

# A legislative framework to regulate restrictive practices

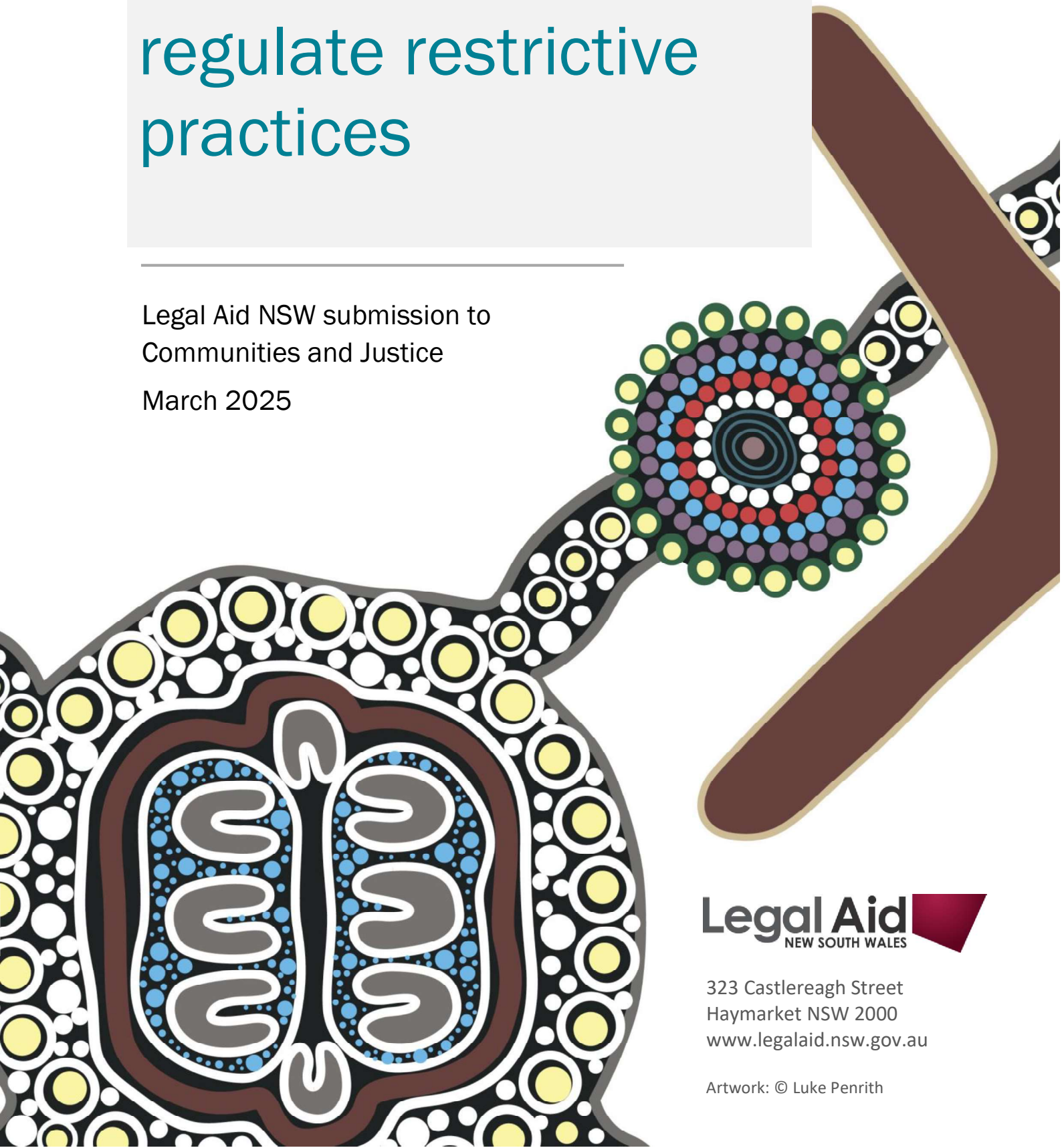
Legal Aid NSW submission to  
Communities and Justice

March 2025

**Legal Aid**  
NEW SOUTH WALES

323 Castlereagh Street  
Haymarket NSW 2000  
[www.legalaid.nsw.gov.au](http://www.legalaid.nsw.gov.au)

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## Acknowledgement

We acknowledge the traditional owners of the land we live and work on within New South Wales. We recognise continuing connection to land, water and community.

We pay our respects to Elders both past and present and extend that respect to all Aboriginal and Torres Strait Islander people.

Legal Aid NSW is committed to working in partnership with community and providing culturally competent services to Aboriginal and Torres Strait Islander people.

## 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.

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 Family Law Division provides services in Commonwealth family law and state child protection law.

Specialist services focus on the provision of family dispute resolution services, family violence services, services to Aboriginal families and the early triaging of clients with legal problems.

Legal Aid NSW provides duty services at all Family and Federal Circuit Court registries and circuit locations through the Family Advocacy and Support Services, all six specialist Children's Courts, and in some Local Courts alongside the Apprehended

Domestic Violence Order lists. Legal Aid NSW also provides specialist representation for children in both the family law and care and protection jurisdiction.

