

22 April 2021

Committee Secretary
Joint Standing Committee on the NDIS
Department of the Senate
PO Box 6100
Parliament House
CANBERRA ACT 2600
AUSTRALIA
Via email: ndis.sen@aph.gov.au

Dear Sir or Madam,

Joint Standing Committee Inquiry into independent assessments under the NDIS

Thank you for the opportunity to provide a submission to this inquiry and for the extension of time to prepare and submit this response.

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.

The introduction of independent assessments to facilitate entry into the NDIS scheme has caused considerable concern across the disability sector and among NDIS participants, their families, carers, and supporters.

I recently provided feedback regarding the introduction of independent assessments and other changes proposed to the NDIS (including flexible budgets) to the NDIA. It is anticipated that the results of this consultation process will be available to the Joint Standing Committee for their consideration during this inquiry. I have also attached a copy of my submission to that process for Committee members' information.

It is recognised, and has been highlighted in a number of reviews of the Scheme (including the December 2019 Tune Review¹), that the assessment process associated with the NDIS needs to change, given the high costs of assessments for potential participants, issues with inconsistency between assessments, and disparities in annual plan budgets between participants from different socio-economic backgrounds.

Unfortunately, the independent assessment program that has been trialled and is proposed for implementation by the NDIA has excluded critical elements recommended by the Tune Review.

The NDIA's proposed model departs from the Tune Review in the following areas:

- independent assessment being a mandatory part of the access, plan development and plan review process, rather than being used on a discretionary basis;
- participants having to undergo an assessment every five years, even if their functional capacity is stable and their circumstances have not changed; and,
- there will be no right to challenge the assessments, and participants will only be able to request another assessment in very limited circumstances.

¹ Tune, D (AO, PSM), *Review of the National Disability Insurance Scheme Act 2013 – Removing red tape and implementing the NDIS participant service guarantee*, December 2019, <https://www.dss.gov.au/sites/default/files/documents/01_2020/ndis-act-review-final-accessibility-and-prepared-publishing1.pdf>.

These observations reinforce the concerns I raised in my submission to the NDIA (mentioned above), particularly in relation to the need for the independent assessment process to include an adequate review and appeal process.

At present there is a distinct absence of any independent oversight of assessors or their assessments. The decision to exclude any review or appeal against a report of an independent assessor assumes that assessments will always "be correct". This is a dangerous assumption to make, in view of what is known about government and other systems and processes and all areas of human endeavour. To deny any review or reconsideration of an assessment potentially leaves prospective NDIS participants with no access to the Scheme or lower levels of support than they may need, and no means of seeking review or recourse.

It is also critical that independent assessors are consistent and reasonable in their approach and recommendations, and do not, over time, become harsher in their assessments of prospective participants' needs, because they become desensitised to the needs and conditions of people with disability or form the view that the NDIS prefers conservative assessments.

In relation to the 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 appropriate 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.

Other areas of concern with the proposed independent assessment process that I would like to highlight to the Committee, that are also detailed in the Queensland Government's submission to the Committee, and which are particularly relevant to people with impaired decision-making capacity include;

- The evidence base for the proposed independent assessment program. The pilot program currently employed to trial and evaluate the independent assessment program is not generally representative of the NDIS participant population, as it does not include people from rural and remote areas, and includes very few First Nations participants or people from linguistically or culturally diverse backgrounds. People with psychosocial disability have also been significantly under-represented. Most participants in the pilot have high levels of function, are children, and are current Scheme participants. The trial has also failed to follow up and gather information from people who chose to opt-out of the pilot about the reasons why and improvements that could be implemented. The pilot has also not had sufficient focus on the possibility that certain cohorts of people will not engage with the assessment process, as currently proposed, at all, which is likely to include people with impaired decision-making capacity.
- The accuracy of assessments when they are undertaken in unfamiliar settings outside of the person's home, including in residential aged care facilities, hospitals, and custodial settings. In these settings, the potential to accurately assess a person's full range of functional capacity may be severely limited. Another concern is the relatively short time frame allocated for assessments (approximately 3 hours) which may not be sufficient to allow for an accurate reflection of the person's functionality and needs, particularly compared with an assessment

conducted by a health professional who has an established therapeutic relationship with the person.

