Parliamentary Committees



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

Report No. 48, 57th Parliament
Community Support and Services Committee
July 2024

Community Support and Services Committee

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All web address references are current at the time of publishing.

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Chair's foreword

This report presents a summary of the Community Support and Services Committee's examination of the Disability Services (Restrictive Practices) and Other Legislation Amendment Bill 2024.

The committee's task was to consider the policy to be achieved by the legislation and the application of fundamental legislative principles – that is, to consider whether the Bill has sufficient regard to the rights and liberties of individuals, and to the institution of Parliament. The committee also examined the Bill for compatibility with human rights in accordance with the *Human Rights Act 2019*.

Restrictive practices by its definition impinges on the equal rights and freedoms of the individual to whom the practice is applied.

This practice is applied disproportionately to people with a disability, more so than any other group.

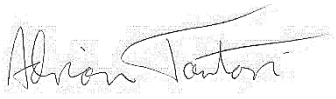
This Bill clearly sets about ensuring that the use of these practices will be regulated and undertaken as a measure of last resort and sets a path so that in time restrictive practices, as we know it today, will eventually be consigned to the history books.

Until then, under this Bill, Queensland will establish the role of the Senior Practitioner, which will align Queensland with the recommendation of the Disability Royal Commission to drive reduction and elimination of such practices. The Bill also expands the framework for authorisation, monitoring and reporting on the use of restrictive practices.

For the families who unfortunately are confronted by the stark reality, through necessity, that the use of restrictive practices must be applied for various reasons on their loved ones, this Bill's outcomes will give them hope, that one day this practice will be effectively eliminated.

On behalf of the committee, I thank those individuals and organisations who made written submissions on the Bill. I also thank our Parliamentary Service staff and the Department of Child Safety, Seniors and Disability Services staff for their assistance.

I commend this report to the House.



Adrian Tantari MP

Chair

Recommendations

Report Summary

This report presents a summary of the Community Support and Services Committee's examination of the Disability Services (Restrictive Practices) and Other Legislation Amendment Bill 2024.

The committee recommends the Bill be passed.

The main objectives of the Bill are to:

- promote the reduction and elimination of the use of restrictive practices in relation to people with disability receiving National Disability Insurance Scheme (NDIS) supports or services or state disability services under the Disability Services Act 2006 (DS Act)
- move toward greater national consistency in authorisation processes
- align Queensland's restrictive practices authorisation framework with the national NDIS (Restrictive Practices and Behaviour Support) Rules 2018
- expand the reportable deaths in care framework to reinstate coverage for persons who receive disability supports under the Commonwealth Government's Disability Support for Older Australians (DSOA) program.

The Bill proposes amendments to the DS Act, the *Guardianship and Administration Act 2000*, the *Public Guardian Act 2014*, *Coroners Act 2003*, and the *Queensland Civil and Administrative Tribunal Act 2009* to remove the current approval processes for restrictive practice matters and make other consequential amendments to the *Forensic Disability Act 2011*.

Stakeholders who commented on the Bill expressed broad support for the reforms proposed in the Bill, particularly the implementation of a Senior Practitioner model. The key issues raised by stakeholders and considered by the committee during the examination of the Bill included:

- the scope of the reformed authorisation framework, and its expansion into other service sectors
- careful consideration of human rights, and cultural safety for First Nations peoples
- appropriate consequences for non-compliance
- the criteria for making authorisation decisions and the grounds for cancelling authorisation
- the involvement of people with disability and consultation requirements in the decision making process.

The committee is satisfied that sufficient regard has been given to fundamental legislative principles, to the rights and liberties of individuals and the institution of parliament, and that any limitations on human rights are reasonable and justifiable.

Overall, the committee supported the purpose of the Bill. The committee makes three additional recommendations to amend the Bill: to expand the scope of the proposed farmwork to include residents in supported accommodation; to add an additional ground for cancellation of a restrictive practice; and that there be a specific offence introduced for the use of unauthorised restrictive practices.

1 Introduction

1.1 Referral

On 14 June 2024, Hon Charis Mullen MP, Minister for Child Safety, Minister for Seniors and Disability Services and Minister for Multicultural Affairs, introduced the Disability Services (Restrictive Practices) and Other Legislation Amendment Bill 2024 (Bill) into the Queensland Parliament. The Bill was referred to the Community Support and Services Committee for detailed consideration.

National Disability Insurance Scheme Quality and Safeguards Commission

The National Disability Insurance Scheme (NDIS) Quality and Safeguards Commission (NDIS Commission) provides the following definition of 'restrictive practices':

A restrictive practice means any practice or intervention that has the effect of restricting the rights or freedom of movement of a person with disability. Under the National Disability Insurance Scheme (Restrictive Practices and Behaviour Support) Rules 2018 certain restrictive practices are subject to regulation. A restrictive practice is a regulated restrictive practice if it is or involves seclusion, chemical restraint, mechanical restraint, physical restraint and environmental restraint.

The Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Disability Royal Commission) final report (DRC Report) published in September 2023 identified 5 types of restrictive practices:

- **Seclusion** – The sole confinement of a person with disability in a room or a physical space at any hour of the day or night where voluntary exit is prevented, or not facilitated, or it is implied that voluntary exit is not permitted.
- **Chemical restraint** – The use of medication or chemical substance for the primary purpose of influencing a person's behaviour. It does not include the use of medication prescribed by a medical practitioner for the treatment of, or to enable treatment of, a diagnosed mental disorder, a physical illness or a physical condition.
- **Mechanical restraint** – The use of a device to prevent, restrict, or subdue a person's movement for the primary purpose of influencing a person's behaviour but does not include the use of devices for therapeutic or non-behavioural purposes.
- **Physical restraint** – The use or action of physical force to prevent, restrict or subdue movement of a person's body, or part of their body, for the primary purpose of influencing their behaviour. Physical restraint does not include the use of a hands-on technique in a reflexive way to guide or redirect a person away from potential harm/injury, consistent with what could reasonably be considered the exercise of care towards a person.
- **Environmental restraint** – The restriction of a person's free access to all parts of their environment, including items or activities.[1]

During her explanatory speech, Hon Charis Mullen MP, Minister for Child Safety, Minister for Seniors and Disability Services and Minister for Multicultural Affairs, stated that the Bill aims to enhance safeguards for Queenslanders with disability who are subject to restrictive practices. This is intended to support the broader goal of reducing, and where possible eliminating, the use of these practices.[2]

1 Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Final Report* (DRC Report), vol 6, 29 September 2023, p 432.

2 Queensland Parliament, Record of Proceedings, 14 June 2024, p 2,369.

1.2 Policy objectives of the Bill

The objectives of the Bill are to:

- promote the reduction and elimination of the use of restrictive practices in relation to people with disability receiving National Disability Insurance Scheme (NDIS) supports or services or state disability services under the Disability Services Act 2006 (DS Act) by considering applications for, and giving restrictive practice authorisations
- move toward greater national consistency in authorisation processes based on the Principles for nationally consistent restrictive practices authorisation processes (National Principles)
- align Queensland's restrictive practices authorisation framework with the NDIS (Restrictive Practices and Behaviour Support) Rules 2018 (Cth) (NDIS RPBS Rules)
- expand the reportable deaths in care framework to reinstate coverage for persons who receive disability supports under the Commonwealth Government's Disability Support for Older Australians (DSOA) program.[3]

The Bill proposes to amend:

- the DS Act, to implement a reformed authorisation framework for the use of regulated restrictive practices in relation to people with disability when receiving NDIS supports or services or state disability services, including establishing the office and functions of the senior practitioner and vesting the Queensland Civil and Administrative Tribunal (QCAT) with merits review jurisdiction over all authorisation decisions by the senior practitioner
- the *Guardianship and Administration Act 2000* (GA Act), *Public Guardian Act 2014* (PG Act), *Coroners Act 2003* (Coroners Act), and the *Queensland Civil and Administrative Tribunal Act 2009* (QCAT Act) to remove the current approval processes for restrictive practice matters and make other consequential amendments
- the Coroners Act, to expand the reportable deaths framework to reinstate coverage for deaths in care for people in Queensland who receive disability supports under the DSOA program
- the *Forensic Disability Act 2011* (FD Act) to reflect terminology under the reformed authorisation framework.[4]

1.3 Background

Queensland currently uses a guardianship-based framework for the authorisation of restrictive practices for adults with an intellectual or cognitive disability who receive NDIS supports or services, or state funded disability services.[5]

