

5 March 2021

Our ref: VK-H&D/DAN

Committee Secretariat

Joint Standing Committee on the National Disability Insurance Scheme  
PO Box 6100  
Parliament House  
Canberra ACT 2600

By email: [REDACTED]

### **Supplementary | NDIS operation and implementation**

Dear Committee Secretariat

Thank you for the opportunity to provide feedback on some of the issues encountered with the implementation and performance of the National Disability Insurance Scheme (the **NDIS**). The Queensland Law Society (**QLS**) appreciates the opportunity to provide feedback on these important issues.

We refer to our correspondence dated 16 October 2020 (the **QLS Submission**). We provide the following as supplementary to that correspondence.

This response has been compiled with assistance of the QLS Diverse Abilities Network and the QLS Health & Disability Law Committee, whose members have lived experience and substantial expertise in the issues relating to this inquiry.

### **NDIS price guide, equity, and resources allocation**

QLS is advised that the NDIS price guide and associated rebates are considerably higher than the prices and rebates afforded to similar services under Medicare. As a result, service providers are able to charge at a higher rate for the same services than would be applied in the case of treating a private patient. The effect of this practice is that participants who rely on the NDIS to provide these services exhaust their allocated NDIS package faster, as increased funds are disbursed to cover the mark up.

To ensure the ongoing economic sustainability of the NDIS, it is critical that the elevated prices, particularly relating to provision of allied health services, are appropriately justified. If they are justified, then it is incumbent upon the government to communicate this to the community in the interests of meeting its transparency and accountability obligations.

The issue of economic sustainability cannot be decoupled from another critical issue – equitable access and participation in the scheme. The *National Disability Insurance Scheme*

## NDIS operation and implementation

Act 2013 (Cth) (the **NDIS Act**) intends to allocate funding for disability with the objective of supporting the independence, social and economic participation of persons with severe or profound disability.<sup>1</sup> To achieve this, the NDIS is to provide 'reasonable and necessary'<sup>2</sup> supports to eligible participants, by way of covering costs for services intended to assist and optimise the eligible person's ability to participate in society.<sup>3</sup>

It follows that resource allocation must be equitable and just. We rely on the following definition as an appropriate interpretation of what equity means in the context of allocating funding:

*"Equity has many meanings, but I propose to use it to mean the utilisation of resources to achieve societal and health system objectives, reflected by the [NDIS] Act, in a manner considered fair and legitimate. This broad view of the fundamental basis of equitable rationing is widely used in literature."*<sup>4</sup>

This is not to say that access to the NDIS scheme ought to be further restricted based on economic sustainability, rather, that it is essential that the process for funding the scheme and the distribution of that funding occurs in a way that is transparent, clear, and equitable.

Apportionment of a finite amount of funding equitably between participants, whilst ensuring that the scheme maintains fiscal buoyancy to guarantee that all eligible persons will be given access to the scheme, is a difficult balance.

Current funding of the scheme would appear to make this an impossible challenge – it is appraised that of the estimated 4 million Australians with disability,<sup>5</sup> the scheme only covers 10% of that number.<sup>67</sup> The 2016-2017 Federal budget noted an estimated \$4.4 to \$5 billion per annum funding shortfall, for which the Commonwealth is wholly responsible.<sup>8</sup>

A consequence of this funding deficit is that eligible persons currently do not receive assistance to seek required support services, and that the Federal Government is non-compliant with its obligations pursuant to the tenets of the NDIS Act.

Notwithstanding this critical issue, it is essential that other factors impacting upon economic sustainability of the scheme are analysed. The NDIS price guide and the accuracy of billing and accounting systems are two examples of key aspects of the scheme's operations which directly affect the sustainability of an individual's plan. In addition to the elevated prices set out in the guide, our members report innumerable issues with overcharging and other billing

---

<sup>1</sup> National Disability Insurance Scheme Act 2013 (Cth), s 3(1).

<sup>2</sup> Ibid, s 34.

<sup>3</sup> Greg Spinda, *Equitable Rationing: The Survival Kit for the National Disability Insurance Scheme*, LWN164 Health Care Law and Ethics, Queensland University of Technology, 2016, 2.

<sup>4</sup> Ibid, 2-3.

<sup>5</sup> Australian Institute of Health and Welfare, 'People with disability in Australia 2019: in brief' <https://www.aihw.gov.au/reports/disability/people-with-disability-in-australia-in-brief/contents/how-many-people-have-disability>

<sup>6</sup> NDIS, 'There are now 400,000 NDIS participants' <https://www.ndis.gov.au/stories/5067-there-are-now-400000-ndis-participants#:~:text=There%20are%20now%20400%2C000%20NDIS%20participants..for%20the%20very%20first%20time..>

<sup>7</sup> Ibid, 4, referring to the report by PricewaterhouseCoopers, 'Disability expectations, investing in a better life, a stronger Australia' (Report, PricewaterhouseCoopers, November 2001), 11 and 16.

<sup>8</sup> Ibid, 4, referring to the Australian Government budget paper, Australian Government, *Budget 2016-2017, Budget Paper No. 1 Fiscal Strategy and Outlook* (Commonwealth of Australia, 3 May 2016 3-14).

## NDIS operation and implementation

discrepancies. Correcting these errors (in cases where they are noticed at all) is a time-consuming process. This may be challenging for participants with an intellectual disability.

An independent review of the costs scale set out in the price guide, alongside improved mechanisms to increase billing transparency and accountability would assist government efforts to improve the scheme's fiscal sustainability. A comprehensive consultation process must be undertaken to inform this review, including appropriate time allowed to ensure accessibility to the process and feedback from a broad spectrum of NDIS participants.

In addition, we recommend that the National Insurance Disability Agency (**NDIA**) develop a system or specialised team to seek out and assist identified cohorts in seeking access to the scheme. This should be undertaken by expanding and providing additional resources to the Assessment and Referral team, with the objective of reaching vulnerable community groups – including persons in remote areas, Indigenous communities, and persons from culturally diverse backgrounds.

### Independent Assessments

We refer to the matters raised in the QLS submission regarding independent assessments. This issue, including whether the proposition is appropriate and compliant with the NDIS Act, is intertwined with the robustness and efficacy of training programs which are provided to NDIA staff. Without appropriately trained delegates and agency support staff, equitable decision-making and outcomes for participants cannot be assured. It has been suggested that the scheme should implement a structure whereby staff are comprehensively trained and upskilled to deal with particular injury cohorts, to ensure decisions are consistent and equitable.<sup>9</sup>

The implementation of targeted services and funding to manage 'starting inequity' between persons applying for the scheme will assist in the provision of equitable support for all eligible persons, irrespective of an individual's level of education or financial capital. Independent assessments alone will not improve this disparity.

There will still be financial barriers regarding access to the scheme as participants need diagnostic reports and evidence of permanency, which will not be provided by independent assessors.

We reiterate our concerns made in the QLS submission that the imposition of independent assessors runs contrary to intention of the NDIS Act – depriving individuals of the choice, autonomy and control that the legislation purports to promote. The imposition of an additional step in the process which requires a person to undergo a separate assessment by NDIA staff or a delegate has not been adequately demonstrated to be justified by the NDIA's governing body, or by the Department of Social Services. Further, and of significant concern, is that these additional assessments may be relied upon and considered to carry more weight than the assessment of the applicant by an allied health professional.

Forcing a person to be examined unnecessarily and without demonstrating any clinical need is an affront to a person's dignity; the process of retelling their story to a stranger can be triggering particularly for people with psychosocial disability and without being able to choose

---

<sup>9</sup> Ibid, 19.

## NDIS operation and implementation

their own assessor, the person cannot be assured that the delegated assessor will have an appropriate level of knowledge and experience about their condition. This method does not properly consider if any assessor will be socially or culturally appropriate for an individual and their circumstances and no guarantees have been made by the NDIA in this regard. The agency has advised that 'where possible' people can choose the gender of their assessor. This uncertainty is unacceptable for individuals who have a history of trauma or abuse.

Whilst reducing functional assessments to a brief or singular assessment may be intended to simplify and bring consistency to assessing NDIS applications, our members have concerns that this approach represents a 'one size fits all' attitude towards people with disability, which is inappropriate given the diversity among this cohort of people. It is also at odds with the values of the NDIS Act as described under Part 2.

Issues concerning the use of delegates have been known for some time. Reliance on delegates in relation to implementation and operationalisation of scheme functions by delegates is problematic, as decisions made in individual cases rely on a degree of discretion – and with this the risk of bias, inconsistency and lack of accountability.<sup>10</sup> Whilst the Operational Guidelines are intended to set criteria to guide delegates in decision-making, we note that much of these merely repeat the NDIS Act and the Rules, and have been criticised as not providing tangible guidance in relation to assessing participant needs.<sup>11</sup>

Substantial further consultation of the independent assessment process is urgently required. This should include the integration of timely and efficient internal review mechanisms for participants seeking to review a decision made by an independent assessor, including the substance of that decision (and not merely the process followed). This is a critical step in seeking to assure participant accessibility to justice and due process.

We refer to the February 2021 submission made by Queensland Advocacy Incorporated (**QAI**) and its recommendations regarding policy reforms for independent assessments. We note that the need for additional and comprehensive consultation on this issue is also supported in the submission made by the Office of the Public Advocate, Queensland (the **OPA**). QLS strongly supports the recommendations set out in the QAI submission and reiterates the position on this issue set out by both QAI and the OPA.

A copy of these submissions is **enclosed** for your reference.

### Effectiveness of the Quality and Safeguards Commission

Our members have raised concerns with the efficacy and functionality of the Quality and Safeguards Commission (the **Commission**). These concerns relate to a variety of key operational aspects of the Commission, including complaints mechanism, the registration process, insufficient monitoring and oversight to avoid conflict and coercion issues, monitoring of and action to eliminate use of restrictive practices, and lack of clarity with respect to the Commission's ability and use of compliance and enforcement actions.

---

<sup>10</sup> Above n 3, 14, in reference to Volker Schmidt, 'Models of healthcare rationing' (2004) 52(6) *Current Sociology*, 969, 970.

<sup>11</sup> Ibid, 14.

## NDIS operation and implementation

### *Complaints process*

Our members report that the Commission's complaint and registration process is unnecessarily lengthy, and administratively burdensome. Upon reflection of member and participant experiences which did not successfully resolve the complaint, it is suggested that the process is wholly ineffective.

Timeliness is a crucial determining factor for persons with disability who seek to have an issue rectified, as complaints will often relate to a need for critical support services. A person with needs who requires urgent relief or support cannot afford to waste time engaging in a protracted complaints process which may not result in a satisfactory outcome. Our members report that, rather than endure this process, it is more effective to send complaints directly to the Ministers for the Department of Social Services, including the Minister for the National Disability Insurance Scheme and Minister for Government Services. Whilst this approach often provides the best chance for speedy resolution, it is a reflection of the ineffectiveness of the Commission's ability to effectively manage complaints. It also raises questions of equity and overall accessibility – not every participant is equipped to raise a complaint directly with a Minister, or even to know that this opportunity exists.

It is reported that in many cases, the complaint is withdrawn or abandoned due to a lack of progress. Whilst the Commission will then administratively mark an issue as 'resolved', in effect, a person has given up and consequently may be left without crucial support services.

We note that this issue has been raised with the Committee by disability organisations on several occasions. We refer to, and endorse, the submission made to this Committee by QAI in July 2020, which describes this issue in detail. A copy of the submission by QAI is **enclosed** for your reference.

