



Queensland Advocacy Incorporated

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

Systems and Individual Advocacy for vulnerable People with Disability

Increasing applications for Guardianship and Administration Appointments in the NDIS

**Submission by
Queensland Advocacy Incorporated**

**Joint Standing Committee on the National
Disability Insurance Scheme**

March 2021

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

Patron: His Excellency The Honorable Paul de Jersey AC

About Queensland Advocacy Incorporated

Queensland Advocacy Incorporated (**QAI**) is an independent, community-based advocacy organisation and community legal service that provides individual and systems advocacy for people with disability. Our mission is to promote, protect and defend the fundamental needs and rights of the most vulnerable people with disability in Queensland. QAI's board is comprised of a majority of persons with disability, whose wisdom and lived experience of disability is our foundation and guide.

QAI has been engaged in systems advocacy for over thirty years, advocating for change through campaigns directed at attitudinal, law and policy reform. QAI has also supported the development of a range of advocacy initiatives in this state. For over a decade, QAI has provided highly in-demand individual advocacy services: the Human Rights Legal Service, the Mental Health Legal Service and Justice Support Program and more recently, the National Disability Insurance Scheme Appeals Support Program, Decision Support Pilot Program, Disability Royal Commission Advocacy Program, Education Advocacy Program and Social Work Service. Our individual advocacy experience informs our understanding and prioritisation of systemic advocacy issues.

QAI's recommendations

- Large-scale training and upskilling of the disability workforce in relation to issues of decision-making capacity and the role of substitute decision-makers, including relevant principles contained within state-based laws. Addressing misinformation regarding the presumption of capacity is a priority. Reform is needed to facilitate a paradigm shift towards supported decision-making as required by the Convention on the Rights of Persons with Disabilities. This could be partially achieved through increased funding for Support Coordination, a role ideally situated to assist NDIS participants exercise choice and control in decision-making.
- Consideration of additional safeguards against unsubstantiated guardianship and/or administration applications regarding NDIS participants initiated by NDIS service providers. For example, consideration of an additional step to be taken prior to the submission of an application to QCAT, such as requiring the NDIS service provider to liaise with the NDIA or NDIS Quality and Safeguards Commission.
- Measures adopted to hold NDIS service providers to account when they are found to have made unsubstantiated applications to the Tribunal, for example consideration of the implementation of penalty provisions. At a minimum, the NDIS Quality and Safeguards Commission must collect relevant data, for example:
 - The number of applications for guardianship and/or administration made per NDIS service provider.
 - The number of applications for guardianship and/or administration made per NDIS service provider that are dismissed at hearing.



- The number of applications for guardianship and/or administration made per NDIS service provider in which an interim order is made before the application is dismissed at hearing.

This data must be publicly accessible and will highlight the NDIS service providers who require additional training.

- Mandatory legal representation for all adults subject to guardianship and/or administration applications. This is particularly essential for adults under interim orders who are essentially, in practice, faced with the task of reversing the presumption of capacity. There should be increased information for NDIS participants regarding their right to legal representation and free legal services within their area.
- Increased scrutiny of guardianship and/or administration applications by the Tribunal, whereby only applications assessed as falling within the scope of the legislation, passing a certain threshold test and which are supported by relevant and sufficient evidence, are accepted and listed for hearing.
- Increased scope for the Tribunal to reject on the papers applications lacking in merit or not supported by an appropriate evidentiary basis or at a minimum, scope to seek further particulars from the applicant prior to accepting the application and listing it for hearing. Greater use of directions hearings to encourage applicants to either submit additional evidence or to withdraw applications should be considered.
- Ensure that legislative powers to invoke interim orders are exercised extremely judiciously, given the significant human rights impact on a person whose voice and right of reply is yet to be heard. The power to make interim orders must only be exercised when there is a clear and substantiated risk of immediate harm. The adult concerned must be consulted and their views obtained, prior to making the order.
- Increased training for Tribunal members regarding the NDIS and its cyclical plan review processes that may act as a catalyst for unnecessary guardianship applications.

