



Access to the National Disability Insurance Scheme for people with impaired decision-making capacity

Report 2: 2018–19



Your ref:
Our ref:

27 September 2018

The Honourable C Pitt MP
Speaker of the Legislative Assembly
Parliament House
BRISBANE QLD 4000

Dear Speaker

Report to parliament

This report is prepared under Part 3 Division 3 of the *Auditor-General Act 2009*, and is titled *Access to the National Disability Insurance Scheme for people with impaired decision-making capacity* (Report 2: 2018:19).

In accordance with s.67 of the Act, would you please arrange for the report to be tabled in the Legislative Assembly.

Yours sincerely

A handwritten signature in blue ink, appearing to read "Brendan Worrall".

Brendan Worrall
Auditor-General

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Audit objective and scope

This is the second report on the National Disability Insurance Scheme (NDIS). We tabled *The National Disability Insurance Scheme: Report 14: 2017–18* on 3 May 2018.

The objective of the audit was to assess how effectively the Queensland Government is managing the transition to the NDIS and how well prepared it is to oversee services after the transition to NDIS.

The audit scope included a separate line of inquiry examining the effectiveness of the supports for those clients/potential clients of the NDIS who have impaired decision-making capacity. This report contains the results of that examination.

We assessed the effectiveness of the public sector entities supporting Queenslanders with impaired decision-making capacity as they make the transition to the NDIS. This included assessing the:

- processes to identify eligible NDIS participants within the Queensland guardianship and administration system
- administration systems for providing assistance in a seamless, appropriate and least restrictive way (that is, the way that places the least amount of restrictions on each participant's ability to make their own choices)
- co-ordination of advocacy services within the state.

The entities in scope for this report were:

- Department of Communities, Disability Services and Seniors
- Department of Justice and Attorney-General
- Office of the Public Guardian
- Public Trustee of Queensland.

The report also refers to the Queensland Civil and Administrative Tribunal's (QCAT) role in relation to people with impaired decision-making, but we did not audit the decisions it made. QCAT is independent from government in relation to its decision-making.

Appendix B contains further details about the scope and approach of the audit.

Appendix C contains the roles and responsibilities of other public sector entities that are involved in the NDIS but are not within the scope of this audit.

Reference to comments

In accordance with s. 64 of the *Auditor-General Act 2009*, we provided a copy of this report to relevant agencies. In reaching our conclusions, we considered their views and represented them to the extent we deemed relevant and warranted. Any formal responses from the agencies are at Appendix A.



Key facts



People with impaired decision-making are some of the most vulnerable clients of the NDIS.

People with impaired decision-making capacity

Approximately 1 500 people with a statutory guardian are eligible for the NDIS in Queensland.

Approximately 6 000 people with statutory administrators are eligible for the NDIS in Queensland.

Note: Statutory guardians make decisions to protect the rights of adults with impaired decision-making capacity. Statutory administrators manage an adult's financial affairs. QCAT declares impaired decision-making capacity.

