

Submission on *Shaping our future: Discussions on disability rights*

The Disability Discrimination Commissioner, Alastair McEwin, is conducting a national consultation to help progress and guide development of his priorities and seek input from the disability community on how he can most effectively work to advance the rights of people with disability.

Community consultations will be held in each capital city and some regional centres between October 2016 and March 2017. In addition to these consultations, written submissions are also being sought on the three consultation questions in relation to the Commissioner's five proposed priority areas:

- Employment
- Education
- Housing
- The criminal justice system
- Implementation of the National Disability Insurance Scheme (NDIS)

Any individual or organisation can make a submission.

Please send your completed submission form to:

Email: disability@humanrights.gov.au

Post: Disability Discrimination Commissioner
Australian Human Rights Commission
GPO Box 5218
Sydney NSW 2001

At this stage there is no definite closing date for submissions, however it is likely to be in March at the conclusion of the community consultations.

To make your submission in another way contact disability@humanrights.gov.au or call (02) 9284 9854

How will my submission be used?

Information collected through submissions will be used for the purposes of progressing and guiding development of the priorities of the Disability Discrimination Commissioner and may be drawn upon, quoted or referred to in report(s) prepared by the Australian Human Rights Commission.

We will ask for your name and email address in case we need to contact you about your submission. We will not publish this information or provide it to anyone.

With your permission some submissions may be published on this website. If you wish to have your submission published on the website, please indicate this on the form below.

Confidential submissions will not be published. Please be aware that whilst every endeavour will be made to ensure confidentiality, there is a possibility that submissions marked confidential might be released, in whole or in part, in accordance with the Freedom of Information Act 1992 (Cth).

The Commission's submission policy provides further information on the use, publication and access to submissions. The submission policy is located at: www.humanrights.gov.au/submission-policy.

Please note that all questions are optional

Part A – Demographic Information

Name of person making submission: Michelle O’Flynn

Submission made on behalf of (if relevant):

Organisation (if relevant): Queensland Advocacy Incorporated (QAI)

Do you want your name to be kept confidential? No

Do you want your submission to be kept confidential? No

Email address: michelle@qai.org.au **Phone:** (07) 3844 4200

Postal address: 2nd Floor, South Central, 43 Peel Street, South Brisbane, Qld 4101

Please provide us with at least one method of contacting you.

Please tell us who you are (select all that apply)

- Australian with disability
- Carer/family member of Australian with disability
- Organisation
- Academic/social policy practitioner
- Other

Please describe:

Gender

- Female
- Male
- X (Indeterminate/Intersex/Unspecified)

Are you of Aboriginal or Torres Strait Islander descent?

- Aboriginal
- Torres Strait Islander
- Both
- No

Are you from a culturally and linguistically diverse background?

- Yes
- No

Part B – Consultation Questions

With reference to the Commissioner's five proposed priority areas:

- Employment
- Education
- Housing
- The criminal justice system
- Implementation of the National Disability Insurance Scheme (NDIS)

What do you think needs to change to see the rights of people with disability better protected in these proposed areas?

Employment:

Queensland Advocacy Incorporated (QAI) considers that the key priority in the employment space is legislative reform and cultural change which:

- challenges what is perceived as 'normal' in the workplace and properly embraces the genuine benefits of workplace diversity;
- increases the scope of roles in which a person with disability can be meaningfully and valuably engaged;
- abolishes demeaning and discriminatory practices, without exception, including Australian Disability Enterprises (sheltered workshops) and the BSWAT wage assessment tool (or any means of paying a person which is not at least equivalent to the minimum adult wage);
- recognises and addresses the need for and importance of support and flexibility for all employees at different stages of their working lives;
- broadens the scope of volunteering roles offered to people with disability, and recognises volunteer work as a training ground that can be easily bridged to paid employment;
- restructuring and reframing the job placement system, so that it responds to the needs of people with disability in an authentic way and achieves sustainable results, including for people with more complex needs.