### *Supported Independent Living*

QLS is concerned that supported independent living arrangements (**SILs**) are not operating to provide participants with outcomes in compliance with section 3 of the NDIS Act.

In particular, practices where a SIL bundles together specialist disability accommodation with provision of support coordination services. There are a number of concerns with this, including the potential for conflicts of interest to arise. Our members report that it is not uncommon for a single service provider to provide all or multiple types of services for a participant. This bundled approach often arises by referral – for example, a support coordinator employed by an organisation to assist a participant then refers that person to spend their NDIS plan funds on other services provided by the same organisation.

The NDIA acknowledged that this practice occurs, and recognises that there are inherent issues with its practice. In its own submission to this Committee in response to the Inquiry into Supported Independent Living,<sup>12</sup> the NDIA addressed the practice:

*"The NDIA is aware of the risks that can be associated with the provision of SIL and SDA [Specialist Disability Accommodation] by the same provider, including that persons could feel pressured to accept poor quality services due to a concern that a*

<sup>12</sup> National Disability Insurance Agency Submission to the Joint Standing Committee on the National Disability Insurance Scheme, submission number 11, [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/National\\_Disability\\_Insurance\\_Scheme/IndependentLiving/Submissions](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/National_Disability_Insurance_Scheme/IndependentLiving/Submissions).

## NDIS operation and implementation

*complaint about one aspect of their supports might affect their ongoing accommodation. The SDA rules require separable service agreements to be in place with regard to SIL and SDA provision. There is also a general requirement for providers to have procedures in place to manage any real or potential conflicts of interest. SDA providers must also open up SIL arrangements to competition. Equally it is recognised that this does not universally occur, but going forward it is expected this should be a key design parameter."*

It is unclear what steps have been taken by the NDIA to ensure that separable agreements are in place in cases where the SIL and SDA are bundled together, and that those participants who have entered into these arrangements have done so voluntarily and with an understanding of the other options that are available to them. It is incumbent on the NDIA to implement protocols to safeguard the rights of participants who require SIL and SDAs, including to ensure that the NDIA Act's objectives are preserved. These include a person with disability's right to exercise choice and control in the pursuit of their goals, and the planning and delivery of their supports.<sup>13</sup>

Serious concerns have been raised by our members regarding exploitative actions by service providers in relation to provision of SIL arrangements. This includes examples where a service provider will allocate multiple people into independent living accommodation, but continue to charge each participant for private accommodation when it is a shared living arrangement. Other processes relied on by service providers are presumably designed with a focus on service provider administrative convenience, rather than on facilitating the best living arrangement for the individual. For example, a participant is unable to seek a review or make changes to their accommodation arrangement without undergoing a full review of their plan. Applications for an NDIA internal review of a SIL package are only permitted within the first 3 months of the participant entering the accommodation, meaning that a participant is often 'locked in' to a SIL package that may not be suitable, for an extended period of time. Appeal pathways to the Administrative Appeals Tribunal are restrained to the limited jurisdiction of the Tribunal to make decisions on these issues.

### *Specialist disability accommodation*

Similar concerns are held with respect to the provision of specialist disability accommodations, particularly in relation to charging and cost structure and ability for a person to exercise individual choice.

Section 3(1) of the NDIA Act describes the legislation's objectives, which are intended to promote a person's individual rights and autonomy. Section 3(1)(c) acknowledges that these rights include equal opportunity to pursue financial stability and advancement, stating that the legislation intends to "*support the independence and social and economic participation of people with disability.*"

This premise is repeated again in the Act's general principles under section 4:

**4(2)** *People with disability should be supported to participate in and contribute to social and economic life to the extent of their ability.*

---

<sup>13</sup> Above n 1, s3(1)(e).

## NDIS operation and implementation

**4(8)** *People with disability have the same right as other members of Australian society to be able to determine their own best interests, including the right to exercise choice and control, and to engage as equal partners in decisions that will affect their lives, to the full extent of their capacity.*

This is inconsistent with the functioning of SDAs. Section 24 of the *National Disability Insurance Scheme (Specialist Disability Accommodation) Rules 2020* (the **SDA Rules**) requires that specialist disability accommodation must be provided by an SDA provider.

However, the SDA Rules do not appear to include provision for a participant to become their own SDA provider. This would allow a participant to invest in their own accommodation and to build assets, and in doing so would align with the objectives relating to economic independence and equal participation.

### Education integration

Significant improvements are needed in the education sector at early childhood, primary, secondary and tertiary levels to ensure that every individual receives consistent educative support.

QLS is concerned by reports from our members who act for children and young people with disability that there is often a reluctance or refusal by an educational facility to allow NDIS service providers to conduct assessments, or provide services within school grounds. The attitude that the NDIS should '*stop at the [school] gate*' is one which continues to have influence in Queensland schools, to the detriment of children with disability being provided with equal access to education and optimal opportunity to learn.

We **enclose** the QLS submissions made in response to the Royal Commission's Education Issues Paper, and to the 2020 Review of the *Disability Standards for Education 2005*, which details some of these issues with examples.

### Summary

Consistent with other issues raised by QLS in response to this inquiry, a cultural shift is required to ensure that the NDIA's administrative, operational and facilitation arms operate to serve the objectives of the NDIS Act. The NDIA needs to champion this change.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Senior Policy Solicitor Vanessa Krulin at [REDACTED] and copying policy@qls.com.au, or by phone on (07) 3842 5930.

Yours faithfully

[REDACTED]  
Elizabeth Shearer  
President

16 October 2020

Our ref: VK-HD/DAN

Committee Secretariat  
Joint Standing Committee on the National Disability Insurance Scheme  
PO Box 6100  
Parliament House  
Canberra ACT 2600

By email: [REDACTED]

Dear Committee Secretariat

**General issues around the implementation and performance of the National Disability Insurance Scheme**

Thank you for the opportunity to provide feedback on the inquiry into general issues related to the implementation and performance of the NDIS (the **Inquiry**). The Queensland Law Society (**QLS**) appreciates the opportunity to assist the Joint Standing Committee on the National Disability Insurance Scheme (the **Committee**) as it undertakes this important review.

QLS is the peak professional body for the State's legal practitioners. We represent and promote over 13,000 legal professionals, increase community understanding of the law, help protect the rights of individuals and advise the community about the many benefits solicitors can provide. QLS also assists the public by advising government on improvements to laws affecting Queenslanders and working to improve their access to the law.

This response has been compiled with the assistance of the QLS Diverse Abilities Network, whose members have substantial expertise and ongoing lived experience with the National Disability Insurance Scheme (the **NDIS**), and the QLS Health & Disability Law Committee, whose members have significant experience in navigating the legal framework underpinning the NDIS as well as advocating on behalf of key stakeholders.

The NDIS is a critical tool in the funding and delivery of disability services. Ensuring that the governing legislation is appropriate and that the scheme is appropriately funded, managed and administered is essential to achieving its intended aims – to provide Australians with disability with choice and control, and in turn, to live with equal opportunity to participate in the community as afforded others.

**Impediments to access**

Our members reported a number of scenarios encountered in the operation of the scheme which have resulted in limiting access, some significantly.

## General issues around the implementation and performance of the National Disability Insurance Scheme

### *Communication and eligibility criteria*

Several examples indicate significant inconsistency in decision-making by NDIS administrators when assessing an applicant's eligibility criteria. Clearer communication and publication of appropriately detailed factors which may impact access criteria (including any likely inclusion or exclusion markers) is urgently required – not only for the benefit of applicants and carers, but for assessment staff in conjunction with provision of increased training and support resources.

QLS acknowledges the difficulty in ensuring that scheme eligibility criteria and the application process is effectively communicated to applicants and potential applicants. The NDIS website provides accessibility options to navigate visitors around the site, including web chat, availability of other languages, calling options, font size enlargement, internet relay, speak and listen, and email services.

Providing several options for engagement is essential to facilitating scheme access for applicants. Flexible communication pathways must run continuously through the scheme as applicants navigate the application process. QLS is advised this is not the case.

In one example, a QLS member completed the NDIS application form to apply for hearing aid funding, noting therein that due to moderate-severe hearing loss, email was the best method of communication. The member was subsequently contacted by telephone, and despite explaining that fully participating in the conversation was impossible due to being deaf and reiterating the previous request that they communicate by email, the member was advised this was not possible. The member was forced to enlist a colleague to speak with the NDIA caller, in effect acting as a translator during the call. When a conversation was eventually able to be had between the member and the NDIA representative, the member was advised that the reported hearing proficiency *in one ear* needed to be between 1-2% worse in order to qualify for assistance. This disqualification was concluded even though that the member's overall status of being legally deaf and requiring hearing aids, was never in dispute.

Upon reviewing published submissions made to date to this Inquiry, and after consulting with our members who rely on and/or are engaged by clients in relation to the NDIS, it is clear that this is not an isolated occurrence. The Ernst & Young independent review in 2015 (the **2015 Review**) of the *National Disability Insurance Scheme Act 2013* (the **NDIS Act**) undertaken in accordance with section 208 of the NDIS Act and submitted to the Hon. Christian Porter (as then Minister for Social Services), found inconsistency in application, and sometimes inflexibility in practice as demonstrated by the experience described above. The 2015 Review reported that whilst the legislative framework was suitably formed to enable government to further the object and principles of the NDIS Act, changes were required in order to improve its administration:

*"There is a need to amend elements of the NDIS Act and NDIS Rules to provide greater clarity on the policy intent of governments and how the Scheme should be administered in practice. There is also scope to amend the NDIS Act to enhance the efficiency and effectiveness of the NDIS administration."*<sup>1</sup>

---

<sup>1</sup> A. Metcalf AO, *Independent review of the NDIS Act* <  
[https://www.dss.gov.au/sites/default/files/documents/04\\_2016/independent\\_review\\_of\\_the\\_ndis\\_act.pdf](https://www.dss.gov.au/sites/default/files/documents/04_2016/independent_review_of_the_ndis_act.pdf)>.

## General issues around the implementation and performance of the National Disability Insurance Scheme

We have reviewed the COAG report<sup>2</sup> published in response to the 2015 Review, and note with concern that the vast majority of recommendations and required amendments to the NDIS Act and associated legislative framework are yet to be made. This is despite COAG's agreement with all but two of the 33 recommendations made for legislative amendments.

The prolonged inaction in implementing the agreed recommendations is a significant issue which should not be overlooked in seeking to understand why significant gaps in the scheme's functionality persist.

Recommendations 1 to 5 of the 2015 Review suggested legislative changes to sections 4, 5 and 17A of the NDIS Act, to ensure that the principles of the legislation reflect the inclusive and accessible intentions of the scheme. The suggested amendments include:

1. Amend principles that directly reference carers so that they align with the 'recognise' and 'respect' terminology of the *Carers Recognition Act 2010* (Cth).
2. Amend section 5(d) to reference lesbian, gay, bisexual, transgender and intersex (LGBTI) status.
3. Amend relevant principles to remove moderating language (e.g. 'to the extent of their ability' and 'to the full extent of their capacity').
4. Add a new principle to section 4 that reflects the concepts of the centrality of people with disability and co-design.
5. Add a new principle to section 4, reflecting the importance of a diverse and sustainable market that provides choice and control and high quality supports to people with disability.

The suggested principles must be inserted into the NDIS Act, in support of the Act's intention to ensure broad and appropriate access to the scheme, underpinned by values of individual autonomy and respect for persons with disability. Frequent issues encountered with the scheme relating to inconsistency in applying the eligibility criteria will continue to arise if the guiding principles of the NDIS Act are not reflective of its accessibility and operative intentions. This is a threshold issue, and must be urgently addressed by way of legislative change.

