

Senator Marielle Smith
Chair, Community Affairs Legislation Committee
Parliament House
Canberra ACT 2600

31 May 2024

National Disability Insurance Scheme Amendments

Dear Chair,

I write to provide a submission on behalf of the Human Rights Law Centre's Whistleblower Project to the *National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No. 1) Bill 2024*. I acknowledge that the submission deadline has closed. However, I am concerned about deficiencies in the *National Disability Insurance Scheme Act 2013* (Cth) in relation to whistleblower protections. Given the Bill's focus on addressing fraud and ensuring protection of participants including strengthening regulatory responses to quality and safeguards issues, I hope that you will accept and consider our submission to the Inquiry.

Please find **enclosed** our submission. We are happy for the submission to be published, and would be pleased to appear before the Committee if that would be helpful.

We can be contacted by email at kieran.pender@hrlc.org.au.

Kind regards,



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Protecting and Empowering Whistleblowers in the NDIS

Shortcomings in the *National Disability Insurance Scheme Act 2013* in relation to whistleblower protections

Submission to the Senate Community Affairs
Legislation Committee

Human Rights Law Centre

May 2024

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Human Rights Law Centre

The Human Rights Law Centre uses strategic legal action, policy solutions and advocacy to support people and communities to eliminate inequality and injustice and build a fairer, more compassionate Australia.

In 2023, we launched the Whistleblower Project, Australia's first dedicated legal service to protect and empower whistleblowers who want to speak up about wrongdoing. We provide legal advice and representation to whistleblowers, as well as continuing our longstanding tradition of advocating for stronger legal protections and an end to the prosecution of whistleblowers. We are also a member of the Whistleblowing International Network.

We advise and act for clients under relevant state and commonwealth public interest disclosure legislation and sector-specific protections. This includes advising on safe disclosure pathways and whistleblower protections under the *National Disability Insurance Scheme Act 2013* (Cth) (**NDIS Act**). As a consequence of the deficiencies in the *NDIS Act* in comparison to other private and public sector whistleblower protections, our clients face challenges in making safe and lawful disclosures of wrongdoing occurring in connection with the National Disability Insurance Scheme (**NDIS**).

Whistleblower protection is an essential part of the wider human rights framework in this country, underpinned by Australia's international obligations and provides vital checks and balances on the provision of disability services in Australia. The right of persons with disability to receive equal access to justice and be treated with care and dignity are enshrined within the *Convention on the Rights of Persons with Disability*, to which Australia is a signatory, and reflected in the *Disability Discrimination Act 1992* (Cth). The ability of whistleblowers to speak up, and the public's right to know, about wrongdoing by NDIS providers or within the NDIS is an essential corollary of the *NDIS Act*. This is particularly important for NDIS providers who are obligated under the NDIS Code of Conduct to disclose information about potential breaches to the Act. It is critical that these individuals are afforded adequate pathways and protections for disclosure.

In recent decades whistleblowers have proven critical to exposing human rights abuses around the world – without robust whistleblowers protections across public and private sectors and public interest journalism, too often wrongdoing goes unchecked. Whistleblowers play an important role in upholding transparency and accountability in the NDIS, ensuring individuals have the ability to speak up when they hold concerns about the human rights of persons with disability in Australia. It is the responsibility of all of us to ensure governments respect and uphold human rights to build a fairer, more compassionate country. We consider it to be of the utmost importance that the proposed reforms to the *NDIS Act* reflect the importance of whistleblowers in this context.

The Human Rights Law Centre acknowledges the people of the Kulin and Eora Nations, the traditional owners of the unceded land on which our offices sit, and the ongoing work of Aboriginal and Torres Strait Islander peoples, communities and organisations to unravel the injustices imposed on First Nations people since colonisation. We support the self-determination of Aboriginal and Torres Strait Islander peoples.

