
- All individual employees and those contracted by a registered NDIS provider or any of the providers as listed above.

What the Code represents

It is critical to note that the values detailed in this Code go beyond providing guidance. Instead, and significantly, they are directives that are required to be met by the entities and individuals who are covered by the Code.

The Code of Conduct does not stand separately from legislative, policy and standards associated with the NDIS. Equally, the Code does not stand separately from the broader policy, legislative and regulatory environments as applying to all people in Australia. Further, the Code does not operate in isolation from other Codes of Conduct, practice standards and the rules or requirements established by professional bodies responsible for the registration of individuals.

Application of the Code of Conduct

Given the Code of Conduct is mandated in legislation it is therefore essential that all who are required to ensure its application acknowledge their obligation and responsibility to do so. It is also essential that all entities and individuals that are subject to the Code of Conduct fully understand that failure to apply the Code of Conduct or allegations of a failure to apply the Code of Conduct will lead to an inquiry or investigative process.

It is also essential that all entities and individuals, who are subject to an inquiry or investigative process where the outcomes confirm that the Code of Conduct has been breached, fully understand that they will be subject to a penalty determined as appropriate to the breach. A list of possible regulatory or legal actions to be applied to entities and individuals who have been proven to have breached the Code of Conduct is provided in Part 12 below.

I now commend the NDIS Code of Conduct to all who are responsible for its application.

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Quality and Safeguarding Commissioner

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The Mandated Values

Values 1 to 10 below detail the values that comprise the Code of Conduct. Significantly, Values 1 to 9 inclusive have been developed and refined to the point where they now represent the foundation and requirements of the expected behaviour towards people with disabilities. Value 10 reflects expectations and requirements in relation to good governance and administrative management, both of which are critical in the delivery of efficient and effective services and support.

Within the context of this Code of Conduct these Values are required to be met by all those entities and individuals who are identified in this Code of Conduct.

The Values address the broadest range of requirements including reference to the National Standards for Disability Services and the Quality and Safeguarding Framework.

Value 1 – Rights

The concept of rights is enshrined in various pieces of legislation. In the context of the Code of Conduct, rights are an expression of how an entity or an individual is required to treat a person with a disability. Conversely, rights are an expression of how a person with a disability may expect to be treated.

Obligations included in this Value are:

- Always treating people with disability with dignity and respect and valuing their contribution to society.
- Adhering to the rights, standards, and principles underpinning the National Disability Insurance Scheme and the United Nations Convention on the Rights of Persons with Disability.
- Communicating in a form, language, and manner that enable people with disability, their families and their carers to understand the information provided and to make known their preferences and feelings.
- Taking into account the expressed needs, values, and beliefs of people with disability, including those relating to culture, religion, ethnicity, gender, identity, age and disability.
- Respecting and taking into account the expressed choice and will of a person with a disability

- At all times promoting the individual's right to freedom of expression, self-determination and decision-making.

Value 2 – Accountability

The concept of accountability is about the obligation one entity or individual has towards another individual. In the context of the Code of Conduct, an obligation is imposed on providers to be accountable to the people with a disability to whom they provide services and supports. Essentially, accountability is not just about expectations. It is about being held to account for the way in which services and supports are delivered.

Obligations included in this Value are for entities and individuals:

- To at all times ensure adherence to the NDIS Standards and any other mandated requirements associated with services and supports.
- To actively prevent all forms of violence, exploitation, neglect and abuse.
- To work to clear objectives in a transparent manner.
- To accept responsibility for their decisions and actions.
- To ensure the most effective and efficient use of resources including time.
- To submit themselves to the scrutiny of designated assessment processes.

Value 3 – Integrity, Honesty and Transparency

It is non-negotiable that all activities associated with the management and delivery of services and supports are to be based on this value. Integrity, honesty and transparency go beyond statements of intent or what is desirable. Integrity, honest and transparency are action orientated '*must do*' actions.

Obligations included in this Value are:

- At all times act with integrity, honesty and transparency.
- Providers and employees and those contracted to provide a service under the entity's name must only recommend and provide supports and services that meet the identified needs of a person with a disability.
- All parties involved with an entity providing services and supports to persons with a disability, including employees and those contracted to provide a service, are required to provide truthful and accurate information as to his or her qualifications, training, professional experience and professional affiliations.
- All parties involved with an entity providing services and supports to persons with a disability, including employees and those contracted to provide a service, must not use his or her possession of a particular qualification to mislead or deceive people with disability, the employer or the public regarding his or her competence in a field of practice or ability to provide supports.
- Providers and employees and those contracted to provide a service under the entity's name must not make false claims about the efficacy and the appropriateness of their supports, services or products.
- Providers and employees and those contracted to provide a service under the entity's name must not ask for, accept or provide any inducement, gift or hospitality that may affect or be seen to affect the way the NDIS supports or services are provided, including referral arrangements with other providers.

Value 4 – Responsiveness

This value is about the need to provide services and supports in accordance with services standards and the individual's needs in a timely and appropriate manner.

Obligations included in this Value are for entities and individuals:

- To at all times to provide supports in a safe and ethical manner with care and skill.
- To ensure that they provide frank, impartial and timely advice to colleagues, persons with a disability and their families.
- To ensure that at all time they provide quality services in accordance with the National Standards for Disability Services and any NDIS Practice Standards required to be met.
- To ensure they identify, promote and implement best practice in relation to services and supports provided to persons with disability.

Value 5 – Respect, Privacy and Confidentiality

This value is about any activity where entities and individuals deal with others. It is essential that in their dealings they respect the person they are dealing with in terms of his or her individuality and adhere to legislated privacy and confidentiality requirements.