The Civil Law Division provides advice, minor assistance, duty and casework services from the Central Sydney office and most regional offices. The purpose of the Civil Law Division is to improve the lives of people experiencing deep and persistent disadvantage or dislocation by using civil law to meet their fundamental needs. Our civil lawyers focus on legal problems that impact on the everyday lives of disadvantaged clients and communities in areas such as housing, social security, financial hardship, consumer protection, employment, immigration, mental health, discrimination and fines. The Civil Law practice includes dedicated services for Aboriginal communities, children, refugees, prisoners and older people experiencing elder abuse.

The Criminal Law Division assists people charged with criminal offences appearing before the Local Court, Children's Court, District Court, Supreme Court, Court of Criminal Appeal and the High Court. The Criminal Law Division also provides advice and representation in specialist jurisdictions including the State Parole Authority and Drug Court.

Should you require any further information, please contact:

Phoebe Mountain

Strategic Law Reform Unit

[phoebe.mountain@legalaid.nsw.gov.au](mailto:phoebe.mountain@legalaid.nsw.gov.au)

## Executive Summary

Legal Aid NSW welcomes the opportunity to make a submission to the Department of Communities and Justice (DCJ) Consultation Paper on a legislative framework to regulate restrictive practices (**the consultation paper**).<sup>1</sup>

In 2019, Legal Aid NSW made a submission to the Department of Premier and Cabinet's review of restrictive practices authorisation in NSW.<sup>2</sup> In 2021, Legal Aid NSW made a submission to DCJ on the Persons with Disability (Regulation of Restrictive Practices) Bill 2021.<sup>3</sup> The concerns we raised in these submissions about the use of restrictive practices continue to apply.

In our experience, the use of restrictive practices can cause immense harm to people living with a disability. 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.

Legal Aid NSW is concerned that the framework DCJ has proposed in the consultation paper (**the proposed framework**) leaves serious gaps in the protection of people with a disability from the use of restrictive practices.

The Royal Commission recommended at 6.35(a):

States and territories should ensure appropriate legal frameworks are in place in disability, health, education and justice settings, which provide that a person with disability should not be subjected to restrictive practices, except in accordance with procedures for authorisation, review and oversight established by law.<sup>4</sup>

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<sup>1</sup> NSW Department of Communities and Justice, *A legislative framework to regulate restrictive practices* (Consultation paper, December 2024).

<sup>2</sup> Legal Aid NSW, Submission to the Department of Premier and Cabinet, *Review of restrictive practices authorisation in NSW* (3 September 2019).

<sup>3</sup> Legal Aid NSW, Submission to the Department of Communities and Justice, *Persons with Disability (Regulation of Restrictive Practices) Bill 2021* (25 February 2021).

<sup>4</sup> *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (Final Report, September 2023) vol 6, 32.

In our view, the proposed framework does not align with recommendation 6.35(a) and would have a much more limited operation than recommended by the Royal Commission. The proposed framework would require only disability service providers to follow an authorisation process and apply only to NDIS participants.

The proposed framework would allow government agencies to continue to use restrictive practices with no authorisation procedures and minimal review and oversight. The requirement for government agencies to submit an annual report is in our view unsatisfactory and inadequate to address the concerns of the people with disabilities in NSW and the urgent need for real reform.

Legal Aid NSW's position is that a legislative framework should cover all settings. We support additional oversight and monitoring of the use of restrictive practices on persons with a disability in all spaces where they are used. In particular, we have set out our concerns about the use of restrictive practices in the out-of-home care, education, youth justice, justice, mental health care, and aged care settings.

Given our reservations about the model that DCJ has proposed, in this submission, we use the term **the proposed framework** when discussing the specific framework DCJ has proposed in the consultation paper, and the term **the restrictive practices legislation** to refer to the broader framework recommended by Legal Aid NSW.

In regard to the proposed model, Legal Aid supports the following key features:

- prohibiting the use of the restrictive practices identified by the Disability Reform Council
- introducing a Senior Practitioner and Authorised Program Officers to oversee the use of restrictive practices.
- empowering the Senior Practitioner to issue guidelines and provide education, to handle complaints and to undertake investigations
- introducing measures to improve the quality of BSPs
- providing internal and external review options in relation to authorisation decisions.

Legal Aid recommends improving the proposed model by:

- empowering the Senior Practitioner to issue determinations about whether a restrictive practice is involved in an individual's care
- providing an alternative approval option in regional and remote areas where an APO is unavailable
- addressing how the additional authorisation and review requirements will be funded
- addressing how the proposed framework will impact on NDIS participants residing in group homes.

## Recommendations

### Recommendation 1

The restrictive practices legislation<sup>5</sup> should:

- prioritise the rights of children and young people in OOHC.
- cover all children and young people in the out-of-home care setting, not just children and young people who are NDIS participants.
- maintain the current prohibition on the use of seclusion and chemical restraint as against all children in OOHC.

### Recommendation 2

- The restrictive practices legislation should apply the use of restrictive practices on any person with a disability, not just NDIS participants.
- The legislation should apply to all settings where restrictive practices are used. In particular, the restrictive practices legislation should be extended to the education, justice, youth justice, and aged care settings.

### Recommendation 3

- The NSW Government should amend the *Children (Detention Centres) 1987 Act* (NSW) to restrict the use of restrictive practices in youth justice settings.

