



# **Disability Advocacy Network of Australia and the Australian Federation of Disability Organisations**

## **National Disability Insurance Scheme Amendment (Quality and Safeguards Commission and Other Measures) Bill 2017**

August 2017



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## Who is AFDO?

The Australian Federation of Disability Organisations (AFDO) is the peak organisation in the disability sector representing people with lived experience of disability. AFDO and its member organisations are run by and for people with lived experience of disability.

AFDO's mission is to champion the rights of people with disability in Australia and support them to participate fully in Australian life. AFDO has strong relationships not just with its member organisations, but across the disability sector including peaks representing service providers as well as those representing families and carers.

As a founding member of the National Disability and Carer Alliance, AFDO played a key role in the campaign for the introduction of the National Disability Insurance Scheme (NDIS). As the NDIS has moved through the trial phase and begun the transition to full scheme, AFDO and its members have continued to work constructively with the National Disability Insurance Agency (NDIA) as well as Commonwealth and State and Territory governments to provide critical feedback and address implementation issues as they arise.

### AFDO's members include:

Blind Citizens Australia	Disability Advocacy Network Australia
Brain Injury Australia	Disability Justice Advocacy
Deaf Australia	Disability Resources Centre
Deafblind Australia	People with Disability ACT
Autism Aspergers Advocacy Australia	Enhanced Lifestyles
Down Syndrome Australia	People with Disability WA
Physical Disability Australia	Deafness Forum of Australia



## Who is DANA?

Disability Advocacy Network Australia (DANA) is the national peak body for 70 independent disability advocacy organisations across Australia. Our goal is to advance the rights and interests of people with disability by supporting our members in their targeted advocacy as well as engaging in systemic advocacy on a national level to further these objectives. DANA works to a vision of a nation that includes and values persons with disabilities and respects human rights for all.

Independent advocacy agencies address the advocacy needs of those people with disabilities who are more likely to be vulnerable to abuse, neglect and/or breaches of their fundamental human rights. They do this through a variety of delivery models that include systemic advocacy, legal advocacy, individual advocacy support by paid advocates, citizen advocacy using volunteer advocates, self advocacy development and support, and family advocacy development and support.

DANA's input provides insight into the myriad human rights problems faced by people with disabilities in contemporary Australia. Our membership is comprised of advocacy organisations that work to protect the rights and interests of some of the most disadvantaged and marginalised people with disabilities. To manage within limited funding environments, advocacy services prioritise clients with cognitive impairments, communication barriers, complex needs, those with experience of institutionalisation, abuse or neglect, and those without strong networks of support from peers, family or friends.

## Introduction

As a founding member of the National Disability and Carer Alliance, AFDO played a key role in the campaign for the introduction of the National Disability Insurance Scheme (NDIS). As the NDIS has moved through the trial phase and begun the transition to full scheme, AFDO and its members have continued to work constructively with the National Disability Insurance Agency (NDIA) as well as Commonwealth and State and Territory governments to provide critical feedback and address implementation issues as they arise.

AFDO and DANA welcome the opportunity to have input into the Community Affairs References Committee inquiry into National Disability Insurance Scheme Amendment (Quality and Safeguards Commission and Other Measures) Bill 2017. We want to begin, however, by emphasising our unwavering support for the NDIS. AFDO and DANA and its members regularly hear from people with disability and their families about the difference the NDIS is making to their lives. People who now have the dignity of appropriate and timely support, the opportunity to be more involved in their communities, the chance to move out of home, the economic freedom of a new job. These are the kinds of differences the NDIS is making.

AFDO and DANA and its members were all too familiar with the failings of the previous disability system, which the Productivity Commission infamously characterised as “inequitable, underfunded, fragmented, inefficient and gives people with disability little choice and no certainty of access to appropriate supports”. AFDO and DANA and its members were highly critical of the previous system and its chronic failure to neither provide appropriate support to people with disability nor close the gap in life outcomes between those with a disability and those without.

And it is because of our deep understanding of the failings of the previous system that we are making a Submission into the Quality and Safeguards Framework.

AFDO and DANA remain committed to the vision of the NDIS and is determined to ensure it is implemented in full. AFDO and DANA strongly opposes any attempts to deviate from the original vision and intent or to curtail its implementation. The comments that follow should therefore not be interpreted as lack of support for the scheme. They represent AFDO’s thoughts about how to ensure the scheme is the best it can be, identifying issues and areas that warrant further attention, analysis and action. We want to see the scheme reach its full potential and improve outcomes for people with disability.