Source: Office of the Public Guardian and Public Trustee of Queensland



Glossary

| Terms | Definition |
|---|---|
| Advocate | An advocate is an individual or entity who speaks, acts, or writes with minimal conflict of interest on behalf of the interests of a disadvantaged person or group, to promote, protect, and defend the welfare of and justice for either the person or group. |
| Administrator | An administrator makes decisions about financial matters of an adult with impaired capacity. The appointment of an administrator is a legal decision (through the Queensland Civil and Administrative Tribunal). An administrator can be the Public Trustee or a private administrator. |
| Community Visitor Program | The Public Guardian manages the adult Community Visitor Program, which involves Office of the Public Guardian's community visitors independently monitoring different types of accommodation called 'visitable sites' where vulnerable adults live. An adult visitable site is defined under <i>the Public Guardian Act 2014</i> and includes authorised mental health services; the forensic disability service; or a place, other than a private dwelling house, that is prescribed under a regulation. |
| Financial matter | A financial matter, for an adult, is a matter relating to the adult's financial or property matters as per the <i>Guardianship and Administration Act 2000</i> . |
| Guardian | A guardian makes decisions about personal matters of an adult with impaired capacity. QCAT appoints guardians for adults with impaired capacity for a personal matter. |
| Impaired decision-making capacity | Impaired decision-making capacity is the inability to go through the process of reaching a decision and putting it into effect. There are three elements to making a decision: understanding the nature and effect of the decision, freely and voluntarily making a decision, and communicating the decision in some way. |
| National Disability Insurance Scheme | The National Disability Insurance Scheme (NDIS) provides eligible Australians under the age of 65, who have a permanent and significant disability, with the reasonable and necessary supports they need to enjoy an ordinary life. |
| National Disability Insurance Agency | The National Disability Insurance Agency (NDIA) is an independent statutory agency whose role is to implement the NDIS. |
| NDIS Quality and Safeguarding Framework | The framework is designed to ensure high quality supports and safe environments for all NDIS participants. It seeks to help participants and providers access information and resolve issues quickly, and strengthen the capability of participants, the workforce, and providers to participate in the NDIS market. |



| Terms | Definition |
|--|--|
| Nominee | <p>The <i>National Disability Insurance Scheme Act 2013</i> recognises two types of nominees when appointing friends and family to support someone with access to the NDIS. These are plan nominees and correspondence nominees.</p> <p>A plan nominee has the same authority as the participant. Correspondence nominees are unable to participate in the preparation, review, or replacement of the participant’s plan or the management of funding for supports under the participant’s plan.</p> |
| Personal matter | <p>A personal matter, for an adult, is a matter relating to the adult’s care, including the adult’s health care, or welfare. It can include: where the adult lives and with whom, services provided to the adult, diet, and dress. A personal matter excludes a special personal matter or special health matter as defined in the <i>Guardianship and Administration Act 2000</i>.</p> |
| Queensland Civil and Administrative Tribunal | <p>The Queensland Civil and Administrative Tribunal (QCAT) is an independent tribunal empowered to make decisions under various pieces of legislation including the <i>Guardianship and Administration Act 2000</i>.</p> |
| Restrictive practices | <p>People who live with intellectual disability or cognitive disability may engage in behaviours that place them and/or others at risk of harm. Service providers and state government agencies may use restrictive practices (when authorised) to protect a person from harm or doing harm. Note: governments have agreements in place to minimise or eliminate the use of restrictive practices.</p> |
| The Public Guardian | <p>The Queensland Public Guardian is an independent statutory appointment of the Queensland Government. QCAT can appoint the Public Guardian to make decisions to protect the rights and interests of adults for personal matters. The Public Guardian is the guardian of last resort.</p> |
| The Public Trustee | <p>The Public Trustee is a self-funding statutory authority that reports to Queensland Parliament through the state’s Attorney-General. QCAT can appoint the Public Trustee to manage a person’s financial matters.</p> |



Introduction

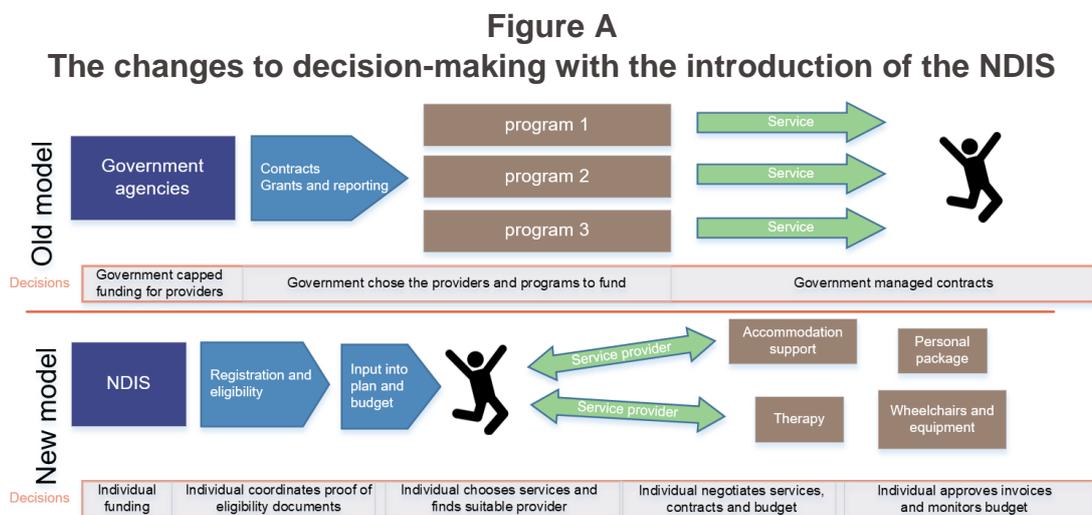
The National Disability Insurance Scheme (NDIS) is one of the largest public policy reforms ever implemented in Australia. It gives people with disability greater choice and control over the supports they can access in their NDIS plan and over who provides them. By the end of March 2018, 14 410 people with disability in Queensland had an approved NDIS plan.

