

# National Disability Insurance Scheme - Code of Conduct

Submission by Legal Aid Queensland



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## Introduction

Legal Aid Queensland (LAQ) welcomes the opportunity to make a submission on the National Disability Insurance Scheme - Code of Conduct Discussion paper.

LAQ provides input into State and Commonwealth policy development and law reform processes to advance its organisational objectives. Under the Legal Aid Queensland Act 1997, LAQ is established for the purpose of “giving legal assistance to financially disadvantaged persons in the most effective, efficient and economical way” and is required to give this “legal assistance at a reasonable cost to the community and on an equitable basis throughout the State”. Consistent with these statutory objects, LAQ contributes to government policy processes about proposals that will impact on the cost-effectiveness of LAQ’s services, either directly or consequentially through impacts on the efficient functioning of the justice system.

LAQ seeks to offer policy input that is constructive and based on the extensive experience of LAQ’s lawyers in the day to day application of the law in State and Commonwealth courts and tribunals. LAQ considers that this experience provides LAQ with valuable knowledge and insights into the operation of the justice system that can contribute to government policy development. LAQ also endeavours to offer policy options that may enable government to pursue policy objectives in the most effective and efficient way.

LAQ’s civil justice lawyers have extensive experience providing specialist advice and representation in civil matters including the development of codes to regulate industry behaviour. LAQ lawyers within the civil justice team were involved in the working groups that developed the Mobile Premium Service Code and reviewed Telecommunications Consumer Protections Code. They have also made submissions to the reviews of a number of financial services codes, such as the Banking Code of Practice and the Insurance Code of Practice.

Since the rollout of the National Disability Insurance Scheme (NDIS) in Queensland LAQ lawyers in the Civil Justice Team have provided representation to participants appealing decisions of the National Disability Insurance Agency (NDIA) to the Administrative Appeals Tribunal.

The National Disability Insurance Scheme Amendment (Quality and Safeguards Commission and Other measures) Bill 2017 proposes the establishment of the NDIS Quality and Safeguards Commission (the Commission). The functions of the Commission will include the registration and regulation of NDIS providers and the development of Practice Standards and a Code of Conduct<sup>1</sup>.

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<sup>1</sup> National disability Insurance Scheme Amendment (Quality Safeguards Commission and Other Measures) Bill 2017 – Explanatory Memorandum at page iv

The development of the NDIS Code of Conduct (NDIS Code) supports the Commission's functions relating to "the quality and safety of NDIS services and supports provided to people with a disability" and "managing and resolving complaints about NDIS providers".<sup>2</sup>

LAQ does not propose to comment on the substantive requirements contained in the NDIS Code and will limit comments to:

- issues relating to the complaint options for participants alleging breaches of the NDIS Code and how the NDIS Code provisions can be enforced by participants and their families;
- promotion of awareness of the NDIS Code; and
- monitoring provider compliance with the NDIS Code.

LAQ's comments relate primarily to unregistered providers though they may also apply to registered providers and other providers as defined in clauses 1.3.3 and 1.3.4 of the NDIS Code.

## 1. Complaint Avenues and Enforcement Options

Whilst acknowledging that stakeholders in the consultation phase of development of *the Quality and Safeguarding Framework* preferred the option that one agency would have the dual roles of regulation and complaint handling, it is the experience of LAQ that regulators undertaking both functions are often ill-equipped to deal with the resolution of individual complaints, particularly in relation to providing binding determinations in a timely manner. This can be the result of a lack of general resources for the agency involved, but it can also be impacted by the strategic focus of the agency.

LAQ understands that as part of its regulatory role, the Commission will have the following functions:

- monitoring;
- compliance; and
- complaints handling.

In relation to monitoring and compliance, the Commission will have the Commonwealth's standard suite of monitoring and investigative functions as well as enforcement functions, including powers to impose civil penalties, infringement notices, enforceable undertakings and injunctions.

The National Disability Insurance Scheme Amendment (Quality Safeguards Commission and Other Measures) Bill 2017 also provides that requirements under the NDIS Code are enforceable and civil penalties can be imposed for contraventions of the NDIS Code – section 73V.

In relation to the complaints handling function, it is unclear from the discussion paper:

- how the complaints handling will work;
- what mechanisms participants are to use, to enforce breaches of the NDIS Code; and

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<sup>2</sup> National Disability Insurance Scheme Amendment (Quality Safeguards Commission and Other Measures) Bill 2017 at page 3

- what powers the Commission will have to award compensation for breaches for financial and non-financial loss, particularly where:
  - the service provider is not registered, or
  - the breach is a one off rather than systemic issue, or
  - the damage suffered, from a legal perspective, is minor but the participant feels aggrieved by the breach.

This is best illustrated by an examination of one of the clauses in the NDIS Code. Clause 2.3 of the NDIS Code requires that persons and entities covered by the Code must act with integrity honesty and transparency.

Scenario 2.3.2 in the discussion paper describes a situation involving Jenny and Mena where Mena has accepted a monetary gift from Jenny. In that example, if Mena refuses to return the money to Jenny (assuming that Jenny wants the money returned) how does Jenny enforce her rights?

After the introduction of the *Quality and Safeguarding Framework*, Jenny ostensibly will have two enforcement options:

- firstly, right to lodge a complaint with the Commission for a breach of the NDIS Code, and
- secondly, rights under the general law for unconscionable conduct.

