

Disability Services and Other Legislation (NDIS) Amendment Bill 2019

Submission to the Education, Employment and Small
Business Parliamentary Committee

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Introduction

The Public Advocate welcomes the opportunity to comment on the *Disability Services and Other Legislation (NDIS) Amendment Bill 2019* (the Bill).

As the statutory agency with legislative responsibility to systemically advocate to protect the rights and interests of people with impaired decision making capacity,¹ one of the key roles of the Public Advocate is to ensure that any changes to legislation directly affecting members of this cohort maintains all of the safeguards Queensland currently has in place to protect them.

The National Disability Insurance Scheme (NDIS)

The amendments to the Bill being considered directly reflect how the Queensland disability sector will operate following the full roll-out of the NDIS, which is expected (but may not be fully realised) by 1 July 2019.

The overall objectives of the NDIS are to:

- support the independence and social and economic participation of people with disability;
- provide reasonable and necessary supports, including early intervention supports, for participants;
- enable people with disability to exercise choice and control in the pursuit of their goals and the planning and delivery of their supports;
- facilitate the development of a nationally consistent approach to the access to, and the planning and funding of, supports for people with disability; and
- promote the provision of high quality and innovative supports to people with disability.²

The Public Advocate fully supports the goals of the NDIS. The NDIS offers an unparalleled opportunity for positive social change that will support Queenslanders to live better, more autonomous lives.

While funding for the NDIS is provided by the Commonwealth Government, the Queensland Government still has a vital role to play in providing an inclusive, safe and accessible community for all Queenslanders with disability, regardless of whether they are NDIS participants.

Further commentary on the safeguards for people with disability currently provided under Queensland law and the proposed amendments to these safeguards is provided below.

The key safeguards for people with disability considered in the Amendment

The *Disability Services Act 2006*, the *Public Guardian Act 2014* and the *Coroners Act 2003* each include provisions to safeguard and protect Queenslanders with disability living in care. (This arrangement should be distinguished from living arrangements for people with disability who live with family.)

The *Public Guardian Act* establishes a Community Visitor Program, where adult community visitors independently monitor different types of accommodation called 'visitable sites' where vulnerable adults live.³

Community visitors can investigate a range of issues including whether:

- adequate services are provided for assessment, treatment and support;
- the standards of accommodation, health and wellbeing are appropriate;

¹ *Guardianship and Administration Act 2000* (Qld) s 209.

² *National Disability Insurance Scheme Act 2013* (Cth) s 3.

³ *Public Guardian Act 2014* (Qld) Pt 6.



- services are provided in a way least restrictive of rights;
- adequate information is available for consumers about their rights; and
- there is an accessible and effective complaints process in place.⁴

Community visitors also have complaint functions which require them to inquire into, and seek to resolve, complaints.⁵ They can also refer unresolved complaints to external agencies, including Queensland Health and the Department of Communities, Disability Services and Seniors.⁶

Given that many Queenslanders with disability residing in care are not able to communicate verbally or by using other conventional methods, and may not have access to advocates or other people to provide advocacy support, the community visitor program plays a vital role in monitoring their health and wellbeing and raising issues of concern.

The *Coroners Act* provides for the deaths of people with disability to be reportable to the Coroner.⁷

The reporting of deaths of people with disability in care to the Coroner provides for the investigation of these deaths and their causes. If the death is found to have been potentially avoidable, the investigation can (among other things) make recommendations to improve the practices and procedures of care providers, with a view to improving the care and treatment of residents and reducing the incidence of premature deaths among this population.

Both the *Public Guardian Act* and the *Coroners Act* use the same definition of a site from which a disability death in care needs to be reported or which should be visited by community visitors.

As noted above, the *Coroners Act* currently defines a death to be reportable if it was a death in care. Under section 9(1)(a), a person's death is a death in care if, when the person died, the person had a disability noted in the *Disability Services Act*, section 11 and was residing in certain types of accommodation, namely: a level 3 accredited residential service; disability accommodation funded by the department administering the *Disability Services Act*; or a residential service (not a private dwelling or aged care facility) funded by a Health and Hospital Service or Queensland Health. In 2016, the *Disability Services and Other Legislation Amendment Act 2016* (DSOLAA) extended the definition of a death in care to also include the deaths of people receiving NDIS-funded services.

