**Queensland Advocacy Incorporated**

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

***Systems and Legal Advocacy for vulnerable people with Disability***

# *Disability Services and Other Legislation Amendment Bill 2019* (Qld)

## Submission by Queensland Advocacy Incorporated

## Education, Employment and Small Business Committee

**17 April 2019**

Without Power and Control over One's Life – what Hope is There?

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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 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 almost 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 and Decision Support Pilot Program.

We have previously been involved in reviews of the *Disability Services Act 2006* (Qld), including most recently in the 2018 review into reshaping this legislation by the Department of Communities, Disability Services and Seniors.

From its inception, QAI has engaged in extensive systemic advocacy around the application of Restrictive Practices on vulnerable people with disability. QAI's Human Rights Legal Service (HRLS) also provides individual advocacy for people living under Restrictive Practices. Our submissions on this Bill are informed by our knowledge and experience in this context.

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## Introduction

The *Disability Services and Other Legislation Amendment Bill 2019* (Qld) (**DSLA Bill**), a Government Bill to amend, chiefly, the *Disability Services Act 2006* (Qld) (**DSA**), arises from a state-wide legislative review in anticipation of full NDIS roll-out, and commencement of operation of the NDIS Quality and Safeguards Commission in Queensland, by 1 July 2019.

QAI supports the need for the DSLA Bill, to reflect the changing roles and responsibilities of relevant parties with the full rollout of the NDIS. Below, we outline our response to particular proposed reforms.

## Summary of QAI's response to the DSLA Bill

1. ***Worker screening:*** QAI agrees with the continuation of the current safeguards for worker screening under the yellow and blue card systems. We support expansion of the exclusion of persons qualified to hold a yellow card as proposed.

2. ***Restrictive Practices:*** QAI advocates for the development of a nationally consistent framework for Restrictive Practices, rather than state-specific regimes, which must be driven by a focus on eliminating the use of Restrictive Practices.

3. ***Coronial jurisdiction amendments:*** QAI does not support narrowing the definition in which a death is considered 'death in care'. In particular, we consider it important that the scope of the coronial jurisdiction continues to cover deaths in aged care facilities, where there is already insufficient investigation.

4. ***Community Visitation Program:*** QAI does not support the narrowing of the definition of visitable sites for the Community Visitor Program for adults to a place where an NDIS participant lives and receives a particular class of (very high level) supports from a registered NDIS provider.

## Worker Screening

QAI agrees with the continuation of the current safeguards for worker screening under the yellow and blue card systems. QAI supports choice and control and recognizes the diversity of needs of people with disability. We support limiting screening to the scope required by the national policy for NDIS worker screening, allowing self-managing participants to request workers of unregistered providers to have a NDIS worker screening clearance but not requiring screening for unregistered providers.

QAI submits that the weighting in screening should be heavily in the favour of protective, proactive action, and therefore support expansion of the exclusion of persons qualified to hold a yellow card in the manner proposed.

In October 2017, QAI provided feedback to the Department of Social Services (Department) on the DSS Worker Screening Consultation Paper. In that feedback, we agreed with the importance of a nationally consistent approach to worker screening. We supported rigorous and comprehensive requirements for self-disclosure by applicants as part of the application process for consideration by NDIS Worker Screening Units. We proposed that, in addition to

the information identified by DSS, applicants should also be required to disclose whether any complaints have been made against the applicant by or on behalf of a person with disability that relates to the applicant's fitness to work with people with disability. We noted that the weighting should be more heavily in the favour of protective, proactive action in this realm, having regard to:

1. recognition of the particular vulnerability of many people with disability, which can impact upon a person's ability to safeguard themselves from abuse and to respond to and report abuse;
2. the power imbalance between a person with disability and their support worker;
3. the high rates of violence, abuse and neglect of people with disability;
4. the low rates of conviction or disciplinary action against perpetrators of violence and abuse against people with disability;
5. the need for cultural change towards a zero tolerance approach to violence and abuse by those in positions of power towards people with disability; and

We note that the reforms currently before Parliament is also consistent with the findings of the Royal Commission into Institutional Responses to Child Sexual Abuse.

