

EFFECTIVENESS OF THE NDIS QUALITY AND SAFEGUARDS COMMISSION'S REGULATORY FUNCTIONS

Submissions to the Australian National Audit Office

October 2024

About Us

Villamanta Disability Rights Legal Service Inc. (**Villamanta**) has been providing advocacy and legal services to people with disability since 1990. We are funded to provide advocacy under the National Disability Advocacy Program, NDIS Appeals and the National Legal Assistance Partnership Agreement.

Villamanta engages in the following activities which inform this submission:

- **Telephone Information Service** – our intake team receives around 2,000 contacts per year from people with disability seeking assistance.
- **Advice calls** – our legal team provide discrete advice to over 150 people with disability per year.
- **Casework** – we provide representation to individuals, most of whom have a cognitive impairment, some of whom have or are experiencing financial abuse.

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Introduction

Thank you for the opportunity to contribute to the Australian National Audit Office's (ANAO) investigation into the NDIS Quality and Safeguards Commission (NDIS Commission).

Villamanta supports individuals with disability to navigate complaint and reporting processes, and assert their rights in relation to the quality and appropriateness of their NDIS funded supports.

Role of the NDIS Commission

We note the following functions of the NDIS Commission under the *National Disability Insurance Scheme Act 2013* (Cth):

Section 181E

- (a) to uphold the rights of, and promote the health, safety and wellbeing of, people with disability receiving supports or services, including those received under the National Disability Insurance Scheme;
- (e) to promote continuous improvement amongst NDIS providers and the delivery of progressively higher standards of supports and services to people with disability;

Section 181G

- (c) to build the capability of people with disability to pursue complaints in relation to the provision of supports or services by NDIS providers;
- (e) to 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.

Our submissions below are made in the context of our experience with the NDIS Commission in fulfilling these roles.

General observations of the NDIS Commission's performance

In the last year, Villamanta has made at least six complaints to the NDIS Commission on behalf of clients. We have encountered significant delays in receiving a response, and instances where a response has not been received at all.

Our intake team regularly refer enquiries to the NDIS Commission for complaints. We have recorded 37 referrals in the last year. Clients have reported delays to us as well (when lodging their own complaints with the NDIS Commission), sometimes months to receive a response and months between responses.

In our experience, communication within the NDIS Commission and to complainants is inconsistent, not proactive and extremely slow.

The NDIS Commission's Feedback and Complaints Policy notes that "we aim to resolve simpler complaints within 14 days and more complex complaints within 90 days." In our experience, the Commission is not meeting these timeframes.

Effectiveness of the NDIS Quality and Safeguards Commission's regulatory functions

The policy also stipulates that “we will.. explain clearly what we can and cannot do..we will give you (or your representative) clear reasons for our decisions.”

In our experience, responses from the NDIS Commission are often very difficult to interpret and use a lot of internal terminology (such as referring to their various divisions). This renders the complaints process inaccessible to our clients with cognitive impairments, and is often too inaccessible for our lawyers to make sense of.

This is entirely inappropriate for an organisation communicating with people with disability. In fact, responses are often difficult to interpret and understand, even to lawyers.

The below example seeks to demonstrate some of the problems we have encountered in the timeliness of information gathering and sharing by the Commission.

Case Study

In October 2023 a nominee of our client made a complaint to the NDIS Commission regarding amounts being charged by an NDIS provider.

On 19 October 2023, an offer was made by the Commission to discuss the matter with the nominee, who responded the same day proposing times. No response was received from the Commission despite numerous email follow-ups.

On 29 November 2023 the nominee was advised that the Commission had spoken to the provider and outlining their response to the complaint.

In February 2024 the nominee was advised that the officer “would like to pass this matter to the Regulatory Operations Division for compliance action.” No explanation was given as to what this means, and what the nominee can expect from this process, or what happens to the complaint.

Meanwhile the nominee has engaged Villamanta to assist with the matter. We followed up with the Commission on 17 June 2024 to ascertain the status of the complaint and were advised on 25 June 2024 that

“I can confirm this matter was escalated to the NDIS Commission’s Regulatory Operations Division for assessment and to take into consideration of the current ongoing compliance action. Further updates will be provided as soon as they become available.”

We replied the same day:

“I’m sure you must hear this a lot, but I have no idea what that means? We are looking for an answer as to whether (provider) can charge our client in the way that it is, given that it seems completely wrong. Who can assist with this matter?”

No response was received, and on 15 July 2024 we escalated the matter to the Feedback and Complaints division, laying out the specifics of the matter and what outcome was sought.

On 16 July 2024 we received a response to this complaint, explaining what happens next and stating:

“The IIU will review your complaint and current information held by the NDIS Commission and take steps to determine whether a remedy needs to be applied to

address your concerns. During this initial review process, we may need to seek from you, additional information. We hope to be able to contact you again within seven days.”

No contact was made. We followed up on 29 August 2024 and received no reply to this request either.

We finally received a reply on 25 September 2024, being informed that:

“I can see that the complaint is open with the Provider Relations Team and that the matter has also been escalated for further assessment to the Regulatory Operations Team.”

