Disability Services (Restrictive Practices) and Other Legislation Amendment Bill 2024

Statement of Compatibility

Prepared in accordance with Part 3 of the HR Act

In accordance with s 38 of the HR Act, I, Charis Mullen, Minister for Child Safety, Minister for Seniors and Disability Services and Minister for Multicultural Affairs, make this statement of compatibility with respect to the Disability Services (Restrictive Practices) and Other Legislation Amendment Bill 2024 (the Bill).

In my opinion, the Bill is compatible with the human rights protected by the *Human Rights Act 2019*. I base my opinion on the reasons outlined in this statement.

Overview of the Bill

Authorisation of the use of restrictive practices in disability service settings

The Bill amends the *Disability Services Act 2006* (DS Act), *Guardianship and Administration Act 2000* (GA Act), *Public Guardian Act 2014* (PG Act), *Queensland Civil and Administration Tribunal Act 2009* (QCAT Act) and makes minor amendments to the *Coroners Act 2003* (Coroners Act) and *Forensic Disability Service Act 2011* (FD Act) to reform Queensland's authorisation framework for the use of restrictive practices in disability service settings. The Bill seeks to

- strengthen safeguards for the use of regulated restrictive practices to support people with disability,
- promote the reduction and elimination of the use of restrictive practices in disability service settings by considering applications for, and giving restrictive practice authorisations, and
- achieve greater national consistency.

'Restrictive practices' refer to practices used to respond to the behaviour of a person with disability that causes harm to the person or others. Restrictive practices can include physical, environmental, chemical or mechanical restraints or seclusion. These include actions that, without a lawful justification, may constitute offences that attract civil or criminal liability. Restrictive practices must only be used as a last resort and in a way that is compatible with human rights.

The use of regulated restrictive practices to support NDIS participants is regulated by the Commonwealth Government under the National Disability Insurance Scheme (NDIS) (Restrictive Practices and Behaviour Support) Rules 2018 (NDIS (RPBS) Rules), created under the *National Disability Insurance Scheme Act 2013* (NDIS Act) (Cth), with oversight by the NDIS Quality and Safeguards Commission (NDIS Commission).

States and territories remain responsible for authorising the use of regulated restrictive practices in their jurisdictions.

The NDIS (RPBS) Rules provide that regulated restrictive practices must:

- not occur where the relevant state and territory prohibits such use;
- be undertaken in accordance with state and territory authorisation processes and a behaviour support plan;
- be recorded by the provider and reported to the NDIS Commissioner so that the NDIS Commissioner can effectively monitor the use of regulated restrictive practices in the NDIS.

Queensland has a well-established guardianship-based framework for authorising the use of restrictive practices in relation to adults with an intellectual or cognitive disability receiving NDIS supports or services or state funded disability services. A key focus of the framework is the reduction and elimination of restrictive practices by considering applications for, and giving restrictive practice authorisations in recognition of the significant human rights issues involved. Under the existing framework, regulated restrictive practices may only be used in accordance with a positive behaviour support plan, and depending on the type of restrictive practices required, if authorised by a guardian appointed for restrictive practices matters, the Queensland Civil and Administrative Tribunal (QCAT) or the Chief Executive (Disability Services).

However, since Queensland's authorisation framework was introduced in 2008, there have been a number of intersecting reforms, including:

- Implementation of the NDIS and introduction of the NDIS (RPBS) Rules, which set requirements for NDIS providers who use restrictive practices when supporting NDIS participants.
- On 24 July 2020, Disability Ministers agreed to progress work toward greater consistency based on the *Principles for nationally consistent practices authorisation processes* (the National Principles).
- The former Queensland Productivity Commission's *Final Report into the NDIS Market in Queensland* (QPC Report) made recommendations to promote clarity and efficiency in its restrictive practices regime (recommendation 48) and to announce a timetable for removing Queensland's statutory monopoly on the preparation of behaviour support plans (recommendation 49).
- The September 2023 final report from the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Disability Royal Commission), made a number of recommendations about the legal frameworks for the authorisation, review and oversight of restrictive practices.
- The October 2023 final report of the Independent Review of the NDIS (the NDIS Review) (released publicly in December 2023) recommended action to promote the reduction and elimination of restrictive practices.

Since 2019, the Queensland Government has progressed the Positive Behaviour Support and Restrictive Practices (PBSRP) Review to consider whether improvements could be made to better align Queensland's framework with the NDIS Quality and Safeguarding Framework, and with the National Principles developed by the NDIS Commission. The review was informed by an independent review of Queensland's authorisation framework by Griffith University's Policy Innovation Hub. It was also informed by a Ministerial review, under s 241AA of the DS Act, of particular provisions of the DS Act that were inserted to support full-scheme operation of the NDIS in Queensland (including some provisions dealing with restrictive practices).

The review found Queensland's guardianship-based restrictive practices authorisation framework should be replaced with a clinically focused, administrative model where all restrictive practices authorisation decisions are made by an appropriately qualified senior practitioner, and subject to external merits review. The review has also found the framework should be expanded to capture the use of all regulated restrictive practices with adults and children as part of NDIS supports or services or state disability services under the DS Act.

The Bill implements the legislative aspects of the review outcomes. Key features of the Bill include:

- Establishing the statutory position of the senior practitioner and the Office of the Senior Practitioner;
- Establishing functions of the senior practitioner to promote the reduction and elimination of the use of restrictive practices by relevant service providers by considering applications for, and giving restrictive practice authorisations under Part 6.
- Expanding the authorisation framework to include all people with disability (adults and children) who receive NDIS supports or services or state disability services under the DS Act from relevant service providers, rather than the current scope of only adults with intellectual or cognitive disability.
- Expanding the authorisation framework to include all forms of regulated restrictive practices under the NDIS (RPBS) Rules, including the locking of gates, doors and windows in response to a person with a skills deficit (which is not currently a restrictive practice regulated under Queensland's existing framework).
- Aligning important definitions with the terminology used in the NDIS (RPBS) Rules.
- Aligning the formal requirements for state behaviour support assessments and the content of state behaviour support plans with the requirements in the NDIS (RPBS) Rules to minimise excess administrative overhead.
- Providing a regulation making power to declare prohibited restrictive practices the senior practitioner cannot authorise.
- Vesting QCAT with merits review jurisdiction over all authorisation decisions.

