

Our ref: D25/133240

19 March 2024

RE: A legislative framework to regulate restrictive practices

Delivered by email to: policy@dcj.nsw.gov.au

Dear Department of Communities and Justice

Thank you for the opportunity to provide comments on the legislated framework for regulating the use of restrictive practices on people with disability.

The Disability Council NSW (the 'Council') is a statutory body that provides independent advice to the Minister for Disability Inclusion on matters that affect people with disability in NSW, as well as their families and carers. The Council is pleased to be able to support the Department of Communities and Justice in consulting with the disability community on this matter.

The Council acknowledged the complexity of the framework and appreciated the time that the Policy team took to join their meeting on February 19. This facilitated a lengthy yet crucial discussion on the framework. However, it was challenging for members with intellectual disabilities to provide their feedback due to the delayed launch of the easy-read version. It may be beneficial if the easy-read version was released simultaneously with the consultation paper.

The Council wishes to provide the following comments to the consolidated list of proposals and questions.

Questions

1. Should the proposed legislative framework cover the out of home care setting?

Yes, the Council believes the proposed legislative framework should cover the out-of-home care setting to reduce service provider confusion and misunderstanding.

2. Should the proposed legislative framework cover any other setting?

The proposed legislative framework should cover the disability service provision, health, education, and justice settings.

3. What issues and challenges are raised by there being different frameworks for the authorisation of restrictive practices in the disability service provision setting and the aged care setting?

Different frameworks for restrictive practices in disability service provision and aged care settings create inconsistencies and potential confusion for providers. These frameworks also offer varying levels of protection and oversight for individuals subjected to these practices.

Implementing the least restrictive approach is difficult without proper planning and resources. Ensuring that staff are adequately trained, managing the risks associated with transient staff, and improved communication methods are essential to reducing restrictive practices and fostering independence for people with disability.

Proposals

Proposal 1: Legislation should provide that the use of restrictive practices on NDIS participants in the disability service provision, health, education, and justice settings should be governed by the principles recommended by DRC Recommendation 6.35(b).

Proposal 2: The legislation should require government agencies in the health, education and justice settings to provide an annual report to the Senior Practitioner on their, and their contractors', compliance with the principles.

Questions

4. Do you support legislation requiring that restrictive practices on NDIS participants in the disability service provision, health, education and justice settings should be governed by the principles recommended by DRC Recommendation 6.35(b)?

The Council supports legislation requiring that restrictive practices on NDIS participants in disability service provision, health, education, and justice settings be governed by the principles recommended in DRC Recommendation 6.35(b).

While the Council acknowledges the framework's principles, it highlights implementation challenges. Concerns include risks when practices lapse

and families provide consent, potential dangers of removing restrictive practices without safeguards, and the risks of automated decision-making without adequate participant voice. A robust consultation process is essential to address these complexities.

5. Are there any other principles that should be considered?

When providing support to a person with a disability, it's essential to recognise that the person providing support is in a position of power or authority. Our responses should always be the least restrictive option available. This principle applies to the use of controlled substances, preventive measures taken for safety and assistance in helping the person with a disability manage behaviours of concern.

Furthermore, principles such as cultural considerations and the impact on Aboriginal or Torres Strait Islander persons should also be considered.

6. Should a legislative framework prohibit any practices? If so, which practices and in which settings?

Yes, a legislative framework should prohibit specific forms of physical restraint, punitive approaches, and practices related to degradation or vilification in all settings.

Restrictive practice should be seen as a last resort, they should be used only in response to a serious risk of harm to a person with a disability or others. They should only be used after all other strategies, including supported decision-making, have been explored and applied.

If restrictive practices are used, there needs to be a mechanism/safeguard in place as a mandatory review and verification, not simply assumed it should be continued. It should also include strong, frequent evaluations, training, and safeguards to prevent overuse, misuse, or abuse in practice or power imbalance.

- **Least restrictive option:** The approach should be the least restrictive response possible to ensure safety.
- **Proportionality:** The use must be proportionate to the risk of harm and negative consequences of the restrictive practice.

Proposals

Proposal 3: The NDIS definitions of restrictive practices should be adopted for the NSW legislative framework for restrictive practices.

Proposal 4: The Senior Practitioner should have the power to issue guidelines that clarify how the definitions apply in different situations.

Questions

7. Do you agree that:

- **the framework should use the NDIS definitions of restrictive practices?**

Yes, the Council agrees that the framework should use the NDIS definitions of restrictive practices to reduce potential confusion.

