Persons with Disability (Regulation of Restrictive Practices) Bill 2021

Legal Aid NSW submission to the Department of Communities and Justice

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Table of Contents

About Legal Aid NSW 3

Introduction 4

Consultation questions.....4

Question 2: Is the reporting framework for NSW Government agencies sufficiently robust? 4

Dual system regarding the use of restrictive practices 4

Government vs non-government service providers 5

Question 5: Do you think the Bill provides enough support for people with disability to make decisions for themselves? 6

Question 6: Are there any other safeguards that should be put in place around the trusted person framework? 6

Question 7: Do you think having an independent behaviour support practitioner on the authorisation panel provides enough independence and expertise? 6

Question 9: Does the authorisation framework provide enough balance between the rights of the person with disability and the responsibilities of their service provider? 7

Question 11: Do you have any other comments on the Bill? 7

Determination of whether a practice is a "restrictive practice" 7

Information provided to a participant 8

Impact on forensic patients 9

Interaction with the guardianship regime 11

About Legal Aid NSW

The Legal Aid Commission of New South Wales (**Legal Aid NSW**) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW). We provide legal services across New South Wales through a state-wide network of 25 offices and 243 regular outreach locations, with a particular focus on the needs of people who are socially and economically disadvantaged. We offer telephone advice through our free legal helpline LawAccess NSW.

We assist with legal problems through a comprehensive suite of services across criminal, family and civil law. Our services range from legal information, education, advice, minor assistance, dispute resolution and duty services, through to an extensive litigation practice. We work in partnership with private lawyers who receive funding from Legal Aid NSW to represent legally aided clients.

We also work in close partnership with community legal centres, the Aboriginal Legal Service (NSW/ACT) Limited and pro bono legal services. Our community partnerships include 27 Women's Domestic Violence Court Advocacy Services, and health services with a range of Health Justice Partnerships.

The Legal Aid NSW Civil Law Division provides advice, minor assistance, duty and casework services from the Central Sydney office and 20 regional offices. It focuses on legal problems that impact on the everyday lives of disadvantaged clients and communities in areas such as housing, human rights, social security, financial hardship, consumer protection, employment, immigration and fines. The Civil Law practice includes dedicated services for Aboriginal communities, children, refugees, prisoners and older people experiencing elder abuse.

Legal Aid NSW, together with other legal aid commissions on behalf of National Legal Aid, delivers Your Story Disability Legal Support. This is a free national legal service that provides support to people with disability to share their story with the Disability Royal Commission. We are independent of the Royal Commission. We support people with disability, their families, carers, supporters and advocates. This service is a joint initiative of National Legal Aid and National Aboriginal and Torres Strait Islander Legal Services.

Legal Aid NSW welcomes the opportunity to make a submission to the Department of Communities and Justice. Should you require any further information, please contact:

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Introduction

Legal Aid NSW welcomes the opportunity to make a submission to the Department of Communities and Justice (**DCJ**) on the Persons with Disability (Regulation of Restrictive Practices) Bill 2021 (**the Bill**).

We previously made a submission in 2019 to the Department of Premier and Cabinet's review of restrictive practices authorisation in NSW.[1] As stated in that submission, many of Legal Aid NSW's clients have complex needs and have experienced significant trauma and abuse as children. Our casework experience has included instances of clients being subject to restrictive practices which have exacerbated trauma and led to an escalation in challenging behaviour, which has ultimately resulted in arrest and incarceration. Legal Aid NSW strongly supports efforts to reduce and eliminate the use of restrictive practices.

Below are our responses to certain consultation questions set out in the Information Booklet accompanying the exposure draft Bill, dated January 2021.

Consultation questions

Question 2: Is the reporting framework for NSW Government agencies sufficiently robust?

Dual system regarding the use of restrictive practices

Legal Aid NSW is concerned that the framework for restrictive practices authorisation and reporting outlined in the Bill is not sufficiently robust, and leaves serious gaps in the protection of people with a disability from the use of restrictive practices.

