

# Deliver high quality, safe services

## VCOSS Submission on the NDIS Code of Conduct

June 2017



## About VCOSS

The Victorian Council of Social Service (VCOSS) is the peak body of the social and community sector in Victoria. VCOSS members reflect the diversity of the sector and include large charities, peak organisations, small community services, advocacy groups, and individuals interested in social policy. In addition to supporting the sector, VCOSS represents the interests of vulnerable and disadvantaged Victorians in policy debates and advocates for the development of a sustainable, fair and equitable society.

This submission was prepared for VCOSS by Carly Nowell with input from VCOSS members.

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VCOSS acknowledges the traditional owners of country and pays its respects to Elders past and present.

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# Executive Summary

## Background

The Victorian Council of Social Service (VCOSS) welcomes the opportunity to provide a response to the National Disability Insurance Scheme (NDIS) Code of Conduct (Code).

The NDIS Code forms a central component of the NDIS Quality and Safeguarding Framework (the Framework), setting out the obligations providers and workers are expected to comply with when delivering NDIS services.

The Code has the potential to ensure participants receive high quality, safe service if it is designed and implemented effectively as part of the Framework. However, the Code will only be useful in driving positive behaviours and organisational culture if all parties are aware of their rights and responsibilities under the Code, and if the Code is actively regulated and enforced.

## Submission Recommendations

The VCOSS Submission makes a series of recommendations to strengthen the Code, such as including obligations about effective behaviour support and avoiding restrictive practices, and including a greater emphasis on gender and diversity. Overall, we support the Code's broad coverage of all workers, including executive level staff, and both registered and unregistered providers. However, we remain concerned about what quality control measures will apply to non-NDIS funded services in particular, and how the NDIS Code will align and interact with any existing state based mechanisms.

VCOSS recommends the NDIA develops a communication strategy to ensure all parties are aware of the Code and understand how it applies to them. This includes providing all workers and service providers with comprehensive training on their obligations and responsibilities, as well as their rights, under the Code.

We also recommend implementing a systematic method of educating unregistered providers about the Code. Relying on participants to inform unregistered providers about the Code unfairly places the onus and risk on individuals who choose to self-manage their plans. This is contrary to one of the key drivers of the NDIS reforms – to take the burden of navigating the service system off the participants.

VCOSS strongly supports the Code being made available in a wide range of easy to understand formats for people with disability, their families and carers, and mechanisms being implemented that will allow every participant to understand their rights and responsibly under the Code.

This would be complemented by building participants' skills and understanding of their rights and how to make a complaint, through capacity building support in NDIS plans. One of these mechanisms would be increasing funding to independent disability advocacy, specifically to assist more people with disability access support to understand their rights or make a complaint.

VCOSS believes that it is crucial the NDIS Quality and Safeguards Commission (the Commission) has strong corrective powers and uses these effectively to address and remedy breaches of the Code. Individual cases should be resolved effectively and promptly, so people with disability are safe and receive quality services.

Complaints and breaches of the Code should also inform a systemic response of improvements through an established quality assurance mechanism, for the relevant provider and/or the broader sector, aimed at reducing the likelihood of future breaches. This must include adequate mechanisms to monitor and enforce actions for unregistered providers, so self-managing participants are not exposed to greater risk of unsafe or poor quality services. Strong whistleblower protections will also help people feel safe to make a complaint or report a breach of the Code.

We believe the proposed system for regulating compliance with the Code is too reactive, relying on complaints and incident reports. VCOSS recommends the Commission includes a formalised audit function to proactively monitor providers and identify issues, through both targeted and random audits. To effectively perform its functions the Commission requires adequate staffing and resources.

Monitoring and evaluating compliance with the Code will help determine whether it is successful in providing safe, high quality services. VCOSS believes this will drive continuous improvement. We also recommend the Commission publicly reports on the nature and frequency of complaints and outcomes, breaches of the Code and the corrective action undertaken to provide transparency and accountability.

Our recommendations are based on what we currently know about the Code and the Commission's functions and powers. We note the NDIS Amendment (Quality and Safeguards Commission and Other Measures) Bill 2017, which establishes the functions and powers of the Commission, is currently before the Senate and subject to a Senate inquiry with reporting in early September.

# Summary of recommendations

## Strengthen the Code

### Reflect the voices of people with disability

- Engage people with disability in the design and implementation of the Code and how it's regulated and enforced, including input into the appointment of the Commissioner.

