

Final Recommendations

to The Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability

December 2022

About Queensland Advocacy for Inclusion

Queensland Advocacy for Inclusion (QAI) (formerly Queensland Advocacy Incorporated) is an independent, community-based advocacy organisation and community legal service that provides individual and systems advocacy for people with disability. Our purpose is to advocate for the protection and advancement of the fundamental needs, rights and lives of people with disability in Queensland. QAI's Management Committee is comprised of a majority of persons with disability, whose wisdom and lived experience is our foundation and guide.

QAI has been engaged in systems advocacy for over thirty years, advocating for change through campaigns directed at attitudinal, law and policy reform. QAI has also supported the development of a range of advocacy initiatives in this state. For over a decade, QAI has provided highly in-demand individual advocacy services. These services are currently provided through our four advocacy practices: the Human Rights Advocacy Practice (which provides legal advocacy in the areas of guardianship and administration, disability discrimination and human rights law and non-legal advocacy support with the Disability Royal Commission and the justice interface, as well as Indigenous Advocacy); the Mental Health Advocacy Practice (which supports people receiving involuntary treatment for mental illness); the NDIS Advocacy Practice (which provides support for people challenging decisions of the National Disability Insurance Agency and decision support to access the NDIS); and the Disability Advocacy Practice (which operates the Pathways information and referral line, and provides non-legal advocacy support with Education and other systems that impact young people with disability).

From 1 January 2022, we have been funded by the Queensland Government to establish and co-ordinate the Queensland Independent Disability Advocacy Network (QIDAN), which includes operating the Disability Advocacy Pathways Hotline, a centralized phone support providing information and referral for all people with disability in Queensland. We have also been funded to provide advocacy for young people with disability as part of the QIDAN network, which we provide in addition to our non-legal education advocacy for Queensland students with disability. Our individual advocacy experience informs our understanding and prioritisation of systemic advocacy issues.

The objects of QAI's constitution are:

- To advocate for the protection and advancement of the needs, rights and lives of people with disability in Queensland;
- To protect and advance human rights including the Convention on the Rights of Persons with Disabilities (CRPD);
- To be accountable to the most disadvantaged people with disability in Queensland; and
- To advance the health, social and public wellbeing of disadvantaged people with disability.

QAI's recommendations

In addition to the detailed recommendations provided in QAI's ten previous written submissions to the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability ('Royal Commission' hereafter);

1. End the segregation of people with disability

- a. Fully implement the "Guidelines on deinstitutionalization, including in emergencies" from the Committee on the Rights of Persons with Disabilities.
- b. Ensure a fully inclusive education system through implementation of the Australian Coalition for Inclusive Education (ACIE)'s Roadmap "Driving change: A roadmap for achieving inclusive education in Australia" including the phasing out of segregated education.
- c. Develop a plan to eradicate Australian Disability Enterprises (ADEs) and productivity-based wage assessment tools, following broad stakeholder engagement that includes people with disability and their representative organisations.
- d. Address discriminatory practices by employers that prevent people with disability accessing the workforce. For example, develop Disability Employment Standards as a form of subordinate legislation under the *Disability Discrimination Act 1992* (Cth).
- e. Remove barriers that deny people with disability the right to live in a home of their own, in a location of their choice and with whom they wish to reside. For example, long waiting lists for public housing, unaffordable private rentals, and inaccessible buildings.
- f. Increase funding for, and access to, individualised living options that facilitate people with disability living where they want to live, with whom they choose and with the support that they need to live independently in the community.

2. Address prejudicial attitudes and a lack of understanding of the needs of people with disability

- a. Develop a national, multi-pronged public education campaign with the objective of achieving greater visibility of people with disability in the community and which addresses prejudice and a lack of understanding of the needs and aspirations of people with disability.

The campaign should aim to:

- Improve public awareness and understanding of disability and the needs and aspirations of people with disability to live ordinary lives in the community.
- Present positive portrayals of people with disability as productive and contributing members of the community.

The campaign should be supported by:

- New national media and entertainment standards that require minimum levels of representation of people with disability in advertising and media content produced in Australia.
- A government grants program that provides funding to media and entertainment projects that provide realistic and positive portrayals of people with disability living ordinary lives in the community.

- b. Introduce mandatory requirements for disability awareness training across all educational settings and across all industries. This should include people with lived experience sharing their stories.
- c. Ensure evidence-based approaches inform the individual support of people with disability. For example, Michael Kendrick's framework on 'Right Relationships' could be used to train, and audit the quality of, ethical partnering between people with disability and the support services they interact with.
- d. Require all levels of government to review their policies and consider the assumptions, values and beliefs underlying them, including the extent to which they reflect ableist attitudes. Where necessary, reform policies following meaningful consultation with people with disability and their representative organisations, and within specified timeframes.

3. Involve people with disability in decision-making processes

- a. Implement the supported decision-making paradigm required by Article 12 of the CRPD to ensure people with disability retain their legal capacity and have their will and preferences upheld in decision-making about their lives. This could be achieved by:
 - Community education campaigns regarding the concept of legal capacity and decision-making support;
 - Introducing and legislating a nationally consistent supported decision-making framework as per the Australian Law Reform Commission's work;
 - Introducing legislative changes that will prevent vexatious applications for, and unnecessary appointments of, substitute decision-makers, including increased scrutiny of applications, more frequent review of appointments, and penalties for unmeritorious applications;
 - Providing access to legal safeguards, such as free legal representation for all adults subject to applications for substitute decision-makers.
- b. Ensure the inclusion of people with disability at the policy-making level. For example, consider introducing quotas and mandatory requirements for people with disability to actively participate in the development, implementation, and monitoring of policy-making in all aspects of public, government, and community life.
- c. Ensure people with disability are involved in co-designing and monitoring reforms that follow the recommendations of the Disability Royal Commission.

4. Ensure access to essential supports

- a. Australia's social security system must accept greater responsibility for ensuring that all members of society, including people living with disability, have access to an acceptable standard of living. In light of the economic benefits of improved financial security;
 - Increase the monetary value of the Disability Support Pension;
 - Ensure it remains a constant safety net rather than one that is taken away when recipients try to participate in employment to the best of their abilities;
 - Reform the way in which eligibility for the Disability Support Pension is assessed. For example, reinstate the medical evidence template for General Practitioners

and remove the arbitrary requirement that eligible recipients need 20 points on a single Impairment Table to avoid completing a program of support.

- b. Ensure the NDIS is properly resourced into the future and fully accessible and operational to eligible Australians with disability. This could be achieved by, among other things:
 - Considering an increased Medicare levy to ensure long-term funding
 - Ongoing and increased funding of programs such as the ART (Access and Referral Team) program
 - Requiring the National Disability Insurance Agency (NDIA) to update its Operational Guidelines and practices following decisions made in the Administrative Appeals Tribunal (AAT); and
 - Introducing a targeted action plan to improve the availability of disability support services in regional and remote parts of Australia.

5. Introduce stronger safeguards that will protect against abuse

- a. The Australian government legislate an Australian Charter of Human Rights that gives full effect to the CRPD.
- b. Ensure greater oversight and safeguards for disability supports provided under the NDIS. For example:
 - Require the NDIS Quality and Safeguards Commission to monitor the number of applications for the appointment of substitute decision-makers initiated by NDIS service providers for NDIS participants, and introduce penalties for applications found to be unmeritorious.
 - Strengthen the remit and capacity of the NDIS Quality and Safeguards Commission to conduct independent investigations and to proactively monitor and regulate the delivery of disability supports under the NDIS.
 - Ensure each state and territory retains its role as a provider of last resort in relation to Positive Behaviour Support Plans.
 - Prevent service providers from providing wrap around supports to individual NDIS participants, for example providing both support coordination and core supports.
 - Ensure blanket consumer law protections to NDIS participants, including access to specialised legal advice, regardless of the contents of individual NDIS service agreements.
- c. Implement an independent and sufficiently resourced National Preventive Mechanism that is disability-aware, and which successfully fulfils Australia's obligations under the Optional Protocol to the Convention Against Torture, including making provision for inspection and reporting about the conditions and treatment of people detained in all authorised mental health services, forensic mental health services, forensic disability services and residential aged care services.
- d. Guarantee a well-resourced and sustainable independent disability advocacy sector that ensures people with disability can access face-to-face, local, and trauma-informed disability advocacy. This requires at a minimum, five-yearly funding cycles and a shared commitment from both Commonwealth and state and territory governments to fund disability advocacy into the future, notwithstanding the implementation of the NDIS.

6. Address intersectional disadvantage

- a. Ensure sophisticated policy responses to disability issues that consider all elements of a person's identity. This means being responsive to the additional barriers faced by First Nations Australians, people from Culturally and Linguistically Diverse (CALD) communities, older and younger Australians, and members of the LGBTIQ+ community.
- b. Consider introducing quotas or mandatory requirements for people with lived experience of disability from diverse communities to be involved in policy-making at all levels of government.