Introduction

Whistleblowers make Australia a better place by speaking out and exposing misconduct, fraud, and other wrongdoing across the public and private sectors. The whistleblower protections found in Division 7 of the *National Disability Insurance Scheme Act (NDIS Act)* are a crucial tool for ensuring participants are treated with respect and dignity, preventing fraud, and increasing accountability and transparency in the National Disability Insurance Scheme (NDIS). This submission identifies deficiencies in the *NDIS Act*, not addressed by the *National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No. 1) Bill 2024 (the Bill)* despite the stated objects of the Bill, to highlight the need for comprehensive reform to the whistleblower protections found in the *NDIS Act*.

The Explanatory Memorandum for the Bill¹ states that it aims to give effect to several recommendations that arose from the NDIS review report.² In particular, it seeks to strengthen the regulatory response to quality and safeguards issues and provide more flexibility on how the Commissioner can take regulatory actions to protect participants from abuse, harm and neglect.³ The current version of the Bill primarily focuses on addressing these recommendations through amendments that are aimed at redefining disability supports to prevent fraud in the scheme and provide for a new assessment process for entry into the NDIS. We are concerned that, whilst important, these reforms in isolation will not address the underlying concerns about participant welfare, financial sustainability, fraud and eligibility, without providing appropriate safeguards for individuals who witness wrongdoing by workers and providers to speak up about their concerns.

In 2022, the Human Rights Law Centre co-published *Protecting Australia's Whistleblowers: The Federal Roadmap*,⁴ which highlighted the incomplete and out-of-date patchwork of whistleblower protection laws. We built on this work in 2023 with the *Cost of Courage* Report⁵ which provided the most comprehensive empirical review of Australia's whistleblower protection laws in practice undertaken to date. Across our empirical research and our client work, we have seen firsthand the negative impact that piecemeal, out-of-date, and overly complex whistleblower laws are having on transparency and accountability in Australia. We are concerned that the *NDIS Act* whistleblower protections have fallen far behind other jurisdictions, and even further behind best practice.

In 2017, the Parliamentary Joint Committee on Corporations and Financial Services recommended the harmonisation of whistleblowing legislation across Australia.⁶ Seven years on, we are yet to see some of these out-of-date laws on whistleblower protections be reformed and harmonised. The whistleblower protections in Division 7 of the *NDIS Act* were introduced by the *National Disability Insurance Scheme Amendment (Quality and Safeguards Commission and other Measures) Act Bill 2017*. The explanatory memorandum states that protections were designed to promote integrity and accountability of NDIS

¹ Explanatory Memorandum, *National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No. 1) Bill 2024*, 3.

² *Working together to deliver the NDIS: Independent Review into the National Disability Insurance Scheme* (Final Report, October 2023).

³ Explanatory memorandum, 1 and 3.

⁴ AJ Brown and Kieran Pender, *Protecting Australia's Whistleblowers: The Federal Roadmap* (updated January 2023).

⁵ Kieran Pender, Human Rights Law Centre, *The Cost of Courage: Fixing Australia's Whistleblower Protections* (August 2023).

⁶ Parliamentary Joint Committee on Corporations and Financial Services. Whistleblower Protections in the Corporate, Public and Not-for-profit Sectors. September 2017 (Steve Irons MP, Chair), Recommendation 3.1.

providers.⁷ The protections have not been reformed since being introduced, and in that time, significant reforms across whistleblowing legislation has occurred. The time to pursue comprehensive reform is now, and the Committee should look to reforming the *NDIS Act* in line with best practice models, to avoid ‘catch ups’ across sectors and inconsistencies flowing from a complex regulatory framework.

We make the following recommendations regarding the Bill:

Recommendation 1: Section 73ZA(1)(a) of the *NDIS Act* be reformed to include former employees and other eligible whistleblowers no longer working with or for the NDIS provider their disclosure relates to, including persons with a disability no longer receiving services from the NDIS provider their disclosure relates to.

Recommendation 2: The requirement under s 73ZA(2)(b) to inform the recipient of the disclosure of the discloser’s name before making the disclosure, should be removed to allow individuals to make anonymous disclosures.

Recommendation 3: The ‘good faith’ requirement be removed from s 73ZA(2).

