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

Submission No:	8
Submitted by:	Queensland Nurses and Midwives' Union
Publication:	Making the submission and your name public
Attachments:	See attachment
Submitter Comments:	

Queensland Nurses & Midwives' Union

Submission to

Community Support and Services Committee

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

July 2024

106 Victoria St, West End Q 4101
GPO Box 1289, Brisbane Q 4001
(07) 3840 1444
(07) 3844 9387
qnmu@qnmu.org.au
www.qnmu.org.au

submission

Contents

Introduction

The Queensland Nurses and Midwives' Union (QNMU) thanks the Community Support and Services Committee (the Committee) for the opportunity to provide feedback on the *Disability Services (Restrictive Practices) and Other Legislation Amendment Bill 2024* (the Bill).

The QNMU is Queensland's largest registered union for nurses and midwives, representing over 74,000 members. The QNMU is a state branch of the Australian Nursing and Midwifery Federation (ANMF) with the ANMF representing over 326,000 members.

Our members work in health and aged care including public and private hospitals and health services, residential and community aged care, mental health, general practice, and disability sectors across a wide variety of urban, regional, rural, and remote locations.

The QNMU is run by nurses and midwives, for nurses and midwives. We have a proud history of working with our members for over 100 years to promote and defend the professional, industrial, social, and political interests of our members. Our members direct the QNMU's priorities and policies through our democratic processes.

The QNMU expresses our continued commitment to working in partnership with Aboriginal and Torres Strait Islander peoples to achieve health equity outcomes. The QNMU remains committed to the Uluru Statement from the Heart, including a pathway to truth telling and treaty. We acknowledge the lands on which we work and meet always was, and always will be, Aboriginal and Torres Strait Islander land.

The QNMU represents members who are employed by National Disability Insurance Scheme (NDIS) providers or are sole practitioners for the NDIS market. Reforms to the authorisation framework for restrictive practices in the NDIS will impact on the practice of those members.

The QNMU has provided several submissions regarding the need to reduce and eliminate the use of restrictive practices in the disability sector, including submitting to the *Reforming Queensland's authorisation framework for the use of restrictive practices in NDIS and particular disability services settings* consultation.

We consider the review of the Queensland framework to provide a valuable opportunity to take onboard the lessons learned from other areas of healthcare. Many of the issues surrounding restrictive practices have already been deliberated on and addressed in the mental health sector and Aged Care. The QNMU contends it would therefore be prudent to seek guidance from the existing models of authorisation, professional obligations, practice, and notification requirements in these sectors.

The QNMU's submission will provide feedback and recommendations on the proposed legislative and procedural reform for restrictive practices that have been outlined in the Bill. Although the Bill is well intentioned, we reiterate that reform must be accompanied by a range of system level changes. This includes a deliberate and sustained change of culture by NDIS service providers, as well as improved practice informed by both quality training and independent evaluation and review (Cortis. N et al., 2023). Workforce and resourcing issues,

within the sector must also be addressed if the overarching goal of eliminating restrictive practices is to be achieved. We raise a number of suggestions in our submission for the Committee to consider.

Recommendations

The QNMU recommends:

- Developing a workgroup in consultation with key stakeholders including the disability community, unions, consumers and their families and professional bodies to oversee the implementation of this legislation and ensure that it is operating effectively, safely and as intended;
- Behaviour support practitioners should operate in a multidisciplinary team and consist of regulated health practitioners to provide appropriate specialist consultation, decision-making, coordination and facilitation of care related to people with complex needs as it relates to restrictive practices;
- The Senior Practitioner role should be fulfilled by a registered Health Practitioner (that is, a person who holds a current registration with the Australian Health Practitioner Regulation Agency) and has the appropriate clinical background, skills, education, and qualifications to carry out the necessary functions of the role;
- Broad support for expanding Queensland's authorisation framework to include all people with disability. However, we recommend a separate authorisation framework for children with disability to ensure appropriate use of restrictive practices;
- Behaviour support practitioners should operate in a multidisciplinary team and consist of regulated health practitioners to provide appropriate specialist consultation, decision-making, coordination and facilitation of care related to people with complex needs;
- Significant cultural and educational training for service providers and staff is required across the care sector, especially where unregulated care workers are the predominant workforce. Education should focus on what alternatives to restrictive practices can be implemented and when restrictive practices can be engaged as a last resort and who has the appropriate qualifications to make these decisions;
- Regulation and quality of care in the sector could be improved by implementing duty of care requirements for registered providers, similar to the approach proposed to be included in the new Aged Care Act;
- Harmonising legislation across jurisdictions to achieve consistent standards of care; and
- Addressing workforce issues to support best practice in disability services, including reducing the need for restrictive practices. The QNMU supports the Royal Commission into Violence, Neglect and Exploitation of People with Disability recommendation for regulation of the currently unregulated care workforce.

General comments

Restrictive practices can have a significant, long term negative impact on a person's human rights and humanity. While the QNMU recognises that in a small number of cases these practices may be necessary to protect a person's rights to life, safety and security as well as the rights of those around them, the goal of restrictive practices should be towards their elimination wherever possible, in favour of less restrictive options where these can be safely implemented. As evidenced by the findings of the Royal Commission into Violence, Neglect and Exploitation of People with Disability (Royal Commission into Violence Abuse Neglect and Exploitation of People with Disability, 2021), the use of restrictive practices can constitute a significant infringement on the human rights of people to whom they are applied. Such as inappropriate restrictive practices without sufficient clinical support or oversight, and can involve violence, abuse and neglect against people with disability. We continue to assert that

the use of restrictive practices must only be used when it is part of a behaviour support plan developed by a registered NDIS behaviour support practitioner and authorised by the state or territory in which the participant resides. NDIS providers and their staff must meet competency standards and provide regular reporting if using restrictive interventions.

Whilst improving the authorisation process is an essential first step, this alone will not be sufficient and must be considered as part of a larger piece of work that is required to overhaul the use of restrictive practices on people with disability in every setting in which they occur, including schools, aged care facilities and detention settings. Inadequate funding for behaviour support plans and insufficient oversight by the NDIS Quality and Safeguards Commission continue to constitute significant barriers for Queenslanders with disability seeking to uphold their human rights. These issues must also receive urgent policy attention and become the subject of meaningful consultation.

We seek a commitment from the Committee that a workgroup is developed in consultation with key stakeholders including the disability community, unions, consumers and their families and professional bodies to oversee the implementation of this legislation and ensure that it is operating effectively, safely and as intended.

Proposed amendments

Establishing the office and functions of the Senior Practitioner

The QNMU supports in-principle the establishment of the office and functions of a Senior Practitioner. The QNMU agrees with the previous suggestion for reform outlined in the Queensland Government's 2022 consultation - *Reforming Queensland's authorisation framework for the use of restrictive practices in NDIS and disability service settings* that a Senior Practitioner could be a highly qualified and experienced clinician appointed by the government under legislation to administer the restrictive practices framework (Queensland Government, 2022). Requiring the Senior Practitioner to have the appropriate clinical qualifications and experience to perform the functions and exercise the powers conferred on them, aligns with the legislative frameworks of other jurisdictions, including the Northern Territory under the *NDIS (Authorisations) Act 2019* (NT) and the Victorian legislation under the *Disability Act 2006* (Vic).

There has been broad support from stakeholders to transition Queensland's guardianship-based framework towards a more streamlined administrative framework based on clinical decision-making, in line with the National Principles (Griffith University Policy Innovation Hub, 2020). As previously recommended, the QNMU reiterates that this role must be fulfilled by a registered Health Practitioner (that is, a person who holds a current registration with the Australian Health Practitioner Regulation Agency) who has the appropriate clinical background, skills, education, and qualifications to carry out the necessary functions of the role. The process should involve experienced clinicians who can provide expert advice in assessing the escalation events leading to restrictive practices and the clinical appropriateness. As well as interrogating behaviour support plans in a consistent manner that does not rely on appointed guardians who may or may not have the knowledge, skills and expertise to gauge the quality of behaviour support plans and necessity for restrictive practices.