7. Introduce a redress scheme

Following the Disability Royal Commission, introduce a redress scheme that takes a human rights approach that provides reparations alongside court-based available remedies. Ensure it:

- Acknowledges the violence, abuse, neglect, and exploitation experienced by people with a disability in Australia;
- Holds institutions, companies, and individuals accountable for this abuse; and
- Helps people with a disability who have experienced abuse to gain access to counselling, a direct personal response, and/or a redress payment.

Introduction

As an organisation dedicated to promoting and advancing the human rights of the most vulnerable Queenslanders with disability, the realisation of an inclusive society lies at the very core of our work. Whilst progress has undeniably been made, with deinstitutionalisation and Australia's ratification of the Convention on the Rights of Persons with Disabilities (CRPD) both constituting significant milestones, many social, attitudinal, and environmental barriers that exclude people with disability have endured. People with disability continue to suffer violence, abuse, neglect, and exploitation and experience prejudice and discrimination because of negative community attitudes.

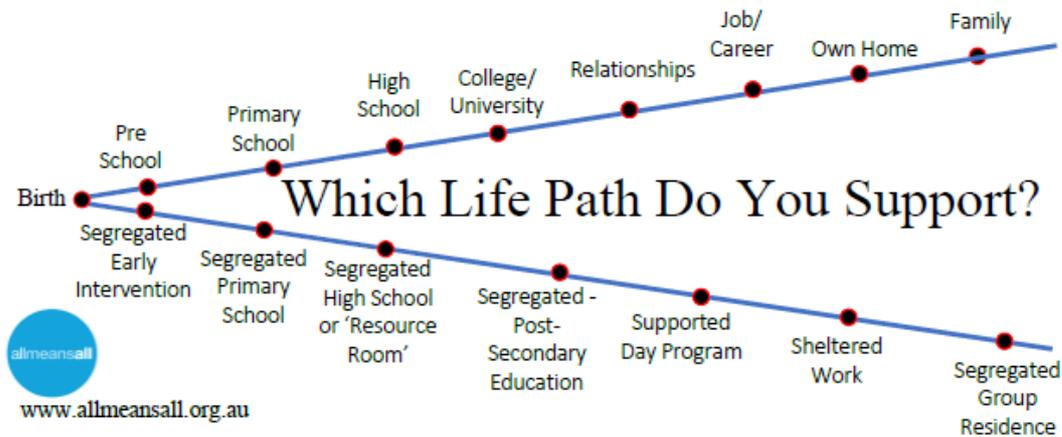
During the course of the Royal Commission, QAI has provided extensive evidence of the ongoing mistreatment of people with disability in Australian society. QAI has made ten written submissions covering various topics, including education, guardianship, criminal justice, group homes, Restrictive Practices, and our most recent submission on Places of Detention in Queensland. QAI has also given evidence at three public hearings: Public hearing 6 on *Psychotropic medication, behaviour support and behaviours of concern*, Public hearing 7 on *Education*, and Public hearing 30 on *Guardianship, substituted and supported decision-making*.

Our evidence includes recommendations for attitudinal, law and policy reform that, if implemented, would prevent and better protect people with disability from experiencing violence, abuse, neglect, and exploitation, and empower people with disability to live their best lives. When considered together, our recommendations reflect several consistent themes. This submission presents our key recommendations within these themes, which can be summarised as the following:

- 1. End the segregation of people with disability;**
- 2. Address prejudicial attitudes and a lack of understanding of the needs of people with disability;**
- 3. Involve people with disability in decision-making processes;**
- 4. Ensure access to essential supports;**
- 5. Introduce stronger safeguards that will protect against abuse;**
- 6. Address intersectional disadvantage; and**
- 7. Introduce a redress scheme**

It is hoped that these themes will influence the Disability Royal Commission's final report to the Australian Government and will inform meaningful systemic change that substantially improves the lives of people with disability, and promotes an inclusive society that supports people with disability to live independently and free from violence, abuse, neglect, and exploitation.

1. End the segregation of people with disability



The above image¹ depicts the typical life path of many people born with a disability in Australia. Practices of segregation, and the subsequent devaluation of people with a disability, begin at a very young age. They place people with disability onto a distinct life path that has reduced opportunities to be in valued roles that lead to the enjoyment of ‘the good things of life’ that people without disability take for granted. For example, the enjoyment of freely given relationships, educational achievements, open employment, and financial independence. They also increase the risk of violence, abuse, neglect, and exploitation, due to the absence of a ‘community gaze’ from networks of support that provide oversight and accountability for harmful actions.²

In education

Segregation starts in the Early Childhood Education and Care (ECEC) setting. Barriers for children with disability seeking to attend childcare services are frequently overlooked as childcare providers are not covered by the *Disability Standards for Education (DSE)*.³ This means that requests for enrolments of children with disability into childcare centres can be, and regularly are, denied without any consultation or proper consideration, denying children with disability the benefits of socialisation and school readiness that childcare attendance can bring, leaving them already ‘behind’ when they commence formal education.

Segregation continues to occur in mainstream education settings. The right to an inclusive education under Article 24 of the CRPD requires States Parties to ensure persons with disabilities are not excluded from the general education system on the basis of disability,⁴ yet the vision of inclusive education articulated by the Committee to the CRPD in General Comment 4 is not the reality for many students with disability in Queensland. QAI’s Young People’s Program continues to

¹ © R.Jackson 2007, 2018. May be reproduced non-commercially for use with families. www.include.com.au

² Drawn from Social Role Valorisation (SRV), see for example, Sherwin, J (2021) *Submission in response to the rights and attitudes paper, Royal Commission into violence, abuse, neglect and exploitation of people with disability*; <https://disability.royalcommission.gov.au/system/files/submission/ISS.001.00211.PDF>

³ Disability Standards for Education 2005 - 2020 Review Summary. Note, however, that this does not mean that childcare providers are exempt from complying with the *Disability Discrimination Act 1992 (Cth)*.

⁴ Committee on the Rights of Persons with Disabilities (2016) *General Comment No.4. CRPD/C/GC/4*

bear witness to the exclusion of students with disability from mainstream education settings through practices such as gatekeeping by Principals, the disproportionate use of school disciplinary absences⁵, refusal to provide reasonable adjustments, and the use of unregulated Restrictive Practices, all of which either directly remove students from the classroom or indirectly drive them into part-time education, home schooling or enrolling in special schools.⁶

The Centre for Inclusive Education (C4IE) states that “*the foundation of an inclusive society is an inclusive education system,*”⁷ yet discriminatory practices persist without adequate accountability and cause significant harm in the process. Research consistently shows that education settings that segregate students with disability perpetuate negative stereotypes⁸, lead to poorer educational outcomes for students with disability, condition students with disability for a lifetime of exclusion and leave them ill-equipped for adult life. Students with disability are denied the opportunity to interact with peers who live without disability, learn skills from them, form friendships, and achieve the sense of belonging that is the very essence of inclusion. Segregated educational settings also deny students without disability the many benefits that learning in a diverse environment alongside peers with disability can bring.⁹

Despite advice to the contrary, successive governments continue to invest in special school settings. Indeed, the behaviour of some educational institutions leaves many families with no other option than to enrol their child with a disability into a ‘special school’, an action that is labelled the right of the parent and interpreted as justification for the ongoing existence of special schools. However, comparative research looking at placements in the United States and Australia¹⁰ showed that when mandates were clearly embedded within legislation that the default placement for students should be a regular education setting, and the system was responsible for ensuring access to support within that setting as a first port of call, there was a dramatic change in placements and enrolments within segregated classrooms/schools dropped substantially. It can therefore be inferred from this that if mainstream educational settings were genuinely inclusive and students with a disability were guaranteed access to necessary reasonable adjustments to support their learning, ‘special school’ enrolments would decrease.

In employment

The segregation of people with disability is also starkly apparent within the labour market. Specifically, Australian Disability Enterprises (ADEs) and productivity-based wage assessment tools constitute considerable barriers to the full inclusion and participation of people with disability in the open workforce. These archaic institutional approaches perpetuate low expectations of and for people with disability and ignore their capacity to positively contribute to the workplace. While ADEs may have had benevolent origins, in reality ADEs function as day centres for people with

⁵ See for example, *QAI and ATSILS call for inquiry into school disciplinary absences*; <https://qai.org.au/2022/02/16/qai-and-atsils-call-for-inquiry-into-school-disciplinary-absences/>

⁶ See QAI’s submission to the DRC on inclusive education; <https://qai.org.au/2019/11/29/inclusive-education/>

⁷ C4IE Position Statement on the Dual System of Regular and Special Schools, 2022

⁸ For example, ‘Stigma of a Label: Educational Expectations for High School Students Labelled with Learning Disabilities’ *Journal of Health and Social Behaviour*, December 2013, Vol 54. No.4, pp462-480

⁹ Queensland Parents for People with a Disability (2008) *Inclusion or Segregation for Children with an Intellectual Impairment? What does the research say?* Dr Bob Jackson

¹⁰ Kate De Bruin, ‘The Impact of Inclusive Education Reforms on Students With Disability: An International Comparison’ (2019) *International Journal of Inclusive Education*, 23:7- 8, 811-826

disability in areas where there are limited other supports or services. Theoretically, ADEs are meant to operate as training centres that move employees with disability into open employment. However, this theory is not reflected in reality, and there are few incentives for ADEs to progress their employees into open employment.¹¹ In some instances, ADEs are highly productive and compete on the open market against other businesses yet continue to exploit and pay inadequate wages to their employees with disabilities. Rather than incentivising people with disability into the workforce, ADEs and the supported wage system demean the contribution of employees with disability through grossly insufficient remuneration and the confinement of workers to a small and undervalued sector of the labour market.