- The need for the independent assessment process to include embedded safeguards particularly for people with impaired decision-making capacity, such as the person being permitted to have an independent advocate attend the assessment if they wish, in addition to a support person, to ensure that they are supported to understand and engage with the process to the extent they can. (The proposed independent assessment process only allows for one support person to be involved.)
- The failure to recognise and accommodate the need for advocacy support as noted above, also raises concerns in relation to support for decision-making and the adoption of the least restrictive approach in relation to decision-making for people with disability. These are key principles that underpin Queensland's guardianship and administration system. The requirement for prospective applicants and participants to understand and access the NDIS via independent assessment may result in additional substitute decision-makers being appointed by Tribunals. This places additional pressure on the guardianship and administration system of each State and Territory and has the potential to undermine the commitment of the NDIS to providing choice and control to participants.

Based on the above concerns I respectfully submit that the introduction of an independent assessment program by the NDIA be delayed, until such time as;

- trials of the process can be completed with a representative cohort of participants and potential participants;
- issues associated with engagement of particularly vulnerable participants with independent assessments (including those with psychosocial disabilities, First Nations people and people from culturally and linguistically diverse backgrounds) are satisfactorily addressed;
- the necessary safeguards and protections, as recommended in the Tune Review, are embedded into the independent assessment program; and,
- provisions can be made to include more than one other person in the assessment process, which should extend to care givers, treating medical professionals and advocates.

Regardless of whether these changes are made, I do not support the introduction of mandatory independent assessments for NDIS eligible and existing participants. Rather, the proposed independent assessments should be improved as outlined above and be one of a range of tools that NDIS applicants and participants can access, according to their own circumstances and preferences.

Thank you for the opportunity to provide feedback to the Joint Standing Committee on this critical issue. I would be pleased to make myself available if Committee members would like further clarification of any of the issues raised in this letter. I can be contacted on 07 3738 9510 or via email at mary.burgess@justice.qld.gov.au

I look forward to the outcomes of the inquiry.

Yours sincerely



Mary Burgess

Public Advocate

Enc

4 February 2021

Dr Karen Hopper, B.Econ (Hons), Ph.D, GAICD
Principal Commissioner
Queensland Productivity Commission
PO Box 12112
George Street
Brisbane Qld 4003

Via email: enquiry@qpc.gov.au

Dear Dr Hooper,

Queensland Productivity Commission – Draft Report on the National Disability Insurance Scheme (NDIS) market in Queensland

I write in response to the Commission's request for submissions providing feedback on the above draft report.

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. Many people with impaired decision-making capacity may become NDIS participants.

I support in principle all of the recommendations included in the draft report.

I have prepared this submission to provide some further information to support the inquiry, as well as suggestions for additional recommendations for the Commission to consider in the preparation of the final report.

The interface between mainstream government services and the NDIS

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, justice, housing, guardianship and administration and transport.

Improving the interface between mainstream government services and the NDIS has been a key focus of my office. While the NDIS is responsible for the provision of necessary disability supports for participants, the fact a person is an NDIS participant does not relieve other essential state government services of responsibility for ensuring their services are responsive and accessible to NDIS participants. It is critical that people's NDIS plans acknowledge their other needs, especially their complex health needs, and establish appropriate points of contact between the NDIS and those other services. Otherwise, NDIS participants remain at risk of poor outcomes as a result of insufficient oversight and protections.

In some circumstances the result of this lack of integration and oversight, particularly in relation to health services, can have tragic consequences. 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.¹

Ideally, people with disability and complex health conditions should be identified by the State health system, so that they can receive appropriate and responsive health care, which takes into account their disability care needs, and makes adequate provision for NDIS supports and services to be available or accessible to them while in hospital or receiving other health services.

