

# Inquiry into the NDIS market in Queensland

Submission to the Queensland Productivity Commission

August 2020

# Introduction

The Public Advocate welcomes the opportunity to contribute to the consultation process for the Queensland Productivity Commission's (QPC's) Inquiry into the National Disability Insurance Scheme (NDIS) market in Queensland.

The Public Advocate is established under the *Guardianship and Administration Act 2000* (Qld) to undertake systemic advocacy to promote and protect the rights and interests of Queensland adults with impaired decision-making capacity. More specifically, the Public Advocate has the following functions:

- promoting and protecting the rights of adults with impaired capacity (the adults) for a matter;
- promoting the protection of the adults from neglect, exploitation or abuse;
- encouraging the development of programs to help the adults reach the greatest practicable degree of autonomy;
- promoting the provision of services and facilities for the adults; and
- monitoring and reviewing the delivery of services and facilities to the adults.<sup>1</sup>

'Having capacity' means a person is capable of understanding the nature and effect of decisions about a matter, can freely and voluntarily make decisions about it, and can communicate their decisions in some way. If a person is unable to do one or more of these things, they may have impaired decision-making capacity.

There are a number of conditions that may impact a person's decision-making capacity. These include, intellectual disability, acquired brain injury, mental illness, neurological disorders (such as dementia) or alcohol and drug misuse. While not all people with these conditions will experience impaired decision-making capacity, many of them will at some point in their lives. For some, impaired decision-making capacity may be episodic or temporary, requiring intensive supports at specific times in their lives, while others may require lifelong support with decision-making and communicating their choices and decisions.

The introduction of the NDIS has triggered fundamental changes to the disability service system. These changes include the transition from a State to a Commonwealth model and a range of new market entrants. The new legislative framework is comprised of State and Commonwealth laws, compliance and regulatory bodies, including a Commission to oversee the necessary regulation and standards to ensure that the rights and wellbeing of NDIS participants are monitored.

The complexities associated with the transition and operation of the NDIS have resulted in a range of issues that should be the subject of inquires such as this one. It is likely that the NDIS transition and the 'bedding down' of processes and practices will take some years before we can consider that the system has settled. It is anticipated that the NDIS will require ongoing review to ensure that it continues to achieve its objectives and provide choice and control to participants, assisting them to achieve their life goals.

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<sup>1</sup> *Guardianship and Administration Act 2000* (Qld) s 209.



# Scheme eligibility and entry

## Key Points

- NDIS participation rates in Queensland remain low.
- For historical reasons, there are a lot of people with disability in Queensland who have never accessed disability supports. These people can be hard to identify and connect with the NDIS.
- Other people who may experience challenges accessing the NDIS include those with multiple conditions and complex support needs, people experiencing economic disadvantage, and people from the specific cohorts outlined in the Issues Paper.
- The outcomes from projects facilitating access to the NDIS may provide useful information to inform strategies and policies to improve NDIS participation rates.

Prior to the NDIS, Queensland's disability service system was characterised by a lack of funding and support. The Queensland Audit Office's report *The National Disability Insurance Scheme*<sup>2</sup> noted that Queensland historically provided significantly less funding for disability services than many other states, focusing primarily on people with high and complex support needs. Consequently, the transition to the NDIS in Queensland has involved a significant number of 'new participants' (almost 50 percent), that is, people who were not receiving Queensland government-funded disability services prior to the introduction of the NDIS.<sup>3</sup>

A lack of disability support funding prior to the NDIS resulted in many Queenslanders with disability living most of their lives without appropriate disability supports.<sup>4</sup> It is likely that a lack of contact with disability services and government continues to be a significant contributing factor for Queenslanders with disability not engaging or entering the NDIS.

During the transition to the NDIS in Queensland, the accessibility of the scheme generally, including the cost of the functional assessments required to determine eligibility and access to the scheme, especially for people resident in hospitals, prisons and long stay residential facilities for people with disability, have remained obstacles to entry.

Other issues associated with scheme accessibility appear, anecdotally, to include a lack of awareness of the scheme generally, the inaccessibility of the language and structure of the scheme, and the process required to determine eligibility. All of these barriers to entry are exacerbated for people with greater levels of disability and disadvantage.

Given that a significant proportion of Queenslanders accessing the scheme were expected to be 'first timers' to government supports, it was appreciated from an early stage in the roll-out of the NDIS that general awareness of the scheme among this cohort would be an issue. Specific outreach programs were funded to build community awareness of the NDIS, however it does appear that awareness remains an issue.

Issues relating to general awareness in the community about the NDIS are exacerbated for particular target groups, including people with psychosocial disability, people with a dual diagnosis of intellectual disability and a mental health condition, people with disability who are homeless,

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<sup>2</sup> Queensland Audit Office, *The National Disability Insurance Scheme, Report 14: 2017-18*, Brisbane, Queensland 2018, p18-19, accessed online

<[https://www.qao.qld.gov.au/sites/default/files/reports/the\\_national\\_disability\\_insurance\\_scheme\\_report\\_14-2017-18\\_1.pdf](https://www.qao.qld.gov.au/sites/default/files/reports/the_national_disability_insurance_scheme_report_14-2017-18_1.pdf)>.

