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Monday 12 June 2017

Mr Bruce Smith  
Branch Manager, NDIS Market Regulation (Quality and Safeguards) Branch  
Department of Social Security  
GPO Box 9820  
Canberra ACT 2601

**RE: Submission regarding the proposed National Disability Insurance Scheme (NDIS) Code of Conduct**

Dear Mr Smith

Thank you for providing Physical Disability Australia (PDA) with an opportunity to submit our thoughts and concerns regarding the proposed NDIS Code of Conduct.

PDA is a national peak membership-based representative organisation run by people with physical disability for people with physical disability. PDA was founded 21 years ago. We have over 1,000 members from all Australian States and Territories. Our purpose is:

- Remove barriers by encouraging all levels of government to enable and provide every Australian living with a physical disability with opportunities to realise their full potential;
- Proactively embrace and promote difference and diversity for an inclusive society; and
- Include within all our operations the active promotion of the rights, responsibilities, issues and participation of people with a physical disability.

As with many representative organisations, PDA is excited about the roll-out of the NDIS across Australia and the differences it has the potential to make to the lives of our members and every Australian with disability. Counter-posing this excitement, however, are our concerns about the relationships participants, service providers and workers will develop under the overarching *NDIS Quality and Safeguarding Framework* and its revised Code of Conduct. In particular, PDA is concerned that these documents will entrench and legitimate the archaic institutional thinking and practices underlying disability support services of the pre NDIS paradigm.

This submission will elucidate our concerns about the Code as it is explained and illustrated in the Department of Social Service's (DSS) *NDIS Code of Conduct* website<sup>1</sup> and *Discussion Paper*<sup>2</sup>

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<sup>1</sup> <https://engage.dss.gov.au/ndis-code-of-conduct-consultation/>

<sup>2</sup> <https://engage.dss.gov.au/wp-content/uploads/2017/06/NDIS-Code-of-Conduct-Discussion-Paper-v3.pdf>

## Executive Summary

PDA recommends:

1. That the NDIS Code of Conduct be generally reworded in concise terms so that it is clear to workers and providers what their 'requirements' entail and what it means in their workplace contexts.
2. That specifically the NDIS Code of Conduct require workers and providers to:
  - **Respect** participants' rights rather than 'promote' them;
  - Communicate in a form, language and manner that enables the participant to understand the information provided and make known their preferences (or equivalent);
  - **Respond appropriately** to instances of violence, exploitation, neglect and abuse rather than 'actively prevent' them;
  - **Respect** the rights and dignity of all NDIS participants, including their right to **choice and control** and to take **reasonable risks**;
  - **Maintain** appropriate records to ensure probity and participant health (or equivalent) rather than simply "Keep appropriate records";
3. That the requirement for workers to generally "Raise and act on concerns about matters that may impact on the quality and safety of supports provided to people with disability" not be included in the NDIS Code of Conduct.
4. That the Minister for Social Services and senior officials at DSS give careful consideration to how the Code of Conduct be established in law so that its scope and reach is clear to all those who are bound to follow it.
5. That due to its poor design, the results of the survey included as a 'have your say' option on the NDIS Code of Conduct website be interpreted with caution and not be used to endorse any clauses of the NDIS Code of Conduct in their current form.
6. That the NDIS Quality and Safeguarding Commission's ability to investigate and sanction providers and workers be restricted to those specifically registered with the NDIA and that complaints against non-registered providers be referred to other statutory bodies and professional regulators as applicable.
7. That the NDIS Quality and Safeguarding Commission assist participants to exercise choice and control and lead ordinary lives by facilitating exploration of alternate accommodation and support arrangements when it is found providers have breached the Code of Conduct.
8. That in keeping with the principle of participant choice and control, the NDIS Quality and Safeguarding Commission not overly concern itself with maintaining relationships between participants and providers
9. That the finalised NDIS Code of Conduct be published with explanatory texts that provide significant details about the range of consequences for workers and providers who breach the relevant clause of the Code.
10. That in keeping with General Principles under the NDIS Act, the finalised NDIS Code of Conduct be published with illustrative scenarios that show participants resolving issues by exercising choice and control to lead ordinary lives by using mainstream services (as applicable).