In housing

Despite formal policies of deinstitutionalisation, many people with disability also continue to live in segregated settings and remain excluded from mainstream housing.¹² Barriers such as long waiting lists for public housing, unaffordable private rentals and inaccessible buildings directly contribute to this segregation. Congregated housing is any place where a person is forced to share their care with another person where this is not the decision of the person. Group homes include large residential facilities, boarding houses, hostels, long-stay health facilities, small group homes or Supported Independent Living (SIL) arrangements under the National Disability Insurance Scheme (NDIS). People with disability living in these settings are required to share much of their lives, including living space, communal bathrooms, communal living areas and/or their personal supports. Despite new terminology used by the NDIS, such as ‘Supported Independent Living’ and ‘Specialist Disability Accommodation’, fresh labelling has not heralded a new approach to shared living arrangements, in which practices of abuse, exploitation and neglect, in addition to the denial of choice and control, have perpetuated. The lack of choice and control over day-to-day activities, together with the power imbalance between accommodation providers and residents, increases the risk of violence and exploitation¹³. Moreover, despite legislation requiring services to be designed in such a way as to ensure no single service provider exercises control over all or most aspects of the life of the person with disability,¹⁴ this is not the reality in the current NDIS market where NDIS service providers are free to provide in-home core supports as well as support coordination and accommodation to the same individual participant.

In summary, people with disability continue to suffer violence, abuse, and neglect in settings where they are physically removed from the wider community and experience prejudice and discrimination because of negative attitudes fostered by policies of segregation. People who are isolated from the broader community are subject to less protective oversight ‘from the gaze of citizens’ and are therefore more vulnerable to abuse.¹⁵ The belief that people with disability belong in segregated settings, the ‘us and them’ mentality, continues to drive policy making despite its incongruence with Australia’s obligations under the CRPD. These attitudes are deeply ingrained and

¹¹ Australian Human Rights Commission (2016) *Willing to Work: National Inquiry into Employment Discrimination against Older Australians and Australians with Disability*, p242

¹² Weisel, I & Bigby, C (2015) Movement on Shifting Sands: Deinstitutionalisation and People with Intellectual Disability in Australia, 1974–2014, *Urban Policy and Research*, 33:2, 178-194

¹³ See QAI’s submission to the DRC on Group Homes; <https://qai.org.au/2020/06/25/group-homes/>

¹⁴ For example, *Disability Services Act 2006* (Qld), section 28

¹⁵ Sherwin, J (2021) Submission in response to the rights and attitudes paper, Royal Commission into violence, abuse, neglect and exploitation of people with disability; <https://disability.royalcommission.gov.au/system/files/submission/ISS.001.00211.PDF>

will be difficult to challenge, requiring a clear vision about what a good, ordinary life looks like for people with a disability and an unwavering commitment to achieving it even in the face of strong opposition. Australia will never be a truly inclusive society while it continues to segregate people with disability across all aspects of their lives from non-disabled members of the community. As long as the segregation of people with disability continues to occur, so too will the incidence of violence, abuse, neglect, and exploitation.

Recommendations

1. End the segregation of people with disability

- a. Fully implement the “Guidelines on deinstitutionalization, including in emergencies” from the Committee on the Rights of Persons with Disabilities.¹⁶
- b. Ensure a fully inclusive education system through implementation of the Australian Coalition for Inclusive Education (ACIE)’s Roadmap “Driving change: A roadmap for achieving inclusive education in Australia”¹⁷ including the phasing out of segregated education.
- c. Develop a plan to eradicate Australian Disability Enterprises (ADEs) and productivity-based wage assessment tools, following broad stakeholder engagement that includes people with disability and their representative organisations.
- d. Address discriminatory practices by employers that prevent people with disability accessing the workforce. For example, develop Disability Employment Standards as a form of subordinate legislation under the *Disability Discrimination Act 1992 (Cth)*.
- e. Remove barriers that deny people with disability the right to live in a home of their own, in a location of their choice and with whom they wish to reside. For example, long waiting lists for public housing, unaffordable private rentals, and inaccessible buildings.
- f. Increase funding for, and access to, individualised living options that facilitate people with disability living where they want to live, with whom they choose and with the support that they need to live independently in the community.

2. Address prejudicial attitudes and a lack of understanding of the needs of people with disability

Research shows that a lack of familiarity with people with disability, for example due to policies of segregation, results in prejudicial attitudes about the skills and abilities of people with disability.¹⁸ Prejudicial attitudes then influence how people with disability are treated and can lead to the violence, abuse, neglect, and exploitation of people with disability.¹⁹

¹⁶ CRPD/C/5: Guidelines on deinstitutionalization, including in emergencies (2022)

¹⁷ Australian Coalition for Inclusive Education (ACIE). (2020). *Driving change: A roadmap for achieving inclusive education in Australia*.

¹⁸ Kantar Public (February 2017) ‘Building Employer Demand: Literature Review’

¹⁹ Idle, J., Giuntoli, G., Fisher, KR, Robinson, S., Purcal, C., Newman, C., Reedy, K. (2022). Research Report – Changing community attitudes to improve inclusion of people with disability. Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability

Social Role Valorisation (SRV) is a theoretical framework that provides an explanation for the origins and consequences of harmful prejudicial attitudes. According to SRV, people with disability are denied access to a 'good, ordinary life' (a life full of richness and meaning) because they hold a devalued status. That is, they have characteristics linked to their impairment that are not typically valued by the wider community, for example they might be dependent on others or look different, and are consequently perceived negatively. These negative perceptions influence how people with disability are treated, with stereotypes leading to their rejection and segregation from the wider community. These perceptions are then reinforced through language and imagery and by people with disability internalising the messages around them and adopting the roles they are given.²⁰ This can occur even within disability service settings, where people may be grouped together, branded, have reduced autonomy or are forced to engage in activities that contribute to, rather than counteract, their devalued status.²¹ These harmful experiences, referred to as 'wounds', are more likely to occur to people with a devalued status and will have greater impact on people with a devalued status because of their pre-existing vulnerability and likely absence of protective factors that can mitigate against the impact of negative life experiences.

SRV proposes that to support the acquisition of a 'good, ordinary' life for people with disability, and to change the negative perceptions that influence how they are treated, people with disability must be supported to acquire socially valued roles, such as employee, student, guitarist, soccer player etc. They must also be supported to embody the identity, expectations, status, and respect held by people with a valued status in those roles, using 'culturally valued means.' This is achieved by enhancing the competency and imagery of the person and through conscious adherence to certain 'role communicators.'²² For example, if a person with disability wishes to learn the guitar, ensure they learn from a guitar teacher rather than a support worker. Or if a person with disability wants to be part of a soccer team, ensure they wear the relevant uniform. This will then lead to greater societal participation, the acquisition of freely given and valued relationships, and a sense of belonging that is more than just a presence in the community.

In health settings

Prejudicial attitudes and a lack of understanding of the needs of people with disability are apparent in almost every sector of society. In the health sector, many healthcare professionals continue to hold paternalistic and degrading attitudes towards people with disability, viewing them as deviating from 'bodily, cognitive and mental norms that require care, treatment and protection'.²³ Whilst optimising health and wellbeing is important, practices that problematise 'differences' that need to be 'cured' remain prevalent and are especially harmful in situations where the person is not included in their healthcare decision-making. For example, forced sterilisation and the use of

²⁰ Sherwin, J (2021) Submission in response to the rights and attitudes paper, Royal Commission into violence, abuse, neglect and exploitation of people with disability;
<https://disability.royalcommission.gov.au/system/files/submission/ISS.001.00211.PDF>

²¹ Armstrong, J (2020) Submission to Royal Commission into Violence, Abuse, Neglect and the Exploitation of People with Disability;
http://www.asrva.org.au/uploads/1/2/6/7/126742284/johm_armstrong_submission_to_royal_commission_on_abuse.pdf

²² Osburn, J (2006) An Overview of Social Role Valorization Theory. *The SRV Journal*, 1(1), 4-13

²³ Kayess, R. & Sands, T. (2020) *Convention on the Rights of Persons with Disabilities: Shining a light on Social Transformation*. Sydney: UNSW Social Policy Research Centre, p1

chemical restraint occur without informed consent and can be experienced as violence by the person with disability. There is also a lack of knowledge and understanding of disability and the particular health conditions that people with disability often experience, contributing to poor treatment and health outcomes. Disability awareness training that includes hearing stories from people with lived experience is therefore a vital part of the curriculum for all health professionals that must become mandatory.