## **AFDO and DANA Welcome the Following Amendments to the NDIS Act**

### **AFDO and DANA welcome the Amendment under Item 3 – Subsection 4 (9)**

Subsection 4(9) of the Act provides that people with disability should be supported in all their dealings and communications with the Agency and the Commission so that their capacity to exercise choice and control is maximised in a way that is appropriate to their circumstances and cultural needs.

### **AFDO and DANA welcome the Amendment under Division 2 – Information Held by the Commission New Section 67A – Protection of Information Held by the Commission etc**

People need to have confidence that the information they provide to the Commission will be protected otherwise there is a risk that they will not come forward to provide information the Commission requires to carry out its functions. This is particularly important as recent inquiries into disability services have demonstrated regulatory failures in the current mechanisms in place to record and report incidents and to protect and prevent harm to people with disability.

### **AFDO and DANA welcome the Amendment under Division 4 – NDIS Code of Conduct**

An NDIS Code of Conduct contributes to safe and ethical service delivery by explicitly stating the standards and obligations that people with disability and all Australians can expect of providers and workers delivering NDIS supports and service. It will have both a preventative effect, by clearly setting out expectations of providers and workers and a corrective effect through sanctions by providing a mechanism for enforcing compliance of providers and workers who engage in unacceptable conduct in the NDIS market.

### **AFDO and DANA welcome the Amendment under Division 5 – Complaints management and resolution**

The Commissioner may commence an inquiry in relation to any information that it receives. An inquiry enables the Commissioner to seek further information about a matter that may be broader than the consideration of NDIS provider compliance with the Act. The Commissioner may invite interested people to provide information or submissions or use the information gathering powers in new section 55A in relation to an inquiry.

The inquiry process is intended to determine or define potential matters including any systemic issues which may be connected with supports or services provided under the NDIS. Where the Commissioner determines or defines an issue but has no direct ability to further consider or resolve the matter, the Commissioner may provide a report and recommendations to assist in the resolution of issues and further the Commissioner's functions in relation to promoting and protecting the rights, health, safety and wellbeing of people with disability. An inquiry may also lead to the Commissioner engaging monitoring or investigation powers in relation to NDIS provider compliance with the Act.

## **AFDO and DANA welcome the Amendment under Part 2 – NDIS Quality and Safeguards Commissioner: 181G – Commissioner's Complaints Functions**

New section 181G sets out the Commissioner's complaints functions. It is envisaged that a dedicated Complaints Commissioner will be responsible for receiving complaints and incident reports. The Commissioner's complaints functions are as described in new section 181G and Division 5 of this Bill and include;

- functions relating to the investigation, management, conciliation and resolution of complaints conferred on the Commissioner by the NDIS rules made for the purposes of section 73X;
- educate people about, and develop resources relating to, best practice handling of complaints arising out of, or in connection with, the provision of supports or services by NDIS providers; and matters arising from such complaints;
- build the capability of people with disability to pursue complaints in relation to the provision of supports and services by NDIS providers which includes facilitating the complaints process for people with disability and supporting them to understand their rights;
- build NDIS provider capability to develop a culture of learning and innovation to
- deliver high quality supports and services, prevent incidents and respond to complaints;
- collect, correlate, analyse and disseminate information relating to complaints arising out of, or in connection with, the provision of supports or services by NDIS providers.

The collection, correlation and analysis of data will be undertaken to identify systemic issues to be addressed. This will enable the Commissioner to identify emerging issues in the NDIS market and coordinate information exchanges and regulatory responses with other relevant bodies.

## **New section 181H – Commissioner's behaviour support function**

New section 181H sets out the behaviour support function of the Commissioner. It is envisaged that a national Senior Practitioner with appropriate clinical expertise will be



responsible for providing leadership in behaviour support, and in the reduction and elimination of the use of restrictive practices, by NDIS providers, including:

- building capability in the development of behaviour support through:
- developing and implementing a competency framework for registered NDIS providers whose registration includes the provision of behaviour support assessments and developing behaviour support plans; and
- assessing the skills and experience of such providers against the competency framework; and
- developing policy and guidance materials in relation to behaviour supports and the reduction and elimination of the use of restrictive practices by NDIS providers; and
- providing education, training and advice on the use of behaviour supports and the reduction and elimination of the use of restrictive practices; and
- overseeing the use of behaviour support and restrictive practices by:
  - monitoring registered NDIS provider compliance with the conditions of registration relating to behaviour support plans; and
  - collecting, analysing and disseminating data and other information relating to the use of behaviour supports and restrictive practices by NDIS providers; and
- undertaking and publishing research to inform the development and evaluation of the use of behaviour supports and to develop strategies to encourage the reduction and elimination of restrictive practices by NDIS providers.