### Recommendation 4

- The *Crimes (Administration of Sentences) Act 1999* (NSW) should be amended to expressly deal with the use of restrictive practices on persons with disabilities in custody.

### Recommendation 5

- The *Mental Health Act 2007* (NSW) should be amended to regulate the use of restrictive practices in mental health care settings, with the aim of reducing and eliminating their use.

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<sup>5</sup> The term the “restrictive practices legislation” refers to the broader framework recommended by Legal Aid NSW, not the framework proposed in the Consultation Paper.



### Recommendation 6

- Restrictive practices legislation should prohibit the use of restrictive practices in disability, health, education and justice settings, except in accordance with the requirements recommended by DRC recommendation 6.35(b).

### Recommendation 7

- Health, education and justice providers should be subject to the same authorisation process and oversight as disability service providers.

### Recommendation 8

The restrictive practices legislation should:

- adopt the principles recommended in the DRC final report.
- comply with Australia's international obligations under the Convention on the Rights of Persons with Disabilities.

### Recommendation 9

- The restrictive practices legislation should prohibit the use of the restrictive practices identified by the Disability Reform Council on any person with a disability in any setting.

### Recommendation 10

- The use of confinement and seclusion as a form of discipline, punishment or threat in OOHC, youth justice, and education settings should be prohibited.
- The prohibitions on the use of certain restrictive practices in the education setting should be extended as against all students.

### Recommendation 11

The Senior Practitioner should have the power to:

- a) issue guidelines that clarify how the definitions apply in different situations.
- b) give guidance on the use of restrictive practices on persons with a disability in all settings.

The restrictive practices legislation should specify the legal effect of this guidance.

### *Recommendation 12*

- The restrictive practices legislation should make provision for NDIS participants and NDIS service providers to seek a determination from the Senior Practitioner on whether a restrictive practice is involved in an individual's care.
- The Senior Practitioner should have the power to undertake an initial assessment and make a determination about whether there is a restrictive practice involved in an individual's care.
- Determinations and guidelines issued by the Senior Practitioner should be subject to external review.

### *Recommendation 13*

- DCJ should work with the disability community to develop the authorisation model and requirements for Behaviour Support Plans.

### *Recommendation 14*

Behaviour Support Plans should be improved by:

- a) documenting the views of the person consulted in the Behaviour Support Plan
- b) documenting the other strategies that have been and will be explored and applied as alternatives to the restrictive practice
- c) requiring an 'independent person' to be available to explain the proposed use of the restrictive practice, and to inform the person the review options available to them, as per the Victorian model.

### *Recommendation 15*

- NDIS participants should be funded to meet any additional authorisation and review requirements required under the restrictive practices legislation.
- The proposed framework needs to address the interaction with Chapter 3 of the National Disability Insurance Scheme Act 2013 (Cth), which deals with participants and their plans.

### *Recommendation 16*

- DCJ should give consideration to how the proposed framework will impact on NDIS participants residing in group homes and include measures to ensure the framework does not have unintended consequences for these participants.

### *Recommendation 17*

- Legal Aid NSW supports a two-step model of authorisation of restrictive practices, to share the workload of monitoring and approving restrictive practices across Authorised Program Officers and the Senior Practitioner, and to ensure the independence of the final decision maker.

### *Recommendation 18*

- NDIS participants should not be required to bear the cost of administering the proposed framework through their individual NDIS funding.
- The proposed framework must be accompanied by sufficient funding to ensure it does not act as a barrier to NDIS participants receiving disability support.

### *Recommendation 19*

- The NSW Government should introduce a restrictive practices panel, to act as the decision maker in the use of restrictive practices outside of the NDIS.
- The restrictive practices panel should be empowered to make decisions in circumstances where an Authorised Program Officer is unavailable.

### *Recommendation 20*

- The proposed framework should contain clear and specific timeframes for providers to seek authorisation, and for Authorised Program Officers and Senior Practitioners to make decisions.

### *Recommendation 21*

- The Senior Practitioner should have the power to cancel an authorisation of restrictive practices where the relevant provider has otherwise engaged in misuse of the restrictive practice.

#### *Recommendation 22*

- Authorisation decisions should be open to internal review by the Senior Practitioner and review at NCAT.
- Senior Practitioner's Guidelines should be open to internal review and review at NCAT.
- To address the risk of long delays in the internal review process, there should be a deemed negative decision where the complainant has not received a response from the Senior Practitioner within 28 days.

#### *Recommendation 23*

- Service providers should have a right to seek review of a decision not to authorise restrictive practices.

#### *Recommendation 24*

- The restrictive practices legislation should clearly define circumstances in which the Senior Practitioner can share information with other oversight bodies.

#### *Recommendation 25*

- The Senior Practitioner should have the proposed education and guidance functions.
- The Senior Practitioner should be empowered to give guidance on the use of restrictive practices in non-NDIS settings.

#### *Recommendation 26*

- Individuals who have been subject to the unauthorised use of restrictive practices should have recourse to apply for nominal damages.

#### *Recommendation 27*

- The proposed framework should not include a legislated immunity.