<sup>3</sup> Ibid, p 27.

<sup>4</sup> Office of the Public Advocate (Qld), *Submission to the Community Affairs Legislation Committee for the Inquiry into the National Disability Insurance Scheme Bill 2012*, Brisbane, Queensland 2013,

<[https://www.justice.qld.gov.au/\\_\\_data/assets/pdf\\_file/0012/176889/Inquiry-into-the-National-Disability-Insurance-Scheme-Bill-2012-January-2013.pdf](https://www.justice.qld.gov.au/__data/assets/pdf_file/0012/176889/Inquiry-into-the-National-Disability-Insurance-Scheme-Bill-2012-January-2013.pdf)>.



Aboriginal and Torres Strait Islander people with disability and people with disability from culturally and linguistically diverse (CALD) backgrounds.

The Department of Communities, Disability Services and Seniors (DCDDS), using funds from the Commonwealth Government, has commenced a project to assist more people to access the NDIS. Under the project, an Assessment and Referral Team (ART) has been established, supported by community based non-government organisations such as Queenslanders with Disability Network (QDN).<sup>5</sup> The project is focusing initially on assisting people with disability in rural, regional and remote areas of Queensland to access the NDIS. However, it is anticipated that it will extend over the next few years to provide assistance State-wide.

The outcomes of this program could be useful to inform additional strategies for government to improve rates of entry to the NDIS going forward.

Accessing the NDIS without one-on-one assistance is particularly challenging for people with a disability, especially those with cognitive or psycho-social disabilities. The NDIS is sometimes described (anecdotally) as using a different 'language' that is difficult to interpret if you are not familiar with the scheme and the particular issues it focuses on for eligibility. This may contribute to people 'giving up' before the process even begins. It appears that significant resources and effort have been applied to the NDIS website to improve scheme accessibility however the site still includes a large number of acronyms (e.g. LAC, ARF, NDIA etc) which can be confusing, and all forms are only available in a pdf format. Document availability in pdf format may not be accessible for people using assistive technologies, including text-to-speech capability.<sup>6</sup>

Eligibility for the scheme requires an applicant undertaking a series of functional assessments relevant to their specific disability, as per the access and supporting evidence forms on the NDIS website. This requires people to seek a recent opinion and assessment from one or a range of medical or health specialists, including psychologists, psychiatrists, paediatricians, occupational and speech therapists, neurologists and physiotherapists.<sup>7</sup> While these assessments are recognised as a necessary component of the process, the cost of obtaining these assessments can sometimes be prohibitive. Anecdotal evidence suggests that some functional assessments can cost up to thousands of dollars, which is a major barrier to people accessing the scheme, and particularly those experiencing the highest levels of social and economic disadvantage or who may require multiple functional assessments by different health professionals.

To ensure that people are not excluded from access to the NDIS due to economic disadvantage, consideration should be given to government funding of assessments, either by the State or jointly with the Commonwealth government. Creating a Medicare item for the funding of functional assessments would also be a way to support people to obtain these assessments. However, the system would need to be monitored to ensure that a significant proportion of these assessments were bulk billed so that the gap between the Medicare funding for the assessment and its cost does not become too large for people with disability to afford.

It is also imperative that the process involved in assessing people in hospital who require NDIS supports to transition to community living is streamlined. People will continue to have accidents, experience significant health events (such as a stroke leading to a brain injury) or be diagnosed with conditions requiring extended hospital stays and resulting in permanent disability. The NDIS and Queensland Health and Health and Hospital Services need to establish a permanent, streamlined process to facilitate people's access to NDIS supports in order for them to discharge from hospital or other facilities. Considering the daily cost of a hospital bed, it is in the Queensland government's

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<sup>5</sup> Minister for Communities and Minister for Disability Services and Seniors, The Honourable Coralee O'Rourke, *New partner on board to help more Qlders with disability enter NDIS*, Media Statement 10 February 2020, Brisbane.

<<http://statements.qld.gov.au/Statement/2020/2/10/new-partner-on-board-to-help-more-qlders-with-disability-enter-ndis>>.

<sup>6</sup> Queensland Government websites must have AA level conformance with the World Wide Web Consortium (W3C) Web Content Accessibility Guidelines 2.0. See <https://www.qgcio.qld.gov.au/documents/websites-policy-is26>.

<sup>7</sup> National Disability Insurance Scheme, *Providing evidence of your disability*, 20 July 2020,

<<https://www.ndis.gov.au/applying-access-ndis/how-apply/information-support-your-request/providing-evidence-your-disability>>.



interests to provide the necessary functional assessments and reports for in-patients to progress their transition.