Recommendation 4a: An external disclosure pathway should be included under the *NDIS Act*, allowing a whistleblower who have made a protected disclosure internally and no action has been taken, to make a disclosure to media or a parliamentarian, in line with the public interest.

Recommendation 4b: The Act should expressly provide protections for making a disclosure to lawyers and other support people who may represent either the discloser or a person with a disability to which the wrongdoing relates.

Recommendation 5: The procedures for making a disclosure to an eligible recipient should be clarified to make them more accessible for persons with disability, and there should be a positive obligation for a recipient to investigate a disclosure.

The *NDIS Act* reform cannot hope to sufficiently address the issues regarding visibility and regulation of all providers and workers and strengthen the regulatory response without providing greater protections to whistleblowers. The current outdated whistleblower protections under the *NDIS Act* are currently stifling the voices of would-be NDIS whistleblowers. We say this from firsthand experience. Right now there is grievous wrongdoing occurring in the NDIS sector that is not being addressed because the *NDIS Act* does not provide safe and lawful pathways for would-be whistleblowers to speak up. That must be changed as a matter of urgency.

These recommendations are put to the Committee to highlight the most pressing issues that we have seen in our work with clients that fall under the NDIS whistleblower protections. We would welcome the Committee’s further engagement and consultation to provide greater detail on how the *NDIS Act* whistleblower protections could be reformed to reflect best practice. In other words, our remarks are preliminary only, in light of the urgency in which we prepared this submission.

⁷ Explanatory Memorandum, *National Disability Insurance Scheme Amendment (Quality and Safeguards Commission and other Measures) Act Bill 2017*, 34.

A. The scope for a disclosure to qualify for protection

The *NDIS Act* whistleblower protections confer one of the narrowest scopes for whistleblowers protections to apply, in relation to the range of individuals who may have information of alleged fraud or other misconduct under the NDIS. Three key issues with the scope of protections are discussed in this section, with reference to the whistleblower protections found in other commonwealth legislation.

Issue 1: The scope for an individual to be eligible to make a protected disclosure

Former employees, officers, members, partners, and participants

Section s 73ZA(1) of the Act provides the scope for an individual connected to an NDIS provider to be eligible to make a protected disclosure under Division 7. The categories of persons eligible to make a protected disclosure respective to each type of provider or participant in subsections (a)-(d) extend only to individuals who are currently still employed, providing services to, or being provided services by, the NDIS provider to which the disclosure relates. This is inconsistent with most other private and public sector whistleblowing protections, including the *Corporations Act 2001* (Cth) and the *Public Interest Disclosure Act 2013* (Cth) (the **Commonwealth PID Act**), which allow whistleblowers in the private sector and federal public sector to make disclosures regardless of whether they continue to be engaged by the organisation or department at the time of the disclosure.

The scope of an individual's eligibility to make a protected disclosure is recognised as a particularly crucial aspect of the private sector and federal public sector whistleblowing regimes and aligns with the paramount public interest in bringing information of wrongdoing to the attention of the appropriate body. We have clients that come to us in our work who are employed by NDIS providers that are not body corporates to which the *Corporations Act* applies – this means they may have no other lawful avenue to blow the whistle, if they do not qualify under the *NDIS Act*. Additionally, other whistleblowing pathways (such as the *Corporations Act*) have narrow regulatory reporting pathways, including to the Australian Securities and Investments Commission, which inhibit NDIS whistleblowers speaking up to relevant sector-appropriate oversight bodies. It is critically important that the *NDIS Act* whistleblower protections account for all potential whistleblowers who could be in possession of important information about NDIS provider practices.

Further, limiting the scope to current employees, officers, members or partners does not allow for the flexible nature of NDIS work. In our practice, we have seen potential whistleblowers leave their employment with the NDIS provider where the wrongdoing occurred before they have a chance to make a protected disclosure. Under the current s 73ZA(1) they would not be protected from proceeding with the disclosure after leaving their employer where the alleged wrongdoing occurred. Section 73ZA(1) should be reformed to at minimum mirror the *Corporations Act* and *Commonwealth PID Act*, where current and former employees or other eligible disclosers can make a protected disclosure.