Although the Explanatory Notes accompanying the Bill indicate that the Senior Practitioner Role will be similar to other jurisdictions to ensure national consistency, there appears to be no express mention of the Senior Practitioner qualifications and requirements for the role. The QNMU seeks that these clinical qualifications and experience requirements are explicitly codified in the Bill.

Expansion of the authorisation framework to include all people with disability

While an estimated 4.4 million Australians live with disability, just over 649,000 people are eligible to receive NDIS support (NDIS, 2024). Many people who are not on the NDIS are struggling to get the services and support they need to live ordinary lives (ABC, 2022). As previously stated, the QNMU supports expanding Queensland's authorisation framework to include all people with disability. However, we recommend a separate authorisation framework for children with disability. Children have different developmental and social requirements from adults and certain types of restrictive practices may be inappropriate and harmful. It is also important to remain cognisant that although some children may present like adults, they are cognitively and developmentally children and therefore must not be treated as though they are an adult. Moreover, the legal parameters may also be different for children. While the QNMU supports the NDIS (Restrictive Practices and Behaviour Support) Rules 2018 (Cth) (NDIS rules), they must be considered for compatibility with the *Criminal Code Act 1899* (Qld) (s 280), where it is lawful for a parent or a person in the place of a parent to "to use, by way of correction, discipline, management or control, towards a child or pupil, under the person's care such force as is reasonable under the circumstances." Such practices may also be considered restrictive practices in the context of providing care for a child with disability.

The current fragmented coverage of the *Disability Services Act 2006* (Qld) is inherently problematic, and results in some people with disability having their freedoms limited and are unable to equitably access critical human rights protections provided by legislation. For example, research has shown that some people with disability are at a higher risk of being mechanically restrained than others, including children, people with autism spectrum disorder, and people with communication difficulties as well as people taking antipsychotic medication. It should be noted that people with hearing impairments are nearly eight times more likely to be mechanically restrained than those who are not. Hearing and vision impairments may affect a person's ability to communicate and express their needs which can lead to misunderstandings and behaviours of concern (NDIS Quality and Safety Commission, 2020; Webber. L.S et al., 2019). To leave vulnerable members of the community without such protection may represent an unreasonable limitation on several rights protected in the *Human Rights Act 2019* (Qld) including recognition and equality before the law (s 15), protection from torture, cruel, inhuman or degrading treatment (s 17), protection of families and children (s 26) and the right to privacy (s 25).

Greater alignment with the NDIS rules that require service providers to register restrictive practices used on children and adults with disabilities, other than intellectual or cognitive disability, would be welcomed by the QNMU. Expanding the definition to all people with disability will also help to create attitudinal change by setting an expectation that anyone who is subjected to such restraints in the context of disability service provision is entitled to the same legislative safeguards. In short, there must be consistent standards and practices for all those with a disability rather than risking the development of a two-tier approach where

services are not equally distributed across the population, or some people may derive less benefit from the scheme than others.

The QNMU would also like to emphasise that those with a disability deserve to be supported by all levels of government working cooperatively to provide some degree of certainty and reassurance to those with a disability that they will be considered and supported in a consistent way no matter their situation or circumstances.

Behaviour support practitioners

New section 175 of the Bill outlines that a state behaviour support plan must be developed, or reviewed, by a behaviour support practitioner. The Explanatory Notes for the Bill indicate that behaviour analysts, medical practitioners, psychologists, psychiatrists, speech and language pathologists, occupational therapists, registered nurses, social workers are all examples of who might be appropriately qualified to be behaviour support practitioners under the framework.