In this increasingly globalised era where work across many industries is now being done remotely, using ever more developed technology, many workplaces continue to cling to the model of the 'unencumbered' or 'ideal' worker in recruiting and promoting staff. We now know that we can no longer expect many people to be able to work in a full-time, 9 – 5 capacity, without the need for any modifications to the time or demands of their role. This is the case for people with disability, people with mental health conditions which may be episodic in nature, people with caring responsibilities, whether for a person with disability, an elder family member or a child, and people with substantial commitments to a sporting or cultural endeavour.

There are few jobs that actually require a person to work the standard 9 – 5 hours, yet we continue to cling to this model, despite that this has the effect of

disadvantaging a large subset of the current and potential pool of employees. By dismantling these mindsets and challenging the stereotypes about what commitment to a job and good performance as an employee really entails, we can significantly increase the number of jobs which may be appropriate for people with disability. This will benefit not only people with disability, but also our economy, by reducing the number of people reliant on welfare and increasing the proportion of the population contributing to the economy.

At present, there is very little creativity as regards to employing people with intellectual impairment in open employment. And yet we know of many people with disability who are gainfully employed in open employment, some with supports such as a support worker or an assistance dog. Often the stumbling block can be the initial period when a prospective employer becomes aware that the person will need ongoing support in the workplace, and this stumbling block often bars people with disability from gaining volunteer positions, despite their strong desire to contribute.

Finally, we note that a robust Human Rights Act which aligns with our commitments under the Convention on the Rights of Persons with Disabilities would help to protect and defend the basic human rights of all people with disability, in the workplace and elsewhere.

Education

In the educational context, QAI submits that the key target areas should be:

- Facilitating properly inclusive education for all students at pre-school, primary, secondary, and tertiary schooling levels;
- Ceasing to condone discriminatory and abusive practices perpetrated on students with disability, including the application of Restrictive Practices;
- Ensuring flexible schooling options are easier to access;
- Funding proper training for teachers to respond to diversity within the classroom;
- Ensuring all students have access to the right support at the right time – support chosen by them, which helps them to overcome any barriers they may face because of their disability.

Without much needed change in the approach taken by our educational systems to learning outcomes for students with disabilities, the pathway to employment is extremely difficult. This is particularly felt by students with intellectual impairment, who are all too often are exempted from assessments and face lowered expectations of and for them. Far too many such students leave school with little or no literacy or numeracy, and are often deflected to TAFE courses for SWD that people may repeatedly undertake.

Inclusive education is the foundation upon which later opportunities are built. Its importance extends well beyond the confines of the education system. Education is an important human right that has significant benefits for all aspects of a person's later life. All students, not only students with disability, benefit from an inclusive and diverse schooling environment, which reflects life. A properly inclusive educational system must encompass not only educational, but also social, cultural and economic considerations.

We note that the United Nations, in its recent Draft General Comment on Inclusive Education,¹ emphasised the need for member states to focus on transforming educational systems, rather than trying to force persons with disability to assimilate, as well as the need to focus on ability, rather than disability. We endorse this approach.

There is a pressing need for Australian educators to receive both theoretical and practical edification in disability. We propose transforming current special education units into resource centres for this purpose.

In Australia, there have recently been horrific instances of the application of unspecified, unsanctioned and illegal use of Restrictive Practices to students in educational institutions. For example, recent allegations of physical and emotional abuse and deprivation of liberty of a child with disability include the caging of a 10 year old boy with autism in a Canberra classroom,² locking a child with autism in a dark cupboard at a Newcastle school,³ tying a child with special needs to a chair with a seat belt,⁴ and constraining an autistic boy in a cell-like room.⁵ A key priority area for the Commission to focus on is calling for explicit recognition that Restrictive Practices constitute cruel, inhuman and degrading treatment and should be prohibited, including in the educational system.

Lack of funding, which was identified as a key issue requiring redress in the 2013 Inclusion Report Card,⁶ is an important issue to address – it is critical to opportunities, facilities, training and support levels. We note that a lack of resources can be indicative of a lack of commitment from government treasury and the relevant

¹ Draft General Comment no. 4, Article 24 - The Right to Inclusive Education.