It is unclear why the Bill establishes a dual system regarding the use of restrictive practices on persons with disability – one robust framework for NDIS providers, and one significantly weaker one for government agencies:

- The Bill establishes an authorisation process that NDIS providers must follow in order to use a restrictive practice on an NDIS participant. However, NSW government agencies are not required to follow this authorisation process, and instead only have to take into account the objects and guiding principles of the proposed Act when developing relevant policies or "providing, or arranging for the provision of, services that include the use of restrictive practices to a person with disability".[2]
- For NDIS providers, the use of seclusion on a child NDIS participant is expressly prohibited under the Bill,[3] and there is scope for other restricted practices used by

[1] Legal Aid NSW, Submission to the NSW Department of Premier and Cabinet, *Review of Restrictive Practices Authorisation in NSW* (September 2019).
[2] Persons with Disability (Regulation of Restrictive Practices) Bill 2021 cl 7(2).
[3] Ibid cl 8(1).

NDIS providers to be prohibited by regulation.[4] However, there is no such prohibition for government agencies or non-government organisations contracted to provide services to people with disability that are not NDIS providers.

- While the Bill requires government agencies to report annually,[5] it allows the regulations to exempt government agencies from a requirement to include specified information or to address specified matters in a report.[6] This weakens the already soft framework for government agencies.

Limiting the authorisation process to NDIS providers is, in our view, inadequate and inconsistent with the views expressed by the majority of submissions to this consultation. The consultation findings report dated September 2019 noted that "there was strong support, from all perspectives, to expand the scope of [restrictive practices authorisation] regulation in NSW beyond NDIS providers delivering services to an NDIS participant", and recommended that the scope of settings where a restrictive practices authorisation is required be expanded.[7] We query why this report recommendation has not been taken up.

We reiterate our position that we support an overarching authorisation mechanism that applies in all settings, which may assist in providing additional oversight and monitoring, to ensure that vulnerable people are not subject to unregulated use of restrictive practices.

Government vs non-government service providers

Under the Bill, the regulation of other service providers funded by NSW government agencies appears to be even weaker, and only indirect through the provisions that regulate government agencies. Clause 7(2) of the Bill provides that government agencies must take into account the objects and guiding principles of the proposed Act when "arranging for" the provision of services that include the use of restrictive practices to a person with disability. These include services that government agencies "pay non-government services to provide, like assisted school transport and out-of-home care".[8] However, the non-government service providers themselves are not expressly required to take into account the objects and guiding principles of the proposed Act when providing services that include the use of restrictive practices to a person with disability, let alone follow the authorisation process outlined in the Bill.

There does not appear to be any strong policy reason for why these types of service providers should be less regulated than NDIS providers. Out-of-home care (**OOHC**) providers, for example, have day-to-day care for a large number of children with a disability. Schools (both government and non-government) also have daily care of a large number of children with disability. In our view, these types of service providers should be

[4] Ibid cl 8(2).
[5] Ibid cl 7(4).
[6] Ibid cl 7(6).
[7] NSW Government, *Restrictive Practices Authorisation in NSW: Consultation Findings Report* (September 2019) 7.
[8] NSW Government, *Persons with Disability (Regulation of Restrictive Practices) Bill 2021 Exposure Draft*, 'Information Booklet' (January 2021) 7.

subject to the same regulations that govern the use of restrictive practices by NDIS providers.

We recommend that the regulation of the use of restrictive practices on people with disability be consistent across government and non-government service providers.

Question 5: Do you think the Bill provides enough support for people with disability to make decisions for themselves?

See response to Question 11 on 'Legal consequences for forensic patients' below.

Question 6: Are there any other safeguards that should be put in place around the trusted person framework?

Clause 13 of the Bill outlines appropriate trusted persons for children and adults. If the NDIS participant is a child, the trusted person is the person with parental responsibility. If the child is in the care of the DCJ Secretary under the *Children and Young Persons (Care and Protection) Act 1998* (NSW), the trusted person is the DCJ Secretary.