Using Restrictive Practices

The use of Restrictive Practices is another area where prejudicial attitudes are pervasive, and with devastating consequences. Restrictive Practices are used as a form of behaviour control for individuals exhibiting 'behaviours of concern' that allegedly pose a safety threat to themselves or others. Despite assertions that Restrictive Practices are a necessary response to avert imminent danger, it is QAI's experience that the use of Restrictive Practices is often the result of a myriad of factors, many of which do not stem from the individual concerned. For example, the prejudicial attitudes of disability support workers towards people with disability.²⁴

Many people with disability experience a lifetime of devaluation from birth, throughout their school years and beyond. The imprint left upon people by the multiple layers of discrimination, exclusion and rejection is often a terrible burden of loneliness, pain, or anger. When any, and at times the only, interaction they have with another person is in the form of a direction or instruction, a "do this, don't do that" chorus echoed throughout the years, it is not unexpected, having regard to normal human behaviour, that some people will retreat into themselves while others will attempt to exert some will and determination. Research has shown that even a person who uses verbal communication may rely upon the manifestation of uniquely personal behaviours as their reflex communication strategy when experiencing duress, anger, fear, or emotional upheaval.²⁵ The person, their behaviour, and the message they are trying to communicate is therefore misunderstood, judged, and lost in the situation. Instead, they acquire a reputation as being 'challenging' that can be difficult to shed. Those in positions of power seek to exert their dominance over the person by restricting their liberties, ironically often leading to self-fulfilling prophecies where the suppression of the person's rights has the effect of exacerbating their disempowerment, inflaming the perceived behaviour of concern, and thereby legitimising the ongoing use of the Restrictive Practice.

Behaviour is a social construct. What is considered to be challenging behaviour will differ from one person to the next and will depend upon their understanding of the other person and their support needs. The person behind the behaviour must also be understood. To what extent are they being disempowered by their service provider? What is the relationship like? Michael Kendrick's work on exploring the ethics of 'right relationships' for people with disability identifies an ethical framework for interpersonal and impersonal relationships that can act as a safeguard²⁶ and can provide a blueprint for increasing community understanding of the needs of people with disability.

²⁴ See QAI's submission to the DRC on Restrictive Practices; <https://qai.org.au/2020/12/10/restrictive-practices/>

²⁵ Peter Andersen, *Nonverbal Communication: Forms and Functions* (Mayfield, 1999), 18.

²⁶ Kendrick, Michael, 'Some Initial Thoughts On Establishing "Right Relationship" Between Staff, Professionals, Service Organisations and the People They Assist' QAI Newsletter, April 2000

When the approach is changed, through empowerment and ensuring a person with disability is scaffolded by support from ethical partnerships with service providers, the perspective on that person can change from negative to positive. When expectations are changed, our approaches, behaviours and responses also change. Actions that 'deplete the humanness of individuals with a disability' increase the likelihood of violence,²⁷ whereas people who are perceived positively and treated equally are less likely to be vulnerable to abuse and exploitation.

Use targeted measures

Targeted measures designed to change community attitudes towards people with disability are required. Current measures that are successfully helping to shift attitudes should be built upon and expanded, such as the inclusive practices of the ABC who make concerted efforts to cover news items that relate to people with disability. Media outlets have a responsibility to be mindful of the messages they send through their use of imagery and news items. Sherwin argues that messages depicting people with disability in socially valued roles should be presented, along with imagery that promotes the capacity, competence, and contribution of people with disability in order to counter unhelpful stereotypes.²⁸ To change the mindset of citizens, we must build 'interpersonal identification and compassion' between people with and without disability, and this will occur when people with disability acquire, and are seen in, socially valued roles.²⁹

According to Fisher and Purcel, attitudinal change is needed at the personal, organisational and government level, with success dependent upon various factors, including multi-pronged and long-term information and awareness campaigns, direct contact with people with disability, education and training and anti-discrimination legislation that is enforceable with appropriate sanctions for non-compliance.³⁰ Essentially, critical to changing attitudes is ensuring greater visibility of people with disability in our community and viewing disability as an ordinary and indeed valuable part of humanity.

Further, governments should consider the assumptions, values and beliefs underlying current policies. To what extent do they reflect a human rights framework? To what extent are they grounded in ableist attitudes or archaic assumptions about the capabilities of people with disability that stem from the medical model? Do they start with a vision of people with disability holding socially valued roles and living a good, ordinary life? Governments must model the self-reflection required at all levels of the community if people with disability are to be genuinely included and prejudicial attitudes successfully addressed.

²⁷ Sherwin, J (2021) Submission in response to the rights and attitudes paper, Royal Commission into violence, abuse, neglect and exploitation of people with disability;
<https://disability.royalcommission.gov.au/system/files/submission/ISS.001.00211.PDF>

²⁸ Sherwin, J (2021) Submission in response to the rights and attitudes paper, Royal Commission into violence, abuse, neglect and exploitation of people with disability;
<https://disability.royalcommission.gov.au/system/files/submission/ISS.001.00211.PDF>

²⁹ Ibid

³⁰ Fisher, K & Purcel, C (2017) Policies to change attitudes to people with disabilities, *Scandinavian Journal of Disability Research*, 19(2)

Recommendations

2. Address prejudicial attitudes and a lack of understanding of the needs of people with disability

- a. **Develop a national, multi-pronged public education campaign with the objective of achieving greater visibility of people with disability in the community and which addresses prejudice and a lack of understanding of the needs and aspirations of people with disability.**

The campaign should aim to:

- **Improve public awareness and understanding of disability and the needs and aspirations of people with disability to live ordinary lives in the community.**
- **Present positive portrayals of people with disability as productive and contributing members of the community.**

The campaign should be supported by:

- **New national media and entertainment standards that require minimum levels of representation of people with disability in advertising and media content produced in Australia.**
- **A government grants program that provides funding to media and entertainment projects that provide realistic and positive portrayals of people with disability living ordinary lives in the community.**

- b. **Introduce mandatory requirements for disability awareness training across all educational settings and across all industries. This should include people with lived experience sharing their stories.**
- c. **Ensure evidence-based approaches inform the individual support of people with disability. For example, Michael Kendrick's framework on 'Right Relationships' could be used to train, and audit the quality of, ethical partnering between people with disability and the support services they interact with.**
- d. **Require all levels of government to review their policies and consider the assumptions, values and beliefs underlying them, including the extent to which they reflect ableist attitudes. Where necessary, reform policies following meaningful consultation with people with disability and their representative organisations, and within specified timeframes.**

3. Involve people with disability in decision-making processes

The centrality of people with disability to all decision-making processes, be they at the individual or policy level, must be the basis of all future reforms and actions that impact the lives of people with disability. For too long, people with disability have had their legal capacity denied on account of arbitrary conclusions drawn from the presence of impairment and because of paternalistic attitudes that pathologize disability. A 'best interests' mantra has dominated the sector and the practices of those working within it for years. At the policy level, people with disability have been excluded from decision-making processes and denied opportunities to hold positions of influence. As a result, the views and needs of people with disability have consistently been overlooked and their human rights violated.

At the individual level

Article 12 of the CRPD requires Australia to provide access for persons with disabilities to the support they may require in exercising their legal capacity, to ensure that the rights, will and preferences of persons with disabilities are enjoyed on an equal basis with others.³¹ In other words, by signing and ratifying the CRPD, the Australian government committed to a supported decision-making approach for all people with disability, in which a person is supported to exercise their autonomy and maintain their legal capacity through supported decision-making.

However, supported decision-making is yet to be fully implemented and substituted decision-making frameworks remain throughout Australia. While guardianship and administration appointments are theoretically posed as an option of last resort, the experience of many people with disability does not reflect this and instead reflects a system that typically favours the interests of government agencies and service providers, resulting in unnecessary and inappropriate appointments of substitute decision-makers.³²

Substituted decision-making remains deeply entrenched in key aspects of Australia's laws, policy, and practices, limiting more creative and person-centred approaches to personal autonomy and choice. Resourcing constraints, coupled with paternalistic attitudes, limit the availability of interventions that increase decision-making capacity and support the establishment of relationships that enable the views, will and preferences of adults with reduced decision-making ability to be fully expressed and understood.

A key barrier is the inadequate understanding of decision-support needs of people with disability. Many stakeholders are not fully cognisant of the complexity of decision-making support, the challenging and often changing life circumstances of individuals who require it, and the associated skills required to effectively work alongside a person with impaired decision-making abilities. Such nuanced work does not come naturally and requires specific training. Some people require specialist decision-making support from independent, professional advocates who are trained in working alongside people with impaired capacity to elicit their will and preferences, and to ensure their human rights are not usurped by the interests or views of others.

In the absence of training on supported decision-making principles, people can revert to 'best-interests' approaches where they make a decision that *they* perceive to be in the adult's best interests as opposed to enacting the will and preferences of the adult concerned. Whilst such an approach may be well-intentioned, it is rooted in ableist ideology and fails to implement the rights-based framework required under the CRPD. The person's right to legal capacity is denied and their autonomy and self-determination suppressed through resort to formal guardianship arrangements that would otherwise not be required if the individual was adequately supported. Such arrangements not only violate a person's right to equality before the law, but they can also lead to the exploitation of people with disability, where substitute decision-makers act and make decisions in accordance with their own personal interests.

