



# **Disability Services and Other Legislation Amendment Bill 2015**

**Report No. 13, 55<sup>th</sup> Parliament**

**Health, Communities, Disability Services and  
Domestic and Family Violence Prevention Committee**

**March 2016**



## **Health, Communities, Disability Services and Domestic and Family Violence Prevention Committee**

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### **Acknowledgements**

The Committee acknowledges the assistance provided by the Department of Communities, Child Safety and Disability Services.

The Committee also acknowledges the work undertaken by the Members of the former Communities, Disability Services and Domestic and Family Violence Prevention Committee in completing this inquiry.

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## Abbreviations

Bill	Disability Services and Other Legislation Amendment Bill 2015
COAG	Council of Australian Governments
Committee	Health, Communities, Disability Services and Domestic and Family Violence Prevention Committee
Coroners Act	<i>Coroners Act 2003 (Qld)</i>
CSA	<i>Community Services Act 2007 (Qld)</i>
Department	Department of Communities, Child Safety and Disability Services
DRC	Council of Australian Governments Select Council on Disability Reform
DSA	<i>Disability Services Act 2006 (Qld)</i>
Former Committee	Communities, Disability Services and Domestic and Family Violence Prevention Committee
Forum	Disability Services Partnership Forum
Minister	Hon Coralee O'Rourke MP, Minister for Disability Services, Minister for Seniors and Minister Assisting the Premier on North Queensland
MOU	Memorandum of Understanding
NDIA	National Disability Insurance Agency
NDIS	National Disability Insurance Scheme
NDIS Act	<i>National Disability Insurance Scheme Act 2013 (Cwlth)</i>
NDS Qld	National Disability Services Queensland
NIIS	National Injury Insurance Scheme
POQA	<i>Parliament of Queensland Act 2001</i>
QAI	Queensland Advocacy Incorporated
QDN	Queenslanders with Disability Network Limited
QLS	Queensland Law Society

## Chair's foreword

This Report presents a summary of the Health, Communities, Disability Services and Domestic and Family Violence Prevention Committee's examination of the *Disability Services and Other Legislation Amendment Bill 2015*.

The Committee's task was to consider the policy outcomes to be achieved by the legislation, as well as the application of fundamental legislative principles – that is, to consider whether the Bill had sufficient regard to the rights and liberties of individuals, and to the institution of Parliament in accordance with section 4 of the *Legislative Standards Act 1992*.

The majority of the work in examining the Bill was undertaken by the former Communities, Disability Services and Domestic and Family Violence Prevention Committee. The Committee wishes to acknowledge and thank the Members of that Committee for their significant contribution in the examination of the Bill. The Committee provided a copy of the draft report to the former Members in order to ensure they had input into the final report.

The Committee has made three recommendations as follows:

1. A recommendation that the Bill be passed
2. A recommendation aimed at addressing a minor drafting error identified in section 200F, clause 44 of the Bill
3. A recommendation that various issues and areas for further improvement identified by stakeholders be considered as part of the next stage of the whole-of-government review of legislation, to support the full roll-out of the NDIS, by 30 June 2019.

On behalf of the Committee, I would like to thank those who took the time to provide submissions and additional information during the course of this inquiry. The Committee very much appreciates this assistance. I would also like to thank the officers from the Department of Communities, Child Safety and Disability Services for their cooperation in providing information to the Committee on a timely basis.

Finally, I would also like to thank my fellow Committee Members, Hansard and Committee Office staff for the support they have provided.



Leanne Linard MP  
Chair

## Recommendations

**Recommendation 1** 5

The Committee recommends that the Disability Services and Other Legislation Amendment Bill 2015 be passed.

**Recommendation 2** 19

The Committee recommends that new section 200F of the *Disability Services Act 2006*, as inserted by clause 44 of the Disability Services and Other Legislation Amendment Bill 2015, be amended to clarify that both Divisions 3 and 4 of Part 6A of *Disability Services Act 2006* apply to authorised officers instead of Part 4, Divisions 3 and 4 of the *Community Services Act 2007*.

**Recommendation 3** 31

The Committee recommends that the Department of Communities, Child Safety and Disability Services considers those issues raised by submitters which do not relate directly to the Disability Services and Other Legislation Amendment Bill 2015, as part of its review of the *Disability Services Act 2006* to be completed by 30 June 2019.



## 1. Introduction

### 1.1 Role of the Committee

The Health, Communities, Disability Services and Domestic and Family Violence Prevention Committee (Committee) is a portfolio committee of the Legislative Assembly which was established on 16 February 2016 under the *Parliament of Queensland Act 2001* (POQA) and the Standing Rules and Orders of the Legislative Assembly and commenced operation on 18 February 2016.<sup>1</sup>

The Committee's primary areas of responsibility include:

- Health and Ambulance Services
- Communities, Women, Youth and Child Safety
- Domestic and Family Violence Prevention, and
- Disability Services and Seniors.<sup>2</sup>

Section 93(1) of the POQA provides that a portfolio committee is responsible for examining each Bill and item of subordinate legislation in its portfolio areas to consider:

- the policy to be given effect by the legislation
- the application of fundamental legislative principles, and
- for subordinate legislation – its lawfulness.

Section 92 of POQA provides that a portfolio committee is to also deal with an issue referred to it by the Legislative Assembly or under another Act, whether or not the issue is within its portfolio area.

### 1.2 Examination of the Bill

The Disability Services and Other Legislation Amendment Bill 2015 (Bill) was introduced into the House by the Hon Coralee O'Rourke MP, Minister for Disability Services, Minister for Seniors, and Minister Assisting the Premier on North Queensland (Minister) on 1 December 2015. The Bill was referred to the former Communities, Disability Services and Domestic and Family Violence Prevention Committee (Former Committee) for examination pursuant to Standing Order 131.

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1 Motion – Amendments to Standing Orders, *Hansard*, 16 February 2016, pp.17-19  
*Parliament of Queensland Act 2001*, section 88 and Standing Rules and Orders of the Legislative Assembly, Standing Order 194

2 Standing Rules and Orders of the Legislative Assembly, Schedule 6

The Members of the Former Committee<sup>3</sup> were:

- Ms Nikki Boyd MP, Member for Pine Rivers, Acting Chair (from 15 December 2015)
- Mr Mark McArdle MP, Member for Caloundra, Deputy Chair
- Ms Ann Leahy MP, Member for Warrego
- Mr Matt McEachan MP, Member for Redlands
- Mr Rob Pyne MP, Member for Cairns, and
- Mr Peter Russo MP, Member for Sunnybank (from 15 December 2015).

On 3 December 2015, the Former Committee wrote to the Department of Communities, Child Safety and Disability Services (Department) to seek advice on the Bill. The Department provided a written briefing on the Bill on 9 December 2015 and officers from the Department also briefed the Former Committee at a public briefing on 18 January 2016 (see **Appendix B**).

The Former Committee invited submissions on its website and by notice to subscribers to updates on the work of the Committee. The Former Committee also directly invited submissions from stakeholder organisations. The Former Committee received five submissions (see **Appendix A**).

On 16 February 2016, the Legislative Assembly passed a number of motions which:

- dissolved the Former Committee and established the Health, Communities, Disability Services and Domestic and Family Violence Prevention Committee (Committee) on 18 February 2016, and
- transferred the majority of the Former Committee's areas of responsibility to the Committee, including the examination of the Bill.<sup>4</sup>

The Committee was required to report to the Legislative Assembly by 1 March 2016.

The transcript of the public briefing on the Bill, correspondence received from the Department, and the submissions received and accepted, are published on the Committee's website: <http://www.parliament.qld.gov.au/work-of-committees/committees/HCDSDFVPC/inquiries/current-inquiries/10DisabilityServOLABill2015>.

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3 On 15 December 2015, the Leader of the House advised that the Member for Bundaberg had decided to stand down from the Communities, Disability Services and Domestic and Family Violence Prevention Committee. In accordance with Standing Order 202, the Leader of the House appointed the Member for Sunnybank to replace the Member for Bundaberg and nominated the Member for Pine Rivers as Acting Chairperson.