Some people with disability may need support in accessing the NDIS. The National Disability Insurance Agency (NDIA), which implements the NDIS, provides some assistance through its Local Area Coordinators, across the state. In addition, people with disability can receive assistance through:

- **informal support** from a family member or friend, who can be recognised by the NDIS as a 'plan nominee'. The nominee can participate in the planning process, manage plan reviews, and enter into contracts with service providers on the person's behalf
- **advocates** (from a professional advocacy service). They can help people with disability prepare for NDIS planning and manage reviews and disputes, including legal challenges to NDIS decisions
- **guardians or administrators** Guardians are appointed by Queensland Civil and Administrative Tribunal (QCAT) to make decisions for a person who has been found to have impaired decision-making capacity for decisions about personal matters. Administrators are appointed by QCAT or the Supreme Court to make decisions for a person who has been found to have impaired decision-making capacity for decisions about financial matters.

Choice and control

As the new NDIS model places greater emphasis on the need for choice and control, this may increase the amount of decisions individuals and their families and carers need to make. Figure A demonstrates this.



Note: Participants whose NDIS funds are self-managed approve invoices. Invoices of participants whose funds are NDIA managed are approved by the NDIA.

Source: Queensland Audit Office



Guardians and administrators

People with impaired decision-making capacity may need support in accessing the NDIS. Providing this support is changing the way the justice system (in particular the Office of the Public Guardian, Public Trustee, and advocacy services) support their clients who may be eligible for the NDIS.

Entities in the guardianship system, including the Public Guardian and the Public Trustee, play a role once appointed by QCAT. Guardians make decisions for personal matters, which may include matters related to health, accommodation, and/or service provision. The Public Guardian also has a role protecting the rights and interests of people subject to the use of restrictive practices (including short-term approvals for the use of containment or seclusion). The Public Trustee makes decisions about financial matters for people with impaired decision-making capacity.

The Department of Justice and Attorney-General (DJAG) funds the Office of the Public Guardian from its appropriation. The Public Trustee charges its clients fees.

Disability advocacy services

Some people with disability may need help in accessing the NDIS regardless of whether they have impaired decision-making capacity or not. They may be able to get support from family, friends, or a professional advocate. Access to a suitable advocate may reduce the need for someone to have a guardianship appointment.

Advocacy services are funded by:

- the Department of Communities, Disability Services and Seniors—disability advocacy services. These services are delivered by non-government (not-for-profit) organisations and associations that support a range of people with disability across the state
- DJAG—legal advocacy services provided by legal aid commissions and community legal centres across the state. These are for people experiencing financial disadvantage and priority clients, including people with disability
- the Australian Government—advocacy services through the National Disability Advocacy Program. These services are delivered by non-government (not-for-profit) organisations and associations that support a range of people with disability.

Community Visitor Program

The Public Guardian also manages the adult Community Visitor Program. This involves community visitors independently monitoring different types of accommodation called 'visitable sites'. An adult with an impairment, or with impaired capacity may live in places such as:

- disability accommodation
- authorised mental health services
- some private hostels
- the Forensic Disability Service (for people with disability and a history or risk of criminal offending)
- community care units.



