



2 August 2017

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**Submissions should be received by 28 July 2017. The reporting date is 5 September 2017.**

Committee Secretary  
Senate Economics Legislation Committee  
PO Box 6100  
Parliament House

**re Inquiry into the National Disability Insurance Scheme Amendment (Quality and Safeguards Commission and Other Measures) Bill 2017**

Dear Committee

We thank you for this opportunity to make a submission in relation to the Inquiry into the National Disability Insurance Scheme Amendment (Quality and Safeguards Commission and Other Measures) Bill 2017.

Yours sincerely

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Director

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## **QAI Submission**

### **About QAI**

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, rights and lives of the most vulnerable people with disability in Queensland. QAI does this by engaging in systems advocacy work; through campaigns directed to attitudinal, law and policy change; and by a range of advocacy initiatives in this state and nationally.

QAI has a 30 year track record of effective systems advocacy, through campaigns directed to attitudinal, law and policy reform, and by supporting the development of a range of advocacy initiatives. We have provided, for almost a decade, advocacy through three individual advocacy services – the Human Rights Legal Service, the Mental Health Legal Service and the Justice Support Program. Our expertise in providing legal and advocacy services and support for individuals within these programs has provided us with a wealth of knowledge and understanding about the challenges, issues, needs and concerns of people who are the focus of this submission.

QAI believes all people are equally important, unique and of intrinsic value and should be seen as a whole. QAI believes that all communities should embrace difference and diversity rather than aspiring to an homogenous ideal. QAI avoids language that stereotypes or makes projections based on a particular feature or attribute of a person or that detracts from the worth or status of a person with disability. Appropriate language and discourse is fundamental to protecting the rights and dignity and to elevating the status of people with disability.

Queensland Advocacy Incorporated's constitution mandates that the Board of Management is comprised of a majority of people with disability. Their wisdom and lived experience has formed the foundation and guides the direction of Queensland Advocacy Incorporated.

## Key Recommendations

QAI recommends the use of wording that is 'rights-focused'<sup>1</sup> as opposed to recipient-focussed, particularly in amendments to the purposes, goals or objectives of the National Disability Insurance Scheme Act 2013 (Cth) (NDIS Act).

For example, the wording at 3(1)(ga) could be 'Recognise the right of persons with disabilities to freedom from harm and from experiencing harm arising from poor quality or unsafe supports or services provided under the National Disability Insurance Scheme'.

QAI supports the Australian Law Reform Commission's (ALRC's) recommendation that parliament should amend the objects and principles in the *National Disability Insurance Scheme Act 2013* (Cth) to ensure that they are consistent with the National Decision-Making Principles.<sup>2</sup>

QAI proposes (in accordance with the evidence and widely expressed views on the importance of advocacy) that the Quality and Safeguards Commission and Other Measures Bill 2017 ('the Bill') amends the National Disability Insurance Scheme Act 2013 ('NDIA Act') to include express reference to a person's right to advocacy and right to have advocates present during Quality and Safeguards Commission processes, whether the person is a prospective or actual NDIS participant, and that advocates and advocacy, including systemic advocacy, should be included in the protections for disclosures of violence, abuse and neglect.

QAI supports the ALRC's recommendation<sup>3</sup> that the Commission should have responsibility for promoting access to advocacy and supported decision-making. QAI recommends that ministerial control of the Commission should be qualified at section 181 K so that the Minister's control must be consistent with Vision and Principles of the National Disability Strategy.

The Commission, which is charged with ensuring the protection, promotion and defence of Participants, to be effective, hold the knowledge and experience and to be independent of government, must be made up of people with disability, advocates and or human rights advocates etcetera or persons of that ilk and not bureaucrats or persons related to the service sector or systems of government.

QAI recommends that section 73X includes a provision that sets out the Commissioner's obligation to investigate complaints fairly but vigorously, and that persons with disabilities should be referred as of right to communication and advocacy support.

QAI strongly suggests that in addition to reference to 'early resolution' section 73X (2) (a) includes express reference to timeframes for the resolution of complaints. Queensland Advocacy Incorporated recommends that at 73ZM the Commissioner should have the power to

- issue a 'show cause' notice in relation to why other compliance strategies should not be commenced (such as defunding, de-registration, or interim management).

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<sup>1</sup> 'People with disability are citizens with rights, not objects of charity' - National Disability Strategy 2010-2020. Page 15.

<sup>2</sup> Australian Law Reform Commission. *Equality, Capacity and Disability in Commonwealth Laws* (DP 81) (Proposal 5-1).

<sup>3</sup> Australian Law Reform Commission 2015. *Equality, Capacity and Disability in Commonwealth Laws* (DP 81) at 5.112.

- install an interim external manager or other service provider (in serious cases where management are unsupportive of the investigation or seem to be complicit in the violence, abuse and neglect) to ensure all clients are safe;

QAI strongly suggest that the Bill expressly states that information about ways to complain must be available in accessible formats, including Easy Read format, with simple words, phrases, and pictures.

QAI recommends that the Commissioner engages with complainants throughout complaint processes to ensure that they are aware of their rights and responsibilities and that they are informed about the progress and status of the complaint.<sup>4</sup>

QAI recommends that Community Visitor Programs (such as the Queensland Program) or a similar inspectorate should operate to identify and investigate complaints and should have a role in referring complaints to the Commissioner.

QAI proposes an amendment after Section 4(13) that establishes the principle that participants have a right to and will be referred to advocacy during the making of complaints under the Quality and Safeguards Framework.

QAI recommends that parliament amends section 181D (3) (d) to include the word 'rights' before 'interests and needs'.

QAI strongly urges parliament to amend the NDIS Act section 181E (c) to include the word 'accessible' before 'advice'.