Since the authorisation framework was introduced in 2008, significant and intersecting reforms have been introduced. In 2014 Australia's states and territories endorsed the *National Framework for Reducing and Eliminating the Use of Restrictive Practices in the Disability Service Sector* which aimed to 'protect the rights, freedoms and inherent dignity of people with disability'.[6]

During a meeting of commonwealth, state, and territory disability ministers held on 24 July 2020, ministers 'agreed to work together in a coordinated fashion' to respond to numerous inquiries being

3 Explanatory notes, p 1.

4 Explanatory notes, p 3.

5 Statement of compatibility, p 2.

6 Australian Government, Department of Social Services, *National Framework for Reducing and Eliminating the Use of Restrictive Practices in the Disability Service Sector*, dss.gov.au/our-responsibilities/disability-and-carers/publications-articles/policy-research/national-framework-for-reducing-and-eliminating-the-use-of-restrictive-practices-in-the-disability-service-sector.

conducted nationally in relation to the quality and safety of supports being delivered to people with disability.[7]

While all other jurisdictions agreed to the National Principles proposed, Queensland provided only 'in-principle' support, on the basis it would need to consider the policy, legislative, and financial implications of the principles in greater detail. To achieve this, the Queensland Government undertook the Positive Behaviour Support and Restrictive Practices Review.[8]

Positive Behaviour Support and Restrictive Practices Review

The review made the following recommendations:

- replace the current guardianship-based model with a clinician-based model where the use of all regulated restrictive practices is authorised solely by the senior practitioner, or a delegate, within a central administrative office within the Queensland Government
- expand the authorisation framework to include all people with disability (adults and children) while receiving NDIS supports or services or state disability services
- expand the authorisation framework to include all forms of regulated restrictive practices under the NDIS RPBS Rules, including the locking of gates, doors and windows in response to an adult with a skills deficit
- align important definitions with the terminology used in the NDIS RPBS Rules
- ensure the formal requirements around behaviour support assessments and the content of behaviour support plans are consistent with the requirements for assessments and the development of behaviour support plans in the NDIS RPBS Rules to minimise excess administrative overhead
- prohibit certain restrictive practices
- vest the QCAT with merits review jurisdiction over all primary authorisation decisions
- devolve the responsibility for the development of positive behaviour support plans that include containment and/or seclusion to specialist behaviour support practitioners in the market in a phased approach over a 24-month period based on the market readiness of different regions across Queensland.[9]

The Bill also proposes other related reforms to address the need for nationally consistent authorisation processes, and to promote the reduction and elimination of restrictive practices. This need has been informed by the DRC Report, and the *Independent Review of the NDIS, Final Report* (NDIS Review), released publicly in December 2023.[10]

1.3.1 Report of the Public Advocate of Queensland

In *Adult Safeguarding in Queensland, Volume 2: Reform recommendations* (Adult Safeguarding Report) the Public Advocate of Queensland, Dr John Chesterman, pointed to the complexity of the current authorisation process for the use of restrictive practices. The Public Advocate noted the current process is consent-based, spans state and federal legislation, and involves diverse decision-

7 Department of Social Services (Cth), *Statement - Disability Ministers Meeting 24 July 2020*, 24 July 2020, dss.gov.au/disability-and-carers-programs-services-government-international-disability-reform-council/statement-disability-ministers-meeting-24-july-2020.

8 Explanatory notes, pp 1-2.

9 Explanatory notes, p 2.

10 Explanatory notes, p 3.

makers, including QCAT, private guardians, the Public Guardian, and the chief executive of the relevant department.[11]

Recommendation 16 of the Adult Safeguarding Report was that:

> The Queensland Government should adopt a senior practitioner model for the authorisation of restrictive practices that can be utilised across sectors including the disability, aged care, and health sectors.[12]

Such a model, the Public Advocate argued, could help to overcome challenges associated with the current consent-based model, and could be applied in multiple settings, such as in the community, in residential aged care, and in healthcare environments. It would be a single process and would help to reduce confusion and uncertainty about the authorisation process.[13]

1.3.2 Report of the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability

The Disability Royal Commission deliberated on the use of restrictive practices on people with disability, particularly through the lens of human rights.

The key points of the DRC Report with regard to restrictive practices were that:

- People with disability are disproportionately subjected to restrictive practices in many areas of their lives. Restrictive practices can cause physical and mental harm to people with disability. They are not consistently used as a last resort.
- Restrictive practices are used in response to 'behaviours of concern'. Behaviour is an important form of communication, particularly for people with intellectual disability and cognitive impairment. However, rather than recognising someone may be communicating pain or distress, behaviours are pathologised and labelled as 'concerning'.
- The definition of 'restrictive practices' is not consistent across settings and across states and territories. People with disability are therefore not equally protected.
- States and territories should ensure legal frameworks are in place, based on a set of national principles, to reduce restrictive practices, with the aim of elimination. As an immediate step, states and territories should ensure use of the most egregious restrictive practices is not permitted.
- Legal frameworks should establish or clarify the powers and functions of a Senior Practitioner, or equivalent role, to oversee and drive down the use of restrictive practices.
- Psychotropic medication is over-used and over-prescribed to people with cognitive disability. Education and training for disability and health professionals are needed.
- Further research is crucial to determine what works to reduce and eliminate the use of restrictive practices.
- Little data is publicly available on the use of restrictive practices, and data collection and reporting should be addressed as an immediate priority.[14]

1.3.2.1 Criticisms and perspectives

The DRC Report cited a variety of criticisms and perspectives relating to the use of restrictive practices.

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11 Office of the Public Advocate, *Adult Safeguarding in Queensland, Volume 2: Reform recommendations* (Adult Safeguarding Report), November 2022, p 63.

12 Adult Safeguarding Report, p 13.

13 Adult Safeguarding Report, p 64.

14 DRC Report, p 429.

The Lojic Institute submitted to the Disability Royal Commission that:

> The routine and pervasive use of restrictive practices on people with disabilities … is worrying. The result is the trivialisation of interfering with another person's equal rights and freedoms, which contributes to the dehumanisation of people with disability.[15]

Professor Leanne Dowse, Professor of Disability Studies and Chair of Intellectual Disability and Behaviour Support at the University of New South Wales, advised during a public hearing that, from a human rights context, restrictive practices could be viewed as a 'deprivation of liberty'.[16]

Dr Claire Spivakovsky, Senior Lecturer in Criminology in the School of Social and Political Sciences at the University of Melbourne, considered restrictive practices to be 'forms of violence and abuse' comprising 'disability-specific lawful violence' because they are permissible by law, and specific to people with disability.[17]

Ms Jacqueline Mills, Managing Director of Microboards Australia told the Commission restrictive practices are 'neither good nor bad. It's the context in which they're used that makes them okay or not okay for a person'.[18]

National Disability Services, the disability service providers' peak group, said when 'used properly, restrictive practices can reduce the risk of harm to a person or the people around them'.[19]

1.3.2.2 Royal Commission recommendations

The Disability Royal Commission proposed Australian states and territories establish a senior practitioner who authorises and oversees the use of restrictive practices, 'to drive the reduction and elimination' of such practices.[20]

The DRC Report also included 2 recommendations specific to the use of restrictive practices:

- Recommendation 6.35 - Legal frameworks for the authorisation, review and oversight of restrictive practices
- Recommendation 6.36 - Immediate action to provide that certain restrictive practices must not be used.[21]

1.3.3 Restrictive practices: A pathway to elimination [report]

The report *Restrictive practices: A pathway to elimination* (UOM Report), authored by Dr Claire Spivakovsky (University of Melbourne), Associate Professor Linda Steele (University of Technology Sydney), and Associate Professor Dinesh Wadiwel (University of Sydney), was commissioned by the Disability Royal Commission. Its authors argued that restrictive practices are 'at odds with international human rights obligations', may contravene the United Nations Convention on the Rights of Persons with Disabilities, and may contravene international prohibitions against torture.[22]

According to the UOM Report, restrictive practices strip people of their dignity, constitute an environment of coercion and control, and are driven by disparate 'institutional and societal dynamics';

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15 DRC Report, p 430.

