

## **Submission: National Disability Insurance Scheme Amendment (Improving Supports for At Risk Participants) Bill 2021**

The horrific death of Ann Marie Smith, an NDIS participant, in Adelaide last year shocked the disability sector and the broader community. The terrible circumstances of the last 12 months of her life resulted in a number of investigations and inquiries including:

- an investigation by the South Australian Police (charges have been laid)
- a Coroner's examination
- a SafeWork SA investigation
- an inquiry by a South Australian Taskforce
- an independent inquiry by Alan Robertson (a former Federal Court judge) on behalf of the NDIS Quality and Safeguards Commission.

Reports of the inquiries undertaken by Robertson and the SA Taskforce both identify gaps in NDIS safeguarding arrangements. This Bill aims to close some of these gaps and responds directly to many of the recommendations made in the Robertson report.

The provision of high quality and safe supports is core to the work of NDS members. For this reason, NDS supports amendments to the NDIS Act that will help prevent the abuse and neglect endured by Ann Marie Smith from happening again. The comments that follow are offered to assist Parliament improve the safeguarding of participants.

### **Overarching comments**

In almost every submission NDS has made on NDIS Commission matters, we have argued that not requiring unregistered providers or persons to obtain NDIS worker clearance places NDIS participants using these supports at greater risk.

An NDIS worker clearance check should be a minimum requirement for all disability supports purchased with NDIS funds.

NDS supports the need for strengthening some elements of the NDIS Act to give greater protections for NDIS participants, particularly the ability to consider past behaviours. We do, however, ask that greater clarity be provided on what some of these mean in practice.

For example, the Fair Work Act already requires the HR files of past employees be retained for 7 years. It would be appropriate that this 7-year time period be applied to any requirements for an NDIS provider or person to be able to produce information about past conduct matters of a person who was employed or was a member of the key personnel of an NDIS provider.

It would be useful to understand what information on Board members should be held on the file of an NDIS provider beyond a record of an NDIS worker clearance check, record of any complaint/s made in association with their role as a Board member, and attendance at Board meetings.

NDIS providers came under the regulatory framework of the NDIS Commission over time, as jurisdictions fully transitioned to the scheme. New requirements on providers to hold information on some key personnel—notably Board members—should come into being at the time they were required to introduce them (for instance, in Western Australia from December 2020). Organisations cannot be expected to ‘retrofit’ their personnel records.

Related to this is how a past ‘association’ might be managed. If an organisation employed a worker for a period of time, who resigned and was subsequently banned for problems that occurred after that employment, what are the implications for that organisation? Will the information that they were a past employer of that banned worker become public knowledge? It would be unfair if this was the case.

NDS has not addressed the privacy concerns of individuals who may be subject to banning orders. The sector’s interest in this matter hinges on the importance of them knowing which worker is subject to a banning order and that this information also be readily available to participants who may be directly engaging a worker. NDS understands privacy matters are being considered by the Parliamentary Joint Committee on Human Rights.

One final comment is that NDIS price caps only have an allowance of 12 per cent for overheads, inadequate for organisations providing human services. The provision of high quality supports must be underpinned by prices that adequately cover the costs of regulatory compliance; currently they do not.

For clarity, we use the item numbers in the explanatory memorandum to structure our feedback, which is outlined below.

### **Item 1**

NDS has no concern about extending the definition of ‘protected Commission information’ to include information about a deceased person. We also support the change to the definition that means the Commission does not need to consult with a person about whether they object to the Commission disclosing that it has no information about that person. Measures to reduce delays in communicating are warranted.

**Item 2**

The insertion of 'or has contravened' after 'contravening' gives the Commission the necessary ability to use information about past conduct about persons when determining protections for participants. This is necessary.

**Item 3**

In a similar manner to the above, the insertion of 'or has met' after 'meeting' allows the Commission to issue a notice for a person to give information or produce a document which may be relevant to whether an NDIS provider is meeting, or has met, the conditions of registration noted in subsection 73F(1). The consideration of past conduct may be necessary to provide the appropriate protections of NDIS participants.

NDS understands why this may be necessary and requests guidance as to what documents may need to be produced and over what past time-period.

**Item 4**

NDS supports this amendment which clarifies the scope of the provision to encompass contraventions of the NDIS Code of Conduct by persons who were previously employed or engaged by an NDIS provider rather than limiting it to those who were employed or engaged at the time the notice was issued.

The amendment also extends the class of persons to whom the notice may relate by including current and previous members of an NDIS provider's key personnel.

Clear guidance should be given that this requirement applies from the date that the NDIS provider, its employees and key personnel had to meet the requirements of the NDIS Code of Conduct.