The QNMU takes issue with several factors with this approach. The broader remit of the NDIS Restrictive Practice rules has led to an increased demand for behaviour support plans, yet insufficient registered service providers capable of providing them are available, particularly in rural and remote parts of Queensland. Recent statistics from the NDIS Quality and Safeguards Commission's Activity Report showed that there were 101,580 incidents of unauthorised restrictive practices for the 12-month period between June 2020 and June 2021 in Queensland (NDIS Quality and Safeguards Commission, 2022). This is a staggering figure which, together with the above-mentioned issues, highlights a market that has struggled with the transition to the NDIS, and which is unprepared for the move towards privatising the preparation of behaviour support plans. The current inability of the Quality and Safeguards Commission to respond to participant complaints in a timely manner is also cause for concern. It stands that any decision around restrictive practices should be consistent across all patient cohorts, with the most vulnerable in need of greater protection.

As per the NDIS Rules, a behaviour support practitioner must be considered suitable to deliver specialist behaviour supports by the NDIS Commission. Recent media investigations (ABC, 2023; The Guardian, 2021) have shown the real detriment and damage that is incurred when non-regulated health practitioners are allowed to undertake restrictive practices. The QNMU raises concern that assessments require greater oversight and access to regulated health practitioners with authorised qualifications and regulation under the National Law to make evidence-based critically appraised decisions on their needs as it relates to restrictive practices. Professionally regulated professions are subject to the regulations and safeguards provided by other protective checks and balances of the service delivery environment. For those healthcare workers who are not registered, it has been notoriously difficult for consumer protection agencies such as the health ombudsman to be able to take effective action when a serious complaint they receive pertains to the conduct, health or performance of an unregistered healthcare worker. A shortage of behavioural support practitioners should not be addressed through lowering the standard of qualifications for the position. For these reasons, we consider that behaviour support practitioners should operate in a multidisciplinary team and consist of regulated health practitioners to provide appropriate specialist consultation, decision-making, coordination and facilitation of care related to people with complex needs.

Reformed authorisation process

The QNMU submits that the provision for immunity in relation to the locking of gates, doors and windows may remain in place only if a comprehensive risk assessment by a competent health practitioner has indicated that such practices would be appropriate (for example, when a person with disability is determined to be at high risk of immediate harm to themselves or to others, should such practices not be in place).

The QNMU is however concerned that immunity provisions are proposed to be provided to service providers under clause 16 of the Bill, may apply in situations where delays have occurred in the processes established to consider whether approvals for the use of restrictive practices should be granted. The QNMU's preference would be for sufficient resources to be provided to both the decision-making bodies, and to those making the applications, to ensure that sufficient information and adequate resources are available for timely decisions to be made, without permitting a period of unsupervised restrictive practices to occur.

To support the implementation of immunity provisions in the Bill, significant cultural and educational training for service providers and staff is required across the care sector, especially where unregulated care workers are the predominant workforce. The QNMU raises concerns with some service providers prioritising the reputation and protection of the organisation over supporting health practitioners to exercise their clinical judgement and complex decision-making to make an evidence-based decision about the use of restrictive practices. For instance, the QNMU is aware of an instance where despite our member exercising critical appraisal and undertaking an appropriate risk assessment to engage a restrictive practice, as a qualified and experienced registered health practitioner, the member was subjected to a punitive disciplinary process by the employer. Best practice outcomes can be achieved where organisations and staff are educated about what alternatives to restrictive practices can be implemented and when restrictive practices can be engaged as a last resort and who has the appropriate qualifications to make these decisions. Education about role clarity and the differences in roles and authorisations of carer workers (however titled), enrolled nurses and registered nurses would also be beneficial for service providers.

Further to this, the QNMU suggests that regulation and quality of care in the sector could be improved by implementing duty of care requirements for registered providers, similar to the approach proposed to be included in the new Aged Care Act (Department of Health and Aged Care, 2024).