Legal Aid NSW submits that the powers or role of the "trusted person" for children in OOHC should not be delegated to anyone below the Senior Executive Service of DCJ. In particular, we consider that it would be problematic if DCJ child protection caseworkers were delegated the role of trusted person, as, in our experience, the relationship between children and their DCJ caseworkers can be fraught.

See also our response to Question 11 on 'Interaction with the guardianship regime'.

Question 7: Do you think having an independent behaviour support practitioner on the authorisation panel provides enough independence and expertise?

Clause 16(2) of the Bill provides that an authorisation panel is to consist of each NDIS provider proposing to use the restrictive practice on the NDIS participant, and an NDIS behaviour support practitioner who is independent of the NDIS participant and provider(s).

Legal Aid NSW has serious concerns about NDIS providers, who may have a vested interest in implementing the restrictive practice, forming part of the authorisation panel. In our view, an authorisation panel should consist only of independent panel members, to whom the NDIS provider(s) submits its evidence and input for a decision. We submit that an authorisation panel should consist of other independent agencies and bodies, such as the Children's Guardian (if relevant), disability peak body, and advocates. These members should have clinical expertise, and seek to eliminate the use of restrictive practices.

Question 9: Does the authorisation framework provide enough balance between the rights of the person with disability and the responsibilities of their service provider?

Legal Aid NSW is concerned that, under clause 11(3) of the Bill, an unauthorised use of a restrictive practice can be in place for a month before the NDIS provider is required to obtain authorisation. We submit that this length of time is excessive, and should be reconsidered.

Question 11: Do you have any other comments on the Bill?

Determination of whether a practice is a "restrictive practice"

Legal Aid NSW submits that the Bill should contain an initial process to determine whether a practice is a "restrictive practice" within the meaning of section 6 of the *National Disability Insurance Scheme (Restrictive Practices and Behaviour Support) Rules 2018* (Cth) (**Rules**), and if so, what kind. This process should be accessible by providers, people with disability and by appropriate trusted persons, where necessary.

Under rule 6 of the Rules, the definitions of restrictive practices are descriptive, and it is possible for a practice to fall into more than one category. In many cases, it requires clinical judgement to determine whether a restrictive practice is involved. For example, the definition of "mechanical restraint" in rule 6 "does not include the use of devices for therapeutic or non-behavioural purposes" but does not specify how the purpose of the support is to be determined, or by whom. There is also the possibility that some practices could be considered either seclusion or environmental restraint, where under the Bill seclusion is prohibited and an environmental restraint can be authorised.

A process by which providers and participants could get a determination about the nature of the practice would provide clarity and certainty about the steps to be followed. In our experience, issues in relation to restrictive practices arise in Administrative Appeals Tribunal (**AAT**) proceedings and can cause delays in the approval of needed supports for our clients.

The following case studies illustrate these issues.

Wendy's story[9]

Legal Aid NSW assisted the family of Wendy in an application for NDIS funding for a bed with a lockable door. Wendy was six years old and had an intellectual disability and hypermobile limbs, so she could get out of bed by herself but potentially injure herself in the process. The bed that the family wanted could be locked by her paid carers at times when Wendy was at risk of hurting herself, and open at other times. One issue in the case was how to characterise

[9] All case studies in this submission have been de-identified.

the practice involved – whether it was an environmental restraint, mechanical restraint, or seclusion. If the practice was a mechanical restraint, if it was used for a therapeutic purpose, authorisation would not be required.

A question arose about whether the bed could be funded under the NDIS without a determination from the restrictive practices panel. There was no way for Wendy's family to get resolution on this issue because they were not responsible for the restrictive practices process – it lay with their provider to determine whether authorisation was required.

