Minister for Communities, Child Safety and Disability Services

Queensland Government Response to Health and Community Services Committee Report No. 37

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

INTRODUCTION

On 3 February 2014, the Health and Community Services Committee's report (No. 37) on the Disability Services (Restrictive Practices) and Other Legislation Amendment Bill 2013 (the Bill) was tabled in Parliament.

The Queensland Government Response to the Report's recommendations is provided below.

RESPONSE TO RECOMMENDATIONS

Recommendation 1
The Committee recommends that the Disability Services (Restrictive Practices) and Other Legislation Amendment Bill 2013 be passed.

Government response
The Government thanks the Committee for its consideration and support of the Bill.

Recommendation 2
The Committee recommends that, to address stakeholders' concerns, the Minister inform the Legislative Assembly during the second reading debate of the impact of the amendments of Clause 6 on clients who receive self-directed funding, particularly:

- whether the costs incurred by host providers to comply with the legislation will be paid from an individual's self-directed funding
- who would be responsible for preparation of a positive behaviour support plan for an individual who uses self-directed funding to purchase services from several service providers.

Government response
The Your Life Your Choice Self-Directed Support Framework is a big step towards getting Queensland ready for self-direction under the NDIS. As more people choose to self-direct their supports, service providers who provide the direct care and support to a client will not receive funding directly from the department, but rather via a host provider or the client.

A host provider is a certified service provider, accountable under the provisions of the *Disability Services Act 2006* (DSA) and responsible for assisting in the management and administration of a client's funding and the planning for their supports.

Under the Your Life Your Choice Self-Directed Support Framework, a funded and certified disability service provider using a restrictive practice in relation to the care and support of a client is responsible for ensuring compliance with the requirements of the restrictive practices framework (for example, ensuring a positive behaviour support plan is developed for an adult).

The certified and funded service provider must meet all costs associated with compliance with the restrictive practice framework within the clients existing funding, which is set at a level which recognises the high and complex needs of the client. These costs will need to be negotiated and agreed to between a client, their host provider or family, and the service provider. The Centre for Excellence for Clinical Innovation and Behaviour Support will be developing a suite of resources and rolling out further training to support service providers to understand the restrictive practices framework and implement positive behaviour support in their organisations.

In the circumstances where a client is self-directing and accessing multiple service providers, responsibility for the development of the plan depends on the restrictive practices that are to be in place.

For adults where a service provider needs to use containment or seclusion, the Chief Executive of the Department of Communities, Child Safety and Disability Services is responsible for the development of the positive behaviour support plan.

For restrictive practices other than containment or seclusion the service provider providing the majority of direct care or support to the adult where restrictive practices are required generally leads the development of an adult's plan.

In relation to an adult where practices other than containment or seclusion need to be used, it will be up to the service providers to determine which provider will lead the development of the plan, and all providers applying restrictive practices need to be aware of and implement the plan requirements. In developing the plan, the service provider is required to consult with any other relevant service provider providing disability services to the adult. In practice, it would most likely be the service provider that provides the majority of services to the adult where restrictive practices are required that would lead the development of an adult's plan.

Recommendation 3
The Committee recommends that the Minister inform the Legislative Assembly during the second reading debate of her response to concerns about possible confusion regarding the interaction of Clause 9(2) of the Bill, which would amend the definition of chemical constraint, with the definition of health care under the *Guardianship and Administration Act 2000 (GAA)*.

Government response
The Government notes that some submissions to the Committee raised concerns about the amendment to the definition of chemical restraint to exclude from the definition of 'chemical restraint' the use of a medication, for example a sedative prescribed by a medical practitioner to facilitate or enable the adult to receive a single instance of health care under the GAA. In particular the Government notes that the submission to the committee from the Public Advocate recommended amendment to this clause to clarify any potential uncertainty with respect to the definition of health care under the GAA.

To clarify this issue, 'Chemical Restraint' is defined in the DSA and the approval process is outlined under the Restrictive Practices framework. 'Health Care' is defined in Schedule 2 of the GAA and the requirements for consent to health care is outlined in Chapter 5 of the GAA. Consent to the use of the medication to facilitate or enable the provision of health care to an adult with impaired capacity will be dealt with under the provisions for health care in the GAA.

Therefore the current amendment will mean that if an adult requires a medication, such as a sedative, for the purposes of facilitating or enabling the adult to receive a single instance of health care as defined in the GAA, consent to the use of the medication will be subject to the provisions in the GAA that deal with consent to health care.

The Government has carefully considered an amendment to the proposed clause suggested by the Public Advocate in her submission to the Committee. However, given the distinctions between 'health care' and 'chemical restraint', and the legislative approval process in place for each, the Government considers that further amendment to the clause is not necessary.

Alongside the legislative amendments to the restrictive practices framework, the Centre of Excellence for Clinical Innovation and Behaviour Support will be preparing guidelines on each type of restrictive practice. The guideline on chemical restraint will provide additional guidance to service providers on the circumstances in which proposed section 123F(2)(b) applies and make it clear that the use of medication prescribed to facilitate or enable an adult to receive a single instance of health care is considered health care as defined under the GAA, and subject to the requirements for consent to its use under that Act.