16 DRC Report, p 433.

17 DRC Report, p 433.

18 DRC Report, p 433.

19 DRC Report, p 433.

20 DRC Report, p 430.

21 DRC Report, p 32-35.

22 University of Melbourne, University of Technology Sydney and University of Sydney, *Research report – Restrictive practices: a pathway to elimination* (UOM Report), Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, July 2023, pp 4, 19-20, 31-44.

as such, the authors declare there is 'a strong foundation for the finding that restrictive practices have no place in Australian society'.[23]

1.4 Legislative compliance

The committee's deliberations included assessing whether or not the Bill complies with the Parliament's requirements for legislation as contained in the *Parliament of Queensland Act 2001*, *Legislative Standards Act 1992* (LSA) and the *Human Rights Act 2019* (HRA).

1.4.1 *Legislative Standards Act 1992*

The LSA sets out fundamental legislative principles that are the 'principles relating to legislation that underlie a parliamentary democracy based on the rule of law'.[24] The principles include that legislation has sufficient regard to:

- the rights and liberties of individuals
- the institution of Parliament.

The committee's assessment of the Bill's compliance with the LSA identified issues which may be considered to have insufficient regard to rights and liberties of individuals, as summarised below:

- the Bill provides for the use of regulated restrictive practices in relation to a person with disability under a restrictive practice authorisation approved by the senior practitioner (ordinary activities should not be unduly restricted without sufficient justification)
- the Bill makes provision for the disclosure of confidential information about a person with disability in certain circumstances (disclosure of confidential information)
- the Bill proposes amendments to the DS Act to give relevant service providers and individuals acting for a relevant service provider immunity from criminal and civil liability if, acting honestly and without negligence, they use a regulated restrictive practice under the Act (immunity from proceedings or prosecution without adequate justification).

Part 4 of the LSA requires that an explanatory note be circulated when a Bill is introduced into the Legislative Assembly and sets out the information an explanatory note should contain. Explanatory notes were tabled with the introduction of the Bill. The notes contain the information required by Part 4 and a sufficient level of background information and commentary to facilitate understanding of the Bill's aims and origins.

1.4.2 *Human Rights Act 2019*

The committee's assessments of the Bill's compatibility with the HRA are included below.

A statement of compatibility was tabled with the introduction of the Bill as required by s 38 of the HRA. The statement contained a sufficient level of information to facilitate understanding of the Bill in relation to its compatibility with human rights.

[23] UOM Report, p 277.

[24] *Legislative Standards Act 1992,* s 4.

Committee comment

The committee finds that the Bill is compatible with human rights.

The Bill has been developed to improve safeguards of the rights of persons with disabilities. In doing so, it restricts some rights of persons with disability, in outlining means for restrictive practices to be implemented against persons with disability. The committee notes that the Bill is designed with in-built safeguards to respect the human rights and dignity of people with disability who may be subject to restrictive practices. The Bill also recognises the rights of people with disability to their autonomy and independence, including the freedom to make decisions about their own lives.

We are satisfied the Bill gives sufficient regard to the rights and liberties of individuals and the institution of Parliament.

1.5 Should the Bill be passed?

The committee is required to determine whether or not to recommend that the Bill be passed.

Recommendation 1

The committee recommends the Disability Services (Restrictive Practices) and Other Legislative Amendment Bill 2024 be passed.

2 Examination of the Bill

This section discusses key issues raised during the committee's examination of the Bill. It does not discuss all consequential, minor or technical amendments.

Stakeholders were generally supportive of the new restrictive practices authorisation framework and its focus on the reduction and eventual elimination of restrictive practices.[25] Where relevant, stakeholder views are included below.

2.1 Scope

The Bill proposes to expand the scope of individuals with disability who are subject to the authorisation process for the use of restrictive practices. The Bill would require that the framework apply to all people, both adults and children, who receive either of the following from a 'relevant service provider':

- NDIS supports or services (as defined in s 12A of the DS Act), or
- disability services (as defined in s 12 of the DS Act).[26]

The Bill proposes new s 140(1) with the following definition for a relevant service provider:

(1) This part applies in relation to the following service providers that provide disability services or NDIS supports or services to a person with disability—

(a) a registered NDIS provider;

(b) a funded service provider;

(c) the department;

(d) another service provider prescribed by regulation.[27]

The Bill would also broaden the scope of restrictive practices that require authorisation, aligning the framework with the NDIS RPBS Rules. This is intended to make the process more rigorous. For example, Queensland's current authorisation processes have 'less onerous authorisation requirements' for administering restrictive practices in respite or community access settings where either (or both) of these are the only disability service being accessed by the adult. The Bill also removes provisions that allow for the locking of gates, windows, and doors of adults who do not have appropriate skills to safely exit their premises without supervision. These provisions are considered not to be necessary, as the scenario will be captured within the reformed authorisation framework.

2.1.1 Stakeholder feedback and departmental response

A number of stakeholders called for the senior practitioner's role to be extended to authorising restrictive practices in other service settings, as the Bill currently only covers NDIS participants or state-funded disability services.[28]

While the Queensland Human Rights Commission (QHRC) supported the expansion of protections to all persons receiving NDIS and department funded services, including children and people with mental health disability, its submission noted that 'it does not cover all restrictive practices occurring in hospitals, residential aged care, schools, home and work'. [29]

[25] Submissions 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12.

[26] Explanatory notes, p 3.

[27] Bill, cl 140(1).

[28] See submissions 2, 4, 7, 8 , 8, 9, 12.

[29] Submission 4, p 1.

Rebekah Leong, Principle Lawyer, Queensland Human Rights Commission, Public Hearing, 19 July 2024

Once the new model is established and evaluated, consideration should be given to if and how it can be expanded to provide all people with disability with consistent safeguards and protection, no matter what services or systems they encounter.[30]

The Public Advocate and the Queensland Law Society also supported the extension of the authorisation framework to the aged care sector and other health facilities.[31] In their submission to the committee, Queensland Advocacy for Inclusion (QAI) recommended the proposed authorisation framework be amended 'to ensure it applies to all settings in which people with disability are subjected to restrictive practices, including residential service providers accredited under the *Residential Services (Accreditation) Act 2002*'.[32] Noting that many residents in accredited supported accommodation are not NDIS participants, the QAI submitted that

> a significant cohort of residents in supported accommodation will continue to be at risk of and be subjected to unauthorised and unregulated restrictive practices, with no oversight and no safeguards in place.[33]

In response to the Queensland Law Society submission, the Department of Child Safety, Seniors and Disability Services (department) advised that:

> … the framework has been designed to operate in the context of disability service settings, in a co-regulatory environment with the NDIS Quality and Safeguards Commission.

To QAI's suggestion that the model encompass supported accommodation settings, and to the other stakeholders who called for a wider application of the Bill, the department stated:

> Expanding the scope of the framework across different service settings, such as supported accommodation, justice, youth justice, health, child safety and education requires further consideration of the use and regulation of restrictive practices in those settings, noting each setting has its own unique regulatory environments and oversight mechanisms.[34]

Committee comment

The committee acknowledges that the Bill proposes a framework to operate in the context of disability service settings, and in partnership with the NDIS Quality and Safeguards Commission, and is satisfied that an expansion of the scope of the framework across different service setting would require careful consideration.

However, the committee is cognisant that many of the most vulnerable residents living in accredited residential settings, and especially those in level 3 supported accommodation, have complex mental and physical health issues and are not recipients of the NDIS. While the committee agrees that careful consideration of how this should be implemented is necessary, we are also of the view that giving this consideration is crucial. As the committee has recently seen first-hand in its Inquiry into the Provision and Regulation of Supported Accommodation in Queensland, these residents are at risk of being subjected to restrictive practices without any oversight or safeguards in place.

30 Public hearing transcript, Brisbane, 19 July 2024, p 7.

31 Submissions 3, 12.

32 Submission 7, pp 4, 8.

33 Submission 7, p 9.

34 Department of Child Safety, Seniors and Disability Services (department), correspondence, 15 July 2024, p 6.

Recommendation 2

The committee recommends the Bill be amended at clause 14 to expand the scope of the proposed framework to include accredited residential services under the *Residential Services (Accreditation) Act 2002,* so that residents who are not participants of the NDIS may be protected from unauthorised or inappropriate restrictive practices.

2.2 Reformed authorisation processes

The Bill proposes to replace the current guardianship-based model with a clinician-based model. This framework would require that the use of all restrictive practices be authorised solely by the senior practitioner, or their delegate, 'within a central administrative office within the Queensland Government'. As such, the Bill proposes to omit legislation relating to restrictive practices from the GA Act (cls 33-36) and the PG Act (cl 40).[35]

The reformed authorisation process would comprise:

(a) Behaviour support assessments

(b) Behaviour support plans

(c) Authorisation

(d) Review

(e) Monitoring.[36]

The Bill would provide that state disability services adhere to these 5 requirements.