## The lack of a complete draft Code of Conduct

Our first concern is that no draft Code of Conduct (with the detail needed to understand its scope and limits) is provided to would-be submission writers. Had such a document been provided, PDA, and other interested parties, would have been able to more readily assess its likely impact on the behaviour of workers and providers. Instead, the *Discussion Paper* provides a list of 'requirements' in very broad, hard-to-object-to, positive terms:

*The proposed Code of Conduct will require workers and providers delivering NDIS supports to:*

1. *Promote individual rights to freedom of expression, self-determination and decision-making;*
2. *Actively prevent all forms of violence, exploitation, neglect and abuse.*
3. *Act with integrity, honesty and transparency.*
4. *Provide supports in a safe and ethical manner with care and skill.*
5. *Raise and act on concerns about matters that may impact on the quality and safety of supports provided to people with disability.*
6. *Respect the privacy of people with disability.*
7. *Not engage in sexual misconduct.*
8. *Keep appropriate records.*
9. *Maintain adequate personal and professional liability insurance appropriate to the risks associated with the supports provided.*<sup>3</sup>

'Requirements' expressed in terms such as these are very hard to interpret let alone enforce. Moreover, they leave workers and providers open to complaint in the event of any misadventure a participant to whom they are supporting experiences.

For example, it is implied that the worker, Monique, in Scenario 2.2.2<sup>4</sup> of the *Discussion Paper* is breaching clause 2 (presumably the 'neglect' aspect) of the Code of Conduct by neglecting to ensure the participant, Dut, can summon her easily. But without any clarification on what 'neglect' is in the context of providing support to Dut (let alone participants in general), it is difficult to delineate between conduct that is unlawful and that which is not. The scenario also implies that the relieving worker, Hien, would similarly be in breach of the Code if she did not show Monique Dut's attention-getting bell.

PDA therefore recommends that the Code of Conduct be reworded in concise terms so that it is clear to workers and providers what their 'requirements' entail and what it means in their workplace contexts. The "indicative elements of an NDIS Code of Conduct" published in the *NDIS Quality and Safeguarding Framework*<sup>5</sup> (hereafter referred to as the 'suggested Code') provide some great examples. For instance, its clause 6: "Communicate in a form, language and manner that enables the participant to understand the information provided and make known their preferences" has the capacity to provide a lot more guidance to Monique (the worker in Scenario 2.2.2) than clause 2 of the Code provided in the *Discussion Paper* about what she should do when working with Dut.

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<sup>3</sup> *Discussion Paper*, p. 9

<sup>4</sup> *ibid* p. 18

<sup>5</sup> p. 96

## The Survey

PDA's concerns about the survey on the *NDIS Code of Conduct* website<sup>6</sup> flow from those we have regarding the wording of the proposed Code: its questions' lack of contextual detail makes it hard to judge exactly what the implications are for each clause of the proposed Code of Conduct. This means the data DSS gets from the responses to this survey are relatively meaningless because each respondent will have their own (subjective) idea about what each clause will mean in terms of the influence it will have on worker and provider behaviour.

Do the authors of the survey seriously expect the vast majority of respondents from the disability community not to rate the outcome to be delivered by each clause as 'Extremely Important'?

If PDA were prone to cynicism, we might suggest that this survey was written to provide a rubber stamp of endorsement to the proposed Code of Conduct in its current form and not at all intended to gain insight into what, exactly, should be included in it.

We therefore recommend that the results of the survey be interpreted with caution and not be used to endorse any clauses of the NDIS Code of Conduct in their current form.

## Part 1 – Preamble and Contextual Background of the Code of Conduct

### *Is a NDIS Code of Conduct the right approach?*

The *Discussion Paper* states that a NDIS Code of Conduct is needed "to ensure the safety and quality of supports within the emerging NDIS market" and that it will apply to almost everyone who is involved in arranging and delivering NDIS supports. In our experience, this is quite an expansion of the usual purview of such documents. Most Codes of Conduct are confined to particular organisations and professions. They are embedded in internal policy and work to create particular workplace cultures. Additionally, Codes of Conduct are typically accompanied by training and are formally committed to by those who are to be held by it.