4 Motion – Amendments to Standing Orders, *Hansard*, 16 February 2016, pp.17-19  
Motion – Transfer of Committee Responsibilities, *Hansard*, 16 February 2016, pp.19  
Motion – Portfolio Committees, Reporting Dates, *Hansard*, 18 February 2016, pp.308

### **1.3 Policy objectives of the Bill**

The National Disability Insurance Scheme (NDIS) is a new way of providing supports to people with disability on an individualised and life-long basis.<sup>5</sup> In Queensland, the NDIS will commence operation at three early launch sites from 1 April 2016.<sup>6</sup> The full roll out of the scheme will be completed by 1 July 2019.<sup>7</sup>

The Bill contains amendments which were identified by a whole-of-government review as “critical and essential” to support the maintenance of existing quality assurance frameworks and safeguards, together with the management of financial reconciliation processes, during the NDIS early launch and transition period.<sup>8</sup>

The Bill’s primary objectives are to:

- ensure Queenslanders who are receiving specialist disability supports funded through their individual package under the NDIS, have the same level of safeguards as Queenslanders who are in receipt of specialist disability supports funded by the Department
- provide the Department with the necessary powers to monitor the compliance of NDIS non-government service providers and with safeguards to protect NDIS participants receiving disability services
- provide the Department with the authority to request identifiable client information from other Queensland Government agencies for the purpose of reconciliation against National Disability Insurance Agency (NDIA) invoices, and
- ensure the regulatory burden on non-government service providers is limited, as far as possible, acknowledging that during the transition period service providers will be required to be registered with the NDIA and meet Queensland’s quality and safeguard requirements.<sup>9</sup>

While the majority of amendments contained in the Bill relate to the *Disability Services Act 2006* (DSA), the Bill also amends the *Coroners Act 2003* (Coroners Act), *Guardianship and Administration Act 2000*, *Powers of Attorney Act 1998*, Public Guardian Regulation 2014 and *Working with Children (Risk Management and Screening) Act 2000*.<sup>10</sup>

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5 Disability Services and Other Legislation Amendment Bill 2015, *Explanatory Notes* (Explanatory Notes), p.1

6 Hon Coralee O’Rourke MP, Minister for Disability Services, Minister for Seniors, and Minister Assisting the Premier on North Queensland (Minister), Explanatory Speech, *Hansard*, 1 December 2015, p.2979

7 National Disability Insurance Scheme, ‘Our sites’, About us, webpage (accessed February 2016). Available at: <http://www.ndis.gov.au/about-us/our-sites>

8 Explanatory Notes, p.1; Minister, Explanatory Speech, *Hansard*, 1 December 2015, p.2979

9 Explanatory Notes, p.2

10 Department of Communities, Child Safety and Disability Services (Department), *Briefing Note*, 9 December 2015, p.2

#### **1.4 Consultation on the Bill**

The Explanatory Notes state that targeted consultation was undertaken with members of the Disability Services Partnership Forum (Forum), which is comprised of representatives from a range of disability service providers and peak and advocacy organisations. Forum members include:

*... National Disability Services Queensland, Carers Queensland, Synapse, Ozcare, BlueCare, Cerebral Palsy League, Multicap, Anuha Services, Queensland Mental Health Alliance, Queenslanders with Disability Network, Queensland Disability Advisory Council, Queensland Aged and Disability Advocacy, Queensland Advocacy Incorporated.<sup>11</sup>*

The Department held an extraordinary meeting with the Forum on 5 November 2015 to discuss an exposure draft of the Bill and give Forum members the opportunity to raise any issues or ask questions.<sup>12</sup>

Queensland Advocacy Incorporated (QAI) raised concerns about the extent of the Department's consultation on the Bill. QAI stated that "a briefing by departmental staff with members of the Disability Partnership does not and should not be interpreted as genuine consultation, nor agreement or acquiescence from QAI".<sup>13</sup>

In response, the Department advised that following the meeting, "members of the Forum had three days to provide feedback in writing or contact the Department further with any queries" and "the Department received no feedback directly on the Bill during this time".<sup>14</sup>

The Explanatory Notes state that "on the whole, members of the Forum were supportive of the Bill and its objectives".<sup>15</sup>

In addition, the Department noted:

*For the most part, issues raised throughout consultation related to the design of the NDIS' quality and safeguard framework. Those issues have been noted and will be addressed as part of Queensland's ongoing involvement in the development, design and implementation of the national quality and safeguard framework within the Australian Government.<sup>16</sup>*

The Department advised that all relevant Queensland Government departments, agencies and statutory advocates were also consulted, including the State Coroner, the Office of the Public Guardian and the Office of the Public Advocate.<sup>17</sup>

The Department stated that "... the Offices of the Public Guardian and the Public Advocate are supportive of the Bill" and "The State Coroner supports the amendments to the ... Coroners Act 2003".<sup>18</sup>

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11 Explanatory Notes, pp.4-5

12 Department, *Response to submissions*, 9 February 2016, p.4

13 Queensland Advocacy Incorporated (QAI), Submission no.2, p.5

14 Department, *Response to submissions*, 9 February 2016, p.9

15 Explanatory Notes, p.5

16 Ms Helen Ferguson, Senior Executive Director, Policy and Legislation, Department, *Public briefing transcript*, 18 January 2016, p.4

17 Explanatory Notes, p.4

Committee comment

The Committee notes the consultation undertaken by the Department and the support expressed for the Bill by members of the Forum and key statutory agencies.

The Committee notes the Department's assessment that the majority of issues raised by stakeholders related primarily to the operational framework and design of the NDIS rather than the provisions of the Bill. The Committee considers, however, that more appropriate response timeframes for the consideration of draft proposals would facilitate a more robust and inclusive consultation process in the future.

**1.5 Should the Bill be passed?**

Standing Order 132(1) requires the Committee to determine whether or not to recommend the Bill be passed.

After examination of the Bill, including its policy objectives, and consideration of the information provided by the Department and from submitters, the Committee recommends that this Bill be passed.

**Recommendation 1**

The Committee recommends that the Disability Services and Other Legislation Amendment Bill 2015 be passed.

## 2. Policy background and context

### 2.1 National Disability Insurance Scheme

The National Disability Insurance Scheme (NDIS) launched on 1 July 2013, following years of discussion about the need for a major reform of disability services in Australia.<sup>19</sup>

The establishment of the NDIS, alongside a parallel National Injury Insurance Scheme (NIIS), was recommended by the Productivity Commission in August 2011, following an inquiry into long-term disability care and support. The Productivity Commission identified that while Australia's social security and universal health care systems provide an entitlement to services based on need, the country lacks an equivalent entitlement to disability care and support services.

The Productivity Commission deemed existing systems "underfunded, unfair, fragmented and inefficient".<sup>20</sup> Accordingly, the Productivity Commission sought to address this by proposing new arrangements to fund the lifetime support needs of all Australians who have a permanent and significant disability, or who require assistance as a result of catastrophic injuries, such as major brain or spinal cord injuries.<sup>21</sup>

In October 2011, at a meeting of the Council of Australian Governments (COAG) Select Council on Disability Reform (DRC), Ministers agreed to lay the foundations for the NDIS by mid-2013 – a year ahead of the timetable recommended by the Productivity Commission. Three jurisdictions subsequently agreed to participate in an early launch of the NDIS, with trials commencing on 1 July 2013 under the *National Disability Insurance Scheme Act 2013* (Cwlth) (NDIS Act), which provided for the establishment of the scheme and its administrating agency, the NDIA.<sup>22</sup> All States and Territories are now preparing for the roll out of the scheme, with coverage expected to progressively commence on 1 July 2016 and be completed by 1 July 2019.<sup>23</sup>

In Queensland, early transitions to the NDIS were announced on 25 September 2015 for Townsville, Charters Towers and Palm Island.<sup>24</sup> While these early NDIS trials will commence on 1 April 2016, the Commonwealth and Queensland Governments are currently negotiating a bilateral agreement which will detail how the scheme will roll out across the rest of the State.<sup>25</sup>

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19 National Disability Insurance Scheme, 'Our history', What is the NDIS?, webpage (accessed February 2016). Available at: <http://www.ndis.gov.au/about-us/our-history>

20 Productivity Commission, *Disability Care and Support: Productivity Commission Inquiry Report*, vol. 1, No.54, July 2011, Canberra, p.2

21 Productivity Commission, *Disability Care and Support: Productivity Commission Inquiry Report*, vol. 1, No.54, July 2011, Canberra, p.2

22 National Disability Insurance Scheme, 'Our history', What is the NDIS?, webpage (accessed February 2016). Available at: <http://www.ndis.gov.au/about-us/our-history>

23 National Disability Insurance Scheme, 'Our sites', About us, webpage (accessed February 2016). Available at: <http://www.ndis.gov.au/about-us/our-sites>

24 Premier and Minister for the Arts, the Hon. Annastacia Palaszczuk MP and Minister, 'NDIS set to improve lives of Northern Queenslanders', Media Statement, 25 September 2015 (accessed February 2016). Available at: <http://statements.qld.gov.au/Statement/2015/9/25/ndis-set-to-improve-lives-of-northern-queenslanders>

25 National Disability Insurance Scheme, 'NDIS in Queensland', Our sites, webpage (accessed February 2016). Available at: <http://www.ndis.gov.au/about-us/our-sites/qld>

Employing an approach similar to Medicare, the NDIS will insure all Australians against major disability, with the costs of support services shared among the wider community.<sup>26</sup>

Under the NDIS, service providers will no longer be funded directly by government. Instead, each NDIS participant will receive funding through the NDIA<sup>27</sup> to engage the mix of NDIS service providers and supports of their choice; with funding allocations determined by assessment of the individual's personal needs and goals and their accompanying participant care plan.<sup>28</sup>

As part of Queensland's readiness for transition to the NDIS, the Department is leading a two-staged, whole-of-government review of relevant legislation. Stage One required all relevant agencies across government to identify the amendments to their portfolio legislation necessary to support the early launch and transition; while Stage Two will address amendments to enable full scheme implementation by 1 July 2019.<sup>29</sup>

The Minister stated that the Bill is the culmination of the Stage One review process.<sup>30</sup> The Department advised that while "this began as a broad review... it was identified that the majority of critical and essential amendments relate to the operation of Queensland's quality and safeguards system".<sup>31</sup>

## 2.2 Current legislation

In Queensland, the *Disability Services Act 2006* (DSA) provides a range of measures to safeguard the rights and safety of people with a disability, including affirming key principles of service delivery and establishing criminal history screening requirements for service providers; a positive behaviour support system to eliminate and/or reduce the use of restrictive practices; and a complaints management process.<sup>32</sup> The *Forensic Disability Act 2011*, the State's *Anti-Discrimination Act 1991* and various other key Acts and regulations also provide important provisions governing service and safety procedures and requirements.