The *Public Guardian Act* and *Regulation* define visitable sites according to whether the accommodation or services provided to the person at the site are funded or provided by a disability or public health agency, or is an accredited residential service of a certain level under the *Residential Services (Accreditation) Act 2002*. Essentially the definition is consistent with the definition of a site for a disability death in care under the *Coroners Act*. The DSOLAA also extended this definition to include people receiving NDIS-funded services.⁸

The *Disability Services Act* also provides a legislative framework for the use of restrictive practices on people with disability by state government-funded service providers. The framework details a process for the use of restrictive practices that includes:

- Assessment by 1 or more qualified professionals;
- The development of a behaviour support plan – which must be reflective of the principles of the *Disability Services Act* in relation to restrictive practices. This means that it must be informed by a best practice evidence base, producing behavioural change focused on skills development and environmental design, recognises that restrictive practices should only be used when

⁴ *Public Guardian Act 2014* (Qld) s 41(2), Office of the Public Guardian, *Visiting Adults*, <<https://www.publicguardian.qld.gov.au/community-visitors-for-adults/visiting-adults>>.

⁵ *Public Guardians Act 2014* (Qld) s 41(3)(a).

⁶ *Public Guardian Act 2014* (Qld) s 41(3)(b).

⁷ *Coroners Act 2003* (Qld) s 8.

⁸ *Disability Services and Other Legislation Amendment Act 2016* (Qld) s 4.



necessary to prevent harm and if the use if the least restrictive way of ensuring the safety of adults and others;

- The plan must aim, overall, to reduce the intensity, frequency and duration of the adults behaviour and reduce or eliminate the need to use restrictive practices;
- Approval for the use of restrictive practices by the Queensland Civil and Administrative Tribunal (QCAT)
- Approval for the use of restrictive practices is valid for a period of 12 months prior to revocation or review.⁹

The adoption of this regime has resulted in greater transparency around the use of restrictive practices in Queensland's disability sector and has increased consistency, professionalism and oversight of these practices.

Changes being considered in the amendment

Two key changes are being considered in the amendment:

The definition of visitable sites/deaths in care

A key change proposed in the amendment relates to the definition of 'visitable sites' and 'death in care' – places where community visitors visit and places where, if a death of a person occurs, it is reported to the Queensland Police Service or the State Coroner.

The definitional change effectively removes State-funded disability services from the definition, as they will no longer be operating following the full roll out of the NDIS. It also provides for a more detailed definition of NDIS participants who will receive the protections of the legislation, i.e. will eligible for a visit by a community visitor or to have their death reported to the Coroner.

This change is required prior to the full roll-out of the NDIS to provide some clarity in relation to visitable sites and deaths in care. However, the proposed change raises some concerns in relation to the potential narrowing of the definitions of visitable sites and reportable deaths that may lead to fewer protections and safeguards for vulnerable Queenslanders.

Restrictive practices

As noted, Queensland currently employs a legislative framework for the use of restrictive practices for people with disability receiving State-funded services.

From 1 July 2019, Queensland will retain responsibility for authorising the use of restrictive practices. The Bill seeks to ensure that the current safeguards under the *Disability Services Act* form part of the authorisation process in Queensland. The Bill makes changes to reflect the new roles and responsibilities of agencies from 1 July 2019 and to reflect the necessary intersections between Queensland legislation and relevant Commonwealth legislation. The Bill also provides flexibility to ensure Queensland legislation can operate effectively with the *Commonwealth NDIS (Restrictive Practices and Behaviour Support) Rules 2018*, which are yet to be formally agreed to for operation in Queensland.

Additionally, the amendment allows for the application of the restrictive practices legislative framework in the development of community access and respite plans prepared for people with disability in receipt of NDIS funding.

⁹ *Disability Services Act 2006* (Qld) pt 6.; *Guardianship and Administration Act 2000* (Qld) ch 5B.



Issues and Concerns

Restrictive practices

The proposed amendment to the *Disability Services Act* for the development of a regulation for restrictive practices will enable flexibility to ensure Queensland legislation can operate effectively with the *NDIS (Restrictive Practices and Behaviour Support) Rules 2018* when agreed for operation in Queensland.

This amendment is fully supported by the Public Advocate.

Visitable sites/Death in care

The new definition of visitable sites and death in care includes a definition of NDIS participants/providers that is related to the classes of support received and/or offered by a provider.

At present, the NDIS legislation includes a set of practice standards which identify classes of support, specifications and assessment procedures, outlined in the *National Disability Insurance Scheme (Provider Registration and Practice Standards) Rules 2018*. Each of the 37 classes of support are identified under broad headings with applicable schedules and assessment methods noted.