The United Nations Committee on the Rights of People with Disabilities (UNCRC) has expressed concern about the unregulated use of restrictive practices and recommended that State parties take immediate steps to end such practices. Consistent with the UNCRC, Commonwealth, State and Territory Governments endorsed the National Framework for Reducing and Eliminating the Use of Restrictive Practices in the Disability Service Sector in 2014 (the National Framework).

The National Framework outlines high-level guiding principles (such as human rights and a person-centred approach), and core strategies, including use of data to inform practice and workforce development. These principles and strategies underpin the approach taken in the NDIS Quality and Safeguarding Framework and the new arrangements will align with the commitment of all Australian governments to reduce and eliminate the use of restrictive practices in disability services and with Australia's obligations under the UNCRC.

- developing policy and guidance materials in relation to behaviour supports and the reduction and elimination of the use of restrictive practices by NDIS providers; and

- providing education, training and advice on the use of behaviour supports and the reduction and elimination of the use of restrictive practices; and
- overseeing the use of behaviour support and restrictive practices by;
- monitoring registered NDIS provider compliance with the conditions of registration relating to behaviour support plans; and
- collecting, analysing and disseminating data and other information relating to the use of behaviour supports and restrictive practices by NDIS providers; and
- undertaking and publishing research to inform the development and evaluation of the use of behaviour supports and to develop strategies to encourage the

## General concerns

The legislation does not contain a requirement that public consultation must be undertaken on draft rules and changes to rules which will provide the detail of the approach of the Commission. This must be changed to ensure transparency and that people with disability have a voice in the way in which quality and safeguards should be delivered. AFDO and DANA would like to see the Rules, Legislative Instruments and Practice Standards released for public consultation prior to being presented to the Federal Parliament.

AFDO and DANA remain concerned that the NDIS Code of Conduct will not apply to the National Disability Insurance Agency (NDIA) – the NDIA Board, the Quality and Safeguarding Commission or the NDIA operational staff. The quality and safeguards framework is proposed to apply to disability service providers in the market, but not to the actions of the NDIA and it is not clear whether the community partners delivering LAC and ECIC services are or are not covered by the framework. This appears to be overly complex for people with disability. For example, those who self-manage NDIS funds for communication supports (core funding) and use this fund for interpreting, captioning and the like, the providers may not be required to be qualified. This is particularly important because, for example, a deaf person may source someone who is not an accredited interpreter to perform interpreting when meeting a doctor for a medical appointment. This may seriously impact the deaf person's wellbeing if the information is not conveyed correctly.

AFDO and DANA would like to see the provision of access to an independent advocate during an inquiry process as outlined under Division 6 – Incident management – registered NDIS providers.

AFDO and DANA would like to see the inclusion of 'financial abuse' in Division 6 – Incident management – registered NDIS providers 73Z (4) in the list of Reportable incidents.

In Part 2 - NDIS Quality and Safeguards Commissioner<sup>181E</sup> Commissioner's core functions, AFDO and DANA remain concerned about systemic issues for 'at risk' populations particularly in the context of market failure including:

- Indigenous Australians
- people with disability living in rural and regional areas,
- people with disability involved in the criminal justice systems, the child protection system, the homelessness systems, the mental health systems, the drug and alcohol systems
- people with disability who have behaviour support programs with restrictive interventions
- people with profound disability and communication impairments

In Part 2 - NDIS Quality and Safeguards Commissioner 181F describes the Commissioner's registration functions which includes reportable incidents as a condition of registration. It is envisaged that an NDIS Registrar will be responsible for the following registration and reportable incident functions:

- collect, correlate, analyse and disseminate information relating to incidents, including reportable incidents, to identify trends or systemic issues.

AFDO and DANA would like to see the Commission's data publicly reported to the Parliament rather than just disseminated, and seeks clarification relating to:

1. What will be done with information collected relating to reportable incidents?
2. Will such information be made publicly available?
3. Will the Commission have capacity to act regarding trends or systemic issues relating to reportable incidents

AFDO and DANA would like to see included in the Quality and Safeguards Framework recommendations from the 2013 Concluding Observations of the United Nations Committee of the Rights of Persons with Disabilities (see Appendix 1) in relation to:

- Article 13 – Access to Justice
- Article 14 – Liberty and Security of the Person
- Article 15 - Freedom from torture and cruel, inhuman or degrading treatment or punishment

AFDO and DANA seek clarification on a timeframe referencing Section 327 of the Explanatory Memorandum which states that the Commonwealth, State and Territories will work together with a view towards national consistency in authorisation arrangements *over time*. This is not included in 181H, the Commissioner's behavior support function

AFDO and DANA are concerned about "181J – Charging of fees by Commissioner"  
AFDO and DANA seek clarification on the following issues relating to Section 334 and Section 335:

1. What fees are being charged for what service from the Commission?
2. Who will be required to pay fees and for what service
3. What mechanism is to be employed to determine the amount of a fee that is being charged for what service
4. Why would the determination of structure and amount of fees involve the Minister?