This process needs to commence, when people are in hospital and/or initially diagnosed with a disability that may make them eligible for entry into the NDIS. Currently hospital rehabilitation and discharge processes for people with disability who may be eligible for the NDIS can be inconsistent. While there are some trials of discharge programs occurring, including NDIS nurse navigators in larger hospital settings, often the patients or their families are expected, after being given some initial information, to engage with the NDIS and organise assessments and a plan. People who are unfamiliar with the NDIS and its processes will find the system difficult to negotiate without assistance. All of this takes time, during which, the person remains in a hospital bed, costing the State unnecessary expense and not being in the interests of the person with disability who may no longer require medical treatment, but cannot be discharged without appropriate supports in place. There is a clear need for Queensland Health to develop and implement a State-wide consistent discharge process in conjunction with the NDIS to both support and facilitate eligibility and access to the scheme from hospital and other health-related residential services.

Once living in the community, NDIS participants with disability and complex health conditions should have an annual health assessment that informs an annual health care plan, which should include the coordination of health care between multiple services, including a GP, private or public medical specialists and a plan for the provision of emergency and specialist care via the local Hospital and Health Service (HHS), when necessary. The plan should include preventative medical interventions including screening for cancer and other diseases and an annual Fluvax, and eventually a COVID-19 vaccination, depending on the person's health conditions.

I also suggest that for people with disability with particularly complex health conditions, consideration should be given to establishing health liaison or health coordination positions within HHSs, whose role it would be to ensure that the health care plans of this vulnerable cohort of people are being implemented and reviewed.

When attending hospital for either routine or emergency assessments and procedures, participants should also be able to access their essential day to day NDIS supports (for example assistance at mealtimes, turning in bed, and being comfortably positioned for eating and sitting) as they would when living in their own home, as well as be accompanied by a support person to assist with communication and other reasonably and necessary adjustments.

For other NDIS participants, a lack of suitable and affordable housing can be an issue. These are participants who are not eligible for specialist disability accommodation (SDA), but nonetheless require accessible accommodation and/or modifications to a home so they can comfortably reside there. As many NDIS participants receive a disability support pension as their sole source of income, housing options are limited and will generally require them to seek accommodation in the public or community housing sectors, the responsibility of the Queensland state government.

Again, to address the accommodation issues for this cohort, it is critical that the Department of Communities, Housing and Digital Economy:

- Deliver on its 2016-17 commitment to a target of 50 percent of newly constructed social housing dwellings meeting the 'Gold' or 'Platinum' Liveable Housing Design Guidelines Standard.²

¹ 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>.

² Australian Building Codes Board Office on behalf of the Commonwealth of Australia and States and Territories of Australia, *The Accessible Housing Options Paper*, (2018), Canberra.

- Is actively involved in the approval process for, and assists with any other processes required, to facilitate the modification of current public housing stock rented by NDIS participants if they have funding available in their plan for this work to be undertaken.

The *Queensland Government Housing Strategy 2017-2027* acknowledges that by 2027, almost 380,000 additional homes will be needed to support our growing population. It also reports that 25,000 people with disability on low incomes currently live in inappropriate or unsustainable settings. However, it seems that since 2017-18 only 238 new dwellings have been completed across Queensland under the Housing Construction Jobs Program with another 180 under construction.³ It is unclear how many of these homes meet the 'Gold' or 'Platinum' Liveable Housing Design Guidelines Standard. Despite these efforts, they amount to a 'drop in the bucket' in terms of addressing Queensland's social housing needs and the housing needs of the 25,000 Queenslanders with disability on low incomes who are living in inappropriate or unsustainable settings. Clearly, urgent action needs to be taken by State Government agencies to address the critical shortfall in housing for disadvantaged Queenslanders, particularly those living with disability. No level of support from the NDIS can compensate for the lack of safe, accessible and affordable housing.

As noted in my initial submission to the Commission, the experiences of NDIS participants interacting with the justice system in Queensland also highlights the need for improved coordination and integration.

Section 174 of the *Mental Health Act 2016 (Qld)* is a new provision in the *Mental Health Act 2016* that provides 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 remains unclear how many diversions have occurred under this section since the commencement of the new Act. The Public Advocate is also aware that 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.

The more recent introduction of Justice Liaison Officers by the NDIS across each state and territory is viewed positively, however the funding of only two officers to service all of Queensland is considered to be grossly inadequate.