PDA has no objection to the Government insisting that registered providers include an appropriate Code of Conduct in their internal documents and mandating that their workers formally commit to keeping to it. However, it seems to be an overreach to insist that it also apply to non-registered providers who, for the most part, operate in the mainstream economy. These providers and their workers may have no knowledge of the Code nor understand they are bound to it when providing services that are being paid for by the NDIS. They will not have had the opportunity to undergo the training needed to understand its scope and implications. Nor will they have been able to give (or refuse) informed consent to abide by it.

Given that many mechanisms exist to deal with inappropriate workplace behaviour in mainstream contexts already, PDA does not support the imposition of further regulatory oversight on these potential providers because it exposes them to double jeopardy (through investigation and potential sanction by both the NDIS Quality and

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<sup>6</sup> <https://engage.dss.gov.au/ndis-code-of-conduct-consultation/ndis-code-of-conduct-consultation-survey/>

Safeguards Commission and existing jurisdictional entities) and serves as a disincentive for them to offer their services to participants.

The NDIS is supposed to “enable people with disability to exercise choice and control in the pursuit of their goals and the planning and delivery of their supports”<sup>7</sup> and the legislation underlying it acknowledges “people with disability should be supported to exercise choice, including in relation to taking reasonable risks, in the pursuit of their goals and the planning and delivery of their supports”<sup>8</sup>.

PDA argues that these goals are not achieved by wrapping NDIS participants in regulatory cotton-wool.

#### *The proposed mechanisms for applying the NDIS Code of Conduct*

The *Discussion Paper* proposes that the NDIS Quality and Safeguards Commission will have a broad capacity to accept complaints and initiate investigations itself, apply its sanctions to providers and workers, and refer complaints to police and other statutory bodies that oversee the behaviour of professional workers as appropriate.<sup>9</sup>

PDA approves of the commitment to offering people with concerns about the behaviour of those who deliver NDIS funded supports “no wrong door”, but we do not believe it is appropriate for it to investigate and sanction non-registered providers and their workers given there are multiple existing pathways for complaint resolution available in Australia. Complaints about non-registered service providers and their workers should therefore be referred to the same jurisdictional entities used by non-participants with similar complaints.

As noted above, PDA is concerned that the proposed additional investigation and sanction risks have the potential to impact on participants’ ability to use their NDIS support packages across the full range of mainstream service providers.

Finally, we note the Commission will be able to “trigger a re-assessment of a worker’s NDIS worker screening clearance...”, but the document does not provide any detail of what this entails. In other jurisdictions, challenges to screening clearances are made before tribunals to ensure that due process is followed and that natural justice is provided. PDA would like DSS to make similar assurances for NDIS worker permits and for these to be stated to in the finalised Code of Conduct document.

## **Part 2 – Detailed Explanations of Each Clause with Scenarios**

PDA encourages the provision of detailed explanations about the scope and implications of each clause with the NDIS Code of Conduct (once it has been finalised). Indeed these are a necessity in the context of a disability services market that is likely to grow significantly as the NDIS rolls out across the country. However, the scenarios provided in the *Discussion Paper* are alarmingly anachronistic in comparison to the rich, engaged and included lives participants will be able to enjoy in the post NDIS roll-out world.

Below are our thoughts about each clause’s wording, explanatory texts and accompanying scenarios.

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<sup>7</sup> Section 3 (1) (e) *National Disability Insurance Scheme Act 2013* (Cth)

<sup>8</sup> *ibid*, Section 4 (4)

<sup>9</sup> *Discussion Paper*, p. 12

Promote individual rights to freedom of expression, self-determination and decision-making

PDA does not approve of the proposed Code of Conduct's requirement for workers to be actively involved in 'promoting' rights. These people are employed to provide services to participants and this should be their primary focus. 'Promoting' involves actively persuading others to value something and while it is appropriate for providers to do this, it may not be appropriate worker behaviour in certain contexts.

We much prefer the wording of the *NDIS Quality and Safeguarding Framework's* suggested Code: "Respect the rights and dignity of all NDIS participants, including their right to choice and control and to take reasonable risks<sup>10</sup>" (emphasis added). 'Respecting' participants' rights acknowledges their pre-existence and this can be done passively by workers in the course of their employment.

