



SUBMISSION TO

Disability Services and Other Legislation

Amendment Bill 2015

The measures of Queensland's interpretation of Transition to the National Disability Insurance Scheme

"The care of human life and happiness, and not their destruction, is the first and only object of good government"

Thomas Jefferson

"A government big enough to give you everything you want is a government big enough to take from you everything you have"

Gerald R. Ford

Will Queenslanders with a disability have autonomy, choice and control?

About QAI – our values and beliefs

Queensland Advocacy Incorporated (QAI) is an independent community-based advocacy organisation that has for over twenty-five years campaigned for the rights of vulnerable people with disability in Queensland. With a focus on the fundamental needs of the most vulnerable people in our community, QAI has a history of avant-garde advocacy for people with disability to have supports to live an inclusive life in the community.

At QAI, we believe that all human beings are equally important, unique and of intrinsic value. Everyone should be seen and valued as a whole person, first and foremost. The human condition is such that societies tend to devalue those who do not fit within their models of perfection. These groups, including people with disability, are socially marginalised. As an organisation we seek to bring about a common vision where all human beings are equally valued.

To ensure that the National Disability Insurance Scheme (NDIS) is implemented in Queensland according to the principles of “choice and control” and the implied autonomy and authority that are inherent with that catchphrase, it is essential that the amendments to the Disability Services Act do not merely replicate the current Act with differing language. It is vital that the legislative framework for Queensland is progressive and congruent with what the NDIS promises for people with disability and their families.

Concern:

The following statement from the “**Achievement of policy objectives**” of the amendment implies that financial concerns for the Queensland government may over-ride the rights and liberty of people with disability and their families.

*“The scope of this power is required to be kept broad to ensure impacts across all departments can be identified and reconciled so that Queensland **does not suffer negative financial impacts through the NDIS transition period.**”*

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.

ESTIMATED COST FOR GOVERNMENT IMPLEMENTATION

*“The proposals in the Bill will be implemented through a combination of **Queensland and Australian Government resources.**”*

This statement (above) would indicate that the department has reserved funds for the transition process yet has abdicated core responsibilities in the interim of serving and

supporting people with disabilities. We are aware of significant numbers of people with medium to high support needs who have been denied access to funded supports and services – some who have had to remain living in inappropriate settings, or been referred to inappropriate settings because of a lack of funded supports.

JUSTICE RELATED AMENDMENTS

The Bill also extends Queensland's existing quality and safeguard system to NDIS participants by:

- *broadening the definition of 'visitable site' to permit a community visitor appointed under the Public Guardian Regulation 2014 to visit sites in which an NDIS participant is receiving supports;*

The wording of the Amendment Bill is somewhat unwieldy and at times unclear. For example there is a need for clarification in regard to "visitable sites" and a lack of definition regarding "occupier". While the amendments state that private dwellings will be excluded from visitable sites, the term "occupier" does not define whether this may be the service provider owner of a residence such as a boarding house or hostel (not level 3), or an individual person with disability in their own home.

While it is understandable that there is a need for the amendment to be broad enough yet flexible to enable some ease within the bureaucratic processes, this should not come at the expense of the freedoms and rights of the people for whom the NDIS was developed.

For example there needs to be a degree of caution regarding the broadening of visitable site to ensure that people are protected and safeguarded from abuse or neglect, and the unlawful use of cruel, inhuman and degrading treatment (Restrictive Practices), that an individual's private home and privacy is not invaded without reasonable suspicion of abuse.

Recommendations:

- QAI strongly suggests that there is a need for clarification around identifying who is the "occupier" and perhaps this should be renamed as "resident". We urge that there is a high degree of caution regarding whether a person's private home will be considered a **visitable site**, with the consent of the person with disability receiving supports to reside there.
- QAI recommends that visitable sites include any place where a person with disability is subjected to the use of Restrictive Practices.
- Visitable sites should include boarding houses and hostels.
- QAI recommends that where a person resides in a private dwelling and lives under the imposition of Restrictive Practices (particularly if the person employs and self-direct their own supports) there must be

- Consent from the person (resident)
- That visits are unannounced, ad hoc and only once per year, except where
 - There is a reasonable degree of suspicion of abuse or neglect.

The underpinning factor to visitable sites must lie in the linkage with funded supports, and or the use of Restrictive Practices.

Community Visitor Program – QAI holds concern regarding the strength of this program.

This Bill is an opportunity to show its commitment to the program by legislating to strengthen it as outlined by the submission by the Australian Guardianship and Administration Council to the Quality and Safeguards Framework consultation. ¹

Restrictive Practices:

QAI considers the use of Restrictive Practices to be cruel, inhuman and degrading treatment and falls within the definition under the Convention Against Torture. People who live with the application of these practices are highly vulnerable and while we acknowledge that some practices may be utilised for safety of the person, QAI is concerned about the deprivation of personal bodily integrity and freedom, and the concern for isolation of the person, and demonization that can occur to the person as a result of related ill-deserved reputation.