Community visitors make inquiries and lodge complaints on behalf of residents and can refer complaints to an external agency (such as the Department of Communities, Disability Services and Seniors, the NDIA, Queensland Health, or the Residential Services Unit) where appropriate. This program plays an important role in protecting the rights of vulnerable Queenslanders. The impact of changes on this program under the NDIS are not yet fully understood.

NDIS quality and safeguards

A new NDIS Quality and Safeguards Commission (NDIS Commission) will start operating in Queensland from 1 July 2019. Until that time, NDIS participants, providers, and workers will continue to be covered by existing state-based quality and safeguard arrangements.

The NDIS Commission will be responsible for working to improve the quality and safety of NDIS services and supports, investigating and resolving problems, and strengthening the skills and knowledge of providers and participants across Australia.

The framework has three components:

- developmental—building capability skills and support systems
- preventative—preventing harm and promoting quality
- corrective—responding if things go wrong.



Summary of audit findings

Supporting the transition of people with impaired decision-making capacity

Planning—Department of Justice and Attorney-General

We assessed the planning that the Department of Justice and Attorney-General (DJAG) undertook to prepare for the transition of its clients to the National Disability Insurance Scheme (NDIS) in 2014. It developed an overarching NDIS transition plan that covered all the affected business units and independent statutory authorities in the justice portfolio, including the Office of the Public Guardian and the Public Trustee.

While formal measures were not in place to monitor progress of the affected business units under its transition plan, DJAG did periodically seek updates from both the Office of the Public Guardian and the Public Trustee in relation to:

- impacts on both agencies as a result of the interface with NDIS
- preparedness for NDIS.

These updates were sought as part of the reporting process for the group overseeing Queensland's transition—the Reform Leaders Group.

Managing the transition—the Office of the Public Guardian

In preparation for the transition to the NDIS, the Office of the Public Guardian proactively put processes in place to support its clients and developed information for its staff. It identified which of its clients with formally appointed statutory guardians would be eligible for the NDIS and worked on data-sharing agreements and ways to support them. However, it did not complete its preparation in time for the start of transition in 2016. This is in part due to uncertainty arising from operational aspects of the NDIS. Some work is still in progress.

By May 2018, the Office of the Public Guardian had registered 87 per cent of its clients in regions that have completed transition, and 69 per cent of its clients have an approved plan. The National Disability Insurance Agency (NDIA) approves the plans.

Managing the transition—the Public Trustee of Queensland

In preparation for the transition to the NDIS, the Public Trustee has also proactively put processes in place to identify and support its clients and has developed guidelines and training for its staff. However, it does not keep sufficient records of staff attendance or completion of NDIS training sessions. These are necessary, as attendance records from NDIS training sessions can demonstrate that staff have the information they need to fulfil their roles to refer clients with impaired decision-making capacity for assistance in registering with the NDIS.



The Public Trustee identified which of its clients would be eligible for the NDIS and worked on registering them with the NDIA. However, it did not complete its preparation in time for the start of transition in 2016.

Its systems for registering are now ready for the rest of the transition. By May 2018, it had registered 100 per cent of its clients in regions that had completed transition to the NDIS.

Managing changes in workload

In 2016, when the Townsville region transitioned to the NDIS, the Office of the Public Guardian recognised that supporting its clients through the registration and planning process placed additional pressure on staff. It identified that it did not have the resources to allocate to the extra work.

Uncertainty about the operational aspects of the NDIS reduced the Office of the Public Guardian's ability to analyse the additional resources needed before transition began. DJAG funds the Office of the Public Guardian from its appropriation as a grant. This grant has increased by five per cent since 2014–15.

The Public Trustee is self-funded, and its fee schedule is published in the Queensland Government Gazette. So far, it has absorbed the additional resource costs associated with assisting its clients in transitioning to the NDIS.

