



A new Act to replace the *Disability Services Act 1986* (Cth)

**Submission by
Queensland Advocacy for Inclusion**

to

Department of Social Services

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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); 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 phone line for all people with disability in Queensland, and provides non-legal advocacy support to young people with disability, including in relation to education). Our individual advocacy experience informs our understanding and prioritisation of systemic advocacy issues.

Since 1 January 2022, QAI has also been funded by the Queensland Government to establish and co-ordinate the Queensland Independent Disability Advocacy Network (QIDAN). QIDAN has three aims: member support, sector advocacy and systemic advocacy. Member organisations work collaboratively to raise the profile of disability advocacy while also working towards attitudinal, policy and legislative change for people with disability.

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

A replacement Act needs to, among other things:

1. Ensure that people with disability are at the centre of, and meaningfully involved in, decision-making regarding their own lives.
2. Embed supported decision-making into the legislation, requiring disability services governed by the Act to respect and uphold the legal capacity of people with disability.
3. Include an aspirational purpose and vision. For example, replicate the purpose in Article 1 of the Convention on the Rights of Persons with Disabilities (CRPD).
4. Contain a list of general principles that will inform the exercise of legislative power under the new Act. Specifically, replicate the general principles listed in Article 3 of the CRPD.
5. Strengthen the proposed Objects of the Act in keeping with the CRPD and other related legislation, such as the *National Disability Insurance Scheme Act 2013* (Cth).
6. Where possible, achieve consistency within the disability policy and legislative landscape regarding definitions.
7. Limit definitions within the Act to the services governed by the Act, rather than seeking to identify (and therefore potentially limit) a target group of people for those different services.
8. Provide a prescriptive and person-centred approach to the issue of service duplication. Legislate that a person will not be denied access to services or supports while their eligibility for other services is explored or tested. Where duplication exists, the onus should be on the service of the person's choice to continue providing supports until the person decides or is able to obtain services elsewhere.
9. Contain updated quality and safeguarding arrangements that incorporate learnings from the Disability Royal Commission.
10. Consider introducing a minimum set of standards for all disability services, such as a need for basic CPR training and a requirement to facilitate supported decision-making.
11. When considering regulatory alignment, adopt the framework that imposes the highest possible quality of service delivery.
12. Require regulatory bodies to employ persons with disability to ensure the knowledge and lived experience of people with disability is at the heart of service regulation and monitoring.
13. Consider a regulatory framework for the use of Restrictive Practices on all people with disability, by all agencies that seek to apply them, in all settings in which they occur.
14. Improve the definition of "advocacy" by defining the role of advocacy and including other advocacy types, such as individual, legal, systemic, and family advocacy.

Introduction

QAI welcomes the opportunity to provide feedback on the Commonwealth government's plan to replace the *Disability Services Act 1986* (the Act). QAI agrees that a lot has changed in the disability sector over the last three decades, rendering the Act outdated.

However, QAI considers that, unless otherwise required, significant legislative reform that will directly impact the rights of people with disability to access essential disability services should occur after the publication of the Disability Royal Commission's final report later this year, following meaningful consultation with the disability sector regarding the validity of its recommendations. It is hoped that the recommendations will facilitate long-term and substantial systemic change in the way that disability services are delivered. This change must be genuinely co-designed with the sector, where people with disability are actively involved as per Article 4(3) of the Convention on the Rights of Persons with Disabilities (CRPD). This means ensuring people with disability are given access to the support and information they require to participate in policy reform processes on an equal basis with others, which includes accessing information in a variety of formats and having extended time in which to provide feedback.

QAI's submission will provide general feedback on the consultation paper, before commenting on the following topics: Objects of the Act, Definitions and Service Duplication, Quality and Safeguarding arrangements, and Advocacy services.

QAI also endorses the joint submission of the Disability Representative Organisations.

General feedback

The disability policy and legislative landscape is currently fragmented. This Act could sit as an overarching piece of legislation above Acts such as the *National Disability Insurance Scheme Act 2013* (NDIS Act) and provide a set of consistent definitions and service descriptors, as well as a set of minimum standards, that other state and territory disability services and their governing legislation could follow.

To ensure the Act facilitates supports and services that genuinely improve outcomes for people with disability, fulfilling the promise of both *Australia's Disability Strategy 2021-31* (the Strategy) and the CRPD, the replacement Act should, among other things:

- Ensure that people with disability are at the centre of, and meaningfully involved in, decision-making regarding their own lives; and
- Embed supported decision-making into the legislation, by requiring disability services to ensure they respect and uphold the legal capacity of people with disability. Disability services must take active steps to uphold the will and preferences of people with disability and provide access to the support people with disability require to exercise their legal capacity on an equal basis with others.

