

Hon Greg Donnelly MLC,
Chair,
Portfolio Committee No 2 -
Health and Community Services,
NSW Parliament,
Macquarie Street,
SYDNEY NSW 2000

Ms. Alisa Coleman,

Attention: Ms. Helen Hong
Senior Counsel Officer
Upper House Committees

2 October, 2018.

Dear Sir,

Re: Inquiry into the implementation of the National Disability Insurance Scheme and the provision of disability services in New South Wales:-

Supplementary Comments

Thank you for giving me the opportunity to address the Committee of Inquiry into the NDIS on 17 September 2018 and to subsequently revisit the conversations from the hearing through transcript (see attached corrections).

While I do not seek to retract or to alter any of the answers I gave during the hearing, I have additional comments to make regarding my testimony. In particular, I want to elaborate on answers I gave in response to:

1. a question regarding the new Quality and Safeguards Commission (the QSC) from the Hon. Courtney Houssos; and
2. a question regarding NDIS Service Provider accountability from the Hon. Paul Green.

In relation to point one above, while I will be continuing to pursue my ongoing homecare service complaint without late-stage involvement by the QSC, I am concerned about the accessibility and effectiveness of NDIS quality control measures being largely complaint driven.

The primary reason for my concern is one of access. While it is commendable that the first of ten listed QSC functions is to:

- respond to concerns, complaints and reportable incidents, including abuse and neglect of NDIS participants,

making a complaint can be a difficult and confronting experience for anyone. The presence of disabilities, whether age related or otherwise, arguably compounds the difficulties (as the issues currently under focus through the media and the Federal Government concerning instances of abuse and or neglect from within the aged care sector, graphically illustrate).

Like many frail aged people, younger people with significant and permanent disabilities may also face difficulties in voicing concerns, accessing complaint procedures and pursuing complaints. Some of the more significant difficulties include:

- **recognising and reacting to complaint worthy issues** (ie you have to be aware that you are being subjected to unfair, discriminatory, harmful or abusive treatment in order to be able to report it);
- **being in a position to make a complaint** (ie you have to know how and where to self-report complaints or have the capacity and opportunity to access reliable and trusted people or paid advocates (all independent of potential respondents), who will act impartially to assist complainants; and
- **following the complaint through to a satisfactory conclusion** (ie a complaint body must have sufficient reach and or authority to fully pursue a complaint in a procedurally fair manner, to act on findings and to broker a definite conclusion (including, where necessary, the application of penalties or sanctions) for all parties involved in the complaint. Otherwise, there is nothing to be gained from making a complaint.

There are at least three substantial reasons for such difficulties, in the context of the NDIS. They are:

1. **The nature of the disabilities of complainants.** People may be non-verbal, have intellectual disabilities, mental illnesses (either sporadic or constant), experience dexterity issues etc. In such cases, potential complainants may need to rely heavily upon other people (eg family members, friends, care staff, paid advocates etc) to be on the alert for complaint worthy incidents and or to initiate and pursue appropriate courses of action, on behalf of complainants).

Most, if not all, complaint processes require complainants to "tell a story", to provide details, to recall dates, to name names "in your own words" through written statements, telephone conversations, conciliation conferences, briefing sessions, perhaps even court appearances. Each of these processes require the availability and use of specific skill sets which may, in some cases, be compromised or absent due to the presence of particular disabilities.

2. **The relationship inequalities that exist between potential complainants and potential respondents.** Having to make a complaint places the onus of responsibility for the correction of unacceptable behaviour and or harmful practices on the wrong people – the victims. It should not.

NDIS Service Providers have a duty of care (ie a fiduciary duty) to NDIS Service Participants. This higher level, protective duty deliberately creates unequal relationships between Service Providers and Service Participants, for the purpose of securing the welfare of dependent participants.

For the purposes of this response, although I am reluctant to resort to the term "dependent" in an NDIS context, I use it to mean "reliance upon the provision of "participant specific" goods or services by a Service Provider."

Dependency includes, at its most basic, the provision of essential personal care services such as toileting, washing, dressing, feeding, lifting and shifting, on a daily basis. To complain is not only intimidating it is potentially harmful, when dependency, as defined here, is involved.

Complainants with disabilities potentially risk the suspension or loss of essential services and must face one of three prospects:

- **changing service providers at short notice** (ie leaving behind a problem);
- **confronting the issue** (ie attempting to resolve the problem for yourself and other people, systemically), or
- **doing nothing** (ie learning to live with the problem).

Each of the prospects carries risks and uncertainties.

Changing service providers (assuming that an alternate provider is available) introduces the uncertainties that accompany the use of unfamiliar people, policies, programs and practices.