In 2019, Queensland Health funded The Summer Foundation (Summer Housing) to conduct a hospital discharge planning project. The project brought together key personnel from Hospital and Health Services, the NDIA, advocates, NDIS service providers, and the Department of Housing and Public Works (DHPW) to develop a co-ordinated process for hospital discharge with an NDIS plan, appropriate disability supports and housing. The outcomes of this project may be useful to inform recommendations regarding the development of policy in this area.

## Lessons from COVID-19

Key lessons from the COVID-19 pandemic have included:

- The success of working groups that included representatives from key State agencies, the NDIS, and non-government organisations in addressing critical issues related to the implementation of the NDIS in Queensland;
- Patients who had been long-term in hospitals, but eligible for the NDIS were able to be rapidly transitioned from hospital to community living, demonstrating what can be achieved when there is genuine commitment to an agreed outcome, releasing much-needed hospital beds for COVID-19-infected patients.
- The streamlining of processes that occurred in response to the pandemic have the potential to significantly reduce the time for NDIS eligible patients to transition from hospital to community living into the future. Consideration should be given to establishing a permanent working group to oversee these processes and continuing the resourcing that was dedicated to this issue during the crisis to continue to achieve these outcomes.

During the COVID-19 pandemic, Australian governments at all levels have worked cooperatively to make key decisions to protect the health and safety of citizens. This has been particularly important for vulnerable members of the community, including NDIS participants, to ensure they receive appropriate levels of support and protection, while safeguarding of their human rights.

The outcomes from the current Parliamentary Inquiry into the Queensland Government's health response to COVID-19 may be relevant to the operation of the NDIS in Queensland.

The Public Advocate made a submission to the Parliamentary Inquiry, and a copy has been published by the Health, Communities, Disability Services and Domestic and Family Violence Prevention Committee. It is available on the Queensland Parliamentary website:

<https://www.parliament.qld.gov.au/documents/committees/HCDSDFVPC/2020/COVID-19/submissions/011.pdf>.

The submission highlighted the establishment of inter-agency working groups during the pandemic by Queensland Health focussed on disability and aged care services. The inter-agency working groups included membership from key stakeholders representing government agencies (including the NDIA and the NDIS Quality and Safeguards Commission), service providers, community service and advocacy organisations.

During this crisis, the groups got things done. One particularly long-standing challenge that has been addressed during the pandemic relates to the discharge of patients with disability who were medically ready for discharge from hospital to safe and supported accommodation in the community, but had languished long-term in hospitals.<sup>8</sup> The majority of these people were either

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<sup>8</sup> Queensland Health, *Inquiry into the Queensland Government's health response to COVID-19* Health, Communities, Disability Services and Domestic and Family Violence Prevention Committee, Queensland Health written submission to





NDIS participants or NDIS-eligible, with their move out of hospital allowing for their NDIS plans to be fully realised for the first time and the consequent freeing-up of hospital beds.

Queensland Health, working with the NDIS and numerous other agencies, including members of the inter-agency working group, achieved the discharge of 392 long-stay patients from Queensland Health facilities between 25 March and 29 July 2020.<sup>9</sup>

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## NDIS Workforce

### Key Points

- The NDIS workforce has the potential to be a key driver of employment growth in Queensland, post COVID-19.
- Implementation of the NDIS Training and Skills Support Strategy should be expedited.
- A communication strategy is required to build awareness of employment and career path opportunities available in the NDIS and disability sector.
- Longer term strategies are required to decrease the level of casualisation and increase the diversity of the NDIS workforce. This is especially relevant in regional, rural and remote areas, where NDIS markets are thin and rates of unemployment are high, particularly among First Nations people, young people and people from culturally and linguistically diverse backgrounds.
- Potential barriers to employment in the NDIS, including the worker screening process, require a support program to assist people to undertake the screening and understand that a conviction may not preclude employment in the disability sector.

One of the core priorities in the Queensland Government's *Our Future State: Advancing Queensland's Priorities*, is the creation of jobs in a strong economy.<sup>10</sup> With the economic impact of COVID-19 now apparent, an economic recovery strategy has recently been prepared by the Government to complement the Queensland Priorities document, with a focus on three key areas:

- building vital Infrastructure
- strengthening Queensland's Industries, and
- enabling Future Growth.<sup>11</sup>

A key issue relevant to the government's priority of jobs creation is the projected demand for NDIS services expected in Queensland, which will require the current disability services workforce to double, with an additional 15,900 to 19,400 workers required in the field.<sup>12</sup>

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Committee, 16 June 2020, accessed online 23 June 2020.

<<https://www.parliament.qld.gov.au/documents/committees/HCDSDVFPC/2020/COVID-19/bp-17Jun2020.pdf>>.

<sup>9</sup> Queensland Health, 'COVID-19 People with Disability (PWD) – as at 29 July 2020'.

<sup>10</sup> Queensland Government, *Our Future State – Advancing Queensland's Priorities*, February 2019,

<<https://www.ourfuture.qld.gov.au/create-jobs.aspx>>.

<sup>11</sup> Queensland Government, *Unite and Recover – Our economic recovery strategy*, 21 July 2020,

<<https://www.covid19.qld.gov.au/government-actions/our-economic-recovery-strategy>>.