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26 Disability Services Australia, 'NDIS FAQs', Be Informed, 5 January 2015 (accessed February 2016). Available at: <http://www.dsa.org.au/Pages/BeInformed/NDIS-FAQs.aspx>; PWC on behalf of Queensland Treasury, *National Injury Insurance Scheme: MVA Consultation Regulatory Impact Statement*, April 2014, p.7

27 The National Disability Insurance Agency (NDIA) is an independent statutory agency whose role is to implement the NDIS.

28 Department, *Briefing Note*, 9 December 2015, p.2

29 Department, *Briefing Note*, 9 December 2015, p.2; Minister, *Explanatory Speech*, Hansard, 1 December 2015, p.2979

30 Minister, *Explanatory Speech*, Hansard, 1 December 2015, p.2979

31 Department, *Briefing Note*, 9 December 2015, p.1

32 Disability Services Queensland, *An overview of the Disability Services Act 2006: safeguarding rights and improving services*, Queensland Government, August 2006 (downloaded February 2016). Available at: <https://www.communities.qld.gov.au/resources/disability/publication/disability-services-act-2006.pdf>;

Ms Helen Ferguson, Department, *Public briefing transcript*, 18 January 2016, p.2

However, the statutory definitions that underpin the disability system mean that to-date, the safeguards under the DSA and related legislation have applied only to department funded and delivered disability services.<sup>33</sup> As the NDIS rolls out and NDIS participants begin to purchase their own supports under the scheme, these funding contracts will be gradually phased out and the safeguards linked to these funding contracts will be lost.<sup>34</sup>

The Australian Government is currently designing a national NDIS quality and safeguards framework, in partnership with other States and Territories, which is due to be agreed by the DRC in early 2016.<sup>35</sup> However, the timeframe for the finalisation of this national framework will mean that it will not be implemented in time for Queensland's early transition to the NDIS.<sup>36</sup>

The Department advised that "in order to ensure appropriate protections are in place for NDIS participants during and throughout the transition, Queensland is committed to extending its existing quality and safeguards system".<sup>37</sup> In addition, the Department noted that it is "critical" that legislation supports the "funding arrangements and financial processes that will need to occur through the transition period".<sup>38</sup>

### **2.3 Proposed amendments**

Shaped largely by the results of Stage One of the whole-of-government review of legislation, the Bill contains amendments which:

- redefine the scope of the DSA by amending key definitions to ensure the legislation's safeguards are applicable to non-government service providers that are not funded by the Department but through the NDIS
- enable the Department to monitor the compliance of NDIS non-government service providers with these DSA provisions, including establishing powers to require relevant information and documents and the power of entry, pursuant to a warrant, and
- introduce an information requesting power which will enable the chief executive to request auditing information from another department or disclose auditing information to another department, to support the monitoring and reconciliation of Queensland's funding contribution to the NDIA under the scheme.

The Bill also makes ancillary and consequential changes to definitions in other relevant Acts to ensure the applicability of their respective quality and safeguard systems to NDIS participants.<sup>39</sup>

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33 Department, *Briefing Note*, 9 December 2015, p.2

34 Department, *Briefing Note*, 9 December 2015, p.2; Ms Helen Ferguson, Department, *Public briefing transcript*, 18 January 2016, p.2

35 Department, *Briefing Note*, 9 December 2015, p.1

36 Department, *Briefing Note*, 9 December 2015, p.1

37 Ms Helen Ferguson, Department, *Public briefing transcript*, 18 January 2016, p.2

38 Explanatory Notes, p.1

39 Explanatory Notes, p.3

### 3. Extension of existing legislative safeguards

The Bill amends the DSA to redefine its jurisdiction and scope so that it extends to non-government service providers that are not funded by the Department, but through the NDIS (NDIS non-government service providers). The Explanatory Notes state that the amendments provide that the following key legislative safeguards apply to NDIS non-government service providers:

- complaints management
- criminal history screening, and
- restrictive practices.<sup>40</sup>

Clause 6 amends section 12 of the DSA to expand the list of *disability services* covered by the DSA, to include “another service prescribed by regulation”. The Explanatory Notes state that the amendment is necessary to capture the current range of services provided under the NDIS, which are “identified using different terminology to that currently identified in the DSA”.<sup>41</sup>

Clause 7 amends the definition of *funded service provider* at section 14 of the DSA. Currently, the definition only covers:

- service providers that receive funds from the Department to provide disability services, or
- the Department itself, to the extent that it provides services.

Clause 7 extends this definition to include “a service provider that provides disability services prescribed by regulation to a participant under the participant’s plan”.<sup>42</sup>

The Department advised that these amendments will ensure that key legislative safeguards in the DSA will apply to NDIS non-government service providers:<sup>43</sup>

*Firstly, it will ensure consumers, family members, carers, advocates or other persons have standing to make a complaint to the chief executive about the delivery of disability services by a NDIS service provider. Secondly, it will extend the application of the restrictive practices framework (part 6 of the DSA) to include NDIS service providers that provide services to an adult with an intellectual or cognitive disability.*<sup>44</sup>

Clause 7 clarifies that a funded service provider does not include “another department providing disability services prescribed by regulation to a participant under the participant’s plan”. This maintains an existing exemption for other government departments with respect to services rendered under the NDIS.<sup>45</sup>

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40 Explanatory Notes, p.2

41 Explanatory Notes, p.6

42 Disability Services and Other Legislation Amendment Bill 2015, clause 7

43 Ms Helen Ferguson, Department, *Public briefing transcript*, 18 January 2016, p.4

44 Explanatory Notes, p.7

45 Disability Services and Other Legislation Amendment Bill 2015, clause 7

The Department advised that the exemption is necessary “to ensure that government providers of NDIS supports— for example, hospital and health services—are not captured, given that they are already subject to and regulated by their own specific set of quality and safeguard measures”.<sup>46</sup>

Clause 8 inserts a new section 16A (Meaning of NDIS non-government service provider) which defines an *NDIS non-government service provider* as a “non-government service provider that provides disability services prescribed by regulation to a participant under the participant’s plan”. In capturing NDIS non-government service providers under the DSA, new section 16A will permit the chief executive of the Department to obtain the criminal history of, and related information about, persons engaged or to be engaged at a service outlet of an NDIS non-government service provider.<sup>47</sup>

The Department emphasised that the scope of this definition is limited to providers delivering specific types of disability services that are to be prescribed by regulation. The Department noted that “this allows for the full range of NDIS supports to be appropriately listed and to provide the necessary flexibility to amend this list if and as the NDIS supports change or are updated over the future of NDIS”.<sup>48</sup>

Clauses 9 to 43 make consequential amendments to Part 5 of the DSA to ensure that existing criminal history screening requirements are extended to NDIS non-government service providers.<sup>49</sup>

### **3.1 Submissions**

Submitters generally supported the amendments and their extension of existing protections to NDIS participants. Submitters did, however, identify a wide array of areas for further improvement to the current framework (see chapter 7 of this report).

The Public Advocate, National Disability Services Queensland (NDS Qld), Queenslanders with Disability Network Ltd (QDN) and the Queensland Law Society (QLS) supported the expansion of the Department’s jurisdiction and associated safeguards to NDIS non-government service providers.

The Public Advocate considered that the amendments would ensure the application of screening practices; the availability of complaints mechanisms for NDIS participants and their supporters; and ensure that the protections provided under the restrictive practices framework apply to NDIS participants.<sup>50</sup> QDN noted the importance of establishing legislative safeguards “in this time of transition ... so that all people with disability receiving services are protected and safeguarded regardless of where these services sit within the system”.<sup>51</sup> QAI stated that it “supports the requirement for vigorous safeguards for people with disability”.<sup>52</sup>

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46 Ms Helen Ferguson, Department, *Public briefing transcript*, 18 January 2016, p.4

47 Explanatory Notes, p.7

48 Ms Helen Ferguson, Department, *Public briefing transcript*, 18 January 2016, p.4

49 Department, *Briefing Note*, 9 December 2015, p.2

50 Public Advocate, Submission no.1, p.2

51 Queenslanders with Disability Network (QDN), Submission no.4, pp.1-2

52 QAI, Submission no.2, p.8

However, submitters raised a number of concerns in relation to the scope of the amended definitions and their practical implications.