NDIS supports, as well as being required to meet these requirements, would require all assessments be completed, and NDIS behaviour support plans be developed, in line with the NDIS RPBS Rules. As well, as outlined in the NDIS Quality and Safeguarding Framework, the NDIS Commissioner would be responsible to monitor the use of restrictive practices by registered providers. As such, registered providers would continue to be required to report the use of regulated restrictive practices to the NDIS Commissioner.[37]

2.2.1.1 Stakeholder views and department response

A number of stakeholders called for the Bill to expressly refer to human rights under the HRA,[38] and for the senior practitioner to consider the human rights principle including the cultural rights and safety of First Nations people.[39]

The department noted these submissions and advised that under the Bill, an entity exercising a function or power under the Act (including the senior practitioner and relevant service provider) in relation to a person with disability must have regard to the human rights principle.

The department advised:

> While the specific rights named by the submitters are not incorporated in section 18 [clause 11 amending section 18], the reformed authorisation framework provides in-built safeguards to ensure any limitation

35 Explanatory notes, p 4.

36 Explanatory notes, p 4.

37 *Disability Services Act 2006* (DS Act), s 142; explanatory notes, p 4.

38 Submission 4, 5, 7.

39 Submissions 4, 7, 9.

on a person's human rights are done so to protect the person with disability from harm or harming others in the least restrictive way possible.[40]

2.2.2 Behaviour support assessments

For NDIS participants, the NDIS RPBS Rules in relation to behaviour support assessments state that '[i]n developing a comprehensive behaviour support plan for a person with disability, the specialist behaviour support provider must undertake a behaviour support assessment, including a functional behavioural assessment of, the person with disability'.[41]

The Bill proposes to require state disability services meet the same standard. Proposed s 149 would require that an application to authorise the use of restrictive practices, lodged with the new senior practitioner, must be accompanied by a 'copy of the NDIS behaviour support plan or State behaviour support plan' and 'any behaviour support assessment, including a functional behavioural assessment, carried out for the development or review of the NDIS behaviour support plan or State behaviour support plan'.[42]

The Bill would also remove the previous requirement that the Chief Executive, Disability Services, decide whether a multidisciplinary assessment is to be conducted in situations where a service provider wishes to contain or seclude a person with disability.[43]

2.2.3 Behaviour support plans

New s 143 of the DS Act defines state behaviour support plans. A state behaviour support plan, in general, is a plan that describes strategies to meet an individual's needs, support the development of their skills, maximise opportunities to improve their quality of life, and reduce the intensity, frequency, and duration of the behaviour that causes harm to the person, or to others.[44] New s 143 proposes 2 types of state behaviour support plans:

(3) A ***comprehensive state behaviour support plan***, for a person with disability, is a plan developed under this part that—

(a) is based on a behaviour support assessment, including a functional behavioural assessment, of the person; and

(b) contains proactive and evidence-informed strategies to improve the person's quality of life and support their progress towards positive change; and

(c) includes provisions for the use of a regulated restrictive practice in relation to the person over the long term.

(4) An ***interim state behaviour support plan***, for a person with disability, is a plan developed under this part that—

(a) contains general preventative and responsive strategies designed to keep the person and others safe while—

(i) a behaviour support assessment, including a functional behavioural assessment, of the person is carried out; and

(ii) a comprehensive state behaviour support plan for the person is developed; and

40 Department, correspondence, 15 July 2024, p 3.

41 NDIS (Restrictive Practices and Behaviour Support) Rules 2018 (Cth), s 20(5).

42 Bill, cl 14, see new s 149(1)(b)(i)-(ii) of the DS Act.

43 Explanatory notes, p 5.

44 Bill, cl 14, see new s 143(1)-(2) of the DS Act.

(b) includes provisions for the use of a regulated restrictive practice in relation to the person over the short term.

For disability services, the Bill would require the development of a state behaviour support plan. The Bill would remove the requirement for the Chief Executive, Disability Services to develop all positive behaviour support plans. Under the amendments, state disability services providers would be responsible to facilitate the development, or the review of, state behaviour support plans, by a behaviour support practitioner.[45]

The Bill, if passed, would mandate the following content be included in a state behaviour support plan:

- a description of:
    - the intensity, frequency, and duration of behaviours that have caused harm to the person with disability or others
    - the consequences of the behaviour
    - early warning signs and triggers for the behaviour
- proactive strategies to be attempted prior to using a restrictive practice
- the circumstances in which each restrictive practice will be used
- information demonstrating why the restrictive practice is the least restrictive option
- procedures for using the restrictive practice
- any other measures to ensure the restrictive practice is necessary to ensure the person's proper care and treatment; the person is safeguarded from abuse, neglect, and exploitation; and the restrictive practice is used for the shortest time that is reasonable
- a description of anticipated effects on the person, both positive and negative
- at what interval will the use of the practice be reviewed by the service provider
- strategies to be used to support the development of skills by the person to reduce the need for regulated restrictive practices
- the behavioural goals of the plan for the person
- if seclusion is proposed—the maximum period for which seclusion may be used at a time, and the maximum frequency of seclusion
- if chemical restraint is proposed:
    - the name of any medications or chemical substances to be used (including information about side effects)
    - the dose, route, frequency, and circumstances of administration
    - if the medication or chemical substances has been reviewed by the person's treating doctor, and the date of last review
    - the name of the person's treating doctor
- if mechanical restraint is proposed—the maximum period for which the restraint may be used at any one time
- any other matter prescribed by regulation.[46]

[45] Explanatory notes, p 5.

[46] Bill, cl 14, new s 178 of the DS Act.

To obtain an interim state behaviour support plan, less comprehensive information is required.[47]

2.2.4 Authorisation process and the introduction of a senior practitioner

If passed, the Bill will require all applications for regulated restrictive practices to be made to the senior practitioner. Applications must be in the approved form and accompanied by relevant documents (including a copy of the NDIS or state behaviour support plan). The authorisation for the use of a restrictive practice is time limited, having effect until the earliest of the following:

- the end of the period stated in the authorisation
- the cancellation of the authorisation
- a new restrictive practice authorisation in relation to the person takes effect.[48]

The Bill also provides for the revocation of an authorisation. There are provisions for the automatic cancellation of a restrictive practice authorisation (cl 14, new s 167 of the DS Act), and a cancellation at the direction of the senior practitioner (cl 14, new s 168 of the DS Act).

The senior practitioner may only authorise the use of a restrictive practice if satisfied:

- there is a need for the restrictive practice because the person's behaviour has previously resulted in harm to themselves or others
- there is a reasonable likelihood that the person's behaviour, if authorisation is not given, will cause harm to the person or others
- if an NDIS behaviour support plan includes provision for a restrictive practice, the plan was developed:
    - in accordance with the NDIS RPBS Rules
    - if the plan includes provision for chemical restraint, in consultation with the individual's treating doctor
- if a state behaviour support plan includes provision for a restrictive practice, the plan was developed:
    - in accordance with provisions relating to state behaviour support plans
    - if the plan includes provision for chemical restraint, in consultation with the individual's treating doctor
- there is a reasonable likelihood the behaviour support plan will:
    - reduce or eliminate the risk of the person's behaviour causing harm
    - improve the persons quality of life, in the long term
    - includes provisions to ensure the plan will be appropriately observed and monitored
- the regulated restrictive practice will be used only as a last resort, and after consideration of the likely impact of its use in relation to the individual
- where possible, alternative strategies will be used before the regulated restrictive practice is used
- that alternative strategies considered and used are documented in the behaviour support plan

[47] Only the matters mentioned in new s 178(1)(a)(i) and (ii),(b),(c),(f),(g), and (h) of the DS Act need to be included in an interim state behaviour plan.

[48] Explanatory notes, p 5.