- **the Senior Practitioner should have the power to issue guidelines that clarify how the definitions apply in different situations?**

Yes, the Council agrees that the Senior Practitioner should have the power to issue guidelines that clarify how the definitions apply in different situations, though proper briefing and monitoring is required to ensure practices are applied correctly and reviewed regularly. Monitoring is crucial to ensure that practices are not excessive and that the person with disability's rights are protected.

8. What role should the Senior Practitioner play in regulating behaviour support plans? For example:

- **Should the Senior Practitioner have the power to prescribe additional and/or more detailed information for inclusion in the BSP? If so, what information?**

Yes, the Senior Practitioner should be able to prescribe additional and/or more detailed information for inclusion in the BSP, including cultural considerations and influences on Aboriginal or Torres Strait Islander persons. It is crucial to consider marginalized and vulnerable communities, as individuals from these backgrounds may have had traumatic experiences with professionals, leading to escalated behaviour. Additionally, it is important to explain the positive behaviour support plan and its role in the process.

- **Should the Senior Practitioner have the power to require a behaviour support practitioner have certain qualifications and the Senior**

Practitioner's approval before they can prepare a BSP which will be used to authorise the use of a restrictive practice? If so, what should the additional qualifications and criteria for approval be?

Yes, the Senior Practitioner should have the power to require a behaviour support practitioner to have specific qualifications and the Senior Practitioner's approval, including clinical expertise in behaviour support and understanding of cultural considerations.

• Should there be any specific provisions relating to consultation in the development of a BSP, in addition to the requirements in the NDIS Rules?

Yes, there should be specific provisions relating to consultation in developing a BSP, including the involvement of an independent person and a summary of the views of those consulted.

9. Is there anything else the proposed framework should do to improve the quality of BSPs?

Yes, the proposed framework should include mechanisms to regulate the quality of BSPs, such as prescribing additional information, regulating behaviour support practitioners, and specific consultation requirements. Council suggests prescribing behaviour modification programs and regular testing alongside restrictive practices. Continuous evaluation is essential to ensure practices are effective and participants' rights are protected.

Proposal

Proposal 5: A Senior Practitioner model should be structured to use APOs as part of the authorisation process.

An APO should:

- have operational knowledge of how the BSP and proposed restrictive practice would be implemented,
- be required to meet prescribed professional standards set by the Senior Practitioner, and,
- be approved by the Senior Practitioner.

10. Should APOs be empowered to either:

- **authorise particular categories of restrictive practices without separate Senior Practitioner authorisation (a partially delegated model). If so, what categories of restrictive practices should be able to be authorised by APOs? Should these be prescribed by legislation, or through class or kind orders?**

A new approach, such as the Authorised Program Officer, is logical to ensure that decisions are not delayed. APOs should be empowered to authorise categories of restrictive practices, such as environmental and chemical restraints, through class or kind orders.

The risk is that decision-making can be inconsistent without the appropriate safeguards, training, and guidelines. So, this would need to be addressed before a level of comfort strong enough to safeguard the person with a disability can be achieved.

It is a more substantial option than the other two. Option one develops a bottleneck and unrealistic expectations of the senior practitioner's ability to respond. Although there would be greater consistency, there needs to be a balance.

The third option is the current model, which does not work because the support organisation can easily influence it. Although there are guidelines, it is rare to see a significant decrease in restrictive practices. If we want to follow the guidelines and recommendations of the Royal Commission, we should introduce a new model.

- **provide preliminary approval of restrictive practices, with final authorisation provided in all cases by the Senior Practitioner (a two step model)?**

Yes, APOs should be empowered to provide preliminary approval of restrictive practices, with final authorisation provided in all cases by the Senior Practitioner (a two-step model).

- **What would be the benefits and risks of the above models?**

The benefits of the above models include timely authorisations and operational knowledge from APOs, while the risks involve potential conflicts of interest and regulatory duplication.

11. Are there alternative approaches to authorisation that would be preferable to these models?

An alternative approach could be a centralised model where the Senior Practitioner approves all types of restrictive practices without involving APOs.

12. Should APOs be required to be employed by a single provider? Or should APOs be permitted to be consultants to a number of providers? If so, what safeguards should there be in relation to this?

APOs should be permitted to be consultants to a number of providers, with safeguards such as Senior Practitioner approval, periodic reviews, and conflict of interest checks.

Proposals

Proposal 6: The Senior Practitioner and APO should have a discretion to determine the duration of an authorisation, up to 12 months.

Proposal 7: There should be an emergency use process for restrictive practices before a BSP has been prepared and authorisation given, which should replace the interim authorisation process.