### Ensure broad coverage

- Retain broad coverage of the Code for all providers and workers funded under the NDIS, including unregistered providers.
- Ensure quality control measures will apply to non-NDIS funded services and clarify how the Code will interact with any state based measures.

### Include restrictive practices

- Include obligations about delivering safe and effective behavioural support for participants and avoiding the use of restrictive practices.

### Clarify obligations and responsibilities

- Provide additional guidance about how obligations under the Code will be measured.
- More clearly delineate the responsibilities between providers and workers.
- Provide more guidance about when matters require police notification.

### Strengthen references to gender and diversity

- Strengthen reference to gender in the Code in consultation with specialist women's services and violence prevention organisations such as OurWatch.
- Explicitly include the rights of participants to choose the gender of their support workers.
- Strengthen reference to upholding equality and respecting diversity when delivering services.

### Enhance the scenarios

- Enhance and add to existing scenarios to demonstrate more commonly experienced situations and complex situations which may be faced by people with disability or workers.

## **Help people understand and use the Code**

### **Implement a communications strategy**

- Develop and implement a communication strategy to promote broad knowledge and understanding of the Code.

### **Educate all service providers about the Code**

- Ensure the orientation process includes comprehensive training on the Code.
- Provide a systematic method of educating unregistered providers about the Code.

### **Empower people with disability**

- Provide the Code in a wide range of easy to understand formats, to reach different audiences.
- Explain the Code to every participant in a way they understand and provide them with a copy in their preferred format.
- Include capacity building support in people's NDIS plans to build their skills and knowledge of their rights, concepts of safety and how to make a complaint.

### **Fund advocacy organisations**

- Increase funding for disability advocacy to assist more people to understand their rights and make a complaint.

## **Monitor and enforce the Code**

### **Power to investigate and enforce action**

- Ensure the Commission uses its power to investigate individual cases, organisations and systemic issues of concern.
- Ensure the Commission has adequate powers and uses these to monitor and enforce meaningful corrective action for both registered and non-registered providers.

### **Include an audit function**

- Include an audit function to proactively monitor NDIS providers through random and targeted audits.

### **Adequately resource the Commission**

- Adequately resource the Commission so it can effectively perform all of its functions.
- Ensure the Commission has a physical presence in each state and territory.
- Ensure staff involved in investigations have adequate skills and experience to effectively communicate with all NDIS participants, and are able to identify early warning signs of abuse and neglect and breaches of the Code.

### **Adequately manage unregistered providers**

- Ensure there are adequate mechanisms to monitor unregistered providers and powers to enforce actions where breaches of the Code are identified.

### **Implement clear complaints processes and whistleblower protections**

- Retain the Commission's 'no wrong door' policy for complaints.
- Ensure anyone in the community is able to make a complaint, including advocates.
- Ensure strong whistle-blower protections are implemented to protect people who raise issues or make a complaint.

### **Evaluate and publicly report on compliance with the Code**

- Publicly report on the nature and frequency of complaints and outcomes, breaches of the Code and corrective action undertaken.
- Monitor and evaluate sector compliance with the Code to identify systemic trends and use this to drive continuous improvement and educate the sector.

# Strengthen the Code

## Reflect the voices of people with disability

### Recommendation

- Engage people with disability in the design and implementation of the Code, and how it's regulated and enforced, including input into the appointment of the Commissioner.

People with disability, their families, carers and advocates are well placed to advise on what works best in relation to the Code, based on their direct experience of disability. These groups of people should, therefore, be at the centre of decision-making about the design, development and implementation of the Code. This includes being fully engaged about how the Code is regulated and enforced, including having input into the appointment of the Commissioner.

VCOSS members have continually highlighted the inadequacy of existing complaints mechanisms, including:

- insufficient power to direct action
- conflicts of interest
- lack of analysis to identify systemic issues
- inadequate resources to properly monitor services.

They warn against creating a Code framework, full of well-meaning, motherhood statements that have little or no impact in actual practice. VCOSS supports a Code that is designed, developed and delivered in a way that reflects the real, lived experiences of people with disability.

## Ensure broad coverage

### Recommendations

- Retain broad coverage of the Code for all providers and workers funded under the NDIS, including unregistered providers.
- Ensure quality control measures will apply to non-NDIS funded services and clarify how the Code will interact with any state based measures.

VCOSS endorses applying the Code to all providers and workers funded under the NDIS, including registered and unregistered NDIS providers, providers delivering Information, Linkages and Capacity building (ILC) activities, Early Childhood Early Intervention (ECEI) services, and Local Area Coordination (LAC).