Further, in acknowledgement of the significant shift in the disability service landscape initiated by the NDIS, a replacement Act needs to recognise not only the theory behind the new market-based approach, but also the reality. In other words, the replacement Act needs to recognise and address the unintended consequences of this changed approach and remedy the gaps created when the market-based approach fails to ensure people with disability have access to services.

Such a gap can be seen in the growing trend of state and territory governments removing themselves as a provider of last resort for the provision of Positive Behaviour Support Plans (PBSPs)

for people with disability subjected to Restrictive Practices.¹ In QAI's experience, NDIS participants who have complex support needs are likely to be subjected to Restrictive Practices and can experience difficulties accessing supports from the free market. For example, some service providers terminate service agreements when challenges arise. This can leave vulnerable people with complex support needs without PBSPs that regulate the use of Restrictive Practices and which provide a pathway towards the elimination and reduction of the use of such measures. The grave nature of the limitations imposed by Restrictive Practices require a safety net that the free operation of the NDIS market will simply not provide and as such, QAI continues to advocate for governments to retain a role as a provider of last resort.

Objects of the Act

QAI considers that the wording of the proposed objects for the new Act, listed on page 4 of the consultation paper, are uninspiring and could be significantly strengthened. They are much shorter than the objects of the NDIS Act, for example. Language such as “*support*” the independence of people with disability, as opposed to “*facilitate*” or “*ensure*”, is somewhat lacklustre and indicative of the pervasive low expectations of people with disability. Similarly, seeking to “*increase*” public awareness and “*acceptance*” of people with disability does not aspire to the level of attitudinal change required by the CRPD.

In light of the significant work undertaken to develop the Strategy, and the intention for a replacement Act to address the Strategy's seven priority areas², the replacement Act should state its intention to support a vision similar to the Strategy's Vision and Purpose, which is:

*“An inclusive Australian society that ensures people with disability can fulfil their potential, as equal members of the community”.*³

Alternatively, Article 1 of the CRPD states that the purpose of the Convention is to:

*“Promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.”*⁴

Including an aspirational purpose and vision such as this would demonstrate the Commonwealth government's commitment to achieving the paradigm shift required by the CRPD and will raise the standards of the services delivered under its authority.

Similarly, given that it is intended the replacement Act will align with Australia's obligations under the CRPD, the new Act should contain a list of general principles that match the general principles listed in Article 3 of the CRPD. These general principles are vital to the effective delivery of disability services and should inform the exercise of legislative power or functions under the new Act. The general principles of the CRPD are:

- Respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons;

¹ For example, the Queensland Government states “...the goal is for these functions to be market driven, with the Queensland Government not providing a provider of last resort function” in ‘Queensland Government response to the Queensland Productivity Commission's Inquiry into the NDIS market in Queensland’, p44

² Consultation Paper: A New Act to Replace the *Disability Services Act 1986*, page 1

³ Australia's Disability Strategy 2021-31, page 5

⁴ Convention on the Rights of Persons with Disabilities, Article 1

- Non-discrimination;
- Full and effective participation and inclusion in society;
- Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity;
- Equality of opportunity;
- Accessibility;
- Equality between men and women;
- Respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.⁵

The proposed objects in the consultation paper also do not mention autonomy, or exercising choice and control, and instead focus purely on the social and economic participation of people with disability. QAI recommends including an object similar to section 3(1)(e) of the NDIS Act:

“Enable people with disability to exercise choice and control in the pursuit of their goals and the planning and delivery of their supports”.

Further, there is no object relating to the need to protect people from experiencing harm from their disability services. QAI recommends including an object similar to section 3(1)(ga) of the NDIS Act:

“Protect and prevent people with disability from experiencing harm arising from poor quality or unsafe supports or services provided under the National Disability Insurance Scheme”.

The object relating to meaningful opportunities for employment, education, and development should also include reference to the need to ensure such opportunities are free from exploitation and guarantee people with disability receive appropriate and respectful remuneration for their work.