- the restrictive practice is the least restrictive way of ensuring the safety of the person and others, and is proportionate to the risk of harm to the person or others
- the regulated restrictive practice is not a prohibited restrictive practice.[49]

The Bill also includes matters the senior practitioner would be required to consider when making an authorisation decision:

(1) In deciding the application, the senior practitioner must consider—

(a) the person's capacity for understanding, or making decisions about, the use of restrictive practices in relation to the person; and

(b) if the senior practitioner is aware the person is subject to a forensic order, treatment support order or treatment authority under the Mental Health Act 2016—the terms of the order or authority; and

(c) any information available to the senior practitioner about strategies, including regulated restrictive practices, previously used to manage the behaviour of the person that causes harm to the person or others, and the effectiveness of those strategies; and

(d) the type of disability services or NDIS supports or services provided to the person; and

(e) the suitability of the environment in which the regulated restrictive practice is to be used.[50]

The Bill also provides a variety of considerations the senior practitioner 'may' consider, including:

- the findings, theories, and recommendations of a functional behavioural assessment, or any differences of opinion taken into account when developing a behaviour support plan
- the views of entities consulted during a functional behaviour assessment, or the development of the behaviour support plan
- the way the service provider will support and supervise staff to implement the plan
- any information the senior practitioner receives from the NDIS Commission
- any reports provided to the senior practitioner under the PG Act
- for children, any information provided to the senior practitioner under the *Child Protection Act 1999*.[51]

The senior practitioner would also be required, when making an authorisation decision, to undertake consultation, and be required take reasonable steps to consult with the person the proposed restrictive practice relates to, and to consider their expressed or demonstrated views. Where practicable, the senior practitioner would also be required to consult with, and consider the views of:

- each relevant person for the person with disability the senior practitioner is aware of
- if the senior practitioner is aware the person with disability is subject to a forensic order or treatment authority under the *Mental Health Act 2016*, the authorised psychiatrist responsible to treat the person under the Act
- if the senior practitioner is aware the person with disability is a forensic disability client, a senior forensic disability practitioner responsible for the person's care

[49] Bill, cl 14, new s 158 of the DS Act.

[50] Bill, cl 14, new s 159(1) of the DS Act.

[51] Bill, cl 14, new s 159(2) of the DS Act.

- any other person the senior practitioner considers is integral for making the decision
- unless it is not practicable, the parents of a child.[52]

2.2.4.1 Matters of fundamental legislative principle – rights and liberties of individuals

Legislation should not, without sufficient justification, unduly restrict ordinary activities.[53]

The explanatory notes recognise that the use of regulated restrictive practices may be a 'significant intrusion' in the rights and liberties of a person with disability.[54] The explanatory notes seek to justify the proposed provisions as the Bill contains measures to limit the circumstances in which regulated restrictive practices may be authorised or used to minimise the limitation on an individual's rights and liberties.[55]

The explanatory notes also note that there are further safeguards outside the Act, for example the NDIS RPBS Rules require registered NDIS providers to report the unauthorised use of regulated restrictive practices to the NDIS Commission.[56]

While the use of regulated restrictive practices will clearly limit the rights and liberties of individuals, it is evident that the use of regulated restrictive practices is designed to protect both the person with disability and others from harm and in the least restrictive way possible.[57]

Regulated restrictive practices are to be used as a last resort. Further, the Bill includes safeguards at various decision-making levels, with the senior practitioner required to consider particular matters and consult with relevant people in making decisions on authorisation applications. Any authorisation for the use of regulated restricted practices is also time limited to not exceeding 12 months (and 6 months where a person with disability has an interim behaviour support plan in place). It must also be noted that the senor practitioner's decision in relation to an authorisation is subject to a merits review. There are also obligations on service providers in using regulated restrictive practices and a complaints mechanism.

Committee comment

Considering the factors above, the committee is satisfied that the Bill strikes an appropriate balance between rights and limitations and includes safeguards and review processes.

2.2.4.2 Human rights consideration

The authorisation of restrictive practices, as proposed by the Bill, engage a number of human rights in the HRA, namely:

- recognition and equality before the law (s 15 HRA)
- right to life (s 16 HRA)
- protection from torture and cruel, inhuman or degrading treatment (s 17 HRA)
- freedom of movement (s 19 HRA)
- freedom of expression (s 21 HRA)

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52 Bill, cl 14, new s 160 of the DS Act.

53 See LSA, s 4(2)(a). Office of the Queensland Parliamentary Counsel (OQPC), *Fundamental legislative principles: the OQPC Notebook* (Notebook), p 118.

54 Explanatory notes, p 8.

55 Explanatory notes, p 8.

56 Explanatory notes, p 10.

57 For an example of how the use of regulated restrictive practices may operate in practice, see statement of compatibility, pp 11-12.

- right to protection of children (s 26 HRA)
- cultural rights, including of Aboriginal peoples and Torres Strait Islander peoples (ss 27-28 HRA)
- right to liberty and security of person (s 29 HRA)
- right to privacy (s 25 HRA)
- humane treatment when deprived of liberty (s 30 HRA)
- right to health services (s 37 HRA).

These rights are interdependent and indivisible.

Recognition and equality before the law may be regarded a precondition for the legal system to 'see' a person and protect their rights. This recognition leads to the protection of other human rights, which is particularly important in the context of persons living with disabilities. This right, coupled with the right to freedom of expression, facilitates people with disabilities to make themselves heard by the legal system in the consideration of restrictive practices.

Protection from cruel, inhuman or degrading treatment is the human right most impacted by the Bill, as restrictive practices may constitute cruel, inhuman or degrading treatment, together with deprivation of a person's freedom of movement. The protection from cruel, inhuman or degrading treatment is a non-derogable human right, meaning it should not be limited. It is therefore important to ensure that restrictive practices do not reach the threshold of cruel, inhuman or degrading treatment. Any limits to the right to freedom of movement as a result of the use of restrictive practices should be centred on the autonomy and dignity of the person with disabilities.

The right to privacy is a core right for the protection of a person's dignity, since it allows them to consider what information about them is available to others or the state, and under what conditions. It is a right that allows limitations, particularly for the protection of health and the rights of others.

The protection of families and children is important in the context of the Bill as the Bill applies to children with disabilities, and parental involvement in decisions relating to the child. It is also important to take into account the intersectionality of children as persons with disabilities, and that both these characteristics (as well as other characteristics, such as gender, migrant status, and indigeneity, among others) must be considered in ensuring the best interests and the autonomy of the person living with disabilities. This is also the case regarding cultural rights and the right to health services.[58]

The right to health services is also an important right in the context of the Bill, as the Bill seeks to advance the health of persons living with disabilities. The right to health services provides justification for any rights limitation contained in the Bill, together with the dignity and autonomy of people with disabilities.

Limitations on human rights in the Bill include:

- the disregard of a person with disability's voice
- the imposition of treatment measures against a person with disability's will, restricting their movement
- the disclosure of private information to facilitate decision-making on restrictive practices
- the imposition of restrictive practices on children with disabilities
- downplaying cultural expectations (as well as other intersectional considerations) in decision-making about whether to impose restrictive practices.

[58] See International Covenant on Economic, Social and Cultural Rights, articles 12 and 15; HRA, s 12.

For all these limitations on human rights, the purpose is to advance the right to health of the person with disability, in a way that is proportional and respects their autonomy.

Generally, the limitations in the Bill are narrowly construed so as to advance the rights and best interests of people with disability. There are procedural opportunities for treatment decisions involving restrictive practices to be reviewed. There are also limits on the types of restrictive practices that can be used.

The Bill includes a number of provisions that highlight the connection between the limitations on human rights and their purposes:

- new s 139 states the purpose of Part 6 in relation to restrictive practices, specifying that the part is to protect the rights of people with disability
- new s 141, which sets out the principles for providing disability services or NDIS supports or services to particular people with disability
- new s 160, which requires the senior practitioner to consult with the person with disability, unless it is not practicable in the circumstance, about the proposed use of restrictive practices and, if it is not practicable, specifies other persons the senior practitioner must consult with
- new s 176, which specifies the steps a relevant service provider must take before developing State behaviour plans, including, by way of example, consulting with the person's treating doctor.

Committee comment

Considering the factors above, the committee is of the view that the Bill strikes an appropriate balance between rights and limitations in this case, with the caveat that it is hard to make these decisions on medical issues in the abstract, and that procedural guarantees, read through the imperative of protecting the health, dignity, and autonomy of persons living with disabilities, play an important role, and should be subject to constant scrutiny by decision-makers in this area.