The Queensland Civil and Administrative Tribunal (QCAT) is funded from DJAG's appropriation. It has estimated that the additional workload over 2018–19 will see QCAT's wait time for considering appointments (related to the NDIS) increase from the current 13 weeks to 16 weeks. To date, QCAT has received approximately 390 NDIS-related guardianship applications. The delays in hearing matters will likely result in delays to the ability of adults with impaired capacity to participate in the NDIS.

Review of workload

In February 2018, the Office of the Public Guardian initiated a review of its operations in preparation for a future funding submission. Although the review is not yet complete, the Queensland Government has allocated additional funding from DJAG's appropriation of \$2.5 million in 2018–19 for the Office of the Public Guardian and QCAT to meet immediate demand pressures. Of this amount, \$2.2 million has been allocated to the Office of the Public Guardian to help with the additional workload created by the NDIS. QCAT received \$0.3 million for two registry positions and to partially pay for the required sessional tribunal members to hear related matters.

The adequacy of this funding needs to be confirmed with reviews and analysis across the Office of the Public Guardian and QCAT.

Monitoring the transition

Monitoring progress of clients

Both the Office of the Public Guardian and the Public Trustee are monitoring the intake rates of their clients as they make the transition to the NDIS.

As the financial decision-maker, the Public Trustee supports its clients in registering for access with the NDIS. It is not involved in the personal and lifestyle decisions required to develop an NDIS plan or in contracts with service providers. At present, it can't access data about this from the NDIS and can't monitor plan approval rates or budgets for its clients.



This increases the risk that supports and services that could be funded through the NDIS may be paid for from individuals' own funds. The Public Trustee is currently working (with other public trustees nationally) to negotiate with the NDIA to be recognised as a limited plan nominee. This would give the Public Trustee access to the information from the NDIA it needs to manage its client's financial affairs but not personal information.

The Office of the Public Guardian can access data on its clients, as the NDIS recognises the role of a guardian. It is monitoring the progress of its clients.

Monitoring quality and safeguards

The NDIS Quality and Safeguarding Framework (the framework) released in February 2017, establishes the NDIS Quality and Safeguards Commission to give effect to the Commonwealth Government's regulatory responsibilities under the Framework. It allows anyone to make a complaint about a provider of NDIS-funded supports. This may include participants, family members, an individual worker or provider, an advocate or community visitor, a professional, or a member of the community. Complaints may be about suspected abuse, neglect, or exploitation.

The framework also has a capacity building component, as relatively few participants and their families are likely to have had experience in managing contracts with service providers. It acknowledges that some participants may need support, for example, in recognising good and bad quality NDIS providers. Participants may also need help to understand their rights to complain and to exercise them. This will include people with impaired decision-making.

The Office of the Public Guardian is amending its existing training programs and guidance for staff on their responsibilities in reporting critical and non-critical incidents. The Public Trustee trains its staff in managing the financial affairs of its clients and has amended the training to include the impacts of the NDIS.

However, neither the Office of the Public Guardian nor the Public Trustee has reviewed complaints management policies and systems to ensure they are ready to support clients in referring complaints about NDIS service providers under the new national framework.

Community visitor programs in all jurisdictions are currently being reviewed by the Australian Government to determine their ongoing role with the introduction of the NDIS Quality and Safeguards Commission. Given the important role the program plays in Queensland, the Office of the Public Guardian will need to monitor the impacts of the new framework on its ability to continue to protect the rights and interests of its clients.

Coordinating advocacy services

We found there are gaps in the geographic coverage and types of advocacy services for people with disability who do not need a formally appointed (by QCAT) substitute decision-maker. If an adult does not have support from people in their lives to assist them in making decisions, applications may be made to consider assigning a formal substitute decision-maker. Advocacy services could fulfil the role of providing support to people with disability who require support but do not need formal substitute decision-making appointments.

The new model relies on giving people as much choice and control as possible, so it is important that help is provided to enable successful access to appropriate support plans. The NDIS Local Area Coordinators and the NDIS information, linkages and capacity building activities provide some support to participants. But the NDIS does not include advocacy. National evaluations have found that people who cannot strongly advocate for themselves are getting poorer outcomes from the NDIS.



