



# **Disability Services and Other Legislation (NDIS) Amendment Bill 2019**

**Submission to the Queensland Parliament Education, Employment  
and Small Business Committee**

**April 2019**



## About the Office of the Public Guardian

The Office of the Public Guardian (OPG) is an independent statutory office which promotes and protects the rights and interests of adults with impaired decision-making capacity for a matter, and children and young people in the child protection system or staying at a visitable site. The purpose of OPG is to advocate for the human rights of our clients.

The OPG promotes and protects the rights and interests of adults with impaired decision-making capacity for a matter through its guardianship, investigations and adult community visitor programs:

- The guardianship program undertakes both supported and substituted decision-making in relation to legal, personal and health care matters, supporting adults to participate in decisions about their life and acknowledging their right to live as a valued member of society.
- The investigations program investigates complaints and allegations that an adult with impaired decision-making capacity is being neglected, exploited or abused or has inappropriate or inadequate decision-making arrangements in place.
- The adult community visitor program independently monitors visitable sites (authorised mental health services, community care units, government forensic facilities, disability services and locations where people are receiving NDIS support, and level 3 accredited residential services), to inquire into the appropriateness of the site and facilitate the identification, escalation and resolution of complaints by or on behalf of adults with impaired decision-making capacity staying at those sites.

When providing services and performing functions in relation to people with impaired decision-making capacity, the OPG will support the person to participate and make decisions where possible, and consult with the person and take into account their views and wishes to the greatest practicable extent.

The OPG provides individual advocacy for children and young people through the following two programs:

- the child community visitor program, which monitors and advocates for the rights of children and young people in the child protection system including out-of-home care (foster and kinship care), or at a visitable site (residential facilities, detention centres, corrective services facilities, authorised mental health services, and disability funded facilities), and
- the child advocacy program, which offers person-centred and legal advocacy for children and young people in the child protection system.

The OPG provides an entirely independent voice for children and young people to raise concerns and express their views and wishes. The OPG's child community visitor program independently monitors visitable locations and facilitates the identification, escalation and resolution of issues by and on behalf of children and young people. The OPG's child advocacy program elevates the voice and participation of children and young people in the child protection system in decisions that affect them. When performing these functions, the OPG is required to seek and take into account the views and wishes of the child to the greatest practicable extent.

The *Public Guardian Act 2014* and *Guardianship and Administration Act 2000* set out the OPG's legislative functions, obligations and powers. The *Powers of Attorney Act 1998* regulates the authority for adults to appoint substitute decision makers under an advance health directive or an enduring power of attorney.

# Submission on the Disability Services and Other Legislation (NDIS) Amendment Bill 2019

## Position of the Public Guardian

The Office of the Public Guardian (OPG) appreciates the opportunity to provide a submission on the Disability Services and Other Legislation (NDIS) Amendment Bill 2019 (the Bill) to the Queensland Parliament Education, Employment and Small Business Committee.

The OPG welcomes these amendments to the *Disability Services Act 2006* (DSA) and the corresponding amendments to the *Public Guardian Act 2014* (PGA) in order to ensure that Queensland has made critical amendments required to support the commencement of the operation of the NDIS Quality and Safeguards Commission in Queensland from 1 July 2019. The OPG would be pleased to lend any additional support as required. Should clarification be required regarding any of the issues raised, the OPG would be happy to make representatives available for further discussions.

## Summary of recommendations

1. The OPG recommends that the definition of ‘relevant class of supports’ be removed from the amendments proposed to section 39 of the *Public Guardian Act 2014*.
2. Rather, the OPG recommends that the definition of ‘relevant class of supports’ be expressly included in the Public Guardian Regulation 2014 to ensure adequate flexibility to amend the prescribed classes should they be altered as part of the corresponding Commonwealth scheme, or if they are not able to be fully operationalized at full scheme NDIS.
3. The OPG recommends in relation to new section 241AA of the *Disability Services Act 2006*:
  - a. That the Department of Communities, Disability Services and Seniors commits to undertaking public consultation on the review of sections 32A; 140; the chief executive’s functions under part 6, division 3, subdivisions 2 and 3; and section 216
  - b. The completion of the review be extended to 2 years after commencement so that adequate public consultation and decision making processes can occur.
4. The OPG requests that the Committee specifically recommends in its report that the public consultation must include persons with disability subject to the use of restrictive practices, the Office of the Public Guardian, the Queensland Civil and Administrative Tribunal, and Advocacy Agencies from the commencement of the review process.
5. The OPG recommends that the Committee report recognises that any changes resulting from the reviews conducted under new section 241AA must provide for appropriate transition time for implementation.