Disclosure by any person

We would further recommend that the Committee consider extending s 73ZA(1) to allow for a disclosure by any person, where the discloser reasonably believes there is a significant and substantial risk to the health or safety of a person with a disability. Section 12(1)(a) of the *Public Interest Disclosure Act 2010* (QLD) allows for a disclosure of this kind, and the Committee may consider modelling a similar section in the *NDIS Act*. We are confident that

the Committee is aware of the importance of the community in safeguarding the rights of persons with disability, and limiting the scope of a disclosure to those people currently employed or working with the NIDS provider to which the disclosure relates does not allow sufficient breadth to receive disclosures of all fraud, misconduct and other wrongdoing that may occur in connection to the NDIS.

Recommendation 1: Section 73ZA(1)(a) of the *NDIS Act* be reformed to include former employees and other eligible whistleblowers no longer working with or for the NDIS provider their disclosure relates to, including persons with a disability no longer receiving services from the NDIS provider their disclosure relates to.

Issue 2: Anonymous disclosures

Section 73ZA(2)(b) of the *NDIS Act* requires a person to "inform the person to whom the disclosure is made of the discloser's name before making the disclosure". It is unclear whether this requires a person to write to the recipient, for example, the NDIS Commissioner, informing them of their name and intention to make a disclosure before doing so.

This section should be reformed to allow for anonymous disclosures to be made. Almost all public sector whistleblowing legislation and the *Corporations Act* whistleblower protections allow for anonymous disclosure, at least in the first instance. It is our view that a disclosure should be able to be made anonymously at any stage and be protected under the *NDIS Act*. Anonymous disclosure pathways allow people who may otherwise be deterred from speaking up to come forward, with their identity protected.

Recommendation 2: The requirement under s 73ZA(2)(b) to inform the recipient of the disclosure of the discloser's name before making the disclosure, should be removed to allow individuals to make anonymous disclosures.

Issue 3: the 'good faith' requirement

Section 73ZA(2)(d) confers an ambiguous "good faith" requirement on the maker of a disclosure. It is our view that this requirement is unnecessary, given the discloser is already required to have reasonable grounds for suspicion of the wrongdoing under subsection (c). The "good faith" test was previously also found in the *Corporations Act*, however, it was removed in the reforms to the *Corporations Act* whistleblower scheme in 2019 and replaced with a "reasonable grounds test" which we note is already found in the *NDIS Act*. The good faith requirement has been recognised as creating uncertainty and risk for whistleblowers, by enabling companies or organisations to allege subjective or collateral motivation of the whistleblower to prevent a disclosure from being protected.⁸ The good faith requirement is also no longer found in federal or state public sector whistleblowing laws. On this basis, we consider the good faith requirement should be removed from the *NDIS Act* to bring the protections in line with other commonwealth legislation.

Recommendation 3: The 'good faith' requirement be removed from s 73ZA(2).

B. Accessibility and effectiveness of disclosure pathways

The experiences of whistleblowers in speaking out about wrongdoing show that it can be a difficult, confusing and distressing process. The procedures for disclosure and investigation

⁸ *Quinlan v ERM Power Ltd & Ors* [2021] QSC 35 [19].

as they currently stand in the *NDIS Act* do not provide sufficient for support or guidance for whistleblowers. Two key issues in relation this are discussed in this section.

Issue 4: Pathways for external disclosure where appropriate

Under the *Corporations Act* and the *Commonwealth PID Act*, whistleblower who has made protected disclosures to the correct recipients in the proscribed way under the legislation and has not received an adequate response can, where it would be in the public interest, make a disclosure to other people outside of the department or organisation (often referred to as an external disclosure).

We recommend that an external disclosure pathway, similar to the *Commonwealth PID Act* be included.⁹ When an individual has made an internal disclosure of disclosable conduct and not received an adequate response, there should be circumstances where they may be empowered to give the information to a journalist or parliamentarian, where it is reasonable to do so. This reform would be consistent with the public interest in ensuring transparency of the NDIS and bring the *NDIS Act* in line with whistleblower protections in the *Corporations Act* and *Commonwealth PID Act*.