In particular, we welcome the term ‘providers’ being inclusive of “any person with responsibility or influence over planning, direction or decisions, including board members and stakeholders or significance”.<sup>1</sup>

VCOSS members too often report that management and senior executives have not acted on early warning signs of abuse, have ignored or dismissed concerns about suspected abuse or poor practices or worse, have actively ‘covered up’ reports concerning people with disability.<sup>2,3,4</sup> We, therefore, endorse the broadest scope for the term ‘workers’ in the Code to include all employees, contractors, consultants, volunteers and people who are self-employed.

*“Evidence was also presented that showed a propensity for reports to service providers about violence and abuse to be ignored, swept under the carpet or treated as a ‘workplace issue’ rather than a crime.”<sup>5</sup>*

The question still remains, however, about what quality control measures will apply to non-NDIS funded services in this regard. The 2015 Commonwealth Senate Standing Committee on Community Affairs report into violence, abuse and neglect, recommended a national system for reporting, investigating and eliminating violence, abuse and neglect of people with a disability, which covered “all disability workers, organisations and people with disability, without being restricted to NDIS participants.”<sup>6</sup> The Code and NDIS Quality and Safeguarding Framework will only apply to NDIS providers and participants, potentially leaving a major gap in coverage and a range of associated risks in relation to this.

In Victoria, the government is introducing a Code for disability workers as part of the *Disability Abuse Prevention Strategy*. Initial information about the NDIS Code indicates it will apply during the transition period, up until the full roll out of the NDIS in July 2019.<sup>7</sup> It is unclear if it will continue beyond this point. It is also unclear how the Victorian Code and the NDIS Code will align or interact, specifically which will have precedence. This may cause confusion and unnecessary distress for all parties involved including workers, providers, people with disability and their family and carers.

VCOSS recommend non-NDIS funded services also be subject to robust quality control measures, beyond the full rollout of the NDIS, and that clarification is provided as soon as possible about how the NDIS Code will interact with any state based measures.

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<sup>1</sup> Department of Social Services, *National Disability Insurance Scheme (NDIS) - Code of Conduct Discussion Paper*, pp.10.

<sup>2</sup> Parliament of Victoria Family and Community Development Committee, *Inquiry into abuse in disability services Final Report*, May 2016.

<sup>3</sup> Community Affairs References Committee, *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*, Commonwealth of Australia 2015, November 2015, p.xxvi

<sup>4</sup> For example, ABC News, [Abuse in the disability sector has been exposed](#), 26 November 2014.

<sup>5</sup> Community Affairs References Committee, *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*, Commonwealth of Australia 2015, November 2015, p.xv

<sup>6</sup> Community Affairs References Committee, *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*, Commonwealth of Australia 2015, November 2015, p.xv

<sup>7</sup> Media Release, [Protecting The Safety Of People With A Disability](#), Victorian Government, November 2016.

## Ban restrictive practices

### Recommendation

- Include obligations about delivering safe and effective behavioural support for participants and avoiding the use of restrictive practices.

The Code does not include obligations for workers and providers to deliver safe and effective behavioural support for participants and avoid the use of restrictive practices. Delivering safe, high quality services for people with disability and upholding their rights necessitates avoiding the use of restrictive practices, such as seclusion and physical or chemical restraint.

The NDIA has stated their intention to reduce or eliminate restrictive practices through the NDIS Quality and Safeguarding Framework. The Commission will also monitor the use of interventions which restrict the rights or freedom of movement of a person with disability. Eliminating the use of restrictive practices could be reinforced by explicitly stating worker and provider obligations in the Code, which VCOSS would strongly support.

## Clarify obligations and responsibilities

### Recommendations

- Provide additional guidance about how obligations under the Code will be measured.
- More clearly delineate the responsibilities between providers and workers.
- Provide more guidance about when matters require police notification.

VCOSS are pleased the Code includes 'obligations' workers and providers must meet, however, VCOSS members question how several of these will be measured. For example, a provider must offer reasonable supervision and take reasonable steps to ensure workers are competent and supported to perform their role. While we support this obligation, it is unclear how this will be measured and if it will adequately capture the higher levels of supervision and training likely required for workers assisting participants with complex needs. Without adequate NDIS funding to support these obligations, there is a risk services may refuse to assist participants with complex needs.