Introduction

QAI welcomes the opportunity to make a submission to the Joint Standing Committee on the National Disability Insurance Scheme's (NDIS) '*General issues around the implementation and performance of the NDIS*' inquiry. As a human rights organisation devoted to the interests of people with disability, QAI has held a strong interest in the rollout of the NDIS. The historic remodelling of the disability sector has had far reaching consequences. For some people with disability, the NDIS has facilitated access to previously unobtainable yet essential support services. For others, it has added a layer of complexity to their lives that is counter-intuitive to the purported aims of the scheme. Due to the market-based philosophy underpinning the



NDIS, participants and service providers are deemed free to make decisions in accordance with their own interests. Whilst this theoretically facilitates increased choice and control for participants, it also enables service providers to put their own needs ahead of the people they support and, in some situations, this has resulted in the exploitation of people with disability.

One example of people with disability experiencing harm and reduced choice and control due to the actions of NDIS service providers is through the rising number of applications for guardianship and administration appointments to Queensland's Civil and Administrative Tribunal (QCAT). Many of these applications are unsubstantiated and some are occurring in situations where the provider has a conflict of interest and seeks financial gain from a participant's NDIS funding. Whilst this appears to be an unintended consequence of the rollout of the NDIS, it is nevertheless a deeply concerning trend that has significant human rights implications for people with disability. It highlights the critical need for effective safeguards and robust accountability measures and shall be the focus of this submission.

Increase in guardianship and administration applications

The increase in guardianship and administration applications due to the rollout of the NDIS is documented in QCAT's 2018-2019 Annual Report. The Tribunal advised that during the three-year rollout period, QCAT received 843 applications for guardianship and administration appointments, many of which were initiated by NDIS service providers.¹ Over half of these applications occurred during the third year, indicating a trend of increasing application numbers over time. Indeed, such was the increase in demand that QCAT sought extra funding for two additional registry positions in order to cope with the influx of applications.²

QAI has also seen an increase in the number of referrals to its Human Rights Legal Service (HRLS) for assistance with guardianship and administration applications. For example, in the 2015-16 financial year, immediately preceding the rollout of the NDIS in Queensland, our HRLS provided legal advice to 25 clients regarding guardianship matters. In the 2019-20 financial year, we provided legal advice regarding guardianship matters to 61 clients.

Applications made without merit

In addition to the increasing number of guardianship and administration applications initiated by NDIS service providers, QAI is concerned about the number of applications being submitted without merit. That is, applications based upon unsubstantiated claims of incapacity or uncorroborated allegations of inappropriate conduct by current decision-makers. QAI has witnessed a concerning trend in applications submitted with little to no

¹ Queensland Civil and Administrative Tribunal, *Annual Report 2018 – 19*, p26.

² *Ibid*, p27.



evidentiary basis and which instead rely upon the opinions of varying health professionals, many of whom do not possess expertise in assessing decision-making capacity. As QCAT is not bound by the rules of evidence, medical and allied health reports prepared for alternative purposes, such as those written in deficit-laden language for the purpose of obtaining access to the NDIS, have been used to support applications for guardianship and administration, despite the content not pertaining to issues of capacity.

Whilst many applications have benevolent intentions, some are nonetheless occurring in situations where prior to the NDIS, informal decision-making arrangements as per the General Principles of the *Guardianship and Administration Act 2000* (Qld) were working well. This is because the NDIS has introduced a level of formality and bureaucracy into disability service provision not previously seen in the sector. According to the Victorian Public Advocate, the marketisation of disability services increases the likelihood of service providers wanting to transfer risk and reduce uncertainty by seeking contractual agreements with decision-makers that officially have legal capacity.³ The diversification of service settings due to the marketisation of disability services has also increased this likelihood. People with disability typically receive support from a number of service providers, many of whom may incorrectly believe there is a need to formalise decision-making arrangements and/or who view this as a mechanism to fulfil their administrative goals.