² Rachel Browne, 'Children with autism caged and abused at school', *The Sydney Morning Herald* (online), 2 April 2015 <<http://www.smh.com.au/nsw/children-with-autism-caged-and-abused-at-school-20150331-1mbt48.html>.

³ <http://mobile.abc.net.au/news/2015-12-16/police-investigate-schools-treatment-of-autistic-child/7032038?section=nsw>.

⁴ <http://www.scribd.com/doc/287809156/Parents-Claim-Special-Needs-Student-Tied-to-Chair-With-Seat-Bel>.

⁵ <http://www.scribd.com/doc/287338662/School-Puts-Autistic-Boy-in-Cell-Like-Room-QLD>.

⁶ Jackson, Robert and Wills, Darrell. *The 2013 inclusion report card: From failure to mediocrity*.

departments and, in a resource-rich country such as Australia, should not be accepted as appropriate justification.⁷

We again note that enactment of a Human Rights Act is an important priority that would help to protect the human rights of people with disability in the educational realm.

Housing

In the area of housing, QAI submits that the following practices need to change to see the rights of people with disability better protected:

- We must cease forced co-tenancies to share care and services;
- We must address the current levels of discrimination within the rental market, and the lack of appropriate disability accommodation within the rental market.
- We must allow service provision to be more flexibly assessed;
- More affordable housing should be made available to people with disabilities, across a wider range of geographical areas so that people can have more options to stay close to family and friendship networks and in areas where there are well developed public transport systems, etc. This will aid community integration and assist people with disability to engage in the workforce.
- Most housing Departments say that they have a problem with having sufficient stock to meet demand. QAI proposes that a solution to this is that housing departments could subsidise people who are living in private rental, to the amount which they would normally pay if they were in social housing. This would be a good solution for those people who can't get into public housing or social housing and sometimes have moved to private rental because, even though they can't afford it, they can actually have their access needs met in this way. There is a range of needs that must be addressed through accessible housing – whilst for some people it may be physical access, for others it can be the location, the type of property, or the proximity either to/from neighbours.
- Many tertiary homeless people are living in boarding houses and hostels. QAI holds concerns that, while the NDIS may enable them so that they can leave this temporary accommodation, they may face difficulties having somewhere appropriate to go to given the lack of appropriate accessible accommodation.

⁷ For discussion of the Australian situation, see: <https://theconversation.com/australia-lags-behind-the-evidence-on-special-schools-41343>; and <http://www.theage.com.au/victoria/education-executives-get-bonuses-as-school-performance-declines-20151113-gkywj.html>.

The criminal justice system

QAI has undertaken a significant body of work exploring the interface between disability and the criminal justice system.⁸ The over-representation of people with disability within the criminal justice system is well known. It is also now recognised that a holistic response must be taken to addressing this over-representation, acknowledging and providing redress from the multiple disadvantages many people with disability experience from birth. There is a pressing need to address issues of multiple disadvantage – often people come into contact with the criminal justice system because they are homeless and are therefore more frequently within public spaces where particular behaviours come to the attention of officers of the justice system.

Areas of particular importance are:

- Forensic Orders (Disability) – in Queensland, these orders can run indefinitely, with periodic reviews but no fixed end-date. This is inappropriate and a breach of human rights which requires redress.
- Within prisons, corrective service centres and detention centres, people with intellectual disability don't get the services they need.
- Specialised programs that recognise and cater for the particular vulnerabilities of people with disability and mental illness – such as the Mental Health Court, need to be appropriately funded to expand in scope.
- We need to provide appropriate education to people with intellectual and cognitive impairment, particularly sex education, to ensure that they do not end up in justice system due to a lack of appropriate education on social norms.
- In Queensland, people with an intellectual or cognitive impairment who are detained in the forensic system have individualised plans that lack quality. They are inferior to positive behaviour support plans and there is no monitoring of their effectiveness. As such, there is a lack of accountability about whether or not they are delivered – those people who have limited community treatment (or in disability terms "community access") may have this entitlement recorded in their plan but fail to receive it due to the lack of access to ordinary service providers to deliver that community access. Further, these people will not be eligible for NDIS supports, despite that they have the most to gain from having proper services to assist them with their limited community treatment. Life skills must be learned in the community, not within the confines of the Forensic Disability Service Unit (a facility that has been

⁸ We refer you to our recent publication *dis-Abled Justice: Reforms to Justice for Persons with Disability in Queensland* (QAI, 2015), which builds upon *Dis-Abled Justice: Access to Justice for Persons with Disability in Queensland* (QAI, 2007).

deemed to be unfit for human habitation by the previous Director – Forensic Disability).