Queensland Advocacy Incorporated recommends that a new paragraph 24(1)(f) be placed section 34.

QAI recommends amend section 4(9) to include a right to accessible format support and correspondence from the NDIA and from the Commission.

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<sup>4</sup> This recommendation is adapted from Recommendation #1 in the report by the Senate Standing Committee on Community Affairs. 10 May 2017. *Complaints mechanism administered under the Health Practitioner Regulation National Law* at <[http://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Community\\_Affairs/ComplaintsMechanism/Report](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/ComplaintsMechanism/Report)>

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## Introduction

For more than forty years, 'nothing about us without us' has been a founding principle of the disability rights movement in Australia, which has given rise to the signing of the Convention of the Rights of Persons with Disabilities and more recently, the creation of the National Disability Insurance Scheme. This principle is as fit for high level policy and legislative settings as it is for ground-level decisions about life essentials like food, shelter and clothing. The lack of reference to this principle (or similar) is a conspicuous omission from the National Disability Insurance Scheme Amendment (Quality and Safeguards Commission and Other Measures) Bill 2017 ('the Bill').

The most important NDIS safeguard is the right and ability of participants to make, express and operationalise their own decisions. Time and again abuse occurs because persons with disabilities have neither the opportunity, support nor the confidence to communicate their experience of it.<sup>5</sup>

When at risk of violence, abuse and neglect, the person with disability is their own first line of defence. The living conditions of many people with disabilities place them at a disadvantage, a fact acknowledged in the Bill's Explanatory Notes.<sup>6</sup>

Many participants and other people with disabilities rely for support on the people who are responsible for violence, abuse or neglect, and they may fear further abuse, punishment, reprisal or withdrawal of support if they complain. In the new, market-based system, some participants will be able to leave, or, in effect, to 'fire' service providers who harm or exploit them, but in practice even those who can voice complaints may be constrained by adverse market conditions, for example, an absence of similar market-competitive services in regional and remote areas, or because they fear that a complaint may jeopardise their living conditions.

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<sup>5</sup> Victorian Centre Against Sexual Assault highlights that 90 per cent of women with an intellectual disability have been sexually abused and 68 per cent have been subjected to this kind of exploitation before the age of 18. Merri Community Health Victims Assistance Program community education. Jo Seymour said not enough women with disabilities were empowered to come forward to report abuse. Laura Armitage, 2015. 'Women with Disabilities encouraged to report sexual abuse and violence' in the *Herald Sun*. 11 November < <http://www.heraldsun.com.au/leader/north/women-with-disabilities-encouraged-to-report-sexual-abuse-and-violence/news-story/6e106aef7deae86eddbf813495bb46d2>>.

<sup>6</sup> Page 41.

Australia is party to the *Convention on the Rights of Persons with Disabilities*, Article 12 of which states that persons with disabilities ‘enjoy legal capacity on an equal basis with others in all aspects of life’. States Parties agree to take appropriate measures to provide access to the support persons with disabilities may require to exercise their legal capacity.

Although the NDIS Act, Rules and Operational Guidelines incorporate supported decision-making to a limited degree, government must review them further to reflect the concept that all participants, with support where needed, should be entitled to make NDIS-related decisions. They should also be amended to provide a mechanism for participants to appoint decision supporters, and where a participant desires or requires fully supported decision-making, the Act should include provision for the appointment of a representative or nominee.

The Terms of Reference of the Australian Law Reform Commission’s 2015 inquiry into Equality, Capacity and Disability in Commonwealth Laws<sup>7</sup> asked the ALRC to consider ‘how maximising individual autonomy and independence *could be modelled* in Commonwealth laws and legal frameworks’. The focus of the Inquiry was on the ‘ability to exercise legal capacity’ and equal recognition before the law of people with disability.

**Recommendation: Amend NDIS Act ‘Objects and Principles’ section 4 (8) to incorporate the National Decision-making Principles**

The ALRC recommended that this could best be achieved by setting up an overall framework of principles and guidelines that could then be used as the template for specific reforms in Commonwealth areas of responsibility included in the Terms of Reference; and at state and territory level, in reviews of guardianship and related regimes. The resulting National Decision-Making Principles are four general principles that reflect the key ideas and values upon which the ALRC’s bases its approach to legal capacity. QAI supports the ALRC’s recommendations in *Equality, Capacity and Disability in Commonwealth Laws*<sup>8</sup> at Proposal 5–1, which states that the ‘objects and principles in the *National Disability Insurance Scheme Act 2013* (Cth) should be amended to ensure consistency with the National Decision-Making Principles’.

Parliament should amend s 4(8) of the NDIS Act and there remove references to people with disability being ‘equal partners in decisions’, and to ‘the full extent of their capacity’. Legislators should replace these phrases with language that reflects the right of persons with disabilities to determine their own interests and their right to appropriate support to exercise their legal capacity. Such amendments would reflect the rights-based shift from substitute decision-making to the a supported decision-making approach; away from ‘best interests’ towards ‘will and preferences’ and the idea that decision-making authority should remain with the participant.

**1. Schedule 1—NDIS Quality and Safeguards Commission**

In clause 1, the Bill states:

1 After paragraph 3(1)(g)

Insert:

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<sup>7</sup> [Equality, Capacity and Disability in Commonwealth Laws](#) (DP 81)

<sup>8</sup> (DP 81)

(ga) protect and prevent people with disability from experiencing harm arising from poor quality or unsafe supports or services provided under the National Disability Insurance Scheme

The first stated object in the *National Disability Insurance Scheme Act 2013* (Cth) is to -

[..] in conjunction with other laws, give effect to Australia's obligations under the Convention on the Rights of Persons with Disabilities done at New York on 13 December 2006 ([2008] ATS 12)

The language and intent of the *Convention on the Rights of Persons with Disabilities* reflects a paradigm shift in international understanding of disability, from a deficit-based medical model to a strengths-based, rights-focused and social model. The social model recognises disability as a product of the interaction between impairment and environment.