### *Improvements to bureaucratic nature and processes*

QLS acknowledges the complexity associated with administration of a multi-faceted scheme, and reiterates the point made above regarding legislative change to amend the guiding principles. Operational aspects of the scheme, including subordinate legislative instruments, guidelines and policies, are developed in alignment with the principles and objectives of the primary act. The subsequent operation of the scheme and effect on those attempting to access it will be impacted accordingly.

A lack of nuance in decision-making related to the eligibility and assessment of some medical conditions is a common problem reported by QLS members. This is demonstrated in the example above, relating to a member's application for hearing aids – the threshold issue being that the hearing aids were ultimately required, was overlooked. In another example, a member

<sup>2</sup> Australian Government Department of Social Services, COAG Response to the independent Review of the National Disability Insurance Scheme Act 2013, <<https://www.dss.gov.au/disability-and-carers/programs-services/for-people-with-disability/national-disability-insurance-scheme/coag-response-to-the-independent-review-of-the-national-disability-insurance-scheme-act-2013>>.

## General issues around the implementation and performance of the National Disability Insurance Scheme

reported cases where persons with multiple sclerosis were being refused reasonable NDIS service costs on the basis that their condition at the time of approval was relatively stable. However, this did not consider the fluctuating nature of the condition, and as such, the likelihood that support would be necessary when relapsing-remitting episodes occur. A willingness to engage in reasonable and evidentially supported future planning and provision for persons with fluctuating conditions must be adopted by the scheme if it is to operate in accordance with the NDIS Act, which states:

*"People who are participants in the NDIS will be assisted to develop a personal, goal-based plan about how they will be provided with general supports and reasonable and necessary supports."*

This statement is repeated in *the National Disability Insurance Scheme (Supports for Participants) Rules 2013*.<sup>3</sup>

In response to the repeated service refusals, Multiple Sclerosis Queensland created a policy which required treatment providers to write a report on envisaged relapsing episodes, based on a patient's history, and set out predicted increased costs to be borne in association with the progression of the autoimmune condition. This has had a positive impact on the number of successful applicants and appeals undertaken to seek assistance for persons with multiple sclerosis in Queensland.

In another example a member reported that after having received funding for a new bed, they discovered a less expensive bed with voice activation technology which was more appropriate for their circumstances. Despite the preferred option being within the allocated funding amount, and against all common sense the NDIA representative insisted that the member purchase the more expensive, and less functional, option – an outcome clearly to the detriment of the scheme and the participant. The member was forced to raise an argument pursuant to section 34 of the NDIS Act, eventually convincing the representative and receiving approval to purchase the voice activated, cheaper option.

These examples identify a significant challenge which the scheme must overcome – that scheme operation and accessibility itself should not be reliant on an individual's capacity to advocate. This failure results in a complete misdirection of limited resources, and significant delays, all of which can be easily avoided. Participation and access must be encouraged and matched with equal participation and flexibility on the part of scheme administrators.

### Decision-making, consistency and delay reduction

The scheme would benefit from changes to increase transparency in decision-making, which will lead to greater consistency and a reduction in delayed outcomes resulting from the decisions.

Acting to implement the recommendations of the 2015 Review is a critical first step. Following this, a review of the suite of NDIS Rules must be urgently carried out to identify if additional amendments are required to the supporting legislation. This is in addition to the changes to

---

<sup>3</sup> *National Disability Insurance Scheme (Supports for Participants) Rules 2013*.

## General issues around the implementation and performance of the National Disability Insurance Scheme

the various NDIS Rules which were recognised in previous inquiries, such as the 2015 Review.

### Independent assessments

QLS is aware of concerns raised by some stakeholders regarding the introduction of mandatory independent assessments. We understand that the intent of the process is to provide a consistent approach to assessments of functional capacity of eligible participants.

Appropriately detailed information for the reasons necessitating the new process must be provided by the Government to ensure transparency and to assess if the new protocol can be justified, and if it poses a risk to individual rights.

The issue was recently considered by the Administrative Appeals Tribunal, which found that the NDIA's use of an assessor and their findings to be inappropriate in the circumstances.<sup>4</sup> This raises questions about its suitability as a uniform process.

We recommend that the Government urgently commence a thorough consultation process with key stakeholders, including NDIS recipients and client advocacy groups, to ensure that the resulting process aligns with the principles of the NDIS Act.

### NDIS participants seeking to engage family members as paid supports

Engaging family members in paid support roles is anticipated by the scheme, and provided for in particular circumstances. This is set out in the operational guideline, 'Including Specific Types of Supports in Plans Operational Guideline – Sustaining informal supports',<sup>5</sup> which states that the NDIA will fund family members to provide supports in exceptional circumstances, including for example:

- There is a risk of harm or neglect to the participant;
- There are religious or cultural reasons for funding a family member to provide supports; or
- The participant has strong personal views, for example in relation to their privacy.

QLS is concerned by reports from members with clients who have sought paid support for family members in accordance with the operational guideline, and who were advised by their plan manager or support coordinator that it is 'not permitted'.

The guidelines do not have the authority or operation of primary legislation. It is concerning that NDIA administrators are relying upon the guidelines to assert decision-making authority on an issue which is not captured by the NDIS Act.

QLS recommends that consultation with key stakeholders be urgently commenced to consider the issue and determine whether legislative amendment is required.

<sup>4</sup> Ray and National Disability Insurance Agency [2020] AATA 3452 (8 September 2020).

<sup>5</sup> NDIS Operational Guideline, Sustaining informal supports [11.1] <

## General issues around the implementation and performance of the National Disability Insurance Scheme

### NDIS price guide, auditing of service providers and appropriate accountability and complaints mechanisms

Multiple concerns have been expressed by members about the NDIS price guide. QLS considers an urgent review of the price guide and its development is required, for transparency, improvement and accountability purposes. The review must include appropriate consultation with key stakeholders, including patient advocacy groups and individual recipients. The review should include markers for financial and social appraisal of the price guide in comparison to the Medicare price guide (including its formulation and auditing processes).

Auditing of service providers, complaints and accountability issues are not isolated to the price guide, and significant improvement is urgently required to ensure that these processes are functional and effective. Ensuring efficacy and accessibility of these functions is a critical component of the scheme, and necessary to satisfy the principles of the NDIS Act.

QLS would be pleased to consult with the Joint Standing Committee to develop improved legislative and operational guidelines on these processes.

### Integration with education and learning institutions

Strategies should be implemented in schools and government departments to improve the relationship between the NDIS and the state school system. QLS understands that parents are sometimes forced to apply for funding through the NDIS to fill gaps in education services. This practice has increased during COVID-19 (see **below**: 'Impacts of COVID-19').

QLS believes that clearer pathways and guidelines should be developed to assist schools and NDIS providers in supporting students with disabilities. We believe that the process of communication between schools, NDIS providers and parents should be streamlined. The onus of developing this process and ensuring these relationships develop should be with the schools as they bear the responsibility of supporting and educating the children. The NDIS must ensure it is appropriately accessible to work with schools, and NDIA administrators trained to manage and assist in this integration. The aim of this process should be to allow schools and NDIS providers to collaborate whenever students should require their NDIS providers to assist them during school hours on school grounds.<sup>6</sup>

By primarily operating in separate environments, NDIS and school-generated support services are unable to collaborate, to the disadvantage of the affected student. QLS recommends that in Queensland, a review of the *Education (General Provisions) Act 2006* (the **Education Act**) be urgently undertaken with a view to making amendments to:

---

<sup>6</sup> NDIS Provider Access to Queensland Schools, Department of Education, <<https://ppr.qed.qld.gov.au/education/management/Procedure%20Attachments/NDIS-provider-access-to-state-schools/Provider-fact-sheet.pdf>>.

## General issues around the implementation and performance of the National Disability Insurance Scheme

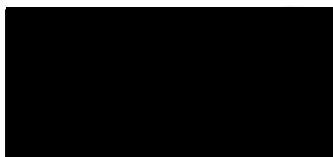
- recognise that schools have a key role in supporting the positive development of children with disability and to work collaboratively with the student, family, caregivers and other appropriately qualified specialists and allied health professionals to facilitate optimal learning opportunities for the child;
- mandate that schools implement adjustments that are recommended by a student's NDIS-funded specialist, or by an appropriately qualified privately engaged paediatric specialist; and
- ensure that the Education Act, Regulations and associated policies operate in compliance with the *Human Rights Act 2019* (Qld).

### Impacts of COVID-19

In the midst of the COVID-19 pandemic, people with disability are at increased risk. In some cases this is because their disability or health condition increases vulnerability to illness. In all cases, accessing required support services was difficult even before the onset of the pandemic. With rapid changes to community, government, service availability and movement associated with limiting the virus spread, accessibility issues for persons reliant on the NDIS have become even more acute. It is reported that nearly 50% of people with disability were living below the poverty line before the pandemic began.<sup>7</sup> New costs emerged as required to maintain personal safety, such as protective equipment (for example masks and gloves), and additional support services such as online shopping and delivery. Delivery of essential services, such as education, was difficult for all learning providers and families – but much more so for students with disability. Professor Helen Dickinson, Director of the Public Service Research Group at the University of New South Wales reported that reliance on the NDIS increased notably during this time, as families were forced to access the scheme to seek accessible remote learning pathways for children.<sup>8</sup> Reliance on the NDIS to facilitate access to education should not be required.

If you have any queries regarding the contents of this letter, please do not hesitate to contact Senior Policy Solicitor Vanessa Krulin via [REDACTED] or by phone on (07) 3842 5930.

Yours faithfully



Luke Murphy  
President

<sup>7</sup> Kirsten Deane, *Pandemic experience shows the NDIS is still not working like it should*, 22 August 2020 <<https://everyaustraliancounts.com.au/opinion/pandemic-experience-shows-the-ndis-is-still-not-working-like-it-should/>>.

<sup>8</sup> Helen Dickinson, Catherine Smith, Sophie Yates, *The Conversation*, *Only one fifth of school students with disability had enough support during the remote learning period*, 24 July 2020 <<https://theconversation.com/only-one-fifth-of-school-students-with-disability-had-enough-support-during-the-remote-learning-period-143195>>.



# Queensland Advocacy Incorporated

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

*Systems and Individual Advocacy for vulnerable People with Disability*

## SUBMISSION TO JOINT STANDING COMMITTEE ON THE NATIONAL DISABILITY INSURANCE SCHEME

July 2020

The Hon Kevin Andrews MP (Chair)  
Senator Carol Brown (Deputy Chair)  
Senator Wendy Askew  
Senator Anthony Chisholm  
Ms. Libby Coker MP  
Senator Hollie Hughes  
Dr Fiona Martin MP  
Ms Alicia Payne MP  
Senator Jordon Steele-John  
Mr. Andrew Wallace MP

## INQUIRY IN TO THE NATIONAL DISABILITY INSURANCE QUALITY AND SAFEGUARDS COMMISSION

**'quality** noun (EXCELLENCE) the degree of excellence of something, often a high degree of it'  
Cambridge English Dictionary

**'safeguards** plural noun: a measure taken to protect someone or something or to prevent something undesirable'

**'safeguards** verb 3rd person present: protect from harm or damage with an appropriate measure.  
Oxford English Dictionary

"The supreme quality for leadership is unquestionably integrity. Without it, no real success is possible, no matter whether it is on a section gang, a football field, in an army, or in an office."  
Dwight D. Eisenhower

'Quality means doing it right when no one is looking.'  
Henry Ford

**Ph:** (07) 3844 4200 or 1300 130 582 **Fax:** (07) 3844 4220 **Email:** [qai@qai.org.au](mailto:qai@qai.org.au) **Website:** [www.qai.org.au](http://www.qai.org.au)

**2nd Floor, South Central, 43 Peel Street, STH BRISBANE QLD 4101**

QAI endorses the objectives, and promotes the principles, of the Convention on the Rights of Persons with Disabilities.