Queensland Civil and Administrative Tribunal (QCAT)

The QNMU supports the Bill in giving the Queensland Civil and Administrative Tribunal (QCAT) a new jurisdiction to independently review authorisation decisions, providing an additional level of oversight for restrictive practice decisions. The QNMU considers that this function requires independent assessment from the Tribunal that has at least one registered health practitioner to provide the level of expertise and judgement required that is informed by lived experience in the sector.

Additional comments

Jurisdictional inconsistencies and clarity

There is inconsistency in how service providers interpret current regulatory reporting requirements and conduct the necessary assessments on their use of restrictive practices and may be further cofounded by service providers operating across jurisdictions. In the experience of the QNMU, this inconsistency can extend to providers' professional obligations across all areas of practice, including the application of governance structures (including clinical governance), transparency around financial, operational and care related activities, and the quality and safety of care provision. This lack of consistency and regulation creates a 'wild west' environment, where unregistered providers can operate without the basic checks and balances, such the need for a criminal history check, or freely offer services without complying with government standards. We therefore welcome reform measures that strengthen and clarify providers' professional, financial, and operational obligations, and encourage further developments in this area. We support further efforts to harmonise legislation across jurisdictions to achieve consistent standards of care.

Geographical location should not be allowed to impact on the health and care provision given to people with disability, and their family/carers should have assurance that instances of restrictive practices are subject to the same level of scrutiny, consideration, and review regardless of where they reside.

Workforce issues

A significant area of concern identified by the Royal Commission has been the quality of care and safety of care provided to people with disability and the need for workforce regulation, development, training and education to facilitate the reduction and elimination of restrictive practices (Royal Commission into Violence Abuse Neglect and Exploitation of People with Disability, 2023b). The roll-out of the NDIS in Queensland has resulted in a proliferation of new disability service providers, many of which remain unregistered, that are required to comply with the complex regulatory system when using restrictive practices. This expansion has also given rise to an increasing number of unregulated health and care workers, where there is no professional or occupation based regulatory framework.

The QNMU maintains that these concerns are in large part a result of insufficient staffing, and a hollowed-out workforce characterised by a predominance of unregulated care workers and not enough nurses to meet the increasing complexity of care needs. This therefore impacts not only the type of care delivered to people with disability, but it places strain on an already crowded health care system in having to meet the healthcare needs of patients and consumers.

The QNMU supports the Royal Commission's recommendation for regulation of the currently unregulated workforce (Royal Commission into Violence Abuse Neglect and Exploitation of People with Disability, 2023a). The Australian Health Practitioner Regulation Agency (Ahpra) already provides a process for the implementation of the National Registration and Accreditation Scheme for health practitioners and would be the appropriate regulator to undertake this work. Such an approach would undoubtably lead to a more qualified and skilled workforce. The QNMU believes that the direct employment model is the best mechanism to support this approach. Indirect workers, as independent contractors, are responsible for their own training, ongoing development and upskilling. While directly employed workers also share this responsibility, employers also have obligations in relation to training and education to

maintain standards of care and safety and continuous quality improvement which would be inherently more difficult in an indirect employment model, particularly if this practice became more widespread. Reliance on an indirect workforce, with less rights of control by the employer, may exacerbate the safety and quality issues identified by the Royal Commission, rather than offer a solution.

We do however acknowledge that for some participants, their preference is for a blend of unregulated care workers and regulated workers such as RNs, ENs and midwives to provide support and services. This choice allows participants to have a role in directing the care they receive. However, unregulated care workers should only be employed to support RNs and ENs in the provision of personal care and assisting people with activities of daily living. Service providers must be transparent and not position unregulated care and support workers as cost-effective alternatives to more a highly trained nursing workforce.

