Queensland Advocacy Incorporated

Our mission is to promote, protect and defend, through advocacy, the fundamental needs, rights and lives of the most vulnerable people with disability in Queensland.

Systems and Individual Advocacy for vulnerable People with Disability

Inquiry into the NDIS Market in Queensland – Draft Report

Submission by
Queensland Advocacy Incorporated

Queensland Productivity Commission

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About Queensland Advocacy Incorporated

Queensland Advocacy Incorporated (**QAI**) is an independent, community-based systems and individual advocacy organisation and a community legal service for people with disability. Our mission is to promote, protect and defend, through systems and individual advocacy, the fundamental needs and rights and lives of the most vulnerable people with disability in Queensland. QAI's board is comprised of a majority of persons with disability, whose wisdom and lived experience of disability is our foundation and guide.

QAI has an exemplary track record of effective systems advocacy, with thirty years' experience advocating for systems change, through campaigns directed to attitudinal, law and policy reform and by supporting the development of a range of advocacy initiatives in this state. We have provided, for over a decade, highly in-demand individual advocacy through our individual advocacy services – the Human Rights Legal Service, the Mental Health Legal Service and the Justice Support Program and, more recently, the National Disability Insurance Scheme Appeals Support Program, Decision Support Pilot Program, Disability Royal Commission Advocacy Program, Education Advocacy Service and Social Work Service. Our individual advocacy experience informs our understanding, and prioritisation, of systemic advocacy issues.

QAI's recommendations

1. Provide assurance that the development of the National Outreach Strategy will involve the meaningful consultation of people with disability and their representative organisations.
2. Include more innovative ways of delivering supports to address thin markets, such as allowing participants to employ family members and investing in new, local and person-centred services to address the monopoly of large service providers.
3. Incorporate first-aid training into the Certificate III in Individual Support, with subsidized annual refreshers.
4. Call upon the Queensland government to commit to continue funding state based individual advocacy services, something currently only funded until June 30th 2021.
5. Rather than amending the definitions of 'reasonable and necessary' and 'choice and control', focus on improving the understanding of these concepts through more case examples, resources and training.
6. Ensure that planners and LAC's are trained to support participants under a supported decision-making framework.
7. Address the conflict-of-interest nature of many NDIS transactions, for example requiring support coordinators to be independent of and separate to other service providers that deliver supports to the participant, except in situations where this is unavoidable or is the informed choice of the participant.
8. Recommend the NDIA provide mandatory training to support coordinators and review the billable-hour model in their review of support coordination.

9. Consider a suite of recommendations that will strengthen the remit of the Q&S Commission and improve the accountability of unethical service providers. For example, improve the complaint handling process; impose consequential enforcement measures that successfully deter stakeholders from breaching the Code of Conduct; improve the information available to participants; make warm referrals to advocacy services for participants who make a complaint; proactively monitor participants subject to Restrictive Practices and improve the collection of data regarding the use of Restrictive Practices.
10. Extend the recommendation regarding mutual recognition of qualifications to ensure workers who have been disqualified and deemed unfit to work in one industry, such as the aged care industry, are disqualified from working in the disability industry.
11. Review the regulatory framework that is enabling NDIS service providers to make unsubstantiated applications for guardianship and/or administration appointments for participants, particularly in situations where there is a conflict of interest. (Further recommendations are detailed in the submission.)
12. Refrain from recommending changes to the definitions of Restrictive Practices in the *Disability Services Act 2006* (Qld) until further legal analysis within a human rights framework has been conducted.
13. Refrain from recommending the continued fostering of a market for the private preparation of PBSPs until such a time that there is confidence in the ability of the market and service providers to provide high quality PBSPs and comply with relevant legal obligations. Recommendations should alternatively focus upon the Queensland government's capacity to invest in attracting Positive Behaviour Support practitioners to the market, reduce wait-times to access their services, improve the quality of PBSPs and improve provider compliance with regulatory frameworks.
14. Remove the recommendation that the Queensland government signal its intention to withdraw from preparing PBSPs and instead recommend the Queensland government utilise its expertise to work with service providers to develop best practice guidelines.
15. Consider a suite of recommendations to address the inadequate support currently provided to prisoners with disability to access and utilise the NDIS. (A table of recommendations is provided in the submission).

Introduction

QAI welcomes the opportunity to make a submission in response to the Queensland Productivity Commission's draft report 'The NDIS market in Queensland'. This submission is informed by QAI's experience in delivering non-legal advocacy for people engaging with the National Disability Insurance Scheme (NDIS) through its NDIS Appeals Support Program and Decision Support Pilot Program. It is also informed by insights from our Human Rights Legal Service, our systems advocacy and the lived experiences of staff, board members and our allies in advocacy.

QAI acknowledges the scale of reform created by the introduction of the NDIS. The historic remodelling of disability service provision has changed the lives of many people with disability and has impacted mainstream service delivery in almost every sector. The task of implementing a nationwide scheme to replace services previously delivered by states and

territories was always going to present considerable challenges. Five years into the operation of the scheme in Queensland, the sector continues to grapple with changes brought about by revised funding arrangements and the ideological shift towards person-centred care. With the transition now complete and the scheme at a critical juncture, QAI is concerned that some of the reforms intended to address the challenges of implementation will not adequately protect the person-centred ethos upon which the NDIS is founded. The fundamental objectives of the scheme cannot afford to be lost amid efforts to boost economic investment into the market. At its core, the NDIS is about improving the lives of Australians with disability and this must remain at the forefront of policy reform in this area.

This submission builds upon our previous report to the Queensland Productivity Commission (QPC).[1] Given the breadth of the inquiry, our response will first provide general feedback in relation to the draft report and will then provide specific feedback in relation to some of the draft recommendations, listed below. If a draft recommendation has not been listed in our submission, it can be interpreted that QAI does not wish to provide a response to that draft recommendation.

General feedback regarding draft report

QAI agrees with the QPC's position that there needs to be improved access to information, data and resources for all stakeholders in the NDIS market. The development of new resources for participants, such as in relation to the planning process, will greatly assist participants make informed decisions and exercise choice and control over the purchase of disability supports, with subsequent benefits to the overall functioning of the market. QAI agrees with the proposed investment in the development of digital marketplaces and a comparator website. There remains a need for a user-friendly website where participants can easily access clear and truthful information about their rights and opportunities under the scheme. Of course, digital resources are not accessible for everyone and people with disability have diverse communication needs, which will need to be taken into consideration. Resources will need to be in a variety of accessible formats, including Easy English, Braille, Auslan and various languages. The content of translated resources should be verified by native speakers in order to ensure accuracy.

QAI agrees that a one-size-fits-all approach will not adequately address the challenges presented by thin-markets across Queensland, both in rural and remote communities and for specific types of therapeutic support. Innovative ways of delivering supports will need to be considered and should be included in the draft recommendations. For example, allowing participants to employ family members in certain situations, providing they are adequately skilled. Investment in new, local and person-centred services is also needed from the Queensland government to address the monopoly of large service providers in the market. This is particularly important for participants with complex needs who typically lose out when service providers terminate service agreements because supporting the person is perceived to be 'too challenging'. The provider's monopoly on the market means that they

[1] Queensland Advocacy Incorporated, *Inquiry into the National Disability Insurance Scheme market in Queensland,* 12 August 2020

are not reliant upon the participant's funds for survival and so the person with disability is left without access to essential everyday support.

QAI acknowledges the ongoing work to address the multiple and challenging issues confronting the disability workforce. The need for flexible support workers has contributed to the casualisation of the disability sector and the subsequent reduction in training, support and investment in its workers. Whilst there has been a need to quickly attract new workers to the industry in order to respond to the surge in demand created by the NDIS, the NDIA must remain cognisant of the quality and skill level of its workers. Through its advocacy services, QAI is aware some participants and their families are fearful for their safety due to the lack of first-aid training of some NDIS support workers. A lack of first-aid training can pose a serious threat to the safety and well-being of people with disability whose welfare is placed into the hands of support workers during their shifts. If long-term relationships with service providers can no longer be guaranteed in the industry, there at least needs to be a basic level of safety training guaranteed to all participants by providers. This would also apply to family members employed by participants, should this option be implemented. QAI therefore calls upon the Queensland government to further invest in the skill-level of the disability workforce and consider incorporating first-aid training into the Certificate III in Individual Support, with subsequent subsidized annual training refreshers.

