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

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Committee Secretary
Community Support and Services Committee
Queensland Parliament
George Street
BRISBANE QLD 4000

By email: cssc@parliament.qld.gov.au

Dear Committee

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

Thank you for the opportunity to provide feedback on the Disability Services (Restrictive Practices) and Other Legislation Amendment Bill 2024 (the **Bill**). Aged and Disability Advocacy Australia (**ADA**) appreciates the opportunity to review the discussion paper and provide feedback.

About ADA Australia

ADA is a not for profit, independent, community-based advocacy and education service with more than 30 years' experience in informing, supporting, representing and advocating in the interests of older people, and persons with disability in Queensland.

ADA also provides legal advocacy through ADA Law, a community legal centre and a division of ADA. ADA Law provides specialized legal advice to older people and people with disability, including those living with cognitive impairments or questioned capacity, on issues associated with human rights, elder abuse, and health and disability legal issues related to decision-making.

ADA advocates and legal practitioners work with identified First Peoples advocates through the Aboriginal and Torres Strait Islander Disability Network Queensland (**ATSIDNQ**), a network established to support mob with disability and provide individual advocacy services for Aboriginal and Torres Strait Islander people with disability.

We provide the following comments for your consideration.

Objectives of the Bill

ADA supports the stated objectives of the proposed amendments to *"reduce and eliminate these practices by improving the regulatory framework authorising a restrictive practice."*[1]

[1] Introductory speech, Qld Parliament, Hon. C Mullen, pg 2369 < chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://documents.parliament.qld.gov.au/events/han/2024/2024_06_14_WEEKLY.pdf>.

We support the Minister's statements made when introducing the Bill that restrictive practices are overused and are often not a method of last resort.

Complaint mechanisms about restrictive practices

ADA generally supports the introduction of Division 5, which seeks to expand the complaints and oversight mechanisms under the *Disability Services Act 2006* (the **Act**). However, the complaints mechanisms are limited. We note section 183, that sets out where a complaint about the use of a restrictive practice is made to the senior practitioner, the senior practitioner must *'maintain a system that deals effectively with complaints received.'*

Further information is required to ascertain what this will mean in practice, including whether it will be effective and appropriate in the context of the injury caused to the person with disability who was unlawfully restrained. We suggest for example that a system that deals 'effectively' with unlawful behaviour should direct the senior practitioner to the circumstances that should be assessed as being so serious that they would require a referral to police for further investigation.

Potential referral by the senior practitioner is proposed by section 184, which states the senior practitioner *may* refer matters to a 'complaints entity'. This is insufficient to ensure that the process adequately recognises the rights of the person with disability pursuant to the *Human Rights Act 2019* (the **Human Rights Act**), and to assist the decision-making public entity to comply with their obligations under that Act. We strongly suggest the section 184 is amended to replace *'may'* with *'must'*, and further, that 'police' should be expressly added to the list of identified complaints entities.

Proceedings relating to adults with disability

ADA supports the Bill's recognition of the importance of a tribunal panel with the requisite experience and knowledge to adjudicate these importance issues for persons with disability.

This is reflected by proposed section 188M of the Bill, regarding the constitution of tribunal hearings for restrictive practice matters, noting that in addition to the matters mentioned at section 167(1) of the *Queensland and Civil Administration Act 2009* (the **QCAT Act**), the hearing panel should *a member* with experience in:

a) Adults with disability;
b) Guardianship and administration proceedings;
c) Strategies to prevent and eliminate use of restrictive practices in relation to adults with disability.

Further, that where proceedings relate to an Aboriginal person or Torres Strait Islander person with disability, the panel should include a member who is an Aboriginal person or a Torres Strait Islander person (we note, 'if practicable').

The drafting under section 188M should be refined to clarify that the member/s of the panel must have experience with all the identified areas. This can be quickly remedied by adding *'and*' after section 188M(2)(b).

In addition to the areas listed under this section, we strongly suggest that a '*comprehensive knowledge of the Human Rights Act 2018'* should be added to the list. Doing so will assist the public entities participating in a restrictive practice matter to prepare for and make associated decisions in ways that support their obligations under the Human Rights Act.

We strongly support the drafting of section 188O(2), reinforcing the right of the impacted adult to express their views and the obligation upon QCAT to seek and take account of their views, wishes and preferences.

We note with support the premise of section 188P, wherein the Tribunal may appoint a representative to assist the adult in the expression of, or representation of their views and wishes. However, this section should be amended to ensure that an appointed representative should be an independent third-party advocate who is not a current, or potentially a future decision-maker. This is critical to avoid any potential for a conflict of interest between the person or entity operating as the person's representative under section 188P and as a supported decision-maker should an appointment be made. For this reason the Office of the Public Guardian should not be appointed as a representative under section 188P, as the office may be called upon as a decision-maker for the adult.

We note the amended limitation order provisions, including those under proposed sections 188T, 188U, and 188V. We support the notation under section 188X that identifies that a journalist may be an entity that is adversely affected by the making of a limitation order.

We note that under section 188Z, the Tribunal must give written reasons for the making of a limitation order within 45 days. As the appeals limitation period under section 143(4)(b) of the QCAT Act is only 28 days, the timeframe under section 188Z should be amended to at least 20 days to allow for a person (who may be the impacted adult) to adequately consider and prepare for the avenue of an appeal of such an order.