Advocacy groups have raised concerns publicly and with us about:

- gaps in advocacy provision for people with disability
- shortages of supply of independent face-to-face advocacy in regional areas
- the need to educate the community about advocacy services.

The Department of Communities, Disability Services and Seniors (DCDSS) funds individual, system, and some legal disability advocacy services. DJAG funds legal and system advocacy services, which are accessible by people with disability. Since the transition to the NDIS, DCDSS has increased funding for state disability advocacy services from \$3 million in 2015–16 to \$3.8 million in 2017–18 (an increase of 29 per cent). It has committed to extend the funding to 2020–21.

The Australian Government is currently reviewing its disability advocacy program and is maintaining existing funding levels until June 2020.

There is currently no overall state strategy for the coordination of state-funded individual and legal disability advocacy services. This increases the risk that the demand caused by the new NDIS model may disadvantage people who need help in accessing the NDIS.



Audit conclusions

The Public Guardian and Public Trustee have successfully supported most of their clients in accessing the NDIS in the regions that have already transitioned. Both agencies have made several process changes to accommodate the NDIS, but they are not fully ready for full scheme (after transition).

The Public Trustee has made changes to its processes but could make improvements to staff training and to client communications about the changes. The Office of the Public Guardian has also made many of the necessary changes but is still preparing and assessing its capability in terms of staff and systems.

Both agencies need to amend their processes to align with the new NDIS Quality and Safeguarding Framework (from 1 July 2019).

The transition to the NDIS and a National Quality Safeguarding Framework may affect the Public Guardian's Community Visitor Program. The results of a national review will inform the future operations of the program. In order to ensure Queenslanders are well supported under the new scheme, the Queensland Government will need to consider the impacts of the changes and work through the division of responsibilities between the national and state services.

Agencies involved in this audit agree there is a gap in the advocacy system for people who are not supported by the guardian and administration system but need help accessing the NDIS. These people require more help than a Local Area Coordinator provides, but they may not need a substitute decision-maker.

The agencies responsible for funding advocacy services still have work to do in delivering a strategic approach to the delivery of advocacy services. They have to ensure that those who need it receive enough support to successfully access the NDIS.



Recommendations

The Public Trustee

We recommend that the Public Trustee of Queensland:

1. review its complaints management policies, guidance, and training materials to align with the new NDIS Quality and Safeguarding Framework

The review should cover providing support to its clients (within the limitations of its legislative functions) to recognise when they have the basis for a complaint and how the complaints process works.

The Public Guardian

We recommend that the Public Guardian:

2. review its complaints management policies, guidance, and training materials to align with the new NDIS Quality and Safeguarding Framework

The review should cover:

- providing support to its clients (within the limitations of its legislative functions) to recognise when they have the basis for a complaint and how the complaints process works
- considering referrals of complaints from or on behalf of NDIS participants about service providers under the NDIS National Quality and Safeguarding Framework
- working with the NDIS Quality and Safeguards Commission on client data-sharing arrangements.

The Department of Justice and Attorney-General

We recommend that the Department of Justice and Attorney-General:

3. analyses the adequacy of the resources allocated to the Office of the Public Guardian and the Queensland Civil and Administrative Tribunal (QCAT) to ensure people with impaired decision-making capacity are effectively supported in getting timely access to the supports available from the NDIS

The analysis should determine the resources necessary to:

- effectively manage the initial increase in applications in (2018–19 and 2019–20) to QCAT for the appointment of the Public Guardian for a matter
- support people appointed a guardian in accessing the supports of the NDIS for the period of the appointment (maximum of five years).



The Department of Communities, Disability Services and Seniors

We recommend that the Department of Communities, Disability Services and Seniors:

4. develops a statewide strategy to support people with disability access the NDIS.

The strategy should include consideration of:

- the role of advocacy in supporting access to the NDIS
- actions to reduce the pressures on the guardianship system
- the results of the current review of the National Disability Advocacy Program to identify opportunities to improve coordination of Commonwealth and state-funded services.



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