QAI also supports the need to leverage existing government institutions to help potentially eligible participants apply and meet access to the scheme. This is particularly vital for certain cohorts of the community, such as people in prison or other closed institutions, who are falling through the ever-widening gaps created by funding disagreements of the state and federal government. Utilising existing touchpoints with potential NDIS participants is essential to avoid duplication of assessments and the unnecessary drainage of resources. Despite the initial investment required, it is arguably more economically viable in the long-term, as people with inadequate access to disability supports are more likely to interact with and utilise other government services, such as the health and criminal justice systems.

QAI is concerned however, that there is insufficient focus in the draft report on measures of accountability. The review of the policy and regulatory framework initiated by this inquiry is a timely opportunity to revise and optimise the accountability measures embedded into the scheme. Due to the market-based mechanism of the NDIS, both participants and service providers are free to make decisions in accordance with their own interests. Whilst this facilitates increased choice and control for participants, it also facilitates service providers putting their own needs ahead of participants. In some situations, this has resulted in the exploitation of people with disability, whose funds or personal circumstances have been used for the provider's own gain to the serious detriment of the participant. Given the nature of the market and the vulnerability of its consumers, the need for robust accountability measures is critical. Participants need to be able to trust that dishonest service providers who fail to act in accordance with the NDIS Code of Conduct will be held to account, and yet there is considerable concern within the disability community that the NDIS Quality and Safeguards Commission (Q&S Commission) is ineffective in doing this. Without a strong oversight mechanism, or 'big stick' that raises the standards of service delivery through enforcement measures and proactive compliance strategies, the fate of a participant's journey in the NDIS becomes dependent upon whether they happen to encounter a safe and ethical service provider.

The risks to consumers in a market where service providers are inadequately held to account will be greater still if the QPC's recommendations regarding price deregulation are adopted and if the Queensland government withdraws as a provider of last resort in relation to Positive Behaviour Support Plans (PBSPs) for Restrictive Practices. In other words, two scenarios in which participants are at even greater risk of exploitation. Further, the conflict of interest inherent in many NDIS transactions, as documented throughout the draft report, are also with respect, inadequately addressed by the draft recommendations. QAI urges the QPC to consider recommendations that will strengthen the remit of the Q&S Commission and improve the accountability of unethical and inadequate service providers.

In light of the market-based mechanism of the scheme, there will be an ongoing need for independent advocacy to assist participants to uphold their rights and hold service providers and government agencies to account. This is integral to the ongoing life and success of the scheme and should also be addressed by the draft recommendations. QAI calls upon the QPC to recommend the Queensland government commit to continue funding state based individual advocacy services, something currently in jeopardy and only funded until June 30th 2021.

Specific feedback regarding recommendations in draft report

Draft Recommendation 1 - *Improving access*

The difficulties encountered by some people with disability attempting to seek access the NDIS, as highlighted throughout the draft report, resonates highly with QAI. The complex processes, evidence requirements and language used by the National Disability Insurance Agency (NDIA) all present challenges which are particularly felt by certain participants, such as participants who identify as Aboriginal or Torres Strait Islander, participants from Culturally and Linguistically Diverse (CALD) backgrounds or participants with psychosocial disability.

QAI agrees with the draft recommendation proposing that the Disability Reform Ministers' Meeting should oversight the development of the proposed national outreach strategy, including the preparation of a publicly available implementation plan and periodic public reporting strategy. QAI seeks assurance that the development of the national outreach strategy will involve the meaningful consultation of people with disability and their representative organisations. The success of the strategy will be dependent upon whether the voices, experiences and perspectives of people with disability have been heard and incorporated into the strategy. It is also the right of people with disability to be consulted in the development of policies that impact upon their lives, as required by Article 4 of the Convention of the Rights of Persons with Disabilities (CRPD).

With regards to existing programs that are designed to increase access to the NDIS, QAI supports the proposed evaluation of their effectiveness. QAI has successfully supported NDIS participants through its Decision Support Pilot (DSP) Program, however this program still only remains a pilot. This program has proved to be an invaluable asset to its participants, supporting individuals to successfully navigate the start of their NDIS journey

and building their capacity in the process. QAI further supports the evaluation of the Assessment and Referral Teams (ART). Whilst they have had high reported levels of success in supporting individuals to gain access to the NDIS, the eligibility criteria is strict, their geographical remit is moveable and limited, and there have been reports of allied health professionals conducting clinical functional assessments outside of their scope of practice. In order to connect with potential participants who are 'hard to reach' by virtue of their limited supports or current connections to existing services, the ART program needs to be fully embedded into the local community rather than offering a transient service. We further add that the proposed review of existing programs designed to increase access to the NDIS should focus upon areas where potential participants are falling through the gaps created by conflicting funding responsibilities of the state and federal government. QAI is particularly concerned about the level of access to disability supports currently offered to people in prison in this regard and will discuss this in response to draft recommendation 35, below.

We note the QPC's position that it is beyond the scope of this inquiry to comment on Independent Assessments. QAI remains deeply concerned about the proposed introduction of Independent Assessments and the threat to participant choice and control that they represent in their current form. In the event of their implementation, QAI supports the QPC's draft recommendation that they be monitored and evaluated independently of the NDIA and the organisations selected to deliver them.

Draft Recommendation 2 - *Improving plan creation*

Whilst further clarity on the concepts 'reasonable and necessary' and 'choice and control' would be welcome, QAI is wary about the development of a statement attempting to define these two concepts. What is deemed to be 'reasonable and necessary' for one participant will look different for another and must continue to be assessed on a case-by-case basis. Further defining this concept raises the risk that its application will become narrowed and restricted, thus removing the individualised component of each participant's plan and potentially reducing a person's ability to access essential disability supports. Rather than seeking to amend the definitions of 'reasonable and necessary' and 'choice and control', QAI suggests further investment is targeted towards increasing the *understanding* of these concepts by agency staff and other stakeholders, through the development of more case examples that illustrate how the legislative definitions can apply. Much misinformation exists around what constitutes a 'reasonable and necessary' support, and is spread by the NDIA's failure to make timely updates to their operational guidelines. For example, the operational guidelines still state that a gym membership will not be considered a 'reasonable and necessary' support. This is despite the cases of *King and National Disability Insurance Agency 2017 AATA 643* and *Milburn and National Disability Insurance Agency 2018 AATA 4928* heard in the Administrative Appeals Tribunal (AAT) which found that funding for gym memberships can indeed be 'reasonable and necessary', and has since been included in numerous participant plans. Likewise, misinformation about transport funding persists due to the NDIA's continued attachment to its 'three level' system despite the Federal Court finding in *McGarrigle v National Disability Insurance Agency [2017] FCA 308*

Further resources that better educate and train planners around what constitutes a 'reasonable and necessary' support, incorporating key rulings from the AAT and Federal Court, would better help to improve the application of this concept. Training should also support planners to better understand and interpret clinical evidence, the recommendations of which are often ignored during planning meetings. Training should also focus upon the bilateral agreements. QAI acknowledges the complexity inherent in these agreements and the ever-evolving understanding of their application. A highly skilled and knowledgeable agency staff is critical to the overall success of the scheme.

QAI supports the recommendation that the NDIA should develop, implement and report on a strategy to remove barriers to self-managed plans. As the QPC has identified, there is a lack of information that supports participants to self-manage their plans and QAI perceives this to be the biggest barrier to increased numbers of self-managed participants. Targeted resources that inform participants of the benefits of self-management, provide a user-friendly checklist on the steps required to successfully self-manage, as well as training sessions to upskill participants interested in self-managing would all assist to remove some of the fear and uncertainty around taking up this option. This would reduce the scheme's expenditure on agency-managed and plan-managed plans. Building the capacity of participants to self-manage is also in keeping with the scheme's underlying philosophy, so long as the decision whether to self-manage is a fully informed choice that remains within the control of the participant.