Confronting a business or an agency without necessarily being sufficiently resourced (ie by money, people, knowledge, skills or access to alternative services), leads to the uncertainties that attach to the raising of a formal complaint.

Doing nothing, although on the face of it is, for many people with disabilities, a seemingly simpler choice, means putting up with a problem, indefinitely.

The result, when either unsatisfactory service providers are left behind or nothing is done, is the same. Potential complaints go unreported, undocumented and unseen, while systemic problems remain unresolved.

Many people with disabilities do not have the background of advantages and experiences that I have accumulated through my university education, history of involvement in disability advocacy, 15 years of employment within the NSW Public Service and familiarity with many complaint procedures. However, from recent personal experience I can now confidently report that complaint making is laborious, frustrating, emotionally taxing and financially draining work.

The lodgement of external complaints should only be seen as an action of last resort and NOT as an effective means of NDIS quality control under the QSC.

3. Service Provider accountability. See following comments.

Service Provider accountability is the second of the issues upon which I want to make some supplementary comments (as noted on page 1 above).

As the Productivity Commission's Issues Paper on NDIS Costs, released in February 2017, correctly states in Table 1 at page 6:

"The primary relationship is between the consumer and service provider."

However, while the relationship may indeed be a primary one, it is not a private one between a private provider and a private client, in the context of the NDIS. Arguably, the relationship between NDIS Participants and NDIS Service Providers is a quasi-public relationship because it exists as a result of the establishment of a nationally funded public Scheme, called the NDIS. The objects of the Scheme are prescribed in Commonwealth legislation: s3, *NDIS Act 2013* and have bipartisan support across all levels of government.

Similarly, it can be argued that if the NDIS establishes a quasi-public relationship between Scheme Parties, that NDIS Service Providers are, in effect, quasi-public servants (in the context of the NDIS), when they accept the role of supplying NDIS Participants with NDIS registered goods and services in accordance with NDIS scheduled fees, obtained from the tax paying Australian public.

Further, if it is accepted that the quasi-public function and the "primary relationship" it establishes between NDIS Service Providers and NDIS Participants exists, then the functions and relationships established must be bound to the NDIS framework using existing regulatory mechanisms under the auspices of the NDIA and in conjunction with the QSC. Public accountability for NDIS outcomes, whether they be good or poor, is essential.

In fact, at the present time, there is currently NO requirement for NDIS Service Providers (with or without the acceptance of the quasi-public functions argument) to adhere to any specific requirements of the NDIS, post Registration. A fact that the NDIA were recently able to confirm.

On 29 March, 2018, the Australian Human Rights Commission (AHRC) wrote to Mr Rob De Luca, CEO of the NDIA (the Agency) on my behalf (see attached copy), to advise the Agency that it had been joined as a Respondent in my complaint against my homecare NDIS Registered Service Provider. As a part of the letter of advice to the NDIA, the AHRC requested that "additional information and documents", relevant to the complaint, be made available (see attached copy).

The NDIA's response to the AHRC took the form of three emails dated 19 June 2018 (as quoted in my opening remarks to the Committee on 17/9/18), 21 June 2018 and 11 July 2018, respectively (see attached copies).

The NDIA's responses, when read together, appear to confirm at a minimum, the following limits to Agency authority;

- The NDIA does not accredit (ie credential as suitably capable) Service Providers, it merely Registers (ie lists) company details;
- NDIS Individual Service Agreements are written off an NDIA template;

- The NDIA is not a party to NDIS Individual Service Agreements between NDIS Participants and NDIS Service Providers;
- The NDIA does not retain copies of any NDIS Individual Service Agreements that are struck between NDIS Participants and NDIS Service Providers;
- The NDIA has no jurisdiction over complaints lodged by individual NDIS Participants against NDIS Service Providers but can revoke a Service Providers Registration on a number of grounds under s.72 *NDIS Act* (2013).

Unless the limits on NDIA authority can be removed, the Registration process meaningfully strengthened to ensure public accountability and NDIS Individual Service Agreements altered to have contractual force (with NDIA and or QSC oversight), in accordance with the Objects of the *NDIS Act* (2013), the Productivity Commission's "primary relationship" between NDIS Service Providers and NDIS Participants, is more aspirational than actual and is not accountable.

Like NDIS Participants, NDIS Service Providers who choose to participate in the Scheme, must be prepared to accept the obligations of Scheme participation (along with the benefits) and must be able to be held to account for their actions, through appropriately binding regulatory mechanisms.

Once again, should the Committee require a more detailed explanation of the issues raised by my supplementary comments, I may be contacted at the address provided above, by email at _____ or by telephone on _____

I await any future developments and outcomes from the Inquiry, with interest.

Alisa Coleman
LLB (Hons); LLM (Hons)
NDIS Participant