NDS Qld highlighted a need for further examination and clarification of the application of the new definition of a funded service provider, noting that the NDIS's provision for participant choice of service supports is likely to lead to greater diversity in the types of supports and services engaged. NDS Qld questioned whether support workers operating as sole traders would be captured under the proposed definition. NDS Qld also noted a lack of clarity as to how the NDIS Act and State regulations will be rationalised in cases of self-management under the NDIS where a person is subject to restrictive practices and engages an intermediary plan management provider to assist them in coordinating service providers and purchasing supports.<sup>53</sup>

QAI questioned the exemption of other government departments from the definition of funded service provider, emphasising that "when and if any government department is delivering NDIS supports, then the same level of quality and safeguards must apply as in other models".<sup>54</sup> QAI submitted that such uniformity of standards and procedures is "particularly important given the historical mistreatment that occurs when conflation of disability with mental health and the medical model predominates".<sup>55</sup>

QAI and the Public Advocate drew attention to the potential increased impost on the complaints management system as a result of the definitional change, especially given "the changing dynamic that will come as people with disability take control of their service provision" and new providers enter the disability services marketplace.<sup>56</sup>

The Public Advocate emphasised that the complaints management system must be properly managed and resourced to accommodate these developments, noting that "poor outcomes are likely to have a compounding impact on the quality of the services provided".<sup>57</sup> QAI submitted that service providers with numerous complaints must be investigated and complaints satisfactorily resolved prior to the roll out of the NDIS in Queensland "as an urgent priority... in order to avoid contaminated practices following into the new scheme".<sup>58</sup> In addition, NDS Qld highlighted the need to address potential confusion about who to contact and how complaints will be managed amid shifting relationships between participants, the NDIA and the Department respectively during the transition.<sup>59</sup>

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53 National Disability Service Queensland (NDS Qld), Submission no.5, p.5

54 QAI, Submission no.2, p.7

55 QAI, Submission no.2, p.7

56 Public Advocate, Submission no.1, p.2

57 Public Advocate, Submission no.1, p.2

58 QAI, Submission no.2, pp.5-6

59 NDS Qld, Submission no.5, p.5

Concerns were also identified in relation to the new definition of an *NDIS non-government service provider* and its implications for screening practices. Specifically, QAI speculated whether new section 16A of the DSA might mean that people with disability who manage their own funds will be subject to a criminal history check. QAI considered this would be “unwarranted” and likely to undermine the person’s sense of autonomy, control and authority over their lives.<sup>60</sup> In addition, QAI stated that while it supports the requirement for screening safeguards, “in relation to Category C and D offences, there may be a need for discretionary exemptions in the cases of people with disabilities and Indigenous people with disabilities living in remote areas or where the person with a criminal history may be the most appropriate or only available support”.<sup>61</sup>

In addition, submitters emphasised the importance of appropriate education, training and guidelines to support the implementation of the Bill. Submitters recommended:

- robust engagement with disability service providers around the quality system and compliance to ensure all stakeholders have a thorough understanding of how operation under a dual system could potentially result in additional requirements for providers that have not previously been considered<sup>62</sup>
- a particular focus on engagement with NDIS non-government service providers, to facilitate their development of consistent organisational cultures and appropriate staff policies and procedures, and<sup>63</sup>
- transition periods be put in place to ensure availability of suitably trained and skilled support workers and professional staff to provide the Positive Behaviour Support Plans underpinning the use of restrictive practices in the timeframes provided under legislative requirements.<sup>64</sup>

Submitters also highlighted the cost implications of the legislation, which NDS Qld stated “are substantial in terms of implementation and ongoing compliance requirement costs for disability service providers”.<sup>65</sup> NDS Qld also submitted that the transition to new sets of requirements needs to be carefully managed so that disability service providers are not subject to dual compliance requirements and auditing processes – or multiple processes for multi-state providers – and to “ensure that valuable resources are not wasted as this complex transition is managed”.<sup>66</sup>

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60 QAI, Submission no.2, p.5

61 QAI, Submission no.2, p.8

62 NDS Qld, Submission no.5, p.4

63 Public Advocate, Submission no.1, p.2

64 NDS Qld, Submission no.5, p.4

65 NDS Qld, Submission no.5, p.5

66 NDS Qld, Submission no.5, p.4

### 3.2 Department's response

In response to NDS Qld's concerns about the new meaning of a funded service provider, the Department advised that clause 7 "will capture sole traders delivering supports under the NDIS".<sup>67</sup> In addition, the Department clarified that under Part 6 of the DSA, the restrictive practices framework applies to funded service providers who provide services to an adult with intellectual or cognitive disability irrespective of whether the participant is self-managing. Persons acting as plan management providers for these individuals will be subject to the requirements of the NDIS Act, *NDIS (Plan Management) Rules 2013* and *NDIS (Registered Providers of Supports) Rules 2013*.<sup>68</sup>

In response to QAI's concerns that the failure to include other government agencies under a uniform quality and safety framework may lead to inconsistencies in service provision; the Department stated that it has sought to maintain the current position and avoid unnecessary duplication by including them under the DSA, as "these agencies' quality and or safeguarding systems continue to cover their services".<sup>69</sup> In addition, during the public briefing, the Department advised:

*We have been in close contact with the departments across government in the preparation of this particular bill as well as in the preparation of moving towards the NDIS. Those departments are very aware of the requirements in the future and are preparing their systems for that transition to the NDIS ... we are continuing to work with the NDIA as it sets up in Queensland to ensure ... a consistent approach across the Queensland government departments.*<sup>70</sup>

The Department also advised that it expects to continue to receive and manage complaints about department funded and delivered services, and will extend these complaints mechanisms in relation to service providers operating under NDIS funds during transition years. The Department stated that in the event that numerous complaints are raised and systemic issues are identified:

*... the department will raise these concerns directly with the service provider and provide recommendations for their consideration, to ensure best practice. As part of this process, complainants and their supporters are kept informed on the progress of their issues, and feedback is sought prior to finalisation of a complaint.*<sup>71</sup>

In addition, the Department stated that it would work with the NDIA throughout the transition to ensure that complaints processes remain accessible to both people with disability and service providers, including developing guidelines and working arrangements "which will operationalise how issues which arise in the provision of services and supports, will be addressed".<sup>72</sup>

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67 Department, *Response to submissions*, 9 February 2016, p.8

68 Department, *Response to submissions*, 9 February 2016, p.9

69 Department, *Response to submissions*, 9 February 2016, p.6

70 Ms Helen Ferguson, Department, *Public briefing transcript*, 18 January 2016, p.7

71 Department, *Response to submissions*, 9 February 2016, p.4

72 Department, *Response to submissions*, 9 February 2016, p.10

In response to concerns about the application of criminal history screening requirements, the Department clarified that there is no provision in the Bill which requires self-managing NDIS participants to be subjected to a criminal history check.<sup>73</sup> The Department clarified that while the Assessment Guidelines for criminal history screening under the DSA list particular offences which are disqualifying offences for which a negative notice must be issued; the DSA also identifies certain categories of lesser offences or types of police information with respect to which a positive notice must be issued.<sup>74</sup> In addition, section 54 of the DSA provides for the chief executive to issue a notice contrary to these provisions if an “exceptional case” exists under the DSA. The Department advised:

*In deciding if an “exceptional case” exists, there are a number of factors taken into consideration, including:*

- *When the offence was committed;*
- *The nature of the offence and its relevance to persons with a disability;*
- *The penalty imposed by the court;*
- *The personal circumstances of the applicant at the time of the offences and any changes to these circumstances since;*
- *Any rehabilitation that the applicant has undergone since the offences occurred;*
- *Employment and/or professional references; and*
- *Anything else relevant to the application.*

*Consideration of these factors enables the decision maker to consider particular circumstances of Indigenous applicants.*<sup>75</sup>

In response to calls for engagement and training across the sector to support the implementation of the amendments, the Department noted that service providers are currently required to keep and implement a policy for preventing and responding to abuse situations, and a resource kit has been developed by the Department to support providers to meet this obligation. The resource, “which includes best practice tools and strategies”:

*...is already publicly available. Both the policy and resource kit embody a ‘zero tolerance’ approach to abuse, neglect and exploitation. This safeguard will continue to apply throughout the NDIS transition period.*<sup>76</sup>

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<sup>73</sup> Department, *Response to submissions*, 9 February 2016, p.4

<sup>74</sup> Department, *Response to submissions*, 9 February 2016, p.6. See also *Disability Services Act 2006*, section 54

<sup>75</sup> Department, *Response to submissions*, 9 February 2016, p.6

<sup>76</sup> Department, *Response to submissions*, 9 February 2016, p.1

In addition, the Department stated that its:

*... Centre of Excellence for Clinical Innovation and Behaviour Support provides practice leadership, education and resources specific to the needs of service providers working with people with complex needs including challenging behaviour... The Centre of Excellence is working with the Australian Government to address issues in relation to building up the capacity of positive behaviour support practitioners.<sup>77</sup>*

In relation to concerns about new financial imposts associated with compliance for service providers and the potential for regulatory overlap or duplicative systems, the Department stated that:

*The amendments in the Bill are aimed at preventing the creation of a two tiered system where people with disability experience different safeguarding systems, depending on the source of funding for their supports. Existing providers funded by the department are already required to comply with Queensland's quality and safeguards system. New providers who register with the NDIS to deliver disability services will be required to meet these same standards.<sup>78</sup>*

Further:

*The NDIA will be responsible for any enforcement measures, which will be triggered upon referral from the Queensland Government. The NDIA has the option to de-register providers under the NDIS Act 2013 for non-compliance issues. Working arrangements to set out the detail of these processes are being developed with the Australian Government and the NDIA.<sup>79</sup>*

#### Committee comment

The Committee notes submitters' broad support for the establishment of consistent legislative protections for all recipients of disability supports and services in Queensland during the State's transition to the NDIS.

The Committee considers that the amendments are a simple and effective means by which to achieve the Bill's objective of facilitating the extension and consistent application of existing statutory requirements in relation to complaints management, restrictive practices and criminal screening requirements to NDIS non-government service providers.

The Committee is satisfied that the Department's response to the issues raised in submissions adequately addresses the questions and concerns identified by stakeholders about the provisions and practical implication of the definitional changes.