Draft Recommendation 3 – *Plan utilisation*

QAI supports the QPC's focus on improving rates of plan utilisation given that over 40% of NDIS participants in Queensland are utilising less than half of their plan budgets. QAI endorses the recommendation that planners and Local Area Coordinators (LACs) adopt a 'coaching role' to assist participants to develop their capabilities and increase their independence. A coaching role was originally envisaged for LACs following the success of its trial in Western Australia. The LACs provided a single point of contact and adopted a case-management stye approach, building a relationship with the participant so they could better respond to their situation. This model was intended for rollout across the country, however an increasing focus on achieving key performance indicators subsequently removed attention away from this component of the role. If planners and LACs are to adopt a 'coaching role' however, QAI stresses the need for planners and LACs to be trained in supporting clients under a supported decision-making framework. We recommend this requirement is added to the draft recommendation in order to ensure the role is in keeping with best-practice and also adheres to Australia's legal obligations under the CRPD.

QAI notes the analysis of the support coordinator role and in principle, supports the proposition that the NDIA consider maximising funding for support coordination, so long as a participant's funding for support coordination is not at the expense of other funded supports in their plan. QAI further notes the QPC's acknowledgement that conflicts of interests can and do arise when a participant's support coordinator is employed by the same service provider that delivers other services to the participant, such as in-home support through Supported Independent Living (SIL) funding. Given the significant impact

that these conflicts of interest can have, both on the participant's ability to freely purchase their preferred disability supports and the market's ability to supply high quality services in response to participant demand, QAI suggests that the draft recommendation regarding the NDIA's review of support coordination is made stronger to prevent this from occurring. Accordingly, QAI recommends requiring support coordinators to be independent of and separate to other service providers that deliver supports to the participant, except in situations where this is unavoidable or is the informed choice of the participant concerned.

In support of the QPC's finding that many support coordinators are lacking the skill, knowledge-base or capacity to effectively support participants to utilise their plans, QAI recommends support coordinators receive mandatory training provided by the NDIA. Support coordinators are essentially performing a function of the agency and this could be modelled on the level and type of guidance provided to Jobactive providers from Centrelink who perform a similar function. The review of support coordination by the NDIA should also examine the billable-hour model, given the number of participants who say their level of funding is insufficient to cover their needs, is quickly used up with phone calls or emails and/or is inflexible and does not allow support coordinators to respond to unexpected issues that might arise. In some situations, this has prevented participants from raising concerns about the questionable conduct of service providers due to insufficient funding in their plan for their support coordinator to assist. In light of the findings coming from the Disability Royal Commission, there must be safe and clear avenues for participants to raise concerns regarding abuse, neglect and exploitation and a pre-existing relationship with an impartial and independent support coordinator is a good opportunity for this.

Draft Recommendation 10 – *Extended service agreements and plans*

QAI agrees with the proposition that in markets where there are significant and persistent shortfalls in supply, the NDIA should allow extended service agreements and longer duration participant plans.

Draft Recommendation 11 – *Q&SC reporting participant harm*

QAI agrees with the recommendation that the Q&S Commission report regularly on the incidence and context of participant harm. As the QPC has identified in the draft report, information about the nature of harm occurring in the market is critical to any review of the policy and regulatory frameworks. The absence of accurate data that captures the variety of situations in which participant harm occurs, further perpetuates unethical practices that lead to the ongoing abuse, neglect and exploitation of people with disability.

However, QAI is concerned about the ability of the Q&S Commission to adequately report on the incidence and context of participant harm, given the well-known inadequacies of the Q&S Commission's response to allegations of participant harm thus far. The ability of the Q&S Commission to appropriately address this significant issue is limited by its establishment as a Commission with predominantly reactive, rather than proactive, powers. This essentially passive role, which has been ingrained by the high volume of complaints received, limits the Commission's capacity to properly utilise its investigative powers. QAI

therefore considers recommendations are also required to address the limitations of the Q&S Commission more generally. The successful operation of the NDIS market is reliant upon there being a high-functioning oversight body who effectively hold stakeholders to account. However, this is presently lacking in the NDIS market.

A commonly cited concern relates to the Q&S Commission's response to complaints. The response can be slow and/or inappropriate, causing participants to feel confused and unsupported as illustrated in Case Study 1. The response can also be ineffective, leading to an increase in expenditure by the NDIA to remedy the consequences of poor-quality service provision, as illustrated in Case Study 2.

Case study 1

A participant made a complaint regarding the perceived unethical practices of their support coordinator. It was alleged that the support coordinator shared the participant's information without their consent, made hurtful comments about their disability and only recommended services within their organisation. The participant contacted the Q&S Commission and was assigned a case manager who was pleasant and supportive. The case manager arranged for a meeting between the participant and support coordinator, however did not attend the meeting themselves. It was unclear from the emails that the case manager would not be attending, and both the participant and support coordinator expected them to attend. This left the participant in a very awkward situation with the support coordinator. The participant felt unable to express their concerns alone due to the power imbalance inherent in their relationship. The Q&S Commission considered the matter to be resolved following the participant's subsequent termination of their service agreement, despite the complaint never being addressed or the unethical practices of the provider remedied.

Case study 2

A participant living in North Qld required modifications to their wheelchair-accessible vehicle. The planner recommended sending the vehicle to Provider Y in Brisbane for the work to be completed. The modifications were quoted to cost $28,000. Provider Y advised that the work would take 3 weeks to complete, would be covered by warranty and completed to the appropriate health and safety standards. Two months later, the participant was finally advised the work had been completed. When the vehicle was delivered to the participant, notable defects became apparent. There was a leak in the fuel tank, the logbook and spare key had been misplaced, the fuel tank had incorrect fittings, the quality of the welding was poor and did not meet standards, there was some exposed wiring, and the electronic restraint was not working. The participant contacted Provider Y who advised the repair work could be completed locally and that they would reimburse the participant for this work. Subsequent correspondence with Provider Y revealed that they refused to accept responsibility for the poor workmanship and did not follow through on their offer to rectify the work. The participant sought the assistance of the NDIA, who advised it was not within their scope and could not assist even though it was the NDIA's planner to choose Provider Y in the first place. The participant made a complaint to the Office of Fair Trading which advised that welding standards were outside of their scope and that the participant should pursue the matter through QCAT, the courts or the Q&S Commission. The participant made a complaint to the Q&S Commission, which advised they were also unable to make

Provider Y pay for the repair work. The participant was eventually able to use $6,000 of their NDIS plan funding to repair the vehicle, after obtaining an assessment which verified the poor workmanship. However the provider was not held to account, the NDIA had to pay an additional $6,000 of tax-payers money to rectify the provider's poor quality work and the Commission was ultimately ineffective in ensuring the quality and service of NDIS funded supports.

The Q&S Commission also appears to be provider focused as opposed to participant focused. For example, information regarding service providers who have received banning orders is available on the website, however it is extremely difficult to locate and understand and is not within the participant section of the website. The resources available on the NDIS Code of Conduct are also provider focused, with limited accessible information for participants on how this applies to their plans. The information available to service providers on the authorisation of Restrictive Practices is also provider focused, with the tone of factsheets and brochures implying the role of the Q&S Commission is to protect providers rather than work towards reducing or eliminating the use of Restrictive Practices on participants. Further, the Q&S Commission have been reluctant to become involved in complaints alleging conflicts of interest that consequently force participants to remain with service providers despite poor quality service provision, out of fear of reprimands or the threat of losing other essential supports, such as housing.

The Q&S Commission must fulfil its role of ensuring the quality and safety of NDIS supports and safeguarding the interests of people with disability. QAI recommends the Q&S Commission improve their complaint handling processes, impose consequential enforcement measures that successfully deter stakeholders from breaching the Code of Conduct or registration requirements, improve the accessibility of information available to participants, proactively monitor situations where conflicts of interests are occurring and make warm referrals to advocacy services on behalf of participants when a complaint is registered with the Q&S Commission.

QAI is particularly concerned about one type of harm that appears to be unnoticed by the Q&S Commission and policymakers in general; harm caused by the rise in applications for guardianship and/or administration (GAA) appointments by NDIS service providers. Many of these applications are unsubstantiated and are occurring in situations where the provider has a conflict of interest and seeks to gain financially from vulnerable participants with generous funding packages. This appears to be an unintended consequence of the rollout of the NDIS but a trend nonetheless that has significant human rights implications for participants.