## Amendments to the definition of visitable sites

One of the purposes of the Bill is to amend the PGA to ensure that community visitors (adult) and (child) are able to continue to visit certain prescribed disability sites where National Disability Insurance Scheme (NDIS) participants are staying in order to ensure that their rights and interests are protected. To enable this, clause 62 of the Bill amends section 39 of the PGA to include a new definition of visitable sites for the purpose of the adult community visitor program. However, problematically for the OPG, under this Bill definitions of a visitable site for the purpose of the NDIS have been moved to the primary legislation (the PGA), and will no longer be located in subordinate legislation. This change to the status quo removes flexibility for the OPG to easily amend the definition if it is not operationally workable, or if the Commonwealth makes amendments to the classes of the supports at the national level.

Currently, section 39 of the PGA provides that a visitable site for the purpose of the adult community visitor program means ‘an authorised mental health service under the *Mental Health Act 2016* that provides inpatient services; or the forensic disability service; or a place, other than a private dwelling house, *that is prescribed under a regulation*’. Visitable sites that are not private dwelling houses are currently prescribed under the Public Guardian Regulation 2014 (the Regulation). This currently includes definitions for those disability sites visited while Queensland transitions to the NDIS. The OPG and service providers and consumers have not experienced any problems with having the definition of visitable site provided for under the Regulation. Positively, having the definition in the Regulation has provided the OPG with flexibility to address the operational needs of the organisation, and make amendments relatively easily where required. This flexibility has been critical to address operational needs of the OPG, chiefly while the NDIS service industry is establishing itself and there is ongoing expansion in the number of ‘visitable sites’ as more opportunities arise for service provision and support under the NDIS. Amendments have already been made to the Regulation regarding the definition of visitable sites during transition to the NDIS to clarify scope and parameters of adult disability sites to be visited. Maintaining this regulatory flexibility while the service delivery sector remains in a state of change is critical from an operational perspective for the OPG, particularly as there are still so many unknowns regarding the number or nature of residents at sites that may potentially fall within the scope of ‘visitable sites’. Existing visitable sites in Queensland are already aware that the Regulation contains elements of the definition.

The key concern under this Bill is that the definitions for adult visitable sites as they relate to NDIS sites have been moved *from the subordinate legislation* (the Regulation) to the *primary legislation* (the PGA). This is despite the fact that the Regulation still provides for definitions regarding *other* adult visitable sites. Of greatest concern, the Bill provides that definitions regarding the ‘relevant class of supports’ are not provided for in the Regulation, but are to be included in the PGA. The definition of relevant class of supports is very specific and includes ‘any of the following classes of supports under the *National Disability Insurance Scheme Act 2013 (Cth)* – (a) high intensity daily personal activities; (b) assistance with daily life tasks in a group or shared living arrangement; (c) specialist positive behavior support that involves the use of a restrictive practice; (d) specialist disability accommodation’.

This is a new and untested definition that seeks to establish parameters for sites that can be visited by the adult community visitor program under the NDIS at full scheme. However, the OPG needs

regulatory flexibility to change this definition if it proves unworkable in practice. This flexibility is best achieved by removing the express definitions of ‘relevant class of supports’ from the PGA altogether and maintaining the status quo by placing this detail within the Regulation.

Arguably, a reason for including the definition in the primary legislation as currently worded is to maintain consistency between definitions within the PGA and those under the *Coroners Act 2003* (CA) regarding the reporting of ‘deaths in care’. However, it is submitted that while the Bill seeks to align the definitions in the PGA and CA, the two acts have different purposes and operational imperatives. The aim of the amendments to the CA is to ensure that the scope of coronial jurisdiction for deaths in care of people with disability in Queensland is focused on those people in receipt of high levels of support and care, who are living in certain environments and receiving certain types of supports and services. However, the community visitor program is impacted by different operational concerns. Most critically, the community visitor program is still in the process of determining the most vulnerable NDIS participants who should be visited in the context of the NDIS service system that is still developing in Queensland, and operates with only limited resources to visit appropriate sites. Given the potential for growth in the number of visitable sites that could fall within the scope of the proposed definition, the OPG needs regulatory flexibility to adapt to the changing context of NDIS service provision and support and ensure operational sustainability of the visiting program, while ensuring the most vulnerable participants and the sites where they live have been properly identified.

Therefore, while the new definition proposed under the Bill is generally supported by the OPG, its placement *within* the main body of the Act, rather than within the Regulation is **not supported**. It is recommended that the definition of ‘relevant class of supports’ be removed from the Bill, and instead be inserted into the Regulation.

It is the OPG’s understanding that the Coroner has not raised issue with the definition of a visitable site being contained within the Public Guardian Regulation 2014 (where it has always been located to date).

