



Submission to consultations on the Disability Worker Regulation Scheme

February 2020

Dr Colleen Pearce
Public Advocate
Office of the Public Advocate

Dr John Chesterman
03 9603 9567
John.Chesterman@justice.vic.gov.au

Office of the Public Advocate
Level 1, 204 Lygon Street, Carlton, Victoria, 3053
Tel: 1300 309 337
www.publicadvocate.vic.gov.au

1. Introduction

The Victorian Office of the Public Advocate (OPA) is a statutory office, independent of government and government services that works to protect and promote the rights, interests and dignity of people with disabilities in Victoria.

Under the *Guardianship and Administration Act 1986* (Vic), the Public Advocate is appointed by the Governor in Council and is answerable to the Victorian State Parliament.

OPA provides a range of services for people with cognitive impairment or mental illness, including guardianship, advocacy, and investigation services. In 2018-19, OPA was involved in 1,823 guardianship matters (978 which were new), 404 investigations and 258 cases requiring advocacy.¹

OPA provides telephone advice service that offers information and advice on a diverse range of topics affecting people with disability. Last financial year, the service answered 13,644 calls. One or more forms of abuse were the concern of 1169 enquiries or 9.3 per cent of all enquiries.

OPA is supported by more than 700 volunteers across four volunteer programs: the Community Visitors Program, the Community Guardian Program, the Independent Third Person Program (ITP Program) and the Corrections Independent Support Officer (CISO) Program.

Community Visitors are empowered by law to visit Victorian accommodation facilities for people with disability or mental illness at any time, unannounced. They monitor and report on the adequacy of services provided, in the interests of residents and patients. They ensure that the human rights of residents or patients are being upheld and that residents are not subject to abuse, neglect or exploitation.

There are more than 400 Community Visitors who visit across three streams: disability services, supported residential services, and mental health services. In 2018-19, Community Visitors made 5,527 statutory visits. In their annual report, Community Visitors report to parliament on the quality and safety of the services they visit.

OPA welcomes the opportunity to provide feedback on the proposed Code of Conduct and registration standards for disability workers.

2. Code of Conduct

Do you agree with the recommendation to adopt the NDIS Code of Conduct as the Code of Conduct that Victorian unregistered disability workers must comply with? Why?

Are there any changes from the NDIS Code of Conduct that you think need to be made to ensure safeguards in Victoria are not reduced? Why?

The discussion paper proposes that the NDIS Code of Conduct be the Code by which all Victorian disability workers will have to abide. OPA considers this to be an inappropriate approach for a number of reasons.

Firstly, the NDIS Code of Conduct is articulated in a manner that limits its relevance and application to the NDIS context and environment. Most importantly, the Code sits within the

¹ Office of the Public Advocate (Vic), *Annual Report 2018-19* 9.

NDIS legislative and policy context, which includes the *National Disability Insurance Scheme Act 2013* (Cth), its associated Rules, and the NDIS Quality and Safeguarding Framework, all of which are of course restricted to the delivery of NDIS services. The NDIS Code of Conduct does not reflect the provisions of the *Disability Services Safeguards Act 2018* (Vic) nor does it refer to state-based legislation that is relevant in the context of delivering disability services outside of the NDIS.

In Victoria, disability workers need to abide by a number of state-based laws, such as the *Charter of Human Rights and Responsibilities Act 2006* (Vic). They should be explicitly referred to in any Code of Conduct that workers must comply with. Furthermore, the State Disability Plan and its associated policies are also pertinent to workers. Of particular importance is Victoria's *Disability Abuse Prevention Strategy*, which builds upon the commitments in the State Disability Plan and aims to strengthen safeguards for people with disability (during transition to the full rollout of the NDIS). The Strategy is supported by the Department of Health and Human Services' (DHHS) *Code of Conduct for Disability Service Workers: Zero Tolerance of Abuse of People with a Disability*, which contains five obligations that all disability support workers must abide by.

The discussion paper notes that "the NDIS Code of Conduct is largely consistent with the Zero Tolerance Code and there have been no changes identified that need to be made to the NDIS Code of Conduct to address gaps in obligations or protections for Victorians". OPA and Community Visitors disagree with this statement.