With respect to proposed section 188ZA, which authorises the Tribunal to direct the adult with disability to undergo an examination, we suggest that guidelines are produced and made publicly available to outline the qualifications of the assessor, if they will be required to prepare a report, and clarify what the purpose of the examination is. We suggest that regard is had to the requirements of assessors under the *Mental Health Act 2016* (the **Mental Health Act**), as well as the disclosure obligations to the patient (person with disability) by the assessor.

Proceedings relating to children with disability

Similarly to the provisions regarding constitution of the tribunal panel for an adult matter, it is critical that panel members in a children's matter demonstrate a comprehensive understanding of the various intersecting issues that may be present for the child with disability. We note the listed areas in which the members should have knowledge under section 188ZE of the Bill. We strongly support the drafting that requires a member to have knowledge of *'strategies to prevent and eliminate use of restrictive practices for children with disability.'*

As for adult matters, we repeat our suggestion that in addition to the areas listed under this section, a '*comprehensive knowledge of the Human Rights Act 2018'* should be added to the list, for the reason provided above.

ADA supports the appointment of the 'separate representative' under section 188ZF. We again highlight the need for appointees to be appropriately qualified, independent (not a current or future decision-maker), and specially trained to carry out the role. Further, we suggest the section is amended to clarify that a hearing may be adjoined for the separate representative to be notified of their appointment and subsequently carry out their duties to prepare the child for the hearing, as is outlined in the provisions to this effect for adult matters.

We suggest that section 188ZK be amended to include a child's legal advocate (as this may differ from a 'representative'), as well as their nominated advocate or support person as being persons who are permitted to be present for a proceeding.

Limitation orders applying to proceedings for children

We note with support the similar provisions to an adult regarding limitation orders. Similarly, the timeframe for giving reasons under section 188ZS(3) must be reduced as suggested, so that an affected child is able to obtain the copy of the reasons prior to the appeal timeframe expiring.

Proposed immunity for individuals acting for service providers

ADA has concerns in relation to clause 17 which suggests replacing section 190 of the Act regarding immunity from liability for an individual acting for the relevant service provider.

In particular, section 190(2) that seeks to prevent an individual from being held criminally or civilly liable for using a regulated restrictive practice if they do so acting honestly and without negligence (in the use of chemical restraint or containment).

It is concerning that the Bill suggests that there are no circumstances where an individual should not be held criminally or civilly responsible for the unlawful use of these restrictive practices on the basis that they consider they were done 'with honesty'. The default position should not be a blanket immunity. This does little to reform and improve the culture of disability operators to ensure that any use of significant rights-limiting acts (such as chemically restraining or containing a person) is only in circumstances where it is lawful, as a last resort, and having properly considered the impacts to the affected person's human rights.

We suggest that section 190(2) is removed, and instead, a positive obligation is placed on service providers to ensure that individuals are properly instructed about what restrictive practices are permitted for a person with disability.

Referrals and information about use of restrictive practices

ADA supports the section 200 relating to a senior practitioner sharing information about the use of regulated restrictive practice with those persons or entities set out in the section.

In our view, the section should be amended to remove the discretion of the senior practitioner whether or not to make such a referral or share information in circumstances where there is a concern that use of the regulated restrictive practice has been inappropriate or excessive. In this case, the senior practitioner should be obliged to make the referral. We again suggest that the police should be added to the list of entities to whom the senior practitioner should make the referral in some circumstances. Addition guidance should be developed for a senior practitioner to comply with their obligations under this section.

We also suggest that other formally appointed guardians, including private guardians and the Office of the Public Guardian should be added to the list of entities to be informed.

Senior practitioner – appointment, experience and powers

ADA strongly supports the drafting under section 200AB that states the 'main function' of the senior practitioner role is to promote the reduction and elimination of the use of restrictive practices.

We consider that the description of the experience of a senior practitioner should be clarified as being a person who, in addition to demonstrating a comprehensive understanding of the Mental Health Act, disability and guardianship legal frameworks, must also have an applied knowledge of the Human Rights Act and relevant understanding of any cultural factors to be considered in the context of an individual.

These same qualities should also be expressly required of any person who a senior practitioner delegates on of their powers to under section 200AF.

In our view, expanded guidance on the powers and responsibilities of the senior practitioner role would assist. For example, the amended Act should expressly state that a senior practitioner called upon to make a determination, undertake an assessment, produce a report or other functions associated with the role for the purpose of the Act is performing a function that is in the public interest and is therefore obliged to consider and apply the Human Rights Act.

Greater participation in the process of people with disability

Efforts should be made to maximise the opportunity of an individual to provide their views and preferences about the proposed use of restrictive practices, and where possible, these should be incorporated into a behaviour support plan.

As mentioned, significant improvement is needed in the understanding of restrictive practices by support staff and an individual's care network. A program of education to upskill staff, support workers and carers should emphasise the goal of extinguishing these practices.

Thank you again for the opportunity to comment. ADA would be pleased to further assist the Committee with its inquiry. Should you wish to discuss this submission, please do not hesitate to contact [redacted]

Yours faithfully

[redacted]

Geoff Rowe

Chief Executive Officer