Patron: His Excellency The Honorable Paul de Jersey AC

## About QAI

Queensland Advocacy Incorporated (QAI) is a member-driven and non-profit advocacy organisation for people with disability. Our mission is to promote, protect and defend, through advocacy, the fundamental needs, rights, and lives of the most vulnerable people with disability in Queensland.

QAI is an association of persons with concern for the needs of people with disabilities with a constitutionally designated committee comprising a majority of people with disability; their wisdom and lived experience of disability is our foundation and guide.

QAI undertakes systems advocacy aimed at changing policies, laws and attitudes in ways that will benefit groups of people with disability rather than individuals alone.

QAI strives to maintain its complete independence as an organisation and to restrict its function solely to advocacy.

QAI has an exemplary track record of effective systems advocacy, with over thirty years' experience advocating for systems change, through campaigns directed to attitudinal, law and policy reform and by supporting the development of a range of advocacy initiatives in this state.

We have provided, for over a decade, highly in-demand individual advocacy through our individual advocacy services – the Human Rights Legal Service, the Mental Health Legal Service, the Justice Support Program, the National Disability Insurance Scheme Appeals Support Program and Decision Support Pilot Program and most recently the Disability Royal Commission Advocacy Program and the Education Advocacy Service.

Our Human Rights and Mental Health services offer legal advice and representation on guardianship, administration, and mental health matters. Our Justice Support provide non-legal advice and support to people with disability engaged with the criminal justice system. QAI's NDIS Appeals and Decision Support Pilot provide advocacy and support to individuals and families to engage with and access the NDIS (including assisting with internal review and appeals to the Administrative Appeals Tribunal). QAI is also a member of the Combined Advocacy Groups of Queensland. QAI's individual advocacy assists us to understand the challenges, needs and concerns of people with disability and informs our campaigns at state and federal levels for changes in attitudes, laws and policies.

QAI's constitution holds that every person is unique and valuable, and that diversity is intrinsic to community.



## Background

People with disability and their families, advocates, supporters and allies were overjoyed at the instigation of the National Disability Insurance Scheme (NDIS), and QAI also eagerly awaited the much-anticipated independent complaints and monitoring mechanism that would complement the Scheme.

Like our allies, QAI wrote submissions and papers about the history lessons of failed and overly complex, burdensome and dissatisfactory processes commonly experienced in the state systems.

The following account demonstrates a non-exhaustive list of relevant submissions and papers that QAI has made in earnest advocacy towards establishing and improving the safeguarding and raising of standards for quality service delivery for people with disability. Please note that QAI has made more than one submission to some of the inquiries below as various committees or subsequent inquiries have eventuated.

In 2015 QAI offered a submission to the Department of Social Services regarding the NDIS Quality and Safeguarding Framework, a submission to the Joint Standing Committee on the NDIS and Queensland NDIS Readiness, and QAI witnesses appeared before the Joint Standing Committee that same year in which a need for an independent and transparent complaints mechanism was raised as urgently required. QAI also tendered a submission to the Ernst and Young review of the operation of the NDIS Act. Later that year QAI made a submission to the Senate Inquiry into violence, abuse and neglect against people with disability in institutional and residential settings. All of these actions are related.

In 2016, the *Disability Services Act 2006* (Qld) was amended: "The measures of Queensland's interpretation of Transition to the National Disability Insurance Scheme" and QAI again offered in our submission key messages regarding necessary ways of handling complaints prior to rollout in Queensland. Later in this year, as a partner of the Civil Society, a joint statement was issued to the Council of Australian Governments (COAG) and the National Disability Insurance Agency (NDIA) calling for stronger engagement with people with disability in the NDIS.

Following our 2015 submission to the Department of Social Services (the Department), in 2017 QAI consulted the Department regarding the NDIS Code of Conduct which was to be central to the Quality and Safeguards Framework. Relevantly, we noted:

*We are concerned about the translation of the Principles of the Code into practice, as the power imbalance between individuals, particularly individuals with recognised vulnerabilities including a disability, and service providers is significant, and can silence the making of complaints.*

Additionally, QAI offered a detailed submission to the Senate Economics Legislation Committee Inquiry into the National Disability Insurance Scheme Amendment (Quality and Safeguards Commission and Other Measures) Bill 2017. A further submission to the Joint Standing Committee on the NDIS regarding General Implementation explained additional concerns about complaints handling.



In June 2018, the Department brought Advocates from across Australia to meet with the newly formed Quality and Safeguards Commission (the Commission) at a forum. There was a great consensus from all the advocates and not a lot of confidence in the Commission at that stage. In August 2018, QAI tendered a submission (attached) to the Department on Advocacy and the NDIS Quality and Safeguards Commission that summarised the forum, offered suggestions and raised concerns.

In November 2018 QAI wrote to the state Department of Communities, Disability Services and Seniors on Reshaping the Disability Services Act 2006 about worker screening as a safeguard to mitigate abuse and resultant complaints. In 2019 a subsequent submission to the state government Education, Employment and Small Business Committee on Disability Services and Other Legislation Amendment Bill 2019 (Qld) also examined worker screening and complaints about specific workers as a safeguarding measure. Further submissions regarding worker screening have been made this year (all are attached).

QAI's response of August 2019 to the Department's consultation into NDIS Thin Markets Project provided an opportunity for our organisation to address safeguards as a proactive measure and to raise concerns about the lack of prevention (attached).

COVID19 raised significant concerns for QAI regarding the safety and wellbeing for people with disability and we promptly wrote to the Commission, the NDIA, and National Disability Services to urge that disability supports be declared essential services. This was followed up again later in the same month (March 2020) and we raised additional concerns regarding reported withdrawal of supports, denial of access to supports and services and advocates by some hostel owners. The response from the Commission included their fact sheet regarding Coronavirus (COVID19) Behaviour Support and Restrictive Practices.<sup>1</sup>

---

<sup>1</sup> NDIS Quality and Safeguards Commission March 2020, *Fact sheet: Coronavirus (COVID-19) – Behaviour support and restrictive practice*, <https://www.ndiscommission.gov.au/document/1991>



## **Terms of Reference**

- a. The monitoring, investigation and enforcement powers available to the Commission, and how those powers are exercised in practice;
- b. The effectiveness of the Commission in responding to concerns, complaints and reportable incidents – including allegations of abuse and neglect of NDIS participants;
- c. The adequacy and effectiveness of the NDIS Code of Conduct and the NDIS Practice Standards;
- d. The adequacy and effectiveness of provider registration and worker screening arrangements, including the level of transparency and public access to information regarding the decisions and actions taken by the Commission.
- e. The effectiveness of communication and engagement between the Commission and state and territory authorities;
- f. The human and financial resources available to the Commission, and whether these resources are adequate for the Commission to properly execute its functions;
- g. Management of the transition period, including impacts on other commonwealth and state based oversight, safeguarding, and community engagement programs; and
- h. Any related matters.



## QAI's recommendations

QAI recommends:

1. The Commission adopt a proactive and diligent, rather than regulatory and responsive, approach to protecting NDIS participants
2. The Commission establish referral pathways with National Disability Advocacy Program (NDAP) providers, independent state funded disability advocacy organisations, Community Legal Centres (CLCs) and State Legal Aid Commissions to ensure participants who are particularly vulnerable are supported through complaint and investigation processes.
3. The Commission promotes and supports people with disability to understand their rights and what 'best practice' service provision looks like by either:
  - a. Directing people to authentic and existing resources relating to quality service provision such as the Community Resource Unit's information;<sup>2</sup> or
  - b. Developing best practice resources in collaboration with people with disability, their families and carers and advocacy organisations.
4. The Commission ensures that no service providers are registered to deliver 'wrap around services', as a means to avoid conflict of interest and coercion, ensure participants' rights to 'choice and control' and ensure alternative choices are available for participants.
5. The Commission monitors the data of reported Restrictive Practices, including the types and frequency, to ensure that strategies to eliminate or reduce the uses are consistent with the National Framework. This could also include:
  - a. The Commission order mandatory training of support workers where uses of Restrictive Practices are not reduced or eliminated within an agreed review period; and
  - b. An onus on providers to demonstrate that strategies in the participant's Behaviour Support Plan have been implemented. If this is not evident the Commission order a change of provider; and
  - c. Where more than one review period has passed without any progress towards reduction or elimination of Restrictive Practices, the Commission order a change in service provider.
6. The Commission works with plan managed and self-managed participants, their families and informal supports who directly employ workers to better understand their responsibilities as employers.
7. The Commission works with plan managed and self-managed participants, their families, and informal supports to provide clarity about their rights to hire or employ service providers or support workers, and their responsibilities in relation to Behaviour Support and Restrictive Practices.

<sup>2</sup> Community Resource Unit 2017, *The Good Life*, <http://thegoodlife.cru.org.au/funded-supports/>



8. The Commission investigates allegations of abuse, neglect and exploitation in a timely manner, including the use of unauthorised Restrictive Practices.
9. The Commission works collaboratively with the National Disability Insurance Agency to provide information and context when NDIS participants request reviews of funding to leave undesirable situations such as abusive home environments.
10. The Commission supports NDIS participants through complaints processes rather than referring matters back to service providers with no support for participants.
11. The Commission makes the compliance and enforcement actions (including banning and exclusion list) easily accessible.
12. The Commission refers Participants who require assistance to independent disability advocacy organisations.



## The monitoring, investigation and enforcement powers available to the Commission, and how those powers are exercised in practice

The NDIS Quality and Safeguards Commission (the Commission) commenced operating in Queensland on 1 July 2019. During the past year, QAI have assisted NDIS participants, their families and informal supports through the complaints process. QAI has been satisfied with the response from frontline staff, who show empathy and compassion, however QAI is unsatisfied with the response and method the Commission has taken in relation to these complaints. The follow-up from the Commission has left participants unsupported, confused and reluctant to reengage with the Commission.

### Case Example 1: Rob\*

*Rob is a 35-year-old who lives independently with his pet cat. Rob is significantly impacted by his mental health condition and receives NDIS funding for daily support in the home and his community. Rob also receives funding for a support coordinator. Rob extensively researched support coordinators with experience supporting people with psychosocial disabilities and found 'MNO Support Coordination'. Rob's experience with MNO Support Coordination was not positive as he found them to be only recommending their own services for support workers and therapists, sharing his contact details and personal information without consent and making hurtful comments about his mental health. Rob contacted the NDIS Quality and Safeguards Commission to discuss his concerns. He was assigned a case manager who was very pleasant and supportive. The case manager arranged a meeting between Rob and MNO Support Coordination to discuss the issues however, the case manager did not attend the meeting. It was unclear from the emails that the case manager would not be attending and both Rob and MNO Support Coordination expected them to be at the meeting. This left Rob feeling very deflated and put into a corner as he did not feel as though he could stand up for himself with the provider. Rob ceased services with MNO Support Coordination and the NDIS Quality and Safeguards Commission considered the matter resolved, despite Rob being left without supports and feeling deflated by the process and meeting.*

*\*Identifying details have been changed*

QAI has been particularly concerned with the lack of monitoring and oversight the Commission has shown to date of NDIS service providers. One particular concern which has been highlighted to the National Disability Insurance Agency and the Commission, is the lack of oversight, monitoring and investigation of service providers who provide 'wrap around services', such as accommodation, support workers, support coordinators and even their own therapist's or medical professionals. These service models are especially prevalent in Supported Independent Living (SIL)



arrangements, hostels and other group home settings. Many participants living in SILs, hostels or group homes did so prior to the NDIS roll out. These participants have not been provided the opportunity to explore different housing options, different service providers or even different support coordinators outside of the service provider who provides both accommodation and support workers. On occasion where a participant may voice their concern or request that an outside organisation provide support (such as support coordination), the participant is threatened with eviction, termination of support services and in some cases 'reprimanded'. This results in participants staying quiet to ensure they have somewhere to live. QAI classes these types of actions as sharp practice as well as a conflict of interest which impinges on a participant's right to choice and control.