³¹ *Convention on the Rights of Persons with Disabilities*, Article 12(1)-(3).

³² See QAI's submission to the DRC on guardianship; <https://qai.org.au/2022/08/24/guardianship-substituted-and-supported-decision-making/>

Poor adherence to supported decision-making practices is particularly evident in the health setting. Hospital bed shortages and attitudes remnant of the medical model can be behind a clinician's recourse to substituted rather than supported decision-making practices, where the views and preferences of family members or guardians are obtained instead of providing the person with disability the necessary time, information, and support to lead the decision-making regarding their discharge.

To implement the supported decision-making approach required by the CRPD, QAI foresees the need for ongoing community education regarding the concept of legal capacity, its fluctuating nature and the role that increased autonomy and control can play in increasing a person's capacity. We need targeted education and awareness campaigns that place the discussion about decision-making support within a human rights framework, emphasising the rights of people with disability to receive support when making decisions, the dignity of risk and the right to make 'poor' decisions as people without disability often do. We also need a nationally consistent supported decision-making framework as per the Australian Law Reform Commission's recommendations³³, and to address specific aspects of state and territory guardianship frameworks that contribute to the unnecessary appointment of substitute decision-makers. There also needs to be improved access to legal advocacy for people with disability, safeguards, and increased oversight of substitute decision-makers.

The unique and additional barriers to personal autonomy experienced by First Nations people with disability and people from CALD communities also need to be understood and incorporated into future reforms. Decision-support must be culturally appropriate and cognisant of a person's unique experiences. For example, cultural beliefs about the role of government and a need for independent interpreting services both influence the decision-support needs of people from CALD communities.

At the policy-making level

The CRPD also necessitates the inclusion of people with disability at the policy-making level, requiring their active participation in public life and requiring they be consulted in the development, implementation, and monitoring processes of the Convention and related domestic policies.³⁴ Historically this has not occurred, with many people with disability denied opportunities to hold decision-making roles due to the pervasive systemic barriers that exclude people with disability from education and employment. Consultation processes have also been largely tokenistic, where the views of people with disability have been sought within a very short timeframe or after a particular policy decision has already been made. For example, the failed introduction of Independent Assessments to the NDIS in 2021 followed tokenistic consultation processes and a complete lack of understanding of the needs of NDIS participants, leading to almost unprecedented pushback from the disability sector which forced the policy to eventually be dropped.

A lack of effective consultation with people with disability at a policy level was also evident in the Australian government's response to the Covid-19 pandemic. For example, the introduction of

³³ Equality, Capacity and Disability in Commonwealth Laws (ALRC Report 124) 2014

³⁴ *Convention on the Rights of Persons with Disabilities*; Article 33, Article 4

Rapid Antigen Tests as the primary means for self-testing for Covid-19 was, and continues to be, inaccessible to people who live with a vision impairment. Similarly, the use of QR codes to check in to venues was not accessible to people with vision impairments or people with cognitive disability who find the use of technology challenging. Social distancing requirements also had an adverse effect on people with disability. However, this was not recognised or acknowledged in government messaging about the restrictions, with some people with disability experiencing discrimination and vitriol in the community because of their perceived inability to comply with physical distancing requirements.³⁵

The effective consultation and engagement of people with disability in all levels of decision-making is therefore critical. This includes ensuring people with disability are involved in co-designing and monitoring reforms on how best to create inclusive communities following this Royal Commission. It requires capacity building of people with disability through supported decision-making, as well as capacity building of other stakeholders to formulate disability inclusive practices and environments.³⁶ The failings of the Covid-19 response highlight the need to ensure people with disability are not just included in policy making regarding issues that specifically impact the disability community, such as the NDIS, but in all policy making that affects the whole community. Thus, *'nothing about us, without us'* can be shortened to, *'nothing without us.'*

Recommendations

3. Involve people with disability in decision-making processes

- a. **Implement the supported decision-making paradigm required by Article 12 of the CRPD to ensure people with disability retain their legal capacity and have their will and preferences upheld in decision-making about their lives. This can be achieved by:**
 - **Community education campaigns regarding the concept of legal capacity and decision-making support;**
 - **Introducing and legislating a nationally consistent supported decision-making framework as per the Australian Law Reform Commission's work;**
 - **Introducing legislative changes that will prevent vexatious applications for, and unnecessary appointments of, substitute decision-makers, including increased scrutiny of applications, more frequent review of appointments, and penalties for unmeritorious applications;**
 - **Providing access to legal safeguards, such as free legal representation for all adults subject to applications for substitute decision-makers.**
- b. **Ensure the inclusion of people with disability at the policy-making level. For example, consider introducing quotas and mandatory requirements for people with disability to actively participate in the development, implementation, and monitoring of policymaking in all aspects of public, government, and community life.**
- c. **Ensure people with disability are involved in co-designing and monitoring reforms that follow the recommendations of the Disability Royal Commission.**

³⁵ See QAI's submission to the DRC on Emergency planning and response; <https://qai.org.au/2020/06/07/emergency-planning-and-response/>

³⁶ Promoting inclusive environments for the full implementation of the Convention on the Rights of Persons with Disabilities – Note by the Secretariat, United Nations (2020); CRPD/CSP/2020/4 - E - (undocs.org)

4. Ensure access to essential supports

Inclusion is about having a home to live in, a job, access to healthcare, access to education and a chance to enjoy the company of friends and family and participate in recreational activities.³⁷ The United Nations describes inclusive environments as those in which ‘persons with disabilities are empowered to live independently, are integrated in their community, access information and participate in learning, work and social activities.’³⁸ We know that inclusive communities mitigate against risks of violence, abuse, neglect, and exploitation of people with disability. When people with disability are seen as equals and are considered valued members of the community, prejudicial attitudes that precipitate the mistreatment of people with disability reduce.

Financial support

However, for many people with disability, inclusion is not a reality because they do not have the essential supports that they require to fully participate in community life. This can be because they are either denied opportunities to earn a minimum wage or for those who cannot work due to disability, are forced to rely upon inadequate income security payments causing significant financial hardship. In Australia, increasingly onerous mutual obligation requirements compel individuals to continually prove they are deserving of income support. Instead of incentivising individuals to participate in the market and increasing the number of people with disability in employment, this merit-based model imposes unreasonable requirements on individuals living with disability. It decreases social solidarity by perpetuating negative attitudes about welfare recipients that entrench their marginalisation within the labour market.³⁹ And it increases the number of individuals reliant upon the inferior JobSeeker Allowance (the eligibility criteria for which is easier to satisfy) thus forcing many people into a life of poverty.⁴⁰

QAI continues to hear from our clients that the Disability Support Pension (DSP) is inadequate and insufficient to maintain an acceptable standard of living. With a current maximum rate for a single adult of \$952.70 (including maximum supplements) per fortnight,⁴¹ the DSP is \$25 below the poverty line.⁴² Consequently, it is unsurprising that DSP recipients live in poverty, forced to make untenable decisions between paying for accommodation, food, bills, or medicines as the payment amount is insufficient to meet all of a person’s most basic needs. Not all medicines are covered by the Pharmaceutical Benefits Scheme (PBS) and can cost a person living with disability up to \$100 a month. The stress and anxiety caused by living below the poverty line can also negatively impact a person’s mental health and contribute to a decline in overall health and wellbeing for both the individual and their family. That there has been no substantive increase in the payment amount

³⁷ Shut Out: The Experience of People with Disabilities and their Families in Australia (2009) https://www.dss.gov.au/sites/default/files/documents/05_2012/nds_report.pdf p9

³⁸ Promoting inclusive environments for the full implementation of the Convention on the Rights of Persons with Disabilities – Note by the Secretariat, United Nations (2020); CRPD/CSP/2020/4 - E - CRPD/CSP/2020/4 -Desktop (undocs.org) p2

³⁹ Dalton, T. et al (1996) Making social policy in Australia: an introduction, St Leonard’s, NSW Allen & Unwin

⁴⁰ Li, J. et al. (2019) Inequalities in Standards of Living: Evidence for Improved Income Support for People with Disability. NATSEM, Institute for Governance and Policy Analysis, University of Canberra.

⁴¹ <https://www.servicesaustralia.gov.au/individuals/services/centrelink/disability-support-pension/how-much-you-can-get/payment-rates>.

⁴² Australian Council of Social Services and University of New South Wales, *Poverty in Australia 2022: A snapshot*, October 2022, p. 9.

over recent years despite rising costs of living, is an indictment on the attitudes of successive governments towards the worth of people with disability and must be addressed as a response to this Royal Commission.

In addition to the human rights arguments behind calls to improve income support for people with disability, the economic incentives are equally compelling. A study examining the economic implications of increasing the DSP found that a government investment of \$3.1 billion a year would close the gap in income and standard of living for the 715,000 households with a member receiving the DSP by nearly 50 per cent.⁴³ This investment and a subsequent reduction in poverty levels will reduce costs in other systems, such as the health care system, as poverty and financial distress are both linked to poor health outcomes and an increased utilisation of health care services.⁴⁴

The inadequacy of the DSP is therefore a form of institutional economic neglect that denies people with disability access to adequate social security and as a result, denies their most basic human needs, including food, medicine and housing.⁴⁵ To achieve its true purpose and genuinely financially support individuals unable to earn sufficient income from the labour market, Australia's social security system must accept greater responsibility for ensuring that the level of social security payments for all Australians, including people living with disability, are sufficient to support an acceptable standard of living. Increasing the accessibility of the DSP and its monetary value will allow the federal government to exemplify the collective responsibility required to ensure that everyone can enjoy the same basic human rights. Societies develop best when altruism is allowed to flourish,⁴⁶ and this must be reflected in our social security system.