VCOSS members report the current NDIS pricing structure is too low to reflect the true costs of service delivery, including existing staffing structures, supervision and professional development<sup>8</sup>. Pricing limitations are particularly inadequate to meet the costs of delivering quality services to participants with complex and high support needs.<sup>9</sup> The current pricing structure may lead to a deskilling of the workforce and/or a focus on supporting people with disability with the lowest level of support needs.

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<sup>8</sup> VCOSS, [VCOSS submission to the NDIS 2017 Price Controls Review](#), April 2017.

<sup>9</sup> VCOSS, [VCOSS submission to the NDIS 2017 Price Controls Review](#), April 2017.

Similarly, VCOSS supports the requirement for providers and workers to be competent in the types of supports and services they deliver. It is unclear, however, if or how this will reflect the additional skills required to effectively support participants with complex needs, including those with serious mental illness, dual disability and dual diagnosis. VCOSS notes VICSERV's submission on the NDIS Code, which illustrates this issue in further detail.

VCOSS members report it will be challenging to retain and recruit adequately qualified workers who can deliver effective support and therapeutic services within current NDIS pricing constraints.<sup>10</sup> Providing additional information to clarify how obligations will be measured could help workers and providers understand their responsibilities and more easily comply with the Code.

VCOSS supports VICSERV's recommendation for the NDIA to consider the expertise required to support NDIS participant's with psychosocial disability and determine how this can be recognised in the Framework. While outside the scope of the review, VCOSS reiterates our call for the NDIA to review and amend pricing structures.<sup>11</sup>

Adherence to the Code relies on strong commitment and leadership from providers, to provide workers with time to familiarise themselves with the Code and undertake funded training. It also requires a commitment to develop organisational policies and practices which support the Code. To help clarify the obligations of providers, the Code could more clearly delineate between the responsibilities of providers and workers, including expectations of workers if they are directed by their manager to act in breach of the Code. VCOSS members also suggest clarifying the responsibility of all parties involved in sub-contracting arrangements.

VCOSS welcomes the Code's explicit reference to "alleged criminal acts" and "incidents of violence, exploitation, neglect and abuse" being referred to the police".<sup>12</sup> Too often crimes or acts which might be a crime are treated as an 'incident' to be dealt with internally, and are therefore not reported.<sup>13</sup> Some breaches of civil law may also require referral to police, but VCOSS members report there is low level of knowledge and understanding among services providers and workers about when this should occur and on what basis. The Code should provide more guidance about when matters require police notification.

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<sup>10</sup> VCOSS, [VCOSS submission to the NDIS 2017 Price Controls Review](#), April 2017.

<sup>11</sup> Ibid.

<sup>12</sup> Department of Social Services, *National Disability Insurance Scheme (NDIS) - Code of Conduct Discussion Paper*, pp.12, 16, 30.

<sup>13</sup> Victorian Equal Opportunity and Human Rights Commission, *Beyond doubt: The experiences of people with disabilities reporting crime – Research findings*, P.37

## Strengthen references to gender and diversity

### Recommendations

- Strengthen reference to gender in the Code in consultation with specialist women's services and violence prevention organisations such as OurWatch.
- Explicitly include the rights of participants to choose the gender of their support workers.
- Strengthen reference to upholding equality and respecting diversity when delivering services.

Women with disabilities experience higher levels of all forms of violence than other women and are subjected to violence by a greater number of perpetrators. Given the gendered nature of violence, we support Women with Disability Victoria's recommendations to strengthen references to gender in the Code particularly under Section 2.2 (Actively prevent all forms of violence, exploitation, neglect and abuse) and Section 2.7 (Not engage in sexual misconduct) in consultation with specialist women's and violence prevention organisations such as OurWatch.<sup>14</sup> We also recommend explicitly including the right to choose the gender of support workers.

VCOSS is pleased the Code makes specific reference to recognising diversity and respecting people's needs, values, and beliefs including those relating to culture, religion, ethnicity, gender, identity, age and disability. However, VCOSS members report there could be a stronger emphasis on equality and diversity. For example the Code could specifically reference some of the legislative instruments which relate to diversity and equality such as the Discrimination Acts are relevant and the Sex Discrimination Act.

The wording of the Code in Section 2.1 could be strengthened from 'take into account' to 'respect' or 'act in accordance with' people's expressed needs, values, and beliefs. The Code could also include a requirement for organisations to be culturally safe and demonstrate gender sensitive practice, and ensure workers undertake relevant training.

## Enhance the scenarios

### Recommendation

- Enhance and add to existing scenarios to demonstrate more commonly experienced situations and complex situations which may be faced by people with disability or workers.

