

Monday 19 June 2023

Professor Bruce Bonyhady AM and Ms Lisa Paul AO PSM
Co Chairs of the Independent Review of the National Disability Insurance Scheme
c/o NDIS Review Secretariat
Department of the Prime Minister and Cabinet
PO Box 6500
Canberra ACT 2600

**RE: Physical Disability Australia's submission regarding your Proposals
Paper on Participant Safeguarding**

Dear Professor Bonyhady and Ms Paul

Thank you for the opportunity to provide a submission regarding the current safety and safeguarding provisions in place for National Disability Insurance Scheme (NDIS) participants and the Review team's proposals to improve them.

Rather than answering all the questions posed in the Proposals Paper on Participant Safeguarding¹, what follows is Physical Disability Australia's (PDA's) thoughts on:

- What we see as the key threats to the safety of our members and other participants living with physical disability;
- The capability and effectiveness of the NDIS Quality and Safeguards Commission;
- Some of your consultees' desired features of a new Participant Safeguarding Strategy; and
- The three proposals detailed in the Paper.

Our points will largely refer to participant safety and safeguarding in a general sense without much comment on particular safety threats and the safeguarding arrangements that reduce particular risks.

What does safety and safeguarding mean to NDIS participants living with physical disability?

From the perspective of most of the PDA members who are NDIS participants, safety and wellbeing flows naturally from having access to high quality personal care support workers, effective capacity building/maintaining therapy and Assistive Technology (AT) that allows them to lead an ordinary life.

Most of our members' disabilities are related to impairments of their bodies and not their minds and so, as competent adults, are well served by the safety and safeguarding systems that operate Australia-wide including: police; professional regulatory bodies; and consumer protection bodies.

As a result, the key threats to the NDIS participants with physical disability we represent with regard to their NDIS support arrangements are:

¹ <https://www.ndisreview.gov.au/sites/default/files/resource/download/participant-safeguarding-proposals-paper.pdf>

- The possibility that their entitlement to personal care support workers, effective allied health therapies and AT will be reduced or eliminated by National Disability Insurance Agency (Agency) decision makers proceeding from false assumptions about participants' support needs and the impact those supports are having on their lives; and
- The prospect of having to cut back or do without support as a result of overspending by participants and their plan managers or overcharging by support providers.

The first threat is the more significant in our experience. For example, many of our members benefit from regular treatments delivered by physiotherapists and exercise physiologists and report to us that these treatments have improved their capacity and ability to function in their homes and the community. Some of these members have subsequently told us that Agency decision makers, on learning about the beneficial nature effect of these treatments, come to the erroneous conclusion that these effects are permanent and that therefore these participants' entitlement to them should be reduced. This then leads to a loss of function and an increased risk of injury and other safety threats.

Given the current government's aspiration to reduce Scheme cost growth to 8%, we see such economic targets as a real threat to participant safety going forwards, at least as it applies to our members and other participants whose impairments are predominantly physical in nature.

We strongly recommend that any new Participant Safeguarding Strategy include measures to confirm that reductions in participant plan budgets will not leave participants at risk and that systems be put in place to examine, and if necessary change, overspending participants' plan management arrangements and top-up their funding in a timely manner so they spend no time without essential safety-assuring supports.

The effectiveness of the NDIS Quality and Safeguards Commission

As current participant safeguarding arrangements have their main application in informing and guiding the work of the NDIS Quality and Safeguards Commission (NDIS Commission), PDA is disappointed that it remains a largely inconsequential entity for most participants. In our July 2020 submission to the Joint Standing Committee on the NDIS' inquiry into the NDIS Commission², we submitted that:

...we cannot agree that the NDIS Commission is particularly effective when it comes to responding to complaints and reports of quality and safety breaches. Its 6 month report for 1 July to 31 December 2019 states the Commission received 2,022 complaints regarding:

- *Provider practice (51%);*
- *Provider policies and procedures (20%);*
- *Worker conduct or capability (17%); and*
- *Alleged abuse or neglect (11%).*

The same document also stated that registered providers had notified the Commission of 69,397 'reportable incidents' including:

- *1,704 allegations of abuse and neglect*
- *779 allegations of unlawful physical / sexual contact; and*

² <https://www.aph.gov.au/DocumentStore.ashx?id=6ce89f5c-246f-4396-ae3b-679c7748a3f3&subId=690697>

- 65,398 unauthorised uses of restrictive practices.

Despite these alarming statistics, there is no mention in the report of how many of these complaints and reports resulted in disciplinary action against workers or service providers.