¹Australian Guardianship and Administration Council "Proposal for a National Disability Insurance Scheme Quality and Safeguarding framework consultation paper":

Recommendation 9. Community Visitors programs currently in operation should be funded to continue for a 4-year transition period from 1 July 2016.

Recommendation 10. Amendment of the National Disability Insurance Scheme Act 2013 (Cth) will likely be required to enable existing state and territory Community Visitors programs to operate in the context of the full NDIS roll-out. Relevant state and territory legislation will also likely need amendment to enable these programs to continue to operate in an NDIS environment.

Recommendation 11. Transitional legislation at the Commonwealth level, and in those jurisdictions where Community Visitors programs exist, should specify that Community Visitors have authority to visit the accommodation settings of National Disability Insurance Scheme participants where NDIS funds are being used to provide supported accommodation services. 'Supported accommodation services should be defined to refer to situations where the provision of accommodation is connected to the provision of personal care and support.

Recommendation 12. A national evaluation of existing Community Visitors programs should be commenced as soon as possible and be concluded by 1 July 2018. The evaluation should be guided by the principles contained in the Convention on the Rights of Persons with Disabilities, the National Standards for Disability Services, and the National Disability Strategy. The evaluation should identify a best-practice Community Visitors model by assessing, among other things, the extent to which Community Visitors programs:

- a. promote social inclusion and the empowerment of people with disability;
- b. identify matters of concern (including situations of violence, abuse, exploitation and neglect);
- c. provide a cost-effective means of monitoring the well-being of people in NDIS funded accommodation settings.

Recommendation:

The Bill and the transition to the NDIS legislation offer opportunity for the Department to evaluate and revise the current authorisation of orders and the use of Restrictive Practices as well as the reporting and data collection on the use and frequency of Restrictive Practices.

The provisions as a result of the 2014 legislative amendments have not provided the fullest qualitative research that is possible.

With extrapolation of information provided by the online software, the review and evaluation would as a priority

- give the Department insight into the effectiveness or otherwise of these practices
- provide opportunities to mandate training
- review the appropriateness of some service providers in supporting vulnerable people with disabilities.
- review the number of orders made by QCAT and the outcomes of the extension of short term orders (from 3 months to 6 months)

Consistency with fundamental legislative principles

“In requiring NDIS service providers to comply with the existing quality and safeguards system, Queensland is ensuring a level playing field.”

QAI maintains that it is insulting and incongruent with the intention of the NDIS to require people with disability who manage their own funds to be subjected to a Criminal History Check. This provision is unwarranted and denies the person the sense of autonomy, control and authority over their lives and sets a tone of mistrust at the outset. It must be noted that there are considerable safeguards in place for the security and accountability of the acquittal of funds. Reporting and adherence to plans are sufficient to ensure that either participants or plan nominees are complying with the agreements and the acquittal of funds.

Rather, the onus of responsibility should be that the Department ensures Quality and Safeguards are of the highest order in relation to the regulation and reduction or elimination of the use of Restrictive Practices.²

Recommendation:

- In order to avoid contaminated practices following into the new scheme, service providers with numerous complaints must be investigated and complaints resolved to the satisfaction of people with disabilities and their supporters prior to NDIS Qld

² ‘With the greater provision of in-home care supports and other alternative accommodation settings under the NDIS, which may encompass splintered and diverse services, thought must be given to how the regulation of restrictive practices will apply in these settings.’ (Vic Office of the Public Advocate)

rollout. While this should not impede a participant from accessing supports and services under the NDIS, it is important to redress these complaints as an urgent priority.

- Remove the provision that requires criminal history check for a participant who receives direct payments and self manages their funds.

Consultation

A briefing by Department staff with members of the Disability Services Partnership Forum does not and should not be interpreted as genuine consultation, not agreement or acquiescence from QAI given our concerns outlined in this submission.

Consistency with legislation of other jurisdictions

As described in the amendment it is crucial that there is coherency in all legislation as they apply within the context of the NDIS. This is also true of all related legislation and how they mesh with the Disability Service Act amendment. When considering the Quality and Safeguards system, it must also be congruent with the Guardianship and Administration Act and the General Principles that guide its application. This is especially important in relation to the use of Restrictive Practices, the interpretation of the Amendment of the DSA and how these are to be understood and to be utilised. This is critical to ensure that the person whose life will be impacted upon has meaningful and timely opportunities to express their wishes and have them heard and respected and that this translates into the autonomy that “choice and control’ is purported to instate.