The use of restrictive practices for people with disability can present serious human rights implications and is a matter for thoughtful consideration. Any decisions regarding restrictive practices need careful consideration, taking into account a person's human rights, safety and the right to self-determination. As noted by the NDIS Commission, there are times when restrictive practices are necessary as a last resort to protect a person with disability and/or others from harm.

This requires legislation and frameworks to regulate the use of these practices in a way that promotes the rights of individuals under Australia's obligations under the United Nations Convention of the Rights of Persons with Disability (CRPD).

The purpose of the authorisation framework is to ensure that, where restrictive practices are required to prevent harm to a person with disability or others, that they are used in a way that is least restrictive, are a last resort, and supported by robust behaviour support planning that equips the person with disability, the service provider, and support persons to use alternate strategies that will promote the reduction and/or elimination of the use of restrictive practices.

Coroners Act amendments

The Bill also amends the Coroners Act to expand the reportable deaths framework to reinstate coverage for deaths in care for people in Queensland who receive disability supports under the Commonwealth Disability Services for Older Australians (DSOA) program (DSOA clients).

Human rights issues

Human rights relevant to the Bill (Part 2, Division 2 and 3 of the HR Act)

Human rights limited by the Bill

In my opinion, the Bill engages the following rights under the HR Act:

- Recognition and equality before the law (s 15 of the HR Act)
- Right to life (s 16 of the HR Act)
- Protection from torture and cruel, inhuman or degrading treatment (s 17 of the HR Act)
- Freedom of movement (s 19 of the HR Act)
- Freedom of expression (s 21 of the HR Act)
- Right to protection of families and children (s 26 of the HR Act)
- Cultural rights, including of Aboriginal peoples and Torres Strait Islander peoples (ss 27 and 28 of the HR Act)
- Right to liberty and security of person (s 29 of the HR Act)
- Right to privacy and reputation (s 25 of the HR Act)
- Humane treatment when deprived of liberty (s 30 of the HR Act)
- Right to health services (s 37 of the HR Act).

Measure 1: Authorising the use of restrictive practices in disability service settings

Many of these rights are limited by provisions in the Bill that:

- Allow the senior practitioner to authorise, as lawful, the use of a regulated restrictive practice when supporting a person with disability (see amended Part 6, Division 3).
- Provide civil and criminal immunity for relevant service providers and individuals acting for relevant service providers, who use regulated restrictive practices in accordance with the amended Part 6. Part 6, Division 2 provides the circumstances in which a relevant service provider is permitted to use a regulated restrictive practice:
  - if authorised by the senior practitioner (s 145); or
  - when an application has been made to the senior practitioner, and an existing authorisation ends before a decision has been made on the new application (s 146).
- Enable QCAT to direct a person to undergo examination by a doctor or psychologist, or to be brought before the tribunal, for the purpose of merits review of an authorisation decision (s188ZA and 188ZT).

A discussion of how these limitations are reasonable and demonstrably justified in a free and democratic society, based on human dignity, equality and freedom is provided below.

Measure 2: Disclosure of private information to support the authorisation process

Queensland's existing authorisation framework for the use of restrictive practices contains provisions allowing the disclosure of private information, including confidential information, about people with disability. It also includes provisions that facilitate the disclosure of medical

information by certain health care providers to relevant service providers for the purpose of assessments and development of behaviour support plans.

The Bill will repeal and replace existing Part 6 of the DS Act, and include information sharing provisions to facilitate the preparation of behaviour support plans, restrictive practice authorisation decisions and external merits review. In particular, the Bill provides for the collection and disclosure of information, including:

- Relevant service providers are required to receive and disclose information about a person to develop state behaviour support plans (see proposed Part 6, Division 4 of the DS Act)
- The senior practitioner is required to consult with and consider the views of a list of people in deciding whether to grant an application (s 160). Once making the decision, the senior practitioner must give notice to a number of people (s 162).
- Clause 23 amends section 197 of the DS Act to provide that a relevant service provider may request confidential information about a person for the purpose of a functional behavioural assessment or the development of a State behaviour support plan.
- Clause 24 creates a new section 197A to provide that a relevant service provider may also request confidential information from the senior practitioner.
- Clause 26 creates:
  - Part 6, Division 7, Subdivision 4, which provides that relevant service providers must give the senior practitioner information about the use of regulated restrictive practices prescribed by regulation.
    New section 200 to enable the practitioner to share information with the NDIS Quality and Safeguards Commissioner, the relevant service provider and the Public Guardian.
  - Part 6, Division 5 to enable the senior practitioner to receive complaints about the use of a restrictive practice, and refer matters to particular complaints entities.
- Part 6, Division 6 provides certain persons and entities with standing at QCAT for external review of a decision made by the senior practitioner under Part 6. This division includes a number of provisions:
  - Requiring the disclosure of contact details of persons and entities with standing to the QCAT registrar, who would then provide notice of the proceedings (s 188C).
  - Enabling entities to elect to become parties or persons to be joined to proceedings (s 188E and s 188F).
  - Enabling QCAT to request or order information (s 188G)
  - Requiring proceedings related to children to be held in private but allowing for certain people to be present (s 188ZK), and prohibiting the publication of identifying information about particular persons involved in the proceeding, unless ordered otherwise (s188ZM).
  - Providing for proceedings in relation to adults to be public (s 188Q) and enabling information about proceedings to be published, , unless ordered otherwise (s 188V)

These provisions limit the right to privacy because they enable and/or require the collection and disclosure of information about the person with disability or another person involved in the authorisation or merits review process.