2.2.5 Cancellation of restrictive practices

Clauses 168 and 172 of the Bill provide for when a restrictive practice authorisation will be cancelled by the senior practitioner and outline the process to be followed if they believe grounds exist to cancel a restrictive practice authorisation.[59] The power of the senior practitioner to cancel a restrictive practices authorisation is limited to 3 situations in the Bill as set out in cl 168:

(a) the authorisation was obtained by materially incorrect or misleading information or documents or by a mistake

(b) the relevant service provider has contravened a condition of the authorisation

(c) the relevant service provider has contravened a provision of this Act.

2.2.5.1 Stakeholder views and department response

The Public Advocate noted that 'it would be worth adding a new generic ground for cancellation' where there is no longer a need for the use of a regulated restrictive practice.[60] The QHRC also submitted that:

> … broader discretionary powers should be given to the senior practitioner to cancel authorisations that take into account the circumstances, rights and wellbeing of the person the subject of the restrictive practices.[61]

[59] Explanatory notes, p 6.

[60] Submission 3, p 3.

[61] Submission 4, pp 4-5.

In response, the department noted that s 162 of the Bill provides that a restrictive practice authorisation is time limited and requires a new authorisation to be sought after 12 months. Further, 'in circumstances where there is no longer a need for the use of a regulated restrictive practice, a new authorisation would not be given by the senior practitioner'.[62]

However, the department stated it will consider whether the grounds for cancellation under s 168 are sufficient to meet the policy objectives of the Bill.[63]

Committee comment

The committee is of the view that the addition of another ground for cancellation to clause 168 of the Bill, to be used in instances where the senior practitioner is of the opinion that there is no longer a need for a regulated restrictive practice, will provide a discretionary power to cancel, based on the circumstances, rights and wellbeing of the person.

Recommendation 3

The committee recommends that clause 168 of the Bill be amended to include an additional ground of cancellation in situations when the senior practitioner has determined, based on the circumstances and rights and wellbeing of the person, that there is no longer a need for the restrictive practice.

2.2.6 Consequences of unauthorised restrictive practices

The Bill includes offence provisions such as limitation orders and contravention of adult evidence orders but does not provide a specific offence for the use of an unauthorised restrictive practice. Any unauthorised use of restrictive practices would be left to offences under the Criminal Code, such as assault and deprivation of liberty.

2.2.6.1 Stakeholder views and department response

Submitters, including the Public Advocate, the QHRC and QAI, expressed concern that there is no legal consequence in the Bill for a provider or person who uses a regulated restrictive practice that is not authorised. It was further suggested by the Public Advocate that the creation of an offence would make it clear that the use of unauthorised restrictive practices is a serious matter and would lead to greater compliance with the legislation.[64]

Dr John Chesterman, Public Advocate, Public Hearing, 19 July 2024

I think it is quite important as a standard setting to make it clear in the bill that to not follow the authorisation regime would be an offence and to list a penalty there. The example I would give is Victoria, which does that. They have a penalty of 240 penalty units for the unauthorised use of a restrictive practice as a standard setting point. We need to be clear that where you have an authorisation model to not follow it is a significant wrong.[65]

The Public Advocate also submitted that expecting a person with disability to be able to commence proceedings under existing civil laws (where they would need to be the plaintiff) or criminal laws (where they would be expected to make a complaint to police) would be onerous, if not impossible, in many circumstances.[66]

62 Department, correspondence, 15 July 2024, p 17.

63 Department, correspondence, 15 July 2024, p 17.

64 Submission 3, p 2.

65 Public hearing transcript, Brisbane, 19 July 2024, p 5.

66 Submission 3, p 2.

In response, the department agreed that the Bill does not create new offences for use of restrictive practices other than in accordance with the Act. However, the NDIS Commission has compliance and enforcement powers and may apply penalties to registered NDIS providers that fail to meet their conditions of registration, including a civil penalty of 250 penalty units. Further, the department advised that non-compliance with any of the specified provisions (new ss 145 to 147) by a person will leave that person or entity open to civil or criminal consequences (for example through some other mechanism such as prosecution for assault or some other offence under the Criminal Code).[67]

Committee comment

The committee notes the concerns of stakeholders who argue that without a deterrent in the form of a penalty, unauthorised restrictive practices will continue to occur. The risk of civil or criminal liability may not be a sufficient or easily understood deterrent for an individual or a service provider who uses an unauthorised restrictive practice.

Recommendation 4

The committee recommends that the Bill be amended to include a specific offence provision for the use of unauthorised restrictive practices, to ensure there are clear consequences for non-compliance.

2.2.7 Review

2.2.7.1 Review of state behaviour support plans

The Bill would provide that a comprehensive state behaviour support plan must be reviewed every 12 months, or earlier if a change of circumstances requires the plan to be amended. This would align the legislation with the NDIS RPBS Rules relating to NDIS participants.[68]

2.2.7.2 Review by tribunal

The Bill proposes a new Division 6 for the DS Act, which would allow for 'the review of a part 6 reviewable decision relating to a person with disability'.[69] The Bill vests QCAT with merits review jurisdiction over the senior practitioner's authorisation decisions (Chapter 2, Part 1, Division 3 of the QCAT Act).[70]

The application may be lodged by a relevant service provider, a person with disability to whom a decision relates, a relevant person for the person with disability, a nominated advocate, a senior forensic disability practitioner (where relevant), the public guardian (where relevant to a child), or any other interested person for the person with disability.[71] The Bill also includes provisions for making an application in relation to a child with disability (new s 188A).

The explanatory notes state that, by bringing the senior practitioner under the remit of QCAT, the senior practitioner would be compelled to disclose confidential information to the tribunal. They would be required to share 'the names and addresses of all persons, apart from the applicant, who are entitled to apply for a review of the decision'. QCAT may also request information from prescribed persons to inform its decision. The explanatory notes consider this to be justified because '[t]he

67 Department, correspondence, 15 July 2024, pp 9-10.

68 Bill, cl 14, new s 181 of the DS Act; explanatory notes, pp 6, 11.

69 Bill, cl 14, new s 185 of the DS Act.

70 Bill, cl 14, new s 181 of the DS Act; explanatory notes, pp 6, 11.

71 Bill, cl 14, new s 188(1) of the DS Act.

provision of confidential information in these circumstances will enable QCAT to conduct a review of a Part 6 reviewable decision' in a manner that 'protects and promotes the rights of the person'.[72]

2.2.7.3 Matters of fundamental legislative principle – disclosure of confidential information

The disclosure of confidential information is relevant to consideration of whether legislation has sufficient regard to individuals' rights and liberties.

Committees have not objected to provisions authorising or requiring particular entities to share information in the context of child protection where the information was both extensive and sensitive, but the underlying rationale of the legislation, including the protection and care needs of children, took precedence over the protection of confidential information about a person. Further, committees have considered provisions enabling information obtained from health providers and others with information about adults with impaired capacity, which overrode any restrictions on the disclosure of confidential information, to have sufficient regard to the rights and liberties of individuals provided there were reasonable justifications in the circumstances. This is analogous to the Bill where the sharing of confidential information is intended to protect the person with disability and others from harm.

The explanatory notes state that the provisions are justified as the access or disclosure of confidential information serves specific purposes including to provide to the NDIS Commissioner to assist in the performance of the NDIS Commissioner's function, to provide information to service providers for the purpose of a behaviour support assessment or behaviour support plan and to provide information to the tribunal as part of its merits review function. The statement of compatibility suggests that the disclosure of confidential information is essential to ensure decisions on behaviour support plans or the authorisation of the use of restrictive practices are based on fulsome information and are responsive to the person's needs. This is balanced with appropriate safeguards to prevent misuse of the information. The statement of compatibility states that the circumstances in which confidential information can be disclosed under the proposed provisions of the Bill are limited and linked to the specific purposes of the Bill.

Committee comment

Considering the factors above, the committee is satisfied that the Bill strikes an appropriate balance in regard to the disclosure of confidential information.

2.2.7.4 Offence provisions

The Bill proposes to make it an offence, in relation to QCAT proceedings for children with disability, to publish:

(a) information given in evidence or otherwise in the proceeding; or

(b) information that is likely to identify a person who—

(i) appears as a witness before the tribunal in the proceeding; or

(ii) is a party to the proceeding; or

(iii) is mentioned, or otherwise involved, in the proceeding.

The explanatory notes state this is appropriate and reasonable, and that the penalty is commensurate to the offence.[73]

[72] Explanatory notes, p 11.

[73] Explanatory notes, p 11.