For a person who uses a wheelchair, a ramp is accessible but a step is disabling. Like the step, language can be disabling; language, for example, that identifies the person with the impairment. 'He is a spastic' is disabling; 'he has cerebral palsy' is not. The World Down Syndrome Day campaign *Not Special Needs, Just Human Needs* makes a similar point about language that limits people to the impairment.

A rights-based model moves beyond the view that social provision directed to citizens who have impairments is a form of welfare or charitable help. The charitable view may be well intentioned, but it carries an implicit assumption that people with impairments have a dependent and subordinate relationship to the rest of the population.

The *Convention on the Rights of Persons with Disabilities* is a comprehensive and detailed exposition of the basic human rights set out in the *Universal Declaration of Human Rights*, but particular to persons with disabilities. The *Convention on the Rights of Persons with Disabilities* starts with the premise that all people fundamentally are equal and have basic and inalienable rights regardless of social status, race, gender, age and so on.

**Recommendation: QAI recommends the use of 'rights-focused' as opposed to recipient-focussed wording, particularly in the purposes, goals or objectives.**

QAI recommends the use of 'rights-focused'<sup>9</sup> rather than 'recipient-focussed' wording, particularly in the general principles set out in sections 4&5 of the *National Disability Insurance Scheme Act 2013* (Cth). The wording at 3(1)(ga) could be 'Recognise the right of persons with disabilities to freedom from harm and from experiencing harm arising from poor quality or unsafe supports or services provided under the National Disability Insurance Scheme'.

## **2. Division 2 – Registered NDIS providers**

The Explanatory Notes state that the Commission's primary focus will be the regulation of NDIS providers to ensure that participants receive a high standard of service. Typically,

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<sup>9</sup> NB The proposed amendment at section 181E (a) (the Commissioner's core functions) uses rights-focussed wording.

registered service providers may be traditional small-to-medium disability support providers or Allied Health Practitioners in occupational therapy or physiotherapy. Registered service providers may also include a range of people and organisations whose focus is not disability support, yet their support may be critical. A regulatory framework must take into account that the whole is more than the sum of the parts, and services' ability to network and work together will provide pathways to independence.

QAI is concerned particularly to ensure that people with intellectual impairments are properly supported as they move through the various criminal justice systems, including police, courts and corrections, whether in custody or returning to community. The Joint Standing Committee on the National Disability Insurance Scheme is due to report soon on the provision of services under the NDIS for people with psychosocial disabilities related to a mental health condition. Submissions to that Inquiry noted that

- State and Territory Forensic Disability and Disability Justice Support Systems are being dismantled as responsibility and funds are transferred to the NDIS.
- There is limited support for people with disabilities in criminal justice systems.
- The dismantling of state and territory -based support systems is leading to a loss of disability justice pathways, expertise and capacity leading to a lack of sector coordination and coherence.
- The NDIA has not systematically responded to the complex needs of people with cognitive impairment and criminal justice systems.

One of the recommendations from the Inquiry may be a national framework/set of principles around working with people with disability in criminal justice systems, providing guidance and support to providers and agencies working with this group.

Apart from needs that are particular to Aboriginal and Torres Strait Islander people, the broad support needs of people with cognitive impairments in or at risk of the criminal justice system are similar in Australian jurisdictions. The Quality Framework must pay particular attention to:

- **Aboriginal and Torres Strait Islander people:** There are a disproportionate number of Aboriginal and Torres Strait Islander people with cognitive impairments, many in remote communities. Among Queensland Aboriginal and Torres Strait Islander prisoners the proportion with disabilities is astronomical: 73 percent of men and 86 percent of women in Queensland jails have some form of mental impairment.<sup>10</sup>
- **Pathways out of criminal justice.** Until the end of February 2017, Queensland Magistrates had no special powers in relation to defendants with cognitive impairments who were charged with simple offences, even though they comprised, and still do, a substantial minority of defendants. These arrangements drove people with intellectual impairments further into the criminal justice and forensic systems, into

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<sup>10</sup> This is the 12 month prevalence: *ibid.*

jails, debt, homelessness, housing stress and welfare dependency. Now, the *Mental Health Act 2016* (Qld) provides a new legislative structure<sup>11</sup> that allows Magistrates to refer defendants to named support services, including the NDIA.<sup>12</sup>

Now, from March 2017, Magistrates-

- a) will have the power to dismiss complaints (criminal charges) if satisfied on the balance of probabilities that the defendant was of unsound mind or is unfit for trial<sup>13</sup>
- b) may refer defendants who are unfit for trial to a 'appropriate agency', including the National Disability Insurance Scheme<sup>14</sup> or the Transition Agency established under the *National Disability Insurance Scheme Act 2013* (Cwlth) or the department in which the *Disability Services Act* (Qld) is administered,<sup>15</sup> and if 'a' above applies, and the person has or may have a mental illness

Magistrates are not likely to take up the second of these options if they have no confidence in the NDIS' regulatory framework.

- Mental Health Courts which make forensic dispositions in relation to people who are unfit for trial or who are of unsound mind, and Tribunals of review. Each Australian jurisdiction has different arrangements. In Queensland, for example, there is no limiting term, and the Mental Health Court makes orders usually without a determination of guilt beyond a reasonable doubt. In making its review decisions the Mental Health Review Tribunal takes the quality assurance of available services into account.
- Restrictive practices<sup>16</sup> mean something different in every jurisdiction. Disability ministers in each state and territory have now endorsed a National Framework for Restrictive Practices, and each jurisdiction is loosely guided (but not regulated) by the Framework. With appropriate support most restrictive practices can be eliminated.
- While the proposed mechanism regulates restrictive practices in the context of registered service providers there is no mention of regulation in schooling or employment. There is no acknowledgement that people who live with restrictive practices are disempowered with an oppressive regime that curtails communication of last resort. With the increased access to supports and services for children, it is vital that Education Authorities and schools also comply with the National Framework and that reporting and data collection on the uses must occur. Currently across the nation, students with disabilities have been subjected to cruel and inhuman and degrading treatment by untrained and unregulated staff.