Obligations included in this Value are that entities and individuals:

- At all times ensure that their dealings with people with disabilities and their families are fair and objective.
- At all times ensure that their dealings with people with disabilities and their families are free from discrimination, harassment and bullying.
- When expressing views to improve outcomes in relation to the services and supports provided to persons with disability respect and listen to any contribution that may be made by the person with a disability and for whom the outcome relates.
- Ensure that personal information maintained about a person with a disability and his or her family is secure and maintained as private and only made available on a need to know basis.
- Ensure that matters communicated to them by a person with a disability or the person's family are maintained as confidential unless approval is given by the person with a disability to release the information or unless dealing with people who have legislated authority to be given confidential information.
- Only communicate on matters of support being provided to a person with a disability in any marketing and communication with the consent of the person.

Value 6 – Impartiality

This Value requires entities and individuals at all times to act impartially and objectively and without bias.

Obligations included in this Value are that entities and individuals:

- Make decisions and provide advice on merit and known facts.
- Avoid favouritism and self-interest.
- Implement required policies and practices equitably.

Value 7 – Preventing Violence, Neglect, Abuse and Exploitation

At no time is it legitimate for an entity or an individual to accept or condone violence, neglect, abuse and exploitation. Specifically in regards to people with a disability, entities and individuals have a categorical obligation to act in a way which prevents violence, neglect, abuse and exploitation.

Obligations included in this Value are:

- That entities and individuals to report, using the designated reporting systems, all matters of concern about actions or inactions that may impact on the quality and safety of supports or acts of abuse, neglect, exploitation or violence.
- That entities and individuals never engage in sexual misconduct of any kind or allow acts of sexual misconduct to be perpetrated.
- That entities and individuals have an active commitment to addressing and eliminating violence, neglect, abuse and exploitation
- That entities and individuals when supporting the person with a disability avoid placing him or her in a situation of risk.
- Providers must have clearly articulated policies that define violence, neglect, abuse and exploitation.
- Employees and those contracted to provide a service are required to familiarise themselves with and enact the requirements of such policies.
- Providers are required to have systems and procedures directed towards preventing violence, neglect, abuse and exploitation.
- Providers are required to provide their employees and those contracted to provide a service under the entity's name with appropriate supervision and training in order to be able to monitor and act to prevent situations arising that could lead to harmful incidents.
- Providers and employees and those contracted to provide a service under the entity's name are required to immediately report and nominate any person who has allegedly engaged in an act of violence, neglect, abuse or exploitation to the Commission and, where appropriate, other authorities, including the police.

Value 8 – Human Rights

This Value reinforces the Australian Government's commitment to ensuring people with a disability are afforded their human rights.

Obligations included in this Value are:

- Entities and individuals are required to ensure that in making decisions and providing advice such decisions and advice are consistent with human rights.
- Entities and individuals are required to actively implement, promote and support human rights.
- Entities and individuals are required at all time to protect the human rights of a person with a disability if there is a belief that such human rights are being transgressed.

Value 9 – Process and Practice

The management and delivery of services and supports to a person with a disability requires the implementation of identified processes and activation of accurate and timely recording practices.

Obligations included in this Value are:

- Entity Boards and other key individuals involved in the management and operation of an entity must at all times ensure good governance and management of the entity.
- Entities and individuals must at all times maintain accurate, legible and up to date records of NDIS supports and services as provided by the entity and individuals.
- Entities and individuals responsible for the maintenance of records must ensure that such records are held securely and are not subject to unauthorised access.
- Entities and individuals must ensure that a suitably qualified individual conducts any assessment undertaken in relation to a person with a disability.
- Entities and individuals must ensure that all incidents, whether proven or alleged, that impact on a person with a disability are reported via the designated reporting format and process and within any stipulated time frames.
- Entities and individuals must ensure that when writing reports about a person with a disability an unambiguous distinction is made between assessment data, factual information and expressed opinions.
- Entities and individuals must ensure that relevant registrations and insurances are maintained.
- Entities must at all times ensure that appropriate indemnity insurance is held in order to ensure that people with disability who are injured in connection with NDIS supports and services are able to receive fair and sustainable compensation.

Penalties and Sanctions

Notwithstanding the requirement of all entities and individuals who are subject to the mandates of this Code of Conduct to meet these obligations, nonetheless the Code acknowledges the potential for entities and individuals to breach the Code.

In the event of the Commission becoming aware or deciding that the Code has been breached, and determining that an investigation is required, the investigation will assess presenting information and evidence against the requirements of the Code of Conduct.

In the event of the investigation determining that an entity or individual has breached the Code of Conduct, the Commission may at its discretion initiate a particular regulatory action or a nominated sanction.

Regulatory actions in relation to provider entities –

Actions that may be taken against a provider entity include:

- The revocation of the entity's registration.
- The issuing of an order that bans particular activities being undertaken by the entity.
- The initiation of civil penalties.
- The requirement for an entity to undertake specified training and education.
- The issuing of warnings and directions.
- The issuing of enforceable undertakings.

Actions that may be taken against an individual include:

- Initiating civil penalties, which could include fines or imprisonment.
- Reassessing a worker's clearance with a view to determining whether the clearance should be withdrawn.
- The individual's breach of the Code is taken up with the employer entity and the requirement of the entity to undertake particular remedial actions with the individual employee.

End of Submission

Max Jackson
Partner
JacksonRyan Partners

Margaret Ryan
Partner
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