A discussion of how these limitations are reasonable and demonstrably justified in a free and democratic society based on human dignity, equality and freedom is provided below.

Measure 3: Coroner's Act amendments

The amendments to the Coroners Act in the Bill to expand the reportable deaths framework to reinstate coverage for deaths in care for DSOA clients engage and promote the following rights under the HR Act:

- Right to life (s 16 of the HR Act)
- Protection from torture and cruel, inhuman or degrading treatment (s 17 of the HR Act)
- Right to health services (s 37 of the HR Act).

Given the broader objects of the Coroners Act in relation to preventing deaths occurring from similar causes in the future, particularly in the context of matters related to public health or safety, the above rights are fundamentally strengthened by the proposed amendments.

The right to life protects the lives of all persons and includes the right not to be arbitrarily deprived of life. The concept of arbitrariness in the context of the right to life carries a human right meaning of 'capriciousness, unpredictability, injustice and unreasonableness – in the sense of not being proportionate to the legitimate aim sought'.[1] The right to life also includes a positive obligation on States to take steps to protect the lives of individuals, which is exemplified and promoted by the objects of the Coroners Act. Investigating the deaths of certain vulnerable members of society to prevent similar deaths from reoccurring is, at its core, a positive measure safeguarding the right to life. As the most significant investigative mechanism into reportable deaths, the coronial system gives effect to and promotes the right to life throughout Queensland.

The right to health services provides that every person has the right to access health services without discrimination. It also provides that a person must not be refused necessary emergency medical treatment. The operation of the reportable deaths framework is significant in the context of promoting the right to access health services for vulnerable individuals such as DSOA clients. This is because such individuals may be living in a variety of supported living arrangements, with a high reliance on accessing quality health services and medical treatments. Consequently, ensuring any DSOA client deaths are appropriately investigated will reveal if their access to health services or emergency medical treatment was compromised, and potentially prevent such scenarios from reoccurring in the future.

The right to protection from torture and cruel, inhuman or degrading treatment imposes a positive obligation on the State to adopt safeguards to prevent torture, cruel, inhuman or degrading treatment. The scope of the right captures a broad range of conduct, including acts that can cause both physical and mental suffering.[2] Similarly to the above, ensuring any DSOA client deaths are appropriately investigated will reveal if they were subject to any treatment inconsistent with this right, and potentially prevent such scenarios from reoccurring in the future.

In promoting the above rights, the amendments to the Coroners Act also limit the right to privacy and reputation (s 25 of the HR Act), which is discussed further below.

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[1] *WBM v Chief Commissioner of Police* (2012) 43 VR 466, 472 (Warren CJ, Hansen JA agreeing).

[2] United Nations Human Rights Committee, *General Comment No. 20: Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment)*, 44th sess, UN Doc HRI/GEN/1/Rev.9 (Vol. I) (10 March 1992) [2].

If human rights may be subject to limitation if the Bill is enacted – consideration of whether the limitations are reasonable and demonstrably justifiable (s 13 HR Act)

Measure 1: Authorising the use of restrictive practices in disability service settings

(a) the nature of the rights

Recognition and equality before the law (s 15(2) of the HR Act)

The right to recognition and equality before the law encompasses the right to enjoy human rights without discrimination. This right reflects the essence of human rights: that every person holds the same rights by virtue of being human and not because of some particular characteristic or membership of a particular social group. It is supported by Article 5 of the CRPD prohibiting all discrimination on the basis of disability and guarantees persons with disabilities equal and effective legal protection against discrimination on all grounds. The definition of discrimination includes direct or indirect discrimination within the meaning of the *Anti-Discrimination Act 1991* (the AD Act) (for example on the basis of age, impairment, political belief or activity, race, religious belief or religious activity, sex and sexuality). It is also modelled on Article 26 of the International Covenant on Civil and Political Rights (ICCPR), which provides that every person is entitled to equal and effective protection against discrimination. The Bill limits the right to recognition and equality before the law because it provides for authorisations to use regulated restrictive practices in relation to people with disability that cannot be authorised under the framework in relation to other persons, and as a result, discriminates on the basis of impairment (under the AD Act).

Protection from torture, and cruel, inhuman or degrading treatment (s 17 of the HR Act)

Section 17(a) of the HR Act provides that a person must not be subjected to torture. Torture is an act that intentionally inflicts severe physical or mental pain or suffering.

Section 17(b) of the HR Act provides that a person must not be treated in a way that is cruel, inhuman or degrading. It defends an individual's right to personal dignity and physical and mental integrity: 'every person without exception has a unique dignity which is the common concern of humanity and the general function of the law to respect and protect.'

Cruel, inhuman or degrading treatment or punishment often refers to treatment that is less severe than torture or that does not meet the definition of torture. It still involves abuse or humiliation. It does not necessarily have to be intentionally inflicted or cause physical pain, although most cases will involve some deliberate imposition of severe suffering or intent to harm, humiliate or debase a victim. It can include acts that cause mental suffering, debases a person, causes fear, anguish or a sense of inferiority.

Section 17(c) of the HR Act provides that a person must not be subjected to medical or scientific experimentation or treatment without the person's full, free and informed consent. This expands on Article 7 of the ICCPR and Article 5 of the Universal Declaration of Human Rights providing that consent must be given for medical treatment, and that consent must be informed. This is highly relevant when implementing crisis intervention strategies and behavioural management or support plans that include the use of regulated restrictive practices, such as chemical restraint, physical restraint, environmental restraint, mechanical restraint and seclusion.

The Bill limits these rights by permitting the use of regulated restrictive practices in relation to

people with disability, if certain criteria and safeguards are met.

There has been recognition in the field of international human rights law that the use of restrictive practices can, at times, constitute torture or cruel, inhuman or degrading treatment.[3]

Reports from people who have been subject to restrictive practices of chemical, mechanical, physical and environmental restraint and seclusion (such as forced behaviour-modifying medication, tying people to chairs and beds, and locking people in rooms and houses against their will), have described them as cruel, humiliating, dehumanising and traumatising.