Scenarios are a useful feature to help illustrate how the Code will apply in practice. However, VCOSS members report some of the case studies are not realistic and do not represent common

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<sup>14</sup> Women with Disabilities Victoria, *NDIS Code of Conduct, Submission to DSS*, June 2017.

scenarios experienced by people with disability. For example under section 2.1, it would be useful to include a scenario demonstrating the rights of women to choose a female personal care worker.

We welcome the obligation for providers and workers to not disclose any personal details about a person with disability without consent. We note there may be some complex situations faced by workers and providers, such as when a participant's information should be shared for their safety, such as if a worker witness's the participant experiencing family violence.

Additional scenarios could help demonstrate the best actions in these cases, such as those identified in Women with Disabilities Victoria's Submission<sup>15</sup>.

We also support Carer NSW and Carers Victoria's recommendation to extend the right of privacy to Carers, as their personal information may be contained on these records<sup>16</sup>.

VCOSS recommend engaging people with disability, carers and advocacy organisations to enhance and add to the scenarios so they are based on lived experiences, and are therefore, more likely to be useful for people trying to understand their rights and responsibilities under the Code.

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<sup>15</sup> Women with Disabilities Victoria, *NDIS Code of Conduct, Submission to DSS*, June 2017.

<sup>16</sup> Carers NSW and Carers Victoria, joint submission on the NDIS Code of Conduct Discussion Paper, 19 June 2017, pp. 5-6.

# Help people understand and use the Code

## Implement a communications strategy

### Recommendation

- Develop and implement a communication strategy to promote broad knowledge and understanding of the Code.

A Code is of little use if people are unaware it exists or how it applies to them. VCOSS believes the NDIA has a responsibility to proactively educate people with disability, their families and carers, providers and workers about the Code.

We recommend a communication strategy is implemented to promote broad knowledge and understanding of the Code, including people's rights and responsibilities. This could also include educating people about processes for reporting breaches and how to escalate complaints where required.

VCOSS members have noted that the very concept of a Code, and what it entails, is not generally understood by the community. As such, VCOSS recommends that the Code could be rebranded, renamed, or sub-titled, to assist people in the broader community to readily understand both its intent and significance.

## Educate all service providers about the Code

### Recommendations

- Ensure the orientation process includes comprehensive training on the Code.
- Provide a systematic method of educating unregistered providers about the Code.

For the Code to be meaningful and help drive quality service provision, all workers and providers require a thorough understanding of their obligations and responsibilities under the Code and the rights of people with disability. Registered providers, including all workers delivering NDIS funded supports, are required to undertake a compulsory orientation module.

The consultation paper states the orientation module will include information on the Code, but there is no detail specifying how thorough this will be.<sup>17</sup> VCOSS recommend all workers and providers involved with NDIS undergo comprehensive training on the Code as part of the orientation process.

Unlike registered providers, the orientation module is optional for unregistered providers and there is no formal mechanism for informing unregistered providers about their obligations under the Code.<sup>18</sup>

VCOSS and its members are concerned about the reliance on self-managing participants to inform unregistered providers about the Code.<sup>19</sup> This unfairly places the onus and risk on individuals who choose to self-manage their plans. It also relies on these participants having the confidence and skills to inform providers about their responsibilities. Fundamentally, this approach is contrary to a key driver of system reform being introduced through the NDIS – to take the burden of navigating the service system off the person with a disability.

Providing a systematic method of educating unregistered providers about the Code, could help ensure all providers are aware of their responsibilities. For example, the NDIA could mandate unregistered providers undertake the orientation including education on the Code. This is crucial given the Code is the primary quality control mechanisms for non-registered providers, as they are not subject to other registration and oversight arrangements.

## Empower people with disability

### Recommendations

- Provide the Code in a wide range of easy to understand formats, to reach different audiences.
- Explain the Code to every participant in a way they understand and provide them with a copy in their preferred format.
- Include capacity building support in people's NDIS plans to build their skills and knowledge of their rights, concepts of safety and how to make a complaint.

People with disability and their carers need to know the Code exists, understand its significance and feel empowered and safe to make a complaint. VCOSS members recommend the Code is explained to every participant in a way they understand, and that people are not simply given information on the Code to review themselves. People are already being required to take in large quantities of information when transitioning to the NDIS and there is a risk information about the Code could inadvertently be overlooked.

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<sup>17</sup> Department of Social Services, *National Disability Insurance Scheme (NDIS) - Code of Conduct Discussion Paper*, p.10.

