

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

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Community Support and Services Committee  
Queensland Parliament

By email only to: [cssc@parliament.qld.gov.au](mailto:cssc@parliament.qld.gov.au)

Dear Committee Secretary

### **Disability Services (Restrictive Practices) and Other Legislation Amendments Bill 2024**

Thank you for the opportunity to provide feedback on the Disability Services (Restrictive Practices) and Other Legislation Amendments Bill 2024 (**the Bill**).

Unless otherwise stated, section references in this submission refer to new sections of the *Disability Services Act 2006* (Qld) (**DS Act**) proposed by the Bill.

#### **3-year review should consider broadening scope of reform**

Under section 140, the regulation of restrictive practices under the DS Act applies to:

- Registered NDIS providers (but not unregistered NDIS providers) (defined by schedule 8 and section 15(2) of the DS Act);
- A service provider funded by the Department of Child Safety, Seniors and Disability Services (or another department prescribed by regulation) to provide disability services (defined by schedule 8 and section 14 of the DS Act);
- The Department of Child Safety, Seniors and Disability Services;
- Another service provider prescribed by regulation.

While the Commission supports the expansion of protections to all persons receiving NDIS and department funded services, including children and people with mental health disability, it does not cover all restrictive practices occurring in hospitals, residential aged care, schools, home and work.<sup>1</sup>

An individual subject to restrictive practices, who may receive services from multiple service systems and providers, should be able to enjoy the same safeguards independent of service funding or setting. The same or similar regulatory framework for all services who use restrictive practices will facilitate consistency in behaviour support between services, help

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<sup>1</sup> Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Overview of Responses to the Restrictive Practices Issues Paper* (Overview report, April 2021) 4.

service users to better understand the system and their rights, and create compliance efficiencies for service providers.

In consultation processes leading up to the introduction of this Bill, the government has always indicated its intent to limit the scope of restrictive practices reform in this way. Under section 241B, the Minister must review the efficacy and efficiency of the Bill's amendments after 3 years. The Commission submits that the review should further consider whether the restrictive practices framework under the DS Act should be expanded to apply to other settings and service providers, so that people subject to restrictive practices have consistent protection of their human rights.

### **Human rights principles for people with disability should expressly include protection against torture**

Sections 17 and 18 set out applicable principles for performing functions and exercising powers under the DS Act, and articulates human rights principles specific to people with disability.

Most, if not all, service providers subject to the restrictive practices framework are public entities under the *Human Rights Act 2019* (Qld) (**HR Act**).<sup>2</sup> They are therefore required to act compatibly with human rights and give proper consideration to human rights in making decisions.<sup>3</sup>

Despite this, the Commission recommends amendment of section 18 to expressly refer to a person with disability's right to protection against torture and cruel inhuman or degrading treatment, and to humane treatment when deprived of liberty, being rights that are particularly relevant to restrictive practices.

### **Seclusion of children should be a prohibited restrictive practice**

Certain restrictive practices can be prohibited through regulation (see the definition of 'prohibited restrictive practice' in section 142). While regulation amendments are not being considered by the Committee, the Commission observes that the seclusion of children should be a prohibited restrictive practice, or at the least, there should be a significant limit to the length and frequency seclusion can be used for a child.

### **Additional minimum standards needed for seclusion**

Section 147 sets out minimum conditions for a person subject of containment or seclusion, such as sufficient bedding, clothing, food and drink. Depending on how long the containment or seclusion is for, it would be appropriate for minimum conditions to also include access to fresh air, exercise, activities, and meaningful social interaction, to the extent that this is possible. Such standards are necessary to fulfil a person's rights to humane treatment when deprived of liberty protected by section 30 of the HR Act and are consistent with international law on the minimum standard of treatment for people in correctional facilities.<sup>4</sup>

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<sup>2</sup> Services prescribed by regulation can also be subject to the restrictive practices framework under section 140(1)(d) proposed by the Bill. It is possible that these services may not be public entities under section 9 of the *Human Rights Act 2019* (Qld).