Implementation of the National Disability Insurance Scheme (NDIS)

Within the new paradigm of the NDIS, QAI submits that key challenges will be:

- Recognising and acknowledged that the NDIS is not a panacea and that the need for advocacy for people with disability remains a vital need;
- Acknowledging the gaps that exist, both in terms of the services not funded for people with an individual package, and also for those who are not eligible for an individual NDIS package.
- Ensuring the continued vitality of a robust and diverse market of advocacy and support organisations, to ensure people with disability are given the promised choice and control.
- Ensuring that the NDIS, as a national insurance scheme, achieves national consistency.
- Holding the Federal Government accountable to the fact that the NDIS embraces a rights-based approach to support people with disability, and does not attempt to mould it into a welfare model, funding for which will become a political battle in every budget cycle.

With the significant changes that the NDIS brings, it is vital that there is recognition that the NDIS is not a 'cure all' for people with disability. Additional supports and services are still needed, both for those with an NDIS package and those without. Advocacy remains as critical as ever within this new framework, and it is vital that attention be given to ensuring that there is a strong funding model to support advocacy independent to the NDIS.

We are aware of concerns that there may become a class divide between those with and without an individual NDIS package. We submit that safeguards must be put in place to protect against this. This is particularly so given that many allowances and services will be consumed within the NDIS so those not eligible for an individual package that may have or may currently receive these allowances or services (such as the mobility allowance) may be disadvantaged.

QAI holds concerns about the potential difficulties that the NDIS may create for small, not-for-profit organisations within the competitive NDIS market environment. We note the importance of the provision of funding for a diversity of small, medium and larger organisations for the creation and protection of choice and control for consumers. We submit that specific safeguards must be put in place to ensure that smaller organisations are not squeezed out of the market.

What do you think is already being done well in these areas that could be built upon to achieve greater systemic change?

Employment:

- Positive advertising campaigns have been shown to be effective in influencing cultural attitudes and dismantling stereotypes. There is the scope to build upon this going forwards.
- The anti-discrimination legislation has played a role in challenging and dismantling stereotyping and discrimination on the basis of disability. Supplementing existing anti-discrimination legislation with a robust Human Rights Act would bring about greater change.
- There has been a gradual realisation over the past two decades of the need to implement flexible arrangements within workplaces to respond to the needs of, primarily, mothers of young children. A similar approach needs to be taken with respect to the needs of other groups of workers who may be unable to fulfil standard, full-time working roles without modification, such as some people with disability.

Education

- Many educational institutions now take an individualised approach in responding to and planning for the needs of students with disability, which includes consultations with the parent and child. This should become uniform practice.
- There is now recognition of the value of inclusive education in Australia and many educational institutions now talk the talk, even if this does not authentically translate into their actions towards students with disability.

Housing

- There has been a move away from institutional care in Queensland. Whilst we caution that this has been replaced by forced co-tenancy situations, the negative attributes of institutional accommodation for people with disabilities is at least recognised. We now need to deepen and broaden the understanding of what institutionalisation actually looks like, so it is recognised where it occurs within the community.
- The move to liveable housing through the NDIS is a step in the right direction, as it offers people greater choice and control. Yet despite this rhetoric, there are many instances where funding remains directed to shared-care, institutional living situations. This needs to change.