<sup>18</sup> Department of Social Services, *NDIS Quality and Safeguarding Framework*, 9 December 2016, p.58

<sup>19</sup> Department of Social Services, *National Disability Insurance Scheme (NDIS) - Code of Conduct Discussion Paper*, P.10.

Educating people on the Code could easily be built into the process for entering the scheme, such as informing people about the Code during the initial planning process.

The initial explanation of the Code could be supplemented by providing participants with a copy of the Code in their preferred format and building in a subsequent review mechanism to check for understanding and provide an opportunity for any follow-up questions and clarification on rights and responsibilities.

Lengthy, detailed documents are generally not easy for anyone to readily absorb and understand. Making the Code and any supporting material easy to understand and available in a wide range of accessible formats, including an Easy English version, will help reach more and different audiences. For example, the NDIA could develop short narrated video clips on social media explaining each aspect of the Code, and develop easy to follow flowcharts on how to make a complaint.

VCOSS members warn against simply creating a range of factsheets and/or frequently asked questions and placing these on a website. Online communication does not reach everyone, particularly those most marginalised. People with disability and those facing disadvantage are more likely to have limited or no access to the internet,<sup>20</sup> experience accessibility issues,<sup>21</sup> or lack the digital literacy required to find information or apply for the scheme.

Building the capacity of people with disability to better understand their rights and concepts of safety could help empower participants to raise concerns and assert their rights. This could be achieved by including a line item in participant's NDIS plans under capacity building supports. This support could build participants' knowledge and confidence in a range of areas including:

- understanding their rights
- what it means to feel safe
- what types of behaviours are acceptable and unacceptable
- what constitutes violence, abuse and neglect
- principles around privacy and consent for information sharing, including circumstances which compel people to share information
- what to do if they people receive poor quality services or feel unsafe
- how to seek support to make a complaint.

If people do not fully understand these concepts or have a history of receiving poor quality services, they may be less likely to enact their rights and report breaches of the Code. They may also fear reprisal from complaining.

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<sup>20</sup> Women with Disabilities Victoria and Self Advocacy Resource Unit, *Your Say, Your Rights: A Project about Information and Communication Technology and Women with Disabilities*, Melbourne, Australia, 2012.

<sup>21</sup> G Goggin, S Hollier, and W Hawkins, [Internet accessibility and disability policy: lessons for digital inclusion and equality from Australia](#), Internet Policy Review, 6(1), 2017.

Capacity building support is potentially useful for all participants when transitioning to the NDIS, but particularly for participants who choose to self-manage, young people, people with intellectual disability or cognitive impairment and those who are marginalised.

## Fund advocacy organisations

### Recommendation

- Increase funding for disability advocacy to assist more people to understand their rights and make a complaint.

Independent disability advocacy is a crucial safeguard for people with disability, particularly those who are most marginalised, and can help address the power imbalance between individuals and service providers. Advocacy organisations can help raise awareness of the Code among people with disability, their families and carers and the broader disability sector; build people's capacity to understand their rights; and assist people to raise a concern or make a complaint. Advocates can also identify and report systemic issues to the Commissioner to improve sector practice and help prevent future cases of violence, abuse or neglect.

Investing in a strong and diverse disability advocacy sector can enable advocacy organisations to perform this work and reach more people. There are not enough disability advocacy services and VCOSS members advise there is large unmet demand which is likely to grow as the NDIS rolls out. The Federal parliamentary inquiry into violence, abuse and neglect against people with disability in institutional and residential settings, identified that "significant investment" in funded advocates is required "to deliver equitable access and representation of issues and to match the increased demand for advocacy anticipated under the NDIS".<sup>22</sup>

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<sup>22</sup> Community Affairs References Committee, *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*, Commonwealth of Australia 2015, November 2015, p.xx

# Monitor and enforce the Code

## Power to investigate and enforce action

### Recommendations

- Ensure the Commission uses its power to investigate individual cases, organisations and systemic issues of concern.
- Ensure the Commission has adequate powers and uses these to monitor and enforce meaningful corrective action for both registered and non-registered providers.

A Code is meaningless unless it is properly regulated and enforced. VCOSS are pleased the Commission will 'have own motion powers to commence an investigation as a result of any information it receives' and will be 'empowered to take a range of compliance and enforcement actions proportionate to the seriousness of the breach'.<sup>23</sup> We believe these own motion powers should enable investigations into individual cases, organisations and systemic issues of concern.