Disability supports

The ability to access essential disability supports is similarly vital to a genuinely inclusive society. While the introduction of the NDIS has undoubtedly improved the lives of many Australians with disability, some of whom now have access to previously unobtainable yet crucial support services, it remains inaccessible to a significant majority of Australians with disability. Supports such as assistive technology, in-home assistance and allied health therapy can greatly improve the ability of a person with disability to access and participate in the community. Currently, the scheme is only accessible to approximately 10% of people with a disability.⁴⁷ The majority of people with disability, including those aged over 65, are excluded from the scheme and are forced to rely upon usually inferior state-funded services.

Even for participants of the NDIS, accessing reasonable and necessary disability supports can be problematic. For example, when considering requests for supports, the NDIA often excludes funding for requested supports on the basis that they are 'not related' to a person's primary disability. In other words, the requested supports do not relate to the impairment for which the

⁴³ Li, J. et al. (2019) *Inequalities in Standards of Living: Evidence for Improved Income Support for People with Disability*. NATSEM, Institute for Governance and Policy Analysis, University of Canberra.

⁴⁴ Collie, A. et al (2019) *The Health of Disability Support Pension and Newstart Allowance Recipients*, Monash University.

⁴⁵ See QAI's submission to the DRC on Institutional Economic Neglect; <https://qai.org.au/2021/12/20/institutional-economic-neglect/>

⁴⁶ Dalton, T. et al (1996) *Making social policy in Australia: an introduction*, St Leonard's, NSW Allen & Unwin

⁴⁷ As per statistics provided by the National Disability Insurance Agency; <https://www.ndis.gov.au/understanding/how-ndis-works/who-ndis-supports>

participant gained access to the scheme.⁴⁸ However, this is not a criterion within section 34 of the *National Disability Insurance Scheme Act 2013* (Cth) which outlines the criteria for reasonable and necessary supports, nor is it contained within any of the Rules. Once a person becomes a participant, their function and needs are, and should be, viewed as a whole. Their status as a participant is not qualified — they are not a participant only in relation to conditions A or B. They either are a participant or they are not. While the issue was considered in the case of *McLaughlin*, in which the AAT found that “supports that may be funded in a participant’s plan are not limited to supports which relate to the impairment/s which qualified them for access to the NDIS”,⁴⁹ the NDIA is yet to change its approach which appears to be based on a misinterpretation of rule 5.1(b) of the *NDIS (Supports for Participants) Rules* which states that a support will not be funded if it is not related to the participant’s disability.⁵⁰

The use of certain language and processes can also be inaccessible for participants from CALD communities and First Nations Australians. For example, First Nations Australians do not have a culturally equivalent word for ‘disability’ and can find the task of gathering evidence to describe their disability additionally challenging. Accessing disability support services is also notoriously difficult in regional and remote parts of Queensland where the market is extremely ‘thin’ and people with disability are sometimes forced to leave their communities in order to access the services they need.

The NDIS is about improving the lives of Australians with disability and this must remain at the forefront of policy reform in this area. If implemented properly, the NDIS offers many people with disability supports to effectively participate in their community. Participants can enjoy a life characterised by autonomy, choice, control, and a sense of value and belonging that are integral to inclusion, and which mitigate against the risks of violence, abuse, neglect, and exploitation. It can also model how service systems can uphold the rights and inherent dignity of people with disability by providing tailored supports that meet their individual needs, something which other service systems can learn from.

Recommendations

4. Ensure access to essential supports

- a. **Australia’s social security system must accept greater responsibility for ensuring that all members of society, including people living with disability, have access to an acceptable standard of living. In light of the economic benefits of improved financial security;**
 - **Increase the monetary value of the Disability Support Pension;**
 - **Ensure the DSP remains a constant safety net rather than one that is taken away when recipients try to participate in employment to the best of their abilities;**
 - **Reform the way in which eligibility for the Disability Support Pension is assessed. For example, reinstate the medical evidence template for General Practitioners**

⁴⁸ For example, see ‘Fair supports for your disability needs’; <https://ourguidelines.ndis.gov.au/how-ndis-supports-work-menu/what-principles-do-we-follow-create-your-plan/what-principles-do-we-use-create-your-plan/fair-supports-your-disability-needs>

⁴⁹ *McLaughlin and National Disability Insurance Agency* [2021] AATA 496, see 57, 59 and 661

⁵⁰ Rule 5.1(b) states that “A support will not be provided for funded under the NDIS if...it is not related to the participant’s disability; <https://www.legislation.gov.au/Details/F2013L01063>

and remove the arbitrary requirement that eligible recipients need 20 points on a single Impairment Table to avoid completing a program of support.

- b. Ensure the NDIS is properly resourced into the future and fully accessible and operational to eligible Australians with disability. This could be achieved by, among other things:
- Considering an increased Medicare levy to ensure long-term funding;
 - Ongoing and increased funding of programs such as the ART (Access and Referral Team) program;
 - Requiring the National Disability Insurance Agency (NDIA) to update its Operational Guidelines and practices following decisions made in the Administrative Appeals Tribunal (AAT), and
 - Introducing a targeted action plan to improve the availability of disability support services in regional and remote parts of Australia.

5. Introduce stronger safeguards that will protect against abuse

This Royal Commission has heard extensive evidence of violence, abuse, neglect, and exploitation of people with disability occurring in the absence of sufficient scrutiny. The inadequacies of current oversight mechanisms in identifying and protecting against the mistreatment of people with disability was a significant factor in the establishment of the Royal Commission and has been a strong focus throughout the duration of the Commission.

Ensure quality and safe disability supports

While the NDIS has brought about positive change to the way in which many people with disability now access disability supports, some of the supports are poor in quality and/or are delivered in an unsafe manner, as the tragic death of Anne Marie Smith exemplifies.⁵¹ Due to the market-based philosophy of the scheme, participants and service providers are free to make decisions in accordance with their own interests. Whilst this theoretically facilitates increased choice and control for participants, it also enables service providers to put their own needs ahead of the people they support and, in some situations, this has resulted in the exploitation of people with disability. For example, the many NDIS participants whose service providers have made applications for guardianship and administration appointments in situations where the service provider has a conflict of interest and potential to gain financially from a participant's funding.⁵²

The extent to which the NDIS Quality and Safeguards Commission provides effective oversight of NDIS-funded supports is severely limited by its establishment as a regulatory body with primarily reactive, rather than proactive, powers. This essentially passive role, which has been reinforced by the high volume of complaints received, limits the Commission's capacity to properly utilise its investigative powers.

Given the nature of the market and the vulnerability of its consumers, the need for robust accountability measures is critical. Participants need to be able to trust that dishonest service

⁵¹ See the Robertson Review; <https://www.ndiscommission.gov.au/media-centre/former-federal-court-judge-head-independent-review-circumstances-relating-death-ann>

⁵² See QAI's submission to the DRC on Increasing Guardianship Applications in the NDIS; <https://qai.org.au/2021/03/26/increasing-guardianship-applications-in-the-ndis/>

providers who fail to act in accordance with the NDIS Code of Conduct will be held to account. Without a strong oversight mechanism, or 'big stick' that maintains standards of service delivery through enforcement measures and proactive compliance strategies, the quality of a participant's service provision can depend upon whether they happen to encounter a safe and ethical service provider.

The risks to consumers in a market where service providers are inadequately held to account will be greater still when jurisdictions such as Queensland proceed with their stated intention to withdraw as a provider of last resort in relation to Positive Behaviour Support Plans (PBSPs).⁵³ It is one thing to remove the Queensland government's statutory monopoly on the preparation of PBSPs for seclusion and containment⁵⁴, but it is another entirely to withdraw as a provider of last resort. The inability of the NDIS market to provide high quality, timely, evidenced-based, and innovative PBSPs has been demonstrated in inquiries such as the Queensland Productivity Commission's inquiry into the NDIS market.⁵⁵ The grave nature of Restrictive Practices require a safety net that the free operation of the NDIS market cannot always provide. People with disability subject to such practices require a level of certainty that they can access appropriate supports, including PBSPs from a government provider if the market cannot provide one.⁵⁶ The provision of these last resort services should be regarded as an obligation of government similar to the provision of public health services.

Further, conflicts of interest inherent in many NDIS transactions, such as when participants access service provision and support coordination from the same provider, continue to leave people with disability at an unacceptable risk of exploitation. QAI is also aware that some NDIS service providers have asked NDIS participants to sign clauses within their service agreements that waive their rights under consumer protection laws.