Recommendation 4
The Committee recommends that the Minister introduce an amendment to clause 13, to provide that the adult, people in their support network such as family members, and the adult's treating doctor, are encouraged, and are given the opportunity, to participate in the development of the adult's positive behaviour support plan.

Government response
A legislative basis to ensure such consultation is provided under Sections 123S (Development of positive behaviour support plan following assessment) and 123ZF (Requirements for development of positive behaviour support plan – assessment and consultation) of the DSA. The combined effect is to provide that in the development of a positive behaviour support plan the following persons must be consulted and have their views considered:

- the adult;
- any guardian or informal decision maker for the adult;
- any other person considered by the chief executive or the service provider to be integral to the decision (for example, a family member who is part of the adult's support network, a key health care provider or an advocate for the adult); and
- if the proposed restrictive practice is chemical restraint, the adult's treating doctor.

As there is already a requirement to undertake consultation with particular people during the development of a plan, it is not proposed to insert any additional requirements into proposed section 123L.

Consultation requirements in legislation will be supplemented by a policy developed by the Department making it a requirement for the person conducting the assessment and in the development of the positive behaviour support plan to consult with and consider the views of family members and/ or members of the adult's support network, including a guardian, advocate, family members or key health care provider.

Recommendation 5
The Committee recommends that the Minister inform the Legislative Assembly of the proposed timing of introduction of provisions about positive behaviour support plans, and specifically respond to stakeholders' concerns about whether and when service providers would be required to re-write existing positive behaviour support plans to be consistent with the model positive behaviour support plan.

Government response
It is proposed that the amendments will commence by mid 2014. This is to allow time to communicate the amendments to those affected, develop and roll out (including training) the web based reporting system, develop new guidelines and revise resources in light of the changes. The Department will continue its consultation with the disability sector on the model positive behaviour support plan, and consult with the sector on the development of guidelines, resources and the reporting system and its requirements.

Under the Bill, a service provider is only required to have regard to the model positive behaviour support plan when a plan is being developed. Therefore, existing positive behaviour support plans will not need to be re-written.

The Centre of Excellence for Clinical Innovation and Behaviour Support will prepare guidelines on the development of positive behaviour support plans which can cover in more detail how service providers can consider the model plan in preparing their plans.

When service providers do prepare new plans for clients, the legislative amendments help to ensure the plans will be more focused and include less unnecessary details. They will also be supported through this process by reference to the best practice model plan. This will help them to prepare plans that are likely to be shorter, easier to understand and implement, and that will achieve a focus on positive client outcomes.

Recommendation 6
The Committee recommends that the Minister inform the Legislative Assembly during the second reading debate of the intended operation of proposed sections 123OA(1)(c) and 123ZDA(1)(c) to clarify the circumstances in which a service provider may use a restricted practice without express authority, particularly if there is no positive behaviour support plan or the adult is transferring to a new service provider, and the consequent scope of immunity for service providers.

Government response
The proposed time limited immunity provisions do not apply in all circumstances where there is a delay in a restrictive practice authorisation being granted. It applies in the specific cases identified during the review where delays were a particular concern.

The amendments introduce the following two specific circumstances where a funded disability service provider or an individual acting for the service provider may have a time-limited immunity from civil and criminal liability in the use of restrictive practices:

1. where a service provider has sought a short term approval for a new practice in relation to an adult that is already subject to a positive behaviour support plan or respite/community access plan being implemented by the service provider, and the decision for the short term approval has not yet been decided; and
2. where the Adult Guardian is the guardian for a restrictive practice matter and the consent of the Adult guardian to use a practice has expired before the Adult Guardian has decided whether to provide a new consent to the use of the practice.

These amendments provide a period of immunity for a maximum of 30 days where there is a delay in these decisions. This removes the risk of civil or criminal liability for service providers in using practices without approval or consent, and ensures they are able to continue to provide the necessary services to the client.

However, this does not mean that the practice can be applied continuously for 30 days. The actual use of the practice needs to meet certain requirements.

For example, in the case of a delay in a short term approval for a new practice, the immunity only applies to the service provider where they act honestly and without negligence in compliance with the following:

- the adult **has an existing positive behaviour support plan** (or respite/community access plan) in place and the plan is being implemented by the service provider;
- the use of the practice is the least restrictive way of ensuring the safety of the adult or others;
- and the use of the restrictive practice is necessary to prevent the adult's behaviour causing harm to the adult or others.

In the case of a delay in the consent of the Adult Guardian when an existing consent is expiring, the immunity only applies to the service provider acts honestly and without negligence in compliance with the following:

- the service provider has applied for the new consent at least 30 days before the existing consent has expired, and the practice is used in accordance with the Adult Guardian's previous consent;
- **the adult has an existing positive behaviour support plan** (or respite/community access plan) in place for the adult and the plan is being implemented;
- the use of the practice is the least restrictive way of ensuring the safety of the adult or others; and
- the use of the restrictive practice is necessary to prevent the adult's behaviour causing harm to the adult or others.