The approach adopted federally via the NDIS Code of Conduct does not replicate the strong underpinning commitment to zero-tolerance as is the case with the DHHS Code of Conduct. The NDIS Code limits itself to requiring that service providers and workers make their best efforts to prevent abuse. This is insufficient in the promotion of safety and wellbeing of service users. Furthermore, in contrast with the DHHS Code, the definitions of abuse in the NDIS Code of Conduct are much more succinct. OPA considers that the Victorian Strategy does more than the NDIS Quality and Safeguarding Framework in relation to abuse within services. 'Abuse' is broadly defined in the Strategy to include physical, sexual, emotional and financial abuse, including abuse by a person with disability towards another person with disability. Each of these categories or types of abuse are individually defined at the start of the DHHS Code, which then further outlines a range of initiatives to build the capacity of individuals, workers and the sector as whole to better understand, report, and respond to abuse. Importantly, on page 6, the DHHS Code lists employer obligations.

The safeguarding of people with disabilities needs to place a premium on them being able to live safely and free from abuse.

In past submissions, OPA has recommended that the NDIS Code of Conduct should be amended to articulate a stronger stance on preventing and responding to abuse within disability services. To adopt the NDIS Code would mean a step back for the Victorian Government on its previous commitment to a zero-tolerance approach.

3. Proposed registration standards

OPA welcomes the registration standards that are proposed in the discussion paper and responds to the consultation questions below.

OPA notes that while it is critical that the registration standards be set in a clear and articulated manner as well as support the workforce to meet those requirements, this alone

will not ensure a thriving disability sector. When examining registration and accrediting bodies in other fields of work, it is common for there to be additional benefits and services provided to members. For example, the Australian Association of Social Workers (AASW) offers, among other things, a matching service for registered members to find a clinical supervisor and opportunities for networking and community building. The organisation also advocates for the profession in a range of policy issues.² The Disability Worker Commission and Board should consider whether it can widen its scope, within the limits of the functions and powers conferred in legislation, in a similar manner to support the workforce and the sector as a whole – this would ensure the sector can thrive, especially in the face of significant reform.

3.1. Application of standards

Before answering the consultation questions about the proposed registration standards, OPA makes a general comment on the Board's transparency in determining the suitability of applicants to register.

The Board must determine that an individual is a suitable person to hold registration according to the eligibility requirements prescribed in section 154 of the *Disability Services Safeguards Act 2018* (Vic). Further, the Board may apply its own discretion to determine that an individual is not a suitable person to hold general registration.

For example, section 156 states that the Board may decide when having regard to the individual's criminal history to the extent that it is relevant, that the individual is not an appropriate person to practise as a disability worker and it is not in the public interest for the individual to practise as a disability worker. Similarly, the Board may decide that an individual is not suitable to hold general registration if, in the Board's opinion, taking into account any other factors, the individual is not a fit and proper person for registration as a disability worker or is unable to practise as a disability worker in a competent and safe manner.

While suitability is a mandatory issue, the Board has discretion in how it evaluates and weighs the various matters set out in section 156 of the legislation. OPA and Community Visitors recommend that if the Board considers that any of the provisions in section 156 apply, the Board should err on side of determining that individual is not a suitable person to hold registration, unless there are extenuating circumstances.

Aggregate data on the application of both sections 154 and 156 of the Act should be published on an annual basis.

3.2. Criminal history

Are there any disadvantages with adopting a criminal history check using identical criteria to the NDIS worker screen?

OPA and Community Visitors consider the NDIS Worker Screening check to be thorough. The NDIS worker screening check is in four parts and includes a proof of identity, national

² <https://www.aasw.asn.au/membership-information/member-benefits-services#>

police check, Disability Worker Exclusion List check, and Working With Children Check (where applicable to the role).³ OPA supports this approach.

The *Disability Service Safeguards Act 2018* (Vic) provides that before deciding about an application for registration, the Board must check the applicant's criminal history in accordance with section 256.⁴ OPA and Community Visitors support the proposal to set a registration standard in respect of the criminal history check required by section 152 of the *Disability Service Safeguards Act 2018* (Vic). OPA and Community Visitors also support the adoption of the criteria required by the NDIS worker screen, namely a national police check of disclosable court outcomes and pending charges sourced from databases of all Australian police services.

3.3. Professional development

Professional development should be underpinned by an intention to empower workers to grow and progress in their career. Training and development should be encouraged and facilitated this but will not be possible unless employers can support their staff to participate in these activities.

What areas of professional development are desirable?