Even more concerning are the applications submitted by NDIS service providers in relation to participants with substantial funding packages following a disagreement between the service provider and the participant and/or their familial guardian. These disagreements can involve service providers preventing family members from visiting the participant and/or excluding family members from decision-making regarding the participant's day to day supports. In these situations, the service provider typically applies to QCAT for the appointment of the Public Guardian and/or Public Trustee. It is well known within the disability sector that the Public Guardian and Public Trustee almost exclusively enter into service agreements with registered service providers as opposed to smaller, independent or unregistered providers which are often preferred by participants and their families. QAI is alarmed by the conflict of interest inherent in some applications, whereby NDIS service providers have a vested interest in maintaining service agreements with participants with substantial funding packages. In the event of a disagreement between the service provider and participant or their familial guardian, the risk of the participant ceasing services with the service provider is mitigated by seeking the removal of the participant or guardian's decision-making rights and with the subsequent appointment of the Public Guardian and/or Public Trustee. In these situations, applications for the appointment of a substitute decision-maker are driven by the service provider's self-interest as opposed to the needs and interests of the participant. They are motivated by prospects of financial gain and are guided by ill-informed

³ Office of the Public Advocate, *Decision Time: Activating the rights of adults with cognitive disability*, February 2021, page vi



understandings of decision-making capacity, with serious consequences for the participant's human rights.

The following case studies provides an example:

Case study #1

Roger, in his 50's, has an intellectual disability and a substantial NDIS funding package that provides 1:1 in home support. He lives in his own home and decisions about his healthcare, finances and NDIS supports are made by his sister Rachel, who was appointed as Roger's guardian following the death of their mother. No concerns regarding this arrangement were ever raised by Roger or anyone else until 2019, when Roger's service provider was taken over by another registered provider, Provider X. The new workers supporting Roger from Provider X were less communicative with Rachel and before long, a dispute arose between Rachel and Provider X regarding the level of support they were providing to Roger. Provider X became concerned it was at risk of losing Roger's service agreement. Email correspondence between staff at Provider X referenced management concern about losing a "\$90,000 client". Provider X support workers took Roger to an appointment with his doctor where they encouraged Roger to tell the doctor that Rachel had been abusing him. Roger became very distressed and confused. Provider X used the doctor's report in a subsequent application to QCAT for the appointment of the Public Guardian and Public Trustee and to remove Rachel as Roger's decision-maker. Rachel terminated Roger's service agreement with Provider X and employed another service to support Roger. Roger remained significantly distressed in the lead up to the QCAT hearing and expressed concern that Rachel would be taken away from him. At the hearing, which took two full days, the application was ultimately dismissed and Rachel remained as Roger's substitute decision-maker. Roger's anxiety then dissipated and his relationship with Rachel has returned to its pre-existing state.

This case study highlights a concerning trend within the post-NDIS climate, whereby people with disability are inappropriately having their legal autonomy called into question. The exact number of guardianship and administration applications that are made to QCAT and subsequently rejected at hearing, including the number of applications rejected at hearing where an interim order has been granted, is unknown. Efforts to obtain these statistics have been unsuccessful. However, this trend has been identified by a number of relevant stakeholders and has recently been highlighted in mainstream media.⁴

⁴ https://9now.nine.com.au/a-current-affair/video-captures-australias-broken-public-guardian-system/86ecbe5b-bce2-4197-938b-abbbc4357a09?ocid=Social-ACA&fbclid=IwAR1BRjPg4R9SfeEgXib4GWrqcAGhCeHMWkkvT1YlYnAmRTIZ5jpQw-c9_pA



The financial and emotional toll placed upon a person forced to defend unfounded and sometimes vexatious applications for guardianship and administration cannot be overstated. Obtaining independent capacity assessments can sometimes cost a participant up to \$4,000. This is a gross misuse of NDIS or personal funds and is likely to impact a participant's capacity to purchase other essential supports or services.

The affront to a person's dignity and their human right to equality before the law causes significant psychological distress. This is particularly unjust for a cohort of individuals who likely already face challenges in their daily lives by virtue of their circumstances. Moreover, the power imbalance typically present in NDIS service provider/participant relationships adds further complexity to the situation, with participants often still reliant upon the service provider for essential everyday supports during the prolonged and often strained QCAT proceedings.