Due to the lack of involvement from the Commission previously towards similar complaints, a NDIS participant and their QAI Decision Support Advocate have had to make the difficult decision not to formally complain about this type of practice due to fears of the repercussions towards the NDIS participant. This is due to the fact that the participant is living in a hostel which is owned by the same service provider which provides daily support. QAI acknowledges that this issue is multifaceted which makes immediate change difficult, such as lack of alternative housing options through Department of Housing. However, a participant should not have to weigh up whether to continue to be poorly supported but have a house to live in, rather than become homeless whilst seeking quality support options.

### **The effectiveness of the Commission in responding to concerns, complaints and reportable incidents – including allegations of abuse and neglect of NDIS participants**

In 2020 QAI met with the State Manager and Director of Complaints of the Queensland section of the Commission to discuss complaints, reportable incidents and Restrictive Practices. During this meeting, advocacy organisations who are funded by the Department of Social Services (DSS) to provide both generalist individual disability advocacy and specialised individual advocacy raised concerns regarding the level of independent advice and support which is provided to a participant when engaging with the Commission. Advocacy organisations raised the idea of creating referral pathways with advocacy organisations, CLCs and possibly legal aid commissions to ensure participants are provided advice and support relating to their rights, understanding the complaints processes and investigation powers. To date, despite assurances made to advocacy organisations at face to face forums that the Commission had a commitment to work with advocates in order to better support participants, this has not transpired. The Commission reported to QAI that there are



links on their website to provide general information to participants about disability advocacy. QAI sees this as a failure of their stated commitment and a failure to ensure participants are adequately protected and supported and their rights upheld. Vulnerable participants of the NDIS may not have the ability to independently seek out advocacy support. This is particularly disappointing as QAI and other advocacy organisations have been successful in establishing direct referral pathways with other government and non-government departments and organisations to support people with disability through often difficult and complex processes. QAI holds the view that the Commission should make 'warm referrals' in a similar way to the warm referrals made by the Administrative Appeals Tribunal (AAT) to advocacy organisations when it is evident that an applicant is particularly vulnerable and will not be able to effectively engage independently in the appeals process. This collaboration ensures people with disability are supported in a way that meets their needs, and often assists the referring party to resolve any issues at hand.

The Commission also reported working closely with the Office of the Public Guardian (OPG) investigations team, and the Queensland Police Service (QPS). QAI has a specialised individual advocacy service funded by the Department of the Attorney General (DJAG) to support people with disability when engaging with Police. NDIS participants should be supported by the Commission to access services which currently exist to maximise a participant's understanding of different processes. While not all people with disability will require the support of an advocate, it is imperative for the Commission to understand that some people with disability are highly vulnerable and will require independent advocacy to ensure their voice is heard, especially where they lack family or informal support. Indeed, it is impractical and unreasonable that a Commission established to safeguard people with disability do not do all that is possible to ensure that people are assisted to access independent advocacy.

### **The adequacy and effectiveness of the NDIS Code of Conduct and the NDIS Practice Standards**

The NDIS Code of Conduct applies to registered service providers, unregistered service providers, service providers delivering information, linkages and capacity building programs (ILC) and service providers delivering Commonwealth Continuity of Support programs. The NDIS Code of Conduct and its related information has been targeted at service providers and their employees. There are guidance resources available for service providers and workers, which expand on the NDIS Code of Conduct and encourage service providers to consider whether, and how, they are complying with the Code. However, no such material exists for NDIS participants; rather participants are provided with the Code on a post card with no context or provision of examples about how the Code could be



met by a provider.<sup>3</sup> Although QAI appreciates that service providers may require guidance on how to meet the Code, this exemplifies the Commission's tendency to focus on service providers and service provision rather than having NDIS participants as the centre of focus. The Commission must spend more time and energy on the development and provision of resources and education which empowers NDIS participants to understand their fundamental rights to quality service provision and choice and control.

### **Case Example 2: Morgan\***

*Morgan, a young woman with intellectual impairment, has self-managed her supports for ten years with the assistance of her nominee (mother) and they directly hire support workers. The NDIS Code of Conduct is written into the service agreement they have devised for all workers along with requisite requirements for criminal history checks, insurances etcetera. However, there is a paucity of workers available in the thin market, and this family has experienced workers not turning up for shifts without notice, resigning without notice, price gouging, and an ongoing cycle of workers who set up meetings and undertake buddy shifts for which they are paid, often for weeks on end, only to fail to commit to the terms of the agreement and leave without notice. There is no recourse for self-managing participants other than to report the individuals who will undoubtedly be free to continue this practice and drive up the costs of the NDIS and exacerbate the 'casualisation' of the workforce.*

## **The adequacy and effectiveness of provider registration and worker screening arrangements, including the level of transparency and public access to information regarding the decisions and actions taken by the Commission**

Much of the critical information on the Commission's website is deeply embedded in such a way as to be inaccessible to most participants. Whilst the Commission must maintain the balance of public information sharing and privacy, the NDIS provider register (compliance and banning orders) are particularly difficult to locate via the Commission's website. In order to find the publicly available banning list, which outlines people and service providers banned from providing services to an NDIS participant, a participant first needs to navigate to the 'NDIS Providers' tab on the Commission's website. A participant then must negotiate a convoluted process that leads the user into a labyrinth of tabs before the information can be located. For example: the user must click on 'provider responsibilities' and then 'registered provider requirements'. From there, a participant must scroll to suitability assessment and click a hyperlink embedded in 'had a banning order in place'.

<sup>3</sup> NDIS Quality and Safeguards Commission June 2019, *Code of Conduct postcards*, <https://www.ndiscommission.gov.au/sites/default/files/documents/2020-03/postcard13032020.pdf>



This will bring the participant to another webpage which has the compliance and enforcement actions available for viewing. It is difficult to comprehend how the Commission expects participants to check service providers compliance status when the information is not linked to the NDIS participant tab on the website.

Further to this, the inaccessibility of Commission's website is matched by its incongruent rules about the responsibilities of self-managed participants and or their nominees as compared to those of registered service providers where the participant is subject to the application of Restrictive Practices. The Commission has ruled that self-managed participants must employ registered providers to develop Behaviour Support Plans, and any support worker or related service provider must be registered to deliver support where restrictive practices are used. However, there is a lack of information for self-managed participants regarding any non-registered supports they may directly hire where there is no use of these Practices. For example, a Participant may use directly hired support workers for community access and social participation if there are no Restrictive Practices(RP) used, but any supports or services that are employed in the home where RP may be used must be registered to do so.

What is also concerning is the Commission failing to provide transparent information about registered service providers who have changed their name since the inception of the Disability Royal Commission (DRC). Many service providers have renamed in an attempt to 'save face', while stories of abuse, neglect and exploitation are reported to the DRC. The Commission could work with the DRC to understand which service providers have purely rebranded themselves, whilst still operating under the same models. Examples include *Aftercare* rebranding as *Stride and House* and *No Steps* rebranding as *Aruma*. Further, some banning orders are actually merely suspensions. While QAI acknowledges that mistakes can be made and that providers may make necessary improvements to warrant reinstatement into the Scheme, Participants should have access to the reasons for the suspensions or bans.

## The effectiveness of communication and engagement between the Commission and state and territory authorities

### Case example

#### Case Example 2: T

##### Background

*T is an NDIS Participant and lives in his own home in North Queensland. He uses a powered wheelchair for mobility and until 2018 he drove a modified accessible van.*



In 2018 his NDIS Plan included conversion upgrades and electronic restraints to a new van. The Planner recommended that T send the vehicle to a NDIS registered service provider (provider) in Brisbane. The decision to send the vehicle to the major city was likely based on the quoted price for the conversion \$27,300. The provider advised the work would take 3 weeks and would be carried out to the appropriate safety and industry workmanship standards and that the work would be covered by warranty.

Two months after the vehicle was delivered to the provider in Brisbane T was informed that the conversion was finally completed.

At the time of delivery, whilst the Multivan was being unloaded from the truck, the truck driver noticed a leak in the fuel tank. At the time of delivery there was also no spare key or logbook. When I inquired with the provider, I was informed that the key and logbook had been misplaced or lost.

T had to organize a replacement key through the local Volkswagen dealership and have the key programmed so that it was compatible to his vehicle. He also organised for the vehicle to be inspected on a hoist and the following major faults were noted:-

- fuel tank did not have the correct clamps on some of the fittings
- poor welding on the subframes for the wheelchair conversion did not meet the expected standard
- underbody of the new vehicle revealed exposed wiring
- electronic restraint was not working correctly

T contacted the provider who agreed that rectification work to the fuel tank and electronic restraint could be carried out locally and the provider would reimburse for this work.

Subsequent email and phone correspondence (December 2018 and January 2019) with the provider indicated the very casual approach to safety particularly with reference to the welding. The provider has not accepted responsibility for the poor workmanship nor offered to rectify the work.

T was directed to the provider by the NDIA and following protracted and fruitless attempts at negotiations with the provider, T contacted the NDIA about the problems, was informed that it was not an NDIS matter – it was a provider, Participant matter and that T had to resolve the problems without any assistance from the Agency.

Despite assurances that NDIS enables Participant choice and control T had no choice or control about where this conversion was to be performed or which provider would perform the work. The NDIA made that decision and his NDIS Plan paid for the work, however the Agency totally abrogated any responsibility for the quality and standard of the work, whether it represents value for money and most importantly if the work carried out is safe and does not represent any risk to a Participant

It seems there is no process in place by the NDIS for ensuring that the work is carried out to required standards and that it aligns with Section 34 (1)c of the NDIS Act, and represents value for money, or Section 34 (5)(1)a, that the support is not likely to cause harm to a Participant.



