

REVIEW OF QUEENSLAND'S REGULATORY FRAMEWORK FOR AUTHORISING RESTRICTIVE PRACTICES UNDER THE NDIS

1. BACKGROUND

On 1 July 2019, the NDIS Quality and Safeguards Commission (the NDIS Commission) commenced operation in Queensland, reflecting the transition to the National Disability Insurance Scheme (NDIS). The NDIS represents a fundamental change to how supports for people with disability are funded and delivered across Australia.

Under the *National Disability Insurance Scheme Act 2013*, the NDIS Commission has a behaviour support function to provide leadership in behaviour support and in the reduction and elimination of the use of restrictive practices by NDIS providers. This includes responsibility for: overseeing the use of behaviour support and restrictive practices; and assisting states and territories to develop a regulatory framework, including in relation to nationally consistent minimum standards for restrictive practices.

The NDIS (Restrictive Practices and Behaviour Support) Rules 2018 (the NDIS Rules), made under the *National Disability Insurance Scheme Act 2013*, sets out the conditions of registration that apply to all registered NDIS providers who may use restrictive practices in the course of delivering NDIS supports to a person with disability. These conditions include that the use of restrictive practices be undertaken in accordance with state and territory authorisation processes.

Queensland's authorisation processes for the use of restrictive practices by disability service providers only applies to adults with an intellectual or cognitive disability with behaviour that causes harm to the adult or others. Depending on the type of restrictive practice and the associated level of risk, and the circumstance (for example, short-term approvals), use is authorised if approval/consent has been obtained from the Queensland Civil and Administrative Tribunal (QCAT) (containment or seclusion); a guardian for restrictive practice matters appointed by QCAT (physical, mechanical or chemical restraint, or restricted access to objects); the Public Guardian (short-term use of containment or seclusion); the chief executive (disability services) (short-term use of: physical, mechanical or chemical restraint; or restricted access to objects); or an informal decision-maker (restricted access to objects – if there is no guardian for restrictive practice matters appointed for the adult).

In light of the NDIS Rules and the NDIS Commission's statutory functions and a desire for greater national consistency, an independent review of Queensland's regulatory framework for authorising restrictive practices in the disability service system is required.

2. CURRENT QUEENSLAND LEGISLATIVE ENVIRONMENT

• ***Disability Services Act 2006 and Guardianship and Administration Act 2000***

In response to the 2006 report by the Honourable W J Carter (*Challenging Behaviour and Disability – a targeted response*) (the Report), the Queensland Government supported in-principle 24 recommendations to develop a new contemporary model for assessment and support of adults with an intellectual or cognitive disability and 'challenging behaviour' (i.e. behaviour which causes harm to the adult or others).

This included developing a legislative framework to ensure that the use of any restrictive practice is independently approved and properly regulated (recommendation 20), with the overall aim of reducing and/or eliminating use.

Part 6 of the *Disability Services Act 2006* (DSA) and Part 5B of the *Guardianship and Administration Act 2000* (GAA) create the legislative scheme to regulate the use of restrictive practices on adults with an intellectual or cognitive disability. Key elements of the restrictive practices framework include: (a) assessment; (b) development of a positive behaviour support plan; and (c) independent consent/approvals.

Queensland's authorisation processes only extend to restrictive practices used in state funded disability services or NDIS funded services. It does not cover: adults who have a disability other than an intellectual or cognitive disability with an impaired capacity; children with a disability (including a child with an intellectual or cognitive disability); restrictive practices used in aged care facilities; hospitals, health services or state funded rehabilitation services; or other private disability services).

In addition, the practice of locking of gates, doors and windows to prevent physical harm being caused to an adult with a skills deficit (for example, an adult who cannot leave the premises unsupervised because he or she lacks road safety skills) is not within the definition of a 'restrictive practice' for the purposes of Part 6 of the DSA. However, the practice is still regulated under Part 8 of the DSA to ensure protection of a person's rights and liberties.

- **Ministerial review**

Under section 241AA of the DSA, the Minister for Communities and Minister for Disability Services and Seniors must review particular matters in the DSA, including:

- the functions of the chief executive (disability services) to decide whether a multidisciplinary assessment of an adult will be conducted and developing positive behaviour support plans that include containment and/or seclusion; and
- the application of locking of gates, doors and windows to prevent physical harm being caused to an adult with a skills deficit.

This review requirement was inserted into the DSA to reflect that positive behaviour support plans are in other jurisdictions prepared by service providers under the NDIS and that this function will need to transition to become a market based service rather than a statutory function of the chief executive.

3. NATIONAL FRAMEWORK (NATIONAL DISABILITY INSURANCE SCHEME)

Under the NDIS Quality and Safeguarding Framework and the *National Disability Insurance Scheme Act 2013*, the NDIS Commission is responsible for overseeing the use of behaviour support and restrictive practices for NDIS participants. This includes ensuring that registered NDIS providers who use restrictive practices in the course of delivering NDIS supports comply with the NDIS Rules. It is noted that, under the NDIS Rules, restrictive practices are more broadly defined (for example, to include locking of doors, gates and windows) and regulation extends to all people with disability (including children) who are NDIS participants.