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<sup>11</sup> The *Mental Health Act 2016* (Qld).

<sup>12</sup> Referral pursuant to the *Mental Health Act 2016* (Qld) section 174, when the matter has been dismissed because, on the balance of probabilities, the person is not fit for trial.

<sup>13</sup> *Mental Health Act 2016* (Qld) section 172.

<sup>14</sup> Or to Queensland Health

<sup>15</sup> *Mental Health Act 2016* (Qld) section 174.

<sup>16</sup> *Disability Services Act 2006* (Qld).

- The Bill must expressly endorse self-direction of supports and services for people who have the most to gain from this aspect of the NDIS. When all control is lost, particularly for people who live not only with restrictive practices, but also within the confines of a forensic facility, having the same rights to direct how they are supported, by whom and when, will return a measure of respect and control that has systematically stripped from them.
- QAI has grave concerns regarding the notion that people who live with Restrictive Practices may experience further discrimination by constraints regarding where they purchase supports and services. This is particularly important in rural regional and remote locations where limited choices in service provision may consign people to a lifetime of cruel inhuman and degrading treatment.
- In Queensland, the families of people who live with Restrictive Practices in the community have worked with their loved ones in the recruitment, selection and training of person-centred support staff who are consistent in their approaches and support styles, know the person very well, and are engaged in 'right relationships' with the person. This approach has delivered enormous benefits with significant reduction and elimination in the use of these practices. The participant's Plan Nominee or relevant person has monitored and reported on the use of restrictive practices just as registered service providers have done – compliant and with better results.
- The Forensic Disability Service is at Wacol, near Brisbane, for the indefinite detention of people with cognitive impairments, who are sometimes a great distance (up to ~ 2200 kms) from home. No-one has yet transitioned from the Forensic Disability Service, despite parliament's intention that it be a transitional facility.

#### **Division 4 – NDIS Code of Conduct**

The Code of Conduct will be as effective as the Commissioner's ability to enforce it. QAI recommends that section 73V includes a specific provision that sets out the Commissioner's obligation to pursue alleged breaches fairly but vigorously, and that persons with disabilities should be referred as of right to communication and advocacy support.

#### **Division 5 – Complaints management and resolution**

##### **Recommendations**

Queensland Advocacy Incorporated recommends that the Bill expressly states that information about ways to complain must be available in Easy Read format, with simple words and phrases, and pictures.

QAI proposes that in every jurisdiction, Community Visitor Programs, or a similar inspectorate should operate to identify, investigate and resolve complaints, or refer complainants to advocacy. Community Visitors should refer complaints to the Commissioner.

QAI recommends that section 73X includes a specific provision that sets out the Commissioner's obligation to investigate complaints fairly but vigorously, and that

persons with disabilities should be referred as of right to communication and advocacy support.

QAI recommends that in addition to reference to 'early resolution' section 73X (2) (a) includes express reference to timeframes for the resolution of complaints.

Sophisticated complaints systems that are consistent with international best practice and supported by educational material and training may not be enough. People with intellectual impairments can still face enormous barriers in making complaints, particularly about violence, abuse and neglect or service dissatisfaction.

Supplying written information about the right to complain may be useless to a person who cannot read or communicate verbally. People with intellectual or cognitive disability may not have the literacy skills to read documents, or even their 'easy English' accompaniments.

People with disability who experience abuse, particularly in congregate settings will often tell someone who is part of the support service. Their dependency upon paid supports will increase their vulnerability to abuse. Their complaints may be unheeded. Denial or lack of immediate investigation may undermine a person's confidence in their supports, and will increase feelings of fear, abandonment and isolation."<sup>17</sup>

QAI strongly urges that persons with disabilities have an automatic referral to independent advocacy services throughout the complaint process. Unfettered assurance of advocacy support is a recognition that vulnerable people with disability have been disadvantaged in complaints processes to date, and that abuse has continued.

There are assumptions that people with a disability can access many of those mechanisms and therefore advocacy is critical to ensure that people are supported to make their claims particularly as sometimes people don't recognise that they have a complaint to make.

Passive methods of promoting the right to complain and the pathways to enacting that right are largely ineffective for many people with disability. Other barriers to making complaints may include fear of retribution, being labelled a 'troublemaker', or if you are a family member of the service user, that the service may decide to relinquish the service provided to your family member, particularly where the service provider is also the landlord. The NDIA must ensure that service providers divest themselves of property wherever they intend to deliver supports.

There is therefore considerable need to develop and implement systems and strategies that are based on the proactive identification of complaints and dissatisfaction amongst service users who may not be able to directly express such a complaint or articulate their dissatisfaction in the form of a complaint. External visitors to residential disability services (such as the existing community visitors in Queensland) are a crucial part of such a strategy as well as a crucial part of a system of oversight and monitoring of disability services.