In addition to public interest external disclosure pathways, it is necessary to allow for disclosure to avenues of support, including legal practitioners and medical practitioners. This approach was supported by the Moss Review¹⁰ and in the review of Queensland's public sector whistleblowing legislation.¹¹ Our empirical and anecdotal evidence underscore the hardships faced by whistleblowers, and it is critical they are protected in seeking support from a variety of services.

The abuse or mistreatment of persons with disability, or maladministration that results in the neglect of persons with disability often tends to be perpetrated in private or may not be witnessed by many people. It is important that the purpose of the *NDIS Act* protections are realised in ensuring misconduct, abuse, fraud and other wrongdoing under the scheme are promptly and adequately addressed. This requires information about wrongdoing to be shared with the people that are able to take action, including the support network of a person with disability.

Recommendation 4a: An external disclosure pathway should be included under the *NDIS Act*, allowing a whistleblower who have made a protected disclosure internally and no action has been taken, to make a disclosure to media or a parliamentarian, in line with the public interest.

Recommendation 4b: The *NDIS Act* should expressly provide protections for making a disclosure to lawyers and other support people who may represent either the discloser or a person with a disability to which the wrongdoing relates.

Issue 5: Procedures for making a disclosure and investigation of a whistleblower disclosure

The *NDIS Act* does not currently provide detail on the steps a discloser should take to make a protected disclosure, beyond the list of individuals or bodies that they should make the disclosure to. It is in the interests of the National Disability Insurance Agency (NDIA) for disclosure of significant or serious fraud or other wrongdoing to be disclosed directly to the

⁹ *Public Interest Disclosure Act 2013* (Cth) s 26(1) Item 2.

¹⁰ Philip Moss (2016) *Review of the Public Interest Disclosure Act 2013: An independent statutory review*. Commonwealth of Australia, 56.

¹¹ Alan Wilson, *Review of the Public Interest Disclosure Act 2010* (Final Report, 8 August 2023).

NDIA or the Safeguards Commissioner, to be promptly addressed. As far as we are aware, neither the Commissioner nor the NDIA provide information for potential disclosers regarding where to submit a disclosure and what form it should be submitted in. NDIS workers have an obligation under the NDIS Code of Conduct to disclose breaches of the *NDIS Act*, and the recently updated NDIS Guidance for Workers cites the whistleblower protections to encourage workers to make disclosures.¹² It is our experience that a lack of guidance in how to do so is a significant barrier for potential disclosures. For NDIS participants, it is inconsistent with the right of persons with disability to have equal access to justice, to not clearly facilitate the making of a disclosure under the *NDIS Act*.

Once a disclosure has been made, there should be an obligation on that recipient or agency to investigate the disclosure within a reasonable amount of time, or otherwise refer the disclosure to the correct agency to do so. We recommend the addition of a section under Division 7 of the *NDIS Act* which would confer a positive obligation on the recipient of a disclosure to investigate or refer to the appropriate agency to investigate.

Recommendation 5: the procedures for making a disclosure to an eligible recipient should be clarified to make them more accessible for persons with disability, and there should be a positive obligation for a recipient to investigate a disclosure.

Conclusion

We commend the Parliament for taking action to address the current deficiencies of the NDIS scheme in relation to preventing fraud, responding to safeguarding concerns and efficient use of resources. We urge the Committee to consider the indivisible nature of measures to strengthen the efficiencies of the NDIS and the protections that allow information about wrongdoing to come to light. This review of the *NDIS Act* has the opportunity to correct the path of the NDIS in Australia to best realise the rights and freedoms of persons with disability. We hope the Committee will not look over this opportunity to significantly improve the whistleblower protections that accompany the scheme, in line with other commonwealth legislation. We encourage the Committee to engage with these recommendations, and we would welcome the opportunity to expand on our submission by providing further information, should the Committee wish to consult with us on any proposed reforms.

¹² NDIS Quality and Safeguards Commissioner, *The NDIS Code of Conduct: Guidance for Workers* (April 2024) [77] and [95].