AFDO and DANA remain concerned about the level of ministerial oversight expressed in 181K Minister may give directions to the Commissioner. AFDO and DANA believe the legislation should ensure that the Commissioner is enabled to act in a fully

independent manner and not be constrained by political factors which may influence the investigations it undertakes.

In Part 2 – Transitional Rules: Item 81 – Transitional Rules, AFDO and DANA would like made explicit the obligation of the States and Territories to maintain their existing quality and safeguards systems

## Independent advocacy

The importance of independent disability advocacy in the realisation of the key aims of the National Disability Insurance Scheme has been acknowledged time and time again. Indeed, it is embedded in the Section 4 of the National Disability Insurance Scheme Act 2013, in the “General Principles guiding actions under this Act”:

*(13) The role of advocacy in representing the interests of people with disability is to be acknowledged and respected, recognising that advocacy supports people with disability by:*

- (a) promoting their independence and social and economic participation; and*
- (b) promoting choice and control in the pursuit of their goals and the planning and delivery of their supports; and*
- (c) maximising independent lifestyles of people with disability and their full inclusion in the mainstream community.*

The particular importance of advocacy in relation to quality and safeguards, has been reflected in:

- the inclusion of “formal individual and systemic advocacy services” as a component of the NDIS Quality and Safeguarding Framework;
- the acknowledgement in the Decision Regulation Impact Statement that, in relation to parties being aware of their rights and obligations to resolve complaints, “there will need to be capacity for people to get advice and support from others, including informal and formal advocates”;
- the recognition of the various important functions of independent advocacy in the 2015 Consultation Report;
- the findings of the Senate Community Affairs References Committee in the 2015 inquiry, on the need to “acknowledge the vital role that formal and informal advocacy plays in addressing violence, abuse and neglect of people with disability” (See Recommendation 15 and Chapter 7);

The 2015 *Independent review of the NDIS Act* acknowledged that “there may be a need to amend the NDIS Act to operationalise or provide greater clarity on advocacy policy directions”. The important functions performed by independent advocacy services include:

- helping people to access and understand information;
- supporting individuals to navigate the system;
- helping people to understand their rights and raise issues if something goes wrong;

- supporting people to communicate their concerns including through all stages of a complaints process
- helping people to “assess the pros and cons of different options and make informed choices” in planning<sup>1</sup>
- strengthening people’s decision-making skills;
- empowering people to advocate for themselves (through Self Advocacy);
- identifying trends and issues at the systems level (through systemic advocacy);
- monitoring the use of restrictive practices.

However, independent advocacy is entirely absent from the proposed amendments.

DANA and AFDO recommend that this omission be remedied and that the amendments should include express reference to a person’s right to advocacy and right to have independent advocates present to support them through quality and safeguarding processes.

An amendment should be made to Section 4 (13) of the NDIS Act to expand the Subsection on advocacy to establish a clearer principle that participants have a right to, and will be referred to advocacy during the making of complaints under the Quality and Safeguards Framework.

## **Towards a more effective complaints system**

DANA has long argued that accessible and effective systems of complaint management and resolution are critical to the protection of individuals and ongoing systemic reforms. (See 2013 Federal Election Call to Parties). The experience of the advocacy sector is that functioning complaints mechanisms have played a crucial role in effecting change and improvements in the disability service system.

However, far too often the capacity to pursue a complaint through existing mechanisms has been hampered by inadequate access to independent advocacy or even a lack of awareness among consumers of their right to complain.<sup>2</sup> DANA’s previous consultation with advocates and people with disability, found that many consumers experiencing poor quality supports and/or unsafe environments often struggle to make complaints.<sup>3</sup>

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<sup>1</sup> ARTD Consultants (2015) *NDIS Quality and Safeguarding Framework – Consultation Report*, 23.

<sup>2</sup> ARTD Consultants (2015) *NDIS Quality and Safeguarding Framework – Consultation Report*, 53. The Senate Community Affairs References Committee (2015) *Violence, abuse and neglect against people with disability in institutional and residential settings, including the gender and age related dimensions, and the particular situation of Aboriginal and Torres Strait Islander people with disability, and culturally and linguistically diverse people with disability*, 195-197.