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<sup>17</sup> QAI Submission Senate Community Affairs References Committee Inquiry "Violence, abuse and neglect against people with disability in institutional and residential settings, including the gender and age related dimensions, and the particular situation of Aboriginal and Torres Strait Islander people with disability, and culturally and linguistically diverse people with disability" 2015

They are particularly important in the context of residential disability services and institutional living environments where there are people with disability with a high level of dependence. Like other 'closed environments' where access to the outside world is limited, for example due to conditions of detention (such as prisons or immigration detention centres), residential disability services and institutional living environments are similarly isolated. In such cases, however, it is often the level of intellectual or cognitive disability and the segregated nature of the environment from the rest of the community (many people with impaired capacity also do not have family or friends who visit them regularly) that means residents are particularly vulnerable to violence, abuse and neglect.

The use of the term "complaint" when referring to people experiencing abuse is feeble and inappropriate. A complaint about quality of service is reasonable in a market of services. However, for people experiencing abuse, neglect, violence, rape, intimidation and threats, the term "complaint" is hardly adequate and diminishes the serious nature of the criminality that is being perpetuated.

"People with cognitive impairment are not afforded credibility by police and considered to be unreliable witnesses because of difficulties in cross-examination. Many allegations of abuse do not proceed to trial. The lack of support to assist people to progress complaints results in people feeling intimidated and humiliated by the investigative and court processes. The mere ordeal of enduring the repeated articulation of their experiences can produce serious emotional trauma, devastating blows to self-confidence and self-esteem and, at times, cause family rifts if the person is not believed or supported by their family members.

When victims with disabilities did report incidents of abuse to authorities, in 52.9% of cases nothing happened. Alleged perpetrators were arrested in only 9.8% of cases where abuse was reported to authorities.

QAI is concerned that any government departments that serve the wider community and do not have specific experience in responding to support needs of people with disability, will register as providers. Police, Education, Health, Transport, etcetera are generic services and not necessarily specialist disability services, and do not comply with National Standards for Disability Services.

The Coroners Act 2003 (Qld) requires every death in care to be reported to the police or coroner, regardless of the circumstances or cause of death. The Queensland Coroner has powers under Coroners Act 2003 (Qld) section 46 to make systemic recommendations about health and safety or how to prevent similar deaths from occurring in the future.

Complaints handling systems must be –

- Accessible
- Fair
- Customer focussed
- Efficient
- Improve Systems

## Accessibility

The onus should not be on the person to know or recognise what avenues for complaints are available. For any service or system that prides itself on excellence this should be offered at any reasonable expression of dissatisfaction.

If a person is experiencing dissatisfaction with either a service or system this should automatically generate a prompt to the internal complaints system and once this is exhausted or rejected for whatever reason is escalated to the independent mechanism.

It is important to ensure any complaints handling process is easily accessible to both complainants and respondents – i.e. it must be available in a simple-to-use format, in a number of forms, and not overly bureaucratic. For people with disability, this can be particularly challenging to ensure. Flexibility as to form is required – there should be no requirement that a complaint from a person with impaired capacity be in a prescribed form or meet certain requirements to be actioned.

## Accessibility

The onus must be on the service provider to promptly investigate informal complaints as well. This will obviously require the introduction of safeguards to ensure that complaints are reported and actioned appropriately.

An important component in accessibility for people with impaired capacity is ensuring that they have the support – this includes support to feel empowered to make the complaint, support to provide adequate detail to enable the complaint to be investigated, support to respond to any questions regarding the complaint. To this end, it is integral that their support people are proactively involved from the earliest opportunity.

Further, it is important that proactive mechanisms are put in place to ensure that, to the greatest extent possible, potential problems are detected. It is inappropriate to place the full onus of understanding, identifying, communicating and pursuing a complaint on a person with impaired capacity. In many instances, there are indicators of a problem that are apparent to relevant observers. Protocols must be put in place to aid the identification and reporting of any indications of sub-optimal service delivery.

It is important to ensure that the system does not rest on assumptions such as that complainants will have access to and the ability to effectively use the internet, the telephone, etc., both as a means of accessing information relevant to making a complaint and to communicate the complaint.

It is vitally important to consider the power imbalance that can exist between a person with impaired capacity and a service provider. People with impaired capacity are often in a very vulnerable situation and may fear reprisal for making a complaint. It is essential that they feel supported to voice any complaints without concern about retribution or cessation/reduction of the service. It is important that the NDIS vision of having people with disability empowered as consumers within a disability services market translates into empowerment for people with impaired capacity to feel they have options and can therefore

voice dissatisfaction with unsatisfactory service and have autonomy to exercise choice and seek change.

### Fairness

People with impaired capacity experience unfairness regularly (sometimes on a daily basis). Fairness can be improved by ensuring the person has support for decision making, and referrals to an advocacy organisation should be offered where no informal supports are available or effective. However, this can only be managed with a well-resourced, vibrant, independent and person-centred advocacy sector, which is very scant and in some areas non-existent and where funding is uncertain.

The complaints process should clearly defined and communicated, open and accountable to both staff and consumers.

Outcomes of the complaints system must be clearly outlined and communicated to all relevant people. This must be counterbalanced with the need to ensure privacy and confidentiality so that people feel confident making complaints without fear of reprisal.

### Customer focus

Everything in the investigations of a complaint is answerable to the person with disability and or their supporter making the complaint. By this we mean that all the concerns are addressed, that the investigations and processes are timely, and that the person is included in the processes. All processes are transparent and the investigating body is accountable to the person making the complaint but also engages all parties and ensures all communications are clear, open and honest.

Complaints must be treated seriously. This has important implications not only for ensuring the complaint itself is appropriately addressed but also in empowering people with capacity impairment to articulate their concerns in a supportive environment. This is particularly appropriate given that the vision of the NDIS is to support people with disability to be consumers in the service marketplace, rather than passive service recipients. It should follow that this will also have the effect of elevating the importance of service satisfaction for people with impaired capacity.