# Questions and feedback on proposals

## Question 1: Should the proposed legislative framework cover the out of home care setting?

Legal Aid NSW's view is that the use of restrictive practices by OOHC service providers should be subject to greater regulation and oversight. We support introducing legislative principles with the overarching goal of reducing and eliminating the use of restrictive practices on children and young people in OOHC. However, there are important considerations that DCJ would need to address before Legal Aid NSW could recommend extending the proposed framework to the OOHC space.

In our view, any framework that applies to the OOHC must prioritise the rights of children and young people in OOHC. It should recognise that children and young people are in a stage of development, and the potential impact that the use of restrictive practices can have on that development.

We note that there is existing legislation, policy and common law that regulates the use of restrictive practices on children and young people in OOHC and prohibits the use of certain forms of restrictive practices altogether.

The *DCJ Behaviour support in out-of-home-care policy (DCJ policy)*<sup>6</sup> requires a Behaviour Support Plan (BSP) to be in place when approved restrictive practices are recommended, including if a behaviour support expert determines that physical restraint is required to keep the child safe and if a medical practitioner or specialist prescribes the child psychotropic medication.<sup>7</sup> The *Children and Young Persons (Care and Protection) Regulation 2022* and *Children and Young Persons (Care and Protection) Act 1998* also regulate the use of certain restrictive practices.<sup>8</sup>

The DCJ policy contains a list of prohibited practices, which includes (amongst other practices):

- chemical restraint,
- seclusion, and

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<sup>6</sup> NSW Department of Communities & Justice, *Behaviour support in out-of-home care* (February 2021).

<sup>7</sup> Ibid, 25.

<sup>8</sup> See *Children and Young Persons (Care and Protection) Act 1998*, s 158 and *1998 Children and Young Persons (Care and Protection) Regulation 2022*, regs 46, 47, 49.



- using psychotropic medication or physical restraint as the only behaviour support strategy for a child.<sup>9</sup>

This policy extends to all children in OOHC, regardless of whether they are an NDIS participant. However, it does not apply to non-government out-of-home care providers and provides limited avenues for oversight of the use of restrictive practices.

At a minimum, the restrictive practices legislation would need to maintain the current prohibition on the use of seclusion and chemical restraint as against all children in the OOHC space, not just NDIS participants.

Our lawyers see a benefit in introducing a Senior Practitioner with clinical expertise in behaviour support and the use of restrictive practices, supported by staff with clinical expertise, to give central authorisation to the use of restrictive practices in OOHC. The current model of authorisation is complex and whilst it allows options for children and young people to make complaints, it does not provide avenues for review or appeal.<sup>10</sup>

We also note that the restrictive practices legislation would be operating alongside the inherent *parens patriae* jurisdiction of the Supreme Court. The *parens patriae* jurisdiction which is often described as a supervisory jurisdiction,<sup>11</sup> is protective in nature, and allows the court to exercise independent judgment on the best interests of a child. We note the *parens patriae* jurisdiction will continue to be available and necessary to determining whether children and young people in OOHC can be subject to certain restrictive practices, including for ordering non-consensual medical treatment and the use of certain medications.

## Children and young people with disabilities in OOHC

Legal Aid NSW is also concerned that the proposed framework could lead to children and young people in the OOHC setting who are NDIS participants having restrictive practices applied to them inconsistently across different care settings based on whether the restrictive practice is being used by an NDIS provider or a OOHC provider.

This is further complicated by the fact that, in our experience, many children with disabilities in OOHC who may be subject to restrictive practices are not NDIS participants. Some of the reasons why children and young people with disabilities may not have access to the NDIS include:

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<sup>9</sup> NSW Department of Communities & Justice, *Behaviour support in out-of-home care* (February 2021) 21.

<sup>10</sup> *Ibid*, 24.

<sup>11</sup> *Re Frances and Benny* [2005] NSWSC 1207.

- Children and young people have limited ability to advocate for themselves to receive NDIS funding and rely on family, carers or caseworkers to advocate on their behalf.
- To be eligible for the NDIS a person must be diagnosed with a medical condition that causes permanent impairment. Children and young people are less likely to meet this criterion because their conditions are less likely to be stable than in adults.

In our experience, despite not having been assessed as eligible for the NDIS, many children have disabilities that are recorded and are known to those responsible for their care in the OOHC setting.

Legal Aid NSW therefore does not recommend introducing a legislative framework to regulative restrictive practices in OOHC that would apply to only NDIS participants and not to other children and young people in OOHC. Legal Aid NSW recommends the existing approach taken in the DCJ policy, which applies whenever restrictive practices are used to respond a child's behaviour, regardless of whether they are an NDIS participant or have a diagnosed disability.<sup>12</sup>

### Recommendation 1

The restrictive practices legislation should:

- prioritise the rights of children and young people in OOHC.
- cover all children and young people in the out-of-home care setting, not just children and young people who are NDIS participants.
- maintain the current prohibition on the use of seclusion and chemical restraint as against all children in OOHC.

### Question 2: Should the proposed legislative framework cover any other setting?

Legal Aid NSW's position is that restrictive practices legislation should cover all settings. We support additional oversight and monitoring of the use of restrictive practices on persons with a disability in all spaces where they are used.

