



Australian Government
Department of Social Services

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Senate Community Affairs Legislation Committee
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Dear Ms Kohen

**SUBMISSION TO THE SENATE COMMUNITY AFFAIRS LEGISLATION COMMITTEE
INQUIRY INTO THE NATIONAL DISABILITY INSURANCE SCHEME AMENDMENT
(IMPROVING SUPPORTS FOR AT RISK PARTICIPANTS) BILL 2021**

Thank you for the opportunity to make a submission to the Community Affairs Legislation Committee about the National Disability Insurance Scheme Amendment (Improving Supports for At Risk Participants) Bill 2021 (the Bill), referred for inquiry on 17 June 2021.

The Department welcomes the opportunity to provide additional information to support the Committee's deliberations.

Overview of the Bill

The *National Disability Insurance Scheme Act 2013* (the NDIS Act) provides the foundation for the quality and safeguards arrangements for the NDIS. This Bill amends various provisions in the NDIS Act to improve the support and protections provided to NDIS participants particularly those who may be at risk of harm.

These amendments provide legislative support to respond to recommendations 1, 5, 6, 7, 8 and 9 of the *Independent Review of the adequacy of the regulation of the supports and services provided to Ms AnnMarie Smith, an NDIS Participant, who died on 6 April 2020* conducted by the Hon. Alan Robertson SC (the Robertson Review). The amendments also clarify the NDIS Quality and Safeguards Commissioner's (the Commissioner) powers to support the effective operations of the NDIS Quality and Safeguards Commission (the Commission) based on early implementation experience.

Response to the Robertson Review

The Robertson Review was commissioned by the Commissioner following the death of NDIS participant Ann-Marie Smith in tragic circumstances. The Robertson Review examined the quality and safeguards mechanisms relevant to Ms Smith's case, the response by the NDIS Commission in carrying out its functions and any changes to the processes, systems and legislation to improve quality and safeguarding protections for at risk NDIS participants. Overall, Mr Robertson found the NDIS Commission acted appropriately and there were no failings on the part of the Commission in the discharge of its responsibilities. Ten recommendations were made for improving quality and safeguards into the future. These recommendations included operational and process improvements, legislative changes and complex policy considerations. A list of the Robertson Review recommendations can be found at **(Appendix 1)** to this submission.

The NDIS Commission has already implemented operational measures to address the concerns that underlie recommendations 2 and 3 of the Robertson Review.

In late 2020, the Commissioner imposed a new registration condition on providers of personal support to participants. The condition precludes the providers allowing personal support to be provided by a sole worker to a participant who lives alone without first assessing relevant risks for the participant and entering or making reasonable steps to enter into a service agreement with the participant that takes into account those risks. The agreement or proposed agreement must include arrangements for monitoring the quality of the supports provided by that worker, as well as the participant's satisfaction with them. The agreement must also specify how the provider will communicate face-to-face with the participant in their home on a regular basis as far as this is practicable. A breach of this condition can form the basis for compliance and enforcement action by the Commissioner. The Commissioner has implemented a compliance strategy to investigate and respond to provider compliance with this registration condition.

The new registration condition was imposed while the Commissioner undertook a consultation process with people with disability, peak disability organisations, NDIS providers and provider representative bodies about proposed amendments to the *National Disability Insurance Scheme (Provider Registration and Practice Standards) Rules 2018* to address recommendation 2 of the Robertson review about sole carers. The consultation has recently concluded and the NDIS Commissioner is intending to amend the Rules to address the issues arising from personal care and sole carers in a broader safeguarding context that would apply to all registered providers regardless of the types of support being delivered. The NDIS Commission will begin consultation on the Rules amendment as required under the NDIS Act in July 2021. The interim condition will remain in place while work is undertaken to progress the amendment.