There is the potential role for the development/use of a tool to assess seriousness of the complaint that will dictate how it is directed and the urgency with which it is prioritised (e.g. 'Seriousness Assessment Matrix' used by Department of Health in Victoria). The use of such a tool must obviously be based on the differing needs and capacity of people with impaired capacity while the use of such a tool is not used to dismiss or exclude complaints that are unusual.

It is important to ensure there is a procedure in place to ensure all complaints are followed-up to ensure the complaint has been properly resolved and has not recurred.

It is important to ensure that people with impaired capacity have all the relevant support they need to understand when conduct or service is suboptimal and should

appropriately give rise to a complaint, when and how a complaint should be made, what they can expect to happen, and to be supported in making the complaint.

The investigations show due diligence, must address the complaint and not merely look at governance or compliance of standards. This Mechanism must be funded as a statutory or Parliamentary body. All recommendations or orders are binding. If for whatever reason the person's complaint is not within the scope of the investigation or is deemed to be not completely relevant there should be redirection to mediation until some satisfaction or compromise is reached.

### Efficiency

We consider that it is important to differentiate between internal and external responses and have clear guidelines stipulating what must happen in each situation, having regard to the seriousness of the complaint and the stage at which it is at.

It is important that there is an emphasis on an expeditious timeframe for dealing with complaints. To ensure complaints are dealt with in an appropriate timeframe, the protocol for addressing complaints must be very specific and detailed about relevant timeframes.

However, it is also important that the specific needs of the complainant are considered, including their need for support including advocacy support in making a complaint and therefore that expediency is not prioritised over meeting the needs of the complainant in a personalised way.

### Systems improvement

The complaint handling system should ultimately be a means of obtaining critical information that can promote positive change in the organisation.

While part of the role of any complaints protocol is addressing grievances, a significant part should also be to educate the service and relevant staff in better practice. Receiving and responding to complaints can help the service and staff to learn and to shape a better practice model.

The complaints system can be integrated into the whole service, such that complaints relevant to systemic issues are used to identify gaps in service quality, develop collaboration in investigating and responding to complaints and sharing information among management teams.

Creating an environment where complaints are readily received and actioned without animosity also encourages the giving of all types of feedback, including positive feedback, and supports staff to feel confident to report any adverse events.

There should be penalties for any retribution against a person making a complaint - after all the complaint should be seen as an opportunity for quality improvement.

However, where any serious complaint of abuse or neglect has been ignored, covered up, and not actioned should incur serious penalties including deregistration. QAI holds grave

concerns in regard to terms such as 'minor breach' when referring to abuse, neglect and or harm, and that any complaint about abuse may instigate an 'outcome letter'. QAI does not agree that any abuse, neglect or harm can be considered MINOR.

### **State-based Compliance**

A federal complaints mechanism overlaps with state-based monitoring and compliance. In Queensland, for example, the *Public Guardian Act 2014* (Qld) regulates the Adult Community Visitor Program – a rights protection and abuse prevention service for adults with intellectual impairment who live in settings deemed as visitable sites. Some of these visitable sites will also be NDIS Registered Service Providers. It is QAI's contention that the NDIS Quality and Safeguards Framework must work to incorporate such monitoring systems, which are more effective because they are 'on-the-ground' rather than at arm's length.

### **Division 8 – Compliance and enforcement**

At 73ZM QAI recommends that Commissioner should have the power to

- issue a 'show cause' notice in relation to why other compliance strategies should not be commenced (such as defunding, de-registration, or interim management).
- install an interim service provider (in serious cases where management are unsupportive of the investigation or seem to be complicit in the violence, abuse and neglect) to ensure all clients are safe; In such instances there must be consultations with the person or persons to determine if they choose to stay in the same situation, or prefer to move, or change service provider.
- Where a service provider is about to be or has been de-registered there must be access to emergency supports, that can be flexible, are creditable and have a proven history of quality assistance to individuals who have experienced trauma and or abuse.
- QAI has maintained for several years that services that have been the subject of serious complaints of abuse should have been investigated and the issues resolved to the satisfaction of the complainants before any registration was approved, for without such determination, will continue to allow abuser to occur without recourse for the victims.

### **Division 9 – NDIS Provider Register**

Under the current arrangements, a person or entity may apply to be a registered provider of supports to manage the funding for supports under plans and/or provide supports (ss.9 and 69(1) of the NDIS Act). The registration process is based on the NDIA being satisfied that a provider has undergone relevant quality and assurance checks through existing State and Territory safeguarding systems.

QAI perceives this to be a conflict of interest. To offer real choice and control, providers of support should not manage the funding. Further, many advocacy organisations including QAI are aware of some service providers that have been 'compliant' with state quality assurance

measures yet have perpetrated abuse without recrimination or recourse for the person. Therefore, the quality and safeguards systems should not be covered by the State or Territory system as it potentially perpetuates embedded systemic issues for individuals and families. Further, it is inconsistent with the National Framework for Reducing and Eliminating the Use of Restrictive Practices in the Disability Service Sector and there must be a National Standard for Positive Behaviour Support Plans which have to date been notoriously of a poor quality.

Every state and territory must have a positive practice framework for behaviour support practitioners as they do in Victoria.

- There must be practical measures for oversight of plans to ensure that the PBSP is properly implemented. Are PBSP's developed for people who are restricted and detained in forensic facilities?
- There must be oversight and quality measurement of the Plans.
- Oversight to ensure that the Individual Plan that is developed for the person is relevant to habilitation and rehabilitation of the person and redresses the issues that were the catalyst for the person's detention.
- oversight is there to ensure that the Individual Plan and/or PBSP is appropriately implemented

QAI has raised concerns about a Service Provider that has perpetuated several instances of abuse of the use of Restrictive Practices against different clients without authorisation and the state system of complaints management failed to address these concerns. QAI has in successive submissions suggested that any Service Provider that has had such allegations should have been thoroughly investigated and all complaints resolved to the satisfaction of the complainants before registration was approved.