Proposal 8: The Senior Practitioner should have the power to cancel an authorisation of restrictive practices where:

- the Senior Practitioner has determined there is no longer a need for the restrictive practice,
- the Senior Practitioner requests evidence to demonstrate the restrictive practice is still needed and the provider fails to provide sufficient evidence,
- the authorisation was obtained by materially incorrect or misleading information or by mistake,
- the relevant provider has contravened a condition of the authorisation, or
- the relevant service provider has contravened a provision of the legislation

13. Do you support the proposed duration of authorisation and emergency use proposals for restrictive practices?

Yes, the Council supports the proposed duration of authorisation (maximum 12 months) and emergency use proposals for restrictive practices. The role of Senior Practitioner offers a great deal of power compared to a panel where multiple experts might weigh in on the guidelines. If this was in place, consider the safeguards that would need to be placed to ensure there's transparency and supports participants.

14. Are there any additional grounds on which the Senior Practitioner should be able to cancel an authorisation?

No, the proposed grounds for cancellation by the Senior Practitioner are comprehensive and sufficient.

Proposal

Proposal 9: An affected person, the NDIS provider and any other person who has a genuine concern for the welfare of the person may seek review of an authorisation decision. The review rights would be:

- first to the Senior Practitioner for internal review,
- then to the NSW Civil and Administrative Tribunal.

15. Should authorisation decisions:

- **be open to internal review?**

Yes, authorisation decisions should be open to internal review.

- **be reviewable at NCAT?**

Yes, authorisation decisions should be reviewable at the NSW Civil and Administrative Tribunal (NCAT).

Council suggests adding the NDIS Safeguards Commission as there needs to be a conduit to trigger incidents, misuse, the volume of use, incident report, and reportable incident increase, and have a trigger point for review.

16. Should rights to seek review be limited to the person or a person concerned for their welfare? Should the service provider have a right to seek review of a decision not to authorise a restrictive practice?

Yes, rights to seek review should include an affected person, their guardian, carer, family member, or other support persons with a genuine concern for their welfare. However, there needs to be a safeguard for the person with a disability, ensuring their voice is heard over that of others.

NDIS providers should also be allowed to seek a review if a restrictive practice is not authorised, however, this should be the only reason unless there needs to be a review triggered after a significant incident.

17. Should a person have a right to request the service provider review the BSP at any time?

Yes, a person should have the right to request the service provider review the BSP at any time.

Proposals

Proposal 10: The Senior Practitioner should have powers to investigate the misuse of restrictive practices, on receipt of a complaint and on its own motion.

Proposal 11: The Senior Practitioner should have the following powers to respond to the misuse of a restrictive practice:

- direct the provider to do / cease doing something in relation to behaviour support or the use of the restrictive practice,
- cancel an authorisation,
- refer the matter to the NDIS Commission, police or another relevant entity.

18. Should the Senior Practitioner have complaints handling and investigation functions either on receipt of a complaint, on its own motion, or both?

Yes, the Council agrees the Senior Practitioner should have complaints handling and investigations functions on receipt of a complaint and on its own motion. This dual capability is essential for several reasons. When a complaint is received, the Senior Practitioner should have the necessary powers to thoroughly investigate the matter. This includes gathering evidence, interviewing relevant parties, and assessing the situation to determine if restrictive practices have been misused.

19. Do you agree the Senior Practitioner should have the proposed powers to respond to misuse of a restrictive practice?

Yes, the Council agrees that the Senior Practitioner should have the proposed powers to respond to the misuse of restrictive practices. However, it is crucial that Senior Practitioners are well-informed about the individual with a disability and the specific challenges they face. This ensures that restrictive practices are applied appropriately and for the correct duration.

Additionally, it is important to consider that people respond differently to various medications, and ongoing monitoring should be taken into account. The complaints handling and investigation functions, as well as the review process, need to be satisfactory to ensure that the person's rights are protected and their safety is maintained, without compromising their rights or their dignity as a person.

20. How should interaction with the NDIS complaints framework be managed?

Interaction with the NDIS complaints framework should be managed through information sharing and collaboration between the Senior Practitioner and the NDIS Commission.

21. To which bodies should the Senior Practitioner have the power to share information and in what circumstances should the Senior Practitioner be permitted to share information?

The Senior Practitioner should have the power to share information with entities such as the NDIS Commission and the police, particularly in non-compliance, misuse of restrictive practices, or when there is a need to protect the safety and rights of individuals with disabilities.

22. Are the means by which the Senior Practitioner would have visibility of the use of restrictive practices by NDIS providers proposed in this Paper sufficient? If not, what additional information should providers be required to report to the Senior Practitioner? How can reporting burden to the Senior Practitioner and the NDIS Commission be minimised?

The means are sufficient.

Proposals

Proposal 12: The Senior Practitioner should have the following functions:

- developing and providing information, education and advice on restrictive practices to people with disability, their families and supporters, and the broader community,

- developing guidelines and standards, and providing expert advice, on restrictive practices and behaviour support planning.

