The operation of the NDIS Quality and Safeguards Commission

Submission to the Joint Standing Committee on the NDIS, July 2020

Introduction

This submission is made on behalf of *Purpose at Work*, a consultancy firm that guides social care organisations – both disability and aged care providers - towards purpose-driven work cultures. One area in which we work is quality and safeguarding, aiming to support providers to focus on what each client wants and needs, and to support frontline staff to do their job well and not be held back by inappropriately restrictive rules, policies and procedures. We have also developed a unique service for disability service providers, *Right on Board: Governing and Managing for Human Rights, Quality and Safeguarding*. We have considerable exposure to, and interest in, the work of the NDIS Quality and Safeguards Commission and to that of other regulators, both in Australia and abroad. *Purpose at Work* is passionate about improving the quality and safety of disability support services, and ensuring that the human rights of people with disability are promoted and observed.

The NDIS Commission's performance

As regulation expert Professor Malcom Sparrow (2000) observed twenty years ago – and remains true today:

> *Regulators, under unprecedented pressure, face a range of demands, often contradictory in nature: be less intrusive – but be more effective; be kinder and gentler – but don't let the bastards get away with anything; focus your efforts – but be consistent; process things quicker – and be more careful next time; deal with important issues – but do not stray outside your statutory authority; be more responsive to the regulated community – but do not get captured by industry.* (p 17).

The NDIS Commission is just two years old, and has not even operated that long in the majority of the States and Territories. The Department of Social Services and the Commission have established the entire regulatory system from scratch, including:

- staffing and resourcing
- the release of Rules, Practice Standards and Guidelines and a range of supporting materials[1] such as the Worker Orientation Module
- the operation of systems (including supporting technology) for registration, complaints, incident reporting and restrictive practices across relevant providers and participants, and
- arrangements for cooperating with regulatory bodies that exist in each State and Territory.

As in the case of the parable of the blindfolded person and the elephant, each person typically only senses part of the Commission and its work. The publicly available information

[1] To give an idea of the complexity of the regulatory arrangements, the author uses 2 x 8 cm thick binders to hold *some* of the documents about the QS&S.

about its operations is limited to its public presentations (which often repeat already available information without adding insight), its annual Corporate Plans, its Annual Reports, its policy statements, and media releases. While there has been a number of media reports that have been critical of the Commission's work, assessing the fairness of these criticisms requires detailed knowledge of the facts, and the facts are not always in the public domain. For example, the South Australian Government's Safeguarding Task Force interim report found that "The NDIS Quality and Safeguards Commission is unclear about the handling of reports of matters of concern" (p. 9). Perhaps the Task Force has access to information which is not in the public domain to support this claim; perhaps it does not. In contrast, the Commission states that it will accept complaints from anyone.

The Commission has considerable potential, in part because it has access to every registered provider – and many unregistered providers – and through the State/Territory worker check schemes, it will have the details of hundreds of thousands of workers. It will have the capacity for mass communication with frontline workers about quality and safeguarding issues, and sharing lessons about good practice.

Through its work on complaints, incidents and restrictive practices, it also has access to an enormous pool of data, providing a basis for analysis and to recommend improved practice. These data pools have previously only existed in some States, and past efforts at synthesising this information and identifying implications for practice were fragmented.

We also note that the Commission has a range of important projects in train, including in relation to the data it holds. These are not well communicated in its public presentations, or even its Corporate Plans or Annual Reports. Regrettably, the main way of finding out about these projects is through informal channels. **We recommend that the Commission communicate the range of work it is undertaking or planning, and the implications of that work.**

Design of the regulatory scheme

We note several problems with the design of the NDIS Quality and Safeguarding Scheme (Q&SS). In the main, these are issues that only the Parliament can resolve through amendment of the NDIS Act. Before going to those issues, we wish to put one matter on the record, namely the quality of consultation about the various elements of the Framework.