Definitions & service duplication

Regarding a definition of *disability*, if the Act is to genuinely align with Australia’s obligations under the CRPD, it should use the definition of disability within Article 1 of the CRPD, which states:

“Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.”⁶

Alternatively, the Strategy states:

“People with disability include, but are not restricted to, those who have long-term physical, mental, cognitive, intellectual, or sensory impairments. People with disability have specific needs, priorities and perspectives based on their individual identities including their gender, age, sexuality, race, and cultural background, and can face additional barriers and inequities.”⁷

⁵ Convention on the Rights of Persons with Disabilities, Article 3

⁶ Convention on the Rights of Persons with Disabilities, Article 1

⁷ Australia’s Disability Strategy 2021-31, page 5

This statement is helpful in its recognition of intersectional disadvantage and reflects the stated intention of the new Act to identify people with particular identities who experience greater barriers to full and effective participation in society.⁸

Ultimately, consistency within the disability legislative and policy landscape is desirable. An alternative approach would be to use the definition of disability contained within the *Disability Discrimination Act 1992* (Cth). However, the definition should be updated to remove references to outdated or inappropriate language, such as ‘disfigurement’, ‘malformation’ or ‘malfunction’.⁹

Further, as the Act is intended to provide a legislative framework for a range of disability services, QAI considers that definitions within the Act should focus on clearly identifying those services as opposed to identifying (and therefore potentially limiting) a target group of people for those services. This is because eligibility criteria and the target group will surely differ between the different types of disability services covered by the Act. The issue of who should receive support from those services will vary between service types. For example, the target cohort for the NDIS is very narrow, being only available to approximately 10% of people with disability.¹⁰ Advocacy services for example, have much broader eligibility criteria and are available to anyone who identifies as having a disability. Some advocacy services also support certain target groups. For example, the Aboriginal and Torres Strait Islander Disability Network Queensland provides individual advocacy support to First Nations people with disability living in Queensland, whereas Speaking Up For You (SUFY) provides individual advocacy to all people with disability living in the Brisbane and Moreton Bay region. Therefore, seeking to define and impose a target group for *all* services governed by the replacement Act will be extremely challenging and could have the unintended consequence of excluding some people with disability from accessing the services that they need, if the definition is too narrow.

QAI also disagrees with the proposed approach for avoiding service duplication when a person is separately eligible for services under the NDIS and state and territory legislation. Specifically, the suggestion that:

“Agencies and providers involved should work together with the person to coordinate the supports and services, avoid duplication, and ensure alignment with the person’s goals”,

is not prescriptive enough and is ambiguous as to how the situation should be resolved, leaving the person with disability at risk of not receiving the essential disability supports that they require.

It is well-known that people with disability access a complex array of Commonwealth funded and state and territory funded disability services, and that gaps created by different service systems, as well as significant administrative processes, often delay or leave people without access to the supports that they need. The onus should not be placed upon the person with disability to prove they are not eligible for one service while seeking access to another, but rather the person should be able to choose which supports or services they access.

Accordingly, the legislation should provide that a person will not be denied access to services or supports while their eligibility for other services is explored or tested. Where duplication exists, the onus should be on the service of the person’s choice to continue providing supports until the

⁸ Consultation Paper: A New Act to Replace the *Disability Services Act 1986*, page 5

⁹ As recommended by the Queensland Human Rights Commission in their report *‘Building Belonging: A review of Queensland’s Anti-Discrimination Act 1991’*, page 26

¹⁰ As per statistics provided by the National Disability Insurance Agency; <https://www.ndis.gov.au/understanding/how-ndis-works/who-ndis-supports>

person decides or is able to obtain services elsewhere, thus removing the risk of a person with disability falling between service gaps. To avoid the risk of service duplication, and creating confusion among recipients, it would be helpful if all Australian government and private funded agencies providing disability services adopted a uniform set of service descriptors and funding codes for disability supports and services.

Quality and safeguarding arrangements

QAI notes the inconsistent quality and safeguarding standards that currently apply across different disability services and we support the intention to work towards regulatory alignment to address this issue.

The replacement Act should contain updated quality and safeguarding arrangements that incorporate changes recommended by the Disability Royal Commission, which has spent the last three years hearing evidence of the many ways in which people with disability suffer violence, abuse, neglect and exploitation at the hands of their service providers.

It would be helpful if there was a minimum set of standards that applied to all disability services, such as a need for basic CPR training and a requirement to facilitate supported decision-making, in order to raise the standards and quality of services. At the same time, when considering regulatory alignment, the framework that imposes the highest possible quality should be chosen. Regulatory bodies should also be required to employ persons with disabilities to ensure the knowledge and lived experience of people with disability is at the heart of service regulation and monitoring. Further, people with disability must be afforded the necessary support, such as access to independent disability advocacy services, to raise concerns regarding the quality and safety of their services.

The government could work towards implementing consistent national quality and safety standards over a set period of time and work towards requiring all providers to operate under a single set of standards and regulatory framework. Or at the least, the same set of standards, with different but similar enforcement approaches depending on whether providers are operating under Commonwealth or state and territory legislation.