QAI considers that the Department should show leadership by explicitly demonstrating that they will not be complicit in the perpetuation of the risk of abuse. For example, where one service provider knowingly employs a person in another sector (for example, from aged care to disabilities) with a history of inappropriate conduct, we recommend this should attract criminal sanctions. We further propose that applicants should be required to disclose additional information, including, whether any complaints have been made against the applicant by or on behalf of a person with disability that relates to the applicant's fitness to work with people with disability.

QAI reiterates our concerns regarding unscrupulous hostel and boarding house owners. QAI is aware that an increasing number of hostels, boarding houses, nursing homes, and long-stay health facilities are now registered as providers for the NDIS. While there may have been some sort of oversight of the operations and staff of these and other congregate care settings in the past, we are unsure as to the type or intensity of checking on the owners and or managers of such facilities.

We are aware that it is not a difficult hurdle to overcome for some owners to register premises in the name of family members, to employ family members and other relatives or friends to avoid scrutiny of hidden but serious misconduct or criminal activity. Additionally, we are aware that people residing in such facilities have been subjected to coercion, threats, control, abuse and potential eviction for even voicing a complaint.

Any worker (and/or complicit employer) found to pose an unacceptable risk of harm to people with disability must be deterred from seeking work in any care system. Any service provider that has been a source of serious and or ongoing complaints by service users should be investigated and complaints resolved to the satisfaction of the client and an independent body before certification and accreditation, thus putting service providers on equal status with

support workers. QAI submits that, for the purposes of the imposition of safeguards to protect the fundamental rights and dignity of people with disability, sole traders should be subjected to the same screening requirements as other types of workers.

## Restrictive Practices

Queensland is oft lauded as having one of the 'strongest quality and safeguard systems for people with disability in Australia [including] a rigorous framework for the use of restrictive practices.'[1] This stems from safeguards introduced in 2006 following the Carter report,[2] focusing on the reduction or elimination of the use of Restrictive Practices. The DSLA Bill provides for the retention of responsibility by the Queensland Government for legislating the use of Restrictive Practices in Queensland by NDIS providers following commencement of operation of the NDIS Quality and Safeguards Commission in Queensland.

In the introductory speech, the Minister for Communities and Minister for Disability Services and Seniors, the Hon. Coralee O'Rourke, noted that the effect of this Bill is that 'Queensland will retain its robust and comprehensive framework in relation to the authorisation of restrictive practices in Queensland.'[3]

QAI does not support the separate, different regulation of Restrictive Practices by states and territories. The roll-out of the NDIS offers the opportunity for the development of a nationally consistent framework for Restrictive Practices. This framework should have the elimination of the use of Restrictive Practices as its core focus and should include appropriate human rights safeguards.

The Australian Government developed the **National Framework for Reducing and Eliminating the Use of Restrictive Practices in the Disability Service Sector** to reduce the use of Restrictive Practices in disability services as an interim step in the transition to the regulation of RPs under the NDIS. We note that regulatory controls to implement a National Framework for Restrictive Practices were endorsed by CoAG in 2014, yet this has not occurred to date. QAI submits that Australia must develop a consistent national definition and approach to Restrictive Practices, which includes (non-differentiating and non-exclusive) practice standards for all service providers and a competency framework for practitioners providing positive behaviour support.