This option would provide the OPG with essential operational flexibility to amend the definition of visitable sites if it is found to be unworkable in practice which is extremely important to ensure that there aren’t significant delays in visiting vulnerable adults in an evolving NDIS landscape should an Act amendment process be required to alter the definition.

## New clause 241AA

The Bill inserts new sections 32A and 241AA, and replaces the existing section 140 in the DSA. New section 32A provides that Part 3 (*complaints* about the delivery of disability services by funded service providers) applies in relation to the delivery of disability services by the following service providers: the department; a service provider that receives funds from the department to provide disability services, other than a service provider that is another department; and another service provider prescribed by regulation. The Bill also replaces section 140 of the DSA (which states the service providers part 6 of the DSA applies to) with a new provision that lists particular service providers, and enables a regulation to specify additional service providers.



New section 241AA provides that the Minister must review new section 32A, replaced section 140, the chief executive's functions under Part 6, division 3, subdivisions 2 and 3 (as they relate to the assessment and development of positive behavior support plans); and section 216 (concerning the application of Part 8, division 2 regarding the locking of gates, doors and windows). Part 6 of the DSA regulates the use of restrictive practices by 'relevant service providers'. Part 6, division 3, subdivisions 2 and 3 of the DSA apply to the effect that where a disability service provider, including an NDIS service provider, seeks to contain or seclude an adult with an intellectual or cognitive disability, the chief executive of the Department of Communities, Disability Services and Seniors (the Department) is required to develop, or change, a positive behavior support plan for the adult. Currently the Bill requires the review of these sections must be completed within 1 year after its commencement, noting that the Minister must consider whether the regulation making power in section 32A is still required to facilitate the effective implementation and application of the NDIS in Queensland.

Given the role that the OPG continues to undertake within the NDIS quality and safeguarding framework regarding both complaints and short term approvals for the use of certain restrictive practices, it is critical that OPG is engaged in the consultation on the review of these provisions from the commencement of the process.

The OPG has an ongoing role in ensuring complaints regarding guardianship clients, or clients at visitable sites are appropriately addressed both under the NDIS quality and safeguarding framework, and in relation to state based residual disability services. While many complaints made by the OPG on behalf of our clients will be directed to the NDIS Quality and Safeguards Commission, there will remain some clients of the OPG who will continue to receive residual disability services in Queensland, including persons subject to forensic disability orders. Any review of complaints processes in relation to state based residual disability services will directly impact the effective fulfilment of OPG's functions, and therefore OPG should be actively consulted throughout the review process.

The Department is also responsible under the DSA for the assessment and development of positive behavior support plans. The review clause relating to the development of these plans has been inserted into the DSA given that this function (while currently performed by the Department), is undertaken by specialist disability service providers in other jurisdictions at full scheme, with funding received through a participant's plan. The requirement for a review is linked to supporting the transition of developing positive behavior support plans from the Department, to specialist disability service providers. Given the Department's intention to withdraw from the role of developing these plans, there is the risk that the quality of plans may deteriorate if there is inadequate capacity and skills developed within the sector to replace this expertise. Low quality positive behavior support plans could delay OPG's restrictive practice approval process and potentially lead to the unregulated use of restrictive practices, negatively impacting upon the lives of persons with disability. The OPG therefore proposes that there is full public consultation on the review, and that the review process occurs over a period longer than the one year currently specified under the Bill (s 241AA(2)). The OPG is concerned that 12 months is insufficient time not only to conduct a full public consultation, but also to allow for adequate transition to transfer or cease current processes following the review and build capacity within the disability sector to develop quality positive behavior support plans. Further, 12 months will not provide adequate time to determine what works, or does not work

within full scheme roll out of the NDIS, particularly as new service providers commence operation in Queensland.

Therefore, it is submitted that new section 241AA(2) be amended to provide that the completion of the review should be *within 2 years* after the commencement.

The OPG also recommends in relation to new section 214AA, that the Department commits to undertaking public consultation on the review of sections 32A; 140; the chief executive's functions under part 6, division 3, subdivisions 2 and 3; and section 216. The OPG requests that the Committee specifically recommends in its report the public consultation must include the Office of the Public Guardian, the Queensland Civil and Administrative Tribunal, as well as persons with disability subject to the use of restrictive practices from the commencement of the review process. It is also requested that the report recommend that provision be made for adequate transition time for any recommended changes following the review processes conducted under section 214AA.

## Concluding remarks

The OPG is supportive of maintaining Queensland's high quality regulation within the NDIS Quality and Safeguarding Framework, to ensure that the rights and interests of vulnerable Queenslanders continue to be protected under the NDIS. The OPG is pleased to lend any additional support to the Committee as required. Should clarification on any of the matters raised above be required, the OPG would be happy to make representatives available for further discussions.