Based on the evidence above, it is respectfully suggested that the Commission's report make recommendations related to the Queensland government;

- Committing to the development of appropriate pathways (including centralised discharge policies), touchpoints, referral systems and risk flags for NDIS participants to access and use Queensland government systems and services seamlessly, with appropriate recognition and integration of their NDIS supports to facilitate and enhance service provision where required.
- Proposing that the NDIS approve the availability of funding in NDIS plans for coordinators/case managers to develop plans (like annual health care plans) that integrate and coordinate services provided by multiple government agencies, inclusive of things like dates and confirmation of appointments, support persons to attend services with participants, transport, risk flags (like the person not visiting their GP for 12 months) and lines of reporting and communication of critical information (this is similar to, but more specific than recommendation 3 in the draft report – the NDIA facilitate reallocating participants' plan budgets towards support co-ordination when it improves plan utilisation and participant outcomes).
- Making a commitment to constructing an identified amount of new housing stock for people with disability to the 'Gold' or 'Platinum' Liveable Housing Design Guidelines Standard, and assisting NDIS participants residing in public or community housing to obtain the necessary approvals for home modifications funded in their individual NDIS plans.

< <https://www.abcb.gov.au/Resources/Publications/Consultation/Accessible-Housing-Options-Paper>>.

³ Department of Communities, Housing and Digital Economy, *Housing Construction Jobs Program*, 29 November 2019, <<https://www.chde.qld.gov.au/about/initiatives/housing-construction-jobs>>.

- Reviewing the resourcing of services to support the implementation of Section 174 of the *Mental Health Act* to ensure that funding is available for appropriately qualified staff to assess people with an intellectual or cognitive disability under this section of the Act and refer them to appropriate disability supports or the NDIS.
- Proposing (subject to an evaluation of the service) that the NDIA commit to funding additional Justice Liaison Officers in Queensland to assist with access to supports for people with disability who are eligible for the NDIS or current NDIS participants to engage with the justice system.

I understand that the submission provided by the Queenslanders with Disability Network (QDN) also addressed a number of the issues I have raised in the information above, particularly in relation to housing and the provision of support coordination. I fully endorse the perspective they have provided on these issues and the recommendations included in their submission, which has now been published on the Commission's website. With its state-wide network of more than 2,000 members, QDN is uniquely placed to provide the Commission with feedback and views from the lived experience of participants (and non-participants), which is of immense value to reviews of this nature.

Restrictive practices

The Commission's report and recommendations in relation to the restrictive practices regime in Queensland note that the current system is complex and recommends the Queensland Government promote 'clarity and efficiency in its restrictive practices regime'.⁴ Achieving this goal will require a range of legislative and system reforms, including adopting definitions and practices consistent with the NDIS Quality and Safeguards Commission and ensuring that key agencies (such as the Queensland Civil and Administrative Tribunal, the Office of the Public Guardian and the Department of Seniors, Disability Services and Aboriginal and Torres Strait Islander Partnerships) are adequately resourced to perform their relative roles effectively. I also note the Commission recommends the development of a private market for the preparation of positive behaviour support plans.⁵

I fully support the intent of these reforms, having noted in my submission that the Queensland system is complex, inconsistent with NDIS service provider obligations under the NDIS Quality and Safeguards Framework and potentially resource intensive and inefficient for guardianship and administration system agencies.

My submission outlined the key principles that should guide any legislative reform process:

- 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.

⁴ Queensland Productivity Commission, *NDIS Market in Queensland, Draft Report Summary*, (2020), p 53 <<https://qpc.blob.core.windows.net/wordpress/2020/11/NDIS-market-in-Queensland-draft-report-Summary.pdf>>.

⁵ Ibid.

I understand that a confidential review of the Queensland restrictive practice regime is currently being led by the Department of Seniors, Disability Services and Aboriginal and Torres Strait Islander Partnerships, and suggest that the outcomes of this review be considered prior to the finalisation of this recommendation.

Thank you for the opportunity to provide feedback to the Commission following the release of the draft report. I would be pleased to make myself available to the Commission if you would like to discuss any of the issues raised in this letter. I can be contacted on 07 3738 9510 or via email at mary.burgess@justice.qld.gov.au

I look forward to reading the final report.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Mary Burgess', written in a cursive style.

Mary Burgess
Public Advocate