<sup>3</sup> In the words of one Advocate, the “majority of vulnerable people are unlikely to complain... Some may have no mechanism for complaining due to limited communication options or severity or complexity of their disability. Some may be complaining by way of behaviour which is not being listened to effectively. Many are unaware that they can complain or that the way things are is not the way things should be.

It also found that historically the complaints process has been ineffective in protecting individuals who have lodged a complaint, leaving people vulnerable to intimidation and abuse. The power imbalance that exists between the consumer and service provider prevents people from pursuing their rights, instead resorting to finding ways of surviving within the system.<sup>4</sup>

## **The role of independent advocacy**

Without advocacy, individualised schemes such as NDIS have the potential to maintain power imbalances between service providers and people with disability that existed under block funding.<sup>5</sup> The design of this new system must take into account that some NDIS participants will require advocacy support to effectively raise or communicate concerns, resolve issues before they escalate, or participate meaningfully in complaints resolution processes.

DANA has previously argued that a further clause should also be included in the NDIS Act requiring the NDIA to inform all NDIS participants of their entitlement to independent support including independent advocacy support for any dealings that they may have with or related to the NDIS. This would assist in ensuring that NDIS benefits are equitably accessed by all members of the NDIS target group including those who are most disadvantaged and marginalised.

The Bill should be amended to recognise that independent advocacy plays a significant role in supporting many people with disability to make complaints or resolve issues.

Section 73X concerns the making of rules that would prescribe the arrangements for the management and resolution of complaints. In Clause (b) of Subsection (2), advocates should be listed along with people with disability, complainants and NDIS providers, so that rules can be made dealing with the roles, rights and responsibilities of independent advocates in this context. This Section should also be amended to ensure that complainants are referred to communication and advocacy support, when needed.

The role of independent advocates is sometimes to ensure that the grievances of a person with disability are not dismissed too quickly, without proper consideration and due process. However, the timely involvement of an independent advocate to assist a consumer in identifying and articulating the issues of concern, will often result in problems being addressed and resolved more swiftly. Therefore, automatically granting access to independent advocacy when a complaint is made is one of the methods supporting “the early resolution of complaints”, referred to in Section 73X (2) (a).

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*Those few people who can complain often having difficulty negotiating the bureaucratic and limited complaints processes available to them.”*

<sup>4</sup> Bill, H. (2015) A Missing Piece: The need for independent advocacy in the NDIS Quality and Safeguarding framework (Honours Report)

<sup>5</sup> Laragy, C., Fisher, K., Purcal, C., & Jenkinson, S. (2015). Australia's Individualised Disability Funding Packages: When Do They Provide Greater Choice and Control. *Asian Social Work and Policy Review*, 9(3), 282-292.



## Ensuring access to independent advocacy

Registered NDIS providers must be required to ensure that participants are aware of their right to make complaints about the services they receive and understand how to access the support needed, including independent advocacy, to raise and pursue issues. Ensuring that consumers are aware of and can access advocacy support must be an essential requirement for the complaints management and resolution systems mandated by Section 73W of the Bill.

As the Community Affairs References Committee recognised during the 2015 Inquiry, violence, abuse and neglect often thrive in institutional and residential settings and people with disability experience significant barriers in seeking access to justice. Consumers who have been isolated and mistreated may struggle, not only to voice a complaint, but to even identify and recognise what they have experienced as abuse or neglect. The Inquiry Report noted that one of the challenges for advocacy services is “having regular access to institutions and residential settings to assist people with disability in identifying and reporting abuse”.<sup>6</sup>

The Committee also expressed particular concern at evidence suggesting that people with disability are actively prevented from accessing Self Advocacy services.<sup>7</sup> This is consistent with many advocates observations of “gatekeeping” around people with disability.

There is an existing example in the *Aged Care Act 1997* Chapter 4 which lists the responsibilities of approved providers, in requiring providers “to allow people acting for bodies that have been [funded to perform advocacy under the Act] to have such access to the service as is specified in the *User Rights Principles*.”<sup>8</sup> These principles provide further detail on the obligation of services to grant advocates access, and list, as one of the rights of care recipients, the right “to have access to advocates and other avenues of redress”.<sup>9</sup>

A legislative basis for independent advocacy services to enter institutional, residential and service settings would allow for isolated consumers to be educated about their rights and be assisted to report incidents of abuse or neglect and make complaints. For instance, Self Advocacy training can play an important role in assisting people with disability to identify abuse and inappropriate behaviour.<sup>10</sup> The Senate Community

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<sup>6</sup> The Senate Community Affairs References Committee (2015) *Violence, abuse and neglect against people with disability in institutional and residential settings, including the gender and age related dimensions, and the particular situation of Aboriginal and Torres Strait Islander people with disability, and culturally and linguistically diverse people with disability*, 194.