Other jurisdictions do not have such tight constraints on people with disability as Queensland. More people in Queensland are subject to guardianship orders, and the Restrictive Practices legislation that is intended to protect people from abuse has become a “how to guide” for service providers. Recently the department has required that people with disability who wish to self-manage their funded supports undertake criminal history checks. This is not only incongruent with the notion of “choice, control and autonomy” but sets the premise that people with disability are not capable or are not trustworthy.

Question:

Queensland is poised to make life altering measures for people with disability. Will Queensland set a high standard for other states to emulate, or will it be the most restrictive on people with disability?

Part 2 Amendment of Coroners Act 2003

Clause 3 provides that Part 2 (Amendment of Coroners Act 2003) of the Bill amends the Coroners Act 2003.

Clause 4 amends section 9 of the Coroners Act to extend the definition of “death in care” so that the jurisdiction of the Coroner includes the ability to investigate the deaths in care of NDIS participants.

QAI asserts that in order to effectively transition to the NDIS and merge with quality supports and diligent safeguards it is imperative that all measures are taken to carefully scrutinise supports and services where the participant is not in charge and control of those supports.

Recommendation:

Coroner's Act amendments should include investigations into deaths of people in aged care facilities, boarding houses and hostels, and any reportable death of an NDIS participant living in private residence. Many people with disability have been forced or coerced into living in aged care facilities and their deaths must be investigated unless the cause of death is clearly related to age or terminal illness, or has been investigated and resolved by police.

Far too many people have suffered abuse and neglect in care facilities and it is long overdue that any death of a vulnerable person whose care has been entrusted to other paid staff in any facility, including private homes, must be scrutinised with due diligence. It is vital that the key factor for the investigation of deaths of people with disability is linking to the provision of paid supports and or the use of restrictive practices.

Part 3 Amendment of Disability Services Act 2006

Clause 7 also exempts certain service providers from the definition of 'funded service provider'.

A funded service provider will not include another department providing disability services prescribed by regulation to a participant under the participant's plan. This is to ensure that government providers of NDIS supports (for example, Hospital and Health Services) are not captured given they are already subject to and regulated by their own specific set of quality and safeguard measures.

Concern:

QAI asserts that many people with disability are forced or coerced to reside in hospitals, community care units, and aged care facilities, at which some or all supports may be provided by another government department.

The Quality and Safeguards measures of other government departments will not necessarily have a significant disability focus. This is particularly important given the historical mistreatment that occurs when conflation of disability with mental health and the medical model predominates.

Recommendation:

When and if any government department is delivering NDIS supports, then the same level of Q&S must apply as in other service models. It is critical that another independent, yet more relevant scrutiny of the NDIS Quality and Safeguards be present to deter any infractions of human rights and freedoms, and to ensure a standard measure of quality in the supports and

services. This is important as the given the history of abuse, neglect and violence that has occurred must not be repeated in the NDIS landscape.

Clause 10 amends section 40

(Main purpose of pt 5) to recognise that the main purpose of Part 5 now includes authority for the chief executive to obtain the criminal history of, and related information about, persons engaged or to be engaged at a service outlet by a NDIS non-government service provider.

The Minister's speech *'the act will be extended to organisations that provide disability services prescribed by regulation to an NDIS participant under that participant's plan. The scope of these definitional changes will be limited to non-government providers delivering specific types of disability services. The services will be prescribed by regulation and the development of this regulation is currently in progress.'*

Criminal history screening is a national check of a person's entire criminal history. This includes all charges and convictions from across Australia, including when no conviction is recorded. In some cases, this may include information about current or past investigations into certain types of offences. The Act identifies some serious offences that will impact on the decisions that are made. If a conviction for one of these offences appears in a person's criminal history, the Act and the Assessment Guidelines provide direction on the decision that is to be made as a result.

The prime consideration in decision-making is the right of people with a disability to live free from abuse, neglect or exploitation.³

Recommendation:

QAI supports the requirement for vigorous safeguards for people with disability, but in relation to Category C and D offences, there may be a need for discretionary exceptions 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.

³ The State of Queensland (Department of Communities, Child Safety and Disability Services) 2010–2016. Queensland Government website

Disability Worker Exclusion Scheme

The Bill provides an opportunity to support a disability worker exclusion scheme, with appropriate safeguards, and which has potential application to any person who provides NDIS-funded supports.

Recommendation:

Safeguards should include the following:

- the scheme must be established by legislation
- principles of natural justice must guide its development and operation
- appeal mechanisms for workers who object to their listing.

Clause 13 amends section 49

(Risk management strategies about persons engaged by funded non-government service providers) to ensure a NDIS non-government service provider must develop and implement a risk management strategy for persons engaged by the provider.

Question:

Does this also apply to people who employ their own support staff?