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<sup>77</sup> Department, *Response to submissions*, 9 February 2016, p.9

<sup>78</sup> Department, *Response to submissions*, 9 February 2016, p.10

<sup>79</sup> Department, *Briefing Note*, 9 December 2015, p.3

## 4. Investigation and monitoring of NDIS non-government service providers

Clause 44 inserts a new Part 6A (Investigation, monitoring and enforcement) into the DSA to provide investigation and monitoring powers to authorised officers of the Department, primarily in relation to NDIS non-government service providers.

These new functions and powers generally mirror those already established for authorised officers with respect to department funded service providers under the *Community Services Act 2007* (CSA).<sup>80</sup>

### 4.1 Appointment of authorised officers

Section 25 of the CSA provides that *authorised officers* are appointed by the chief executive of a department (an appointing chief executive) and may include a public service employee or another employee of the department, or another person if the chief executive is satisfied the person is appropriately qualified for appointment and has competencies prescribed under a regulation as relevant to the person's appointment.<sup>81</sup>

### 4.2 General functions of authorised officers

Section 200D clarifies that the existing functions of authorised officers for the purposes of the DSA and the CSA continue to operate, notwithstanding the introduction of new Part 6A.<sup>82</sup> These functions include:

- investigating, monitoring and ensuring compliance with the DSA
- investigating or monitoring whether an occasion has arisen for the exercise of powers of entry and to require information and documents under Part 4, Divisions 3 and 4 of the CSA, and
- facilitating the exercise of powers of entry and to require information and documents under Part 4, Divisions 3 and 4 of the CSA.<sup>83</sup>

Section 200E provides that, in addition to the above functions, authorised officers will have the function of investigating, monitoring and ensuring compliance of NDIS non-government service providers with the provisions of the DSA.

### 4.3 Powers of authorised officers

Section 200F provides that when performing the function of investigating, monitoring and ensuring compliance of NDIS non-government service providers, authorised officers are to use the powers at new Division 3 of Part 6A of the DSA, instead of the current powers at Part 4, Divisions 3 and 4 of the CSA, which will continue to apply to the monitoring and investigation of department funded service providers.

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<sup>80</sup> *Disability Services Act 2006* (DSA), section 233 and *Community Services Act 2007* (CSA) section 10 and Part 4, Divisions 3 and 4

<sup>81</sup> CSA, section 25

<sup>82</sup> Explanatory Notes, p.11

<sup>83</sup> DSA, section 233 and CSA, section 24 and section 10

New Divisions 3 and 4 of Part 6A of the DSA provide that an authorised officer may:

- enter a place – if the occupier consents (new sections 200H to 200K), if it is open to the public (new section 200G), if authorised by a warrant and in compliance with the DSA (new sections 200L to 200Q); or if it is a place of business for an NDIS non-government service provider and the place of business is open (new section 200G), and
- once he or she has entered the place (except if the place is entered because it is open to the public):
  - search, inspect, examine or film any part of the place or anything at the place
  - take for examination a thing or sample of a thing
  - place an identifying mark in or on anything at the place
  - take an extract from or copy a document, including taking a thing containing an electronic document to another place to produce an image or writing
  - confer alone with a person at the place and require a person to answer questions to help the authorised officer ascertain whether the DSA is being or has been complied with, and
  - remain at the place for the time necessary to achieve the purpose of entry.<sup>84</sup>

New sections 200T and 200U provide that an authorised officer may require an occupier of the place or a person at the place to give the authorised officer reasonable help to exercise a general power and establish that it is an offence not to comply with the requirement, unless the person has a reasonable excuse. Failure to comply is an offence attracting a maximum penalty of 40 penalty units (\$4712).<sup>85</sup>

Section 200V provides that it is also an offence for a person to fail to answer questions asked by an authorised officer to help the officer ascertain whether the DSA is being or has been complied with, unless the person has a reasonable excuse.<sup>86</sup> This offence also carries a maximum penalty of 40 penalty units (\$4712).<sup>87</sup>

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84 Disability Services and Other Legislation Amendment Bill 2015, clause 44 (new section 200S of the DSA)

85 The Penalties and Sentences Regulation 2015, section 3, established that from 1 July 2015, the value of a penalty unit is \$117.80. The *Penalties and Sentences Act 1992*, section 5, explains that the dollar value of a penalty is obtained by multiplying the value of a penalty unit by the number of penalty units, and rounding this number down to the nearest multiple of \$1

86 Explanatory Notes, pp.12-13

87 Explanatory Notes, pp.12-13

Section 200W enables an authorised officer to require information from an NDIS non-government service provider, if that officer reasonably believes:

- an offence against the DSA has been committed
- there has been a service delivery failure by the provider and the provider may be able to give information about the failure, or
- a person who is a participant receiving services, under the person's participant's plan, from an NDIS non-government service provider may be at risk of harm because of abuse, neglect or exploitation by the service provider.<sup>88</sup>

Section 200X provides that it is an offence for an NDIS non-government service provider to contravene a requirement under section 200W. This offence comes with a maximum penalty of 50 penalty units (\$5890).<sup>89</sup>

The Department advised that the NDIA also has the option to de-register providers under the NDIS Act for non-compliance issues.<sup>90</sup>

Clause 51 inserts new section 241B into the DSA to provide that the investigation, monitoring and enforcement powers for authorised officers in relation to NDIS non-government service providers expire on 30 June 2019 immediately before the commencement of the full NDIS in Queensland.

#### **4.4 Submissions**

The Public Advocate, QLS and QAI supported the amendments. The Public Advocate stated that they will "enable DCCSDS [the Department], an entity independent of the National Disability Insurance Agency (NDIA), to monitor the compliance of NDIS non-government service providers and to undertake investigations as required".<sup>91</sup> The Public Advocate considered that "having this independence in executing such functions is of significant value to an effective and accountable system".<sup>92</sup>

However, QAI suggested that there is a need for clarification about the extent of the powers in proposed section 200T (requiring a person or occupier of a place to give an authorised officer reasonable help to exercise a general power).<sup>93</sup> Specifically, QAI expressed concern about the implications of the section in relation to other residents with disabilities, and their rights to silence and not to self-incriminate. QAI stated:

*We do agree that any workers or visitors must be prevailed upon to give information, however we propose that this must be carried out in privacy so as not to influence any other parties.*<sup>94</sup>

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88 Explanatory Notes, p.13

89 Explanatory Notes, p.13

90 Department, *Briefing Note*, 9 December 2015, p.3

91 Public Advocate, Submission no.1, p.2; Queensland Law Society (QLS), Submission no.3, p.1; QAI, Submission no.3, p.10

92 Public Advocate, Submission no.1, p.2

93 QAI, Submission no.3, p.10

94 QAI, Submission no.3, p.10

#### 4.5 Department's response

In response to QAI's concern about possible adverse effects for visitors or co-residents with disability, the Department clarified that clause 44, new section 200U(2) of the DSA recognises that it is a reasonable excuse for an individual not to comply with a help requirement under section 200T if complying with the request might tend to incriminate the individual or expose the individual to a penalty.<sup>95</sup>

#### Committee comment

The Committee considers that the amendments will ensure that authorised officers are appropriately empowered to monitor and investigate issues concerning abuse, neglect or exploitation of people with a disability, and to monitor service delivery standards and legislative compliance among NDIS non-government service providers.

The Committee notes that the NDIA will be responsible for any enforcement measures in relation to services provided under NDIS, and has the option to de-register providers under the NDIS Act for any non-compliance issues.<sup>96</sup> The Committee considers that it is crucial that clear and consistent departmental referral pathways are established to ensure the NDIA is provided with full and timely advice to support it in performing this role.

In examining the Bill, the Committee identified a drafting error in clause 44, new section 200F of the DSA. New section 200F states that in relation to the performance of the functions of an authorised officer mentioned in 200E, "this division" – that is, Division 3 – applies instead of Part 4, Divisions 3 and 4 of the CSA. The Committee considers that section 200F should refer to Division 3 and Division 4 of new Part 6A, which both make provisions about the powers of authorised persons. The Committee notes that the Explanatory Notes state that:

*Section 200F makes clear that in relation to the performance of the functions of an authorised officer mentioned in section 200E, Part 6A Divisions 3 and 4 of the DSA applies instead of Part 4, Divisions 3 and 4 of the CSA.<sup>97</sup>*

#### **Recommendation 2**

The Committee recommends that new section 200F of the *Disability Services Act 2006*, as inserted by clause 44 of the Disability Services and Other Legislation Amendment Bill 2015, be amended to clarify that both Divisions 3 and 4 of Part 6A of *Disability Services Act 2006* apply to authorised officers instead of Part 4, Divisions 3 and 4 of the *Community Services Act 2007*.

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95 Department, *Response to submissions*, 9 February 2016, p.7

96 Explanatory Notes, p.3

97 Explanatory Notes, p.11

## 5. Information sharing amendments

Clause 50 inserts new section 233 into the DSA to provide that the chief executive may enter into arrangements for the giving and receiving of information about persons receiving services funded or delivered by a department, who may meet legislated access criteria for the NDIS (*eligible persons*).<sup>98</sup>

New section 233(1) clarifies that the purpose of the section is to facilitate the monitoring and reconciliation of Queensland's funding contribution to the NDIS.<sup>99</sup>

Section 233(2) specifies that if the chief executive requests auditing information about persons who may be *eligible persons* from the chief executive of another department, the other chief executive must comply with the request. Section 233(3) provides for the establishment of written arrangements under which this auditing information may be given or received, including providing for the electronic transfer of the information (section 233(4)).