2.2.7.5 Stakeholder views and department response

Stakeholders who commented on aspects of the Bill relating to review processes were generally supportive of the information sharing provisions.[74]

The QHRC recommended that the Bill enable a relevant person to obtain all the information they need to fulfil their role, including whether to seek review of a decision at the tribunal.[75]

The Public Advocate, in relation to cl 26 of the Bill, submitted that it would be beneficial to include the Public Advocate as a person to whom the senior practitioner can provide information under s 200 of the DS Act.[76]

The department noted that the Public Advocate has existing systemic advocacy functions in relation to adults with impaired capacity under s 209 of the GA Act; and if the Public Advocate requires advice in relation to adults with impaired capacity, pursuant to its functions under the GA Act, the Public Advocate may issue a notice to the senior practitioner under s 210A to request the relevant information.[77]

To the recommendation of the QHRC, the department provided the following advice:

> [Clause 162] of the Bill provides for the information which must be contained in such a notice and requires that such a notice must comply with existing section 157(2) of the *Queensland Civil and Administrative Tribunal Act 2009* (QCAT Act). Section 157(2) of the QCAT Act provides that such a notice must include the reasons for this decision. Notably, section 160 of the QCAT Act then provides that a person may apply to the tribunal for an order against the decision-maker, seeking further and better particulars about stated matters. If the tribunal considers the written statement of reasons does not contain adequate particulars of the reasons for the decision, the tribunal may make an order requiring the decision-maker to give the person, within a stated period, an additional statement containing further and better particulars about stated matters.[78]

The department further stated, in response to QHRC, that it 'will consider whether information sharing under section 200 requires expansion to include guardians and other relevant persons, in line with the policy objectives of the Bill'.[79]

2.2.8 Monitoring

Under cl 14 of the Bill, new Division 5 of the DS Act would provide for complaints about restrictive practices. New s 183(1) would allow for any person to make a complaint to the senior practitioner about:

(a) the use of a restrictive practice in relation to a person with disability by a relevant service provider in relation to which this division applies; or

(b) the development or review of an NDIS behaviour support plan or state behaviour support plan for a person with disability by a relevant service provider in relation to which this division applies.

The Bill provides that the senior practitioner would be empowered to refer matters to the NDIS Commissioner (when related to an NDIS provider), the Chief Executive, Disability Services, or an entity prescribed by regulation.[80]

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74 Submissions 8, 11, 26.

75 Submission 4, p 4.

76 Submission 3, p 4.

77 Department, correspondence, 15 July 2024, p 25.

78 Department, correspondence, 15 July 2024, p 27.

79 Department, correspondence, 15 July 2024, p 28.

80 Bill, cl 14, new s 186 of the DS Act.

2.2.9 Immunity from liability—individual acting for relevant service provider

Clause 17 of the Bill proposes amendments to s 190 of the DS Act. The new section provides for immunity from liability for an individual working for a relevant service provider. The proposed section states:

> (1) This section applies to an individual who, acting for a relevant service provider, uses a regulated restrictive practice in relation to a person with disability.
>
> (2) The individual is not criminally or civilly liable for using the regulated restrictive practice if the individual acts honestly and without negligence under section 145 or 146.

The department noted that this immunity is potentially a departure from the fundamental legislative principle that a Bill should not adversely affect an individual's rights and liberties, 'specifically that it should not confer immunity from proceeding or prosecution without adequate justification.'[81]

The explanatory notes state that these immunity provisions are justified as they only apply when the use of the regulated restrictive practice is in accordance with the safeguards set out in ss 145 and 146 of the DS Act. This means the use of the regulated restrictive practice must be:

- necessary to prevent the person's behaviour causing harm to the person or others
- used as a last resort to prevent harm to the person or others
- the least restrictive way of ensuring the safety of the person or others
- to be used for the shortest possible time to ensure the safety of the person or others
- used in accordance with the NDIS behaviour support plan or state behaviour support plan for the person, and
- for environmental restraint involving the containment of the person or seclusion—comply with s 147 (relevant service provider to ensure a person's needs are met).[82]

2.2.9.1 Matters of fundamental legislative principle – immunity from civil and criminal liability

Legislation should not confer immunity from proceedings or prosecution without adequate justification.[83]

Generally, everyone is equal before the law and, therefore, each person should be fully liable for their acts or omissions.[84] Actions taken within the limits of statutory authority should not ordinarily give rise to legal liability. Legislation may expressly provide for immunity to clarify the matter and assure the persons taking action that the immunity is in place.[85] Committees have considered the grant of immunity to commercial service providers for honest acts done without negligence in compliance with legislative requirements appropriate.[86]

As set out above, the immunity provisions are justified as there are sufficient safeguards to ensure that the immunities are only conveyed where the use of a regulated restrictive practice complies with ss 145 and 146 of the Act as amended by the Bill.[87]

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81 Department, correspondence, 15 July 2024, p 12.

82 Explanatory notes, p 12.

83 LSA, s 4(3)(h). See OQPC, Notebook, p 64.

84 OQPC, Notebook, p 64.

85 OQPC, Notebook, p 67.

86 OQPC, Notebook, p 68.

87 Explanatory notes, p 12.

2.2.9.2 Stakeholder views and department response

Aged and Disability Advocacy Australia expressed concern that cl 17 of the Bill which proposes to amend s 190 of the DS Act, 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).[88]

In response, the department advised that amendment to ss 189 and 190 of the DS Act provide safeguards to ensure an individual acting for a relevant service provider would only be afforded an immunity for the proper use of a regulated restrictive practice where they act honestly and without negligence, with authorisation, and in compliance with the criteria set in ss 145 to 147. The department stated:

> In relation to ensuring individuals are properly instructed on the use of restrictive practices in compliance with a person with disability's behaviour support plan, section 159 enables the senior practitioner to consider, in deciding an application for a restrictive practice, the way in which the relevant service provider will support and supervise staff involved in implementing the NDIS behaviour support plan or state behaviour support plan for the person.[89]

2.3 Other circumstances regulated restrictive practices may be used

The Bill includes provisions which would allow a relevant service provider, or individuals working for a relevant service provider, to lawfully use regulated restrictive practices during the period between the ending of a previous authorisation, and a decision on a new authorisation.[90] Proposed amendments to the DS Act (see new s 146) include provisions for the use of regulated restrictive practices under the following conditions:

- an existing authorisation for the use of a regulated restrictive practice was granted
- a service provider has applied, at least 30 days prior to the expiration of the current authorisation, for a new authorisation (under new s 148 of the DS Act).[91]

When these conditions are met, if the authorisation ends prior to being decided or withdrawn, the provider may use the regulated restrictive practice, if:

(a) the use of the restrictive practice is necessary to prevent the person's behaviour causing harm to the person or others; and

(b) the restrictive practice is used as a last resort to prevent harm to the person or others; and

(c) the restrictive practice is the least restrictive way of ensuring the safety of the person or others; and

(d) the restrictive practice is used for the shortest possible time to ensure the safety of the person or others; and

(e) the restrictive practice is not a prohibited restrictive practice; and

(f) the use of the restrictive practice complies with the NDIS behaviour support plan or state behaviour support plan for the person; and

(g) for environmental restraint involving the containment of the person or seclusion—the use complies with s 147.[92]

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88 Submission 11, p 4.

89 Department, correspondence, 15 July 2024, p 12.

90 Explanatory notes, p 7.

91 Bill, cl 14, new s 146(1)(a-b) of the DS Act.

92 Bill, cl 14, new s 146(2) of the DS Act.

They may continue to use the restrictive practice until:

- the application for the new restrictive practice authorisation is withdrawn
- the service provider receives notice that the senior practitioner has refused to approve the application
- a new restrictive practice authorisation takes effect
- the day that is 30 days after the day the existing authorisation ends
- a later date, as extended by the senior practitioner.[93]

Notably, the use of a restrictive practice during this interval does not constitute an authorised use of a restrictive practice. Registered NDIS providers, therefore, will be required to report the unauthorised use to the NDIS Commissioner in line with NDIS legislation, which states that 'the use of a restrictive practice in relation to a person with disability, other than where the use is in accordance with an authorisation (however described) of a State or Territory in relation to the person' is a reportable incident.[94]

2.4 Other amendments in the Bill

2.4.1 Amendments to the *Coroners Act 2003*

The Coroners Act is administered by the Department of Justice and Attorney-General (DJAG). The Coroners Court is responsible for administering the reportable deaths framework under the Act.[95]

When transitioning to the NDIS, and cognisant that not all Queenslanders with disability would be eligible for the NDIS, continuity of supports was arranged to safeguard those who might otherwise be left without disability funding. These programs included the Continuity of Supports Programme (CoS Programme), funded by the department responsible for disability services (currently, this is the department).[96]

On 1 July 2021, the Disability Support for Older Australians (DSOA) Program replaced the CoS Programme.[97] The death of a person with disability, if they are a CoS Programme client, is a reportable death in care under s 9(1)(a)(ii) of the Coroners Act. However, the death of a person with disability who is under the DSOA Programme is not a reportable death in care (unless it is reportable under the Act for another reason).[98]

If the Bill is passed, cls 4 to 6 will amend the Coroners Act to ensure the deaths of those who receive DSOA disability supports are included in the reportable deaths framework.