The increase in GAA applications due to the rollout of the NDIS is documented in the Queensland Civil and Administrative Tribunal (QCAT) 2018-2019 Annual Report. Whilst many applications have benevolent intentions, some are nonetheless occurring in situations where prior to the NDIS, informal decision-making arrangements as per the General Principles of the *Guardianship and Administration Act 2000* (Qld), which mandates a least-restrictive approach is taken, would have sufficed. This is because the NDIS has produced a level of formality and bureaucracy into service provision not previously seen in the

disability sector and because there is misinformation among service providers regarding the need to formalise decision-making arrangements.

Adding to this concern is the number of applications being submitted to QCAT without merit. That is, applications based upon unsubstantiated claims of incapacity or uncorroborated allegations of inappropriate conduct of current decision-makers. QAI has witnessed a concerning trend in applications submitted with little to no evidentiary basis and/or which rely upon opinions of varying health professionals, many of whom do not possess expertise in assessing decision-making capacity and/or lack appropriate knowledge of the person. As QCAT is not bound by the rules of evidence, medical and allied health reports prepared for alternative purposes, such as those written in deficit laden language for the purpose of obtaining access to the NDIS, have been used to support applications for GAA appointments, despite the content not pertaining to issues of decision-making capacity.

In some cases, these applications are submitted by NDIS service providers in relation to participants with substantial funding packages following the emergence of a disagreement between the service provider and the participant and/or their familial guardian. These disagreements can involve service providers preventing family members from visiting the NDIS participant and/or excluding family members from decision-making regarding the participant's day to day supports. In these situations, the service provider typically applies to QCAT for the appointment of the Public Guardian or Public Trustee. QAI is alarmed by the conflict of interest inherent in these applications, whereby service providers have a vested interest in maintaining service agreements with participants with large funding packages. Service providers know that the Public Guardian and/or Public Trustee almost exclusively enter into service agreements with registered service providers as opposed to smaller, independent or unregistered providers. In these situations, the GAA applications are driven by the provider's self-interest as opposed to the needs of the participant, are motivated by prospects of financial gain and are influenced by misguided understandings of decision-making capacity. The following case study represents a typical scenario:

Case study

Roger, in his 50's, has an intellectual disability and a substantial NDIS funding package that provides 1:1 in home support. He lives in his own home and decisions about his healthcare, finances and NDIS supports are made by his sister Rachel, who was appointed as Roger's guardian following the death of their mother. No concerns regarding this arrangement were ever raised by Roger or anyone else until 2019, when Roger's service provider was taken over by another registered provider, Provider X. The new workers supporting Roger from Provider X were less communicative with Rachel and before long, a dispute arose between Rachel and Provider X regarding the level of support they were providing to Roger. Provider X workers took Roger to an appointment with his doctor where they encouraged Roger to tell the doctor that Rachel had been abusing him. Roger became very distressed and confused. Provider X used the doctor's report in a subsequent application to QCAT for the appointment of the Public Guardian and Public Trustee and to remove Rachel as Roger's decision-maker. Rachel terminated Roger's service agreement with Provider X and employed another service to support Roger. Roger remained significantly distressed in the lead up to the QCAT hearing and expressed concern that Rachel would be taken away

from him. At the hearing, which took two full days, the application was ultimately dismissed and Rachel remained as Roger's substitute decision-maker. Roger's anxiety then dissipated and his relationship with Rachel has returned to its pre-existing state.

Whilst some of these applications are correctly dismissed at hearing, others are not and lead to the appointment of a substitute decision-maker in situations where it is neither required nor appropriate. Often, the ability of a participant to assert their capacity at hearing and ultimately protect their right to self-determination depends upon whether they have had access to legal advice or representation, something not currently routinely offered or required for adults subjected to GAA applications. In the absence of a threshold test, whereby GAA applications must meet a certain level of evidentiary proof before being accepted by the Tribunal, the burden of proof is perversely placed upon the participant to prove their decision-making capacity. This is contrary to the *Guardianship and Administration Act 2000* (Qld) which states that all adults must be presumed to have decision-making capacity until *proven* otherwise. It is also problematic in a largely self-represented jurisdiction where adults, many of whom have disabilities, are expected to assert their legal rights in a formal, legalistic environment without legal assistance to navigate what is a complex and deeply personal area of law. Whilst not the fault of the service providers themselves, the unsatisfactory intricacies of the legal environment in which GAA applications take place are further compounding the problem and highlight an opportunity for the Queensland government to intervene and address this concerning trend in the NDIS market. The impact on state government resources required to process these unsubstantiated applications is also likely to be of concern to the Queensland government. The increase in GAA applications and the subsequent increase in waiting times for QCAT hearings has been exacerbated by challenges presented by Covid-19 which has seen waiting periods for hearings extend even further.[2]

The financial and emotional toll placed upon a person forced to defend unfounded and sometimes vexatious GAA applications cannot be overstated. Obtaining independent capacity assessments can sometimes cost a participant up to $4,000. This is a gross misuse of NDIS or personal funds which is likely to impact a participant's capacity to purchase other essential supports or goods. The affront to a person's dignity and their human right to equality before the law further causes significant psychological distress. This is particularly unjust for a cohort of individuals who already face challenges in their daily lives. Moreover, the power imbalance typically present in the NDIS service provider/participant relationship adds further complexity to the situation, with participants often still reliant upon the service provider for essential everyday supports during the prolonged and strained QCAT proceedings.

These applications are also arguably in violation of Australia's obligations under international law. Through ratification of the CRPD, Australia has committed to ensuring a model of supported decision-making, where people with disability are assisted to maintain their legal capacity through the assistance of informal supporters to understand, consider

[2] Queensland Civil and Administrative Tribunal, *Annual Report 2019-20,* 6

and communicate their decisions rather than through the appointment of a substitute decision-maker. Only in limited circumstances where a person cannot be assisted to understand, consider and/or communicate a decision, is the appointment of a substitute decision-maker justified. Applications made on the basis of risk adversity or due to the self-interest of NDIS service providers clearly do not fall into this category. The Queensland government therefore has a responsibility to safeguard against such applications and to ensure there is adequate awareness of and compliance with the CRPD, particularly in the disability industry where its application is arguably of greatest relevance.

The removal of a participant's legal capacity and right to make their own decisions clearly takes away their choice and control and contravenes the objectives of the NDIS. The gap in the NDIS regulatory framework that is enabling these applications is widened further by the unsatisfactory legal context in which they are taking place. The lack of accountability for service providers who exert their dominance over participants in this way, perpetuates their monopoly on the market and distorts the market's ability to preference high quality providers. It also has the impact of lowering participant confidence in the market and its ability to regulate unethical conduct. It highlights again the need for robust accountability measures and the need for the Q&S Commission to monitor unscrupulous behaviour of service providers and protect participants from harm.

QAI calls for a review of the state-based legal environment in which these applications are occurring and a review of the regulatory framework facilitating this practice among NDIS service providers. Reform is required to facilitate a paradigm shift towards supported decision-making practices, as required by the CRPD. QAI suggests the QPC include the following recommendations:

- The Q&S Commission capture data on the number of applications for GAA appointments made by each service provider, whether the applications were successful, whether there was an interim order imposed in between the application being submitted and later dismissed at hearing and whether the participant was advised of their right to seek legal advice and/or representation in the process.
- Measures adopted to disincentivise service providers from making unnecessary and vexatious applications to QCAT, such as a penalty or compliance notice when applications are deemed to be unsubstantiated by the Tribunal.
- Additional safeguards to be incorporated into the NDIS regulatory framework, for example the inclusion of an additional step to be taken prior to the submission of a GAA application to QCAT, such as liaison with the NDIA or Q&S Commission.
- Largescale training and upskilling of the disability workforce in relation to issues of decision-making capacity and supported decision-making principles.
- A right to free and independent legal representation for all adults subject to GAA applications.
- Increased scrutiny of GAA applications by QCAT, with the introduction of a threshold test of evidentiary proof and increased scope of the Tribunal to reject applications lacking in merit on the papers or to utilise directions hearings to seek further evidence from the applicant prior to accepting the application.

Draft Recommendation 12 – *Mutual recognition of qualifications*

QAI agrees with the recommendation that the Q&S Commission work closely with stakeholders such as the Aged Care Quality and Safety Commission and the Australian Commission on Safety and Quality in Healthcare to streamline quality standards and introduce mutual recognition of professional qualifications across relevant sectors.