PDA approves of the explanatory text accompanying clause 1 and notes it relates more to 'respecting' rights than to 'promoting' them.

Scenario 2.1.1<sup>11</sup> correctly depicts corporate behaviour that would be in breach of an appropriately worded clause 1 of the Code of Conduct and it illustrates a possible complaint resolution procedure for its participant, Al and his family to get the culturally sensitive support he is entitled to. However, this scenario (and many of those that follow in the *Discussion Paper*) places the narrative in a pre-NDIS context in which Al appears to be a captive consumer of his unnamed service provider.

In the pre-NDIS world (of block funding and limited choice and control), Al may well have felt obliged to receive support from female workers and not had the option to "purchase disability supports" from a more sensitive provider, but this is no longer the case...

To make matters worse, the Commission in this scenario (and again, in some of those that follow in the *Discussion Paper*) is also stuck in a pre-NDIS paradigm as it works to maintain the relationship between Al and his unresponsive provider. In addition to "facilitating a discussion between the service provider, Al and his family" PDA would like the Commission in this scenario to ensure Al and his family understand their rights (and prerogative) as consumers to exercise choice and control with regard to who they purchase disability supports from. We feel potential customer loss is a greater incentive for the provider to change its behaviour than the sanction suggested alone.

Scenario 2.1.2<sup>12</sup> is categorised with the 'Worker' label implying there are issues with the worker's behaviour. However, it is the provider who has fallen short by not assigning a suitable worker in the first place. If the worker, 'Susan' does not speak Auslan, she is clearly unable to assist the participant 'Juanita' prepare for university studies. Similarly, being only a "support worker", it is unreasonable for Susan to be in charge of developing a service plan as this is a specialist task that should be completed by a professional with detailed knowledge of the support deaf university students generally need.

As such it is unfair for the un-named manager to find Susan had not followed the provider's guidelines as she was set-up to fail. Furthermore, if the Code of Conduct contained a clause similar to clause 6 of the *NDIS Quality and Safeguarding*

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<sup>10</sup> p. 96

<sup>11</sup> *Discussion Paper*, p. 14

<sup>12</sup> *ibid*, p. 15

*Framework* suggested Code (Communicate in a form, language and manner that enables the participant to understand the information provided and make known their preferences), this scenario, and the grief it caused Juanita, may have been avoided entirely

*Actively prevent all forms of violence, exploitation, neglect and abuse*

Beyond the oblique reference to “serious incidents” in clause 11, PDA notes that there is no congruent clause to this in the *NDIS Quality and Safeguarding Framework* suggested Code, and we regard its inclusion in the proposed Code of Conduct to be appropriate provided it clearly defines “violence, exploitation, neglect and abuse” and that this doesn’t result in workers violating participants’ rights to choose their own domestic relationships and living arrangements.

We recommend the wording be changed to “Respond appropriately to instances of violence, exploitation, abuse and neglect”, and that appropriate definitions of these mistreatments be provided along with examples of appropriate responses.

PDA approves of most of the explanatory text accompanying clause 2. It correctly acknowledges that “institutional and residential settings” of the pre-NDIS world are a risk factor that exposes people with disability to greater levels of violence, exploitation, neglect and abuse than the general population. However, without clear definitions of what constitutes violence, exploitation, neglect and abuse, its explicit requirement that “providers and workers must report incidents of these behaviours to the Commission and/or any other authorities, including the police, as appropriate”<sup>13</sup> places the worker in the roll of surveillance officer. Moreover, it has the potential to deny participants agency in managing their own lives.

If a worker overhears a torrid argument between a participant and a member of his or her family, one that involves the use of (from the worker’s perspective) ‘abusive’ demeaning epithets... is it to be reported to the Commission?

We recommend that the finalised Code of Conduct make it clear that workers and providers must take into account the settings in which concerning behaviour occurs and participants’ capacity to deal with the matter themselves when deciding if a report to the Commission needs to be made.

Scenario 2.2.1<sup>14</sup> is a great illustration of the all-too-frequent consequences of providing disability supports in institutional settings. We argue that the Commission should deem all congregated group care facilities to unsuitable settings for providing supports to NDIS participants because *that* would be actively preventing violence, exploitation, neglect and abuse.