<sup>12</sup> Queensland Government, *Business Queensland-NDIS workforce*, 16 July 2019,

<<https://www.business.qld.gov.au/industries/service-industries-professionals/service-industries/community-services/ndis/workforce-development>>.



This presents a significant opportunity for NDIS-related employment to be a key contributor to Queensland's economic recovery, post-COVID-19. The disability sector offers stable and diverse employment in a wide variety of fields, ranging from allied health and medical professionals (including occupational and health therapists and, increasingly, registered and enrolled nurses) through to staff providing direct care supports for participants or other activities including gardening and lawn-mowing, home maintenance and modifications, community based outreach programs, respite, and meal services.

The NDIS Training and Skills Support Strategy has been developed to provide strategy advice to Queensland industry and government regarding the NDIS workforce in Queensland, including skill priorities, VET investment, and improvements in the quality of training delivery.<sup>13</sup> This strategy has produced a range of research reports about the NDIS workforce in regions across the State. These reports are based on research conducted in 2019 and highlight the skills shortage, impacts and themes within the disability workforce following the NDIS rollout across six regions, including Brisbane North and South, Ipswich, Toowoomba, Townsville and Mackay. The individual reports are expected to be accompanied by a State-wide analysis in the immediate future.<sup>14</sup>

There has been a significant amount of time and resources invested in the Strategy and the reports it has prepared for government on these various issues. The government should move swiftly to address the issues identified and implement the recommendations in the reports prepared by the NDIS Training and Skills Support Strategy.

In addition, it is suggested that the government develop a communications and promotions strategy to encourage more Queenslanders to consider the disability sector and the NDIS as a strong and ongoing source of employment and provide information about employment opportunities and careers in the disability sector. Using the research undertaken under the Strategy, the government should identify areas where the NDIS markets are 'thin' or lack diversity and target financial incentives and subsidies for people in these locations and from diverse backgrounds to take up training opportunities and a career in disability.

It is further suggested that the NDIS Training and Skills Support Strategy could be complemented with additional promotional and employment strategies targeting particular communities where rates of unemployment and under-employment are particularly high, and expected to increase post-COVID. This includes young people leaving secondary school,<sup>15</sup> indigenous Queenslanders,<sup>16</sup> and people from culturally and linguistically diverse backgrounds.<sup>17</sup> Unemployment rates for these cohorts are significantly higher than the general population, particularly in regional, rural and remote areas, which coincide with areas identified by the QPC as thin markets areas for the NDIS.<sup>18</sup> The matching of unemployed people from these cohorts in regional rural and remote areas could potentially address some of the issues relating to thin markets for the NDIS in these localities while also addressing high levels of unemployment.

The other benefit of targeting these sectors is that the NDIS has lower levels of workforce participation by people from these backgrounds, particularly First Nations People. A more diverse workforce should improve the experience and quality of NDIS services for participants from these groups.

As already noted, to be effective, such a strategy would need to be accompanied by a comprehensive communication strategy, promoting employment in the disability sector as a viable work and career option among the targeted cohorts. Long-term strategies may also be required to

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<sup>13</sup> Ibid.

<sup>14</sup> Workability Queensland, NDIS Workforce Regional Reports available now, 8 July 2020, <<http://workabilityqld.org.au/ndis-workforce-regional-reports-available-now/>>.

<sup>15</sup> Queensland Government, *Regional Youth Unemployment May 2020*, <<https://www.qgso.qld.gov.au/issues/3431/regional-youth-unemployment-202005.pdf>>.

<sup>16</sup> Australian Bureau of Statistics, *2016 Census: Aboriginal and Torres Strait Islander Peoples Quickstats*, 12 July 2019, <[https://quickstats.censusdata.abs.gov.au/census\\_services/getproduct/census/2016/quickstat/IQS315](https://quickstats.censusdata.abs.gov.au/census_services/getproduct/census/2016/quickstat/IQS315)>.

<sup>17</sup> The State of Queensland, Department of Local Government, Racing and Multicultural Affairs, *Diversity Figures June 2018*, <<https://www.dlgrma.qld.gov.au/resources/multicultural/communities/diversity-figures-report.pdf>>.

<sup>18</sup> Queensland Productivity Commission, *Inquiry into the National Disability Insurance Scheme market in Queensland – Issues Paper*, 2020 <<https://qpc.blob.core.windows.net/wordpress/2020/06/NDIS-Issues-Paper.pdf>>.



address the rate of workforce casualisation in the sector to ensure that work in this sector continues to be a viable and stable career choice.

Additional actions the Queensland Government could take to encourage people from diverse backgrounds into employment in the disability sector would be to provide more proactive support for people to undertake worker screening and explain the way the screening system works. Blue Card requirements have historically been viewed as a barrier for First Nations People applying for employment in certain sectors. Consideration should be given to ways of addressing these barriers and informing the community that a conviction will not necessarily preclude a person from employment in all areas of work where people require Blue Cards.