QAI submits that this should be extended to include provisions that ensure workers who have been disqualified and deemed unfit to work in one industry, such as the aged care industry, are disqualified from working in the disability industry.

Draft Recommendation 14 – *Cert III Guarantee eligibility*

QAI agrees with the proposed relaxation of the eligibility criteria for the Cert III Guarantee to allow workers who already have a Cert III to receive funding assistance for a disability sector related Cert III. Further, QAI calls for the inclusion of first-aid training in the accreditation process of all disability support workers.

Draft Recommendations 21 and 22 – *Accommodation*

QAI supports the position that the NDIA should increase the availability of market information on the demand for and supply of Specialist Disability Accommodation (SDA) and SIL support. This should extend to ensuring participants are fully informed of the realities of living with SIL support in its current format and have access to information on the alternatives to SIL funding, such as Independent Living Options. QAI also supports in principle the recommendation that the NDIA investigate ways to streamline SDA, SIL and home modification processes in order to provide faster access for participants and clearer signals to providers. The decisions of SDA panels need to be transparent and reviewable at the AAT.

However, QAI takes the position that SDA, SIL and home modification supports are all fundamentally separate supports that should not be grouped together under the same category. As the draft report states, SDA funding is in relation to bricks and mortar, the physical building in which a small percentage of participants will live due to their need for specially designed facilities, whereas SIL funding is in relation to the support a participant requires from others, both inside and outside of their home. Whilst we support the draft recommendations, QAI considers they should go further in trying to address the many issues with accommodation-related supports that are identified in the draft report. For example, the QPC acknowledges the conflict of interest inherent in many SIL arrangements. On page 276 of the report, the QPC states "*Conflict of interest are prevalent in the provision of SDA, SIL and support coordinators. Conflict of interest should be steadily reduced to improve choice and control and competition*".[3] Whilst concern about the impact to market supply appears to explain the omission of a recommendation addressing this

[3] Queensland Productivity Commission, 'The NDIS market in Queensland', Draft Report 2020

issue, these fears could be mitigated through alternative options. For example, in light of the lack of SDA supply across Queensland, the Queensland government could be asked to consider investing in the building of SDA properties, and be provided consistent SDA payments as a registered provider of the NDIS. This is currently occurring with the Queensland Government's legacy SDA dwellings. Alternatively, the government could consider subsidising the initial development costs in order to attract more suppliers to the market. This could potentially mitigate some of the risks of under-supply to the market if SIL and SDA funding was to be separated and the two groups of providers no longer permitted to form allegiances.

QAI urges the QPC to consider addressing the conflict of interests inherent in many SIL arrangements by expanding its recommendations. The vulnerability of the market's consumers cannot be overlooked during the economic analysis of supply vs demand. Under the current model of SIL funding (in which a participant's funding is locked into a roster-of-care, over which the participant has limited control as to who and when provides their support), the participant is prevented from benefiting from the market-based mechanism upon which the scheme is designed. They are essentially living in a group-home, with no privacy over their care and no choice and control over the delivery of their supports. When a participant has no choice as to their service provider, is not informed as to alternative service providers or risks losing their home if they decide to change service provider, they are not exercising choice and control, selecting the supports that best meet their needs or which represents best value for money. They are also at an increased risk of abuse, neglect and exploitation. Revising the regulatory framework to preclude service providers from delivering 'wrap around' services including accommodation, in-home support, support coordination and community access, has been recommended in other reviews, including the Tune Review. Increasing the flexibility of SIL funding would assist participants to break free from the limitations imposed by the current model. Whilst the NDIA has signalled its intention to revise the relationship between SIL and SDA funding, the wellbeing of people with disability continues to be at risk whilst the sector awaits slow-to-progress reform. This inquiry is therefore an opportunity to add impetus to this call for change and consider revising the model of SIL supports in order to optimise the operation of the market and achieve the scheme's core objectives.

QAI acknowledges that the provision of affordable housing is not the responsibility of the NDIA. However, QAI considers the current review of the NDIS market a timely opportunity to consider recommending further analysis of the impacts that the lack of affordable housing has on the NDIS market and subsequent requests for accommodation-related supports. QAI would be deeply concerned if the inadequacies of the state-funded housing sector forced people with disability into group home situations in which they had no choice and control over their care. Similarly, SDA providers are more likely to build group homes in response to the NDIA's tendency to fund shared support as opposed to 1:1 funding.

Draft Recommendations 25 and 26 – *Employment*

QAI agrees with the recommendation that the NDIA should make available employment information that would help participants select a provider for employment-related supports,

including information which allows comparison of the success rates of providers in supporting participants to fund and maintain employment.

QAI also agrees with the recommendation that the NDIA should review its processes related to assisting people into employment with the objective of significantly reducing the time period between when an employer shows interest in a jobseeker and the first day of employment. This could be aided by making employment-related funding flexible and placing it into the Core supports category of a participant's plan. QAI is aware of situations where a participant has had employment-related funding in their plan but has been prevented by the NDIA from using it. Reducing some of the regulatory restrictions and red tape around utilising this type of funding arguably aligns with the QPC's overall objective to free up the market to allow it to respond more effectively to its needs.

QAI agrees that there are multiple factors impacting upon the ability of people with disability to obtain employment in the open labour market and agrees that it is likely too soon to tell the success of some of the capacity building supports funded over the last couple of years. Policy responses designed to address the ability of the NDIS market to support people with disability to gain employment must continue to be seen within the wider structural context. That is, within a society where discriminatory attitudes towards people with disability are commonly held by employers who fail to see the benefits of employing people with disability. The policy responses must therefore continue to be proportionate and not impose unrealistic expectations or burdens upon people with disability to remove deeply ingrained attitudes of ableism that continue to shape their interactions with the wider community.

In this regard, QAI is wary about potential changes that might remove the ability of participants to choose whether to set employment as a goal within their plan. Deciding to have employment as a goal must not become the decision of a planner and similarly, Independent Assessments cannot become pseudo job-capacity assessments. Choosing to seek employment in the context of a permanent disability which substantially reduces the functional capacity of the person must remain the choice of the participant. QAI agrees with the QPC's stance that other reforms must be given an opportunity to increase the level of employment among NDIS participants before other measures are considered. We therefore call upon the QPC to qualify its recommendations by recommending that the NDIA's review of its processes related to assisting people into employment must ensure that the decision of whether to include employment as a goal remains within the choice and control of the participant.

Draft Recommendation 33 – *Restrictive Practices*

QAI is concerned about the QPC's recommendations in relation to Restrictive Practices. QAI defines Restrictive Practices as any action, approach or intervention that has the effect of limiting the rights or freedom of movement of a person in order to address a behaviour of concern and end or reduce the risk of harm to the person or others. The legal requirement to obtain a Positive Behaviour Support Plan (PBSP) that seeks to understand the function of the behaviour of concern and address it accordingly with appropriate support, cannot be considered lightly due to the invasive and inhumane nature of the practices involved.

QAI takes the position that due to the economic framework of analysis adopted by the QPC, examining the Queensland government's role in relation to the authorisation of Restrictive Practices and preparation of PBSPs as requested in the terms of reference of this inquiry, is inappropriate. QAI considers the use of Restrictive Practices to infringe the fundamental human rights of people with disability. An analysis that self-admittedly focuses on cost efficiencies and effectiveness of market-based mechanisms is not appropriate to examine and make recommendations on actions that authorise the violation of a person's fundamental rights and freedoms. Whilst there is an undeniable need to ensure the market operates efficiently, the context of the market should not be forgotten. The goods and services under examination relate to the daily lives of people living with significant disability and can involve measures that restrict a person's liberties. QAI therefore perceives the development of the NDIS market to be an inappropriate incentive for law reform on this issue. Recommendations for reform on the authorisation of Restrictive Practices must be made within a human rights framework rather than through an economic lens.

Rather than examining the efficiency of the Restrictive Practices regime with regards to its definitional clarity and privatisation of the preparation of PBSPs, the QPC could focus upon how the use of Restrictive Practices increases the costs of funded supports under the NDIS and therefore seek to reduce these costs by considering ways to reduce and eliminate the use of Restrictive Practices on NDIS participants.