This trend further illustrates a waste of limited resources, as significant time and energy is required to process each application, including those with little evidentiary basis and few prospects of success at hearing. The subsequent increase in waiting times for QCAT hearings has been exacerbated by the challenges of the Covid-19 pandemic which has seen waiting periods extend even further.⁵ Moreover, interim orders can at times be made on the basis of inadequate evidence and without hearing the views and wishes of the person subject to the order. In cases where there is ultimately insufficient evidence to demonstrate the need for a substitute decision-maker, an interim order removes a person's right to self-determination often for a period of (the maximum) three months.

Whilst some of these applications are correctly dismissed at hearing, others are not and lead to the appointment of a substitute decision-maker in situations where it is neither required nor appropriate. Often, the ability of an NDIS participant to assert their capacity at hearing and ultimately protect their right to self-determination depends upon whether they have had access to legal advice and/or representation, something not routinely offered or made available to adults subject to guardianship and administration applications. In the absence of a threshold test, whereby applications for guardianship and administration must meet a certain level of evidentiary proof before being accepted by the Tribunal, the burden of proof is at times perversely placed upon the NDIS participant to prove their decision-making capacity. This is contrary to the *Guardianship and Administration Act 2000* (Qld), which establishes that all adults must be presumed to have decision-making capacity until proven otherwise,⁶ as well as the first General Principle contained in that Act.⁷ It is particularly problematic in a largely self-represented jurisdiction where adults, many of whom have disabilities, are expected to assert their legal rights in a formal environment without legal assistance to navigate what is a complex and deeply personal area of law. NDIS participants are also often burdened with the task of educating Tribunal members about the NDIS and correcting misapprehensions regarding funding utilisation. Whilst not the fault of the service

⁵ Queensland Civil and Administrative Tribunal, *Annual Report 2019-20*, 6

⁶ *Guardianship and Administration Act 2000* (Qld), s 11.

⁷ *Guardianship and Administration Act 2000* (Qld), s 11B(1).



providers themselves, the unsatisfactory legal environment in which the increasing number of guardianship and administration applications is occurring, is ultimately compounding the problem and creating additional barriers for people with disability to overcome.

Case study #2

Bart is a 34-year-old man with an intellectual disability who receives support under an NDIS package. Bart was in the State's care system from a very young age until adulthood. Upon reaching legal age, Bart was subject to an administration order, appointing the Public Trustee as his financial administrator. Bart recognises that he needs some assistance in making financial decisions and appreciates the support the Public Trustee provides to him. Outside of his financial decision-making, Bart had been independent his entire adult life. Bart held concerns regarding his NDIS service provider, whom he felt was not acting in accordance with his best interests nor using his NDIS funds appropriately. Bart raised his concerns with his NDIS support coordinator and attempted to find a more suitable service provider. Instead of supporting Bart to make decisions regarding alternative service providers, Bart's NDIS support coordinator submitted an application to QCAT seeking an urgent interim order and the appointment of a guardian for decisions relating to accommodation and service provision, including NDIS service provision. Material included with the applications included occupational therapy reports written for the purpose of seeking access to the NDIS, which focused on Bart's deficits rather than his capacity as defined by the *Guardianship and Administration Act 2000* (Qld). An interim order was granted and the Office of the Public Guardian was appointed as Bart's interim guardian for decisions regarding accommodation and service provision. At the substantive application hearing, the Tribunal adjourned the hearing for Bart to undergo a formal capacity assessment by a neuropsychologist, despite medical and psychological evidence provided by Bart as to his capacity. Bart had to pay \$2,500 for this capacity assessment. No guardian is appointed during the adjournment period and the substantive hearing is pending.