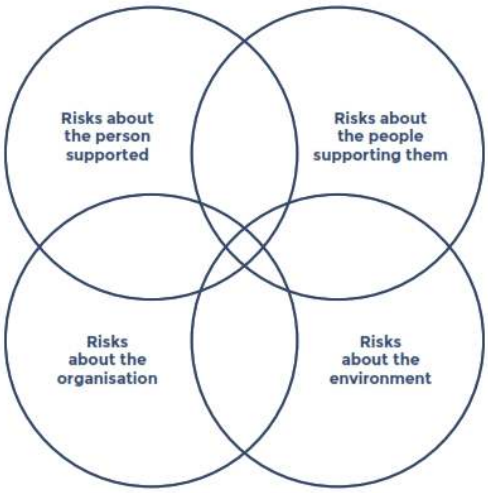
Inadequate consultation

In public presentations, the Department of Social Services and the Commission often talk about the extensive consultation that occurred in the development of the Q&SS. While it is true that there was extensive consultation about the Quality and Safeguarding Framework document, it is misleading to state that there was good consultation around elements such as the Practice Standards and Quality Indicators. Such consultation as occurred was through closed processes, sometimes was last minute, and participants were sworn to secrecy. Further, our understanding is the Department ignored advice about issues such as how to safeguard the health needs of people who lack the ability to attend to their needs and lack natural supports in their life.

Inadequate conceptualisation of risks to people with disability

The NDIS Q&SS only covers risks in relation to NDIS participants, and not in relation to all people with disability in all settings. Even within these confines, the Q&SS has limited reach in relation to unregistered providers.

The focus of the Q&SS is on risks about the person supported, the people (workers) supporting them, and on providers. As shown in the figure below, this completely ignores the other domain of risk, that is risks about the environment.



These can be risks in relation to the familial, physical, social and economic environments, but in this submission, we wish to highlight the risks posed to people with disability by the decisions and actions of the National Disability Insurance Agency. Whereas providers and workers are subject to the NDIS Practice Standards and Quality Indicators, there are no formal quality standards for the NDIA and its staff and agents. **We recommend that the NDIS Act be amended to give the Commission jurisdiction over the NDIA, and the Commission be required to publish Practice Standards and Quality Indicators for NDIA and its subcontractors. Further, the Commission should audit NDIA for compliance with those Standards.** What is good for the provider is good for the NDIA.

While individual disability support workers can be subject to penalties of up to $55,500 and providers of penalties of up to $277,500 for breaches of the NDIS Code of Conduct, there are no equivalent provisions in relation to NDIA staff and the NDIA. Yet the NDIA and its staff make critical decisions affecting the safety and quality of life of NDIS participants. This might be one reason why the NDIA and its staff have repeatedly made what could be characterised as ill-considered and dangerous decisions, as documented in the numerous reports of this Standing Committee and in the decision of the Administrative Appeals Tribunal. **We recommend that the NDIA Act be amended to extend the Act's compliance regime to the NDIA and NDIA staff and agents.**

To give an example of a critical decision made by the NDIA, in the recent decisions about its pricing model for disability support workers, the NDIA increased the assumption about the ratio of supervision from 1:11 to 1:15 full time workers. These figures are misleading: the majority of workers in the sector are part-time, and hence ratios of supervision are likely to be much higher in practice. Yet the Quality Indicators under the NDIS Practice Standards require that:

> *Timely supervision, support and resources are available to workers relevant to the scope and complexity of supports delivered.*
>
> *The performance of workers is managed, developed and documented, including through providing feedback and development opportunities.*

We recently lodged an FOI application for:

> *"1. all information about the assessment of the implications of the proposed change in the ratio of supervision in the Disability Support Worker Cost Model for quality and safeguarding; and*
>
> *2. all documentation regarding communication between the NDIA and NDIS Commission regarding changes in the NDIA'S 2020-21 Price Review, including the change in the ratio of supervision in the Disability Support Worker Cost Model."*

The NDIA advised there was no such documentation. This suggests that the NDIA did not properly consider the implications for quality and safeguarding of its pricing changes; nor did it communicate with the Commission about the implications of its proposed decision. While the price-quality nexus in not absolute, it is extraordinary that there was no documentation about the implications of the proposed change for quality and safeguarding. We suspect that this is true for any price changes. **We recommend that the NDIS Act be amended:**

- **to mandate communication and liaison between the NDIA and the Commission when the NDIA is making policy and pricing decisions that may have significant impacts on the ability of providers and workers to observe the requirements of the Q&SS, and**
- **to require transparency about such communication and liaison, such as disclosure of this in the Commission's Annual Report.**

The need for research

Our last general comment is on the need for research on the effectiveness of regulation. There is very limited research on disability service regulation in Australia, and only some about such regulation overseas. Parliaments and regulators often react to the latest scandal by ever increasing amounts of regulation (and we acknowledge our submission recommends more regulation). However, there is limited research on the impact of regulation, on the most effective types of regulation, on quality auditing and 'audit quality', the unintended consequences of regulation, and whether there are more effective alternatives.