As with Scenario 2.1.1, PDA is disappointed that the *Discussion Paper* legitimates these archaic pre-NDIS models of disability support and tacitly endorses their continuation in direct contradiction to the “general principles guiding actions under [the NDIS] Act”<sup>15</sup>. We are also alarmed that in this scenario the Commission thinks it appropriate that the un-named inmates be lumbered with daily chores in the facility to which they are confined. In no way does this increase their “control over their everyday lives”. In this scenario PDA would prefer the Commission to assist the participants to find more appropriate providers than for it to assist ‘Disability Home

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<sup>13</sup> *Discussion Paper*, p. 16

<sup>14</sup> *ibid*, p. 17

<sup>15</sup> Section 4 *National Disability Insurance Scheme Act 2013* (Cth)

Care' (and the shared accommodation industry generally) in continuing their fundamentally unsound practises.

PDA's thoughts about Scenario 2.2.2<sup>16</sup> are detailed in our commentary about the lack of a complete draft Code of Conduct above.

*Act with integrity, honesty and transparency*

This clause is a positively worded variation of clauses 3, 7, 9 and parts of 11 of the *NDIS Quality and Safeguarding Framework* suggested Code, and as with similarly worded clauses, its lack of detail makes it hard to interpret let alone comply with. The needed detail was provided in the suggested Code and so PDA recommends you make reference to potential conflicts of interest in any clause seeking to entrench integrity, honesty and transparency in the finalised Code of Conduct.

The explanatory text of this clause does a good job on explaining what integrity, honesty and transparency looks like in the context of delivering NDIS funded supports to participants. However, we feel the example of financial exploitation given at the end of the text, and in Scenario 2.3.2<sup>17</sup> should be explicitly labelled "affinity fraud" and invoke a referral to police.

In Scenario 2.3.1, the Commission appears to have the power to order the fictional provider, 'OT Supports' to "stop publishing the brochures [promoting treatment of dubious value to children with cerebral palsy] and to discuss the risks and limitations on evidence for the therapy with their clients..." PDA does not believe this to be an appropriate course of action to follow from the events of the narrative given that print and digital commercial media is awash with promotions for un-evidenced 'therapies' that are purported to alleviate almost any malady. We would much rather see the Commission leave it at determining the therapy to be ineligible for NDIS funding and referring OT Supports to AHPRA and the ACCC.

Here, as in some of the other scenarios, we are perplexed by the Commission's concern with maintaining the relationship between provider and participant. As the NDIS is supposed to operate in a market PDA believes the Commissions conciliation conferences should limit themselves to helping parties to settle their accounts and consider their options moving forward.

Just as it is unreasonable to expect a mainstream consumer to continue a relationship with a business that misled them, it is similarly unreasonable to expect participants to persevere with misleading providers.

In Scenario 2.3.2<sup>18</sup>, the worker 'Mena' commits affinity fraud to secure gratuities from the participant 'Jenny'. PDA would like to see details about what the Commission's referral to the "relevant worker screening unit" entails included in the finalised Code of Conduct. We also wonder why this behaviour would not be referred to police.

*Provide supports in a safe and ethical manner with care and skill*

This clause is more or less identical to clause 2 in the *NDIS Quality and Safeguarding Framework* suggested Code and is a worthwhile inclusion although we believes it should be closer to the top of the list as relates to the core function of workers and the core business of providers under the NDIS.

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<sup>16</sup> *Discussion Paper*, p. 18

<sup>17</sup> *ibid*, pp. 19-22

<sup>18</sup> *ibid*, p. 21



For the most part, this clause's explanatory text is appropriate however the last paragraph relating to worker responsibilities in relation to prescription medication is not reasonable. PDA can think of few congruent workplace contexts in which employees "who are taking prescription drugs that may affect their ability to support participants are required to obtain advice from the prescribing practitioner or dispensing pharmacist and declare it to their employer or the participant if they are engaged directly by them."<sup>19</sup>. Requirements like these set participants from other citizens and serve as a disincentive for the recruitment of workers.