The NDIS Commission has also developed a draft NDIS Commission site visit policy which is undergoing consultation with the States and Territories before finalisation. The policy aims to guide the future practice of NDIS Commission staff in taking every opportunity to directly engage with NDIS participants, their families and carers, and providers in the place where supports are delivered or, for participants, a place of their choosing. The site visit policy also aims to develop the understanding of NDIS Commission staff of the importance of these visits in safeguarding people with disability and build awareness across all operational teams of the issues impacting NDIS participants in the communities in which they live.

Recommendation 10, has also been addressed through legislation passed in November 2020 to strengthen banning orders.

Further legislative changes made through the Bill address a number of other recommendations including facilitating better exchange of information between the National Disability Insurance Agency (the Agency) and the Commission (Recommendations 1, 5, 7, 9), the disclosure of information to relevant state and territory bodies (Recommendation 8) and clarification around the scope of reportable incidents (Recommendation 6).

The Bill makes the following changes:

Information sharing

- ensuring the Commission and the Agency have authority to release protected information to one another, for the purposes of carrying out the legislated functions of both agencies under the NDIS Act
- removing qualifiers like ‘serious’ or ‘necessary’ to ensure that any past, current or future threat to life, health or safety is a sufficient ground for the recording, use or disclosure of protected Commission information or protected Agency information
- clarifying provisions for disclosing information to ensure:
 - the NDIS Commission can disclose that it does not hold information about a person without being subject to information disclosure provisions which would delay this disclosure
 - protected information about a person remains protected even if the person is deceased
 - information recorded on the NDIS Provider Register that has been published is not considered protected information as it has already been made public and accessible to support participant decision making around providers
 - the NDIS Commission is able to disclose information to state and territory worker screening units or other state or territory bodies for the purposes of worker screening laws and transitional checks
 - the NDIS Commission is able to disclose information to prescribed bodies for prescribed purposes under the NDIS rules
 - the NDIS Commission can publish and maintain information on the NDIS Provider Register about historical compliance and enforcement action to support participant decision making around providers.

Reportable incidents

- strengthening the reportable incidents function of the NDIS Commission by allowing NDIS rules to prescribe other circumstances in which reportable incidents have occurred or may have occurred which must be notified to the NDIS Commission.

These are important amendments to improve the protection of NDIS participants in line with the Robertson Review recommendations. It is recognised, however, that further work needs to be undertaken to address other aspects of the recommendations and to strengthen supports for participants at risk of harm. In December 2020, Commonwealth and State and Territory Disability Ministers agreed to initiate work to strengthen supports for people with disability at risk of harm across service systems including the health, education, justice, child protection and the NDIS and to look at cross-system supports and co-ordination. Other policy recommendations made in the Robertson Review including the responsibility for participants’ safety and wellbeing (Recommendation 3) and outreach models for the NDIS participants including a community visitor scheme (Recommendation 4) will be considered in the context of this work and as a part of the NDIS Quality and Safeguarding Framework Review due to commence towards the end of 2021.

Response to Operational Experience

The NDIS Commission commenced operating in 2018 with all states and territories transitioned to the NDIS Commission's jurisdiction from 1 December 2020. The national regulatory functions established in legislation were not previously performed by the Commonwealth. While the national approach is a significant improvement over the previous disparate and inconsistent state/territory-based quality and safeguards arrangements, further legislative changes have been identified which will improve operational arrangements.

To this end, the Bill includes amendments to clarify the Commissioner's powers to support the effective operations of the NDIS Commission based on the early implementation experience of the NDIS Commission.

The Bill makes the following changes:

Commissioner's powers

- empowering the Commissioner to place conditions on the approval of approved quality auditors and making explicit the Commissioner's power to revoke or vary the approval of approved quality auditors
- enabling the review of decisions made to refuse, attach a condition to, or vary or revoke an approval of a quality auditor
- clarifying the Commissioner has the power to obtain information from other persons which is relevant to the Commissioner's functions and to compliance with the NDIS Act, specifically: requiring the provision of information or documentation about the conduct of a provider, worker or member of key personnel, including past conduct or about a person or provider who was previously subject to a banning order
- empowering the Commissioner to make rules about assessment of a person's suitability for the purposes of making banning order decisions, aligning with existing provisions in relation to assessment of suitability for provider registration
- clarifying the Commissioner can ban someone who is or was one of the key personnel of a NDIS provider because the Commissioner considers they are not suitable to delivery NDIS services and supports or for other reasons.