## NDIS interface with mainstream services

The successful operation of the NDIS relies on participants being able to access mainstream services, when necessary, in addition to their NDIS disability supports. This includes accessing state government systems such as health, criminal justice, guardianship and administration, transport and others. NDIS participants also need to access to other federally-funded service systems including health — through the primary health networks — which includes general practitioners and other specialist and allied health services, and, for some, residential aged care facilities.

### Interface with health services

#### Key Points

- Existing NDIS supports to access mainstream services do not always work well for NDIS participants with complex health needs, require NDIS plans that acknowledge the person's health needs and make provision for the necessary disability supports to manage their conditions and proactively maintain their overall health and wellbeing.
- Mainstream health services should be responsible for undertaking annual health assessments for people with disability with complex health needs and developing annual health plans which should document the various doctors and medical specialists the person should see, the frequency of those visits and so on.
- There also needs to be a critical 'point of contact' established between the NDIS, State-based health services and Primary Health Networks to allow the NDIS to follow up on whether its participants are accessing the health services they need.
- NDIS medical risk flags could also be established, which identify any NDIS participants who have not made, for example, a Medicare claim for a medical appointment in the past 12 months.

The NDIS currently provides support to participants to connect with their communities and mainstream services, via a referral service provided by Local Area Co-ordinators (LACs). While this approach may work well for participants with less complex support needs, for those with complex health conditions that require extensive interaction with the health system and the integration of health and disability supports, there is a risk of people 'slipping through the cracks'.

The focus on independence and autonomy represent positive change in the lives of people with disability, however these improvements also increase the risk of people 'not accessing the mainstream services they need to maintain safe and healthy lives, unless they are funded for the necessary supports that will facilitate this interaction.

In the 2016 report, *Upholding the right to life and health: A review of the deaths in care of people with disability*, the Public Advocate identified serious and significant lapses in the quality of health and disability care provided to people with disability who were living in care, resulting in a rate of





preventable death of more than 50 percent.<sup>19</sup> The report also noted that many people with disability have complex health issues. To ensure their health is maintained, this cohort of people should have annual health assessments undertaken by their GP, and these assessments should be used to develop an annual health plan. The annual health plan should document the various doctors and medical specialists the person should see, the frequency of those visits and so on.

While the provision of mainstream health services is outside of the responsibility of the NDIS, the NDIS should still be aware of the health needs of its participants with the most complex health conditions. This group of NDIS participants should have NDIS plans that acknowledge their health needs and make provision for the necessary disability supports to manage their conditions on a daily basis and to implement their annual health plans, including attending medical appointments. This will require significant collaboration between the NDIA, disability service providers, Primary Health Networks and State- and Territory-based health services.

Ultimately, there are significant risks for the NDIS to be funding disability supports for very vulnerable people with complex health conditions without acknowledging those conditions and understanding the supports required to manage them and to keep people well. This siloed approach to the provision of NDIS services to participants, and disregard of their reliance on mainstream health system services will lead to poor health outcomes or death for some participants.

To address the risk of NDIS participants 'falling through the gaps' between the NDIS and mainstream health services, there needs to be a critical 'point of contact' established between the NDIS and State-based health services and Primary Health Networks to allow the NDIS to follow up on whether its participants are accessing the health services they need. For instance, NDIS-funded Support Coordinators could be authorised and required as part of their role to coordinate the implementation of participants' annual health plans.

Additionally, the NDIS could set up a risk flag with Medicare to identify any NDIS participant who had not made a Medicare claim for a medical appointment in the past 12 months.<sup>20</sup>

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<sup>19</sup> Public Advocate, *Upholding the right to life and health: A review of the deaths in care of people with disability*, 2016 <[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)>.

<sup>20</sup> These suggestions have also been made to the inquiry being led by the Hon Alan Robertson that is reviewing the death of Ann Marie Smith in South Australia in June 2020.



## Interface with other State institutions

### Key Points

- Individual NDIS case managers or advocates are required to facilitate access to the NDIS for people living long-term in institutions such as the Forensic Disability Service, prisons and authorised mental health services. The needs of these people are complex, and may require more intensive support over a longer period to assist them to successfully engage with the NDIS.
- The creation of NDIS Justice Liaison Officer positions to assist NDIS participants interact with the criminal justice system are a positive initiative, however are inadequate to meet the level of need in the system.
- This Inquiry should consider:
  - the role and effectiveness of the Justice Liaison Officers;
  - their interaction with the Court Liaison Service (CLS) and any other court support roles, including those who provide assessments of defendants with intellectual or cognitive disability under section 174 of the Mental Health Act;
  - whether additional Justice Liaison Officer positions should be funded; and
  - additional strategies and actions to support the interface between the NDIS and the criminal justice system.
- It is also recommended that this inquiry examine the diversion of people from the criminal justice system under section 174 of the Mental Health Act to determine:
- It is also recommended that this inquiry examine the diversion of people from the criminal justice system under section 174 of the Mental Health Act to determine:
  - what section 174 was intended to achieve;
  - how many diversions have been made under section 174 to the NDIS;
  - whether the Act has been properly implemented, in terms of the operation of section 174; and
  - whether more could be done to ensure people with disability are being fairly and reasonably dealt with by the criminal justice system.