<sup>7</sup> *Ibid*, 201-202.

<sup>8</sup> *Aged Care Act 1997* (Cth) Sections 56-58

<sup>9</sup> *User Rights Principles 2014* (Cth) made under section 96-1 of the *Aged Care Act 1997*.

<sup>10</sup> The Senate Community Affairs References Committee (2015) *Violence, abuse and neglect against people with disability in institutional and residential settings, including the gender and age related dimensions, and the*

Affairs References Committee highlighted the importance of “access to facilities for advocates” and independent Self Advocacy programs.<sup>11</sup>

### **Commissioner’s functions in relation to independent advocacy**

During the Australian Law Reform Commission Inquiry into Equality, Capacity and Disability in Commonwealth Laws (completed in 2014), a number of stakeholders, including the Disability Services Commission of Victoria, advocated that the envisaged oversight and complaint handling body for the NDIS (i.e. the Quality and Safeguards Commission) would also have responsibility for promoting access to advocacy and supported decision-making. DANA and AFDO strongly believe that this is an essential component of the Commission’s role, and are disappointed that no explicit reference to independent advocacy has been included in these sections on the Commissioner’s functions.

The core functions of the Commissioner are articulated in 181E. Clause (c) concerns the Commissioner promoting the provision of advice, information, education and training to NDIS providers and people with disability. This should include information about rights (including the right to complain and the right to access independent advocacy services), and this should be delivered to consumers through independent bodies, like advocacy or other rights-focused organisations that do not have any conflicts of interest around service delivery and complaints-handling. As the Community Affairs References Committee found during the abuse, violence and neglect Inquiry, some disability service providers run Self Advocacy, self-empowerment and/or leadership programs – but it is highly problematic to rely on such training as it may be institutionalised, tokenistic, controlled by the service provider and fundamentally fail to address the power imbalance between people with disability and institutionalised service providers.<sup>12</sup>

Section 181D (4) (a) requires the Commissioner to use his or her best endeavours to “provide opportunities for people with disability to participate in matters that relate to them and take into consideration the wishes and views of people with disability in relation to those matters”. Independent advocacy support is a key method of enabling and empowering people with disability to participate in complaints and investigation processes. This Subsection should be amended, either by expanding this clause or inserting another one, to reflect the vital role played by independent advocacy in achieving this goal. The Commissioner’s functions must include ensuring access to independent advocacy support for people who require it, and this should be reflected clearly in the legislative description of Commission’s role.

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*particular situation of Aboriginal and Torres Strait Islander people with disability, and culturally and linguistically diverse people with disability*, 196.

<sup>11</sup> Ibid, xx, 195-202.

<sup>12</sup> Ibid, 198-200.

Ensuring that independent advocacy is accessible to people with disability, could also be included in the “Commissioner’s complaints functions” outlined in Section 181G – particularly in relation to Clause (c) concerning the function of building “the capability of people with disability to pursue complaints in relation to provision of supports or services by NDIS providers”.

### **Independent advocacy following a reportable incident**

There is a great risk that, even where a reportable incident has been recognised, people who have been victimised in disability service settings will continue to be marginalised and silenced during the investigation process.

Section 73Z should include in Subsection 3, a power for the Commissioner to mandate that after a reportable incident occurs, the person with disability is provided access to an independent advocate. This would be an additional safeguard to ensure that consumers who have experienced abuse, injury, assault and/or unauthorised restrictive practices, are provided with the necessary support to communicate what has happened to them and advocate for their rights and interests through the process.

The occurrence of a reportable incident is a strong indicator that something may be deeply wrong, and should trigger additional protections for the person with disability. There has been a systemic tendency for institutional violence, abuse and neglect of people with disability to be “swept under the carpet” and not be properly investigated.<sup>13</sup> In designing a new and more effective complaints mechanism, ensuring that people with disability who have been mistreated have clear access to independent advocacy support would act as an additional accountability measure to ensure that the voice and rights of people with disability are respected. Such a safeguard would prevent the seriousness of a reportable incident being minimised, or the victim’s perspectives and experiences being devalued, in the management of reportable incidents under Section 73Z.

Ensuring that independent advocacy is accessible to people with disability, could also be included in the “Commissioner’s registration and reportable incident functions” outlined in Section 181F – particularly in relation to Clause (d) concerning the provision of “education, guidance, and best practice information to NDIS providers”.