To give an example of where research is needed, we are interested in whether the achievements of the Dutch social care organisation Buurtzorg can be replicated by other providers. Although Buurtzorg operates on the principles of high trust in staff, keeping things simple and resisting external regulation, it has achieved superior results in quality and safeguarding and is regarded as an exemplar by the Dutch government. This prompted Dutch regulators to open discussions with Buurtzorg on how the regulatory framework and compliance auditing could stimulate more providers to work the way they do.

To give another example, the English Care Quality Commission is encouraging action research in its 'Regulatory Sandbox' program about community care at home.

The theoretical case for more emphasis on purpose and less on systems approaches to quality and safeguarding is argued by Dutch though leader Wouter Hart in his *Lost in Control: Refocus on Purpose* and by Professor Sidney Dekker of Griffith University in his book *Just Culture: Restoring Trust and Accountability in Your Organization.*

Having made these general comments, we now address the term of reference in turn.

The monitoring, investigation and enforcement powers available to the Commission, and how those powers are exercised in practice, and

The effectiveness of the Commission in responding to concerns, complaints and reportable incidents – including allegations of abuse and neglect of NDIS participants

We have combined our comments about these two terms of reference.

In relation to compliance powers, we note that those available under the NDIS Act are stronger than those under the aged care and child care legislation. Although there may be opportunities to strengthen these 'around the edges', the compliance regime is strong and it is consistent with the recommendations of regulatory scholars.

We note the recent criticism of the Commission by members of its investigative staff in its SA Office, as highlighted by Ms Rebekha Sharkie MP. There is insufficient information available on the public record for us to comment on the appropriateness of this criticism. In relation to the criticism that the Commission did not initially elect to investigate a claim of rape, we note that:

- allegations of criminal conduct should continue to be investigated by Police, given the superior resources, abilities and powers of Police services; the Commission's policy should be – and presumably is – one of 'Police first' for any allegation of criminal conduct, and
- investigations by the Commission should supplement Police investigations, e.g., where the evidence will not meet the criminal standard of proof but is likely to meet the civil standard, or where an instance of criminal behaviour raises broader concerns about a provider's quality and safeguarding.

Further, we observe that given the Commission's limited resources and given that one aim of any regulatory system is to foster organisational learning within providers, it makes good sense to require providers to undertake at least some investigations (noting that there are safeguards built into the system in relation to internal investigations).[2]

[2] There are four safeguards.

- The Practice Standards and Quality Indicators require the provider to involve the NDIS participant and any other person with disability in the resolution of the complaint or incident. We understand this to be a unique feature, to the best of our knowledge not present in any other consumer complaint system in Australia.
- The Commission still has the power to commission its own investigation or to require the provider to fund an independent investigation.
- Providers' practices in relation to complaints and incidents are subject to independent audit.
- The NDIS Rules in relation to complaint handling and incidents require providers to review the effectiveness of their practices, and these requirements are subject to audit.

Of course, we acknowledge that the mere presence of these safeguards does not ensure that safeguarding is achieved in practice.

As stated, there is insufficient information on the public record to allow us to comment on whether the criticisms are appropriate and we look forward to the Select Committee's consideration of these issues.

The adequacy and effectiveness of the NDIS Code of Conduct and the NDIS Practice Standards

The NDIS Code of Conduct

The Code of Conduct is broad and general, and thus powerful.

However, the Parliament limited the application of the Code to "NDIS providers" and "persons employed or otherwise engaged by NDIS providers". Legal advice is that this drafting prevents the application of the code – and of the associated compliance provisions – to members of providers' Board of Directors as they are not "employed or otherwise engaged". We are reluctant to recommend that volunteer directors of not-for-profit providers be subject to yet more regulation and compliance provisions, and we acknowledge that there may be unintended consequences of extending regulation by making people reluctant to serve on boards of directors. Nonetheless, it does seem an oversight in the drafting of the legislation not to make directors subject to the Code. **We recommend that the NDIS Act be amended to extend the Code of Conduct to members of the Board of Directors of providers**.