These applications are also arguably in violation of Australia's obligations under international law. Through ratification of the Convention of the Rights of Persons with Disability (CRPD), Australia has committed to ensuring a model of supported decision-making, where people with disability are assisted to maintain and develop their legal capacity through the assistance of informal supporters to understand, consider and communicate their decisions rather than have this right taken away from them through the appointment of a substitute decision-maker. Only in limited circumstances, where a person cannot be assisted to understand, consider and communicate a decision, where there is a need for relevant decisions to be made and the appointment is considered necessary to protect the adult's needs or interests, is the



appointment of a substitute decision-maker justified.⁸ Applications stemming from the self-interest of NDIS service providers clearly do not satisfy these criteria. The state/territory and federal governments therefore have a responsibility to safeguard against such applications and to ensure there is adequate awareness of and compliance with the CRPD.

The removal of a participant's legal capacity and right to make their own decisions clearly takes away their choice and control and contravenes the objectives of the NDIS. The gap in the NDIS regulatory framework enabling this practice is widened further by the unsatisfactory legal context in which the applications are taking place. The lack of accountability of NDIS service providers who exert their dominance over participants in this way, perpetuates their monopoly on the market and distorts the market's ability to preference high quality providers. It also lowers participant confidence in the scheme and its ability to regulate unethical conduct and ultimately protect people with disability from harm.

Recommendations

QAI calls for urgent change to the practices of NDIS service providers who are undermining people with disabilities right to equality before the law. Reform is needed to successfully facilitate a paradigm shift towards supported decision-making practices as required by the CRPD. The NDIS regulatory framework which is aiding these practices must be reviewed. QAI calls for urgent reform of the legal context in which unsubstantiated guardianship and administration applications are taking place. QAI is therefore simultaneously bringing these issues to the attention of relevant state-based institutions, including the Queensland Law Society, the Queensland Civil and Administrative Tribunal and the Queensland Attorney General.

QAI makes the following recommendations:

- Large-scale training and upskilling of the disability workforce in relation to issues of decision-making capacity, including relevant principles contained within state-based laws. Addressing misinformation regarding the presumption of capacity is a priority. Reform is needed to facilitate a paradigm shift towards supported decision-making as required by the Convention on the Rights of Persons with Disabilities. This could be partially achieved through increased funding for Support Coordination, a role ideally situated to assist NDIS participants exercise choice and control in decision-making.
- Consideration of additional safeguards against unsubstantiated guardianship and/or administration applications regarding NDIS participants initiated by NDIS service providers. For example, consideration of an additional step to be taken prior to the

⁸ *Guardianship and Administration Act 2000 (Qld)*, s 12.



submission of an application to QCAT, such as requiring the NDIS service provider to liaise with the NDIA or NDIS Quality and Safeguards Commission.

- Measures adopted to hold NDIS service providers to account when they are found to have made unsubstantiated applications to the Tribunal, for example consideration of the implementation of penalty provisions. At a minimum, the NDIS Quality and Safeguards Commission must collect relevant data, for example:
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 - The number of applications for guardianship and/or administration made per NDIS service provider in which an interim order is made before the application is dismissed at hearing.

This data must be publicly accessible and will highlight the NDIS service providers who require additional training.

- Mandatory legal representation for all adults subject to guardianship and/or administration applications. This is particularly essential for adults under interim orders who are essentially, in practice, faced with the task of reversing the presumption of capacity. There should be increased information for NDIS participants regarding their right to legal representation and free legal services within their area.
- Increased scrutiny of guardianship and/or administration applications by the Tribunal, whereby only applications assessed as falling within the scope of the legislation, passing a certain threshold test and which are supported by relevant and sufficient evidence, are accepted and listed for hearing.
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- Ensure that legislative powers to invoke interim orders are exercised extremely judiciously, given the significant human rights impact on a person whose voice and right of reply is yet to be heard. The power to make interim orders must only be exercised when there is a clear and substantiated risk of immediate harm. The adult concerned must be consulted and their views obtained, prior to making the order.



- Increased training for Tribunal members regarding the NDIS and its cyclical plan review processes that may act as a catalyst for unnecessary guardianship applications.

Conclusion

QAI welcomes the opportunity to make a submission to the '*General issues around the implementation and performance of the NDIS*' inquiry and is happy to provide further detail or clarification upon request.