The Bill also limits these rights by providing for people with disability to undergo behaviour support assessments (s176) to inform behaviour support plans that are required for a restrictive practice authorisation; and enabling QCAT to direct the person with disability to undergo examination by a doctor or psychologist for the purpose of a merits review proceeding (ss188ZA and 188ZT).

Freedom of movement (s 19 of the HR Act)

Section 19 of the HR Act provides that every person lawfully within Queensland has the right to move freely within the state and can enter and leave it as desired.

The right to be free to enter and leave the state is also protected by section 92 of the Australian Constitution and based on Article 12 of the ICCPR. This right affords people freedoms and prohibits restrictions of movement under both the HR Act and the Australian Constitution. The right to move freely within Queensland means that a person cannot be arbitrarily forced to remain in, or move to or from, a particular place.

This right can be restricted on any of the grounds in Article 12(3) of the ICCPR, namely national security, public order, public health or morals or the rights and freedoms of others. The United Nations Human Rights Committee has stated that restrictions should not only serve the permissible purposes, they must also be necessary and proportionate to protect the person with disability and must be the least intrusive means of achieving the desired result.

The amendments in the Bill allow the senior practitioner to authorise the use of a regulated restrictive practice that may impede a person with disability's right to freedom of movement through the use of an environmental or mechanical restraint, or seclusion.

Freedom of Expression (s 21 of the HR Act)

Section 21 of the HR Act provides that every person has the right to hold an opinion without interference, and that every person has the right to freedom of expression which includes the freedom to seek, receive and impart information and ideas of all kinds, whether within or outside Queensland and whether orally, in writing, in print, by way of art, or in another medium chosen by the person.

The use of chemical, environmental, physical or mechanical restraint, or seclusion may constrain a person's ability to communicate in the way they desire. As a result, amendments in the Bill

[3] (for example, see the United Nations Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment,* Juan E. Méndez, UNHRC 22nd sess, Agenda Item 3, UN Doc A/HRC/22/53 (1 February 2013)).

that authorise the use of regulated restrictive practices will impede a person with disability's right to freedom of expression.

Right to privacy and reputation: (s 25 of the HR Act)

Section 25(a) of the HR Act provides that a person has the right not to have the person's privacy, family, home or correspondence unlawfully or arbitrarily interfered with.

The scope of the right to privacy is intentionally broad. It protects privacy in the sense of personal information, data collection and correspondence, but also extends to an individual's private life more generally. The United Nations Human Rights Committee has referred to those aspects of life in which a person can freely express his or her identity, either alone or in relationships with others as within scope for the right to privacy.

Regulated restrictive practices that may be authorised may include mechanical restraint and physical restraint. These regulated restrictive practices may interfere with the physical and mental integrity of the persons on whom they are used, and thereby limit the right to privacy.

Protection of families and children (s 26 of the HR Act)

Section 26(2) of the HR Act recognises that children are entitled to special protection and provides that the right of every child, without discrimination, is to be protected in a way that is needed by the child and is in the child's best interest. This protection recognises the special vulnerability of children, and the additional protections that children are owed by the state. These rights are based on Articles 23(1) and 24(1)-(2) of the ICCPR. It requires the state to ensure the survival and development of every child to the maximum extent possible, and to take into account the best interests of the child as an important consideration in all actions affecting a child. This is modelled on the principles of the United Nations Convention on the Rights of the Child (UNCRC) where the underlying principle is that 'the best interests of the child' shall be a primary consideration in all actions concerning children.

The right to protection of families and children is limited in the Bill as authorises the use of a regulated restrictive practice to support a child with disability to prevent harm to the child or another person. This may be seen to conflict with the best interests of the child.

Cultural rights generally (Section 27 of the HR Act)

Cultural rights are directed towards ensuring the survival and continued development of the cultural, religious and social identity of minorities. They affirm the right of all persons to enjoy their culture, to practise or declare their religion and to use their language, either alone or in community with others who share their background. The right protects persons from being denied the right to enjoy their culture, to declare and practice a religion and to use their language.

The amendments limit this right as an individual's cultural values, norms and practices may conflict with elements of the authorisation framework.

Cultural rights – Aboriginal and Torres Strait Islander peoples (s 28 of the HR Act)

The HR Act recognises the special importance of human rights for Aboriginal peoples and Torres Strait Islander peoples, and explicitly protects their distinct cultural rights as Australia's first people. The core value underpinning the various cultural rights protected under section 28 of the HR Act is recognition and respect for the identity of Aboriginal peoples and Torres Strait Islander

peoples, both as individuals and in common with their communities. Of particular significance to Aboriginal peoples and Torres Strait Islander peoples of Queensland is the right to self-determination, as is reflected in the preamble of the HR Act.

The use of restrictive practices authorised under the Bill will limit this right to the extent that they may conflict with cultural values, norms and practices.

Right to liberty and security of person (s 29 of the HR Act);

Section 29 of the HR Act provides that:

- every person has the right to liberty and security,
- a person must not be subjected to arbitrary arrest or detention,
- a person must not be deprived of the person's liberty except on grounds, and in accordance with procedures, established by law,
- a person who is arrested or detained must be informed at the time of arrest or detention of the reason for the arrest or detention and must be promptly informed about any proceedings to be brought against the person.

This right is linked to personal autonomy involving control over one's bodily integrity free from state interference.

The use of restrictive practices authorised under the Bill limit this right, particularly those involving physical, mechanical or environmental restraint, or seclusion.

Right to humane treatment when deprived of liberty (s 30 of the HR Act)

Section 30 of the HR Act provides that all persons deprived of liberty must be treated with humanity and with respect for the inherent dignity of the human person.

The right to humane treatment when deprived of liberty in section 30(1) of the HR Act is relevant whenever people who deprived of their liberty are subjected to hardship or constraint other than the hardship or constraint that results from the deprivation of liberty. The right in section 30(1) 'proscribes conduct which is unacceptable in our society but of a lesser order [than cruel, inhuman or degrading treatment under section 17(b)], not rising to a level deserving to be called 'outrageous'[4].