The many people with impaired decision-making capacity living long-term in institutions, including the Forensic Disability Service, prisons and secure mental health units, who require support to apply for the NDIS and/or to access NDIS plans remains of significant concern. There has been a lack of consistency in the approach taken to supporting these cohorts to engage with the NDIS. For many, it has resulted in them being 'stuck' between systems, unable to get finalised NDIS plans and accommodation that would satisfy authorities making decisions that they are appropriate for release.

It is suggested that this Inquiry consider recommending a stronger focus by the State government on assisting people residing in State-based institutions to access the NDIS. This should involve the appointment of a case manager or advocate who can actively engage with the NDIS to commence discussions about eligibility for NDIS supports and the type of NDIS plan the person would require. People who have been living long-term in institutions, require more intensive support to develop their NDIS plans and to identify service providers who will take them on as clients. Without appropriate supports in place for their transition to the community, this cohort of people can quickly become unstable and relapse.

Another issue of concern is the interface between the NDIS and the criminal justice system. This issue is not new. People with disability who experience some impairment of decision-making capacity have historically had few, if any, accommodations made for them in their interactions with the criminal justice system.



Some of the issues associated with contact with the criminal justice and courts system by people with impaired decision-making capacity (many of which would be NDIS participants or eligible for the NDIS) include:

- difficulties in expressive and receptive skills;
- a lack of concrete thinking patterns;
- memory problems;
- a short attention span;
- a desire to please others (particularly authority figures);
- suggestibility;
- inability to understand their rights;
- impaired judgment;
- pretending to understand what is being said, and
- attempting to conceal their disability.<sup>21</sup>

There are gaps in official data about people with disability coming into contact with the criminal justice system in Queensland. This needs to be addressed if we are to provide people with disability with fair treatment in our justice system. They are entitled to reasonable accommodation for their disability so that they can engage meaningfully with the legal process and be supported through their completion of any order or sentence imposed on them.

While our justice system is not formally recording data about these issues, there are other sources of information that provide some indication of the proportion of people in our criminal justice system with disability and the level of need of this cohort for supports and other considerations.

The Human Rights Watch 2018 report, *"I Needed Help, Instead I Was Punished": Abuse and Neglect of Prisoners with Disabilities in Australia*, identified that people with disabilities, particularly cognitive or psychosocial disability, are overrepresented in the criminal justice system in Australia — comprising around 18 percent of the country's population, but almost 50 percent of people entering prison.<sup>22</sup> A short precis of this report is provided below.

### **Spotlight: Human Rights Watch Report "I Needed Help, Instead I Was Punished" (2018)**

This report was prepared on the basis of 10 weeks of fieldwork across Australia, involving interviews with 275 people, including currently or recently released prisoners with disabilities, prison staff, health or mental health professionals, advocacy organisations, lawyers, academics, family members and guardians, service providers and government officials.<sup>23</sup>

The report documented serious cases of neglect and abuse of people with impaired decision-making capacity within the prison system. This can commence with a lack of proper assessment and identification of people with disability and continue to challenges associated with understanding prison rules and following instructions, which can lead to violence from other prisoners and staff. This is exacerbated by difficult conditions of confinement, including overcrowding, a lack of accessible facilities and negative staff attitudes.<sup>24</sup>

At all the fourteen prisons that Human Rights Watch visited, people with disability were at significant risk of violence and abuse, including bullying and harassment, and verbal, physical and sexual violence.<sup>25</sup>

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<sup>21</sup> F Davidson, E Heffernan, B Hamilton, D Greenberg, T Butler and P Burgess, 'Benchmarking Australian mental health court liaison services – results from the first national study', *The Journal of Forensic Psychiatry and Psychology*, vol 30, no. 5, 2019, p 735.

<sup>22</sup> Human Rights Watch 2018 report, *"I Needed Help, Instead I Was Punished": Abuse and Neglect of Prisoners with Disabilities in Australia*, p 1.

<sup>23</sup> *Ibid*, 10.

<sup>24</sup> *Ibid*, 3.

<sup>25</sup> *Ibid*, 3.



The report concluded that 'Australia is restricting and violating the rights of prisoners with disabilities, including Aboriginal and Torres Strait Islander people with disabilities'.<sup>26</sup> It recommended that the Australian Government work not only within prisons but within the justice system itself, which was felt 'should make better decisions about who really belongs in prison'.<sup>27</sup>

Human Rights Watch called for immediate action to end the use of solitary confinement as a punishment for prisoners with disabilities, systematically screen prisoners for all types of disabilities when they enter prison and provide reasonable accommodation, including access to support and mental health services, and ensure that all prison officers receive regular training on how to interact with people with disabilities.<sup>28</sup>

The Court Liaison Service (CLS) conducts face to face clinician assessments of people charged with offences, to potentially divert them from the court system and into appropriate mental health care. In 2015-16 (the latest data available), the CLS reported that only 1.32 percent of defendants in the Queensland Magistrates Court received a face to face assessment, and only 0.27 percent were diverted out of custody and into mental health care.<sup>29</sup> These figures could explain the high rates of people with disability, especially psychosocial disability, in prison.