Under s.35(2) of the NDIS Act, the NDIS rules may provide for the manner in which supports are to be funded or provided. This provision has been relied upon to stipulate supports for which providers must be registered in order to provide the support for example, the National Disability Insurance Scheme (Specialist Disability Accommodation) Rules.

QAI is deeply concerned that this could potentially lock people into situations where landlord and service provider are one and the same causing onerous control over the person's life.

Under clause R10, a person may be registered by the Commissioner where they have met the registration criteria, including that they have been assessed by an approved quality auditor (see approved quality auditor) as meeting the applicable standards and other requirements set by the NDIS Practice Standards (see NDIS Practice Standards), as well as the applicant and key personnel meeting a suitability test.

QAI is gravely concerned and appalled that people with disability (and who live with Restrictive Practices) who have until now been self-directing under Queensland's Your Life Your Choice are now being bullied into accepting the traditional service provider response, losing the right to choice and control that is afforded other Participants.

If Providers delivering positive behaviour supports and implementing positive behaviour support plans are restricted to traditional service providers, the Bill will consign many people with disability to a lifetime of cruel, inhuman and degrading treatment especially if they live in a rural or remote area where there may be only the one service.

**QAI asks why is the Quality and Safeguards Bill revoking these rights, undermining this progress and returning people to risk of abuse, and loss of control and choice? QAI has campaigned for 3 years that people who have more power and control in their lives are less forced to exhibit behaviours of concern.**

## **Part 2 Chapter 6A – NDIS Quality and Safeguards Commission**

QAI holds some reservations about sharing information about individuals and their supporters, with regard to disagreement, and how much will unfairly prejudice decisions?

### **Part 1—Commission establishment and functions**

Consistent with the “nothing about us without us” the Commission must employ people with disability and or their family members, advocates and people with experience in redressing complaints, harm and abuse. Without this experience any Commission will not be viewed with adequate confidence and trust given the historical, impervious responses to complaints.

### **Part 2— The NDIS Quality and Safeguards Commissioner**

#### **181D Commissioner’s functions and powers**

Consistent with our recommendation for the use of ‘rights-focused’ as opposed to recipient-focussed wording in the National Disability Insurance Scheme Act 2013 (Cth) (NDIS Act), Queensland Advocacy Incorporated urges parliament to amend section 181D (3) (d) to include the word ‘rights’ before ‘interests and needs’ so that it reads:

(d) have regard to the rights, interests and needs of persons receiving, or eligible to receive, supports or services under the National Disability Insurance Scheme.

#### **181E Commissioner’s core functions**

Queensland Advocacy Incorporated is aware of NDIA correspondence to people with intellectual impairments that does not conform to basic principles of accessible communication. One of the Commissioner’s ‘core functions’ is “to promote the provision of advice, information, education and training to NDIS providers and people with disability;”.

Queensland Advocacy Incorporated recommends that the 181E (c) be amended to include the word ‘accessible’ before ‘advice’.

#### **181H The Commissioner’s behaviour support function**

The *Disability Services Act 2006* (Qld) includes provisions for authorising and monitoring the use of Restrictive Practices. In our view, Queensland’s system is highly imperfect, but it is seen to be one of Australia’s most effective systems because the uses of Restrictive Practices (RP) are reported, the data collected. QAI asserts that this does not go far enough, in that the Centre of Excellence for Clinical Innovation and Behaviour Support (C of E) should

actively analyse this data with powers to intervene during the period for the authority, if the service provider has either applied to increase the use, or applied for more or additional restrictions, and or has not managed to reduce the uses of RP. QAI maintains that the Centre for Excellence should require that service providers who struggle to reduce the use of RP must either undergo significant training with their expertise at the C of E, and or reconsider the suitability of that service provider for that Participant.

However, in some other Australian jurisdictions Restrictive Practices are neither defined, authorised or monitored, and there is no reviewing body that determines whether the practices applied are the least restrictive alternative applied for the shortest possible time, or whether support plans include a plan for the elimination of restrictions.

The Disability Reform Council was responsible for the National Framework for Reducing and Eliminating the Use of Restrictive Practices in the Disability Service Sector. However, that is a set of guiding principles: it does not provide detailed scrutiny or make provision for an independent administrative tribunal to monitor their use.

The Bill sets out the role of the Commission in providing national oversight and policy settings in relation to promoting strategies to reduce challenging behaviours, and monitoring the use of restrictive practices within the NDIS.

Under the Commission a restrictive practice will be used only as a last resort. It must form part of a behaviour support plan which includes positive behaviour support strategies and which has been developed by a registered behaviour support practitioner. Restrictive practices must also be authorised by the state or territory in which the participant resides.

This appears to be an oxymoron. How can the Commission which investigates complaints and using the National Framework (for Restrictive Practices) be coherent with the divergent state and territory authorisations?

Queensland Advocacy Inc. urges that the Commission takes a leadership role and ensures that the National Framework for Restrictive Practices is the benchmark immediately, and that other states and territories do not follow the position that has evolved in this state. The legislation here in Queensland has failed to protect the rights and lives of vulnerable people with disability, becoming an enabler for service providers while sanctioning abuse without relevant authorities.

Recommendation 17 of the Report following the Senate Inquiry into violence, abuse and neglect of people with disability in institutional and residential settings included the recommendations that:

The NDIS Quality and Safeguarding Framework must ensure a zero-tolerance approach to restrictive practice, and be tied to the National Framework for Reducing and Eliminating the Use of Restrictive Practices in the Disability Service Sector; and amendment of the Quality and Safeguarding Bill to include advocacy as a key component to reduce and address incidents of violence, abuse and neglect.