The requirement for the service provider to be implementing a positive behaviour support plan or respite/community access plan for the adult is an appropriate safeguard. It ensures that an automatic immunity around the use of restrictive practices only applies where an adult is being supported under a positive behaviour support approach, where their needs and behaviour have previously been assessed and a plan to meet their needs, address their behaviour and improve their quality of life has been developed.

For example, the immunity does not apply if a service provider applies for a short term approval and there is not an existing positive behaviour support plan or respite/community access plan being implemented by the service provider for the adult.

The Department will ensure it produces very clear communication on the changes to the legislation and the effects of these changes.

Recommendation 7
The Committee recommends that the Minister inform the Legislative Assembly during the second reading debate what steps will be taken by Government to ensure that decisions on short term approvals and consents by the Adult Guardian and short term approvals by the chief executive are made in the shortest time possible that is consistent with sound decision making.

Government response
The Department is committed to addressing delays through better practice. The additional guidelines, training and resources for service providers assist in reducing delays in decision making by helping to ensure decision makers are provided with all the relevant and necessary information they need to make a decision.

The Department and the Office of the Adult Guardian will work together to prepare guidance to service providers about the type of information needed for a short term approval, and to ensure the information being provided to service providers is consistent, and to monitor the implementation process. Efficient processing of applications is of course dependent on applicants and particularly their professional advisers providing the necessary advice and explanations to address issues that must be considered in the interests of the person who is to be subjected to the restrictive practice.

Recommendation 8
The Committee recommends that the Minister inform the Legislative Assembly in the second reading debate about the policy considerations that led to introduction of the immunity provisions in the Bill, in particular the considerations and any incidents that informed the 30 day period for immunity while restrictive practices may be used before approval or renewal of consent.

Government response
During the review, several service providers raised the concerns that delays in obtaining approvals and consents to use restrictive practices creates uncertainty and places them at risk of using restrictive practices without immunity from civil or criminal liability.

Delays can result from the need for further information to be provided to the decision maker or further professional advice to be obtained, or operational delays due to fluctuating numbers of applications.

Delays in decisions and the potential loss of immunity from prosecution are creating significant uncertainty among service providers who want to ensure the safe operation of their services and ensure support workers have certainty about their legal status in using these practices where necessary. These provisions ensure that support workers are not exposed to liability in the use of restrictive practices where the adult is being supported under a positive behaviour support framework, and the service provider has taken steps to obtain the appropriate approval or consent. This allows service providers to have the legal certainty to be able to provide proper care and support to clients in their services.

The 30 day maximum immunity period ends as soon as a decision is made, so it may be a shorter period. The timeframe of 30 days is considered appropriate given that there have been delays of this length. Therefore, this period is currently necessary to provide service providers with the certainty they need.

Recommendation 9
The Committee recommends that the Minister introduce an amendment to clause 31, proposed section 123ZZCA(3) to provide that a statement about the use of restrictive practices include contact details for relevant disability advocacy and legal advice services.

Government response
The Government does not consider it necessary that the Bill be amended to provide that a requirement of the statement in clause 31 be that it include contact details for specific types of support organisations such as advocacy and legal services. The Centre of Excellence for Clinical Innovation and Behaviour Support is developing the statement and will include the contact details of these organisations and other relevant contacts to the client in the

statement. The Centre will undertake consultation with key representatives from the disability sector on the statement, including seeking input on the disability advocacy and legal advice services that should be referred to in the statement.

Recommendation 10
The Committee recommends that the Minister inform the Legislative Assembly in the second reading debate of the expected timing of consultation with the disability sector about reporting requirements that are proposed to be included in a regulation.

Government response
Consultation with the disability sector on the reporting requirements and the reporting system will commence in the first quarter of 2014, as part of an implementation working group that will also provide input into the development of new resources and guidelines. This continues the ongoing liaison the department has had with the disability sector throughout the review.

Recommendation 11
The Committee recommends that the Minister inform the Legislative Assembly during the second reading debate of the rationale for using only two of the three 'limbs' of the definition of harm in section 123E in Notes inserted in definitions of various restrictive practices which are also in section 123E of the *Disability Services Act 2006*.

Government response
The purpose of the notes that have been inserted into definitions of each type of restrictive practice is to make it clearer in the Act that the use of a restrictive practice must be in response to the behaviour of an adult that causes not just physical harm to a person but also a serious risk of physical harm to a person. This is to ensure that service providers are clear about when they needs to seek approval for the use of a restrictive practice, and so they do not expend resources applying for unnecessary authorisations.

Section 123E of the DSA defines harm to be (a) physical harm to the person; or (b) a serious risk of physical harm to the person; or (c) damage to property involving a serious risk of physical harm to the person.

For readability, it was not considered necessary to include the full definition of harm in the notes to these definitions. The proposed amended definitions refer to the section in the Act where the full definition of harm is located. The third limb of the definition of harm (i.e. defining harm to a person as being damage to property involving a serious risk of physical harm to a person) has not been included in the notes to the restrictive practice definitions, as the core of that limb is similar to second limb of the definition – this is that there is a serious risk of physical harm to a person.