The NSW Government's consultation into Restrictive Practices Authorisation in NSW in 2019 found:

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<sup>12</sup> NSW Department of Communities & Justice, *Behaviour support in out-of-home care* (February 2021) 10-12

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. Most respondents said that restrictive practices should be authorised before they can be used in all settings.<sup>13</sup>

Legal Aid NSW supports this position.

### Recommendation 2

- The restrictive practices legislation should apply the use of restrictive practices on any person with a disability, not just NDIS participants.
- The legislation should apply to all settings where restrictive practices are used. In particular, the restrictive practices legislation should be extended to the education, justice, youth justice, and aged care settings.

Our additional comments on the use of restrictive practices in different settings are below.

### Education

Schools (both government and non-government) have daily care of a large number of children with disability. In our view, these types of service providers should be subject to the same regulations that govern the use of restrictive practices by NDIS providers.

### Youth Justice

The restrictive practices legislation should extend to all young people with a disability in youth justice centres. Legal Aid NSW has serious concerns about how children and young people with disabilities are disciplined in youth justice settings. These young people are amongst the most vulnerable people in the State and should receive greater oversight and protection afforded by legislation.

Practices which amount to restrictive practices when used on a person with a disability, including confinement, are expressly approved responses to misbehaviour in youth justice centres.<sup>14</sup>

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<sup>13</sup> NSW Government, *Restrictive Practices Authorisation in NSW* (Consultation findings report, September 2019) 8.

<sup>14</sup> *Children (Detention Centres) Act 1987* (NSW), s 21(1)(d).

The Ombudsman reported that in the 2023-2024 financial year, young people were separated from rest of the prison population, or segregated in isolation, for more than 24 hours a total of 878 times.<sup>15</sup> Given the overrepresentation of young people with a disability in the youth justice system,<sup>16</sup> it is likely that in many of these instances, the young person concerned was living with a disability.

We note DRC recommendation (8.3):

States and territories should:

- a. introduce legislation to prohibit solitary confinement in youth justice settings (being the enforced isolation or segregation for any purpose of a child or young person for 22 or more hours in any day); and
- b. introduce legislation to prohibit the use of isolation (however described) in youth detention centres as punishment in any circumstance.<sup>17</sup>

In our view, changes to the use of restrictive practices in Youth Justice settings are urgently needed. The restrictive practices legislation should apply to Youth Justice settings and in addition to this, Legal Aid NSW recommends review of the *Children (Detention Centres) Act 1987* (NSW) to restrict the use of restrictive practices in this environment.

### Recommendation 3

- The NSW Government should amend the *Children (Detention Centres) 1987 Act* (NSW) to restrict the use of restrictive practices in youth justice settings.

## Justice

While people with disabilities are overrepresented in custody, in our experience, they are less likely to be NDIS participants, due to the rules around what supports the NDIA can

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<sup>15</sup> NSW Ombudsman, *Annual Report 2023-2024* (Report, 31 October 2024) 112.

<sup>16</sup> 'Development of a Youth Justice Disability Action Plan - Improving outcomes for young people with a disability involved with Youth Justice' NSW Department of Communities and Justice (Web Page, 20 December 2023) <<https://dcj.nsw.gov.au/community-inclusion/disability-and-inclusion/disability-inclusion-action-plan/projects/development-of-a-youth-justice-disability-action-plan-improving-outcomes-for-young-people-with-a-disability-involved-with-youth-justice.html>>

<sup>17</sup> *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (Final Report, September 2023) vol 8, 20.

fund while a person is in custody<sup>18</sup> and the practical barriers to accessing NDIS services in a custodial setting.

The following case study illustrates the difficulty in accessing the NDIS in custody:

### **Allen's story - applying for the NDIS in prison<sup>19</sup>**

Allen was diagnosed with ADHD while in primary school and was diagnosed with a mild intellectual disability at age 14. He has poor literacy skills.

As an adult, he was charged with a serious offence. The court found that he was unable to follow court processes to defend his charges and found him unfit to be tried. The court found that on the limited evidence available, Allen committed the offence and Allen was held in custody as a forensic patient.

Alfred applied for the NDIS for the first time while he was in custody. Despite Allen's status as a forensic patient and his permanent impairments, his application was refused.

Legal Aid NSW assisted Allen to obtain a functional capacity report. This report was then used to demonstrate his eligibility for the NDIS and to obtain funding for drop-in support and behaviour support in the community. Without Legal Aid NSW' support, it is unlikely that Allen would have access to the NDIS.

This means that while the proposed framework would apply to these individuals if they were in the community, it would not apply to them while they are in custody. To ensure this group of people still benefit from the protection of the restrictive practices legislation, Legal Aid NSW supports extending the protections to persons with a disability in custody in addition to all young people in custody.

### **Disciplinary practices in NSW corrections centres**

Legal Aid NSW is concerned that current disciplinary practices within correctional centres rely heavily on restrictive practices. These practices need to be reviewed, before restrictive practices legislation can be successfully implemented in the correctional setting.