The criminal justice system

- The Mental Health Court is an excellent initiative. It is currently funded to only sit for 12 weeks per year – lengthening the sitting time (and therefore the volume of cases) the Mental Health Court is able to hear and determine would be beneficial.
- It is now recognised that the formal and alien environment of a courtroom can be very challenging for people with disability. There has been a move towards the use of Plain English language in court rooms, and also the establishment of specialist tribunals. There is scope to make court rooms, and court procedures, significantly more user friendly for all individuals, particularly people with disability.
- We note that some generalist tribunals (such as QCAT) can struggle to appropriately adjudicate highly specialised matters, given the breadth and variety of their jurisdiction. More specialised tribunals (such as the now-defunct Anti-Discrimination Tribunal of Queensland) can be beneficial, as the tribunal members are educated and experienced in that specific area.
- The Transition to Success (T2S) program that has recently been trialled through the Townsville Youth Justice Centre, which provides alternative education, training and skills to young people involved, or at risk of becoming involved, with the youth justice system, has achieved promising results. The T2S program, which the Queensland Government describes as ‘a collective approach to address youth offending with government, non-government, business and local community organisations working together to provide opportunities for young people to engage in training and skills’ appears to be a good model to build upon and extend.

Implementation of the National Disability Insurance Scheme (NDIS)

- The development of the National Disability Strategy and its implementation plans is a step in the right direction, as it brings many of the international human rights obligations Australia has agreed to but, as yet, failed to implement in Australian law to the forefront of policy making. Yet QAI is concerned because we are now past the half-way point in the life of the NDS (2010 – 2020) and insufficient progress has been made. We propose that a renewed focus on translating the NDS into reality across the six thematic target areas as an urgent focus, within the new framework created by the NDIS.
- The vision of the NDIS of handing choice and control to people with disability is laudable. It is important that adequate and appropriate supports are in place to support this.
- The NDIS has raised awareness of disability and its relevance for all Australians, and this is a positive development. The Commission can build

upon this in drawing attention to the abilities of people with disability across a range of areas, including in tertiary education and within workplaces in an increasingly broad range of employment roles.

What would you like to see the Disability Discrimination Commissioner do to most effectively advance the rights of people with disability?

Employment:

- Launch a publicity campaign designed to combat damaging stereotypes and assumptions about intellectual disability and mental illness and raise awareness of their abilities and contribution to the workplace.
- Write to all government and large organisations asking them to impose mandatory quotas for the employment of people with disability and to implement more flexible working hours and arrangements for a set percentage of workers.
- Be a strong, independent voice challenging the continuation of ADEs and the use of the BSWAT. The Australian Human Rights Commission should not approve any further exemptions which permit use of the BSWAT. The Commission should allow all claims of disability discrimination where they pertain to the payment of less than at least the minimum wage.
- Advocate for people with disability to be able to access a broader range of employment options.

Education

- Transform special education units into resource centres for training teachers in diversity.
- Develop an action plan and write to all Australian universities to make tertiary education more accessible and inclusive.
- Focus on the elimination of the use of Restrictive Practices in schools.

Housing

- With the announcement of the South-East Queensland regional plan, it is an opportunity to ensure that all developments are accessible to give people with disability greater choice over where and with whom they live in the future. The Commission should make submissions to all relevant consultations to place disability accessibility on the agenda and seek to have state regulations and standards for new buildings and retro-fits should mandatorily address the needs of people with disability.
- The issue of forced co-tenancies should be a priority issue for the Commission to address.

The criminal justice system

- The Commissioner should call for reform of the forensic system, including the imposition of mandated time limits, not only for review of Forensic Orders but for the lifting of orders.
- The provision of appropriate education for all those working within the justice system on intellectual and cognitive impairment, mental illness and the relevance of support, etc, in building capacity is important. This is more appropriate than labelling people and only providing support to those who are identified or self-identify. All people who come into contact with the criminal justice system require support and this should be explicitly acknowledged and addressed.
- There is a need for clarity regarding the legal rights of informal support people.
- There should be additional disability liaison officers at recognised areas of need, including at all train stations.

Implementation of the National Disability Insurance Scheme (NDIS)

- It is important for the Commission to consider the interface between NDIS and other systems, such as education and aged care.
- The Commission could acknowledge the limits of the NDIS in addressing all needs of all people with disability.
- The Commission should support robust and independent advocacy as vital to the protection and assertion of the rights of all people with disability.