Compliance and enforcement

- clarifying the application of compliance notices, banning orders and revocation of provider registration, including:
 - enabling the review of decisions made to vary or revoke a compliance notice
 - banning orders can have conditions attached
 - if the Commissioner intends to revoke a provider's registration, a specified period can be specified within which the provider is able to make submissions before a decision is made about revocation.

Provider Registration

- clarifying the application of registration provisions to:
 - enable an applicant to withdraw their application for registration
 - a registered provider who has their registration revoked, that any renewal application by them in progress is deemed to be withdrawn

- clarifying provisions to refer to the registration of ‘persons’ rather than ‘NDIS providers’
- clarifying that the NDIS Practice Standards can deal with matters relating to the worker screening of key personnel of a NDIS provider (not only workers) and that the NDIS Code of Conduct does apply to such personnel.

Review of Reviewable Decisions

- clarifying that the Commissioner, the Chief Executive Officer of the Agency, or other decision maker, as applicable, have the power to personally conduct an internal review of a reviewable decision under the Act if they were not involved in making the decision.

These changes will immediately strengthen protections for NDIS participants at risk of harm and improve the operations of the NDIS Commission to support participants to live free from violence, abuse, neglect and exploitation.

In responding to the Robertson Review recommendations and learnings from the early implementation experience of the NDIS Commission, the Bill reflects the Australian Government’s commitment to ensure the NDIS quality and safeguards arrangements remain fit-for-purpose and that NDIS participants receive safe and quality NDIS supports and services. It is important the Bill is passed by parliament expeditiously to better protect NDIS participants.

Consultation on the Bill

In conducting his review, Mr Robertson invited submissions from the public and any interested persons. Submissions were received from individuals with disability, their family and carers and disability stakeholder groups and advocates. These recommendations were well received by the disability sector, there have been consistent calls to act on them as soon as possible. The Bill is principally based on responding to these recommendations.

The additional changes contained in the Bill are focused on clarifying the Commissioner’s powers and minor changes to improve the operation of the legislation based on the experience of the NDIS Commission. The overall regulatory impact of the Bill, including these changes, was assessed as minor. Given this, on balance, it was considered important to make positive changes to improve protections and supports for NDIS participants as soon as possible.

While some stakeholders have raised concerns that further consultation on the Bill, beyond the consultation on the Robertson Review, was not undertaken, very few specific issues around the provisions have been raised. To the extent that concerns have been raised, these concerns are addressed below.

General concerns and further information

On 17 June 2021, the Senate raised concerns with provisions within this Bill around privacy and retrospectivity of provisions and wanted further information on the impact of the changes of regulation of restrictive practices, the operation of banning orders and how decisions will be reviewed.

Privacy

One of the key considerations in drafting the Bill has been to ensure it is in accordance with the provisions of the Article 17 of the *International Covenant on Civil and Political Rights* (ICCPR)

and that any disclosure of information is proportionate to the outcome of protecting people with disability from harm.

In this context, all personal information held by the Agency or the NDIS Commission is protected information under the NDIS Act, and will be handled in accordance with the limitations placed on the use and disclosure of protected Agency or NDIS Commission information under the NDIS Act, the *Privacy Act 1988*, and any other applicable Commonwealth, State or Territory legislation (where a state has received protected information under the NDIS Act). Information will be only disclosed where reasonably necessary for the fulfilment of the Agency's or the Commissioner's lawful and legitimate functions, or as otherwise permitted under the NDIS Act. The penalty provisions in sections 61 to 64 and in sections 67B to 67D of the NDIS Act apply to any unauthorised disclosure of information. The intention is that any civil penalty applied for the breach of condition would be commensurate with the overall impact of the breach in question, with due regard to circumstances around the breach.