Further, QAI supports the adoption of a regulatory framework that would have oversight of the use of Restrictive Practices on all people with disability, by all agencies that seek to apply them, and in all settings in which they occur. QAI has advocated extensively on the issue of Restrictive Practices and considers the fragmented regulatory system and its heavily bureaucratized processes as a contributing factor towards the unacceptably high number of Restrictive Practices used on people with disability.¹¹

Advocacy services

A well-resourced, independent disability advocacy sector is a critical safeguard that helps to ensure quality and safeguards around disability services and QAI is eager to ensure that a replacement Act will appropriately support its continued growth.

As the Queensland Public Advocate recently stated:

¹¹ See for example, QAI's submission on Restrictive Practices to the Disability Royal Commission; <https://qai.org.au/2020/12/10/restrictive-practices/>

“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.”¹²

Despite this recognition 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.¹³ Additionally, many QIDAN member organisations service communities across hundreds of square kilometres with very limited resources for outreach and regional and remote engagement.¹⁴ 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 inquiries¹⁵, 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.

Disability advocacy is a shared responsibility across all levels of government, and we need greater collaboration and investment between the Commonwealth, state, and territory governments. For example, funding of advocacy support for people engaging with the NDIS is, and must be, an additional not alternative funding stream. The sector must also be sufficiently resourced to provide local advocates with knowledge of local problems and supports, to provide advocacy in a manner that is trauma-informed and effective.¹⁶

A recent and extremely concerning development regarding advocacy funding has been the direction from some state and territory governments that state-funded disability advocacy organisations should only provide advocacy services to people with a disability in relation to issues or services *that are state or territory funded*.¹⁷ For example, health, education, and justice. Such an arbitrary approach completely ignores the complexities of people with disabilities lives and results in an approach to service delivery that is impractical and ultimately disadvantageous to the person with disability who must access multiple advocacy services. For example, an advocate may begin assisting a person with a complaint about their access to reasonable adjustments in school, but after supporting the person with meetings and communication with the school, then discovers that this requires accessing supports from the NDIS. In this situation, the current approach of some

¹² Office of the Public Advocate (2022) *Adult Safeguarding in Queensland, Volume Two: Reform Recommendations*, p53

¹³ Data obtained from QAI who facilitate the QIDAN network.

¹⁴ QIDAN (2022) *Review of the National Disability Advocacy Framework 2022-2025*, p6

¹⁵ 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

¹⁶ QIDAN (2022) *Data Analysis January – June 2022*, <https://disabilitypathways.org.au/qidan-data-analysis/>

¹⁷ This has reportedly happened in New South Wales and Western Australia.

jurisdictions would require the person with disability to then be referred to a Commonwealth funded advocacy organisation to access support with applying to the NDIS (assuming there is a Commonwealth funded advocacy service with capacity to assist) where the person with disability is forced to begin all over again and re-tell their story to a new advocate, causing both distress to the person and delays to the resolution of their matter.

It is critical that a replacement Act is responsive to the contemporary and urgent needs of the advocacy sector. QAI endorses DANA's submission on Independent Disability Advocacy to the Disability Royal Commission and the detailed recommendations contained therein, and we urge the Department to consider this submission prior to making legislative changes that will impact the provision of advocacy services in Australia.¹⁸

Additionally, QAI considers that a replacement Act should contain an improved definition of the term "*advocacy*". The Department has existing definitions of advocacy which capture the different types of disability advocacy that exist.¹⁹ However, the current Act only defines advocacy in terms of self-advocacy, citizen advocacy and group advocacy, failing to acknowledge individual, family, legal or systemic advocacy at all.²⁰

As well as defining all types of advocacy, a replacement Act should consider defining the role of advocacy, similar to the NDIS Act which states:

"The role of advocacy in representing the interests of people with disability is to be acknowledged and respected, recognising that advocacy supports people with disability by:

- (a) promoting their independence and social and economic participation; and*
- (b) promoting choice and control in the pursuit of their goals and the planning and delivery of their supports; and*
- (c) maximising independent lifestyles of people with disability and their full inclusion in the community.²¹*

Conclusion

QAI thanks the Department of Social Services for the opportunity to contribute to this consultation process. We are happy to provide further information or clarification of any of the matters raised in this submission upon request.

¹⁸ DANA submission to the Disability Royal Commission into Violence, Abuse, Neglect and Exploitation, '*Independent Disability Advocacy*', December 2022

¹⁹ Department of Social Services, '*National Disability Advocacy Program*', <https://www.dss.gov.au/our-responsibilities/disability-and-carers/program-services/for-people-with-disability/national-disability-advocacy-program-ndap>

²⁰ *Disability Services Act 1986* (Cth), section 7

²¹ *National Disability Insurance Scheme Act 2013* (Cth), section 4(13)