Underpinning Part 6 (and the entire *Disability Services Act 2006* (Qld)) is the principle that people with a disability have the same human rights as others, and specific reference is made to this requirement in implementing any RPs.[4] However, as noted by commentators such as French, the drafting of the legislation insofar as human rights principles are concerned is declaratory only – there are no operative provisions that pragmatically translate this broad

[1] Hon. C O'Rourke MP, Introductory Speech, Disability Services and Other Legislation (NDIS) Amendment Bill, 28 March 2019, 833.
[2] Report by the Hon. WJ Carter QC. (2006). *Challenging Behaviour and Disability: A Targeted Response.*
[3] Hon. C O'Rourke MP, Introductory Speech, Disability Services and Other Legislation (NDIS) Amendment Bill, 28 March 2019, 834.
[4] Sections 17 and 18 of the *Disability Services Act 2006* (Qld) promote and prescribes the human rights principle.

statement into practice, nor are any of the other human rights contained in the CRPD, or more generally in international law, recognised or incorporated.[5]

The stated objective of the Queensland legislative regime is to regulate the use of RPs and only sanction their application as a last resort and in the least restrictive manner, thus reducing and eliminating the use of RPs. However, as French points out, the legislation fails to prescribe any substantive safeguards against the use of RPs, leaving only procedural safeguards, which are akin to no tangible safeguards at all in this context.[6] French states:[7]

> *In my view, at the very least, the legislation ought to have prohibited any conduct or practice that causes pain or discomfort, or that intimidates or humiliates a person, or which is utilised to seclude a person, to physically restrain a person, or to punish a person in relation to their behaviour.*

QAI considers that there should be no requirement that a person living with Restrictive Practices only receive services from a service provider registered as a provider of 'positive behaviour supports', nor should a participant living with Restrictive Practices be denied or excluded from the right to **self-manage their supports or hire their own workers** – including sole traders if that is their choice. QAI has submitted on numerous occasions that the opportunity to determine who and how a person is supported, affords choice, control and autonomy for the person and leads to the reduction or complete elimination of the use of RP.

QAI submits that the worker screening provisions should apply to all workers providing disability services, including sole traders operating as NDIS providers in Queensland during the transition to full scheme NDIS. However, these quality safeguards should not distinguish between those registered to provide behaviour supports and those who are not. We are concerned that any delineation could create incentives for service providers to 'specialist' in the provision of Restrictive Practices, given these packages can be more lucrative, and lead to an increase, rather than a reduction, in the use of Restrictive Practices. It would also necessarily disrupt many established, effective, support relationships.

Section 220 of the Act relating to the **Locking of Doors Gates and Windows** is in our opinion an erosion of the rights of the person with disability, and like the immunity provision is a convenience for service providers. While the intention may be to protect the person from risk or harm, the policy measure of dealing with a practice that could potentially be misused for containment or seclusion, falls far short of the safeguards regulation and protection of dealing with this practice under Containment. There has been little opportunity for public consultation on the development of this policy and or review, with monitoring and review of individual plans left largely at the discretion of the service provider with little independent oversight.

QAI recommend that the Policy be discarded and that all measures of **Locked Doors Gates and Windows be included and absorbed into Division 3 Subdivision 1 Containment or Seclusion.**

[5] French, note 18, 9.
[6] Ibid 12.
[7] Ibid 12.

In 2014 Amendments to the Act included the introduction of **Immunity Provisions** for service providers and QAI strongly opposed the notion that service providers be afforded immunity for the use of unauthorised restrictive practices on the basis of the timeliness of administrative issues in approval. In our submission we wrote the following:-

QAI asserts that if there have been no incidents that warranted the introduction of the immunity provisions then there should be no inclusion in the Bill for immunity. If there have been incidents, the service provider have access to the Doctrine of Necessity (DON) and Workplace Health and Safety (WP&S) provisions. Service Providers have admitted that they have and currently use RP without approval, based on the use of DON and WPH&S.

The consequences of immunity clauses can have the effect of circumventing the restrictive practices process. This may result in the diminishment of minimum standards and a lack of accountability.

The use of a restrictive practice remains a significant imposition on a person life. The application of that practice should have a vigorous assessment at each stage – conception, implementation and review.