Auditing information includes:

- (a) the person's full name;
- (b) the person's unique agency client identifier, if any;
- (c) the person's date of birth;
- (d) the person's gender;
- (e) the person's residential address;
- (f) the name and full contact details of the person's carer or guardian and details of any relationship between the person and the person's carer or guardian.<sup>100</sup>

The Explanatory Notes state that the scope of the information requesting power needs to be kept broad "given the potential impacts of the NDIS on all Queensland Government departments is yet to be ascertained".<sup>101</sup> The Department advised that while "it is likely that there will only be a limited number of departments from which information is required",<sup>102</sup> "the prescription of specific departments may inadvertently impede the reconciliation that is required to ensure that Queensland does not suffer negative financial impact".<sup>103</sup>

Clause 50 also includes a provision authorising the Department to disclose to other departments the fact that an *eligible person* has become, or will not become, a NDIS participant. The Department advised that "this will allow for departments to effectively manage and adjust their funding contracts with non-government providers as well as ensure the continuity of supports for those persons identified by the NDIA as being not eligible".<sup>104</sup>

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98 Disability Services and Other Legislation Amendment Bill 2015, clause 50, new section 233(7) of the DSA; See also relevant access criteria in the *National Disability Insurance Scheme Act 2013* (Cwlth), section 21

99 Explanatory Notes, p.13

100 Disability Services and Other Legislation Amendment Bill 2015, clause 50 new section 233(7) of the DSA

101 Explanatory Notes, p.13

102 Department, *Briefing Note*, 9 December 2015, p.4

103 Explanatory Notes, p.13

104 Department, *Briefing Note*, 9 December 2015, p.4

Clauses 45 to 49 extend current record keeping and information sharing provisions applicable to department funded non-government service providers, to NDIS non-government service providers. This includes:

- requiring an NDIS non-government service provider to keep certain records prescribed under regulation, including the name, address and telephone number for each of the provider's consumers; and documents relating to written complaints made to the provider about the delivery of disability services by the provider (section 215 of the DSA as amended by clause 45)
- enabling a person to disclose information to an NDIS non-government service provider to provide for the needs of a person with a disability (section 228 of the DSA as amended by clause 46)
- enabling the chief executive to give a notice to an NDIS non-government service provider requiring them to give information to the chief executive relating to the provision of disability services to the provider's clients (section 229 of the DSA as amended by clause 47)
- protecting NDIS non-government service providers from liability in situations where they have given the chief executive information under the DSA (section 230 of the DSA as amended by clause 48), and
- ensuring that the chief executive advises an NDIS non-government service provider before disclosing any information obtained from the NDIS non-government service provider under section 229 of the DSA (section 231 of the DSA as amended by clause 49).

## 5.1 Submissions

Submitters had few comments on the proposed amendments to support the sharing of auditing information and other record keeping and information requirements.

QAI expressed a concern, however, that the goals of financial reconciliation underpinning clause 50 may overshadow "the rights and liberty of people with disability and their families".<sup>105</sup> QAI recommended the introduction of a policy guaranteeing that both the Queensland Government and the NDIA will seek consent before sharing personal information.<sup>106</sup> In addition, QAI stated:

*... in recent years people with disabilities have been denied fundamental supports for everyday life as successive governments have acted as 'governments-in-waiting' for NDIS funding...<sup>107</sup>*

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<sup>105</sup> QAI, Submission no.2, p.2

<sup>106</sup> QAI, Submission no.2, p.11

<sup>107</sup> QAI, Submission no.2, p.2

*When [the Department] discloses to other departments the fact that an eligible person has not, or will not become, an NDIS participant, the person should be prioritised for support from a Local Area Coordinator and or other funded supports where and when appropriate.<sup>108</sup>*

QAI noted the “Queensland National Disability Insurance Agency Memorandum of Understanding includes an item on data exchange” and suggested that key areas for consideration should include:

- identifying what data is required
- ensuring “as far as is practicable … [that] comprehensive data is held on the current range of supports provided to each client through development of individual support plans
- working to identify strategies and mechanisms for the transfer of data, and
- developing an information protocol between the NDIA and the Queensland Government to direct the data management approach, including data collection, storage and transfer with appropriate reference to data protection regimes in legislation.<sup>109</sup>

## 5.2 Department’s response

In response to QAI’s concerns, the Department advised that:

*Under the NDIS, people with disability will receive reasonable and necessary supports to enable them to exercise greater choice and control in the pursuit of their goals and the planning and delivery of the supports they need.*

*During the transition period, people with disability and their families will continue to receive services in a way that respects the confidentiality of their information.*

*The proposed amendment in the Bill to section 233 of the Disability Services Act 2006 (clause 50) is for a discrete purpose. It will enable the department to request specific information about persons who may be eligible for the NDIS from other Queensland Government departments only for the purpose of financial reconciliation by the department. It will also ensure Queenslanders continue to receive their disability supports with minimal disruption by placing no additional strain on the service systems of Queensland Government departments.<sup>110</sup>*

The Department noted that the information requesting power “will only be necessary through the transition period”, and that “[the Department] will be bound by its lawful obligations under the Information Privacy Principles in relation to the storage and security of this information”.<sup>111</sup>

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108 QAI, Submission no.2, p.11

109 QAI, Submission no.2, pp.10-11

110 Department, *Response to submissions*, 9 February 2016, p.7

111 Department, *Briefing Note*, 9 December 2015, p.4

In addition, the Department advised that while the Bill does not contain amendments in relation to the sharing of information between the Queensland Government and the NDIA, “the NDIA and the Department have a very close working relationship” and continue to work collaboratively to ensure the secure and lawful transfer of client information to support continuous, person-focused service delivery.<sup>112</sup>

Committee comment

The Committee considers that legislative provision for consistent record keeping and secure information sharing is critical to ensuring continuity of funding and service provision both for people who transition across to the NDIS, and for those persons identified by the NDIA as being not eligible.

The Committee notes that the information collected pursuant to the information requesting and sharing power in proposed section 233 of the DSA is required to ensure the Department can monitor and reconcile Queensland Government funding contributions against NDIA invoices in an efficient and timely manner. The Committee considers this will assist departments to effectively and responsively manage and adjust their funding contracts with NDIS non-government service providers to meet clients’ service needs.

The Committee notes that the power will only be necessary through the transition period, and that the Department will be bound by its lawful obligations under the Information Privacy Principles in relation to the storage and security of this information.

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112 Ms Helen Ferguson, Department, *Public briefing transcript*, 18 January 2016, pp.3 and 4

## 6. Amendments to other legislation

The Bill also extends other elements of Queensland's existing quality and safety system to NDIS participants by amending definitions in the *Coroners Act 2003* (Coroners Act), *Guardianship and Administration Act 2000*, Public Guardian Regulation 2014, *Powers of Attorney Act 1998* and *Working with Children (Risk Management and Screening) Act 2000*.

### 6.1 Coroners Act 2003

Clause 4 amends section 9 of the Coroners Act, which outlines the circumstances in which the death of a person who had a disability recognised in section 11 of the DSA is considered to be a *death in care*. The amendment extends the circumstances currently listed to include a person's death when:

- (e) the person was a participant who was—
  - (i) living in—
    - (A) accommodation provided to persons with a disability; or
    - (B) a residential service that is not a private dwelling or aged care facility; and
  - (ii) receiving services paid for wholly or partly from funding under the NDIS in accordance with the person's participant's plan.<sup>113</sup>

The Explanatory Notes state that this will ensure that the jurisdiction of the Coroner includes the ability to investigate the deaths in care of NDIS participants.<sup>114</sup>

### 6.2 Guardianship and Administration Act 2000, Powers of Attorney Act 1998 and Public Guardian Regulation 2014

Clauses 55 and 57 amend the *Guardianship and Administration Act 2000* and the *Powers of Attorney Act 1998* to broaden the definition of a *personal matter* for which a substitute decision maker may be appointed to respectively include "services provided to the adult" and "services provided to the principal" under the NDIS.<sup>115</sup>

Clause 59 omits and inserts a new Schedule 1 of the Public Guardian Regulation 2014 to permit a community visitor appointed under the regulation to visit sites in which an NDIS participant is receiving supports.<sup>116</sup> Community visitors are appointed by the Public Guardian to conduct site visits to monitor the standard of service delivery and protect the rights and interests of adult residents with intellectual, psychiatric or cognitive disability.<sup>117</sup>

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<sup>113</sup> Disability Services and Other Legislation Amendment Bill 2015, clause 4

<sup>114</sup> Explanatory Notes, p.6

<sup>115</sup> Disability Services and Other Legislation Amendment Bill 2015, clauses 55 and 57

<sup>116</sup> Explanatory Notes, p.3

<sup>117</sup> Office of the Public Guardian, 'The Community Visitors Program (Adult)', Fact sheet (downloaded February 2016). [http://www.publicguardian.qld.gov.au/\\_data/assets/pdf\\_file/0008/273806/JAG-2601812-v1-Community\\_Visitor\\_Program\\_Adult.pdf](http://www.publicguardian.qld.gov.au/_data/assets/pdf_file/0008/273806/JAG-2601812-v1-Community_Visitor_Program_Adult.pdf)