2.4.1.1 Human rights considerations – the right to privacy

*T*he right to privacy is of particular importance in the context of persons living with disabilities, given its centrality to advance the autonomy and dignity of these rightsholders. The limitation associated with the proposed amendments to the Coroners Act consist of the requirement of reporting of deaths of persons living with disabilities so as to scrutinise the actions of state agents in the care of persons living with disabilities. However, there seem to be no less restrictive means to achieve the same

93 Bill, cl 14, new ss 146(3),(4) of the DS Act.

94 National Disability Insurance Scheme (Incident Management and Reportable Incidents) Rules 2018, s 16(1)(f).

95 Department, correspondence, 15 July 2024, p 4.

96 Department, correspondence, 15 July 2024, p 4.

97 Australian Government, Department of Health and Aged Care, *About the Disability Support for Older Australians Program*, 7 March 2022, health.gov.au/our-work/disability-support-for-older-australians-dsoa-program/about-the-disability-support-for-older-australians-program.

98 Department, correspondence, 15 July 2024, p 4.

objective of making information available for the investigation of the deaths of persons living with disabilities who die under state care.

Given the importance of scrutinising state action in its interactions with persons under its custody, especially persons living with disabilities, there is a clear need for a reasonable limitation to privacy, based here on the public safety of all persons living with disabilities, since this type of investigation is necessary for corrective measures and the constant evolution of the structures for the care of persons living with disabilities, in line with the objectives of the Bill and the Convention on the Rights of Persons with Disabilities.

Committee comment

The committee is satisfied that given the importance of holding the state to account in these contexts and the need for the constant evolution of care practices for persons with disabilities, the Bill strikes an adequate balance between the right to privacy and the identified limitations.

2.4.2 Amendments to the *Guardianship and Administration Act 2000*

Chapter 5B of the GA Act provides for the authorisation of certain restrictive practices by appointed guardians (by consent). It also provides the legislative framework, used by QCAT and the Public Guardian, to authorise containment and seclusion. The Bill proposes to omit Chapter 5B, which would be replaced by the new senior practitioner model. The Bill also provides for transitional arrangements outlining how existing proceedings under Chapter 5B would be managed, and how information would be exchanged between QCAT, the registrar, the Public Guardian and the senior practitioner.[99]

2.4.3 Amendments to the *Public Guardian Act 2014*

Similarly, the Bill would make amendments to the PG Act to reflect that the authorisation of restrictive practices would no longer by the responsibility of the Public Guardian. The Bill also:

- creates a new function for the Public Guardian to help a relevant child to initiate or, on the child's behalf, initiate an application to QCAT for a review of an authorisation decision of the senior practitioner under Part 6, Division 6 of the DS Act (cl 41 inserting new s 13(1)(o) of the PG Act)
- permits the Public Guardian to provide a copy of a report provided by a community visitor (adult) after visiting a visitable site to QCAT, a guardian or administrator for an adult, or the senior practitioner, if a regulated restrictive practice is being used at the site (cl 43, amendment to s 47(4)(e) of the PG Act)
- permits the Public Guardian to provide a copy of a report provided by a community visitor (child) after visiting a child under care staying at a visitable home or visitable site to the senior practitioner, if a regulated restrictive practice is being used in relation to the child at the visitable home or visitable site (cl 44, amendment to s 70 of the PG Act)
- amends the PG Act to add the senior practitioner as a prescribed entity for the purposes of the PG Act, to authorise and facilitate an appropriate exchange of information, including confidential information about a child and a child's circumstances, between the senior practitioner and the Public Guardian to help the Public Guardian perform child advocate functions in relation to relevant children (cl 46, amendment to s 86 of the PG Act).[100]

[99] Department, correspondence, 15 July 2024, p 11.

[100] Department, correspondence, 15 July 2024, p 11.

2.5 Developing Queensland's market for behaviour support plans

2.5.1 A provider of last resort

The former Queensland Productivity Commission, in its April 2021 Final Report into the NDIS Market in Queensland (QPC report), emphasised the negative market impacts of Queensland's lack of national consistency, including that it can increase costs and deter market development, and risks harming or undermining the rights of persons with disability. The QPC report also observed that the specialist behaviour support market in Queensland is relatively immature, with a shortage of appropriately qualified practitioners.

Th department advised that the Queensland Government is not currently a provider of last resort for this function, but rather has temporarily continued to perform the function beyond the commencement of full scheme NDIS in Queensland while market capacity and capability develops. The department intends to cease developing positive behaviour support plans for containment and seclusion in geographically based phases, matched to market capacity.

2.5.1.1 Stakeholder views and department response

QAI recommended the Queensland Government introduce a provider of last resort for the preparation of positive behaviour support plans for containment and seclusion.[101]

The Queensland Nurses and Midwives' Union, QAI and Queenslanders with Disability Network submitted that the current 'thin markets' for behaviour support practitioners and workforce issues in Queensland continue to constitute significant barriers for Queenslanders with disability seeking to uphold their human rights.[102] These concerns were acknowledged by the department.[103]

2.5.2 Support for people subject to restrictive practices

Stakeholders noted a need for adequate and stable funding for independent legal advocacy and supported decision making for people subject to restrictive practices that is not means tested.[104]

In response, the department advised:

> Section 43 of the QCAT Act currently provides a right to legal representation for children and adults with impaired capacity. The Bill also provides that QCAT will have the ability (but not an obligation) to appoint a representative for an adult (section 188J), and a separate representative for a child (section 188ZF).[105]

The department also stated that demand for, and access to, advocacy and representation will be monitored during implementation.[106]

101 Submission 7, pp 17-19.

102 Submissions 7, 8, 10.

103 Department, correspondence, 15 July 2024, p 39.

104 Submissions 4, 5, 7.

105 Department, correspondence, 15 July 2024, p 37.

106 Department, correspondence, 15 July 2024, p 38.

Appendix A – Submitters

Sub #	Submitter
1	Associate Professor Dinesh Wadiwel and Associate Professor Linda Steele
2	Australian College of Nurse Practitioners
3	The Public Advocate
4	Queensland Human Rights Commission
5	Queensland Mental Health Commission
6	Queensland Family and Child Commission
7	Queensland Advocacy for Inclusion
8	Queensland Nurses and Midwives' Union
9	Queensland Aboriginal and Torres Strait Islander Child Protection Peak Limited
10	Queenslanders with Disability Network
11	Aged and Disability Advocacy Australia
12	Queensland Law Society

Appendix B – Officials at public departmental briefing

Public briefing – Brisbane – 9 July 2024

Department of Child Safety, Seniors and Disability Services

- Elizabeth Rowe, Acting Executive Director, Strategic Policy and Legislation
- Amber Manwaring, Director, Strategic Policy and Legislation

Department of Justice and Attorney-General

- Melinda Tubolec, Principal Legal Officer, Strategic Policy and Legislation

Appendix C – Witnesses at public hearing

Public hearing – Brisbane – 19 July 2024

The Public Advocate

- Dr John Chesterman, Public Advocate
- Yuu Matsuyama, Senior Legal Officer

Queensland Human Rights Commission

- Rebekah Leong, Principal Lawyer
- Sarah Fulton, Principal Lawyer

Queensland Advocacy for Inclusion

- Sophie Wiggans, Principal Systems Advocate
- Vinay Veerabhadra, Senior Solicitor

Queenslanders with Disability Network

- Rebecca Cason, Senior Policy Officer
- Paige Armstrong, Organisational Consultant (via teleconference)

Aged and Disability Advocacy Australia

- Geoff Rowe, Chief Executive Officer
- Karen Williams, Principal Solicitor