We hold serious concern regarding the action taken after the initial use of a RP - continued use without approval or without applying for approval. Any use of RP under immunity provisions must be included in data collected, and freely available to advocates or supporters of the person with disability. Services providers must also provide a report (detailing the use, reasons, and how often/long) to all stakeholders when using RP under immunity provisions.

A National Framework for Reducing the Use of Restrictive Practices in Disability Services is under developed. This framework aims to put in place nationally consistent overarching principles and strategies to guide future work in the reduction of the use of restrictive practices. Reduction is the operative word, the continuation of immunity as proposed will be in direct conflict with any real efforts to reduce or eliminate the use of RP. It is illogical to seek to provide immunity to service providers rather than addressing the real cause for delays in obtaining approvals.

QAI recommends to the Committee that every time the 'immunity provision' is activated then the service provider must contact a **legal /disability advocacy service**. QAI would be willingly to be the legal service.

The matter should be brought before QCAT for consideration when an immunity provision is activated.

Despite the advocacy around this issue in 2014, the amendments are still in place without the legislative requirements that were part of our recommendations for the following:-

- That an independent party assesses the need for the short term use of restrictive practices according to strict criteria, within 48 hours of an application being made.

- That the service provider must report on the use of restrictive practices, if approved, within 7 days.

- That if consent is not given a review is undertaken with the service provider. The aim of the review would be to explore why the service provider believed a restrictive practice was required, and identify areas of training/support to assist the service provider.

- A notice of approval/non-approval is provided not only to the service provider but to the adult and the restrictive practice guardian.

The minister should ensure no service provider uses Restrictive Practices (RP) without express authority and that there should be no application of RP without a Positive Behaviour Support Plan (PBSP). Furthermore for any person who transfers between service providers and exhibits perceived challenging behaviour for the first time, the service provider MUST develop a PBSP and apply for emergency interim order only and prior to the use of RP. The service provider must report on the use of RP (where, how, why, how often and for how long) and whether ongoing approval is required.

QAI is concerned as to the avenues of address/recourse available to the adult if restrictive practices have been used but **not** approved. This is particularly so with section 151 as it effectively allows a service provider to arbitrarily deprive the adult of their liberty.

QAI recommends that rather than extend existing immunity, the decision maker should be mandated under legislation to **make a decision with 48 hours** of receiving an application on whether or not to approve an interim use of restrictive practices. The length of this 'interim order' should be no longer than 30 days and be conditional that any further information required should be provided within a specified period (7 days). Prior to the end of the 30 days, or on receiving this additional information the decision maker either revokes the interim order or makes a short term order. The duration of any interim order should be considered as part of the duration of any subsequent short term order.

We therefore strongly recommend that all persons subject to restrictive practices must be offered or have access to legal representation. This is particularly important as these amendments presume the adult lacks capacity so it is one thing to give them a statement but another to allow them to be able to exercise legal capacity. This recommendation for legal representation could be incorporated into the statement that is required to be given under Clause 25 regarding the use of restrictive practices.

Clauses 25 – 29 of the DSLA Bill amend sections 191, 193, 194, 195 and 199 of the Act to enable flexibility to exclude certain relevant service providers from the requirements to give statements about the use of restrictive practices, the requirement to keep and implement procedures, the requirement to keep records and other documents, notification requirements and information-giving requirements.

Without clarity about the roles of such relevant service providers QAI does not support these exemptions. It is integral, for the purposes of accountability and transparency (vital for

protecting vulnerable people with disability from abuse) that all service providers are required to comply with these requirements.

Further, it is also important that the reporting and data collection obligations be accompanied by provision for mandatory training of service providers and staff who fail to meet the objective of reducing or eliminating the use of Restrictive Practices, and ultimately removal of those staff in the case of continued failure to comply with the targeted reduction.