With this caveat in mind, QAI does agree that there needs to be increased clarity around the Restrictive Practices legislative regime which is currently complex and difficult to navigate. We support the development of a simplified, cohesive regime that captures the use of Restrictive Practices in all settings in which they occur, including educational institutions. There are prima facie benefits to amending the definitions of Restrictive Practices in the *Disability Services Act 2006* (Qld) to be in line with the NDIS Restrictive Practices rules. The latter's application to children, to people with all disability types and the inclusion of the use of locked doors, gates and windows as a regulated Restrictive Practice is certainly preferable to the somewhat piecemeal coverage offered by the *Disability Services Act 2006* (Qld), which is limited to adults receiving disability supports from funded providers. QAI supports the adoption of a legislative regime that applies to the use of Restrictive Practices on *all* people with disability by *all* agencies that seek to apply them and in *all* settings in which they occur. The legislation must not compromise on the safeguards to protect a person's human rights for the sake of market development and economic growth.

QAI recommends further legal analysis of the level of protection offered by the *Disability Services Act 2006* (Qld) and the NDIS Restrictive Practices rules within a human rights framework. As the QPC has stated, this inquiry has produced insufficient evidence to make a recommendation in relation to whether locked doors, gates and windows should be included as a regulated Restrictive Practice. As this is one of the key differences between the two regimes, QAI respectfully suggests further analysis is required before recommendations regarding legislative definitions can be made. QAI notes the current review of the state level regime being undertaken by the Queensland government and awaits the outcome of this review. Whilst QAI supports the inclusion of locked doors, gates and windows as a regulated Restrictive Practice, further analysis of the two regimes could also consider the extent to which the NDIS Restrictive Practices rules effectively encourage

the reduction and elimination of the use of Restrictive Practices by NDIS service providers. QAI is concerned about current information available to NDIS service providers and the lack of attention paid to the need to work towards reducing and eliminating the use of Restrictive Practices. This was particularly evident within communications from the Q&S Commission regarding the use of Restrictive Practices during Covid-19, in which no reference was made to the need to work towards reducing or eliminating the use of Restrictive Practices nor was the right of participants to access independent advocacy or legal advice mentioned.

QAI supports the QPC's recommendation that the Queensland government review the resources available to and actions undertaken by QCAT, Office of the Public Guardian and the Department of Seniors, Disability Services and Aboriginal and Torres Strait Islander Partnerships to ensure that they are able to adequately manage the authorisation process. QAI is aware of participants experiencing lengthy delays before receiving PBSPs and in the meantime, being subjected to unauthorised Restrictive Practices.

QAI is fundamentally concerned that reducing the regulatory framework around the use of Restrictive Practices and recommending the Queensland government foster a market for the private preparation of PBSPs will lead to an increased use of Restrictive Practices on people with disability. It is one thing to remove the government's statutory monopoly on the preparation of PBSPs for seclusion and containment, but it is another entirely to withdraw as a provider of last resort.

Since the introduction of the NDIS, QAI has found that the quality of PBSPs has declined markedly. There is a lack of experience among practitioners and a lack of innovation in PBSPs leading to an increasing use of generic PBSPs that are not tailored to the individual's needs. This means that people with disability are having their freedoms limited in the absence of evidence-based guidance that will successfully address the behaviour of concern and reduce or eliminate the need for the Restrictive Practice. The broader remit of the NDIS Restrictive Practice rules has also led to an increased demand for PBSPs, yet the lack of registered service providers capable of providing PBSPs is causing significant issues and is particularly problematic in rural and remote parts of Queensland. There is also concern regarding the frequency with which funding for PBSPs proves insufficient. Since the adoption of 'typical support packages', participants often have to initiate lengthy review processes in order to access the required level of funding to obtain an appropriate PBSP. In addition to this, the QPC has identified evidence of a concerning trend among service providers showing non-compliance with regulations that provide safeguards against the inappropriate use of actions which would otherwise constitute criminal offences. For example, the finding of the Q&S Commission that over 50% of unauthorised Restrictive Practices required action by the service provider to be compliant with the relevant regulatory requirements.[4]

All of this indicates a market that has struggled enormously with the transition to the NDIS and which is unprepared for the move towards privatising the preparation of PBSPs. If the government withdraws as a provider of last resort, already lengthy waiting periods are likely to extend even further. Given the inadequacies of the market's current ability to prepare and

[4] Queensland Productivity Commission, 'The NDIS market in Queensland', Draft Report 2020, p223

provide essential PBSPs, recommending an increased move towards fully privatising the preparation of PBSPs is irresponsible, particularly in the absence of any complementary recommendations that seek to improve the quality of PBSPs produced by the market or boosting investment that will attract more Positive Behaviour Support practitioners to the scheme.

One of the fundamental objectives of the NDIS Act is to protect and prevent people with disability from experiencing harm from poor quality and unsafe supports. Despite assurances from the Q&S Commission that providers implementing Restrictive Practices would be closely monitored, this has not eventuated and their actions remain largely unrestrained. The Australian government has a legal obligation to protect the human rights of people with disability under the CRPD. Moving towards the privatisation of the preparation of PBSPs in a market that is obviously inadequate is arguably in breach of the NDIS Act and Australia's human rights obligations under international law. As the QPC has acknowledged, the current inquiry has not provided "…*sufficient evidence to conduct a thorough assessment of what would be required to improve the ability of providers to successfully implement PBSPs*".[5] QAI therefore believes the QPC should refrain from recommending the continued fostering of a market for the private preparation of PBSPs until such a time that there is confidence in the ability of the market and service providers to provide high quality PBSPs and comply with relevant legal obligations. Recommendations should alternatively focus upon the Queensland government's capacity to invest in attracting Positive Behaviour Support practitioners to the market, reduce wait-times to access their services, improve the quality of PBSPs and improve provider compliance with regulatory frameworks.

With the recent introduction of the *Human Rights Act 2019* (Qld), NDIS service providers are still coming to terms with their obligations to act and make decisions in a way that is compatible with human rights. The introduction of the new complaints mechanism under the Act is likely to see disputes around the use of Restrictive Practice brought before the Queensland Human Rights Commission. As NDIS service providers grapple with their new legal obligations in an environment where there is already considerable concern regarding their ability to safeguard the rights of NDIS participants, removing the government's involvement in the preparation of PBSPs appears premature and unnecessarily exposes NDIS participants to continued human rights violations.

QAI concedes that a statutory monopoly by the Queensland government on the preparation of PBSPs for seclusion and containment is inconsistent with the principle of choice and control in the NDIS market. Rather than withdrawing completely from preparing PBSPs, QAI sees a need for the Queensland government to utilise its experience in the preparation of PBSPs by supporting NDIS service providers to develop best practice guidelines. The Queensland government must remain a provider of last resort. The grave nature of the limitations imposed by seclusion and containment require a safety net that the free operation of the NDIS market will simply not provide. People with disability subjected to such practices require a level of certainty that they can access PBSPs from a government provider if the market cannot provide one. In QAI's experience, participants with complex

[5] Ibid, p403

needs (who are more likely to be subjected to Restrictive Practices) often experience difficulties accessing supports as service providers have been known to terminate service agreements when challenges arise. This can leave vulnerable participants with complex needs without PBSPs that regulate the use of Restrictive Practices and provide a pathway towards the reduction and elimination of the use of such restrictive measures. There is significant risk that this practice will increase if the Queensland government withdraws as a provider of last resort and puts people with disability into a situation that likely far surpasses the original intentions of the NDIS.

There is further merit in retaining the Queensland government as a provider of last resort, as government entities are easier to hold to account. Whilst not perfect, government bodies typically have more comprehensive complaints processes and oversight mechanisms than private service providers and are ultimately accountable to Parliament. Retaining an oversight function alone is insufficient. Government providers need to be supporting people with disability on the ground by filling the gaps inevitably left by the market-based mechanisms that leave vulnerable members of the community exposed to serious human rights violations. The current inability of the Q&S Commission to respond to participant complaints in a timely and appropriate manner gives further cause for concern regarding the proposed removal of the Queensland government as a provider of last resort, with government bodies typically responding faster to serious complaints than private providers and the Q&S Commission.