New Schedule 1 includes an additional section 1(e), which provides that a *prescribed visitable site* includes a place, other than a private dwelling house, that is “a place where a funded adult participant with impaired capacity for a personal matter of a financial matter, or with an impairment, lives”. New Schedule 1 also includes an additional section 2 which provides a range of related definitions to support this expanded meaning, including: funded adult participant, NDIS Act, participant, participant’s plan and plan.<sup>118</sup>

### **6.3 Working with Children (Risk Management and Screening) Act 2000**

Clauses 60 to 62 amend the *Working with Children (Risk Management and Screening) Act 2000* to ensure the various definitions of regulated employment and business incorporate NDIS non-government service providers. The Explanatory Notes state that “these consequential amendments ensure the interface between Working with Children checks and working with vulnerable people checks (under Part 5 of the DSA) remains consistent”.<sup>119</sup>

### **6.4 Submissions**

The Public Advocate and NDS Qld welcomed the Bill’s expansion of the definition of death in care under the Coroners Act, which they considered as necessary to “cover NDIS participants” and thereby “allow the Coroner to continue receiving necessary information to enable the monitoring of all deaths in care in Queensland”.<sup>120</sup> However, NDS Qld expressed a concern that the Bill’s new meaning of death in care is broadly framed and provides insufficient detail to inform its application across a diverse range of settings. In particular, NDS Qld stated that this could result in “unclear demarcations related to risk and responsibility” where a provider is delivering minimal supports or services under a participant’s plan.<sup>121</sup>

QAI proposed that the amendments should also extend definitions to enable investigations into the deaths of people in “aged care facilities, boarding houses and hostels, and any reportable death of a NDIS participant living in private residence”. QAI noted that many people with disability have been coerced into living in aged care facilities or have been subject to private care arrangements with paid staff in private homes or other facilities, all of which “must be scrutinised with due diligence”.<sup>122</sup>

In addition, the Public Advocate noted that although the amendments may ensure the deaths of NDIS participants are reported to the Coroner and investigated, the lack of a process for systemic reviews of the deaths of people with disability in care limits the extent to which emerging issues or trends can be identified to support interventions and continuous system improvement.<sup>123</sup>

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118 Disability Services and Other Legislation Amendment Bill 2015, clause 59

119 Explanatory Notes, p.15

120 NDS Qld, Submission no.5, p.5; Public Advocate, Submission no.1, p.2

121 NDS Qld, Submission no.5, p.5

122 QAI, Submission no.2, p.7

123 Public Advocate, Submission no.1, p.2

In relation to the amendments to the *Guardianship and Administration Act 2000* and the *Powers of Attorney Act 1998*, the Public Advocate supported the Bill's clarification that making decisions about *personal matters* may include making decisions regarding NDIS funded services.<sup>124</sup> However, the Public Advocate highlighted the importance of ensuring that substitute decision makers have the necessary skills and knowledge to enable them to make such decisions in a manner that is both consistent with the legislative obligations and beneficial for the adult or principal. The Public Advocate submitted:

*Research undertaken by my Office has indicated that private guardians often lack awareness and understanding in respect of their obligations to apply the general principles of the Guardianship and Administration Act, for example. There is also limited practical guidance, education or training provided to guardians, attorneys and administrators about their roles and obligations.*

*Consideration should be given to further education and training for guardians, administrators and attorneys, inclusive of information about the NDIS to support substitute decision-makers in making decisions associated with negotiating NDIS funding and service arrangements.*<sup>125</sup>

Submitters were generally supportive of amendments to the Public Guardian Regulation 2014, and their effective expansion of the jurisdiction of the community visitor program. The Public Advocate welcomed the amendment, noting that it had recommended in the past that such a program be required under the NDIS. The Public Advocate stated that "external visitors provide a level of scrutiny that would otherwise be absent in accommodation and support services for people with disability, and enable an important safeguard to mitigate abuse and neglect in such settings".<sup>126</sup> QDN strongly supported the extension to the list of prescribed visitable sites, as "an effective way to ensure more people with disability are afforded the same protection of independent, autonomous observation and accountability of service practitioners regardless of where they live".<sup>127</sup>

However, submitters also emphasised the importance of ensuring the community visitor program is adequately resourced to support visits to NDIS sites, as well as calling for a further extension of the definitional amendments to ensure the program better captures the diverse array of care settings in which disability services are provided. For example, the Public Advocate submitted that the amendment "must be accompanied by a commensurate increase in funding to ensure frequent, thorough and effective visits to properly inspect the inevitably increased number of visitable places that will arise under the NDIS".<sup>128</sup> Infrequent and/or brief inquiries, the Public Advocate noted, would likely reduce the effectiveness of the program and "may allow for abuse, neglect or exploitation to go undetected for long periods of time".<sup>129</sup>

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<sup>124</sup> Public Advocate, Submission no.1, p.3

<sup>125</sup> Public Advocate, Submission no.1, p.3

<sup>126</sup> Public Advocate, Submission no.1, p.3

<sup>127</sup> QDN, Submission no.4, p.2

<sup>128</sup> Public Advocate, Submission no.1, p.3

<sup>129</sup> Public Advocate, Submission no.1, p.3

QAI, similarly, called for guaranteed funding for community visitors for a four-year transition period and an evaluation of the existing program model to support enhanced risk-based monitoring and promotion of social inclusion in the future; including consideration of the need for more frequent visits in congregate accommodation settings.<sup>130</sup>

QDN noted that there are many people with disability living in Level 1 and Level 2 Residential Services who may be eligible to receive NDIS funded services either on-site or in the community, “and at this stage Level 1 and 2 Residential Services will not be covered by the widening of visitable sites”.<sup>131</sup> Further, QAI called for the further extension and strengthening of the community visitor program to boarding houses and hostels, and to incorporate consented visits to private dwellings in relation to a person who is a resident and is subject to restrictive practices.<sup>132</sup>

## 6.5 Department’s response

In response to NDS Qld’s concerns that the definition of death in care lacks sufficient detail, the Department advised that the State Coroner’s Guidelines are considered “the more appropriate mechanism by which to articulate the finer detail of the underlying policy intent to assist in the practical interpretation and application of the amended definition”.<sup>133</sup>

In relation to the Public Advocate’s submission regarding the lack of systemic analysis of deaths in care in the State, the Department stated that “the Centre of Excellence for Clinical Innovation and Behaviour Support within the department monitors and analyses critical incident reports in relation to issues such as client deaths and deaths in care”. This includes conducting practice reviews of deaths and serious incidents at the request of the department’s regional executive directors.<sup>134</sup>

Additionally, in response to QAI’s calls for a further expansion of the jurisdiction of coronial powers to various other accommodation settings, the Department noted that the aged care sector is regulated by the Australian Government and that hostels that are accredited Level 3 Residential Services are covered under the current definition of death in care. Further, the Department advised:

*Any expansion to the coronial system to investigate the death of people in aged care facilities, boarding houses, hostels and any reportable death of an NDIS participant living in a private residence would require extensive policy considerations, including stakeholder consultation and significant additional cost to government.*<sup>135</sup>

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130 QAI, Submission no.2, p.4

131 QDN, Submission no.4, p.2

132 QAI, Submission no.2, p.3

133 Department, *Response to submissions*, 9 February 2016, p.10

134 Department, *Response to submissions*, 9 February 2016, p.2

135 Department, *Response to submissions*, 9 February 2016, p.5

The Department also clarified in relation to the proposed broadening of the definition of a prescribed visitable site in the Public Guardian Regulation 2014 that the change is intended to extend existing arrangements:

*...so that community visitors can visit adults with impaired capacity, irrespective of whether the service is funded by the department, or through a NDIS participant's plan, during the transition period.<sup>136</sup>*

The Department noted that this includes visits to accredited Level 3 Residential Services and people with disability subject to restrictive practices in departmentally funded and provided accommodation.<sup>137</sup> Further, the Department advised:

*The future role of the CVP [community visitor program] in the context of the NDIS is subject to the Australian Government's decision on the national NDIS quality and safeguards framework for the full NDIS from 1 July 2019, which is currently under development ...*

*In the interim, the Office of the Public Guardian will maintain its current practice.<sup>138</sup>*

#### Committee comment

The Committee considers that the proposed amendments to the Coroners Act, *Guardianship and Administration Act 2000*, *Powers of Attorney Act 1998*, Public Guardian Regulation 2014 and *Working with Children (Risk Management and Screening) Act 2000* are crucial to ensuring the availability of key external oversight mechanisms to NDIS participants, as important corollary protections to the system of safeguards provided under the DSA.

The Committee notes that section 39 of the *Public Guardian Act 2014* provides the Executive Council with the power to prescribe a visitable site by regulation. While the inclusion of the amendment to the Public Guardian Regulation 2014 in the Bill may be inconsistent with Parliament's original intent under section 39; the Committee considers the amendment is justified, as the Explanatory Notes state, as an "integral part of the package to be considered by Parliament to facilitate the NDIS operating in Queensland".<sup>139</sup>

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136 Department, *Response to submissions*, 9 February 2016, p.3

137 Department, *Response to submissions*, 9 February 2016, p.3

138 Department, *Response to submissions*, 9 February 2016, p.8

139 Explanatory Notes, p.4

## 7. Further review and recommendations

While not strictly related to the proposed amendments in the Bill, submitters made a range of other recommendations to strengthen safeguards and supports for people with disability in Queensland.