23. Do you agree the Senior Practitioner should have the proposed education and guidance functions?

Yes, the Senior Practitioner should have the proposed education and guidance functions to protect and promote the rights of people with disabilities subjected to restrictive practices.

Additional suggested function include:

- **Data Collection and Reporting:** Regular collection and analysis of data on using restrictive practices to inform policy changes and promote transparency.
- **Cross-Sector Coordination:** Enhanced coordination between different sectors (health, education, justice, NDIS) to ensure consistent application of restrictive practices principles.

24. Should the Senior Practitioner have the power to impose sanctions for the misuse of restrictive practices, or are existing sanctions for misuse of restrictive practices sufficient? How should the interaction between sanctions provided for under NDIS legislation and the proposed framework be managed?

The Senior Practitioner should have the power to impose sanctions for the misuse of restrictive practices, complementing existing NDIS sanctions, with clear guidelines to ensure coordination and avoid duplication.

25. Should the proposed framework provide for a legislated immunity from liability from the use of restrictive practices where the use was in accordance with an authorisation and done in good faith?

Yes, the proposed framework should provide for legislated immunity from liability for using restrictive practices when the use was in accordance with an authorisation and done in good faith.

26. Are there any other functions which the Senior Practitioner should have? Should providers in the disability service provision setting be subject to any other requirements?

The Senior Practitioner should have the authority to issue guidelines that clarify the use of restrictive practices and oversee the quality of behavior support plans. Providers should be mandated to report monthly on the use of restrictive practices before authorisation is granted. This ensures continuous oversight and accountability. Additionally, it is beneficial for providers to receive regular training, as clinical reports are often written in ways that support or advocate for the provider rather than benefiting the participant. By focusing on historical behaviors instead of current ones, these reports may not accurately reflect the participant's current needs and circumstances. Therefore, improving the quality of these reports through proper training and education is crucial for ensuring that the best interests of the participants are prioritised.

Potential Role of the NSW Ageing and Disability Commission

The NSW Ageing and Disability Commission (the Commission) could play a pivotal role in monitoring Positive Behaviour Support (PBS) plans, which could be essential for addressing restrictive practices.

The Commission could bring expert oversight to the monitoring process. With its specialised knowledge and authority, the Commission could ensure that PBS plans are implemented correctly and ethically. This oversight could be crucial in maintaining high standards of care and support for individuals with disabilities and older adults. By understanding the underlying reasons for challenging behaviours, carers could address these behaviours positively and respectfully, enhancing the quality of life for individuals in care.

Moreover, the Commission could be dedicated to safeguarding the rights of vulnerable individuals. By closely monitoring PBS plans, the Commission could ensure that restrictive practices are only used as a last resort. The goal could be to find alternative strategies that respect the individual's dignity and autonomy. This approach could help minimise the use of restrictive practices and ensure that individuals' rights are protected.

Regulatory compliance could be another critical aspect of the Commission's role. The Commission could ensure that service providers adhere to the NDIS Quality and Safeguarding Framework, emphasising reducing and eliminating restrictive practices. This compliance could be essential for maintaining the integrity and effectiveness of support services. The Commission's oversight could ensure that restrictive practices are applied ethically and responsibly, in line with regulatory standards.

Accountability could be a key component of the Commission's monitoring activities. By holding service providers accountable for their actions, the Commission could promptly identify and address any issues or concerns. This accountability could ensure that individuals receive the best possible care and support and that any misuse of restrictive practices is swiftly corrected.

Finally, the Commission's monitoring activities could contribute to the continuous improvement of support services. By identifying best practices and areas for improvement, the Commission could help service providers enhance the quality of care they offer. This continuous improvement could lead to a more respectful and supportive environment for individuals.

In summary, the future role of the NSW Ageing and Disability Commission in monitoring PBS plans could be vital for ensuring the safety, rights, and well-being of individuals. Their oversight could help maintain high standards, ensure regulatory compliance, and promote continuous improvement in support services. This approach could lead to a more ethical and effective management of restrictive practices, benefiting both individuals in care and the broader community.

Restrictive practices are an important issue for the Council, and the restrictive practices legislative framework will play a crucial role in combatting the abuse and mistreatment for people with disability in NSW. The Council trusts that its written comments and verbal feedback at the 19 February consultation will be carefully considered.

We thank you once again for the opportunity to provide our feedback.

Yours faithfully

A handwritten signature in black ink, appearing to read "Jane Spring".

Jane Spring AM
Chair

A handwritten signature in black ink, appearing to read "Jill Duncan".

Jill Duncan OAM
Deputy Chair

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