There is a critical need for stronger safeguards in the NDIS. For example, the NDIS Quality and Safeguards Commission could improve its complaint handling processes, impose consequential enforcement measures that successfully deter stakeholders from breaching the Code of Conduct or registration requirements, proactively monitor situations where conflicts of interests are occurring and make warm referrals to advocacy services on behalf of participants when a complaint is registered with the Commission.

Protect people in detention

QAI holds grave concerns regarding some of the physical and psychological conditions that people deprived of their liberty experience when detained in certain Queensland-government funded institutions, such as the Queensland Forensic Disability Service and the Rockhampton Mental Health Inpatient Unit. Conditions observed directly by QAI staff, along with anecdotal reports from our clients and other stakeholders, raise concerns of potential torture and cruel, inhuman and degrading treatment or punishment of people with disability deprived of their liberty in these

⁵³ Queensland Government submission to the Queensland Productivity Commission Inquiry into the National Disability Insurance Scheme market in Queensland, p44

⁵⁴ <https://www.dsdsatsip.qld.gov.au/resources/dsdsatsip/disability/service-providers/centre-excellence/containment-and-seclusion.pdf>

⁵⁵ QPC Final Report – The NDIS market in Queensland, April 2021; <https://s3.treasury.qld.gov.au/files/NDIS-final-report-volume-1.pdf>

⁵⁶ Link to our submission to QPC inquiry

institutions, and they provide further evidence of the systemic abuse, neglect, and exploitation of people with disability in Australian society.

People who are deprived of their liberty and who are held in places of detention, out of sight from the broader community, are the most vulnerable to abuse and mistreatment. In acknowledgement of this, Australia and many other countries have ratified the Optional Protocol to the Convention Against Torture (OPCAT). OPCAT requires the introduction of a National Preventive Mechanism (NPM) that will conduct inspections of places of detention to ensure compliance with the Convention Against Torture (CAT) and prevent the mistreatment of people in detention.

An effective and disability-aware implementation of OPCAT is essential given the significant over-representation of people with disability in all places of detention and the higher rates of violence experienced by people with disability in those settings.⁵⁷ People with disability who are detained are subjected to disability-specific types of torture and ill-treatment, such as the use of Restrictive Practices, and can be subjected to disability-specific types of detention, such as being held in mental health wards and forensic disability centres. Yet Australia (and Queensland) has made a concerning lack of progress in implementing OPCAT. The little progress made does not include disability specific places of detention within the operation of the proposed NPM, with the former Australian Government adopting a ‘primary vs secondary’ approach to the definition of places of detention, despite this not being consistent with OPCAT and recently being the subject of criticism by the United Nations Committee Against Torture.⁵⁸

The implementation of OPCAT in Australia is at risk of failing to meet the needs of people with disability unless specific changes are made. OPCAT represents a unique opportunity to improve safeguards for people who are deprived of their liberty, which disproportionately includes people with a disability, yet Australia’s failure to establish an independent, effective, and well-resourced network of NPMs ahead of the deadline in January 2023 is causing the Committee Against Torture ‘serious concern.’⁵⁹ This follows a failed visit by the Subcommittee on the Prevention of Torture to Australia in October 2022 when the Committee was forced to suspend its visit due to being denied access to several places of detention in Queensland and New South Wales.⁶⁰

Until Australia’s OPCAT implementation includes the monitoring of disability-specific places of detention using a disability-aware approach, people with disability will continue to experience, and be at risk of, violence, abuse, neglect, and exploitation in these settings.

QAI has produced a position statement with six recommendations for effective OPCAT implementation in Australia. It calls for; OPCAT monitoring and reporting obligations to extend to all places of detention; the appointment of the Australian and Queensland Human Rights Commissions to lead and coordinate the NPMs for Australia and Queensland respectively; formal collaborations with Civil Society Organisations; formal collaborations with people with lived experience of detention in monitoring activities; the provision of culturally and disability inclusive

⁵⁷ Lea et al. (2018): A disability aware approach to torture prevention? Australian OPCAT ratification and improved protections for people with disability, Australian Journal of Human Rights, DOI: 10.1080/1323238X.2018.1441611

⁵⁸ Committee Against Torture, Dec 2022, Concluding observations on the sixth periodic report of Australia (CAT/C/AUS/CO/6), p13

⁵⁹ Ibid

⁶⁰ Office of the United Nations High Commissioner for Human Rights, “UN torture prevention body suspends visit to Australia citing lack of co-operation”, 23 October 2022.

information to people in detention; and the enactment of OPCAT compliant legislation at both the federal and state/territory levels.⁶¹

Independent disability advocacy

Another critical safeguard that helps to identify and protect against violence, abuse, neglect, and exploitation of people with disability is a well-resourced, independent disability advocacy sector. As the Queensland Public Advocate recently stated, “individual advocacy is a critical safeguard for at-risk adults as advocates can support people to navigate complex systems, make complaints and raise concerns, ensure that their rights and wellbeing are protected, and that their preferences are heard.”⁶² Independent disability advocates work alongside people facing disadvantage to promote, protect and defend human rights by supporting the person’s will and preferences to be upheld. This can include provision of supported decision-making and can involve assisting a person to hold government departments and other entities to account.

However, funding for disability advocacy is notoriously fragmented, short-term, and perpetually inadequate, meaning that many people with disability who require advocacy are either unaware of its existence, or are unable to access it. In Queensland, recent changes to the distribution of disability advocacy funding across the state have led to an effective reduction in the availability of disability advocates and their capacity to support people experiencing violence, abuse, neglect, and exploitation. Since the establishment of the Queensland Independent Disability Advocacy Network (QIDAN) in January 2022, in just its first few months, QIDAN member organisations had to turn away hundreds of requests for advocacy due to lack of capacity and resourcing.⁶³ Additionally, many QIDAN member organisations service communities across hundreds of square kilometres with very limited resources for outreach and regional and remote engagement.⁶⁴ People with disability also do not always have literal access to phones, emails, or computers or the internet, or find these methods of communication inaccessible, making the need for face-to-face advocacy support even more critical, yet increasingly unachievable given the limited funding.

Instability in the advocacy sector due to insufficient and short-term funding cycles has a direct impact on the lives of people with disability. The importance of independent advocacy is cited in most, if not all relevant inquiries⁶⁵, yet it has failed to attract the commitment from state and federal governments that it requires, forcing the sector to use already depleted resources to continuously advocate for its ongoing existence.

As disability advocacy is a shared responsibility across all levels of government, we need greater collaboration and investment between the Commonwealth, state, and territory governments. Despite mistaken beliefs to the contrary, the introduction of the NDIS does not absolve state and territory governments of their responsibilities to fund disability advocacy, as most people with disability are ineligible for the NDIS and continue to primarily rely upon state funded services.⁶⁶

⁶¹ QAI (2022) The Case for a National Preventive Mechanism to implement the Optional Protocol to the Convention Against Torture; <https://qai.org.au/wp-content/uploads/2022/12/QAI-position-statement-on-OPCAT-requirements.pdf>

⁶² Office of the Public Advocate (2022) *Adult Safeguarding in Queensland, Volume Two: Reform Recommendations*, p53

⁶³ Data obtained from QAI who facilitate the QIDAN network.

⁶⁴ QIDAN (2022) *Review of the National Disability Advocacy Framework 2022-2025*, p6

⁶⁵ For example, increased funding for independent advocacy was a recommendation of the Royal Commission into Aged Care Quality and Safety – recommendation 106 of the Final Report

⁶⁶ See comments from ADA Australia Chief Executive Officer in <https://probonoaustralia.com.au/news/2021/03/disability-groups-fight-for-qld-advocacy-funding/>

Further, many people with disability require advocacy support to engage with agencies that are operated by state and territory governments, such as education, transport, and the justice system. Moreover, funding of advocacy support for people engaging with the NDIS is, and must be, an additional, not alternative, funding stream.

QAI agrees with the Queensland Public Advocate's recommendation that state and federal governments should introduce five yearly funding cycles in order to provide much needed certainty for the sector.⁶⁷ The sector must also be sufficiently resourced to provide local advocates with knowledge of local problems and supports, in order to provide advocacy in a manner that is trauma-informed and effective.⁶⁸ QAI also supports DANA's submission on Independent Disability Advocacy to the Disability Royal Commission and endorses the detailed recommendations contained therein.⁶⁹

National human rights legislation

Human rights legislation has an invaluable role to play in safeguarding against violence, abuse, neglect, and exploitation. A recent report by the Human Rights Law Centre found that human rights laws in Victoria, Queensland and the ACT have all made concrete improvements to people's lives. The report describes 101 cases where the laws helped to uphold or prevent unreasonable restrictions on human rights, including examples that specifically concerned the treatment of people with disability. For example, the *Human Rights Act 2019* in Queensland was used to assist a couple with disabilities to avoid losing custody of their child, and instead access support to build practical and parenting skills to ensure their child was not removed from their care.⁷⁰ It also showed how human rights laws had helped to create accessible and inclusive communities. For example, when escalators at a train station were replaced by steep, inaccessible stairs, an older resident of the community made a human rights complaint which was resolved through a conciliation process that led to agreement that escalators would be installed as part of the station upgrade.⁷¹

According to the Human Rights Law Centre, "charters of human rights help to level the playing field by promoting respect for human rights and by giving people power to take action if their rights are breached."⁷² Australia is the only western democracy without a national charter or similar law.⁷³ Relying on state and territories to enact human rights legislation means that access to justice and human rights protections is inconsistent and dependent upon a person's location rather than a universally accessible right for all Australians that is consistent with the concept of all human beings being born equal and possessing inalienable rights. It means that human rights considerations are not embedded into all administrative decision-making by Australian public authorities. And it inhibits the development of a national human rights-focused culture due to fragmented human rights protections.