Whilst the Queensland government should indeed monitor the quality of PBSPs being developed, QAI seeks further clarification on how it will do this. A model on how the Queensland government would monitor the standards of PBSP's alongside the Q&S Commission requires further elaboration in the draft recommendations. The QPC has stated that if PBSPs are not of an acceptable standard, the Department of Seniors, Disability Services and Aboriginal and Torres Strait Islander Partnerships *may* remain a provider of last resort, however the draft recommendations fail to provide a timeframe in which this will be assessed or what will constitute a PBSP of an 'acceptable standard'. The Q&S Commission must become more proactive in their involvement in situations where the application of Restrictive Practices is known. QAI recommends the NDIA work towards ensuring participants requiring PBSPs have sufficient funding in their plans and consider funding a support coordinator for participants who are subjected to Restrictive Practices. The Q&S Commission could fulfil its responsibilities by improving the collection of data and monitoring of Restrictive Practices including type and frequency. They could impose an onus on providers to demonstrate that strategies in a PBSP have been implemented and where not evident, order mandatory training or a change in provider. Ultimately the Q&S Commission must ensure that service providers are continually working towards the reduction or elimination of Restrictive Practices.

Draft Recommendation 35 – *Interactions with Queensland Government Services - Justice*

Chapter 14 of the draft report explores how people with disability navigate mainstream interfaces – Education, Health, and Justice - with the NDIS. For depth, this section focuses purely on the interface between adult corrective services and the NDIS, centring the issue

on supports for people in prison with disability. QAI has over 30 years' experience advocating for people in closed settings, such as forensic mental health settings and prisons, advocating on both individual and systems levels. QAI has collaborated with stakeholders working intensively in this area and appreciates their ongoing work and input.

Why is identification of prisoners with disability a markets issue? QPC notes the NDIS market is constructed. Reviewing the architecture between the NDIS market and mainstream services provides an opportunity to locate groups that are under-represented in the market. Indeed, QPC notes the economic imperative to improve the identification process of people with disability in prison in the draft report, citing a study which examined the economic value of providing support to people in prison. Rowe and colleagues found, "The benefits that would have been generated from expenditure on disability supports that diverted people from imprisonment ranged from $1.4 to $2.4 for every dollar spent on support (2017, p. 24 in QPC 2020: 422)".[6] Should the provision of necessary supports be delayed, the NDIA, QCS and other service systems are likely to be financially overburdened in the long run. Conversely, intensively supporting people in custody to gain access represents an opportunity to invest in scheme sustainability through providing support at an earlier life stage, which is a legislative imperative of the NDIA under Part 2 3(3)b of the NDIS Act (2013).

To better understand the demand for disability-related supports in prison, it is important to know how many people with disability are incarcerated. Studies on the prevalence of disability in prison vary greatly. QPC (2019) cites studies that estimate between 20-30% of prison entrants live with disability. Taskforce Flaxton, by the Crime and Corruption Committee, heard evidence that this figure may be closer to 50% and rising.[7] This figure is much higher again for people at the intersections of markers of structural disadvantage – such as indigenous incarcerated men in Northern Territory prisons - for whom 96% live with severe hearing impairment (Vanderpoll & Howard 2012 in QPC 2020).

Given the high proportion of those in prison who live with severe impairments and functional deficits, it follows that many would require NDIS-funded supports. It is unclear how many people in prison have NDIS plans, however available data suggests a minority of prisoners have a self-report NDIS flag on the QCS system. QAI is concerned about how the other likely eligible people with a permanent, lifelong disability are accessing necessary supports and services both during their period of incarceration and to facilitate their release from prison.

The gap between people receiving and needing support in Queensland prisons leaves many questions unanswered. How are commonwealth, state and territory governments

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[6] Rowe, S., Simpson, J., Baldry, E. and McGee, P. (2017) The provision of services under the NDIS for people with disabilities who are in contact with the criminal justice system. Australians for Disability Justice: Australia.

[7] Crime and Corruption Commission. (2018). T*askforce Flaxton, An examination of corruption risks and corruption in Queensland prisons.* [accessed online]. < *https://www.ccc.qld.gov.au/sites/default/files/Docs/Public-Hearings/Flaxton/Taskforce-Flaxton-An-examination-of-corruption-risks-and-corruption-in-qld-prisons-Report-2018.pdf*>.

meeting their obligations to support people in prison to meet access to the NDIA? How is the NDIS a universal scheme, while inaccessible to a large group of the likely-eligible prison population? How can we better capture, share and publicise data on the incarceration of people with disability? These questions form the backcloth against which QAI offers the subsequent analysis on identification, NDIS Access and Planning for incarcerated people.

There are many ways to make sense of the gap between those with disability who are likely eligible for supports, and those with an NDIS plan.

- Disability identification relies mostly on people reporting their disability and access to the NDIS via QCS, which is insufficient because people:
    - are not always aware of their disability
    - do not always identify as having a disability
    - do not always have access to their diagnostic information or assessments
    - can be distrustful of government institutions
    - may withhold diagnosis due to stigma[8]
- Over-representation of First Nations people in prison, many of whom may not identify with the colonial construct and language of disability
- Prevalence of dual diagnosis and drug and alcohol use among people in prison may obfuscate assessment opportunities and outcomes
- High threshold of evidence for meeting access, particularly for people with psychosocial disabilities
- Insufficient training of custodial staff in disability awareness, resulting in mischaracterisation of behaviours of concern (Taskforce Flaxton 2018: 9)
- People in custody are a highly mobile population and the process of collecting documentation and assessment, gaining access, arranging a planning meeting, and instituting a support coordinator can be a lengthy process.

QAI acknowledges that identification of people with disability who are incarcerated is a difficult task. It appears the NDIS Implementation projects that resulted in the identification of 1750 likely-NDIS-eligible people in prison, however, were only operational between June 2018 and June 2020. QAI is of the understanding that these projects have now ceased or had funding significantly reduced. QAI is concerned that many people with disability are consequently going without support to complete access requests, submit reviews, arrange planning meetings, and liaise with the NDIA.

The ambiguity of the Act, the Rules and Applied Principles and Tables of Support (APTOS principles) may exacerbate the under-provision of supports to people with disability in prison. The *Disability Discrimination Act 1992* (Cth) mandates state and territory governments make “reasonable adjustment” to ensure people with disability can access services. The NDIS Supports for Participants Rules 2013 aim to clarify which supports the NDIS retains responsibility for in prison (ss. 7.23–7.25), and specifically exclude 'day-to-day

[8] Human Rights Watch (2018). I needed Help, Instead I was Punished – Abuse and Neglect of Prisoners with Disability in Australia” [accessed online] <https://www.hrw.org/report/2018/02/06/i-needed-help-instead-i-was-punished/abuse-and-neglect-prisoners-disabilities>.

care and support needs of a person in custody, including supervision, personal care and general supports' (s. 7.25(a)). This rule is echoed in the APTOS principles, which is now outdated (for example, the QPC notes disability-related health supports and a range of other areas have also changed).

The *NDIA Act 2013* (Cth), 34(1)f(ii) also cites the *Disability Discrimination Act 1992* (Cth) as a basis to not fund supports that would be covered under 'reasonable adjustment'. This term lacks definitional clarity and may result in disagreements between state and federal officials as to who is truly responsible, rather than collaboration on how to fund the necessary supports. QPC notes that it has not seen evidence that the non-provision of funds is an intentional cost-shifting exercise (Queensland Productivity Commission 2020: 417). QAI has heard from stakeholders that such disagreements have resulted in significant delays for participants requiring supports.

The exclusion of day to day supports in the APTOS principles may also reinforce traditional systems of service provision which have been historically inequitable and risky. The delivery of supports to people with disability by untrained and under-paid people also in custody, for example, is one way people with disability are rendered vulnerable by the lack of NDIS-funded day-to-day care and support in prison. It is QAI's understanding that programs exist where people in prison provide support to people living with disability. QAI believes that these "workers" in prison should not be exempt from minimum wage and be supported to acquire adequate training and a yellow card to ensure the person does not have a history of exploitation of vulnerable people. Further, a person's disability related needs can be complex and require responsive, remunerated, and qualified professionals, especially while they are in prison. Not providing funds for a support worker to establish rapport with a person prior to release can only be described as a missed opportunity. QAI considers that the NDIA and the states and territories should review the suitability of the rules and APTOS principles, particularly where day-to-day supports are reasonable and necessary for people in custody.