We were able to find a list of people and organisations who had been subject to sanctions but it required an extensive search of the Commission's website to find it. The 12 page document lists:

- 22 people subject to 'banning orders' that prohibits them from providing disability supports for periods ranging from 12 months to permanently;
- 4 service providers subject to 'compliance notices' requiring them to take certain actions to address non-compliances with parts of the NDIS Code of Conduct;
- 1 service provider subject to an 'infringement notice' for a contravention of the NDIS Act 2013;
- 5 service providers subject to 'suspensions of registration' for varying numbers of 30 day blocks;
- 3 service providers subject to 'revocations of registration ... as NDIS providers on the basis of assessments of their (un)suitability to provide supports and services to people with disability; and
- 3 organisations which received 'refusals to re-register' notices similarly based on assessments of their (un)suitability to provide supports and services under the NDIS.

This list, if it faithfully documents all disciplinary actions carried out by the NDIS Commission since its commencement on 1 July 2018 is woefully short and lacks details regarding why these actions were taken. It in no way suggests it is effectively pursuing the rigorous enforcement of the NDIS practice standards that Participants should expect.

As far as PDA is aware, the NDIS Commission has not received a significant increase in its resources and expect its effectiveness in ensuring support quality and safeguarding participants is not much improved since we made this submission.

We therefore strongly recommend that any new Participant Safeguarding Strategy take into account the NDIS Commission's limited present and expected future capacity to discharge its obligations in any meaningful sense.

Our thoughts about the suggested desirable features of a new Participant Safeguarding Strategy

The Paper lists quite a few desired features of a potential new Participant Safeguarding Strategy that the NDIS Review team's consultations with participants have brought to light. Our thoughts on those that are of particular relevance to our members and other participants living with physical disability are given below.

- 1. That safeguards should be focused on protecting and promoting participants' rights, particularly their rights under the UN CRPD***

PDA is very much in favour of all people involved in arranging and delivering NDIS supports having a clear understanding of participants' rights including those enshrined in the UN CRPD. However, the reality is that Australia's actual commitment to rights-equality for people with disability does not match UN CRPD aspirations.

Asserting disability rights in Australia can be a very fraught process. This country's human rights legislation is reactive, rather than proactive and relies on people who

feel their rights have been denied making complaints and having to prove a breach of the law to get any remedy under law. As such, protecting participant's rights is likely to place an onus on support providers and workers to take action that may be beyond what would normally be expected in a non-NDIS consumer environment.

2. That safeguards should ensure participants have access to safe, high quality and skilled supports and services, and that participants are heard in the design and delivery of supports.

PDA members and other participants with predominantly physical disabilities are often very capable of ensuring their supports are in complete alignment with their design and delivery preferences. A large proportion of our members are self-managing participants who engage providers specifically on their capacity to deliver exactly the services they want when they want, or employ and supervise support workers directly. In this context, quality and skill level are subjective judgements based on each participant's support needs and what they expect support workers to actually do.

While PDA sees some benefit for requiring all employees involved in personal care support to have a worker screening pass from the NDIS Commission (or equivalent State/Territory authority), we do not think it is appropriate, or helpful, to insist they have a Certificate III in Individual Support (Disability) or other such qualification as this does not guarantee any one skill nor an ability to develop appropriate rapport and respect for participants – a key safety-assuring attribute.

3. That supports in plans are an important part of safeguarding, and should be designed with participants taking account of their varying circumstances.

As noted above, for PDA members, adequacy and continuity of NDIS funded support, therapy and AT is the key promoter of their safety and wellbeing, and NDIS decisions to unilaterally reduce or remove these is the key threat we would like to see mitigated.

PDA argues that the Agency's reliance on Typical Support Packages and their planning guidelines expectation that "participants with similar circumstances and disability needs should receive similar amounts of supports in their plans... [and the] need to ensure the total cost of all participant plans are within the overall NDIS budget set by governments"³ means this goal is quite unattainable at present.

From our perspective participant assessments of their safety and well-being will not improve until planning becomes a genuinely person-centred practice.

4. That supports and safeguards should be psychologically safe, trauma-aware and healing-informed.

While psychological safety and trauma awareness are qualities that all support providers should be able to guarantee, PDA is concerned that this assertion presupposes that NDIS participants are psychologically weak and/or victims of trauma when this is not often the case. We also object to the notion that NDIS supports should be expected to be in any way psychologically therapeutic.

³ <https://ourguidelines.ndis.gov.au/how-ndis-supports-work-menu/what-principles-do-we-follow-create-your-plan/what-principles-do-we-use-create-your-plan/fair-everyone-both-today-and-future-generations>

Moreover, we feel these support features are not something that the Agency or the NDIS Commission can easily ascertain. It is Support Coordinators' if not the participants themselves who must ultimately assess their providers capacity to deliver services in a way that respects their mental health status and take action to change arrangements if threats to participants' psychological safety emerge.