James' Story illustrates some of the systemic issues for people with disabilities in prison and shows how a lack of appropriate disability support in prison, including access to medication, can directly lead to behaviours of concern and to the use of restrictive

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<sup>18</sup> *National Disability Insurance Scheme (Supports for Participants) Rules 2013* (Cth) r 7.25

<sup>19</sup> All case studies in this submission have been de-identified.



practices by prison guards. Legal Aid NSW included James' story in our 2022 submission to the Disability Royal Commission.<sup>20</sup>

### James' Story – lack of access to medication leading to seclusion

James lives with multiple, complex mental health disabilities, including schizo-affective disability.

James was in custody in the maximum-security section of a prison. He behaved well in prison and followed all prison rules and regulations. As a result, he was re-classified and moved to a minimum-security section of a prison, enjoying more freedoms and improved conditions.

When James moved sections, he was informed by the CSNSW staff that his medical paperwork had not yet been transferred and as a result, they did not yet have the authority to give him his prescribed medications.

Within two weeks of not being able to access his medication, James' mental health deteriorated. He repeatedly asked for access to his medication. During this time, he started to experience delusions and became psychotic, harassing prison guards and putting himself and other prisoners at significant risk of harm.

As a result of his behaviours, James was placed in isolation and then returned to the maximum-security section of the prison. Since being placed back in maximum security, his mental health has deteriorated.

Given the complexities in the interaction between restrictive practices and disciplinary practices, Legal Aid NSW also recommends review of the *Crimes (Administration of Sentences) Act 1999* (NSW) to expressly deal with the use of restrictive practices on persons with disabilities in custody.

### Recommendation 4

- The *Crimes (Administration of Sentences) Act 1999* (NSW) should be amended to expressly deal with the use of restrictive practices on persons with disabilities in custody.

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<sup>20</sup> Legal Aid NSW, Submission to the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Issues affecting prisoners with disability in NSW* (December 2022) 28-29.

## Mental Health Care

Legal Aid NSW strongly supports greater regulation and oversight of the use of restrictive practices in mental health care settings. Our lawyers noted that in our experience, people in closed environments, such as mental health facilities are particularly vulnerable to the use of unauthorised restrictive practices.

Lizzie's story is an example of how mental health facilities can use restrictive practices for extended periods of time. National Legal Aid included Lizzie's story in its 2022 submission to the Disability Royal Commission.<sup>21</sup>

### Lizzie's story

Lizzie is an involuntary patient in a secure mental health facility. Lizzie assaulted a member of staff and was placed in seclusion. Lizzie was then transferred to another secure mental health facility where she was placed in seclusion intermittently, then detained in seclusion permanently for six years.

Since that time, Lizzie has only returned to seclusion on an infrequent and very short-term basis. Lizzie remains in the secure mental health facility and requires extensive rehabilitation after being kept in seclusion for six years.

Legal Aid NSW recognises that DCJ has created the proposed framework with a focus on the NDIS service provider space. In our view, this model cannot be readily adapted to mental health care settings.

For example, the proposed framework centres around the use of behaviour support plans, drafted by behaviour support practitioners. This model would be unsuitable and impractical for a mental health ward, where patients are under the care of a psychiatrist. The proposed framework also contemplates a process for the emergency use of restrictive practices, however this process has been proposed in reference to the actions of an NDIS service provider and not health care providers.

Legal Aid NSW therefore recommends that DCJ gives consideration to how the use of restrictive practices can be reduced with the aim of elimination, specifically in the area of mental health care.

Currently, the use of restrictive practices in mental health wards is governed by NSW Health policy documents. The *Mental Health Act 2007* (NSW), is silent on the use of restrictive practices in this setting, despite their frequent use.<sup>22</sup> The DRC notes "All states

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<sup>21</sup> National Legal Aid, *National Legal Aid submission to Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (2 November 2022) 63.

<sup>22</sup> The *Mental Health Act 2007* (NSW)

and territories other than New South Wales have legislation regulating the use of restrictive practices in mental health settings.”<sup>23</sup>

As a starting point, Legal Aid NSW supports the approach taken in Victoria, where the use of restrictive interventions by mental health and wellbeing service providers is regulated under the *Mental Health and Wellbeing Act 2022 (Vic)* with the aims of reducing and eliminating their use.<sup>24</sup>

### Recommendation 5

- The *Mental Health Act 2007* (NSW) should be amended to regulate the use of restrictive practices in mental health care settings, with the aim of reducing and eliminating their use.

### Question 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?

As NDIS participants age, disability and aged care providers will increasingly service the same cohort of people. Differing frameworks for the authorisation of restrictive practices will create confusion for care providers, families, and individuals about their rights and the proper use of restrictive practices. People will not receive consistent care when transitioning between services, affecting their continuity of care.

In our experience, the aged care system shares many similarities with the disability service provision setting. Like in the disability service provision setting, in the aged care setting, it is necessary for an individual to have a Behaviour Support Plan<sup>25</sup> in place before they can be subject to restrictive practices. In each setting, service providers are permitted to use restrictive practices in an emergency.<sup>26</sup>

Legal Aid NSW is concerned that if the restrictive practices legislation does not apply to people in the aged care setting, then older people with disabilities will not have the same level of protection as other people with disabilities in NSW. Legal Aid NSW is of the view that the same overarching protections should apply to both settings.

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<sup>23</sup> *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (Final Report, September 2023) vol 6, 454.

<sup>24</sup> *Mental Health and Wellbeing Act 2022 (Vic)* Part 3.7.