A range of potential regulatory actions are briefly outlined in the paper, and further detailed in the proposed National Disability Insurance Scheme Amendment (Quality and Safeguards Commission and Other Measures) Bill 2017. It is crucial the Commission has adequate corrective powers and uses these to promptly resolve individual cases so people with disability are safe and receive quality services.

VCOSS member report too often reports or complaints are not dealt with in an effective, fair and prompt manner. There is too much emphasis on seeking conciliation rather than making a finding and taking action against the perpetrator(s).<sup>24</sup> Ensuring complaints and breaches of the Code are used to inform a systemic response for the relevant provider and/or the broader sector can also help reduce the likelihood of future breaches.

## Include an audit function

### Recommendation

- Include an audit function to proactively monitor NDIS providers through random and targeted audits.

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<sup>23</sup> Department of Social Services, *National Disability Insurance Scheme (NDIS) - Code of Conduct Discussion, Discussion Paper*, 2017, p.12

<sup>24</sup> Community Affairs References Committee, *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*, Commonwealth of Australia 2015, November 2015, p.269

Based on the consultation paper the Commission's role appears to be primarily reactive, relying on complaints, incident reporting from providers and reports from the Senior Practitioner on restrictive practices. The NDIS Quality and Safeguarding Framework<sup>25</sup> indicates providers delivering 'higher risks supports<sup>26</sup>' will be subject to audits undertaken by trained third party auditors. However, there do not appear to be any other proactive monitoring of providers intended.

VCOSS recommends the Commission includes an audit function to proactively monitor providers and identify issues. This could include both targeted and random audits to monitor compliance with the Code. This has the benefit of identifying lower level breaches of the Code which may not have been serious enough to result in a complaint or incident report.

Proactive monitoring of compliance against the Code is more likely to drive systemic cultural change and promote better reporting practices, as providers will be unaware if or when they may be subject to a random audit.

VCOSS members also report relying solely on complaints and incident reports, may lead to the unintended consequence of services pressuring participants or workers not to report or actively covering up incidents. Without a monitoring and audit function, it will be difficult to determine whether incidents have gone unreported.

## Adequately resource the Commission

### Recommendations

- Adequately resource the Commission so it can effectively perform all of its functions.
- Ensure the Commission has a physical presence in each state and territory.
- Ensure staff involved in investigations have adequate skills and experience to effectively communicate with all NDIS participants, and are able to identify early warning signs of abuse and neglect and breaches of the Code.

To effectively perform its functions the Commission requires adequate staffing and resources. The 2017 federal budget included \$209 million over four years from 2017-18 to establish and operate the Commission.<sup>27</sup> However, the Commission has a broad range of functions and it is unclear how much of this funding will be available to proactively monitoring providers, conduct own motion investigations and enforce actions for providers and workers who have breached the Code.

We believe the Commission should have a physical presence in each state and territory, to increase its visibility to all parties and to assist with local monitoring and regulatory action.

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<sup>25</sup> Department of Social Services, [NDIS Quality and Safeguarding Framework](#), 9 December 2016, p.87.

<sup>26</sup> The NDIA has not finalised the full list of high-risk supports but anticipates this will allied health services not covered by AHPRA registration, services involving the implementation of behaviour support plans and restrictive practices, and early childhood intervention services.

<sup>27</sup> Department of Social Services, [Guaranteeing the NDIS and providing stronger support for people with disability](#), Media Release, 9 May 2017.

Staff undertaking investigations or monitoring require adequate skills and experience to effectively communicate with all NDIS participants, and be able to identify early warning signs of abuse and neglect and breaches of the Code. This may require a combination of training and ongoing professional development, as well as access to specialists such as interpreters and people with expertise in augmentative and alternative communication.

## Adequately manage unregistered providers

### Recommendation

- Ensure there are adequate mechanisms to monitor unregistered providers and powers to enforce actions where breaches of the Code are identified.

VCOSS and its members are concerned the current mechanisms for determining whether unregistered providers are meeting their obligations under the Code are inadequate and unsafe. Unregistered providers are not currently required to report incidents of concern to the Commission<sup>28</sup> and are not subject to other regulatory processes or required to complete an orientation module. Without a monitoring and audit function, as we recommend above, the only mechanism for alerting the Commission to any issues is via complaints or voluntary incident reports. This potentially exposes self-managing participants to greater risks of unsafe or poor quality services.