Certainly, the Agency and NDIS Commission complaint handling processes and the staff behind them should interact with participant complainants in a psychologically safe and trauma-informed manner and this should definitely be a key feature of a new Participant Safeguarding Strategy.

5. Safeguards should be responsive when participants' circumstances change.

From PDA's perspective, participant safeguarding arrangements should be tiered in such a way that safety measures go from least intrusive to most assured in a hierarchical way, and that participants and their 'informal' supporters have a determining role into which of the escalating safeguarding processes should be put in place (if any).

Such an approach makes all safeguarding measures available to all participants on an as-needed basis without the problems associated with having them imposed unilaterally by Agency employees.

6. Natural safeguards are a necessity. Supporting and empowering participants to build their capacity, and building family and social supports in line with their preferences, is critical.

Participants' 'informal' support networks obviously provide a degree of safeguarding as they are ideally placed to recognise safety threats and take action to mitigate them as required. However, not all participants have existing informal support networks in place nor necessarily want more people in their lives to assume this role for entirely rational reasons. PDA also does not approve of identifying family and social supports as 'natural' as it implies those without them, either by circumstance or choice, are occupying an 'un-natural' space and by extension are at risk.

With this in mind, we do not think a new participant safeguarding system should in anyway expect or rely on participants' family members, friends and peers to fulfil any official safeguarding function. The Agency and the NDIS Commission should have sole responsibility for officially safeguarding participants with regard to NDIS supports (and have the capacity to intervene in a timely and effective manner).

PDA's thoughts about the draft proposals for change identified in this paper?

Draft proposal 1: An NDIS-wide participant safeguarding strategy

The Paper proposes that "a new NDIS-wide Participant Safeguarding Strategy should be designed with strong engagement from participants, and should include things that participants want to see in it, such as clear guidance on who is responsible for what, and illustrative examples to help them understand what the strategy means in practice for them."

PDA approves of this proposal as a means to develop a whole of Scheme safeguarding strategy provided it engages a broad range of participants and their representative organisations. We also approve of the inclusion of illustrative examples that provide examples of what can be done by at-risk participants and others with knowledge the situations to raise safety concerns and facilitate

interventions. With these, it is important to add details about what whistle-blowers can realistically expect as responses from service providers, the Agency and the NDIS Commission to the sample notification or complaint and what can be done in response to these if they are deemed inadequate.

Draft proposal 2: An improved and individualised approach to work with participants to understand risk and build safeguards

The Paper proposes that the Agency implement “a more comprehensive and individualised approach to understand[ing] risk and build[ing] safeguards that allows participants and their supporters to lead the conversation, and to speak about risk and safeguards in a manner that reflects their needs, values, priorities and experiences”... presumably, in planning conversations.

PDA approves of this proposal provided that the time devoted to these discussions and safeguards building activities are proportionate to participants’ assessment of their overall risk, held after a plan has been agreed-to by participants, and held with planning or other delegates acquainted with their plans, goals and plan management arrangements.

With the expected implementation of the PACE system across Australia in coming years and it’s expectation that planners will actually meet with participants to develop their plans and approve them on a more-or-less consensus basis, tacking on a conversation about anticipated safety risks and how they might be managed should not cause too many problems.

Draft proposal 3: Improved safeguards deployed on an individual basis

The Paper proposes that “all participants should be supported to identify and implement safeguards that will work for their circumstances, supported by accessible information made proactively available to them”.

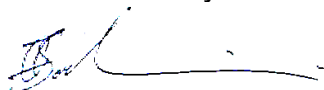
PDA also approves of this proposal if it can take advantage of an above-recommended tiered approach where the safety assurance measures offered to participants start from the least intrusive and only progress to the most assured as agreed to by participants and their ‘informal’ supporters who should have a determining role into which of the escalating safeguarding arrangements should be put in place (if any).

Of course, *all* information provided by the Agency and the NDIS Commission should be accessible and made proactively available to participants and those who support them professionally and informally.

Conclusion

Again, PDA thanks you for the opportunity to provide this submission and we hope our observations and recommendations are well regarded

Yours sincerely



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About Us:

Physical Disability Australia (PDA) is a national peak membership-based representative organisation run by people with physical disability for people with physical disability. PDA was founded in 1995 and have over 1,200 members from all Australian States and Territories. Our purpose is to:

- Remove barriers through systematic advocacy to all levels of government to enable every Australian living with a physical disability opportunities to realise their full potential;
- Proactively embrace and promote difference and diversity for an inclusive society; and
- Actively promote of the rights, responsibilities, issues and participation of Australians with physical disability.