- While the proposed mechanism regulates restrictive practices in the context of registered service providers there is no mention of regulation in schooling or employment. Currently, across Australia, students with disabilities are subjected to unauthorised, unmonitored, and unfettered uses of restrictive practices in schools and by untrained staff. There appears to be no independent oversight, data collection or reporting.
- With the uptake in government funded service delivery to children, there is a dire need to ensure that children are protected in their homes, and in schools from the use of Restrictive Practices.
- QAI asserts that if individuals who live with Restrictive Practices are not afforded the same rights as other participants to self-direct and self-employ their staff, the abuse of the use of Restrictive Practices will continue. Further, new participant entries to the Scheme will inevitably side-step the registered service providers, and therein lay the problem that some nominees will use Restrictive Practices without the benefit of a Positive Behaviour Support Plan, the use of these practices will go unmonitored and unreported, and the exclusion from self-direction will drive these abuses underground.

### **The Commission**

The Commission, which is charged with ensuring the protection, promotion and defence of Participants, to be effective, hold the knowledge and experience and to be independent of government, must be made up of people with disability, advocates and or human rights advocates etcetera or persons of that ilk and not bureaucrats or persons related to the service sector or systems of government.

The Bill establishes the Commission in the *National Disability Insurance Scheme Act 2013* (the act). The existing objects and principles of the act will underpin and inform the commission's regulatory activities. An additional object has been included to provide the specific focus required of this Commission—'to protect and prevent people with disability from experiencing harm arising from poor or unsafe supports or services under the NDIS'.

The Commonwealth minister's power over the commission may compromise its ability to act independently. The proposed model raises the potential for perception of a conflict of interest, particularly as it relates to the handling of complaints.

In support of the Commission's registration functions, the Bill provides the power to mandate types of supports considered higher risk which can only be delivered by a registered NDIS provider.

The registration system requires providers delivering higher risk supports to obtain third-party quality certification against the practice standards and providers delivering lower-risk supports to undergo a 'lighter touch' verification process.

QAI as mentioned previously, is concerned that this approach will restrict people with disability who live with Restrictive Practices, who have to date been self-employing their supports and services will be denied this opportunity under the NDIS and return them to the

confines of traditional service providers. This will most certainly result in a rise of abuse, and increase in the use of these practices, and eradicate the advances that have been made.

### **181K Minister may give directions to the Commissioner**

Australia frequently utilises statutory authorities as an organisational structure for managing regulations that are sensitive and require an emphasis on procedural fairness without political consideration. The proposed section 181K would allow the Minister to give directions to the Commissioner about the performance of his or her functions and powers. While the Minister could not direct the Commissioner how she or he deals with a particular complaint, the minister could impose directions that unduly could constrain the commission.

The Commission is more than a non-departmental service delivery agency, and the Commissioner is more than an executive manager of government business who must implement government policies and programs equitably. The Commissioner's role is to provide objective oversight of the non-government organisations that are tasked by persons with disabilities with the delivery of their support services.

The Commissioner has must have separation from government and a degree of operating independence from ministers and departments in order to achieve these purposes. How can the Commissioner protect persons with disabilities from abuse neglect, violence and other forms of poor service delivery if the Commissioner is not protected from Ministerial interference?

How can the Commissioner fulfil their function to at Core Function (g) provide advice or recommendations to the Agency or the Board in relation to the performance of the Agency's functions if s/he is subject to Ministerial direction?

Queensland Advocacy Incorporated recommends that the Minister's powers to direct the Commissioner be limited only to providing guidance that is consistent with the National Disability Strategy.

### **Schedule 2—National Disability Insurance Scheme Review**

Queensland Advocacy Incorporated recommends an amendment after Section 4(13) that establishes the principle that participants have a right to and will be referred to advocacy during the making of complaints under the Quality and Safeguards Framework.

At Clause 16 the Bill proposes the insertion of a new paragraph 24(1)(f) and the Explanatory Memorandum states that this is to be inserted due to :

feedback that people, especially people with chronic health conditions, were found to meet the disability requirements in section 24 of the Act, but they were not eligible to receive reasonable and necessary supports in their NDIS plans as a result of the requirement at paragraph 34(1)(f) of the Act (that the supports were most appropriately funded or provided through another universal service system). The result was that people could become participants, but would not be eligible to receive supports, and confusion resulted in relation to supports provided or funded through mainstream service systems.

The amendment may cause further unintended confusion if placed with the disability test. It would be placed more appropriately at section 34 (reasonable and necessary supports through the NDIS) than at section 24 (determination of whether a person has a disability).

Queensland Advocacy Incorporated recommends that a new paragraph 24(1)(f) be placed section 34.

Section 4 (9) of the *National Disability Insurance Scheme Act 2013* (Cth) should include an additional clause that provides express reference to the right of persons with disabilities to accessible information and communication from the NDIA. Queensland Advocacy Incorporated is funded to provide appeals support to participants and prospective participants, some of whom have intellectual disabilities. Correspondence from the NDIA makes no concession to persons with intellectual impairment and effectively is unintelligible.

Recommendation: Amend section 4(9) to include a right to accessible format support and correspondence from the NDIA and from the Commission.

People from Cultural and Linguistically Diverse backgrounds and from Aboriginal and Torres Strait Islander communities face language and cultural barriers daily, and should not be subjected to the same discrimination when negotiating the NDIS. It is incongruent for NDIA Planners to direct people to speak with Support Coordinators without access to interpreter services. Further, while we acknowledge that it may be difficult to employ NDIA staff from every possible cultural background to suit every need, there is a distinct lack of concerted effort in safeguards for people to implement Plans if they are not also enabled to communicate effectively with Support Coordinators, or Service Providers by the provision of interpreter services.