<sup>25</sup> *Quality of Care Principles 2014* (Cth) div 2.

<sup>26</sup> This will be subject to Rules under subsection 18(2) of the *Aged Care Act 2024* (Cth).

The *Aged Care Act 2024* (Cth), which will commence on 1 July 2025, uses a consent-based model, under which decisions about the use of restrictive practices are made by the care recipient,<sup>27</sup> or by a restrictive practices substitute decision-maker (RPSDM) if the care recipient lacks capacity to provide consent.<sup>28</sup> We note that this model differs from the proposed framework, which would introduce an Authorised Program Officer (APO) and Senior Practitioner to make decisions about the use of restrictive practices. We discuss the role of consent in the restrictive practices authorisation model below at page 24.

#### **Question 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)?**

### **Legal Requirements**

Legal Aid NSW supports introducing legislation that prohibits the use of restrictive practices in disability, health, education and justice settings, except in accordance with the requirements recommended by DRC recommendation 6.35(b).<sup>29</sup>

Legal Aid NSW's view is that Proposals 1 and 2 in the Consultation Paper are insufficient to address the need identified by the DRC. The DRC recommends that states and territories introduce legal frameworks, "which provide that a person with a disability should not be subjected to restrictive practices, except in accordance with procedures for authorisation, review and oversight established by law".<sup>30</sup> DRC Recommendation 6.35(b) states that "the legal frameworks should incorporate the following requirements". [emphasis added].<sup>31</sup>

It is significant that Proposal 1 contemplates introducing governing "principles" instead of imposing legal requirements. In our view, this would be a weaker framework than that proposed by the DRC.

Legal Aid NSW is also concerned that the proposed framework would establish a dual model, in which disability service providers must comply with an authorisation process,

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<sup>27</sup> The *Aged Care Act 2024* (Cth) s 18.

<sup>28</sup> The *Aged Care Act 2024* (Cth) ss 18(2)

<sup>29</sup> *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (Final Report, September 2023) vol 6, 32.

<sup>30</sup> Ibid.

<sup>31</sup> Ibid.

whereas, government agencies and service providers in health, education and justice settings would be subject to minimal review and oversight.

Our view is that like disability providers, health, education and justice providers should be required to apply for authorisation to use restrictive practices. There should also be clear procedures in place for the emergency use of restrictive practices in these settings.

The proposal that government agencies in the health, education and justice settings provide an annual report to the Senior Practitioner on compliance with the principles is in our view, insufficient to address the concerns raised by the DRC and, without further regulation and oversight, are unlikely to lead to any meaningful change in the use of restrictive practices in these settings.

#### **Recommendation 6**

- Restrictive practices legislation should prohibit the use of restrictive practices in disability, health, education and justice settings, except in accordance with the requirements recommended by DRC recommendation 6.35(b).

#### **Recommendation 7**

- Health, education and justice providers should be subject to the same authorisation process and oversight as disability service providers.

### **A person with a disability**

A consistent theme of the DRC report is that gaps and inconsistencies in the oversight and regulatory frameworks governing disability have led to harm to people with disabilities.<sup>32</sup> Legal Aid NSW is concerned that rather than responding to this issue, the proposed framework would further this issue by introducing new gaps and inconsistencies to the oversight of the use of restrictive practices.

We are concerned that if the proposed framework is only applicable to NDIS participants, it would give rise to a scenario where people in similar situations subject to similar practices may have the benefit of different regulatory frameworks.

In our experience, many Legal Aid NSW clients living with disabilities face significant challenges accessing the NDIS scheme. There is a large cohort of people in NSW who

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<sup>32</sup> *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (Final Report, September 2023) vol 11.



have disabilities and who are not NDIS participants and they should be equally protected by any framework adopted.

Legal Aid NSW supports an overarching authorisation mechanism that applies to all people with disabilities in all settings, to ensure that people are not subject to unregulated use of restrictive practices.

### **Question 5: Are there any other principles that should be considered?**

Legal Aid supports the adoption of the principles recommended in the DRC final report.

We also note that Australia has human rights obligations in regard to the use of restrictive practices. Australia is a signatory to the Convention on the Rights of Persons with Disabilities,<sup>33</sup> under which State parties must protect the legal capacity, liberty and security, and physical and mental integrity, of persons with a disability, on an equal basis with others.<sup>34</sup>

### **Recommendation 8**

The restrictive practices legislation should:

- adopt the principles recommended in the DRC final report.
- comply with Australia's international obligations under the Convention on the Rights of Persons with Disabilities.

### **Question 6: Should a legislative framework prohibit any practices? If so, which practices and in which settings?**

Legal Aid NSW's position is that proposed framework should prohibit the use of the restrictive practices identified by the Disability Reform Council in December 2019.<sup>35</sup> The framework should prohibit the use of such practices on any person with a disability in any setting.

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<sup>33</sup> *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008).

<sup>34</sup> For a detailed discussion of Australia's Human Rights obligations in relation to the use of restrictive practices on persons with a disability see Rosemary Kayess and Therese Sands, *Convention on the Rights of Persons with Disabilities: Shining a light on Social Transformation* (Research Report, September 2020).