### **Inclusion of advocates in protection of disclosers**

Section 73ZA covers the disclosures of information by certain people where the discloser has reasonable grounds to suspect that the information indicates

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<sup>13</sup> The Senate Community Affairs References Committee (2015) *Violence, abuse and neglect against people with disability in institutional and residential settings, including the gender and age related dimensions, and the particular situation of Aboriginal and Torres Strait Islander people with disability, and culturally and linguistically diverse people with disability*, 48.

contravention of the Act. Subsection (1) lists the people who qualify for protection under Division 7. Advocates should be included in the list in Clause (d), along with:

- people with disability receiving a support or service from the NDIS provider
- nominees
- family members
- carers
- significant others

Advocates who disclose information in this context should have the same protections from legal action or victimisation as other types of disclosers.

## **Systemic Advocacy role of the Commissioner**

AFDO and DANA remain concerned that the systemic advocacy of the Commissioner is neither explicit or proactive.

The current amendments to the NDIS (Quality and Safeguards Commission) Act rely on a person with a disability to make a complaint for the Commissioner to initiate any action. Any such action is in response to a complaint. This is a reactive model of advocacy and whilst valuable will not allow for proactive advocacy that paves the way for changes to the lived experience of disability. One of the issues with complaints driven advocacy is that any action taken as a result of complaints will miss those people who are unable to make complaints.

Proactive advocacy would allow the Commissioner to identify issues drawn from the lived experience of people with a disability and provide leadership on that issue. A strong collaborative relationship with the systemic advocacy organisations and peak bodies will be vital to ensuring that the full range of issues affecting people with disability will be able to be addressed.

A good example of how complaints driven advocacy will miss key groups of people with disability lies in the current issue of people with disability in the criminal justice system. People with disability in the criminal justice system are subject to recurrent and indefinite detention. A number of key inquiries have now noted the negative impacts on people with disability in the Criminal Justice System including the:

- 2015 Senate inquiry into violence, abuse and neglect against people with disability in institutional and residential settings, including the gender and age related dimensions, and the particular situation of Aboriginal and Torres Strait Islander people with disability, and culturally and linguistically diverse people with disability
- 2016 Indefinite Detention of People with Cognitive and Psychiatric Impairment in Australia

- 2017 The provision of services under the NDIS for people with psychosocial disabilities related to a mental health condition

These Inquiries have all received evidence and in the case of the 2015 and 2016 inquiries reported on how people with disability, particularly Indigenous Australians, experience negative outcomes both as individuals but also as a group.

In the context of the current rollout of the NDIS and the NDIA 2015 Justice Interface principles, people with disability who are detained on remand or are detained in jails are able to receive NDIS disability supports. However this is largely not occurring due to significant misunderstanding both internally in the NDIA and externally in the disability and justice sectors. It has only been through systemic advocacy that understanding and action that seeks to change legislation, policy and programs has come about.

Without a proactive systemic advocacy function for the Commissioner sitting alongside a complaint driven model of advocacy, highly vulnerable groups of people with disability will continue to miss out on the safeguards the Commissioner is designed to enable.

## Recommendations

1. AFDO and DANA recommend that the quality and safeguards framework, and the commission's role be expanded to include the NDIA itself and the community partners. A single place to go for all concerns regarding quality will be best for participants and their families will ensure consistency of expectation and approach and streamline information and education about quality issues.
2. The legislation would be improved by including clauses which mirror those in the Aged Care Act which grant right of entry for advocates to aged services' premises. An equivalent right of entry for funded disability advocates would be an additional valuable safeguard for people with disability who live primarily within a service system.
3. AFDO and DANA supports the Australian Law Reform Commission's (ALRC's) recommendation that parliament should amend the objects and principles in the National Disability Insurance Scheme Act 2013 (Cth) to ensure that they are consistent with the National Decision-Making Principles.
4. AFDO and DANA recommends (in accordance with the evidence and widely expressed views on the importance of advocacy) that the Quality and Safeguards Commission and Other Measures Bill 2017 ('the Bill') amends the National Disability Insurance Scheme Act 2013 ('NDIA Act') to include express reference to a person's right to advocacy and right to have advocates present during Quality and Safeguards Commission processes, whether the person is a prospective or actual NDIS participant, and that advocates and advocacy, including systemic advocacy, should be included in the protections for disclosures of violence, abuse and neglect.
5. AFDO and DANA supports the ALRC's recommendation that the Commission should have responsibility for promoting access to advocacy and supported decision-making. Section 73Z should include in Subsection 3, a power for the Commissioner to mandate that after a reportable incident occurs, the person with disability is provided access to an independent advocate
6. AFDO and DANA recommend that ministerial control of the Commission should be qualified at section 181 K so that the Minister's control must be consistent with Vision and Principles of the National Disability Strategy.
7. AFDO and DANA recommends that section 73X includes a provision that sets out the Commissioner's obligation to investigate complaints fairly but vigorously, and that persons with disabilities should be referred as of right to communication and advocacy support. In Clause (b) of Subsection (2), advocates should be

listed along with people with disability, complainants and NDIS providers, so that rules can be made dealing with the roles, rights and responsibilities of independent advocates in this context