A failure to provide reasonable and necessary supports for people with disability to meaningfully engage with the criminal justice process results in fewer people being diverted from the court system into more appropriate avenues for treatment and care, such as the Mental Health Court, or under section 174 of the *Mental Health Act 2016*.

Section 174 of the Act was a new provision in the *Mental Health Act 2016* that provided for the diversion of people with a non-mental health disability affecting their capacity, or fitness for trial, to the department responsible for the administration of the *Disability Services Act 2006* or the NDIS, 'for appropriate care'. It is unclear how many diversions have occurred under this section since the commencement of the new Act. The Public Advocate is aware that, from the commencement of the new Act, there have been issues associated with the funding of appropriately qualified staff to undertake the necessary assessments of people with an intellectual or cognitive disability under this section of the Act.

In 2019 the NDIS announced the introduction of Justice Liaison Officer positions in each state and territory to work across their justice systems. The role of the Justice Liaison Officers is to provide a single point of contact for workers within the justice systems to coordinate support for NDIS participants in youth and adult justice systems.<sup>30</sup>

Queensland was only funded for the employment of two Justice Liaison Officers across the state. This is woefully inadequate, in terms of identifying people coming into contact with the justice system who are NDIS participants, or who might be eligible for NDIS plans, and linking them to appropriate planning and services or supporting them to continue to access their services while in custody or under community supervision etc. Again, to have a significant positive impact on the lives of members of this cohort requires varying levels of case management. It is also unclear how these roles differ from and/or are expected to work with staff in the CLS and those assessing people for cognitive impairment. Considering the potential benefits of these types of interventions, and that the criminal justice system is a state responsibility, consideration should be given to the state funding additional Justice Liaison Officer positions to provide case management support and assist people with disability to engage with the NDIS and/or effectively implement their plans.

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<sup>26</sup> Ibid, 2

<sup>27</sup> Ibid, 7.

<sup>28</sup> Ibid, 9.

<sup>29</sup> F Davidson, E Heffernan, B Hamilton, D Greenberg, T Butler and P Burgess, 'Benchmarking Australian mental health court liaison services – results from the first national study', *The Journal of Forensic Psychiatry and Psychology*, vol 30, no. 5, 2019, p. 735.

<sup>30</sup> Department of Social Services, *Meeting of the COAG Disability Reform Council Sydney 9 October 2019 Communique* Department of Social Services <<https://www.dss.gov.au/disability-and-carers-programs-services-government-international-disability-reform-council/communique-9-october-2019>>.



It is suggested that this inquiry examine the diversion of people from the criminal justice system under section 174 of the *Mental Health Act* to determine:

- what section 174 was intended to achieve;
- how many diversions have been made under section 174;
- whether the Act has been properly implemented, in terms of the operation of section 174; and
- whether more could be done to ensure people with disability are being fairly and reasonably dealt with by the criminal justice system.

In terms of the Justice Liaison Officer initiative, this Inquiry should consider:

- the role and effectiveness of the Justice Liaison Officers;
- their interaction with the CLS and any other court support roles, including those who provide assessments of defendants with intellectual or cognitive disability under section 174 of the *Mental Health Act*;
- whether additional Justice Liaison Officer positions should be funded; and,
- additional strategies and actions to support the interface between the NDIS and the criminal justice system.

## Restrictive Practices

### Key Points

- The Public Advocate acknowledges that the Queensland regime for restrictive practice authorisation is complex, and generally supports a simplification of the regime.
- Inconsistencies exist between what is deemed a restrictive practice under Queensland legislation, requiring legal authorisation under the state regime, and what is deemed a restrictive practice under the NDIS, requiring providers to report the practice to the NDIS Quality and Safeguards Commission
- Inconsistencies exist between what is deemed a restrictive practice under Queensland legislation, requiring legal authorisation under the state regime, and what is deemed a restrictive practice under the NDIS, requiring providers to report the practice to the NDIS Quality and Safeguards Commission
- It remains critical that restrictive practices are applied legally, have a number of key principles underlying their use, and continue to be closely regulated, to protect the rights, safety and wellbeing of this very vulnerable group of Queenslanders.

Restrictive practices have been defined as 'any practice or intervention that has the effect of restricting the rights or freedom of movement of a person with disability, with the primary purpose of protecting the person or others from harm'.<sup>31</sup> Restrictive practices can include, detention, seclusion, physical, chemical and mechanical restraint (as well as electronic forms of restraint such as tracking bracelets, camera surveillance or restrictions on access to media devices.

