



National Disability Services

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10th January 2014

Trevor Ruthenberg MP
Health and Community Services Committee
Parliament House
George Street
BRISBANE QLD 4001

Dear Mr Ruthenberg,

Re: Disability Services (Restrictive Practices) and Other Legislation Amendment Bill 2013

National Disability Services Queensland (NDS Qld) would like to thank the Health and Community Services Council for the opportunity to provide feedback into the review of the Disability Services (Restrictive Practices) and Other Legislation Amendment Bill 2013.

Overview of National Disability Services, Queensland

NDS is the peak industry body for non-government disability service providers. Its purpose is to promote and advance services for people with disability. Its Australia-wide membership includes over 800 non-for-profit organisations, which support people with all forms of disability. Its members collectively provide the full range of disability services, from accommodation support, respite and therapy to community access and employment. NDS provides information and networking opportunities to its members and policy advice to State, Territory and Federal governments.

Introduction

NDS Qld acknowledges and congratulates the Department of Communities, Child Safety and Disability Services (the department) on the work to review the regulation and authorisation of restrictive practices within current legislation. NDS Qld supports legislation that strengthens safeguarding the rights of people with disability and a legislative framework to regulate the use of restrictive practices as a mechanism to safeguard to individuals subject to restrictive practices. NDS Qld supports a regulatory framework that provides disability service providers appropriate and comprehensive legal immunity for the use restrictive practices where such practices are considered to be the least restrictive alternative where there is a risk of physical harm occurring to the individual or others. NDS Qld supports this framework being underpinned by the principle of working to reduce or eliminate the use of restrictive practices over time.

NDS Qld is supportive of amendments to the legislation that provide adequate safeguards for people with disability; provide adequate safeguards for the workforce; reduce the cost of compliance to

organisations; deliver clearer and unambiguous guidelines to stakeholders; and improve statutory responsiveness and outcomes. NDS Qld has consistently identified the increased compliance burden and risk to disability service providers relating to the compliance with the current legislation since its introduction in 2008. It is recommended this state level review give due consideration to the broader context in which disability service providers are operating. Contextual factors of particular importance include:

- the development of a national framework being developed around the regulation and use of restrictive practices;
- the transition in 2014 of government disability service provision to the non-government sector;
- the increasingly challenging fiscal environment in which disability services operate;
- the substantial work to be undertaken by disability service providers in the pre-transition period to the introduction of the National Disability Insurance Scheme in Qld in 2016;
- the transition to the National Disability Insurance Agency requires a shift from a welfare model to a market model placing greater emphasis on sound business decision-making by disability service providers including undertaking assessments of the true costs of service provision.

Such contextual factors should be considered in state-based decisions that may require significant investment of resources yet are time-limited and may be superseded by national regulation and/or legislation.

Specific feedback on the Disability Services (Restrictive Practices) and Other Legislation Amendment Bill 2013

Clause 6 – Section 124B

NDS Qld supports the intent of the amendment to s123B (3) which endeavours to widen the scope of the legislation to ensure that increasingly diverse funding arrangements do not result in the removal of safeguards for people with disability. The amendment to s123B (3) intentionally captures the *Your Life Your Choice (YLYC)* funding program to ensure the Host Provider is subject to the relevant legislation where restrictive practices are in use. NDS Qld raises the concern about the negative impact on families / decision-makers where their family member is subject to restrictive practices and they would like to choose self-direction under the YLYC funding program. In such a scenario the Host Provider will need to apply the costs of compliance with the legislation which in effect will come directly from the funding package of the individual. In addition, the amendment to s123B (3) potentially widens the scope of the legislation to disability service providers engaged in fee for service arrangements and supported employment programs.