Disability clients in mental health facilities

Whilst we acknowledge that mental health facilities are outside of the scope of the Bill, the QNMU remains concerned about reports from our members that disability clients are being detained in mental health wards and forensic units, despite not having a mental health diagnosis or actively receiving mental health treatment. In large part due to the lack of specialist community services and supports available to disability clients with complex behavioural needs, such clients may end up inappropriately detained for inordinately long periods of time because a discharge destination cannot be arranged. Given that patients typically have their freedom of movement limited when admitted to a ward, this amounts to a form of restrictive practice. There is a clear, urgent need for a specialist clinical workforce with the skills, training, and education to manage specific types of disability to eliminate such instances of disability clients being detained in mental health wards and forensic units unnecessarily. The QNMU believes that addressing workforce issues is vital to supporting best practice in disability services, including reducing the need for restrictive practices. We also consider the need for more affordable, safe accommodation options to support clients.

Mental Health Australia also provides a range of valuable recommendations to governments about the need for intersectional recognition of mental health and disability services and how they can be better integrated (Mental Health Australia, n.d). The QNMU supports the integration of health services across sectors to provide better support that reflects the whole of a person's health needs.

References

ABC. (2022). Concern millions of Australians with disability not on the NDIS have been 'forgotten'. *ABC*. https://www.abc.net.au/news/2022-05-18/australians-not-on-ndis-forgotten/101072632

ABC. (2023). The number of reports of unauthorised restrictive practices to the NDIS is up five-fold in three years, to 1.4 million. *ABC*. https://www.abc.net.au/news/2023-05-19/qld-ndis-rise-in-instances-of-unauthorised-restrictive-practices/102356712

Cortis. N, Smyth. C, & Katz. I. (2023). *Reducing restrictive practices: A review of evidencebased alternatives. Report for the Royal Commission into Violence, Abuse, Neglect and*
Exploitation of People with Disability.

Department of Health and Aged Care. (2024). *New Aged Care Act: A new duty of care and compensation pathway*. https://agedcareengagement.health.gov.au/images/agedcareact/aca/FACT_SHEET_05.pdf

Griffith University Policy Innovation Hub. (2020). *FINAL REPORT Independent review of Queensland's regulatory framework for positive behaviour support and restrictive practices*.

Mental Health Australia. (n.d). *Disability and Mental Health*. https://mhaustralia.org/sites/default/files/docs/issue_paper_-_disability_support_0.pdf

NDIS. (2024). *Quarterly Reports*. https://www.ndis.gov.au/about-us/publications/quarterly-reports

NDIS Quality and Safeguards Commission. (2022). *Unauthorised uses of restrictive practices in the National Disability Insurance Scheme - Unauthorised uses of restrictive practices reported to the NDIS Quality and Safeguards Commission*.

NDIS Quality and Safety Commission. (2020). *Regulated Restrictive Practices Guide Chemical restraint Environmental restraint*
Mechanical restraint Physical restraint Seclusion Version 1.1

Queensland Government. (2022). *Reforming Queensland's authorisation framework for the use of restrictive practices in NDIS and particular disability service settings - Options for reshaping part 6 of the Disability Services Act 2006*.

Royal Commission into Violence Abuse Neglect and Exploitation of People with Disability. (2021). *Overview of responses to the Restrictive practices Issues paper*.

Royal Commission into Violence Abuse Neglect and Exploitation of People with Disability. (2023a). *Final Report Executive Summary, Our vision for an inclusive Australia and Recommendations*. https://disability.royalcommission.gov.au/system/files/2023-11/Final%20report%20-%20Executive%20Summary%2C%20Our%20vision%20for%20an%20inclusive%20Australia%20and%20Recommendations.pdf

Royal Commission into Violence Abuse Neglect and Exploitation of People with Disability. (2023b). *Research Report Restrictive practices: A pathway to elimination*.

The Guardian. (2021). NDIS providers used unauthorised restraints on clients over a million times in 12 months. *The Guardian*. https://www.theguardian.com / australia-news/2021/nov/ 10/ndis-providers-used-unauthorised-restraints-on-clients-over-a-million-times-in-12-months

Webber. L.S, Richardson. B, White. K.L, Fitzpatrick. P, McVilly.K, & Forster.S. (2019). Factors associated with the use of mechanical restraint in disability services. *Journal of Intellectual & Developmental Disability*, *44*(1), 116-120.