The right to humane treatment when deprived of liberty recognises the vulnerability of those who are deprived of their liberty by the State, whose civil and political rights are compromised because of their detention.

The Bill limits this right by authorising the use of restrictive practices. As discussed above in relation to the limits on section 17(1) of the HR Act, there has been recognition in the field of international human rights law that the use of restrictive practices can, at times, constitute torture. If this threshold has been met under section 17(1) in relation to people with disability whose

[4] *Taunoa v Attorney-General* [2008] 1 NZLR 429, 500 [170], 501-2 [176]-[177] (Blanchard J), 544 [340] (McGrath J agreeing), quoted with approval in *Certain Children v Minister for Families and Children [No 2]* (2017) 52 VR 441, 518 [245] (Dixon J).

liberty has been restricted, it would necessarily follow that their right to humane treatment would also be limited.

Right to health services (s 37 of the HR Act)

Section 37 of the HR Act recognises that every person has the right to access health services without discrimination, and that a person must not be refused emergency medical treatment that is immediately necessary to save the person's life or to prevent serious impairment to the person.

The Bill may limit this right by authorising the use of restrictive practices that would interfere with a person's ability to access health services without assistance from another person.

(b) the nature of the purpose of the limitations to be imposed by the Bill if enacted, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

The purpose of authorising the use of regulated restrictive practices under the reformed framework is to prevent harm to people with disability and enable people to live and work free from violence and other potentially damaging behaviour. This will enhance rights to:

- Right to life (s 16 of the HR Act); and
- Right to security of person (s 29 (2) of the HR Act).

Both rights are of fundamental importance which place positive obligations on states to take positive steps to protect individuals from foreseeable threats to life or bodily integrity. The promotion of these rights is a proper purpose consistent with a free and democratic society based on human dignity, equality and freedom.

(c) the relationship between the limitation to be imposed by the Bill if enacted, and its purpose, including whether the limitation helps to achieve the purpose

The Bill will enable relevant service providers, where authorised, to use regulated restrictive practices to prevent harm to a person with disability or others in response to behaviours of concern. These behaviours can include verbal, physical or sexual aggression or unsafe behaviour, self-injury and property destruction.

These behaviours can be an important way for the person to communicate, and can typically be managed by understanding the issues underlying the behaviours and identifying more productive ways for the person to have their needs met. However, in limited circumstances, and as a last resort, a regulated restrictive practice may be needed.

The following is an example of how a restrictive practice, such as seclusion, can achieve the purpose identified above, and the alternative strategies that can be used to reduce the need for restrictive practices over time:[5]

> Emma is a 32-year old women with diagnosis of a mild intellectual disability and Autism Spectrum Disorder. She receives support from a registered NDIS provider and lives in a specialist disability accommodation setting with two other people. Emma has a history

[5] Based on an example from the NDIS Quality and Safeguards Commission, Regulated Restrictive Practices Guide

of aggressive behaviours; includes hitting, biting, and pushing people to the ground. This has resulted in significant physical injury to staff and co-residents in the past.
A functional behavioural assessment found that Emma would engage in aggressive behaviours to escape situations and tasks that she found overwhelming and stressful. As a result, her behaviour support plan has been updated with strategies aimed to increase Emma's quality of life and help support the reduction and elimination of seclusion. The strategies focused on encouraging Emma to ask for breaks from tasks she found overwhelming, staff offering more active support, using calming routines before situations that were known to be potential triggers; and with Emma's consent, finding an appropriately skilled psychologist to support Emma to develop her social skills and emotional regulation strategies.

Under the behaviour support plan, seclusion is used as a strategy of last resort when:
- Emma is at serious and imminent risk of hurting herself or others (according to documented warning signs, such as invading personal space of staff and co-residents, and yelling loudly), and
- preventative strategies and de-escalation strategies in her behaviour support plan are not enough on their own to reduce the risk.

In these instances, seclusion is used by:
- Informing Emma that she is being given some time to calm down on her own,
- Locking the front door, and
- Removing co-residents and support workers to the backyard under a covered area and locking the backdoor.

At this point seclusion is in place. Staff should visually monitor Emma, and seclusion should stop immediately when Emma is observed to no longer be at imminent risk of harm to herself or others.

This example of the use of seclusion is a regulated restrictive practice that would require the senior practitioner's authorisation under the proposed framework, and require the service provider to comply with the safeguards set out in the Bill, including specific requirements relating to the use of seclusion contained in section 147.

The Bill allows for the use of regulated restrictive practices subject to the safeguards provided in the Bill, where required to prevent harm to the person with disability and others.

(d) <u>whether there are any less restrictive (on human rights) and reasonably available ways to achieve the purpose of the Bill</u>

The Bill seeks to provide for an authorisation framework that is less restrictive on human rights than the status quo by:

- introducing the role of the senior practitioner. The senior practitioner, or a delegate within the Office of the Senior Practitioner, will be responsible for authorising the use of a regulated restrictive practice to support a person with disability, as noted above. This will reduce the risk of conflicts of interest that are inherent in the current regime, and ensure that authorisation decisions will be made by individuals with relevant expertise.
- QCAT will have jurisdiction to undertake a merits review of all authorisation decisions of the senior practitioner, or a delegate of the senior practitioner.

- Ensuring all people receiving NDIS supports or services or state disability services have the benefit of the same protections provided by the authorisation framework by expanding it to apply:
    - to all adults and children when receiving NDIS supports or services or state disability services.
    - removing current immunities for the locking of gates, windows and doors to ensure that these practices are subject to the same safeguards as other regulated restrictive practices.

Under the NDIS Quality and Safeguarding Framework, the use of regulated restrictive practices on all NDIS participants is regulated under the NDIS (RPBS) Rules, with oversight by the NDIS Commission.