<sup>3</sup> *Human Rights Act 2019* (Qld) s 58.

<sup>4</sup> United Nations, *Standard Minimum Rules for the Treatment of Prisoners* (30 August 1955) rr 11(a), 21, 78; *United Nations Standard Minimum Rules for the Treatment of Prisoners* (the Nelson

**Strengthen criteria and considerations for the authorisation of restrictive practices**

Under the Bill, service providers apply to the senior practitioner for authorisation to use restrictive practices. Applications to the senior practitioner must be accompanied by a behaviour support plan, which guides and frames the use of restrictive practices for the person with disability.<sup>5</sup>

Section 158 sets out when the senior practitioner may decide to authorise restrictive practices.

One criteria is whether the NDIS behaviour support plan was developed in accordance with the NDIS (Restrictive Practices) Rules or the State behaviour support plan was developed in accordance with the DS Act (s 158(d)(i)). The Commission considers this should be amended to include whether the plans were *reviewed* in accordance with the relevant regulatory framework. This would provide some oversight over legislative requirements to review State behaviour support plans at least once every 12 months while in effect (s 181(1)). Otherwise, there appears to be little consequence for the service provider for failing to review behaviour support plan within required timeframes.

Another criteria looks at the substance of the behaviour support plan to ensure it addresses the person's behaviours causing harm, improves quality of life, and has appropriate observation and monitoring mechanisms (s 158(e)). The Commission considers the senior practitioner should also be satisfied that the behaviour support plan contains sufficient measures focusing on the reduction and elimination of the use of restrictive practices.

Section 159 sets out matters the senior practitioner must and may consider when deciding an application. A requirement to consider the frequency and use of restrictive practices on the person under previous authorisations would provide additional oversight on the use of restrictive practices, and ensure the plan is moving towards reducing and eliminating restrictive practices. This may or may not be within the scope of section 159(1)(d) – any information available to the senior practitioner about strategies, including regulated restrictive practices, previously used to manage the behaviour of the person with disability, and the effectiveness of those strategies.

The senior practitioner should also be required to consider the general health and wellbeing of the adult with disability relevant to the use of restrictive practices.

**Ensure access to necessary information by a 'relevant person'**

The Bill defines 'relevant person' for a person with disability as a guardian or attorney for the adult, a person who is part of the adult's support network, an unpaid primary carer of the adult, or, for an adult who is an Aboriginal person or Torres Strait Islander adult, any person regarded under Aboriginal tradition or Island custom as a child, parent or sibling of the adult.<sup>6</sup> (s142)

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Mandela Rules), GA Res 70/175, UN Doc A/RES/70/175 (17 December 2015) rr 14(a), 23(1), 42, 44, 45, 105.

<sup>5</sup> Behaviour support plans are either NDIS behaviour support plans, developed and reviewed under the NDIS (Restrictive Practices) Rules, or State behaviour support plans, developed and reviewed under the DS Act.

<sup>6</sup> Section 142 proposed by the Bill also gives a corresponding definition of 'relevant person' for a child with disability.

Before deciding the application, the senior practitioner must, unless it is not practicable, consult with each known relevant person for the person with disability (s 160(1)(b)(ii)). Relevant persons consulted will receive a copy of the senior practitioner's decision on the application (s 163(1)(b)). A relevant person is entitled to apply for review of the senior practitioner's decision to the Queensland Civil and Administrative Tribunal (s 188(1)(c)).

In this way, relevant persons play a significant accountability and advocacy role for the person with disability. However, the Commission has not been able to identify in the Bill whether the relevant person has access to all the information they need in order to fulfil this role. Although a copy of the application for restrictive practices, and attached behaviour support plan, must be given to the person with disability, there is no require to provide this to the relevant person (s 149(2)). The relevant person may face difficulties obtaining the application directly from the adult, and they may not hold a formal legal role that would entitle them to access information on the adult's behalf.