Georgia's story

Legal Aid NSW assisted Georgia, a 14-year-old with a severe intellectual disability and behavioural problems. Georgia's behavioural problems often led to harm to herself, harm to others or damage to property. Her family wanted to create a calm room for her with reinforced walls and door so that if she damaged the room she would not be hurt. The provider who worked with the family was to direct Georgia to go to her room if she was having a behaviour outburst and shut the door. Georgia could open the door but it was implied that she should not until she had calmed down.

Again the issue arose in the context of funding supports in the AAT and there was no simple way for Georgia's family to find out whether a restrictive practice was involved.

We suggest that, at the instigation of a provider or participant, the authorisation panel or the Ageing and Disability Commissioner should be able to undertake an initial assessment and make a determination about whether there is a restrictive practice involved in a person's care. In our view, it is important that a participant can approach the panel or the Commissioner for such a determination as in our matters the whole process is directed by the provider, which the first case study illustrates. An initial assessment and determination would give all those involved clarity about whether a practice is not restrictive, is restrictive and needs authorisation, or is prohibited.

Information provided to a participant

Several clauses of the Bill require the information provided to an NDIS participant to be "readily understandable" by the participant.[10] We consider that this language may be too subjective.

Importantly, we suggest that the Bill provide that failure to provide information that is readily understandable by a participant (particularly where it is used in clauses 17(2) and 18(2) of the Bill) will not affect the NDIS participant's right to review or make a complaint.

[10] Persons with Disability (Regulation of Restrictive Practices) Bill 2021 cl 12(2), 15(6), 17(2) and 18(2).

Impact on forensic patients

Legal Aid NSW has a number of concerns about the impact of the Bill on forensic patients and its interaction with mental health provisions. We note that all forensic patients experience a disability.

Legal consequences for forensic patients

Legal Aid NSW is concerned that the framework established by the Bill is not sufficiently practical in the context of forensic patients.

By way of background, persons who are found not guilty by reason of mental illness (**NGMI**) or subject to a limiting term or order extending their forensic status are regularly released into the community on conditional release. When they are on conditional release, they remain under the jurisdiction of the Mental Health Review Tribunal (**MHRT**), they are reviewed every six months, and the MHRT can impose conditions on the patient's conditional release. In most instances, forensic patients are conditionally released to supported accommodation that is run by an NDIS service provider. It is very common for this cohort of forensic patients to have restrictive practices in place. In the absence of these restrictive practices being in place, it is possible that the MHRT would not grant conditional release, on the basis that the patient's conditional release will seriously endanger themselves or members of the community. Where conditional release is not granted, the forensic patient will remain detained in prison or a mental health facility.

Given the significant legal and practical consequences for forensic patients that can flow from whether restrictive practices are or are not in place, there is a need for this to be expressly addressed in the Bill. We suggest that an additional subclause be added to clause 12(4) of the Bill, to provide that an NDIS participant is not capable of giving consent to the use of a restrictive practice if they are not capable of "understanding the legal or practical consequences of the restrictive practice not being in place".

We also suggest that where an NDIS participant is a forensic patient, they must be provided with the opportunity to obtain independent legal advice about whether they should consent to the use of a restrictive practice. We consider that this would be an appropriate support for people with disability during the decision-making process.

Interaction with mental health provisions

Legal Aid NSW observes that the proposed framework will intersect with the *Mental Health Forensic Provisions Act 1990* (NSW) (**MHFPA**) or the new *Mental Health and Cognitive Impairment Forensic Provisions Act 2020* (NSW), however the Bill makes no mention of how the provisions will interact with each other.

Under section 75 of the MHFPA, the MHRT may impose conditions on a forensic patient's release. This includes with regard to "accommodation and living conditions". The list under section 75 is non-exhaustive. If the MHRT imposes a condition that amounts to a restrictive practice and the person is residing in supported accommodation run by an NDIS provider, it is unclear how this would sit with the need to obtain the consent of the person or the appropriate trusted person, given that the objects and guiding principles in clause 3 of the Bill (which, under clause 3(3), an appropriate trusted person must have regard to

when exercising their functions under the Bill) do not reflect the objects and principles of the MHFPA. An appropriate trusted person may make a decision that is consistent with the objects and guiding principles in clause 3 of the Bill, and yet the effect of that decision is that the MHRT may not be content with that person remaining on conditional release. For example, doors and gates not being alarmed.