These protections ensure that the interference with privacy is proportionate to the end sought which is the protection and safety of NDIS participants.

Although the Bill broadens the circumstances under which information about NDIS participants can be shared, it is restricted to sharing information in relation to a threat to an individual's life, health or safety or the existing provisions for information disclosure under the NDIS Act. In such cases, it is appropriate to share information about NDIS participants to the extent it is required to protect them from harm or potential harm as identified in the Robertson Review recommendations. Any information exchanged continues to be subject to Commonwealth and state privacy provisions as appropriate.

The Bill includes provisions to ensure the NDIS Commission is able to record, publish and share information on the NDIS Provider Register in relation to NDIS providers and workers, including information about past compliance activity. Publishing and maintaining compliance and enforcement information is essential as it allows NDIS participants to make informed decisions about the services and supports they access which is fundamental to supporting their right to exercise choice and control.

The Bill also clarifies the NDIS Commission is able to disclose information to state and territory worker screening units and other agencies as required. This sharing of information about a worker or provider with relevant bodies is necessary to ensure that the agencies have relevant information about whether workers or providers pose an unacceptable risk of harm to a person with disability, including whether they should receive or retain an NDIS Worker Screening clearance.

These limitations on the privacy of NDIS participants, providers and workers are necessary to enable the NDIS Commission and the Agency to uphold Article 16 of the CRPD by working to jointly identify NDIS participants who may be at risk, and to detect and respond to occurrences of abuse, violence, neglect and exploitation. Similarly, the limitation on the privacy of NDIS providers and workers is necessary to ensure that the NDIS Commission, worker screening units, and other agencies are able to carry out their functions, and where that information is made public, to ensure people with disability are able to make informed decisions about the services and supports they use. Other provisions of the Bill are primarily technical in nature and therefore do not engage Article 17 of the ICCPR.

The Department considers the Bill is reasonable and proportionate because it only enables information sharing subject to limitations placed on the NDIS Commission and the Agency by the

NDIS Act, including that the information must only be shared for the purposes which have been defined in the NDIS Act. In addition, these limitations are directly connected to the legitimate purpose of the Bill in upholding the rights of people with disability by strengthening protections against violence, abuse, neglect and exploitation.

All staff in the NDIS Commission and the Agency are made aware and trained in the application of privacy provisions to protected information under the NDIS Act 2013 including any amendments such as those contained in the Bill.

Retrospectivity of provisions

The Bill is not retrospective and the amendments made by the Bill will commence the day after the new Act receives Royal Assent.

The Bill does however, clarify that information about past conduct, can be disclosed in the context of current issues once the amendments come into force. For example, the NDIS Commissioner could disclose protected Commission information about a past threat to an NDIS participant's life, health or safety where that information was obtained before the commencement date. This responds to the Robertson Review recommendation 9 and ensures relevant prior conduct can be considered.

Regulation of Restrictive Practices

The Bill does not make amendments to the regulation of restrictive practices.

The Bill does make provision for the NDIS Commission to specify further circumstances or conditions around provider management and reporting of reportable incidents in NDIS Rules. This is to provide flexibility for the NDIS Commissioner to respond to emerging issues relating to reportable incidents in a timely manner. A consultation draft of these Rules was circulated with the Bill and they are subject to consultation with states and territories, people with disability and the sector before they are finalised. The Rules are a disallowable legislative instrument and will then be subject to a disallowance period before the Parliament.

There were no changes to the reporting of unauthorised restrictive practices as a reportable incident contained in the draft Rules.