These suggestions reflected a strong consensus among submitters that the transition to the NDIS presents a vital opportunity for broader review of the current legislative framework in Queensland, to ensure that it is “progressive and congruent with what the NDIS promises for people with disability and their families”.<sup>140</sup> Submitters’ recommendations included:

- the establishment of an independent agency or body, such as an independent Disability Commissioner, charged with promoting and protecting the rights and best interests of people using disability and community services, and with functions including:
  - receiving, resolving and investigating complaints
  - initiating inquiries and investigations
  - assisting people with a disability to make a complaint, and
  - reviewing the causes of complaints, identifying systemic issues for service improvement and making recommendations for improving the handling and resolution of complaints,<sup>141</sup>
- a review of guardianship legislation to ensure that statutory principles and systems appropriately support the rights of people with disability to autonomy or “choice and control”, and facilitate a shift from a culture of substituted decision making to supported decision making<sup>142</sup>
- the evaluation and revision of the current authorisation of restrictive practice orders and the use of restrictive practices in Queensland – considered by certain submitters to be “cruel”, “inhumane” and over-utilised – to better support options for participant engagement in development of a Positive Behaviour Support Plan and broader choice-based service delivery frameworks under the NDIS<sup>143</sup>
- the establishment of a disability worker exclusion scheme, with appropriate statutory safeguards (including appeal mechanisms)<sup>144</sup>

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<sup>140</sup> QAI, Submission no.2, p.2

<sup>141</sup> QLS, Submission no. 3, pp.1-2

<sup>142</sup> Public Advocate, Submission no.1, p.3; QDN, Submission no.3, p.3

<sup>143</sup> QAI, Submission no.2, p.4; QLS, Submission no. 3, pp.1-2; QDN, Submission no.3, p.3

<sup>144</sup> QAI, Submission no.2, p.8

- continued state funding of independent advocacy services, including the expansion of accredited citizen advocacy programs, to help support vulnerable people who do not have informal support networks and to help NDIS participants to access, navigate and benefit from the scheme,<sup>145</sup> and
- consideration of a system of reporting and analysis of deaths in care by an appropriate agency in Queensland, which should also be properly resourced to carry out regular reviews.<sup>146</sup>

### 7.1 Department's response

The Department reaffirmed that the primary purpose of the Bill is to extend Queensland's existing quality and safeguards system through the transition period to a new category of persons and providers that need to be captured as a result of the new way that disability supports will be provided and funded under the NDIS.<sup>147</sup> The Department noted that the Bill "does not create new quality or safeguard measures".<sup>148</sup>

The Department's response to submissions indicated that the majority of areas identified by stakeholders are currently being given consideration as part of the development of the national NDIS quality and safeguarding framework for the full scheme. The Department advised that:

*Queensland is contributing, with other jurisdictions, to the Australian Government's design of a national NDIS quality and safeguards framework for full scheme which has appropriate levels of protection for people with disability.*<sup>149</sup>

With regards to submitters' concerns about the restrictive practices framework, the Department noted:

*The amendments to the Disability Services Regulation which took effect from July 2015 compel service providers to report on every single instance of use of a restrictive practice.*

*The department's Centre of Excellence for Clinical Innovation and Behaviour Support will continue to provide practice leadership, advice and training to increase the evidence based use of positive behaviour support and eliminate or reduce the use of restrictive practices.*<sup>150</sup>

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145 QAI, Submission no.2, pp.11-12

146 Public Advocate, Submission no.1, p.3

147 Department, *Response to submissions*, 9 February 2016, p.1

148 Department, *Response to submissions*, 9 February 2016, p.1

149 Department, *Response to submissions*, 9 February 2016, p.1

150 Department, *Response to submissions*, 9 February 2016, p.4

Committee comment

The Committee notes that clause 51 inserts new section 241A into the DSA which requires the Minister to review the efficacy and efficiency of the DSA by 30 June 2019. The Committee recommends that the Department consider the issues raised by submitters as part of this review.

**Recommendation 3**

The Committee recommends that the Department of Communities, Child Safety and Disability Services considers those issues raised by submitters which do not relate directly to the Disability Services and Other Legislation Amendment Bill 2015, as part of its review of the *Disability Services Act 2006* to be completed by 30 June 2019.

## 8. Fundamental legislative principles and explanatory notes

### 8.1 Fundamental legislative principles

Section 4 of the *Legislative Standards Act 1992* states that *fundamental legislative principles* are the “principles relating to legislation that underlie a parliamentary democracy based on the rule of law”. The principles include that legislation has sufficient regard to:

- the rights and liberties of individuals, and
- the institution of Parliament.

The Committee has examined the application of the fundamental legislative principles to the Bill. The Committee brings the following to the attention of the House.

### 8.2 Rights and liberties of individuals

#### Clause 44 – investigation, monitoring and enforcement powers

Section 4(3)(e) of the *Legislative Standards Act 1992* provides that legislation should confer power to enter premises, and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer.

Clause 44 of the Bill re-introduces into the DSA investigation, monitoring and enforcement powers which had been previously transferred to the CSA. Clause 44 includes the power for authorised officers to enter places: with consent, if open to the public or under a warrant and to require help; search premises and to require documents and information.

The Explanatory Notes state:

*These changes have sufficient regard to the rights and liberties of individuals as the re-introduction of the powers into the DSA is considered necessary on two grounds.*

*First, the application of the CSA is limited to funding provided by a Queensland Government department that is the subject of a funding declaration. Funding under the NDIS falls outside the application of the CSA. Second, the functions and powers included in the Bill are limited to monitoring and investigating NDIS non-government service providers. The purpose of including these powers is to ensure that persons in the State who are receiving services under the NDIS are still subject to the same protections from harm and exploitation as persons receiving State funding.<sup>151</sup>*

#### Committee comment

The Committee considers that, on balance, the proposed re-introduction of investigation, monitoring and enforcement powers for authorised officers into the DSA has sufficient regard to the rights and liberties of individuals. In reaching this view, the Committee notes that the provisions are intended to protect persons with a disability from harm and that there has been no extension to the existing powers contained in the CSA.

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151 Explanatory Notes, p.4

Clause 50 – giving and receiving private information

The privacy of information is a relevant consideration when assessing whether legislation has sufficient regard to the rights and liberties of individuals.

Clause 50 of the Bill inserts new section 233 into the DSA which provides that the chief executive may enter into arrangements about the giving and receiving of information about persons who may be eligible persons for the NDIS. The Committee notes that this may include private and personal information about a person, including their full name, date of birth, residential address and gender.

The Explanatory Notes state that the purpose of the provisions is to enable the exchange of information to facilitate monitoring and reconciliation of Queensland's funding contributions to the NDIS.<sup>152</sup>

Committee comment

The Committee notes that the provisions are limited to the specific purpose of the chief executive making arrangements for the giving and receiving of information to reconcile invoices from the NDIA. The Committee also notes that the safeguards provided for in the *Information Privacy Act 2009* – in particular, the Information Privacy Principles – will apply to the chief executive when obtaining, storing and using this information.

According, the Committee considers that, on balance, clause 50 has sufficient regard to the rights and liberties of individuals.

**8.3 Institution of Parliament**

Clause 8 – prescribing disability services by regulation

Clause 8 inserts new section 16A into the DSA which defines an NDIS non-government service provider as a non-government service provider that provides disability services prescribed by regulation to a participant under the participant's plan. The effect of being prescribed as an NDIS non-government service provider is that provisions of the DSA apply to the provider.

The prescription of NDIS non-government service providers by regulation raises the issue of whether it is appropriate to prescribe a list of providers by delegated legislation instead of by primary legislation where the list of providers would be subject to more direct scrutiny by the House. Accordingly, the approach taken in the Bill raises the question of whether clause 8 has sufficient regard to the institution of Parliament.

The Department stated that:

*... the prescription of services by regulation is justified on a number of grounds.*

*The Regulation allows for the full range of disability services to be listed. This level of technical detail most appropriately belongs in a Regulation.*

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152 Explanatory Notes, p.3

*The Regulation also represents the most practical mechanism to capture the relevant disability service providers. The prescription of disability services under the Act would be impractical. Rather, listing under Regulation provides the necessary flexibility to amend the list if NDIS support clusters change or are updated. These changes are not in the control of the Queensland Government.*<sup>153</sup>

Committee comment

On the basis of the justification provided by the Department, the Committee considers that clause 8 has sufficient regard to the institution of Parliament.

**8.4 Explanatory Notes**

Part 4 of the *Legislative Standards Act 1992* provides that an Explanatory Note must be circulated when a Bill is introduced into the Legislative Assembly, and sets out the information an Explanatory Note should contain.

The Committee notes that Explanatory Notes were tabled with the Bill on its introduction in the Legislative Assembly.

The Committee considers that the Explanatory Notes are fairly detailed and contain the majority of information required by Part 4 of the *Legislative Standards Act 1992* and a reasonable level of background information and commentary to facilitate understanding of the Bill's aims and origins.

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153 Department, *Briefing Note*, 9 December 2015, p.5

## **Appendix A – List of submissions**

Sub #	Submitter
001	Public Advocate
002	Queensland Advocacy Incorporated
003	Queensland Law Society
004	Queenslanders with Disability Network Ltd.
005	National Disability Services Queensland

## **Appendix B – List of witnesses at the public briefing**

Public briefing 18 January 2016
Ms Helen Ferguson – Senior Executive Director, Policy and Legislation, Department of Communities, Child Safety and Disability Services
Ms Sonya Reesby – Acting Director, Policy and Legislation, Department of Communities, Child Safety and Disability Services