Scenario 2.4.1<sup>20</sup> is another illustration of how the authors of the *Discussion Paper* (and presumably the senior officials overseeing the development of the Code of Conduct) fail to embrace the NDIS' potential to fundamentally change the ways in which participants receive their disability supports and instead place their narrative squarely in the institutionally mediated pre-NDIS world.

In the scenario, the participant 'Sabrina' continues to be a captive consumer of her provider 'Informed (sic) Disability Care' who appear to have assumed an exclusive mediating role between Sabrina and the community in which she lives. This is no doubt a very lucrative arrangement for the provider...

Because a decision has been made not to use mainstream services (such as wheelchair accessible taxis or public transport), Sabrina is exposed to the risks of using her provider's unsuitable vehicles and untrained workers and is adversely affected when a mechanical failure occurs. Insult is then added to injury (with the apparent approval of the authors) when instead of assisting Sabrina to explore alternate transport options that will enable her to more fully participate in the life of her community, her Local Area Coordinator "encourages Sabrina to make a formal complaint to the Commission about the incident." While it might be an appropriate means to instigate an investigation into a clearly negligent provider, this course of action does not assist Sabrina in any way.

This breach of the Code of Conduct, the distress it has caused Sabrina, the worker 'Uta', and the work it has created for staff at the provider and the Commission all flow from the decision not to use mainstream services. Informed Disability Care, and their ilk, are anathema to the ways in which supports should be provided through the NDIS. Regrettably, the Commission in this scenario takes no role in assisting the disability sector to properly meet the needs of participants.

In Scenario 2.4.2<sup>21</sup> where the worker 'David' is charged with drink driving offences, as mentioned above, PDA would like to see the details of what the Commission's referral of "the matter to the state worker screening unit" entails included in the finalised Code of Conduct.

*Raise and act on concerns about matters that may impact on the quality and safety of supports provided to people with disability*

This clause has no corollary in the *NDIS Quality and Safeguarding Framework* suggested Code and we are concerned that, in a similar way to clause 2, it places an obligations on workers to exercise their subjective judgement about what is 'concerning' and then to 'act' unilaterally to fix it. We do not believe it should not be included in the Code of Conduct.

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<sup>19</sup> *Discussion Paper*, p. 22

<sup>20</sup> *ibid*, p. 23

<sup>21</sup> *ibid*, p. 24

PDA acknowledges it is important for NDIS funded supports to be safe and of high quality, but we do not believe that the mechanism for ensuring it is a clause in the Code of Conduct. Rather quality assurance should be integrated in the processes by which providers obtain and maintain their registration through regular audits and the mandating of continuous improvement processes.

Much of the explanatory text for this clause relates to continuous improvement mechanisms that are sound. However, we feel (as stated above) that this is beyond the purview of a reasonable Code of Conduct unless it relates to specifically to the behaviours referenced in clause 2 (of violence, exploitation, neglect and abuse) in which case, the additional clause is unnecessary.

Scenario 2.5.1<sup>22</sup> suggests that children with disabilities as a rule should “never be left unattended”. For the reasons outlined in our criticism of Part 1 of the Discussion Paper above, PDA does not believe it appropriate for practice rules not to take into account the context in which NDIS funded supports are provided nor the attributes of the participants involved. The injury that the participant ‘Ezra’ receives is no similar to those that occur in homes, playgrounds, kindergartens and schools every day.

This is not to say that the provider’s (‘Oliver Twist’s’) policies are unreasonable nor that its responses to the incident were inappropriate. Rather, we are concerned that the inclusion of scenarios like this in documents such as the finalised Code of Conduct depict NDIS participants as harbingers of additional regulatory oversight and potentially not worth mainstream providers’ while.

In many ways, Scenario 2.5.2<sup>23</sup> is a duplicate of Scenario 2.3.1 (discussed above) in which a provider is delivering supports that do not conform with evidence-based best practice. However, rather than making this finding, it instead determines that the real misconduct is that the participant Salim’s human rights are not being respected. This should not be the issue in a scenario that is purportedly related to the need for safe and high quality in NDIS funded supports.

The scenario also suggests that the worker, Lachlan, can rest easy knowing the provider does not officially know who made the complaint despite the fact that he raised this specific issue with his employer (the provider) before contacting the Commission. No reasonable reader of this scenario would believe the provider could not make a very good guess as to who the whistle-blower was...