Alternatively, consideration could be given to amending the Bill to indicate that, to the extent that any orders or directions made by the MHRT or the Supreme Court of NSW amount to a restrictive practice, that practice may be implemented without gaining the consent of the subject person or any third party such as a guardian, or any authorisation as described in the Bill. The safeguard for the forensic patient in that situation would be that the person be informed of the restrictive practice, why it is being imposed and how it is being imposed.

We consider that clarification is needed on how the Bill will operate alongside the MHFPA and the new *Mental Health and Cognitive Impairment Forensic Provisions Act.*

Application to group homes

Legal Aid NSW generally supports a rights-based framework, and acknowledges that the Bill is a positive step in that direction. However, we are concerned about how a rights-based approach with increased compliance will be applied to a disability sector that is under-funded, under-resourced and shifting to the use of private disability service providers.

In particular, we are concerned about how the framework will be applied in group homes. There are certain restrictive practices that cannot be put in place without impacting on every person in a group home. For example, alarms or locks on all exits in the property. In some instances, the restrictive practice may not be required for all residents at the home, therefore an appropriate trusted person would not be operating in accordance with their obligations under clause 3 of the Bill if they were to approve the restrictive practice.

The practical consequences of not consenting to the restrictive practice could be worse than consenting in circumstances where the restrictive practice is not justified by reference to the objects and principles under clause 3. For example, a resident may need to leave the supported accommodation. This could also have consequences for the service provider and the stability of the accommodation for the other residents, as having vacant rooms in a group home may not be economically viable for the service provider. This is especially the case in regional areas. As a result, hospitals can sometimes become de facto places of residence for persons with disability who do not otherwise require the medical attention provided in a hospital-based setting.

The case study below illustrates the complexity of the use of restrictive practices in a group home setting.

Tim's story

Tim is a forensic patient at the Forensic Hospital who has polydipsia – a condition where a person experiences intense thirst despite drinking plenty of fluids. Tim's access to taps would

need to be restricted at any supported accommodation, including potential removal of taps. This would impact on other residents, and it is unlikely that other residents would require the same restrictive practice. The effect of this is that Tim remains in a place of detention indefinitely.

We consider that a move towards a rights-based framework needs to be accompanied by additional ongoing resources and funding to ensure that the disability sector is able to adequately respond to the unique circumstances of each person with a disability. This would help to ensure that the proposed scheme operates as intended, and to avoid setbacks to the progress of our clients.

Alternatively, we suggest that an explicit provision be included in the Bill that provides for the authorisation of a restrictive practice in circumstances where not consenting to the restrictive practice risks placing the person with disability at greater risk of abuse, neglect or exploitation.

Interaction with the guardianship regime

Legal Aid NSW submits that there is a need for greater clarity around how the NDIS scheme works with the guardianship regime in relation to decision-making around restrictive practices.

The Bill acknowledges that the NDIS participant may have a guardian and that the guardian has a role in the decision-making with regard to the use of restrictive practices on the NDIS participant.[11] Clause 13 provides a hierarchy of appropriate trusted persons where the NDIS participant lacks capacity to consent. However, it is unclear what the next steps would be if there is no guardian and no appropriate trusted person for the NDIS participant.

We are concerned that, where the person is concluded to lack capacity and there is no appropriate trusted person identified, decisions regarding the use of restrictive practices may be made on the NDIS participant's behalf through the authorisation panel.

In these circumstances, we consider that it would be more appropriate for an application to be made to the NSW Civil and Administrative Tribunal (Guardianship Division). This could be addressed through ongoing education of NDIS providers, families and appropriate trusted persons on the role of the Guardianship Division, rather than through legislative provisions.

[11] Ibid cl 13(1)(c).