As outlined above, while states and territories remain responsible for the authorisation of the use of restrictive practices under the NDIS, one of the NDIS Commission’s statutory functions is to assist states and territories to develop a regulatory framework, including in relation to nationally consistent minimum standards for restrictive practices.

As part of the NDIS, all Australian Governments have recognised that national consistency will deliver better outcomes for people with disability.

On 13 December 2019, the Disability Reform Council (DRC) reaffirmed its commitment to reduce and ultimately eliminate the use of restrictive practices on people with disability. DRC agreed to a program of work to prioritise and progress national consistency in restrictive practice authorisation in 2020, guided by shared draft principles that were agreed in principle, noting the need for further consideration in terms of their application in some jurisdictions, including Queensland.

4. SCOPE OF REVIEW

The purpose of the review is to consider whether the current Queensland authorisation processes for NDIS-funded supports or services aligns with the NDIS Quality and Safeguards Framework, including the NDIS Rules. The review will inform the Ministerial review under s.241AA of the DSA, and advice to government and further consideration by government of options for reform as required.

In particular the review must consider:

- The draft principles for national consistency in restrictive practices authorisation;
- The restrictive practices authorisation frameworks in place in the other Australian states and territories;
- The current functions of the chief executive (disability services) to decide whether a multidisciplinary assessment of an adult will be conducted and developing positive behaviour support plans that include containment or seclusion (under the DSA, part 6, division 3, subdivisions 2 and 3);
- The principles of choice and control under the NDIS;
- The application of the division in relation to the locking of gates, doors and windows to prevent physical harm being caused to an adult with a skills deficit (section 216 of the DSA);
- The definitions of restrictive practices (section 144 of the DSA), in light of the definition of ‘a regulated restrictive practice’ in the *National Disability Insurance Scheme (Restrictive Practices and Behaviour Support) Rules 2018*;
- The cohort of NDIS participants to whom Queensland’s authorisation processes for the use of the restrictive practices should apply, taking into account the NDIS Rules that extend regulation to all NDIS participants (including adults with a disability other than intellectual or cognitive disability, and children with a disability);
- The consent/approval process for the use of restrictive practices under the DSA and GAA (including short-term approvals), specifically who can provide consent/approval and the relevant decision-making criteria, and opportunities for simplification and streamlining (while maintaining appropriate safeguards);

- The circumstances in which restrictive practices can be authorised (including immunity provisions), including whether there are any restrictive practices that should be prohibited;
- The role of the chief executive (disability services), the Public Guardian and QCAT in the authorisation process and the impact (including workload/financial impact) on these entities of any proposed changes to the authorisation process;
- The capacity and capability of the market to respond to any expansion or changes to the authorisation process in Queensland, including the requirement for a positive behaviour support plan to be prepared;
- Any initiatives that could facilitate market development in response to any expansion or changes to the authorisation process in Queensland;
- Any work being undertaken by the National Quality and Safeguards Commission or work for the purpose of the National Disability Insurance Scheme to assist Australian states and territories in promoting and developing the market for specialist behaviour support practitioners;
- Progress of consideration of issues relating to the use of restrictive practices, arising from the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability; and
- Progress of the Queensland Productivity Commission’s inquiry into the NDIS market in Queensland.

The review should consider these matters within a human rights framework (including compatibility with human rights within the meaning of section 8 of Queensland’s *Human Rights Act 2019* and the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD)) and apply the following key principles in relation to the regulation of restrictive practices:

- The aim/objective should be to reduce or eliminate the need for the use of restrictive practices
- Any restrictive practice should be the least restrictive approach and used only as a last resort, and after alternative strategies have been considered;
- The importance of maximising the person’s:
 - o physical, emotional, social and intellectual potential; and
 - o opportunities for participation and inclusion in the community; and
- The need for transparency and accountability in the use of restrictive practices.

5. OUT OF SCOPE

- Consideration of the use of any restrictive practices in other service settings outside of the NDIS (e.g. health, mental health, aged care, schools, early childhood education and care) and the Forensic Disability Service; and
- Consideration of which service providers Part 6 of the DSA should apply to (DSA, s. 140).

6. REVIEW METHODOLOGY

A consultation strategy must be developed to support consultation with key justice and disability stakeholders including: the Queensland Civil and Administrative Tribunal; the Office of the Public Guardian; the Office of the Public Advocate; the Queensland Human Rights Commission; the Queensland Law Society; the NDIS Quality and Safeguards Commission; and peak advocacy groups, disability service providers and people with disability and their families.

The review is to include analysis of information and data with a view to understanding the efficacy and efficiency of the current process in achieving its purpose, and identifying any gaps or areas for improvement.

6. KEY DOCUMENTS / REFERENCES

Disability Services Act 2006 (Qld)

Guardianship and Administration Act 2000 (Qld)

Public Guardian Act 2016 (Qld)

Human Rights Act 2019 (Qld)

United Nations Convention on the Rights of Persons with Disabilities

National Disability Insurance Act Scheme Act 2013 (Cth)

NDIS (Restrictive Practices and Behaviour Support) Rules 2018 (Cth)

NDIS Quality and Safeguarding Framework

Public communiques (relevant to behaviour support and restrictive practices) – Disability Reform Council

Other relevant reports related to the regulation of restrictive practices – for example: Australian Law Reform Commission’s Report: Elder Abuse – A National Legal Response