For many participants, enforcing rights under the general law will require court proceedings. Most participants will struggle to understand their rights and will lack the financial resources to pursue this option. Additionally, these claims are difficult to establish, may have limited prospects of success and leave the participant open to the risk of substantial legal costs. This makes a complaints handling process integral to the effectiveness and accessibility of the *Quality and Safeguarding Framework* and the NDIS Code.

Even if the Commission finds that Mena breached the NDIS Code, it is unclear if the Commission has power to order compensation both for financial and non-financial loss arising from the contravention of the NDIS Code.

LAQ submits that ideally the Commission should have the monitoring/compliance function and a separate agency should be established to handle complaints.

If it is determined that the Commission be responsible for monitoring compliance and complaint handling then legislation and Codes that support the *Quality and Safeguarding Framework* must clearly identify:

- the complaints process;
- the Commission's powers to award compensation for financial and non-financial loss; and
- the Commission's powers to enforce decisions made.

## 2. Awareness of the NDIS Code

Clause 1.3 of the NDIS Code of Conduct provides that the Code will apply to all providers and workers who are funded under the NDIS, regardless of whether they are registered, or whether they receive funding through individual plans or contracted services.

Under Clause 1.3.1 of the NDIS Code, providers registered under the NDIS will be obliged to comply with the Code of Conduct as part of the NDIS registration requirements. The discussion paper proposes that registered providers will be required as part of the registration process to undertake a compulsory orientation module which will include training in relation to their obligations under the NDIS Code. LAQ supports this proposal. LAQ also supports the incorporation of the NDIS Code into the service agreements with providers who have contractual relationships with the NDIA.<sup>3</sup>

Clause 1.3.2 of the NDIS Code provides that participants who self-manage their funding and registered plan managers are able to engage unregistered providers to deliver services. Unregistered providers will also be subject to the Code if they are receiving NDIS funding for their services.

LAQ considers that participants must be made aware of the provisions of the NDIS Code and how to notify and incorporate the NDIS Code into service arrangements with non-registered providers. Without knowledge and understanding of the NDIS Code, the need to notify providers of obligations under the Code and complaint rights, participants will be unlikely to identify breaches and make complaints regarding provider contraventions of the Code.

#### **Awareness – Non-registered providers**

LAQ understands that participants can choose to have their plans:

- managed by the NDIA;
- self-managed; or
- self-managed with plan management (that can include both a financial intermediary and/or support coordination).

If the plan is not managed by the NDIA, participants can engage non-registered providers.

The NDIS Code of Conduct suggests that self-managed participants will be “strongly encouraged to provide information about the Code of Conduct and its obligations to any unregistered providers they engage”<sup>4</sup>.

There does not appear to be any clear mechanism by which the Commission or providers or others subject to the NDIS Code promote awareness of the Code to participants nor how the NDIS Code will be incorporated into these service arrangements and agreements. It is also not clear how non-registered providers will become aware of their obligations under the NDIS Code.

LAQ is unsure as to how it is proposed that “workers” of registered and non-registered providers will be made aware of their obligations under the Code. At the very least institutions offering training in disability services should be required to include a module about obligations under the NDIS Code. However, we accept that not all workers will have certificate qualifications when working with participants.

LAQ submits that the *Quality and Safeguarding Framework* clearly provide the mechanism by which participants, providers and workers will be made aware of the NDIS Code.

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<sup>3</sup> National Disability Insurance Scheme- Code of Conduct- Discussion paper at page 11

<sup>4</sup> National Disability Insurance Scheme- Code of Conduct- Discussion paper at page 10

LAQ supports wide ranging promotion of the NDIS Code that includes techniques that are accessible to people with disabilities including graphic and/or visual content.

### 3. Monitoring of the NDIS Code

The establishment of an independent system of monitoring by the Commission of the *National Disability and Insurance Scheme Act 2013* (Cwth) and the NDIS Code will be critical to ensuring high quality and safe supports for people with disability.

There does not appear to be any general requirement for monitoring of persons and entities covered by the NDIS Code or reporting of any non-compliance or remedial action taken, beyond the keeping of appropriate records and the reporting by registered providers of reportable incidents<sup>5</sup>.

It is unclear how the Commission will monitor compliance with the NDIS Code in the absence of any requirement by registered and non-registered providers and other providers as defined in clauses 1.3.3 and 1.3.4 of the NDIS Code to provide information about their general compliance to the Commission.

In addition, it will difficult for the Commission to monitor compliance with the NDIS Code in relation to non-registered providers because there appears to be no obligation on the part of nonregistered providers to report even reportable incidents.

The monitoring proposed by the *Quality and Safeguarding Framework* appears to be heavily reliant on participants identifying breaches and making complaints and self-reporting by registered providers of reportable incidents. LAQ submits this is not realistic given the vulnerability of participants in the NDIS.

LAQ supports mandatory reporting of reportable incidents by registered providers but would also like to see that obligation extended to non-registered providers and other providers as defined in clauses 1.3.3 and 1.3.4 of the NDIS Code.

LAQ submits that in addition to keeping records that all providers be required to report:

- their own compliance with the NDIS Code (including any breaches identified, criteria used to assess reportable incident and what remedial action was taken to ensure future compliance);
- the number and nature of complaints made by participants; and
- how each complaint was resolved;

LAQ further supports the scaling of reporting obligations according to the size and risk associated with the provider.

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<sup>5</sup> National Disability Insurance Scheme- Code of Conduct- Discussion paper at page 25 and page 33