Clause 8 - Definitions of a restrictive practice

NDS Qld supports the work under clause 8 which seeks to provide greater definition of restrictive practices in order to clarify that the interventions require authorisation as restrictive practices when they are used to respond to behaviour that causes physical harm or serious risk of physical harm to the adult or others. The implementation of the current legislation continues to demonstrate significant challenges with regard to achieving consistent interpretations between relevant stakeholders and decision-makers with regard to determinations on whether particular actions constitute a restrictive practice. Disability service providers have continued to be subject to

different stakeholders views from department specialist staff and the Chief Practitioner's Office, the Queensland Civil and Administrative Tribunal (QCAT), the Office of the Adult Guardian (OAG) and medical practitioners (for chemical restraint determinations). Ongoing inconsistent interpretations of particular practices have led to significant resource implications for disability service providers. For example, positive behaviour support plans (PBSPs) have been required to be developed, including submission of applications for guardians and attendance at QCAT Hearings, where the same practice has later been determined by a different stakeholder not to be a restrictive practice.

NDS recommends that further work may need to occur to achieve the intention and clarity sort by the proposed changes. The following issues are identified for consideration:

Physical Restraint: make explicit whether protective actions utilised to block a strike, but do not involve a 'grab', constitute a restrictive practice;

Chemical Restraint: provide adequate timeframes for appropriate mental health assessments to occur where it is unclear whether the medication is being used as chemical restraint or as proper treatment for a mental health issue. The capacity to undertake appropriate assessments would provide specialists the opportunity to make considered determinations about the purpose of the medication i.e. proper treatment or chemical restraint. This change would be consistent with a growing body of research that recognises people with intellectual or cognitive disability being at much higher risk of suffering from concomitant mental health disorders. This would enable more appropriate responses and interventions where mental health issues may be a primary or contributing cause of challenging behaviour.

Restricted Access to Objects: It is arguable that there remains potential for inconsistency in interpretation as the proposed change continues to rely on assessing whether the intervention is 'in response to a behaviour that causes physical harm'. NDS Qld proposes that the following insertion may provide greater clarity: *'the interventions require authorisation as restrictive practices when they are used to respond to the challenging behaviour of an adult with intellectual or cognitive disability that causes physical harm or serious risk of physical harm to the adult or others'*. The inclusion of "challenging behaviour", which has an internationally recognised definition, would add further clarify that the uses of other restrictive interventions in response to behaviour that cause physical harm related to other duty of care matters (e.g. health care, safety, etc.) and other forms of harm (e.g. financial harm, psycho-social harm) are not intended to be captured within the scope of this legislation. Such specification would also ensure that where a restrictive intervention is used, and determined outside of the legislative scope and the person also engages in challenging behaviour in response to the use of this restrictive intervention, and a restrictive practice is then required, there should be no ambiguity in relation to the assessment.

Clause 8 - Model Positive Behaviour Support Plan

NDS Qld provides in principle support to clause 8 s123E (2) where a model positive behaviour support plan is introduced to provide guidance to the development of such plans. NDS Qld also supports the legislation providing standards in relation to the content of PBSPs to ensure plans contain comprehensive assessments and related Interventions to respond to the person's needs. NDS Qld consulted with disability service providers in late December 2013 on the Amendment Bill and the model PBSP (released by the department in late December 2013) and seeks clarification on

clause 18 s123S (4) and (4a) which proposes that ‘the chief executive must have regard to a model positive behaviour support plan’. Clarification is sought regarding the phrase “must have regard to” on the following grounds:

1. The model PBSP was released in late December and has therefore not been accessed or seen by many disability service providers;
2. In the NDS Qld consultation in late December 2013 disability service providers gave clear feedback that the model PBSP has not included the range of considerations raised by disability service providers in the consultation on the model PBSP. Consequently, providers stated the PBSP is not suitable to meet their needs and therefore it is not a model PBSP that they will adopt without opportunity for further consultation. Examples of issues raised about the model PBSP included:
 - a. The model PBSP does not meet the current or proposed legislative requirements. PBSPs including the practice of containment are not able to be written by non-government personnel except in the case where clinical personnel are contracted by the department; and the appropriate decision-maker for a PBSP including the practice of containment is the Queensland Civil and Administrative Tribunal i.e. not a Guardian.
 - b. It has a narrow emphasis on Positive Behaviour Support both in the assessment and interventions;
 - c. It removes a comprehensive assessment from the body of the document and therefore will remove critical information about the person and wider considerations that are considered by disability service providers as inextricable to addressing issues related to challenging behaviour and the use of restrictive practices;
 - d. Scant information is provided in the model PBSP on the history of the individual’s behaviours that have caused physical harm or other harms and the associated risks in relation to these harms. This would enable stakeholders to omit information that a disability service provider considers critical to understanding and responding to the person’s needs and to undertaking appropriate risk management and mitigation to prevent harms to the individual or others;
 - e. The PBSP does not contain an implementation plan and the Action List is prescriptive.
3. NDS Qld and disability service providers express the following concerns regarding the inclusion of the proposal about the model PBSP in the absence of clarification on the interpretation of the phrase “must have regard to”. The model PBSP was released in late December 2013 and as such it should be assumed that current PBSPs across Qld that are linked to the authorisation for use of restrictive practices are not likely to ‘have regard to’ the model PBSP. Therefore, NDS Qld raises the following concerns and queries:
 - a. Will there be implications in relation to the legal status of current authorisations if this inclusion is made when the Amendment Bill is passed in legislation?
 - b. Does the phrase imply that all existing PBSPs will need to be re-written to ‘have regard to’ the Model PBSP?
 - c. Does the phrase imply that all new or renewed authorisations for the use of restrictive practices will be given only where PBSPs ‘have regard to’ the model PBSP?
 - d. The re-writing of PBSPs across Qld will draw critical attention and resources away from the implementation of existing PBSPs and re-focus sector resources on re-assessment and re-writing.

- e. If there is an implication that requires the re-assessment and the re-writing of PBSPs across Queensland, there will be substantial and foreseeable human and financial resource implications associated with undertaking this work.
- f. If any of the potential implications noted apply, consideration will need to be given to a transition period in the legislation for such work to be undertaken. If a transition period is considered it will need to have regard to the resources available to undertake the work required in meeting new legislative requirements.

NDS Qld supports in principle the need for improvements in both the quality of assessments and PBSPs. Having said this, in a context where minimal resources are offered to disability service providers to undertake these activities, there must be very serious attention given to whether resources are directed at improvements in documentation or improvements in the implementation of interventions. NDS Qld has consistently raised concerns on behalf of disability services providers about the true costs associated with the implementation of PBSPs and the need to reduce administrative burdens in order to redirect resources into the implementation of activities that result in outcomes, impact and improving quality of life for people with disability.

Clause 12 – Removal of policy requirement

NDS Qld would like to bring attention to clause 12 s123I which endeavours to remove the requirement for disability service providers to keep and implement a policy. It is standard practice for disability service providers to develop and implement policies that govern the operations of their work and this is a requirement under the Human Services Quality Framework of which providers are audited against. Therefore, s123I does not remove the responsibility of organisations to develop and implement a policy. Clause 32 s123ZZDA requires that providers keep and implement a procedure which reaffirms the need for a policy to be kept by a service provider for procedures must reference the relevant organisational policy.

NDS Qld raise the specific concern that disability service providers will be required to undertake the work of reviewing and re-writing their current policies and procedures in relation to the amendments to the legislation. This is a complex task and when the legislation was initially introduced this substantial piece of work was undertaken by a large reference group chaired by the department and with significant input from a range of experts. The products that resulted were shared with the non-government sector following a request from NDS Qld due to the task being a significant undertaking for providers without the necessary resources to do so.