The NDIS Practice Standards

We have previously recommended that the Commission should have jurisdiction to develop Practice Standards and Quality Indicators for the NDIA.

The existing Practice Standards and Quality Indicators give insufficient attention to the health needs of people with disability who do not have the ability to attend to their own health care or do not have natural supporters to do that for them. Our understanding is that when the Practice Standards and Quality Indicators were being drafted, this issue was drawn to the attention of the Department and the Department ignored that feedback. Here we are *not* talking about 'Module 1: High Intensity Daily Personal Activities' but the issue of basic health care planning and provision. This issue is relevant to the care of Ann Marie Smith.

We also wish to raise three points of detail. First, one of the Quality Indicators is that "Access to supports required by the participant will not be withdrawn or denied solely on the basis of a dignity of risk choice that has been made by the participant". While we support the principle of dignity of risk, it is hard to understand what was in the mind of the public servant who drafted this requirement as it ignores the provider's legal duty of care and the associated legal liability. The Indicator cuts across every conceivable notion of risk management and risk allocation. **If the Commonwealth is serious about this provision, the Commonwealth should indemnify providers for legal liability arising when implementing participant's choices against the provider's advice.** Of course, the Commonwealth will do not accept that legal liability: why should providers be expected to do so?

Second, the status of the Quality Indicators should be clarified. While oral comments are often made by Commission staff that it is the Standards that are important and the Quality Indicators are merely indicators, the Commission's *NDIS (Approved Quality Auditors Scheme) Guidelines 2018* state that both "the outcomes **and indicators** are met" [emphasis added] for a provider to be found compliant. If indeed achieving the Quality Indicators is

mandatory, this would make the Practice Standards too prescriptive, potentially hindering innovation. **We recommend that the Auditor Guidelines be amended to specify that the audit judgement is against the Standards/Outcomes.**

Third, the Audit Guidelines state that for a provider to be found compliant there is "negligible risk". This is an *absurd* proposition in relation to people with complex needs, either complex medical needs or complex behavioural needs. Even work health and safety legislation does not require negligible risk; instead, it adopts the ALARP standard, namely that the risk be 'as low as reasonably practicable'. **We recommend that the Quality Auditor Guidelines be amended to adopt the language of WHS legislation, namely that the risks be 'as low as reasonably practicable'.**

The adequacy and effectiveness of provider registration and worker screening arrangements, including the level of transparency and public access to information regarding the decisions and actions taken by the Commission

We note the dilemma that confronts the Commission about publicly announcing its actions in cases of serious abuse and neglect. The public will not see every action that a regulator takes or is contemplating taking, or that the regulator might be gathering the necessary evidence in order to take action. If there are contemporaneous criminal investigations, the public is unlikely to appreciate that the Commission can prejudice criminal investigations and proceedings. However, if the Commission does not appear publicly to be using its powers to the fullest extent, it will be inappropriately accused – as some have done already - of being a toothless tiger.

The effectiveness of communication and engagement between the Commission and state and territory authorities

We have no comments to offer in relation to this term of reference.

The human and financial resources available to the Commission, and whether these resources are adequate for the Commission to properly execute its functions

We cannot comment on this term of reference, other than to note that resourcing issues apply to both the Commission and to providers. The NDIA through its pricing regime requires that providers operate efficiently.

Management of the transition period, including impacts on other Commonwealth and State-based oversight, safeguarding, and community engagement programs

We have no comments to offer in relation to this term of reference.

Any related matters

We made general comments at the beginning of this submission.

We note that when the NDIS Act was introduced, the Regulation Impact Statement said the regulatory scheme would be cost neutral to providers as a group, largely because of the cost savings of having a uniform national system of regulation for those providers which operate

in two or more jurisdictions. This conclusion was based on the findings of a commissioned impact analysis assessment. Even at that time, most providers were projecting significant increases in their costs as a result of the new regulatory system. Any purported offsetting savings for providers operating in Victoria have disappeared as there is no longer a uniform national system of regulation following the introduction of the *Disability Service Safeguards Act 2018 (Vic*), and its regulation of registered and unregistered disability workers and their employers.

Alan Hough
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