Reports on the unauthorised use of restrictive practices to the NDIS Commission show restrictive practices are being used on adults with disability (including adults other than adults with an intellectual or cognitive disability) and children with disability. It is a condition of registration for registered NDIS providers that they comply with a state or territory authorisation process. By expanding the scope of Queensland's authorisation framework to include all people with disability who receive NDIS supports or services and people who receive state disability services, the highest level of safeguards will be achieved.

The Bill provides safeguards to ensure any limitation on a person's human rights are done only for the purpose of preventing harm to the person with disability or others and in the least restrictive way possible. Restrictive practices permitted by the Bill are only to be used where required to prevent harm to support people with disability who display behaviours of concern that are of such intensity, frequency or duration that they may cause harm to the person or others. *Harm*, to a person, is defined in the DS Act to mean physical harm to the person; a serious risk of physical harm to the person; or damage to property involving serious risk of physical harm to the person.

Safeguards include:

- Requiring that regulated restrictive practices are only used if:
    - required as a last resort to prevent harm to the person with disability or others;
    - it is the least restrictive way of ensuring the safety of the person or others;
    - it is used for the shortest time possible;
    - for environmental restraints or seclusion, carried out in accordance with additional safeguards set out in section 147
    - for regulated restrictive practices that are likely to be required more than once, relevant service providers are required to take all reasonable steps to facilitate the development of a behaviour support plan for the person with disability and seek authorisation from the senior practitioner to continue using the restrictive practice in accordance with the plan. The purpose of the behaviour support plan is to ensure that all other strategies to prevent and respond to the person's behaviours of concern have been considered before a restrictive practice is used, and the person's quality of life will be improved in the long term.
    - Once a behaviour support plan has been developed, and authorisation from the senior practitioner has been obtained, the regulated restrictive practice may only be used in accordance with the plan and approval.
- Enabling individuals to seek a merits review of authorisation decisions of the senior practitioner through QCAT.

- Requiring that entities, including relevant service providers, performing a function under the DS Act, perform that function in a way that promotes and safeguards the person's rights, and is least restrictive of those rights, and have regard to the human rights principle. The human rights principle recognises specific rights, including cultural rights, rights to privacy, and autonomy and independence.

Where a registered NDIS provider uses a regulated restrictive practice without authorisation from the senior practitioner, the registered NDIS provider must report the use to the NDIS Commission, to enable appropriate monitoring enforcement actions.

New section 158 sets out the criteria the senior practitioner must be satisfied of before providing authorisation to use a regulated restrictive practice, including that:

- there is a need for a regulated restrictive practice to be used to support the relevant person because the person's behaviour has previously resulted in harm to the person or others;
- there is a reasonable likelihood that, if the authorisation is not given, the relevant person's behaviour will cause harm to the person or others;
- if the regulated restrictive practice is included in a behaviour support plan, the plan was developed in accordance with the requirements under the NDIS restrictive practices rules or the requirements for state behaviour support plans and
- if the regulated restrictive practice is chemical restraint—in consultation with the relevant person's treating doctor; and
- to the extent possible, best practice alternative strategies will be used before the restrictive practice is used; and
- the restrictive practice will be used only:
  - after consideration of the likely impact on the person with disability;
  - as a last resort to prevent harm to the relevant person with disability or others
- the proposed use of the regulated restrictive practice:
  - is the least restrictive way of ensuring the safety of the person and others
  - is proportionate to the risk of harm
- the restrictive practice is not a prohibited restrictive practice.

Further, for decisions relating to children, where there is a conflict between the child's safety, wellbeing and best interests (whether immediate or long-term in nature) and the interests of an adult caring for the child, the senior practitioner must consider as paramount the best interests of the child.

The Bill also provides for a regulation making power for the prohibition of certain restrictive practices. This is intended to provide clear guidance to relevant service providers about what restrictive practices are so harmful, dangerous or punitive that they should not be used. The senior practitioner will not be able to authorise prohibited restrictive practices.

Consideration was given to prohibiting the use of all restrictive practices, and thereby ending legal authorisation for the use of regulated restrictive practices. There already exist provisions under the law for the use of reasonable force in situations that might extend to a 'last resort' circumstance that apply to the general population. For example, the police have powers to use reasonable force that are general, rather than specific to people with disability or any other group.

This option would not achieve the purpose of preventing harm to people with disability and others, and is therefore not a reasonably available option for consideration. By having an

authorisation framework in place, the use of a restrictive practice must be approved by an authorised and appropriately qualified person to be used only as a last resort, and be supported by safeguards and alternate strategies that seek to reduce and eliminate the need to use the restrictive practice over time.

Consideration was also given to including a requirement to obtain consent from the person with disability to use a regulated restrictive practice. However, this is not always viable, safe or in the best interest of the person with disability or others. For example, if a person with disability was displaying behaviours of harm to themselves, or others, and withdraws consent to the use of a regulated restrictive practice (environmental restraint such as locking doors/removing sharps etc.), then the person with disability would remain to be at risk of harming themself or others.

(e) the balance between the importance of the purpose of the Bill, which, if enacted, would impose a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitation.

The authorisation of the use of restrictive practices necessarily entails limitations on rights which protect the fundamental dignity of the person.

However, the importance of preventing harm to people with disability and enabling people to live and work free from violence and other potentially damaging behaviour (thereby promoting the right to life and right to security of the person), balances the need to preserve those rights in these circumstances.

The reformed authorisation framework captures the use of restrictive practices for all people with disability, including children and young people who receive NDIS supports or services or state disability services under the DS Act. This model is consistent with the National Principles and aligns with other leading jurisdictions, and delivers the key reform elements most strongly supported through stakeholder consultation undertaken through the PBSRP Review.

The Bill provides safeguards to ensure that regulated restrictive practices are only used as a last resort and to the extent necessary to prevent harm, thereby minimising the extent of interference with a person's human rights.

On balance, I consider the limitations on the rights outlined above in relation to this measure are reasonable and demonstrably justifiable.