⁶⁷ Office of the Public Advocate (2022) *Adult Safeguarding in Queensland, Volume Two: Reform Recommendations*, p54

⁶⁸ QIDAN (2022) *Review of the National Disability Advocacy Framework 2022-2025*, p 6

⁶⁹ DANA submission to the Disability Royal Commission into Violence, Abuse, Neglect and Exploitation, 'Independent Disability Advocacy', December 2022

⁷⁰ Human Rights Law Centre (2022) *Charters of Human Rights Make Our Lives Better – Here are 101 cases showing how*, p18

⁷¹ *Ibid*, p19

⁷² *Ibid*, p2

⁷³ *Ibid*, p2

Accordingly, QAI supports the national campaign for an Australian Charter of Human Rights. A national charter of human rights would provide an important safeguard against the violence, abuse, neglect, and exploitation of people with disability by ensuring all Australians with disability, regardless of where they live, have equal access to justice if their human rights are violated.

Recommendations

5. Introduce stronger structural safeguards that will protect against abuse

- a. The Australian government legislate an Australian Charter of Human Rights that gives full effect to the Convention on the Rights of Persons with Disabilities (CRPD).**
- b. Ensure greater oversight and safeguards for disability supports provided under the NDIS. For example:**
 - **Require the NDIS Quality and Safeguards Commission to monitor the number of applications for the appointment of substitute decision-makers initiated by NDIS service providers for NDIS participants, and introduce penalties for applications found to be unmeritorious.**
 - **Strengthen the remit and capacity of the NDIS Quality and Safeguards Commission to conduct independent investigations and to proactively monitor and regulate the delivery of disability supports under the NDIS.**
 - **Ensure each state and territory retains its role as a provider of last resort in relation to Positive Behaviour Support Plans.**
 - **Prevent service providers from providing both support coordination and core supports to individual NDIS participants.**
 - **Ensure blanket consumer law protections to NDIS participants, including access to specialised legal advice, regardless of the contents of individual NDIS service agreements.**
- c. Implement an independent and sufficiently resourced National Preventive Mechanism that is disability-aware, and which successfully fulfils Australia's obligations under the Optional Protocol to the Convention Against Torture, including making provision for inspection and reporting about the conditions and treatment of people detained in all authorised mental health services, forensic mental health services, forensic disability services and residential aged care services.**
- d. Ensure a well-resourced and sustainable independent disability advocacy sector that ensures people with disability can access face-to-face, local, and trauma-informed disability advocacy. This requires at a minimum, five-yearly funding cycles and a shared commitment from both Commonwealth and state and territory governments to fund disability advocacy into the future, notwithstanding the implementation of the NDIS.**

6. Address intersectional disadvantage

QAI acknowledges the additional barriers experienced by Aboriginal and Torres Strait Islander Australians with disability as well as those of other marginalised populations, such as Australians living with disability from CALD communities, older Australians, and members of the LGBTIQ+ community living with disability. The intersectional disadvantage experienced by these groups has a significant impact on their inclusion within the community and therefore their capacity to be

protected against violence, abuse, neglect, and exploitation. Policy measures designed to address the consequences of ableism must therefore be equally responsive to the impacts of racism, xenophobia, ageism and homophobia, and alert to all aspects of a person's identity and their related experiences.

For example, First Nations Australians with psychosocial disability have reported experiencing culturally unsafe support in authorised mental health services.⁷⁴ Inexperienced staff who have a poor understanding of culturally safe practices can create culturally unsafe environments. This can lead to First Nations consumers absconding due to feeling isolated and trapped in a culturally unsafe and enclosed space, with consequences upon their return to detention for their access to community leave, which in turn, impacts their discharge planning and recovery.

Similarly, applications for the appointment of the Public Guardian or Public Trustee as substituted decision-makers are less likely to be challenged by families from CALD communities if, due to the family's cultural beliefs and experiences, they do not feel comfortable challenging the government.⁷⁵ This can result in a loss of informal support for the adult and a deterioration in important personal and family relationships.

Intersectional disadvantage is also apparent in the disproportionate use of suspensions and exclusions of students with disability in Queensland state schools. In February 2022, QAI and ATSILS wrote to the Queensland Human Rights Commissioner, detailing longstanding concern that students with disability and First Nations students were being suspended and excluded from school more frequently than their peers.⁷⁶ Evidence has since revealed that students with disability had 3.11 times the risk of short-term suspension in 2022, whereas students with disability who also identified as First Nations faced 5.23 times the risk of short suspension, compared to students not in any of those groups.⁷⁷ Policy responses that aim to address challenging behaviour of school students must therefore recognise the complex and intersecting experiences of students from these backgrounds. For example, there needs to be awareness that First Nations students might have undiagnosed disability because English is a second or third language for them.

For too long, issues relating to disability or indigeneity have been considered in silos, but for people who belong to those communities, their identities are inseparable and interconnected. We therefore need policy responses that are sophisticated, and which consider all elements of a person's identity. Ensuring that people with lived experience from diverse communities are involved in policy-making is an essential starting point for this.

Recommendations

6. Address intersectional disadvantage

- a. **Ensure sophisticated policy responses to disability issues that consider all elements of a person's identity. This means being responsive to the additional barriers faced by First**

⁷⁴ See QAI's submission to the DRC on Places of Detention in Qld; <https://qai.org.au/2022/09/02/places-of-detention-in-queensland/>

⁷⁵ Anecdotal account from advocates at Amparo Advocacy Inc

⁷⁶ QAI & ATSILS (2022) *The need for inquiry into school disciplinary absences in Queensland state schools*; <https://qai.org.au/2022/02/16/qai-and-atsils-call-for-inquiry-into-school-disciplinary-absences/>

⁷⁷ <https://qai.org.au/2022/11/25/qld-children-denied-equal-access-to-education/>

Nations Australians, people from culturally and linguistically diverse communities, older and younger Australians, and members of the LGBTIQ+ community.

- b. Consider introducing quotas or mandatory requirements for people with lived experience of disability from diverse communities to be involved in policy-making at all levels of government.**

7. Introduce a redress scheme

Throughout the duration of the Royal Commission, people with disability, their families and supporters have relived traumatic experiences of violence, abuse, neglect, and exploitation to provide evidence of the many ways and varied places in which people with a disability suffer abuse in Australian society.

In light of the significant harm caused by the pervasive and systemic mistreatment of Australians with disability, QAI considers that a National Redress Scheme should be established following the conclusion of the Royal Commission. This is also recommended by the United Nations Committee Against Torture, who call upon the Australian government to establish an “effective, independent, confidential and accessible national oversight, complaint and redress mechanism for persons with disabilities who have experienced violence, abuse, neglect and exploitation in all settings” in their recent *Concluding observations on the sixth periodic report of Australia*.⁷⁸

Redress means to set right a wrong but is often narrowly limited to court-based remedies.⁷⁹ QAI considers that a human rights approach to redress should be adopted, which extends beyond court-based remedies to include ‘reparations.’ Reparations are actions directed toward repairing harms and are delivered outside of the court system in recognition of the systemic injustices impacting particular communities or groups of people.⁸⁰ An approach to redress based upon reparations offers more opportunities for redress than is otherwise available through court-based remedies, including in relation to which wrongs can be addressed, who can participate and how the redress should be provided.⁸¹ However, reparations should operate in tandem with court-based remedies and should not replace access to justice through the courts.

A redress scheme should:

1. Acknowledge the violence, abuse, neglect, and exploitation experienced by people with a disability in Australia;
2. Hold institutions, companies, and individuals accountable for this abuse; and
3. Help people with a disability who have experienced abuse to gain access to counselling, a direct personal response, and/or a redress payment.

Recommendations

7. Introduce a redress scheme based on a human rights approach that includes reparations.

⁷⁸ Committee Against Torture, Dec 2022, *Concluding observations on the sixth periodic report of Australia* (CAT/C/AUS/CO/6), p12

⁷⁹ Steele, L. & Swaffer, K. (2022) *Reparations for Harms Experienced in Residential Aged Care*. Health and Human Rights Journal, 24, 2

⁸⁰ Ibid, p76

⁸¹ Ibid, p77

Following the Disability Royal Commission, introduce a redress scheme that takes a human rights approach that provides reparations alongside court-based available remedies. Ensure it:

- **Acknowledges the violence, abuse, neglect, and exploitation experienced by people with a disability in Australia;**
- **Holds institutions, companies, and individuals accountable for this abuse; and**
- **Helps people with a disability who have experienced abuse to gain access to counselling, a direct personal response, and/or a redress payment.**