Of the 37 classes of support identified in the NDIS legislation, four are used in the amendment to define NDIS participants/providers, for the purposes of the definitions, namely:

- high intensity daily personal activities;
- assistance with daily life tasks in a group or shared living arrangement;
- specialist positive behaviour support that involves the use of a restrictive practice; and
- specialist disability accommodation.¹⁰

Under this definition, the places where people are receiving the above class/es of support under their individual NDIS plans or residential facilities where NDIS-registered service providers are providing this class of support will be a visitable site or a place where a death in care is to be reported.

The four classes of support listed above may well cover the vast majority of people that were previously protected by the legislation (i.e. when services were provided by the State rather than the Commonwealth). It is also acknowledged that there will almost definitely be more Queenslanders receiving the benefit of these protections after the change in legislation, as the NDIS is expected to fund a larger number of Queensland residents with disability than were previously receiving State-funded disability services.

Issues arise, however, due to the way the listed classes of support are defined and applied in practice. The NDIS has not developed strong working definitions the services that are included under each class, leaving them open to variable interpretation. This means that one NDIS recipient could potentially receive a support under a particular class and another receive that same support categorised under a different class of support. So potentially, one person could be visited by a community visitor and another not, even though they are receiving the same supports (classified differently) under the NDIS.

The definition also creates a situation where a community visitor may visit a residential facility where multiple people with disability reside, however the facility is only classified as 'visitable' due to the class of support provided to 1 or 2 residents. In these circumstances the process of conducting a visit becomes very difficult, as will the process associated with reporting deaths in care, which may create significant confusion for providers and result in visitors not visiting sites or deaths in care not being reported.

¹⁰ *Disability Services and Other Legislation (NDIS) Amendment Bill 2019 (Qld)* cls 51, 62 (definition of 'relevant class of supports').



The situation is potentially compounded by the possibility that a proportion of people who previously received the benefit of the safeguards included in the legislation (i.e. receiving State-funded disability services) not being eligible for the NDIS and hence not being covered by the new definitions. This is most likely to impact people currently residing in level 3 residential accommodation (e.g. boarding houses) who previously were supported by State-funded disability services (with personal care provided at the residential facility), and are now not considered eligible for NDIS support. In these cases, this cohort will not be afforded the legislative safeguards previously available under the legislation should the accredited accommodation facility cease its registration as a level 3 accredited residential service.

The State still is not aware, however, of the exact number of people who will be included under the new definitions and whether the legislation will continue to provide safeguards for those previously protected. This information will need to be collected by the Office of the Public Guardian from the National Disability Insurance Agency. It is noted that the amendment will provide legislative powers for this to occur.¹¹ It is only after the NDIS is fully implemented and the market adjusts to the new environment, that the true coverage of the amended legislation and its impacts will be known.

The first two to three years of the Act's implementation will therefore be critical and will need to be closely monitored to ensure that the safeguards continue to protect the most vulnerable in the Queensland community.

Conclusion

Overall, it is difficult to determine whether the proposed legislative amendments, will impact negatively on the safeguards provided for Queenslanders with disability living in care.

The Public Advocate generally supports retention of a broader definition of visitable sites and deaths in care, that includes all people receiving supports under the NDIS in Queensland rather than those receiving only four specific classes of support.

The unknowns associated with the number of Queenslanders who will receive NDIS funding, who will also be covered by the protections under the legislation, and whether this will include people who previously had the benefit of these protections, means that the ultimate impact of the amendment will be difficult to determine for some time.

It is anticipated that the establishment and operation of the Queensland branch of the NDIS Quality and Safeguards Commission will assist in actively monitoring the health and wellbeing of Queensland NDIS participants. Meetings have recently been initiated between the Public Advocate and the Commission to start building relationships that will allow for effective monitoring of the system into the future. It is anticipated that data collected by the Commission may be useful in monitoring reported deaths in care and other incidents that can be used to improve health and well-being outcomes for people with disability in Queensland. The data trends may also be useful for assessing the impact of the new definitions of visitable site and death in care, going forward.

Thank you again for the opportunity to contribute to this consultation. Should the Committee require, I would be pleased to be part of further discussions in relation to the amendment and the provision of appropriate safeguards for Queenslanders with impaired decision-making capacity.

Yours sincerely



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¹¹ *Disability Services and Other Legislation (NDIS) Amendment Bill 2019 (Qld)* cls 61, 64.