**Items 5 and 6**

Banning orders are an important safeguarding mechanism. NDS supports this amendment which requires a person to give information or produce a document which may be relevant to whether an NDIS provider or other person who is or was the subject of a banning order is providing or has provided supports or services in contravention of the order.

**Items 7, 8, 11 and 12**

The Robertson review identified a need to improve the information sharing across government and government agencies in order to better identify and protect vulnerable NDIS participants. NDS supports this amendment which will enable a person to record, disclose or use protected Agency information where the person reasonably believes that it is required to prevent or lessen a threat to an individual's life, health or safety.

NDS also supports the related amendment that will enable the Agency and the Commission to take into consideration a past threat against a participant's life, health or safety when making decisions about things like whether additional supports or protections should be put in place, or whether a provider or worker is suitable to continue providing NDIS supports.

The Robertson review found that the current threshold requirement of a 'serious' threat to an individual's life, health or safety to be too high and recommended its removal and replacement with a broader threshold of 'threat' to an individual's life, health or safety. NDS supports the amendment at item 11. We also support the amendment associated with item 12.

**Item 9, 10 and 13**

An important finding of the Robertson review was there should be a better exchange of information between the Agency and the Commission to enable the Commission to undertake its statutory functions in a more effective and efficient manner. NDS agrees that this should occur where it meets requirements of the Privacy Act 1988.

On a related matter, NDIS also supports item 10 which will enable NDIS rules to specify entities with a role in relation to persons with disability and facilitate information disclosure to those entities, including: early identification of people with disability who are at risk of harm or neglect; and to support a reasonable, necessary and proportionate safeguarding response by those entities.

**Item 14**

NDS notes the technical amendment will substitute 'NDIS providers' with 'persons'.

**Item 15**

The amendment associated with item 15 is logical. An applicant for registration should be able at any time, withdraw the application. If a provider's registration is revoked while an application for renewal of registration is pending, it is unlikely the provider's renewal application will be successful. Taking the person's application to have been withdrawn makes sense.

**Item 16 to 19**

The extension of the notice period from '28 days' to 'not less than 28 days' for the notice of intention of revocation to a registered provider is supported. Giving the Commissioner the ability to specify a longer period for a provider to appropriately respond to an intention of revocation notice is appropriate.

**Item 20 and 22**

This amendment removes any doubt that key personnel such as board members and chief executive officers of a registered provider are held to the same standard as providers and workers under the NDIS Act. NDS is pleased that this has been articulated.

**Item 21**

It is difficult to comment on this amendment as it is not possible to know what the conditions will be introduced.

NDS does, however, support the inclusion of subsection 73U(11) which allows the Commission to publish on the Commission's website a list of approved quality auditors.

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We also agree there is a need to monitor the performance of quality auditors in an effective, fair, and accurate manner. We note, however, the cost of NDIS quality audits has been a substantial impost on some service providers and are keen to ensure additional requirements on auditors are not passed onto service providers.

### **Item 23 and 24**

NDS supports these amendments which would clarify that NDIS providers are responsible for the notification and management of reportable incidents in accordance with the NDIS rules as well as prescribing the arrangements relating to the notification and management of these reportable incidents. Ambiguity should be avoided.

### **Item 25**

No comment.

### **Item 26**

NDIS rules should prescribe matters relating to the suitability of NDIS providers to which the Commissioner must have regard in determining whether to ban a person who is or was an NDIS provider. Clarity on these matters is important.

### **Item 28 to 37**

Given the NDIS Act describes particular requirements on key personnel – which includes Board members – clarity on the fact that a banning order can be made against a member of key personnel is appreciated. The related items, providing more structure around banning orders, are warranted.

### **Item 38**

Some providers may be concerned about this amendment which will allow the NDIS Provider Register to include information about a compliance notice that was in force, as well as a compliance notice that is in force. This type of information is available in other sectors, and is already available on another part of the NDIS Commission website. Giving participants more information to support their decisions is important.

One major weakness is, however, the fact that unregistered providers do not appear on the NDIS Commission's NDIS Provider Register. The visibility of unregistered providers who are subject to banning orders or a compliance notice also needs to be improved.

NDS asks that consideration be given to how information about banned workers can be made more visible to NDIS participants.

### **Items 39 to 51**

No comments are made on the amendments associated with these items as they are largely administrative in nature.

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**National Disability Services** is the peak industry body for non-government disability services. It represents service providers across Australia in their work to deliver high-quality supports and life opportunities for people with disability. Its Australia-wide membership includes more than 1150 non-government organisations which support people with all forms of disability. Its members collectively provide the full range of disability services—from accommodation support, respite and therapy to community access and employment. NDS provides information and networking opportunities to its members and policy advice to State, Territory and Federal governments.