The definition (above) and use of restrictive practices on NDIS participants in Queensland is currently authorised under chapter 5B of the *Guardianship and Administration Act 2000*, which provides for four different ways in which approval can be given for restrictive practices by disability service providers:

- Queensland Civil and Administrative Tribunal (QCAT) approvals;<sup>32</sup>
- Guardians for restrictive practices;<sup>33</sup>

<sup>31</sup> Australian Government, *National Framework for Reducing and Eliminating the Use of Restrictive Practices in the Disability Service Sector*, (2014) 4 and cited in Australian Law Reform Commission, 2017, *Elder Abuse: A National Legal Response*, at p 142.

<sup>32</sup> *Guardianship and Administration Act 2000 (Qld)*, ss 12(4), 80R, ch 58 pt 2.

<sup>33</sup> *Ibid* ch 58 pt 3.





- Public Guardian approval for short-term restrictive practices;<sup>34</sup> and
- Informal decision-makers in limited circumstances.<sup>35</sup>

Any person or entity that exercises a power or function in relation to restrictive practices must apply the general principles of the *Guardianship and Administration Act 2000*, as well as the human rights principles under the *Human Rights Act 2019* and comply with the other requirements of the *Disability Services Act 2006*.<sup>36</sup>

Prior to the introduction of the NDIS, there were fewer disability service providers in the market and there were very few small and sole operators in the system.

The introduction of the NDIS has meant that there are now hundreds of registered service providers in Queensland who may need to apply for authorisation for the use of restrictive practices in relation to people with disability who they are providing services to.

For most NDIS providers, the process involved in applying for and obtaining approval to use a restrictive practice is complex and resource intensive.

The Public Advocate has been informed anecdotally, that over the past 12 months, the length of time between lodging an application for hearing in the human rights division of the Queensland Civil and Administrative Tribunal (QCAT), have increased. The NDIS Quality and Safeguards Commission, in its most recent activity report (December 2019), also noted that it had received 65,398 reports of the use of restrictive practices on people with disability which have 'not been authorised by state and territory authorities or where plans to promote positive behaviour supports are not in place for that person'.<sup>37</sup>

Considering that restrictive practices constitute a significant intrusion into the fundamental human rights of people with disability, it is critical that they are applied legally and continue to be closely regulated, to protect the rights, safety and wellbeing of this very vulnerable group of Queenslanders.

The NDIS is committed to achieving national harmonisation of restrictive practice regimes, including reducing the complexity of the law authorisation processes.

The Public Advocate acknowledges that the Queensland regime for restrictive practice authorisation is complex, and generally supports a simplification of the regime. Another issue that adds to the complexity and confusion for service providers and families, is the inconsistency between what is deemed a restrictive practice under Queensland legislation, requiring legal authorisation under the state regime, and what is deemed a restrictive practice under the NDIS, requiring providers to report the practice to the NDIS Quality and Safeguards Commission. In Queensland, the locking of gates, doors and windows where clients have what is described as a 'skills deficit', in terms of crossing roads for example, is not considered a restrictive practice requiring formal authorisation. However, the NDIS treats the locking of gates, doors and windows in those circumstances as a restrictive practice that must be reported and managed in accordance with its standards and policies.

These inconsistencies between the two regimes should be addressed to minimise complexity and confusion for service providers and families.

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<sup>34</sup> Ibid ch 58 pt 4.

<sup>35</sup> Ibid ch 58 pt 6.

<sup>36</sup> *Guardianship and Administration Act 2000 (Qld)* s 11, *Disability Services Act 2006 (Qld)* ss 141-142.

<sup>37</sup> NDIS Quality and Safeguards Commission, *Activity Report 1 July 2019 to 31 December 2019*, February 2020, <<https://www.ndiscommission.gov.au/sites/default/files/documents/2020-06/11591-ndis-6-month-activity-report-jul-dec-2019-june-2020.pdf>>.



The key principles underpinning any Queensland restrictive practices regime going forward should include the following:

- Any restrictive practice should be the least restrictive of the person's human rights and used only:
  - as a last resort, and after alternative strategies have been considered;
  - to prevent serious physical harm to the person or another;
  - to the extent necessary and proportionate to the risk of harm;
  - with the approval of a person authorised by law to make this decision;
  - as prescribed by the person's positive behaviour support plan; and,
  - when subject to regular review.
- The importance of maximising the person's:
  - physical, emotional, social and intellectual potential; and
  - opportunities for participation in and inclusion in the community;
- The aim/objective of reducing or eliminating the need for the use of restrictive practices; and
- The need for transparency and accountability in the use of restrictive practices.

## Conclusion

The NDIS has had, and will continue to have, profound and positive impacts on the lives of Queenslanders with disability. The successful implementation of the NDIS in Queensland will continue to improve the quality of life of people with disability.

Thank you for the opportunity to contribute to the consultation associated with this Inquiry into the operation of the NDIS in Queensland. I look forward to the outcomes of the Inquiry and to making further contributions when the draft report is released later this year.

Yours sincerely



Mary Burgess  
**Public Advocate**