### **Follow Up:**

*T engaged the support of an independent advocate who assisted the client to compile a submission detailing the matter to the Office of Fair Trading, whilst simultaneously filing a complaint with the NDIS Quality and Safeguards Commission. The Quality and Safeguards response advised the advocate that they would wait to see the response from the Office of Fair Trading.\**

*The Office of Fair Trading provided a response that indicated that "Welding Standards are outside of their remit; they do not have any powers to follow up on quality of workmanship and they are not experts in this area". In a written response the OFT documented that the OFT does not have the authority to direct a trader to complete repairs to a particular standard. Their recommendations were to pursue the matter through the courts, QCAT and the NDIS Quality and Safeguards Commission.*

*The advocate continued to follow up with the NDIS Quality and Safeguards Commission via several emails and conversations with the Commission representative.*

*In March 2020, the advocate was contacted by phone and given a lengthy verbal update that essentially communicated that the Commission\* was still looking at avenues to hold the provider accountable, however the options for T were best pursued through a QCAT Legal action.*

*Given that this was almost two years after the purchase of this vehicle, it was imperative to organise urgent professional welding inspection to determine if the work met the required standards and to provide a quote for repairs to bring the workmanship up to the required standard. The advocate liaised with the local NDIS office so the inspection/quote could be funded through T's existing supports in his Plan.*

*The report from the vehicle inspection identified that the conversion work clearly did not meet the required standards and the quote for repairs was almost \$6,400.00.*

*Aside from the risks associated with the welding not meeting standard, the inspection report also identified that the fuel tank was still leaking. The advocate considered that this was a direct and immediate risk to the client, electronically restrained in the vehicle, unable to exit the vehicle in the event of a fire. Eventually the remedial work was completed but funded by the Participant's Plan – a cost that he should not have had to bear and the NDIS Quality and Safeguards Commission transferred the responsibility of the matter to the client\*.*

### **The human and financial resources available to the Commission, and whether these resources are adequate for the Commission to properly execute its functions**

In QAI's experience, the frontline staff (such as those answering the hotline) are pleasant and eager to gather information from participants to assess if the Commission is able to assist with their enquiry. However, the Commission's interest in an issue appears to be limited to this initial interaction, following which, participants must frequently check-in with the Commission to ensure their concern is being investigated. Without this follow-up, participants often wait extended periods



of time to have their matter assessed. This is concerning as those who most require safeguarding are often those who do not have the ability to continually follow up. QAI is also concerned that the Commission has a 'hands off' approach towards complaints resolution and investigation. Often people are reaching out to the Commission due to a distressing event, or series of distressing events, and although the Commission may organise a meeting with the participant and the service provider, the Commission does not become involved. This approach is unhelpful (as exemplified in Rob's case (case example 1 above) and can lead to a significant power imbalance between participants and service providers.

### **Management of the transition period, including impacts on other commonwealth and state-based oversight, safeguarding, and community engagement programs**

The Commission has been active in Queensland since July 2019. However, many participants are unaware of the Commission, the Commission's role, and the Commission's powers. QAI receives enquiries daily from participants and their families regarding their rights relating to poor service provision and possible avenues available to resolve these issues.

As of January 1st, 2020, the *Human Rights Act 2019* (Qld) commenced in its entirety, with oversight from the Queensland Human Rights Commission (QHRC). However, to date, it appears there is no such as locking a door for a period of self-isolation or quarantine is **not** a Restrictive Practice.<sup>4</sup> The tone of the factsheets, brochures and general information provided by the Commission during COVID19 and generally feels as if the Commission's role is to protect service providers.

QAI recommends the Commission revisit its purpose and refocus its attention on promoting, safeguarding and protecting participant's lives rights and education. Interface agreement between the Quality and Safeguards Commission and the QHRC. Again, QAI sees this as a failure to uphold participant's rights as NDIS registered providers are specifically defined as public entities under the *Human Rights Act 2019* (Qld). By developing an agreement between the Commission and the QHRC, people with disability are provided the opportunity to have issues resolved by either one or both of the Commissions, rather than being advised that either commission does not resolve certain issues.

### **Any related matters**

<sup>4</sup> Queensland Advocacy Incorporated 2020, *Disability Royal Commission submission – Impact of COVID19 restrictions on people with disability in Queensland*, pages 2-8 <https://www.qai.org.au/wp-content/uploads/2020/06/Emergency-Planning-and-Response-submission.pdf>



The COVID-19 pandemic created unprecedented challenges across all aspects of life for all Australians. NDIS participants were also affected by COVID-19 and QAI is disappointed with the Commission's factsheet prepared in relation to COVID-19, behaviour support and Restrictive Practices.<sup>5</sup> QAI disagrees with the Commission's stance that applying an environmental restraint such as locking a door for a period of self-isolation or quarantine is not a Restrictive Practice.

The tone of the factsheets, brochures and general information provided by the Commission during COVID19 and generally, feels as if the Commission's role is to protect service providers.

QAI recommends the Commission revisit its purpose and refocus its attention on promoting, safeguarding and protecting participant's lives rights and education.

---

<sup>5</sup> NDIS Quality and Safeguards Commission March 2020, *Fact sheet: Coronavirus (COVID-19) – Behaviour support and restrictive practice*, <https://www.ndiscommission.gov.au/document/1991>





## **Queensland Advocacy Incorporated**

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

*Systems and Individual Advocacy for vulnerable People with Disability*

# **Access and Eligibility Policy with Independent Assessments & Planning Policy for Personalised Budgets and Plan Flexibility**

**Submission by  
Queensland Advocacy Incorporated**

**National Disability Insurance Agency**

**February 2021**

**Ph:** (07) 3844 4200 or 1300 130 582 **Fax:** (07) 3844 4220 **Email:** [qai@qai.org.au](mailto:qai@qai.org.au) **Website:** [www.qai.org.au](http://www.qai.org.au)

**2nd Floor, South Central, 43 Peel Street, STH BRISBANE QLD 4101**

QAI endorses the objectives, and promotes the principles, of the Convention on the Rights of Persons with Disabilities.

Patron: His Excellency The Honorable Paul de Jersey AC

## About Queensland Advocacy Incorporated

Queensland Advocacy Incorporated (**QAI**) is an independent, community-based advocacy organisation and community legal service that provides individual and systems advocacy for people with disability. Our mission is to promote, protect and defend the fundamental needs and rights of the most vulnerable people with disability in Queensland. QAI's board is comprised of a majority of persons with disability, whose wisdom and lived experience of disability 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; the Human Rights Legal Service, the Mental Health Legal Service and Justice Support Program and more recently, the National Disability Insurance Scheme Appeals Support Program, Decision Support Pilot Program, Disability Royal Commission Advocacy Program, Education Advocacy Program and Social Work Service. Our individual advocacy experience informs our understanding and prioritisation of systemic advocacy issues.

## QAI's recommendations

### QAI recommends:

1. Independent assessments should be introduced as an option for prospective participants who do not have the financial resources to obtain a functional capacity assessment. Prospective participants should be supported to obtain an assessment from a provider of their choice
2. Inconsistency in decision-making by NDIA delegates could be improved through greater training and awareness and by increased clarity and consistency with regards to the information required for access decisions or plan budget considerations.
3. Participants who complete an independent assessment must be provided a full copy of the assessment report upon completion, not a summary.
4. Participants must be able to review/appeal the outcome of an independent assessment outside of the narrow scope proposed.
5. Participants must be able to review/appeal the decision of an NDIA delegate to grant an exemption from undergoing an independent assessment.
6. Participants must continue to be able to provide clinical evidence of their choosing that will be considered in relation to their access request and/or plan budget considerations.
7. Planning meetings must allow participants to raise the need for reasonable and necessary supports which may not have been identified by an independent assessment, evidenced by relevant clinical information.



## Introduction

The historic remodelling of disability service provision created by the National Disability Insurance Scheme (NDIS) has changed the lives of many Australians with disability and has impacted mainstream service delivery in almost every sector. The task of implementing a nationwide scheme to replace services previously delivered by states and territories was always going to present considerable challenges. Despite assertions that the proposed policy reforms will address many of the inequities experienced by people with disability seeking access to, or utilising the scheme, QAI is concerned that some of the proposed changes will erode the person-centred ethos upon which the NDIS is founded. The introduction of an individualised model of disability service provision resulted from lengthy and arduous systemic advocacy regarding the inadequacies of the previous model, many of which were highlighted in the *'Shut Out: The Experience of People with Disabilities and their Families in Australia'* report. QAI is concerned that proposed changes will reduce a person with disability's choice and control, limit a person with disability's capacity to pursue any grievances and deny their right to reasonable and necessary supports, all of which are legislative objects of the *National Disability Insurance Scheme Act 2013* (Cth) (NDIS Act) and which resonate with the previous model of disability services.

QAI notes the high volume of proposed policy changes currently open for a relatively short period of consultation. The absence of detail required to understand the full impact of the proposed reforms further limits the consultation process. QAI has also noticed the language used by the National Disability Insurance Agency (NDIA) which indicates that feedback is sought not on whether the reforms should be implemented, but how. The lack of meaningful consultation with the disability community in relation to such significant reform is contrary to Article 4 of the United Nations Convention on the Rights of Persons with Disabilities (CRPD), which the NDIS Act explicitly gives effect to: section 3(1)(a). It also sends a message that the current consultation process is a tokenistic gesture.

At its core, the NDIS is about improving the lives of Australians with disability and this must remain at the forefront of policy reform in this area. This submission draws upon QAI's experience in delivering non-legal advocacy for people engaging with the NDIS through its NDIS Appeals Support Program and Decision Support Pilot Program. It will respond to two of the current consultation papers: 'Access and Eligibility Policy with Independent Assessments' and 'Planning Policy for Personalised Budgets and Plan Flexibility.'

## Access and Eligibility Policy with Independent Assessments

QAI agrees that the financial costs associated with obtaining evidence of a person's functional capacity can be a significant barrier for some people seeking access to the NDIS. QAI further agrees that there has been an unacceptable level of inconsistency in decision-making by the NDIA in relation to access requests. However, introducing mandatory



independent assessments for all prospective participants is not the only solution to overcoming these barriers and it is QAI's position that such a reform will introduce further inequities rather than reduce them. Despite the assertion that the introduction of independent assessments is in line with the recommendations of the Tune review, the use of mandatory independent assessments was *not* recommended. Indeed, the Tune review explicitly referred to independent assessments as being a *discretionary* measure available to participants who incidentally, must retain the ability to choose their assessor and, perhaps most importantly, retain the ability to seek a review of or appeal the outcome of the assessment. To reference the proposed introduction of mandatory independent assessments as an outcome of the Tune review is to misrepresent the recommendations of a lengthy and well-considered inquiry.

QAI raises the following concerns in relation to the proposed use of mandatory independent assessments for all prospective NDIS participants, as outlined in the consultation paper:

1. The **financial costs** incurred by prospective participants will not be removed by the introduction of independent assessments. As per the consultation paper, prospective participants will still need to provide evidence that they have a disability that is attributable to one or more of the listed functional impairments, and that the impairment is, or is likely to be, permanent. This includes providing information in relation to treatment options that have been considered and exhausted. The costs involved in accessing specialists, along with lengthy waiting times for appointments that are outlined in the consultation paper as reasons to introduce independent assessments, will therefore still be incurred by people with disability. Further, the incentive to save money is at odds with the NDIA's proposed refusal to accept functional capacity assessments which the prospective participant already has access to. For example, a recent allied health assessment. To force a person to undergo an unnecessary assessment in this scenario is arguably a waste of taxpayers' money.
2. The assertion that independent assessments will provide a 'consistent, **transparent** and equitable' way to capture information about a person's functional capacity is inaccurate. There is no transparency in a process that proposes to withhold the completed assessment report from the participant. Providing only a summary and forcing people with disability to go through bureaucratic information request processes is inappropriate and unnecessary. The information concerned relates directly to the prospective participant and should therefore be their information to share rather than fight to obtain. The lack of transparency inherent in the participant's proposed inability to seek a review of their assessment is also deeply problematic. By narrowly confining the circumstances in which a person can request an alternative assessment and by providing only a complaints mechanism as a form of redress for inadequate assessments, the assessors are placed into a position of considerable power and yet have very little oversight. The inability of a participant to



seek a review of a delegate's decision to grant an exemption is similarly alarming. In some situations, this may perversely prevent a person from obtaining required functional capacity assessments in order to meet access and yet they will be denied an avenue to appeal this decision. This may be particularly relevant for prospective participants in prison, a cohort notoriously overlooked and for whom very little information exists with regards to their potential access to independent assessments. Indeed, in the event of an exemption being granted, will the NDIA fund the participant to obtain evidence of their substantially reduced functional capacity through an alternative means? The concealment of information and shrouding of decision-making outlined in the proposed changes raises fundamental questions of procedural fairness. To deny the appeal rights of people with disability is to silence them from decision-making regarding their every-day lives. It removes essential checks and balances and does little to quell rising concern within the disability sector that the introduction of independent assessments has ulterior motives. That is, that they provide a mechanism for the agency to reduce costs as opposed to the outwardly benevolent intentions of removing financial barriers for participants and improving consistency in decision-making.