The non-provision of funding for people who have met access while in prison is another significant barrier to people in prison receiving supports. QAI is aware of participants in prison having $1 or $0 plans. It is QAI's understanding that the length of a sentence may inform the planner's decision not to fund supports, with participants with longer sentences being more likely to receive $1 or $0 plans. However, refraining from providing funded supports to participants in prison not only lacks legislative support per the NDIS Act (2013) s34(1), but risks participants being without essential disability related supports upon their release.

It is also unreasonable to expect NDIA planners to make a judgement call about the likely length of a person's sentence. "As noted by the Queensland Government: [A]t any given time, the release date for only a small proportion of the total prison population is known to QCS. For example, on 31 August 2018, 13.1% of the prisoner population had an actual known release date … (sub. 43, p. 13)" (In QPC Recidivism report 2019: 375).[9] NDIS

[99] Queensland Productivity Commission. (2020). 'Inquiry Into Imprisonment and Recidivism', [accessed online] <https://qpc.blob.core.windows.net/wordpress/2020/01/FINAL-REPORT-Imprisonment-Volume-I-.pdf>.

planners already require specialised knowledge in many areas and expecting them to understand probation and parole processes is neither supported by the NDIS Act, nor is it an effective way to ensure continuity of supports. Further, it is not well understood how people with disability who are released at short notice without funding in their plan navigate the re-activation of their plan and re-engagement of supports.

"The Anti-Discrimination Commission Queensland (ADCQ) noted that in 2017–2018, the most common length of stay in custody was 1–2 months, with more than 50 per cent of the prisoner population serving less than four months in custody" (In QPC Recidivism Report 2019: 348). This timeframe is, according to the NDIA's Participant Service Guarantee, less time than participants can expect a Planner to schedule a plan meeting and commence building a plan. Recently, one staff member detailed how 14 days of mandatory isolation (solitary confinement) for their client due to a COVID precaution worsened the impact of their psychosocial disability. The worker described their client had no support to access their NDIS funded psychologist, even by tele-link. Greater interagency escalation processes are needed to ensure people have prioritised access decisions and planning.

Within the realm of what the NDIS has agreed to fund under the now outdated APTOS and Rules (2013), the following supports may be required (this is not an exhaustive list):

- Equipment such as prosthetics and wheelchairs;
- Therapies to maintain physical, cognitive, linguistic or sensorial function;
- Support coordination to manage significant life transitions such as re-entry;
- Commissioning and coordination of assessments, including full functional capacity assessments required for Specialist Disability Accommodation (housing is sometimes a pre-condition for Magistrates granting parole); and
- Behaviour support to maintain relationships.

While there is no legislative basis for precluding people who are incarcerated from using their plans in prison, multiple stakeholders reported that some NDIA workers reactivate plans 6 weeks before the participants release.

It is also unknown how people are supported to submit a change of circumstances form, an internal review or external review of their plan while in prison. The NDIA has, on multiple occasions, refused to process an internal review request when it is completed by a support coordinator on a participant's behalf. Support Coordinators have been discouraged from lodging s100 Internal Reviews on behalf of clients, leaving this option unavailable to those provided with funds for support coordination. The necessity of gaining a signature on these forms introduces but another barrier for those who are incarcerated, a problem exacerbated given COVID-19 related restrictions on face-to-face visits. We have also heard from stakeholders that some service providers are reluctant to enter prisons, due to the misconception that they cannot provide support while a person is in custody. QAI sees a great need for disability advocates to support people in custody in relation to accessing supports and exercising their NDIS appeal rights.

Even when an assistive technology support is approved by the NDIS, stakeholders have told QAI that it remains the decision of the General Manager of the prison whether to allow the participant to access the piece of equipment. Further, QAI has seen instances where

access to hearing aids was impeded because the person in prison was unclear who was responsible for lodging a change of circumstances form. This was flagged in QAI's previous submission to the QPC's inquiry into recidivism. Funding of (specialist) supports coordination to meet with the person while they are incarcerated would be a significant safeguard for ensuring this cohort have access to services and assistive technologies in prison, and disability-related supports in place for their release.

The existing architecture of disability identification, access, and service provision for people within prison requires urgent attention. Not only does the under-identification and provision of supports to people with disability raise questions about how the human rights of people with disability are being met in prison, but it is inefficient to under-service this cohort. Urgent work is required to deliver on our international obligations, as well as our obligations to people with disability who deserve and require supports. QAI welcomes points of clarification, questions, and further input from people with disability, people who are incarcerated, QCS, NDIA, QPC and all other interested stakeholders.

QAI provides the following table of recommendations for policy reform on this issue.

	Recommendations for QCS	Recommendations for NDIA	Recommendations for Interfaces
1	Conduct a review into assessment tools and processes used by QCS to identify disability in prison. Commission $600,000 for two research and practice partnership pilots to identify or develop and test culturally responsive disability-identification assessments.	Conduct a nation-wide review of every $0 and $1 plan, installing a minimum suggestion of capacity building supports including support coordination.	Improve information sharing processes between state and federal governments, with consistent protocols to maintain consent and privacy.
2	Provision of funds for, at a minimum, one full-time position within each prison to identify people with disability. These staff should have allied health qualifications, experience with assessment, access to the NDIS Justice Liaison Officer inbox, and should have access to a substantial budget to commission functional capacity reports for people in prison. These roles may be exempt from uniform and have sufficient resourcing to spend time with people in custody to	Fund a program to engage incarcerated First Nations peoples to design culturally safe replacement language for "disability". Embed this language and knowledge practice within practice guides and training for staff.	Revise APTOS principles which absolve the NDIA of responsibility for day-to-day support and personal care while a person is incarcerated.

	establish rapport required to support people – particularly Aboriginal and Torres Strait Islander Peoples - through access.		
3	Make all policies, procedures, and tools for disability identification publicly available on QCS website.	Train NDIA Justice Liaison Officers and Subject Matter Expert Planners in subconscious bias and culturally introspective and -aware practices.	Establish a working group with Office of the Public Guardian, NDIA, QCS and Queensland Health to resolve consent issues for people with impaired decision-making capacity.
4	Amend the Disability Services Plan to demystify how QCS interfaces with the NDIA and Health. Include how QCS plans to reach 1750 Access Request Form submissions for the people QCS identified as likely eligible for the NDIS each year, based upon its modelling.	Report on number of participants incarcerated in the quarterly actuarial reports.	Develop a MOU with the Department of Health and NDIA to gain access information on permanence of disability, and to resolve issues where consent cannot be clearly established.
5	Report yearly per prison on: a) quantity of assessments completed; b) number of people with disability in custody by disability type; c) number of access request forms completed by which department; d) number of access (not) met decisions by disability type.	Fund independent advocacy services for people with disability in prison to exercise their NDIS appeal rights.	
6	Establish referral pathways and NDIS consent collection processes for psychologists and correctional counsellors completing the Immediate Risk Needs Assessment and the Hayes Assessment Screening Index, where the person with a disability and consents to checking whether the person has a plan. Once consent is collected, the NDIA Justice Liaison Officer may be	Create a consent working group to resolve consent and escalation processes where a person in prison does not have capacity.	

	able to confirm access status of that person. Assessment needs to happen early, and at regular intervals.		
7	Commission a truly independent inspection unit to monitor QCS's performance on human rights, the Operational Protocol to the Convention against Torture, United Nations Convention on the Rights of Persons with Disability and Access/ funded supports targets set in collaboration with the Actuary Office of the NDIA. These reports should be made publicly available.	Remove from the Liaison Practice Guide that Liaison Officers are not participant-facing, so Liaison Officers can spend time in the prisons building the capacity of the positions that identify disability.	
8	Review data collection, storage and reporting functions of IOMS to improve data integrity and transparency.	Engage directly with support coordinating agencies operating in the Justice space to educate them on the importance of service continuity while people are imprisoned.	
9		Publish how NDIA plans to make Independent Assessments available to people in prison.	

Conclusion

QAI thanks the QPC for the opportunity to provide feedback on the draft report. QAI acknowledges the breadth of the inquiry and the scale of the task ahead to improve the operation of the NDIS market in Queensland. With the scheme fully operational across Queensland, the need for collaboration between government agencies is greater now more than ever. QAI is happy to provide further clarification upon request.