(f) any other relevant factors

The amendments provide an authorisation framework and safeguards to protect the rights of people with a disability from unnecessary, prohibited and unregulated restrictive practices. The proposed implementation of a clinically based nationally consistent authorisation framework in Queensland will achieve full consistency with the National Principles, which aim to ultimately reduce harm and the use of restricted practices.

The promotion of rights is considered to be a proper purpose that is consistent with a free and democratic society based on human dignity, equality and freedom.

Measure 2: Disclosure and collection of information

Right to privacy and reputation: (s 25 of the HR Act)

(a) the nature of the right

Section 25(a) of the HR Act provides that a person has the right not to have the person's privacy, family, home or correspondence unlawfully or arbitrarily interfered with. The collection, storage and dissemination of personal information engages the right to privacy.

The right to privacy and reputation protects individuals from unlawful or arbitrary interferences and attacks upon their privacy, family, home, correspondence (written and verbal) and reputation. The scope of the right to privacy is intentionally broad. It protects privacy in the sense of personal information, data collection and correspondence, but also extends to an individual's private life more generally. The United Nations Human Rights Committee has referred to those aspects of life in which a person can freely express his or her identity, either alone or in relationships with others as within scope for the right to privacy.

These provisions in the Bill limit the right to privacy because they require the collection and disclosure of information about the person with disability and other people involved in the restrictive practices authorisation or merits review processes. The Bill also includes transitional provisions that allow for the disclosure of information to facilitate the safe transition from the current authorisation framework to the new framework to be implemented through the Bill.

Any interference with privacy rights resulting from the Bill will be lawful, as they are in accordance with the limited circumstances provided for by the DS Act. However, to assess whether the interference would be arbitrary in the sense of being disproportionate it is necessary to consider the factors prescribed by s 13 of the HR Act.

(b) the nature of the purpose of the limitation to be imposed by the Bill if enacted, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

The purpose of the amendments is to prevent harm to people with disability and enable people to live and work free from violence and other potentially damaging behaviour. This will enhance rights to:

- Right to life (s 16 of the HR Act); and
- Right to security of person (s 29 (2) of the HR Act).

Both rights are of fundamental importance which place positive obligations on states to take positive steps to protect individuals from foreseeable threats to life or bodily integrity. The promotion of these rights is a proper purpose consistent with a free and democratic society based on human dignity, equality and freedom.

(c) the relationship between the limitation to be imposed by the Bill if enacted, and its purpose, including whether the limitation helps to achieve the purpose

The limitations on human rights engaged by the Bill assist it to achieve the purposes identified above. For example, in relation to sharing information with the NDIS Commission, this will enable the NDIS Commission to exercise its quality and safeguarding functions (noting in 2019,

most of Queensland's quality and safeguarding functions for NDIS supports or services within scope of the DS Act were transitioned to the NDIS Commission).

The provision of confidential information to support the development of a behaviour support plan or a restrictive practices authorisation is essential to ensure these decisions are made:

- in a way that is responsive to the person's needs
- reduces and eliminates the need for the use of regulated restrictive practices
- are based on fulsome information

Further, the disclosure of information is essential to enable appropriate people to initiate or participate in external review proceedings, and for QCAT to be able to undertake its merits review function.

Finally, the disclosure of information during the transitional period is required to ensure the senior practitioner has appropriate access to records about existing authorisations for the use of restrictive practices to fulfil its new functions, and ensure maximum safeguards for people with disability whose restrictive practices authorisations will transition to the new framework.

(d) whether there are any less restrictive (on human rights) and reasonably available ways to achieve the purpose of the Bill

The less restrictive option is to not facilitate information sharing in line with the provisions outlined above. However, this would not achieve the purposes identified above. The Bill prescribes the circumstances in which confidential information about a person with disability may be collected and disclosed. These are very limited circumstances, that are linked to the specific purposes set out in the Bill. For example, clause 29 amends section 228 of the DS Act, which provides for penalises the unauthorised disclosure of confidential information gained through involvement in the Act's administration, and provides for the limited circumstances in which confidential information can be disclosed.

(e) the balance between the importance of the purpose of the Bill, which, if enacted, would impose a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitation

It is acknowledged that the disclosure of a person's information, including confidential information, impacts the right to privacy.

However, the importance of preventing harm to people with disability and enabling people to live and work free of violence and other potentially damaging behaviour (thereby promoting the right to life and right to security of the person), outweighs the need to preserve those rights in these circumstances.

Further, the proposed framework will be carefully tailored to ensure that any use or disclosure of a person's personal information will only be permitted in limited circumstances where it is necessary to meet the objectives of the Bill.

Measure 3: Coroner's Act amendments

Privacy and reputation (section 25)

(a) the nature of the right

The right to privacy and reputation protects the individual from all interferences and attacks upon their privacy, family, home, correspondence (written and verbal) and reputation. The scope of the right to privacy is very broad. It protects privacy in the sense of personal information, data collection and correspondence, but also extends to an individual's private life more generally. Only lawful and non-arbitrary intrusions may occur upon privacy and reputation.

The concept of arbitrariness in the context of the right to privacy carries a human right meaning of 'capriciousness, unpredictability, injustice and unreasonableness – in the sense of not being proportionate to the legitimate aim sought.'[6] An interference with privacy that is not arbitrary will not constitute a limit on the right to privacy.

The amendments to sections 7 and 9 of the Coroners Act will expand the scope of the reportable deaths framework to ensure that the deaths of DSOA clients, who are not living in a private dwelling or residential aged care, are deaths in care and therefore required to be reported to coroner or police.

Under sections 7 and 8 of the Coroners Act, there will be an obligation on any person to report the death of a DSOA client in Queensland (regardless of how the death arose and where the death occurred). The death of the DSOA client will then be subject to the processes of coronial investigation under the Coroners Act. Such processes may include the publication and dissemination of confidential and personal information about the family of the deceased DSOA client, or information about a person whose conduct is subject to investigation by the coroner. Therefore, the amendments will limit the right to privacy for those personally or professionally (including family, friends, inhabitants of the same household and service providers) linked to the deceased, in circumstances where the process of coronial investigation compels the disclosure or publication of certain information.