Operation of Banning Orders

The purpose of making a banning order is to remove a provider or worker entirely from the NDIS sector or to restrict their involvement in that sector. Orders are made because the continued involvement of that provider or person would pose a risk to NDIS participants that cannot be averted in any other more appropriate way. Making a banning order is one of the most serious compliance actions the Commissioner can take in response to conduct by a provider or worker and is only contemplated after other possible compliance responses such as education, warning letters or infringement notices are considered but found to be inappropriate in the circumstances. The current banning order provisions empower the Commissioner to prevent or restrict a provider or person who is, was or may be employed or engaged by a provider (worker) from engaging in specified activities either permanently or for a specified period.

The current provisions are rigid and do not allow the Commissioner to refine the banning order to address specific concerns in particular cases. The ability to impose conditions allows for more carefully calibrated regulatory responses that can be tailored to the specific circumstances of each

case. It supports the Commissioner, when exercising his or her functions, to use their best endeavours to conduct compliance and enforcement activities in a risk responsive and proportionate manner as required by paragraph 181D(4)(b) of the NDIS Act.

In some cases, it would be beneficial if the Commissioner could require the subject of the banning order to undertake action to remedy identified deficits in the way they have provided supports or services to people with a disability. This could be skill development or training in a particular area, such as medication management.

The Commissioner routinely reviews banning orders which are near the end of their term and can decide to extend them for a further period. Where a banning order is for a specified time, the Commissioner can consider the person's compliance with a condition (e.g. if a person was banned until such time that they had successfully completed particular training) in deciding whether to vary the banning order to extend it. Compliance with the condition could demonstrate to the Commissioner that the banning order subject has addressed the concerns which led to the order being made.

The imposition of conditions can also provide greater safeguards where a banning order restricts a person only from providing particular types of services. For example from providing direct disability support services but not from providing indirect disability support services, such as working in an administrative or clerical role which involves no direct contact with people with disability. The condition might be that the worker provides a copy of the banning order with this restriction to each prospective employer. This ensures the employer knows not to employ the person in a direct service role. Without the power to impose this condition on the banned worker, the Commission relies on the honesty of the worker to inform the new employer of the restrictions in the banning order and to comply with it themselves, although the worker screening system provides some protections in this regard.

In this context, the Commissioner's practice is to notify worker screening units of banning orders which may then affect the worker's NDIS worker screening check. Registered providers must only engage or employ workers who have an NDIS clearance in a risk assessed role. However an unregistered provider is not subject to this requirement and may choose to employ workers without an NDIS worker screening check. It may therefore be appropriate in some cases to impose a condition that the banned worker subject to partial restrictions gives a copy of the banning order to any employer who is an NDIS provider to ensure the employer has knowledge of any restriction on their work duties.

Reviewable decisions

The Bill seeks to clarify who must review a reviewable decision. There is no practical change to the operations of the NDIS Commission or the Agency in terms of who or how a reviewable decision is reviewed.

The amendment clarifies that:

- when the Chief Executive Officer of the Agency or the NDIS Commissioner receives a request to review a reviewable decision they must do so either personally or through a delegate under section 202 and section 202A of the *NDIS Act 2013*
- the reviewer must not have been involved in the original decision.

These amendments are consistent with other Commonwealth regulatory Acts.

Conclusion

The Department considers the Bill advances the protection of the rights of people with disability in Australia consistent with the CRPD, particularly in relation to preventing exploitation, violence and abuse in the disability sector. To the extent the Bill impinges on the human rights of people with disability and of workers in the disability sector, these impositions are reasonable, necessary and proportionate for the purpose of ensuring:

- the NDIS Commission and Agency have sufficient information to identify NDIS participants who may be at risk of harm;
- ensuring the NDIS Commissioner has clear and consistent powers to operate an effective regulatory system; and
- safeguard NDIS participants against exploitation, violence and abuse.

Thank you for your time in considering the proposed amendments outlined in the Bill and the information contained in the Department's submission.

Yours sincerely

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Acting Deputy Secretary, Disability and Carers

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Encl.