#### *Respect the privacy of people with disability*

PDA approves of this clause being included in the Code of Conduct. We also regard the explanatory text to be suitable.

Scenario 2.6.1<sup>24</sup> depicts a useful example of how participants’ privacy can be inadvertently breached through sloppy administrative processes. In this case, the divulgence of participants’ email addresses is investigated by both the Privacy Commission and the NDIS Quality and Safeguards Commission who both issue sanctions against the provider. Apart from the lack of detail as to what a “breach of the Code of Conduct” looks like (is it a fine, something to be added to the next audit, prosecution before a court...?) this scenario tells would-be providers they are at risk of being investigated by multiple statutory bodies if they start operating in the NDIS

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<sup>22</sup> *Discussion Paper*, p. 26

<sup>23</sup> *ibid*, p. 27

<sup>24</sup> *ibid*, p. 28

funded disability support marketplace and potentially warns them off offering their services to participants.

Scenario 2.6.2<sup>25</sup> posits similar consequences and potential outcomes for a worker who inadvertently breaches a participant's privacy. Given that the worker, Martina, is not a registered provider and works principally in the mainstream economy, PDA does not think it appropriate for her to be investigated and possibly sanctioned by multiple statutory bodies just because some of her fees are paid by the NDIS.

*Not engage in sexual misconduct*

PDA approves of this clause being included in the Code of Conduct. We also regard it to be superior to clause 10 of the *NDIS Quality and Safeguarding Framework* suggested Code because it acknowledges participants' agency over their sexuality. The explanatory text is also appropriate, although we feel it should also reference sexual harassment legislation and the human rights commissions that already exist in all state, territorial and federal jurisdictions. This would explicitly inform participants about the alternate forums for resolving these issues.

At the risk of belabouring the point, Scenario 2.7.1<sup>26</sup> again illustrates the pitfalls of providing disability supports in an institutional setting. Refreshingly, the Commission in this narrative responds appropriately to the complaints made by a participant's sister by referring the matter to the police and de-registering the provider once it has ascertained that sexual assault is occurring. However, these actions will do nothing to prevent similar events from occurring in other "specialist disability accommodation" institutions. PDA believes that in this scenario (as in others) the Commission should assist the participant and his family to investigate non-congregated accommodation and support arrangements.

*Keep appropriate records*

Given the need for both NDIS funds to be properly accounted for and for the health of participants to be properly maintained, PDA understands the need for a clause like this to be included in the Code of Conduct. However, this clause, like some of those preceding clauses, its wording is too nebulous. We would prefer it to read "*Maintain appropriate records to ensure probity and participant health*" or words to that effect.

The explanatory text to this clause provides good explanations for why record keeping is necessary. However, it neglects to state that the quantity and detail of records needs to align with individual participant's circumstances. For example, detailed medication records may need to be kept for some participants (who cannot oversee and direct workers themselves), but they may constitute an invasion of privacy for others (as they would be for non-participants without disability).

Scenario 2.8.1<sup>27</sup> details yet another example of how over-supplied institutionalised supports create problems and work that might not have otherwise arisen. If the provider did not involve itself so deeply in the participant Nathan's life, they would have easily avoided the risks associated with having a support worker personally drive him to his appointments. We suggest that Nathan should have been supported to use public transport in which case he could be directed towards being able to independently use mainstream services that do not pass the war memorial and expose him to psychological harm. PDA believes this is the kind of support the Commission needs to provide in scenarios like this. Finding that the provider

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<sup>25</sup> *Discussion Paper*, p. 29

<sup>26</sup> *ibid*, p. 31

<sup>27</sup> *ibid*, p. 33

“breached the Code of Conduct” and directing it to apologise to participants in no way rectifies the problems that spontaneously arise from archaic disability support provision paradigms.

The consequences for the negligent worker in Scenario 2.8.2<sup>28</sup> are appropriate for the narrative provided. However, as in earlier scenarios, PDA does not believe it is appropriate for the Commission to be involved in investigating and sanctioning employees of non-registered providers.