In summary:

- The NDIS Commission failed to respond within the indicated timeframes, and in some instances failed to respond at all.
- The NDIS Commission staff apparently consider that advising a complainant that the matter is with another division or team is a complete answer to the complaint. It is not. It tells the complainant nothing meaningful about the status, what happens next, and does not equip them in any way to understand their rights in relation to the dispute with the provider.
- No meaningful information gathering took place with our client and the Commission appeared to rely solely on information received by the provider.
- The actual substance of the complaint was not addressed by any team involved with the matter.
- No outcome was received (and no outcome has been received to date).

This is reflective of our experience with the NDIS Commission over the years of its operation in Victoria. We are reluctant to use this as a means of resolving complaints for our clients, given the lack of response or outcome.

Intelligence gathering

Does the NDIS Commission have effective and timely intelligence gathering and information sharing arrangements in place?

Our experience with the NDIS Commission is in the context of individual complaints and feedback from callers to our service. We cannot speak to broader information gathering arrangements, but have noted that:

- The NDIS Commission is very slow in its response to complaints and does not always ask the complainant to provide further information. This can lead to complaints not being thoroughly investigated as complainants do not have the opportunity to provide further information. Delays to such requests also cause issues with complaint handling because complainants do not keep detailed records and do not have access to the information when requested months later.

Effectiveness of the NDIS Quality and Safeguards Commission's regulatory functions

- We have attempted to raise concerns about overcharging by providers. While we do not have access to the financial records of providers and cannot prove the matter, this should be within the information gathering powers of the NDIS Commission. For example, when we see a provider with one or two staff supporting ten or more participants, and claiming blocks of 1:1 support hours, this is mathematically problematic. Given then inaction on such complaints, we have to assume the NDIS Commission is not investigating these issues rigorously.¹

Dissemination of information

NDIS participants generally lack a consumer reviewed source of information about the quality of NDIS providers. An important source of information for participants in considering with whom they will contract for services is the providers complaints history.

The NDIS Commission could provide useful information to the sector by making available data about complaints against providers. Failure to do so means that NDIS participants are potentially being approached by providers against whom there is a serious history of complaints and induced to use their services. This creates a risk for participants and undermines the functions of the NDIS Commission in handling complaints by existing service users. If a complainant must wait many months for the NDIS Commission to consider the complaint, may never have an outcome of the complaint, and the provider meanwhile can continue to attract new clients, abusive practices can continue to occur even if the initial complaint is finally investigated.

Risk to participants

Has the NDIS Commission developed a risk-based strategy to guide regulatory decision- making?

The NDIS Commission has a crucial role in upholding the rights of, and promoting the health, safety and wellbeing of, people with disability. Our experience of the NDIS Commission's responsiveness in situations where participants are experiencing significant and ongoing adverse impacts on their health, safety and wellbeing indicates that decision making is not being adequately guided by a risk- based strategy.

Case study

In October 2022 a resident of Specialist Disability Accommodation (**SDA**) was hospitalised at the instigation of the SIL provider at their residence, and when ready to be discharged, the provider refused to allow them to return.

Victorian tenancy legislation defines appropriate steps to be taken when excluding an SDA resident from their home; which provide safeguards against the resident being made homeless.

¹ We suggest that a simple check of the following records would demonstrate that the supports could not possibly have been provided as charged: staff roster, staff time recording, staff payments and relevant PAYG or other tax withholding.

These steps were not taken by the provider. There was no legal basis upon which they could be prevented from returning home. Nonetheless they were refused return.

The client was experiencing significant adverse impacts to their health, safety and wellbeing, and was effectively rendered homeless. On this basis a formal complaint was made to the NDIS Commission.

Villamanta engaged in numerous contacts with the NDIS Commission over many months and provided an extensive chronology and detailed information about the risks for the client. Despite this, the Commission failed to take any action against the provider and the matter remains outstanding to this day.

We do not consider this to demonstrate a risk-based strategy guiding the NDIS Commissions decision making about use of its regulatory powers.

Use of compliance and enforcement powers

Villamanta has experienced many instances of inadequate oversight and monitoring of NDIS providers, the quality of the supports they deliver, and the safety of people with disability relying on them.

This is particularly problematic for people with disability at risk of 'service capture', where they are often interacting with a single service provider and experiencing segregation and isolation, and with limited or no access to independent advocacy. The limited use of compliance and enforcement measures in response to identified failures by service providers, has been well-documented by the Royal Commission into Violence, Abuse, Neglect and Exploitation Against People with Disability.

Where a response or outcome to a complaint is received at all, too often it is in the form of an email outlining the providers version of events and their commitment to improve or change their practices. There does not appear to be any mechanism to ensure these commitments are upheld.

Even where ongoing physical abuse is occurring, providers are not subject to compliance or enforcement action.

Case study

A client was being repeatedly attacked by a fellow resident at an SDA property, sustaining multiple injuries. The attacks occurred over a number of years. The provider failed to take steps to effectively protect the resident.

Villamanta and the client's family made a number of complaints to the NDIS Commission, all of which resulted in the provider making commitments to fix staffing inadequacies, provide appropriate training for staff and improve internal policies and procedures. The provider ultimately took no action.

The NDIS Commission took no enforcement action against the provider.