8. AFDO and DANA strongly recommend that the Bill expressly states that information about ways to complain must be available in accessible formats, including Easy Read format, with simple words, phrases, and pictures.
9. AFDO and DANA recommend that the Commissioner engages with complainants throughout complaint processes to ensure that they are aware of their rights and responsibilities and that they are informed about the progress and status of the complaint.
10. AFDO and DANA recommend that Community Visitor Programs, should have a role to identify complaints and refer complaints to the Commissioner.
11. AFDO and DANA propose an amendment after Section 4(13) that establishes the principle that participants have a right to, and will be referred to, advocacy during the making of complaints.

## Appendix 1

### **Concluding observations on the initial report of Australia, adopted by the Committee at its 10th Session (2-13 September 2013)**

#### **Article 12 - Equal recognition before the law**

The Committee notes that the Australian Law Reform Commission has been recently commissioned to inquire into barriers to equal recognition before the law and legal capacity for persons with disabilities. The Committee is however concerned about the possibility of maintaining the regime of substitute decision-making, and that there is still no detailed and viable framework for supported decision-making in the exercise of legal capacity.

#### **Article 13 - Access to justice**

The Committee recommends that the State party uses effectively the current inquiry process to take immediate steps to replace substitute decision-making with supported decision-making and provides a wide range of measures which respect the person's autonomy, will and preferences and is in full conformity with article 12 of the Convention, including with respect to the individual's right, in his/her own capacity, to give and withdraw informed consent for medical treatment, to access justice, to vote, to marry, and to work.

The Committee further recommends that the State party provides training, in consultation and cooperation with persons with disabilities and their representative organizations, at the national, regional and local levels for all actors, including civil servants, judges, and social workers, on the recognition of the legal capacity of persons with disabilities and on the primacy of supported decision-making mechanisms in the exercise of legal capacity.

The Committee further urges the State party to ensure that persons with psychosocial disabilities are ensured equal substantive and procedural guarantees as others in the context of criminal proceedings and in particular to ensure that no diversion programs are implemented that transfer individuals to mental health commitment regimes or that require the individual to participate in mental health services rather than providing such services on the basis of the individual's free and informed consent.

The Committee further recommends the State party to ensure that all persons with disabilities who are accused of crimes and are currently detained in jails and institutions without a trial are promptly allowed to defend themselves against criminal charges and are provided with required support and accommodation to facilitate their effective participation.



## **Article 14 - Liberty and security of the person**

The Committee is concerned that persons with disabilities, who are deemed unfit to stand trial due to an intellectual or psychosocial disability can be detained indefinitely in prisons or psychiatric facilities without being convicted of a crime, and for periods that can significantly exceed the maximum period of custodial sentence for the offence. It is equally concerned that persons with disabilities are over-represented in both the prison and juvenile justice systems, in particular women, children and Aboriginal and Torres Strait Islander peoples with disability.

The Committee recommends that the State party, as a matter of urgency:

- Ends the unwarranted use of prisons for the management of un-convicted persons with disabilities, with a focus on Aboriginal and Torres Strait Islander persons with disabilities, by establishing legislative, administrative and support frameworks that comply with the Convention;
- Establishes mandatory guidelines and practice to ensure that persons with disabilities in the criminal justice system are provided with appropriate supports and accommodation;
- Reviews its laws that allow for the deprivation of liberty on the basis of disability, including psychosocial or intellectual disabilities, and repeal provisions that authorize involuntary internment linked to an apparent or diagnosed disability.

The Committee is further concerned that under Australian law, a person can be subjected to medical interventions against his or her will, if the person is deemed to be incapable of making or communicating a decision about treatment.

## **Article 15 - Freedom from torture and cruel, inhuman or degrading treatment or punishment**

The Committee is concerned that persons with disabilities, particularly those with intellectual impairment or psychosocial disability, are subjected to unregulated behaviour modification or restrictive practices such as chemical, mechanical and physical restraint and seclusion, in environments including schools, mental health facilities and hospitals.

The Committee recommends the State party to take immediate steps to end such practices including by establishing an independent national preventative mechanism to monitor places of detention including mental health facilities, special schools, hospitals, disability justice centres and prisons, to ensure that persons with disabilities including those with psychosocial disabilities are not subjected to intrusive medical interventions.