Under the proposed NDIS Amendment (Quality and Safeguards Commission and Other Measures) Bill 2017, unregistered providers and employees may be subject to banning orders prohibiting or restricting their activities. VCOSS and its members are keen to obtain further detail on how these will operate in practice and to ensure these orders will be used effectively to promptly address non-compliance.

## Implement clear complaints processes and whistleblower protections

### Recommendations

- Retain the Commission's 'no wrong door' policy for complaints.
- Ensure anyone in the community is able to make a complaint, including advocates.
- Ensure strong whistle-blower protections are implemented to protect people who raise issues or make a complaint.

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<sup>28</sup> Department of Social Services, *NDIS Quality and Safeguarding Framework*, 9 December 2016, p.25

VCOSS support the operation of a ‘no wrong door’ policy for complaints,<sup>29</sup> as it can be confusing for people with disability, their families or carers to know where to lodge complaint, as this has been identified as a real barrier to reporting of issues to date.

VCOSS also endorse that ‘anyone will be able to make a complaint about NDIS funded supports ... including participants, family members, friends, providers, workers and advocates’<sup>30</sup>. Enabling everyone, including carers, neighbours, member of the public who witness an incident and advocates to be able to make a complaint, will help provide stronger protections to people with disability.

In particular, VCOSS members highlight the crucial role advocates can play in this process. Advocates can assist individuals to understand their rights and identify breaches of the Code, navigate the reporting process and build people’s skills and confidence to make a complaint. Investigations into the reporting of abuse confirms VCOSS member views, finding “*there is a critical role for advocates to assist people with disability*” particularly “*where people were afraid to complain or faced difficulties in doing so*”.<sup>31</sup>

Advocates are also well placed to identify and report systemic issues or trends to the Commission, to inform investigations. For example, some VCOSS members report they have already received negative feedback from several NDIS participants about a particular provider. By receiving and acting on this information, the Commission could help identify and address issues early.

VCOSS supports the intention to include whistleblower protection for employees, contractors, committee members, partners, people with disability, or their nominee, family member, carer or significant others in the quality and safeguarding legislation. Strong whistleblower protections are required to protect people who raise issues or make complaints. Staff who report incidents may fear for their jobs without adequate protections, and people with disability their families and carers may fear reprisal, such as reduced support or withdrawal of services.

Fear of reprisal has been identified as a major barrier to reporting abuse, in numerous reviews and inquiries<sup>32,33</sup>. Robust legislative protections would be augmented by clear processes for reporting and escalating issues, along with mechanisms to foster cultures which encourages and enable employees and others to safely report issues.

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<sup>29</sup> Department of Social Services, *National Disability Insurance Scheme (NDIS) - Code of Conduct Discussion, Discussion Paper*, 2017, p.12

<sup>30</sup> Department of Social Services, *National Disability Insurance Scheme (NDIS) - Code of Conduct Discussion Paper*, p.12.

<sup>31</sup> Victorian Ombudsman, [Reporting and investigation of allegations of abuse in the disability sector: Phase 2 – incident reporting](#), December 2015, p.18.

<sup>32</sup> Parliament of Victoria, Family and Community Development Committee, *Inquiry into abuse in disability services*, Final Report, 26 May 2017.

<sup>33</sup> Victorian Ombudsman, [Reporting and investigation of allegations of abuse in the disability sector: Phase 2 – incident reporting](#), December 2015, p.18.

## Evaluate and publicly report on compliance with the Code

### Recommendations

- Publicly report on the nature and frequency of complaints and outcomes, breaches of the Code and corrective action undertaken.
- Monitor and evaluate sector compliance with the Code to identify systemic trends and use this to drive continuous improvement and educate the sector.

Annual public reporting on the nature and frequency of complaints and outcomes, breaches of the Code and corrective action undertaken, will help increase transparency and confidence in the Commission and the NDIS Quality and Safe Guarding Framework. It may also help increase compliance with the Code among providers by increasing awareness of the types of breaches and disciplinary actions undertaken. This aligns with the Commissioner's function in the proposed legislation to 'collect, analyse and disseminate information relating to complaints, reportable incidents, the use of behaviour supports and restrictive practices.

Monitoring and evaluating sector-wide compliance with the Code, will help determine whether it is successful in providing safe, high quality services. It will also help to help determine trends and systemic issues which require sector-wide preventative action. It is crucial this information is used to drive continuous improvement, such as amending the Code, educating providers or people with disability, increasing awareness of rights and responsibilities, undertaking more audits or other preventative action by the Commission.

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