For example, if a coroner investigates a death at an inquest, they must publish their findings and comments on the State Coroner's website, unless they order otherwise (s 46A, Coroners Act). Similarly, if a coroner investigates a death but does not hold an inquest, they may direct that their findings by published on the State Coroner's website, if they consider the publication is in the public interest and (to the extent practicable) they have consulted with and had regard to the views of a family member of the deceased.

Additionally, in certain circumstances, the coroner can permit a person access to coronial and other types of investigation documents (s 54, Coroners Act), or a physical exhibit (s 62A, Coroners Act). For example, a 'coronial document' can include an autopsy report, a police report, or a record of the coroner's findings and comments (sch 2, Coroners Act).

[6] *WBM v Chief Commission of Police* (2012) 43 VR 446, 472 [114].

(b) the nature of the purpose of the limitation to be imposed by the Bill if enacted, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

The purpose of expanding the scope of the reportable deaths framework is to ensure that any deaths in care experienced by DSOA clients in Queensland are appropriately reported and investigated, to prevent them from happening similarly in the future. This purpose is also consistent with the positive obligation on States to take steps to protect the lives of individuals under section 16 of the HR Act

Therefore, the proposed expansion of the reportable deaths framework is consistent with a free and democratic society based on human dignity, equality and freedom.

(c) the relationship between the limitation to be imposed by the Bill if enacted, and its purpose, including whether the limitation helps to achieve the purpose

The existing requirements under sections 7 and 8 of the Coroners Act, in respect of a "death in care", ensure that the deaths of certain vulnerable people in the community are reportable, irrespective of the cause of death. This requirement reflects the underlying policy objective of ensuring there is scrutiny of the care provided to these people, given their specific vulnerabilities.

The significance of a death being reported as a "death in care", lies in the requirement under the Coroners Act for an inquest to be held when the circumstances of the death raise concerns about the person's care. Consequently, expanding the scope of the "death in care" definition, to be inclusive of DSOA clients, will require the death of any DSOA client to be reported to and investigated by the coroner.

Therefore, given the broad powers and functions of the coroner under the Coroners Act, expanding the reportable deaths framework to be inclusive of DSOA clients will enable the coroner to investigate any DSOA client deaths and, where appropriate, make recommendations to mitigate the risk of similar deaths from occurring in the future.

(d) whether there are any less restrictive (on human rights) and reasonably available ways to achieve the purpose of the Bill.

There are no less restrictive and reasonably available alternative ways to ensure the deaths of DSOA clients care throughout Queensland are appropriately scrutinised and prevented from happening similarly in the future.

Maintaining the status quo, would result in a substantially lesser degree of scrutiny and investigation into the deaths of DSOA clients, and not result in a further reduction of the risk of such deaths from reoccurring.

Notably, the amendments will be subject to the existing safeguards within the Coroners Act, regarding the disclosure of personal and confidential information. For example, the Coroner has the power to make various non-publication orders, with significant penalties for their contravention (s 41, Coroners Act). Similarly, individual access to investigation documents is subject to the individual demonstrating they have a 'sufficient interest' in accessing the document, or the Coroner determining their access is in the 'public interest' (s 54, Coroners Act). In any event, even in circumstances where the Coroner grants access to an investigation

document, they may then impose additional access conditions considered necessary to protect the interests of justice, the public, or a particular person (s 55, Coroners Act).

(e) the balance between the importance of the purpose of the Bill, which, if enacted, would impose a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitation

On balance, the limitations on an individual's right to privacy caused by the expanded scope of the reportable deaths framework under the Coroners Act are reasonable and demonstrably justifiable.

As outlined above, the nature and extent of interference with the privacy of those personally or professionally linked to any deceased DSOA client, would be appropriately mitigated by the existing safeguards within the Coroners Act. Any such interference with privacy would only be for the express purpose of facilitating a coronial investigation, whilst being proportionate to the extent and purpose of that investigation. Consequently, such interferences with the right to privacy of impacted individuals is non-arbitrary and therefore the right to privacy is not limited.

Further, the holding of an inquest and the making of findings and recommendations to prevent deaths, is an administration function of the court and therefore subject to the obligations imposed by the HR Act.[7] Additionally, in making recommendations, the Coroner must consider whether recommendations should be designed to protect human rights, (such as the right to life), and should not disproportionately limit human rights (such as the right to privacy).[8]

Ultimately, the interference with privacy caused by the amendments will help prevent further deaths of DSOA clients in care throughout Queensland from happening similarly in the future. Further, they will allow the coroner to provide comments and recommendations on matters connected with any such deaths, including matters related to public health or safety, or the administration of justice.

The proposed amendments also concurrently engage and promote the right to life (s 16 of the HR Act), protection from torture and cruel, inhumane or degrading treatment (s 17 of the HR Act) and the right to health services (s 37 of the HR Act).

For the reasons outlined above in relation to the objects of the Coroners Act and the fundamental importance of scrutinising the deaths of certain vulnerable members of society, the limitations are considered necessary and proportionate.

Therefore, as the limitations are reasonable and justifiable, the amendments are compatible with human rights.

(f) any other relevant factors

Nil.

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[7] *Inquest into the deaths of Yvette Michelle Wilma Booth, Adele Estelle Sandy, Shakaya George ('RHD Doomadgee Cluster')* (Coroners Court of Queensland, State Coroner N. Wilson, 30 June 2023) [125].

[8] Ibid [132].

Conclusion

In my opinion, the Disability Services (Restrictive Practices) and Other Legislation Amendment Bill 2024 is compatible with human rights under the HR Act because it limits human rights only to the extent that is reasonable and demonstrably justifiable in accordance with s 13 of the HR Act.

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