While the right to privacy of the adult must also be considered, there should be ability under the DS Act for a relevant person to obtain all the information they need to fulfil their role, including deciding whether to seek review of a decision at the tribunal, in appropriate cases.

### **Consider First Nations cultural rights and safety**

The Bill acknowledges the cultural rights of Aboriginal peoples and Torres Strait Islander peoples:

- by including them in the principle that people with disability have the same human rights as others (s 18(2)(h)); and
- by requiring service providers to provide disability services in a way that considers the person's cultural rights (s 141(2)).

However, requirements regarding the development of behaviour support plans, and the criteria and considerations for the senior practitioner in deciding restrictive practice applications is silent regarding cultural rights for people with disability who are Aboriginal peoples and/or Torres Strait Islander peoples. A family member should be consulted in the development of behaviour support plans and in considering an application for restrictive practices, but only 'to the extent practicable' (s 178(1)(d)), and not if it is 'not practicable' (s 160(1)(b)).

First Nations cultural rights and safety must be considered:

- when identifying the advice and expertise needed to establish the office of the senior practitioner and fulfil its duties; and
- in developing guidelines under section 200AO about restrictive practices.

### **Allow discretion to cancel authorisations that is person-centred**

Section 168 sets out the grounds upon which the senior practitioner may cancel a restrictive practices authorisation, including contravention of a condition of the authorisation, or a contravention of a provision of the DS Act. The Commission submits broader discretionary powers should be given to the senior practitioner to cancel authorisations that take into account the circumstances, rights and wellbeing of the person the subject of the restrictive

practices. The senior practitioner would still need to provide the service provider with an opportunity to show cause.

### **Specify powers and responsibilities of the senior practitioner to deal with complaints**

Sections 182 to 184 proposed by the Bill provide that any person may make a complaint to the senior practitioner about the use of restrictive practices or the development of a behaviour support plan, and that the senior practitioner must maintain a system that deals effectively with complaints received. The senior practitioner may refer matters to a complaints entity, but otherwise the Act is silent on the functions and powers of the senior practitioner to deal with these complaints.

Further powers and responsibilities vested in the senior practitioner would assist to ensure this complaint mechanism is meaningful. For example, these could include, powers of inquiry and investigation, reasonable action to try and resolve the complaint, provision of advice and information, and referral for criminal prosecution.

### **Improve access to independent and legal advocacy**

Despite changes made by the Bill, restrictive practices frameworks will still be difficult to understand and navigate by the people subject to restrictive practices. They may be unable to advocate on their own behalf, including because they are too frightened to speak up, and may be isolated or not have friends and family able or willing to advocate on their behalf. This renders protections provided by internal complaints and external reviews meaningless without accessible independent and legal advocacy.

The Commission supports ongoing calls for adequate and stable funding for independent and legal advocacy for people subject to restrictive practices.

The Commission is encouraged by section 188ZF which enables the tribunal to appoint a separate representative for a child with disability if it would be in the best interests of the child. Given that restrictive practices can also significantly interfere with the rights of adults with disability, it would be reasonable to further empower the tribunal to appoint separate representatives for adults with disability, either with broad discretion or where it is in the adult's best interest to be represented. This is comparable to the *Mental Health Act 2016*, which allows the Mental Health Review Tribunal to appoint a representative if it would be in the person's best interests to be represented, and requires the appointment of a representative for people subject to forensic orders, applications for electroconvulsive therapy, and children.<sup>7</sup>

### **Enhance senior practitioner functions**

The functions of the senior practitioner are set out in section 200AB.

These include publishing data relating to restrictive practice authorisations. The Commission considers that greater accountability and transparency could be achieved by requiring specific data to be published on an annual basis.

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<sup>7</sup> *Mental Health Act 2016* (Qld) s 740.

The Commission recommends additional functions that would allow the senior practitioner to review issues related to the use of restrictive practices in Queensland and identify systemic improvements.

Yours sincerely

A solid black rectangular box used to redact the signature of Neroli Holmes.

Neroli Holmes  
**A/Queensland Human Rights Commissioner**