

31 July 2017

Senator Jonathon Duniam
Chair
Senate Standing Committee on Community Affairs (Legislation)
PO Box 6100
Parliament House
Canberra ACT 2600

By email: community.affairs.sen@aph.gov.au

Dear Senator

National Disability Insurance Scheme Amendment (Quality and Safeguards Commission and Other Measures) Bill 2017

1. Thank you for the opportunity to provide a submission to the Senate Standing Committee on Community Affairs' inquiry into the National Disability Insurance Scheme Amendment (Quality and Safeguards Commission and Other Measures) Bill 2017 (**the Bill**).
2. The Law Council is grateful for the assistance of the Law Society of New South Wales in the preparation of this submission.
3. The Law Council supports the establishment of a National Disability Insurance Scheme (**NDIS**) Quality and Safeguards Commission along with the appointment of a Commissioner to oversee the regulatory framework as provided in Schedule 1 of the Bill.
4. The Law Council makes the following further comments in relation to the Bill.

Clause 67A – Protection of information held by the Commission

5. The Law Council considers clause 67A of the Bill, which sets out the measures that must be taken for the protection of personal information that the Commission may obtain in the course of its functions, to be appropriate.
6. The Law Council recognises the public interest in protecting against the unauthorised use or disclosure of protected health information. However, the Law Council suggests that the circumstances in which a person may make a record, disclose, or otherwise use protected information in clause 67A should be expanded to include disclosure pursuant to an order of the court.¹ In these circumstances, the court should have regard to the criteria set out in clause 67A.

¹ See National Disability Insurance Scheme Amendment (Quality and Safeguards Commission and Other Measures) Bill 2017, Explanatory Memorandum, [44].

7. The Law Council suggests that the best approach to this issue would be to broaden the scope of information that can be disclosed, modelled on the provisions of the *Health Records and Information Privacy Act 2002* (NSW). This should still be consistent with clause 67A.

Clause 67B – Offence of unauthorised use or disclosure of protected Commission information

8. The Law Council recognises the need to prevent the unauthorised use or disclosure of protection health information. However, this needs to be balanced with the practicability of prohibiting a health practitioner from using health information provided to the practitioner. Once the Commission discloses information, a recipient needs to be able to use that information in accordance with existing privacy and other legislative obligations to perform their usual functions. The Law Council notes that effectively quarantining protected Commission information from the rest of a patient's medical record or file may pose practical difficulties. However, it is noted that this risk may be managed by organisations such as through an evaluation and update as necessary of its information handling systems.
9. The Law Council also notes that it is unclear how the Commission will refer complaints to other regulators such as the Health Care Complaints Commission or the Medical Board of Australia. Consideration should be given to the appropriate framework for complaints to be referred promptly by the Commissioner to the appropriate body.

Clause 67F – NDIS rules for exercise of Commissioner's disclosure powers

10. As outlined in the Explanatory Memorandum, clause 67F provides that NDIS rules may be created by the Commission to make provision for and in relation to the exercise of the Commissioner's powers to disclose information for the purposes of clauses 67E(1)(a) and (1)(b)(i), (i) or (iv). The Bill does not set out those rules.
11. The Law Council supports the development of rules regarding the disclosure of information by the Commissioner. The Law Council considers that relevant stakeholders should be consulted in the development of those rules.

Clause 73V – NDIS Code of Conduct

12. The Law Council notes that clause 73V includes a penalty provision if the NDIS Code of Conduct is breached. The Law Council considers that further consultation regarding the penalty provisions for a breach of the Code of Conduct should be undertaken once the Code of Conduct has been finalised.

Clause 73Z – Reportable incidents

13. The Law Council supports the inclusion of clause 73Z, providing for NDIS rules to prescribe arrangements relating to the notification and management of reportable incidents that occur, or are alleged to have occurred, in connection with the provision of supports or services by NDIS providers. The Law Council considers that relevant stakeholders should be consulted in relation to the creation of such rules.
14. The Law Council also recommends that the Bill include a requirement that the Commission report annually regarding breaches of the Code of Conduct and reportable incidents.

Division 7 of Part 3A

15. The Law Council supports Division 7 of Part 3A, given the public interest in the whistleblower protections. However, in the Law Council's view, a complaint should not be dismissed solely on the basis that it is made anonymously. The Law Council also notes that in respect of complaints made by vulnerable people, there should be consideration of what the appropriate standards might be for accepting complaints, given that a complaint might be made in good faith but without sufficient information in an evidentiary form.
16. In the first instance, please contact Dr Natasha Molt, Senior Legal Adviser, at natasha.molt@lawcouncil.asn.au or (02) 6246 3754, if you would like any further information or clarification.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Fiona McLeod', is written in a cursive style.

Fiona McLeod SC
President