3. The notion that independent assessments will allow the NDIA to focus more upon the person's **functional capacity rather than diagnosis** is at odds with other statements in the consultation paper that indicate the agency's intention to 'make clearer the distinction between disability and chronic, acute or palliative health conditions'. If the NDIA want to focus on building an overall picture of an individual's strengths and support needs, including their environmental factors and 'focus on capability rather than disability', as is asserted throughout the consultation paper, why is there a need to make superfluous distinctions between 'disabilities' and 'health conditions' when a person's resulting need for disability related supports is clearly evident? The nature of a diagnosis, whether it is a 'disability' or 'health condition', is purposefully omitted from the NDIS Act, with the focus being upon the level of impairment or rather, substantially reduced functional capacity. To make arbitrary distinctions based upon semantics is contradictory to the intentions of the scheme and leaves people with significant support needs without access to essential disability services.
4. The '**one-size-fits-all**' approach implied in the use of a single, standardised assessment process is highly inappropriate for determining the diverse needs of people with disability who are known for their heterogeneity. For some people with disability, the need to build trust and rapport with an assessor is essential to their ability to successfully understand and complete an assessment, something which a fixed process will not permit. For others, the episodic nature of their impairment means that their 'functional capacity' is not a clearly observable fact. A uniform approach that fails to cater for the individual needs of the participant will simply not suffice. Assessing the functional capacity of people with disability in this way ignores



the very functional limitations that a person may experience as a result of their impairment. For example, people who may lack insight into their condition or who may not have the ability to articulate its impact or who may experience difficulties communicating with other people. The ability of an assessor to accurately capture the complex support needs of a person with disability whom they have never met and within such tight time constraints is doubtful. The need for the assessment process to remain flexible and tailored to the individual's needs is critical to the entire premise of the NDIS. To impose a standardised process onto something which cannot be standardised is at odds with the nature of disability and the overall purpose of the scheme.

5. The hope that the proposed reforms will create an NDIS that 'empowers participants to exercise **greater choice and control**' is undermined by the introduction of a process whereby participants can only choose their assessor 'where possible', the participant has no appeal rights in relation to the process they are forced to undergo, and the participant is prevented from utilizing the experience or attributes of health professionals with whom they have developed trusting relationships. This not only contradicts the notion of choice and control but is in direct contravention with section 3(1)(e) of the NDIS Act.
6. The assertion that the use of mandatory independent assessments will provide a **more accurate picture of an individuals' capacity** and support needs can also be disputed. The extent to which assessors will truly provide 'independent' accounts of a person's functional capacity is questionable, given their contractual reliance upon the NDIA and the conflict of interest that will tarnish their assessments. Key performance indicators placed upon providers to complete independent assessments within ten days of a referral creates unnecessary workload pressures that are likely to influence the quality of assessments. Providers will likely become anxious to meet targets as opposed to focusing on accurately capturing the participant's support needs, which may require the assessor getting to know the participant over a longer period of time than is permitted by the proposed assessment process. Further, the refusal of the agency to consider other information that is directly relevant to the prospective participant's functional capacity completely undermines the assertion that they will be making decisions based upon a more accurate understanding of the participant. The preference for clinical information from a clinician who is known to the participant and who likely has a better understanding of the person's support needs is now well established in the Administrative Appeals Tribunal (AAT) jurisprudence.<sup>1</sup> Participants must be afforded the opportunity to provide additional clinical information that pertains to their functional capacity that will be considered by the NDIA for the purposes of

---

<sup>1</sup> For example, *Arnel and National Disability Insurance Agency* AATA 4778



determining their access request. To deny the use of relevant information in this way is to overtly limit the NDIA's knowledge of a person and to openly restrict rather than enhance their understanding of the person and their functional capacity. The implied distrust of allied health assessments completed outside of the independent assessment process suggests broader issues with the allied health sector; a position that has not been stated or evidenced.

It is therefore QAI's position that, in line with the recommendations of the Tune Review, independent assessments should be introduced as an *option* for prospective participants who do not have the financial resources to pay for a functional capacity assessment. This option, available as a discretionary measure for NDIA delegates, would allow the NDIA to fund a functional capacity assessment at a provider of the participant's choice. QAI notes that the NDIA already has legislative power to remove financial barriers for prospective participants seeking clinical evidence to support their access requests, as per section 6 of the NDIS Act. This extends to prospective participants who require specialist reports to evidence the permanency of their impairment. This access criterion is equally challenging for many people seeking access the NDIS and yet is not acknowledged by the proposed reforms. In QAI's experience, this option is rarely utilised by the agency and yet provides the required legislative remit for the NDIA to remove the financial barriers experienced by people with disability without introducing mandatory independent assessments.

Consideration would of course extend to the suitability of the provider to undertake the assessment (e.g. in relation to required professional qualifications), the assessment tools to be used (the agency could provide further guidance around which assessment tools are preferred in different circumstances), required reporting formats and the proposed fees to be charged. This would assist the participant to overcome the financial barrier associated with this particular access criterion, whilst supporting them to retain choice and control as per the NDIS Act. It would also prevent the NDIA spending scarce resources on unnecessary assessments when the participant already has the required information. Moreover, it would ensure the participant's dignity and right not to be subjected to needless assessments is upheld.

QAI further considers that inconsistent decision-making by NDIA delegates should be addressed through greater training, awareness and consistency in information both provided by and supplied to, NDIA delegates. Rather than controlling *who* assesses participants and *how* the required information is obtained, the NDIA would do better trying to achieve greater consistency by focusing on *what* information they require. Providing clarity on the information required to inform access decisions can be achieved without subjecting prospective participants to a dehumanizing assessment process that may be unwarranted and is likely to produce inaccurate information pertaining to their functional capacity. Indeed, without addressing the decision-making skills of NDIS delegates, inconsistencies in decision-making are likely to continue to plague the experiences of



people with disability seeking access to the scheme, notwithstanding the introduction of independent assessments.

## Planning Policy for Personalised Budgets and Plan Flexibility

QAI welcomes the NDIA's efforts to increase plan flexibility for participants and in turn, improve levels of plan utilisation. QAI supports the proposed reforms to remove the 'core, capacity building and capital' plan categories with a more user-friendly 'flexible and fixed' model. The idea of using plan check-ins to replace arbitrary and unwarranted plan reviews for participants whose functional capacity and support needs have stabilised, is also a welcome change. Providing these reforms are accompanied by an increase in support for people with disability to fully understand and implement their plans, and assuming that the check-ins are conducted in a manner that meets the diverse communication and support needs of people with disability, they will enable participants to exercise greater choice and control over how their plan budgets are spent. This will in turn fulfil the objects of the NDIS Act and increase the capacity of people with disability to live independent lives.

However, QAI is concerned that whilst the proposed changes will increase participant choice and control with respect to *how* funds are spent, they remove participant involvement with respect to *what* funds are needed. The proposed idea of determining a participant's plan budget based upon the outcome of a mandatory independent assessment relies upon the premise that independent assessments will accurately capture the true extent of a participant's reasonable and necessary support needs, a notion strongly contested above. Greater consistency in planning decisions can be achieved without removing a participant's choice and control over the evidence-collating process and without silencing people with disability from planning discussions in relation to individual reasonable and necessary supports. In seeking to make the NDIS more 'consistent and fair', the proposal to base plan budgets upon the outcomes of mandatory independent assessments will perversely create further inequities. People whose disabilities impact more severely on their ability to communicate or socially interact for example, will likely struggle to articulate and convey the true extent of their support needs within the rigid assessment process proposed. People with disability who have informal supports to help navigate assessment processes will likely experience different outcomes to those who lack such support. These barriers will apply not only to access requests but will then hinder the extent to which people with disability can secure essential disability supports from their plans.

In basing a participant's plan budget solely upon the outcome of a single mandatory independent assessment, the NDIA is proposing to cease considering individual reasonable and necessary supports as is required by the NDIS Act and which has been determined to be a separate decision-making process to access decisions by the Federal Court of



Australia.<sup>2</sup> Instead, the agency is proposing to determine the person's budget in accordance with their perceived level of functional capacity. A budget that reflects only perceived functional capacity to the exclusion of individual reasonable and necessary supports is not personalised. Arriving at a monetary figure from an assessment that was not designed to produce a financial measurement of a person's functional impairment is an inappropriate use of such assessment tools. The lack of information regarding how the agency will turn assessment scores into monetary amounts is concerning. This approach will prevent the participant from accessing an individualized budget that reflects their unique set of circumstances, despite the agency labelling the proposals as a means to achieve 'personalised budgets' as per the title of the consultation paper. Despite claims that this will make the NDIS more 'consistent and fair', the introduction of standardised processes will fail to capture the individual needs of people with disability and will fundamentally alter the nature of the NDIS by moving toward generic support packages that are more akin to the aged care system, thus eroding the individualised model originally envisaged for the NDIS.

The likelihood of independent assessments accurately capturing all of a participant's reasonable and necessary support needs is low, as discussed above. The NDIA's proposed refusal to consider pre-existing evidence pertaining to a participant's support needs and incorporating this into their budget deliberations is similarly of concern. The potential for additional evidence to mitigate the risks of inaccuracies from one-off, standardised assessments is clear, and yet the proposed reforms explicitly prohibit this. The exclusion of participants from the evidence-collating process also denies their right to choice and control in relation to their disability services.

Of equal concern is the proposal for planning meetings to no longer include conversations between planners and participants regarding the reasonable and necessary supports which the person with disability requires. The budget will be pre-determined by the outcome of the inherently problematic independent assessment, with changes only possible 'in specific circumstances, including where the person has extensive or complex needs or if there are additional high cost supports required'. This removes the rights of people with disability to be involved in decision-making that affects them, as is legally required by the NDIS Act and CRPD. The possibility that some required supports will not be captured by the generic assessment process proposed in the consultation paper is high, and yet people with disability will be denied the opportunity to appeal the outcome of the independent assessment or articulate this during the planning meeting. The only option for participants to raise concern about inadequate plan budgets will be to seek an internal review of the delegate's plan decision. This will likely lead to an increase in requests for internal reviews and subsequent appeals to the AAT, something which the advocacy sector is insufficiently funded to cope with.

---

<sup>2</sup> [Mulligan v National Disability Insurance Agency \[2015\] FCA 544 – 03 June 2015, paragraphs 32-34.](#)



To suggest that these changes will benefit participants by facilitating conversations on 'how funds can best be used rather than on justifying each and every support' and by allowing participants and planners to attend the planning meeting with a 'shared understanding of the person's functional capacity' ignores the purpose and widely accepted benefits of separate plan implementation meetings. It is also patronising to people with disability by assuming they will agree with the outcome of their independent assessment and that they will not want to discuss the benefits of specific individual supports.