Clause 31 – Introduction of Statement

NDS Qld welcomes the introduction in clause 31 s123ZZCA of statements about the use of restrictive practices to provide to individuals subject to restrictive practices and for interested persons. NDS note that the development of statements that are accessible and in plain easy English for individuals subject to restrictive practices and statements for interested persons is an additional requirement for disability service providers. The sections 123ZZCA (1) and 123ZZCA (3b) imply that these statements are required at the point that a service provider is considering using a restrictive practice. This requirement needs further consideration as often a restrictive practice is used in a critical incident and hence there is no time to prepare such a statement before the use of the

practice. In addition, this amendment implies that statements will be required for all current circumstances where restrictive practices (often multiple restrictive practices) are in use. A transition period in the legislation and resources will be required for service providers to comply with this amendment.

Clause 17 / Clause 24 - Short-term approvals and timing of reviews for all restrictive practices

NDS Qld supports the need for improvements in the areas of Short Term Approvals to ensure the protection of the rights of people with disability and ensure legal immunity is available for disability service providers. Clause 24 s123ZDA (1C) appears to suggest that a disability service provider is only able to use chemical, mechanical or physical restraint before a decision on a Short-Term Approval where “a positive behaviour support plan or respite/community access plan for the adult is being implemented”. This amendment will therefore only provide immunity to service providers where there is an existing plan in place. Similarly, clause 17 s1230A (1C) provides immunity for a disability service provider to use containment or seclusion before a decision on a short term approval where “a positive behaviour support plan or respite/community access plan for the adult is being implemented”. The insertions s123ZDA (1C) and s1230A (1C) do not appear to cover the following circumstances and therefore leaves gaps in the provision of immunity for providers:

- a. An 18 year old adult transitioning from Child Safety to Disability Services where restrictive practices are in use; there is no PBSP developed; and the disability service provider becomes subject to the relevant legislation upon transition;
- b. An adult entering the funded disability system who is subject to restrictive practices;
- c. The emergence of the use of a restrictive practice with an individual for the first time where no PBSP has been developed;
- d. The re-emergence of a restrictive practice with an individual where there is no current PBSP for implementation.

NDS Qld support the proposal to remove the requirement for Short Term Plans to be developed by disability service providers, however question what safeguards will need to be put in place in the circumstances a, b, c and d noted above.

The amendment in clause 22 s123ZCA (a) and (b) is supported to make provisions for legal immunity to cover interim periods where consent from the guardian has expired and prior to the capacity of the guardian to provide new consent. NDS Qld also supports the extension of the appointment of guardians for restrictive practice (general) matters in s80ZD from a twelve month to two year timeframe.

Clause 36 - Mandatory Reporting

NDS Qld supports the introduction of mandatory reporting of the use of restrictive practices as a mechanism to safeguard the rights of vulnerable people within our community. NDS Qld recommends that an accessible, confidential and integrated web-based system is an option for reporting and monitoring the use of restrictive practices and that such a system is utilised in the spirit of partnerships and collaboration toward the common goal of increasing quality of life for people with disability. NDS Qld seeks clarification on this requirement as it has the potential to have substantial resource implications for providers depending on the nature of the required reporting.

To date in Queensland there has not been a coordinated or evidence-based evaluation of the factors leading to the reductions in the use of restrictive practices and / or reductions in challenging behaviour since the commencement of the Positive Futures Initiative. This is an important consideration for government in linking investment in services to the interventions that are leading to these reductions. Ongoing anecdotal reporting from disability service providers indicates that in addition to and/or apart from the implementation of Positive Behaviour Support interventions, the following interventions and changes have led to reductions and / or the elimination of the use of restrictive practices and episodes of challenging behaviour:

- Establishment of clinical and/or specialist teams within disability service providers and ability to provide:
 - Increased training, mentoring, supervision and support to staff;
 - Provide support to specific cases at organisations discretion (i.e. without needing to meet requirements of government program and referral processes);
 - Key roles in risk assessment and management in the related areas across the organisation;
 - Liaison with external stakeholders in specific cases e.g. QCAT, OAG, families, department, others; and
 - Increased involvement in primary health and mental health concerns and treatment options.
- Increased access to specialist clinicians including department Specialist Behaviour Services and independent specialist clinicians either contracted by the department or by organisations;
- Involvement of independent stakeholders including the Queensland Civil and Administrative Tribunal and the Office of the Adult Guardian and the provision of increased accountability for all stakeholders to these statutory decision-makers;
- Access to appropriate primary health care interventions including the use of the *Comprehensive Health Assessment Plan* and introduction of the associated Medicare item to support the use of this assessment and planning;
- Access to appropriate mental health assessment and psychiatric treatments including medication reviews; changes to medications; reductions in medications; appropriate diagnosis and treatment of mental health problems and illnesses
- Psychological treatments for mental health problems and illnesses
- Thorough risk assessments occurring to prevent the establishment of high risk co-tenancy arrangements leading to alternative housing and/or funding arrangements being pursued
- Separation of unsuitable co-tenancy arrangements and in particular co-tenancy arrangements in which people with disability are at high risk of abuse by adults with disability who engage in behaviour that causes physical harm to others;
- More appropriate housing and essential modifications;
- More appropriate transport / vehicle options and modifications.

NDS Qld seeks a more balanced and evidence-based approach with regard to consideration of the most appropriate intervention and/or range of interventions that will lead to improved quality of life for people with disability. Given substantial anecdotal reporting from disability service providers over the duration of the Positive Futures Initiative that a range of interventions have led to improving people's quality of life, NDS proposes that it is critical that independent data collection, analysis and review is established to ensure that decisions regarding government investment in this area are evidence-based and directed into the areas that are demonstrating that they are leading to the desired outcomes for individuals including the reduction or elimination of restrictive practices.

NDS Qld recommends the Amendment Bill include appropriate accountability with regard to decision-making in all areas that are proving to lead to the reduction or elimination of restrictive practices. The mandatory reporting processes should include a requirement for data reported to the department to be analysed at a systemic level to comprehensively understand the reasons for the use of restrictive practices across the state. Processes such as Root Cause Analysis could be utilised by the department to ensure appropriate breadth and depth of analysis. This can only be achieved if the appropriate data is sort from disability service providers e.g. capturing the specific reasons for the introduction and/or increases of the use of restrictive practices and/or onset or increase in incidents of challenging behaviour; capturing the specific reasons for the reduction and/or elimination of the use of restrictive practices and/or reduction or cessation of challenging behaviour.

Clause 44 - Decision-making

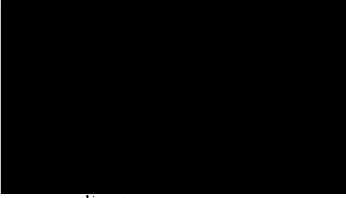
Clause 44 s80ZE adds further requirements for guardian for restrictive practice (general) matters which may impact the likelihood of family members choosing to remain the primary decision-maker in this area of their family member's life. These requirements assume a high level of knowledge in the findings theories and recommendations in PBSPs and the capacity to resolve the sometimes conflicting opinions of various clinicians, medical practitioners, disability service providers and others. To date there has been very little investment made in building the capacity of family members to undertake such decision-making. Where this investment has occurred it has typically been undertaken by disability service providers.

In summary:

National changes to disability sector are in progress as a result of the introduction of the National Disability Insurance Scheme and the review of this state legislation must be considered with this changing landscape in mind. As has been indicated in this submission the proposed amendments to the legislation appear to have foreseeable resource/cost implications for disability service providers. Given the department's explicit statement that the Amendment Bill can be implemented within existing resources, NDS Qld requests that the committee consider the likelihood of this being achieved. This is a critical concern given the issue of unresolved financial imposts associated with legislative compliance and risks that disability service providers have carried from the commencement of the legislation. NDS Qld and disability service providers express concern that if insufficient acknowledgement continues about the costs and risks associated with providing an evidence-based quality service for people with intellectual or cognitive disability and challenging behaviour, that the availability of services is likely to be impacted resulting in greater vulnerability for this cohort.

Thank you for the opportunity to make a submission to the committee for consideration. If any clarification is required please do not hesitate to contact NDS Qld.

Yours sincerely,



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