OPA identifies the following areas of professional development for consideration:

- Human rights:
 - o Quality of care is largely dependent on the skills of workers providing disability services. Formal professional and vocational qualifications are necessary, but OPA is of the view that they must be complemented with training and leadership on improving attitudes towards people with disability.
 - o A human rights framework emphasises the dignity of people with disability, that they are holders of rights and full participants and members of our community is transformative. It challenges thinking that people with disability are merely consumers of services and commodities in a marketplace.
 - o OPA and Community Visitors observe that the broader community tends to have low expectations of people with a disability, attitudes that can also permeate the delivery of disability services. There needs to be a focus on ensuring that people with disability are viewed individuals with aspirations who are entitled to support in the pursuit of those aspirations.
- Identifying abuse:
 - o Bullying and abuse of residents can become embedded in the culture of services where there is an acceptance of poor practices that cause harm, and a reluctance to name these poor practices as abuse, violence or neglect (for example, speaking in an angry, disciplinary or threatening tone; emotional withdrawal by staff from a resident who has upset them). Leadership across the sector needs to instil a human rights framework engendering the primacy of the dignity of the person and engraining the belief that violence and abuse of people with disability is not tolerated within the sector.

³ Department of Health and Human Services (Vic). *Victorian Safety Screening Policy*. (October 2019).

⁴ *Disability Service Safeguards Act 2018* (Vic) s.152

- The establishment of an anti-abuse culture requires strong leadership and continuous professional development, supervision, and support by highly trained and experienced staff. Staff need to be trained on how to identify, report, and respond to abuse.
- Trauma-informed supports
 - The trauma-informed model of care is emerging in the disability sector and generating positive outcomes for people with disability. The framework considers an individual's emotional needs and their history of adverse events. The model is based on the assumption that challenging behaviours are functional to the individual exhibiting them and can be linked to past trauma. A psychological assessment is undertaken to determine the function of the challenging behaviour for an individual and to identify the triggers that lead to outward, potentially aggressive behaviours.

What types of activities and modes of delivery suitable for professional development (such as online modules, in-house training, attendance at information sessions/seminars, formal training)?

There needs to be an appropriate and evidence-based requirement for a mix of competence and knowledge-based skills. Competence based skills are 'on the job' abilities that include observable actions, for example, personal care as well as communication and language skills. They should be developed, evaluated, and upskilled in a practice setting. Knowledge based skills, on the other hand, lend themselves to being developed in a more didactic setting.

Should common requirements such as maintaining currency in first aid and CPR be included in the 10 hours of professional development?

No. Common requirements such as First Aid are foundational and mandatory requirements that are necessary to the delivery of services. These are pre-requisites to employment and for that reason, they do not represent any new learning or deepening of skill and knowledge. Staff should be supported by their employers to maintain these qualifications, but this should be in addition to the 10 hours of mandatory professional development.

3.4. Language skills

How necessary are English language skills to delivering disability services? How might an English language standard be different for practitioners and support workers?

OPA and Community Visitors consider that an appropriate level of English is critical to ensure that disability workers can meet the needs of people with disability. Indeed, it has become an accepted norm within disability services that staff must have this capability.

This is not yet the case in Supported Residential Services (SRS) where Community Visitors observe that some staff do not have sufficient English language skills. Residents in these services have commented on their inability to understand staff and in one service, residents worried that a staff member with poor language skills would not be able to respond or support them in an emergency. In their most recent Annual Report, Community Visitors recommended that staff in SRS have English language skills and competencies to provide a safe environment for residents in matters such as dispensing medications and responding according to safety and emergency procedures. While this recommendation was specific to SRS, OPA considers it applicable to any and all workers providing disability services.

Failures in communication between the person with a disability and a disability support worker can have very serious, and in some cases, fatal consequences. Recent research by the University of New South Wales, commissioned by the NDIS Quality and Safeguards Commission into causes and contributors to deaths of people with a disability in Australia found among other things that “limited use of communication plans and other communication accommodations may have curtailed some clients’ ability to express emerging health concerns to staff.”⁵

Communication is an essential skill when supporting people with disability, and workers could be required to demonstrate additional skills in this area to enable them to adapt their communication style to meet complex communication needs.

English language skills are essential for staff to be able to communicate with service users but also to document incidents, prepare support plans, and complete documentation commonly required for health audits. The reporting and documentation requirements in the disability sector with the NDIS will at least remain constant, if not increase, so English language skills are essential.

Staff need to be able to communicate with service users, and OPA appreciates that in some cases, as suggested in the discussion paper, it can be beneficial for a worker to speak another language when supporting a client from a different linguistic background. For the reasons stated above, the requirement in these situations could be for staff to be bilingual or multilingual, rather than allow for the employment of someone who does not speak English at all.

⁵ NDIS Quality and Safeguards Commission website, <https://www.ndiscommission.gov.au/news-media/research-deaths-people-disability>