QAI considers that participants must retain the ability to raise and discuss the need for reasonable and necessary supports which may not have been identified in an independent assessment. Participants should be able to provide additional clinical evidence to support their requests for specific reasonable and necessary supports which must be considered by delegates when determining the participant's plan budget. Participants should continue to benefit from separate plan implementation meetings that are not at the expense of important planning discussions between participants and planners. Only then will participants truly have access to individualised plan budgets that respect their legal right to be involved in decision-making that affects them. A participant's right to appeal the outcome of an independent assessment must also be enshrined into any policy reform. To deny this most basic legal prerogative is alarming and indicative of an agenda that seeks to infringe rather than protect the fundamental human rights of people with disability in Australia.

## **Conclusion**

QAI welcomes the opportunity to provide feedback on the proposed changes to the NDIS and is happy to provide further information or clarification upon request.



23 February 2021

Mr Scott McNaughton  
General Manager – National Delivery  
The National Disability Insurance Agency

Email: [IACOMMS@ndis.gov.au](mailto:IACOMMS@ndis.gov.au)

Dear Mr McNaughton,

**NDIS Consultation Papers – Access and Eligibility Policy with independent assessments and Planning Policy for Personalised Budgets and Plan Flexibility**

As the Public Advocate for Queensland, I am appointed under the *Guardianship and Administration Act 2000* to undertake systemic advocacy to promote and protect the rights and interests of Queensland adults with impaired decision-making capacity.

It is projected that more than 110,000 Queenslanders will be NDIS participants by 2023, with the most recent figures indicating that Queensland currently has (as at December 2020) 86,535 people receiving NDIS assistance. Almost half of Queensland NDIS participants (49%) are receiving disability related supports for the first time in their lives. A significant proportion also have impaired decision-making capacity, permanently or on an episodic basis.

These statistics make it vitally important for the NDIS scheme and individual plans to be easy to understand and navigate, ensuring that people can receive the supports they need to live their best lives as active and productive members of the community. It is also imperative that the Scheme provides appropriate oversight and protections that maintain its accountability, transparency and responsibilities to participants.

While it is important to avoid being overprotective of people with disability, and recognise that not all people with disability are vulnerable and in need of protection, it is critically important that the NDIS has systems of monitoring, coordination and oversight that will either avoid or identify risks to vulnerable participants, and act on them before a participant suffers harm.

Given the 'dovetailing' of the two new policies above which are the subject of this consultation, I have combined my feedback into one piece of correspondence to the NDIA, focusing on critical issues arising from the proposed changes.

**1. Initial access and eligibility for the Scheme**

It is understood that access and eligibility for the Scheme will now be considered separately from assessments of functionality of potential participants.

Potential participants will be asked for proof of age, residency and their disability and its permanence. Evidence related to disability will need to be obtained from a medical professional, for which the NDIS is currently preparing guidance material about what information will be required.

In addition to the preparation of this guidance material I would like to suggest that the following issues also need to be addressed in the final policy:

- The development of a **training/education program for GPs** and other medical professionals that are required to complete medical assessments for eligibility. The availability of this information will ensure that the appropriate forms are completed and requisite evidence provided 'the first time' and that potential participants do not have to revisit their medical practitioner and resubmit forms multiple times to complete the process.
- A **Medicare item number for assessments**. The process for undertaking an assessment of a person's disability can potentially be complicated, and is likely to take longer than the 'usual' ten minute consultation that GPs ordinarily allocate to patients. It may also require additional time after the consultation for the completion of the assessment and the involvement of specialists such as psychologists, psychiatrists and other neurological medical professionals (particularly for people with impaired decision-making capacity). If medical practitioners are unable to claim against a Medicare item number for these assessments, a potential participant may face significant charges, which would undermine a key driver for the new independent assessment process – cost. Unless doctors can claim their time under Medicare, it may result in potential participants being unable to obtain their assessment from their regular GP with whom they have an ongoing relationship. This is particularly likely to be the case if the practice is a bulk billing service that is constrained by appointment length.

The policy will also need to consider how people in institutions such as correctional facilities, hospitals, forensic disability services or mental health units can complete the requirements for eligibility while resident or detained in those services. It is respectfully suggested, if programs are not already in place, that the eligibility and access process be incorporated into the development of transition plans for prisoners in the correctional system, which are traditionally commenced around six months prior to an expected release date. In hospitals and mental health facilities the process needs to be similar and form a component of all patients' discharge plans.

For these processes to be effective, hospitals, correctional facilities and other places of detention need to have staff trained in NDIS procedures and access and eligibility requirements, whose responsibility it is to support in-mates and patients to apply for access to the NDIS. These positions would be similar to NDIS Navigators that are designated positions in some hospital and health services in Queensland. The person needs to ideally be trained by the NDIA and will guide people through the process, particularly those with impaired decision-making capacity. Many with intellectual disability, an acquired brain injury or significant mental illness will require a high level of support to collate the information and evidence required and to stay engaged with the process. Merely providing written information will not be helpful for this cohort of people who will generally require 'hands on' support. In a custodial environment, this may potentially involve taking a potential participant through a 'diagnosis' process that the person may have not experienced before, with many never having recognised a condition that might have resulted in the loss of some, or significant, functional capacity.

Not all people assessed for NDIS eligibility in these institutions will be successful. However, it is important if we are to ensure that the NDIS provides the necessary supports to all eligible Australians to help them live their best, most productive lives, that this occurs. The supports provided under the Scheme have the potential to be life changing for many in this cohort and may provide the stability they need to prevent them returning to detention or institutional care.

## 2. Independent Assessments – Appeals and review processes

It is acknowledged that the functional assessment process needs to change given the issues identified in the consultation paper – high costs, inconsistent assessments, and a disparity in annual plan budgets related to socio-economic status.

It is critically important for the functional assessment process to be independent and consistent, to provide the NDIA with the information that it requires to make decisions about participants' level of need.

Consequently, I support the independent assessment process in principle, but harbour significant reservations about the levels of oversight of the assessment process and the absence of appeal or review mechanisms.

In relation to oversight, the proposed independent assessment process does not appear to provide for any independent oversight of assessors or their assessments. Considering the outcomes of the assessment process will potentially have such a significant and material impact on people's lives, it is necessary that the process is transparent and accountable and that the Australian community has confidence in its quality, standards, independence and objectivity.

The decision to exclude any review or appeal against a report of an independent assessor, assumes that the assessments are 'always correct'. This would be a dangerous assumption to make, in view of what we know about government and other systems and processes and all areas of human endeavour. To deny any review or reconsideration of an assessment, leaves potential NDIS participants with no recourse and no access to the Scheme, without review.

Understandably, the NDIS is facing a significant amount of unrest and criticism about the proposed new independent assessment process.

While I would prefer that the independent assessments be subject to a review or appeal process, at the very least I would suggest, for the sake of confidence in the integrity of the scheme, that a system of oversight be developed and implemented for assessors.

This could include a team of specialist 'auditors' that could assess the performance of the assessors in 'real time', observing them undertaking assessments and reviewing the final assessment report for quality and other standards set by the NDIS. The type of process suggested is similar to what occurs within the NDIS for registered service providers at present.

In cases where the results of an independent assessment are challenged, an auditor could review the results of the assessment and if necessary re-conduct the assessment. This would provide a valuable 'check and balance' that should be a crucial element of the Scheme, particularly when independent assessments are not always being conducted in person and could be constrained by other environmental factors.

It is critical that the assessors are consistent and reasonable in their assessments and do not, over time, become harsher in their assessments of prospective participants' needs, because they are becoming desensitised or concerned about writing reports that they think the NDIS will prefer.

In relation to this latter issue, it is suggested that independent assessors should be discouraged from developing businesses that are solely reliant on the NDIS independent assessment system for income. Potential dangers of independent assessors' businesses being reliant on their relationship with the NDIS are multi-faceted, but include the risk that over time, assessors may consciously or otherwise move towards providing assessments that they perceive to be more aligned with the needs/requirements of the Scheme, rather than the

person seeking access to the Scheme. This may lead to instances of under-funding of supports. Such outcomes can have serious consequences for the individuals and their quality of life, impacting their health and well-being.

Appropriate oversight to ensure that the independent assessment program remains independent and impartial and maintains its standards and professionalism will contribute to community confidence in the program and may alleviate some of the concerns of advocacy organisations about the current proposal.

### **3. NDIS Budgets**

It is acknowledged that changes to the way in which NDIS budgets are allocated to participants are being proposed to enhance participants' 'choice and control' within the Scheme, as well as providing for efficiency improvements.

I remain concerned, however, that the use of flexible budgets not tied to specific supports could potentially lead, over time, to a deterioration in the Scheme's effectiveness, in terms of its provision of services and supports of recognised therapeutic value and assistance to people with disability.

It is also noted that while the Scheme is based on an insurance model, it is still responsible for the allocation of public funds to participants. Community expectations are that the Scheme will have appropriate systems of accountability to ensure that those funds are being spent appropriately on quality services that improve participants' lives.

Flexible budgets bring with them risks that the Scheme will need to actively manage. They will potentially invite unscrupulous behaviour from service providers, particularly when quite large budgets are allocated to participants, as has been observed in the childcare industry. It remains of vital importance that the appropriate checks and balances are in place to prevent any abuse or exploitation of NDIS participants and misuse of their funding.

It is respectfully suggested that flexible budgets still include particular categories of support provision to which amounts of funding can be allocated. Potentially the supports participants receive under each category could still be chosen flexibly. However, this type of allocation would ensure that there is less potential for all of a participant's funds to be spent on a single service or intervention which may negatively impact the participant's longer-term outcomes.

This is particularly relevant for NDIS participants who are particularly vulnerable and rely on others for their daily care and support.

A report prepared by my predecessor in 2016, which investigated the deaths of 73 people with disability in care, found that many preventable deaths of people with disability were the result of the failure of systems and services to community and coordinate the person's care. The report noted that 'systemic issues such as a lack of appropriate support (including support to access health care and appropriate responses by health care agencies) and ineffective coordination between disability and health services can have a serious effect on people with disability. For some, this includes risk of premature death'.<sup>1</sup>

Since the release of this report I have been actively working to incorporate the availability of support coordination resources in the NDIS. This will assist participants with complex health needs to: make and get to medical appointments, develop and implement Annual Health

---

<sup>1</sup> Office of the Public Advocate (Qld), *Upholding the right to life and health: A review of the deaths in care of people with disability in Queensland*, 2016, p.xi, [https://www.justice.qld.gov.au/\\_data/assets/pdf\\_file/0008/460088/final-systemic-advocacy-report-deaths-in-care-of-people-with-disability-in-Queensland-February-2016.pdf](https://www.justice.qld.gov.au/_data/assets/pdf_file/0008/460088/final-systemic-advocacy-report-deaths-in-care-of-people-with-disability-in-Queensland-February-2016.pdf).

Plans, and monitor particular 'red flags' in the system such as, a person not visiting his GP for a period of 12 months or more.

If completely flexible budgets within plans are implemented, there is a risk that critical support coordination resources may be overlooked or clients may be pressured to spend more of their budget on particular services than they actually need, at the expense of other services that are necessary for their health and well-being.

A series of checks and balances are therefore necessary to ensure that the fundamental supports required in line with a participant's functional capacity are provided, reducing the risk of harm and unintended outcomes.

Thank you for the opportunity to provide input into this review. Please feel free to contact me if you require clarification of the information provided or would like to discuss any of the matters I have raised further.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Mary Burgess', with a stylized, cursive script.

Mary Burgess  
**Public Advocate (Queensland)**