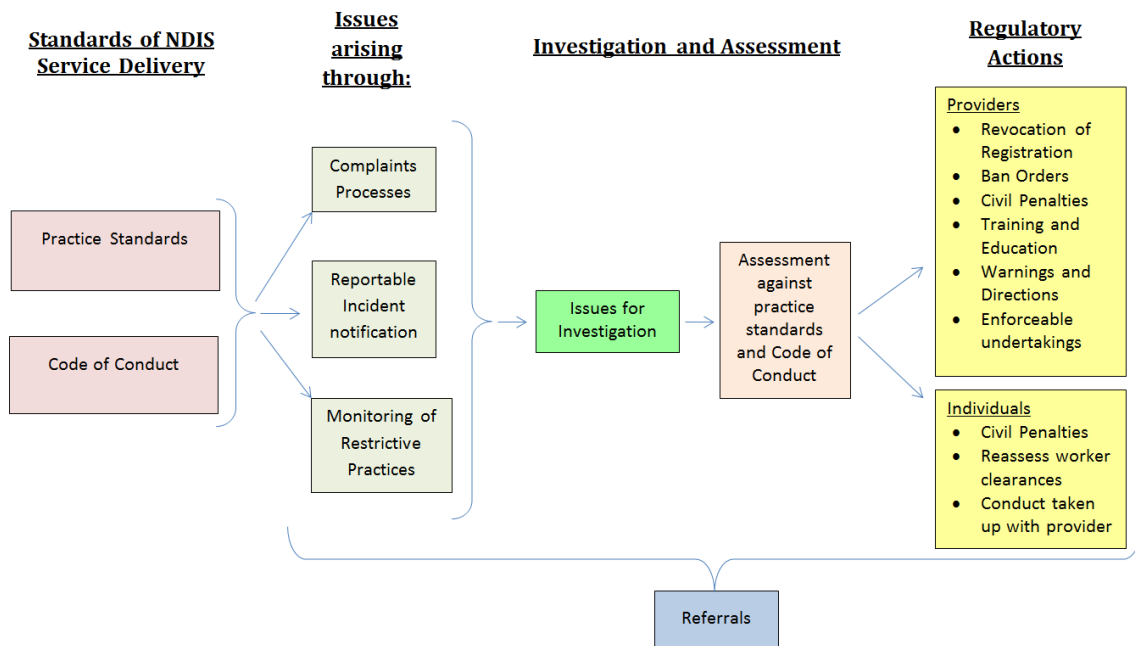
Maintain adequate personal and professional liability insurance appropriate to the risks associated with the supports provided

PDA approves of this clause being included in the Code of Conduct. We note its wording leave providers in no doubt about what this obligation entails.

The explanatory text also provides appropriate detail about the importance of maintaining adequate insurances although we feel the caveat “it is not appropriate for the Code to specify the level of insurance cover that would be required”<sup>29</sup> should be replaced with advice that the insurance needs to be able to cover all cost associated with possible injuries to participants and the injuries’ consequences.

**Appendix A – Process of Code of Conduct Investigation and Enforcement**

The *Discussion Paper* provides the following diagram<sup>30</sup> to inform readers of how issues are processed by the Commission:



PDA supports the inclusion of diagrams such as these in the finalised Code of Conduct document. However, the above chart lacks important detail. Are the ‘Practice Standards’ the same as the *National Standards for Disability Services*<sup>31</sup>? If so, this should be explicit. Similarly the ‘Referrals’ element should provide a list

<sup>28</sup> *Discussion Paper*, p. 34

<sup>29</sup> *ibid*, p. 35

<sup>30</sup> *ibid*, p. 36

<sup>31</sup> <https://www.dss.gov.au/our-responsibilities/disability-and-carers/standards-and-quality-assurance/national-standards-for-disability-services>

possible referees such as police, ACCC, AHPRA, etc. PDA would also like the element labelled 'Monitoring of Restrictive Practices' renamed in such a way as to include sources such as media reports of malpractice and anonymous tips.


## **In Conclusion**

We hope this detailed submission helps the authors of the forthcoming Code of Conduct to develop a document that fosters a responsible and responsive workplace culture in the disability support industry. If you would like to discuss any aspects of this submission further, please do not hesitate to contact us.

Yours Sincerely,



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