To truly deliver upon the spirit of the NDIS, all legislation, policies and procedures even in transition form must adopt the paradigm shift that places people with disability in control of their lives, and paramount in decision making whether they require support to do so or not.

Recommendation:

In the development of any risk management strategies, the person (participant) and their supporters must be included in the development of those strategies.

Clause 24 amends section 68 (Starting engagement of volunteers)

to ensure a NDIS non-government service provider does not engage a volunteer at a service outlet unless the volunteer has:
(a) a current positive notice or current positive exemption notice and the provider has notified the chief executive that the provider is proposing to engage the volunteer;
or (b) a Working with Children positive notice and the provider has applied for an exemption notice.

Question:

Will the same requirements be applied to people with disability who self-manage their own funds and employ their own staff including any volunteers?

Authorised Officer Entry by Warrant

We draw your attention to the reasons for visitable sites regardless of whether it is a facility, group home or private dwelling. QAI asserts that there is a more urgent necessity to ensure that where care is provided in a congregate setting, and or where care is shared; there is a higher need for visitation by Community Visitor Program. This is important as there may be instances of one participant experiencing abuse by support staff, or other residents or neglect because of a lack of individualised support and attention.

However, this does not dismiss the vigilance that will be necessary where there is the use of Restrictive Practices or there is a reasonable suspicion of abuse, exploitation or neglect in any place.

Section 200T

“...recognises that an authorised officer may make a requirement of an occupier of the place or a person at the place to give the authorised officer reasonable help to exercise a general power, including, for example, to give information.”

Concern:

While QAI supports vigilant investigations of any allegations of abuse, neglect or exploitation, there is a need for clarification regarding the extent of such powers in relation to other residents with disabilities and their rights to silence and not to self-incriminate. 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.

Records and Privacy

The Queensland National Disability Insurance Agency Memorandum of Understanding includes an item on data exchange.

Recommendation:

- Introduce a policy that guarantees that both the Qld government and the National Disability Insurance Agency will seek consent before sharing personal information.⁴
- When DCCSDS 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.

Advocacy:

Advocacy and support for decision-making arrangements can play a crucial role for participants who have limited or no informal supports in their lives. Advocacy will perform a quality assurance and safeguarding role within the scheme.

Participants with cognitive impairment accessing the NDIS may have the added disadvantage of being socially isolated and without a network of support to assist them to access and navigate the scheme.

Evidence from the trial sites suggests that the plan nominee's involvement is limited to crisis management rather than to formal monitoring, and that there is no case management within the NDIS, as originally envisaged by the Productivity Commission. This may place people with cognitive impairment without informal support networks at risk.

Not all participants will be able to undertake their own case management, having never had the opportunity to do so in the past. Advocacy will enable some participants to access, navigate and benefit from the scheme: an important safeguard for participants and prospective participants in relation to the general quality of services, and protection from abuse, neglect and exploitation.

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- Identify data required and jointly work to identify strategies and mechanisms for transfer of data.
- as far as is practicable, ensure comprehensive data is held on the current range of supports provided to each client through development of individual support plans.
- Development of an information protocol between NDIS and Queensland Government to direct the data management approach including data collection, storage and transfer with appropriate reference to data protection regimes in legislation such as the NDIS Act, the Privacy Act 1988 (Cth), the Information Privacy Act 2009 (Qld) and the Disability Services Act 2006 (Qld).

Recommendation:

QAI supports the inclusion of express support for continued state funding of independent advocacy, with a particular expansion of accredited citizen advocacy programs that will provide opportunities for support for decision making for vulnerable people with disability who do not have informal support networks to assist them.⁵

Closing Comments

The transition of the DSA to the NDIS implementation must be the catalyst for the changing mindset that embodies the spirit of the NDIS. To do this, the DCCSDS must ensure that the principles underpinning our guardianship legislation that supports the notion of autonomy, 'choice and control', fundamental rights and freedoms afforded other citizens of Australia are experienced by Queenslanders with a disability right now. There can be no waiting for the rollout, there must be no delay. Just as people with disability will learn and grow into competent managers of their funds and supports, with time and practice so too can our government departments and service providers, plan nominees and participants become enablers of the NDIS community if we start immediately.

Support for decision making, self-management and self-direction are terms in the language of change, but ideally in the next decade, these words should disappear as the practices become more commonplace.

It is time for Queensland to begin this process by signing the bi-lateral agreement and including people with disability in the process.

⁵Recommendation 4. Substitute decision making, in the context of NDIS-related decisions, should be restricted to situations of absolute necessity, and supported decision-making alternatives should be promoted and utilised wherever possible. Australian Guardianship and Administration Council "Proposal for a National Disability Insurance Scheme Quality and Safeguarding framework consultation paper".