QAI is concerned about what mechanism will be used to collate reporting and monitor the types, frequency and strategies used to reduce or eliminate the use of RP's. It is crucial that ongoing scrutiny of this material is performed at a local level in order to respond appropriately and make recommendations about the continued improvement or suitability of any service or support operating and using Restrictive Practices.

## Coronial jurisdiction amendments

QAI is concerned with the narrowing of the definition of when a death is a 'death in care'.[8] We understand that this definition, which is the trigger for the conduct of a coronial investigation, was recently expanded during the NDIS transition[9] to deem the death of any NDIS participant living in a residential service a 'death in care' and that the rationale for narrowing it is to re-align with the previous definition, which was directed to capturing only the deaths of the most vulnerable people with disabilities in receipt of extremely high levels of care and support.

QAI opposes this amendment. We consider that the exclusion of deaths in private dwellings or aged care facilities is not appropriate and that these deaths should remain encompassed in this jurisdiction. We do note and support that deaths of persons with disabilities living under Restrictive Practices or in specialist disability accommodation will still be classified as a 'death in care' (even if that person lives alone). However, all deaths of persons with disability in aged care facilities should be covered, particularly having regard to the significant number of young people with disability who live in aged care facilities whose primary disability support needs are often overlooked and not met, and the presently inadequate investigations that are undertaken in this context. The current Royal Commission in to aged care is testament to the need for such provision and the Coroner must be funded to investigate accordingly.

## Community Visitation Program

QAI does not support the narrowing of the definition of visitable sites for the Community Visitor Program (CVP) for adults, which, similarly to the proposed narrowed scope of the coronial jurisdiction (discussed above), restricts visitable sites to a place where an NDIS participant lives and receives a particular class of (very high level) supports from a registered

[8] Clause 51 of the DSLA Bill, which amends s 9 of the Act.

[9] By the *Disability Services and Other Legislation Amendment Act 2016* (Qld).

NDIS provider.[10] While the CVP should focus on the most vulnerable people with disability, it should not exclude other people with disability.

QAI acknowledges the vital role the VCP provides in protecting the rights and interests of vulnerable Queenslanders with disability and strenuously opposes any narrowing of the scope of this scheme. We note that with the implementation of the Optional Protocol to the Convention Against Torture (OPCAT), to be complete by December 2020, additional layers of oversight in the form of inspect for breaches of the Convention Against Torture will be provided by the relevant National Preventive Mechanism(s) (NPM). The role and scope of NPMs under this new framework is yet to be properly determined. QAI considers that the current scope of the CVP, if not expanded under OPCAT, should at a minimum be replicated in full.

QAI supports the proposed amendments to the definition of 'visitable site' for the CVP (child), as we consider it appropriate that a 'residential facility' for this purpose includes a place where a child accommodation service is provided to a child, for the purpose of providing respite services in relation to the child, by an NDIS provider or registered NDIS provider.

QAI has previously advocated for a redesignation of the community visitation function, noting the potential for a conflict of interest between the duty of the Public Guardian to be a decision-making of last resort and the Community Visitor's function to monitor and report on conditions in congregate residential arrangements like hostels and boarding houses. The Public Guardian is making decisions on behalf of people with disability and overseeing the program that monitors and reports on the potentially adverse consequences of those decisions.

We advocated for the establishment of a Disability Commissioner with functions including to undertake systemic advocacy on behalf of the most disadvantaged people with disability.[11] We submitted that, to properly perform this function, the Commissioner would need special powers to access premises where people with disability live in congregate arrangements, like hostels and boarding houses, youth detention or adult correctional centres, disability services or mental health facilities. We maintain these submissions.

## Conclusion

QAI thanks the Committee for the opportunity to make a submission regarding this proposed law reform. We are happy to provide further information or clarification upon request.

[10] Clause 62 of the DSLA Bill amends s 39 of the Act by omitting the definition of 'private dwelling'.
[11] Queensland Advocacy Incorporated. Review of *Disability Services Act*. 2018.