<sup>35</sup> NSW Department of Communities and Justice, *A legislative framework to regulate restrictive practices* (Consultation paper, December 2024) app B.

## Recommendation 9

- The restrictive practices legislation should prohibit the use of the restrictive practices identified by the Disability Reform Council on any person with a disability in any setting.

## Children and young people

Legal Aid NSW strongly supports the prohibition of restrictive practices of confinement and seclusion, as a form of discipline, punishment or threat. This is particularly relevant in the out of home care space and the youth detention space. We refer to our discussion of OOHC above at Question 1, our discussion of youth justice above at Question 2, and DRC recommendation 8.3.<sup>36</sup>

We also refer to the Legal Aid NSW submission to the Inquiry into children and young people with disability in NSW educational settings.<sup>37</sup> Legal Aid NSW recommends enacting legislation to prohibit the use of the restrictive practices identified by the Disability Reform Council, as against any student.

In addition to this list, Legal Aid NSW recommends that the restrictive practices legislation prohibit the use of the following in educational settings as against any student:

- the use of chemical restraints
- the use of mechanical constraints
- the use of restrictive practices as a means of coercion or retaliation, or a form of discipline, punishment or threat
- the use of restrictive practices in response to property destruction
- the use of restrictive practices as a behaviour support strategy
- the use of restrictive practices for reasons of convenience
- the use of restrictive practices to enforce the compliance of a student in undertaking personal care that is non-urgent and does not present a risk to the student.<sup>38</sup>

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<sup>36</sup> *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (Final Report, September 2023) vol 8, 20.

<sup>37</sup> Legal Aid NSW, Submission to Legislative Council Portfolio Committee No. 3- Education, *Inquiry into children and young people with disability in NSW educational settings* (February 2024).

<sup>38</sup> This recommendation was adopted from recommendation 7.3 of the *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (Final Report, September 2023) vol 7.

### Recommendation 10

- The use of confinement and seclusion as a form of discipline, punishment or threat in OOHC, youth justice, and education settings should be prohibited.
- Prohibitions on the use of certain restrictive practices in the education setting should be extended as against all students.

### Question 7: Do you agree that:

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

Legal Aid NSW supports using the existing NDIS definitions for the reasons set out in the Consultation Paper.

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

Legal Aid NSW agrees that the Senior Practitioner should have the power to issue guidelines that clarify how the definitions apply. In our view, disability service providers will be more likely to comply with the legislative requirements if they are given clear guidance on what amounts to a restrictive practice.

The Senior Practitioners should be empowered to give guidance on the use of restrictive practices on persons with a disability in all settings where restrictive practices are used, not just in disability service provision. The restrictive practices legislation should also specify the legal effect of this guidance in these settings.

### Recommendation 11

The Senior Practitioner should have the power to

- c) issue guidelines that clarify how the definitions apply in different situations.
- d) give guidance on the use of restrictive practices on persons with a disability in all settings.

The restrictive practices legislation should specify the legal effect of this guidance.

### Senior Practitioner Determinations

Legal Aid NSW also submits that the proposed framework should contain a process for the Senior Practitioner to determine whether a specific practice in a particular circumstance 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.<sup>39</sup> 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.<sup>40</sup>

In our experience, issues in relation to restrictive practices arise in Administrative Appeals Tribunal (AAT) proceedings (now the Administrative Review Tribunal) and can cause delays in the approval of needed supports for our clients.

The following case illustrates these issues:

### Case Summary – RKKR and NDIA<sup>41</sup>

RKKR is a young person with autism spectrum disorder and an intellectual disability. At the time of this decision, he was 12-years-old. He required constant supervision and was fully dependent on his parents for self-care.

In this case, RKKR’s parents applied to the Administrative Appeals Tribunal (**AAT**) on his behalf for (amongst other things) NDIS funding to increase the height of the fence at their home.

RKKR’s family lived on a busy road and his parents were worried that he would climb over the existing fence and injure himself. RKKR’s family gave the AAT reports from RKKR’s psychiatrist and two occupational therapists supporting increasing the fence height.

The AAT acknowledged that RKKR’s family had legitimate concerns about the fence but said that they could not approve funding for the fence. The AAT found that the fence is a restriction on RKKR’s freedom of movement and therefore a restrictive practice. The AAT said that it could not fund the use of the proposed restrictive practice because it has not been authorised in NSW in accordance with the *NSW Restrictive Practices Authorisation Policy – June 2019*.

We suggest that, at the instigation of a provider or a participant, the Senior Practitioner should be able to undertake an initial assessment and make a determination about

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<sup>39</sup> *National Disability Insurance Scheme (Restrictive Practices and Behaviour Support) Rules 2018* (Cth), r 6.

<sup>40</sup> *Ibid*, r 6(c).

<sup>41</sup> RKKR and National Disability Insurance Agency [2024] AATA 2913 (15 August 2024)

whether there is a restrictive practice involved in a person's care. In our view, it is important that a participant can approach the Senior Practitioner for such a determination, so that the participant is not reliant on the provider to make an application. 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.

Legal Aid NSW also recommends that determinations and guidelines issued by the Senior Practitioner be subject to external review.

### *Recommendation 12*

- The restrictive practices legislation should make provision for NDIS participants and NDIS service providers to seek a determination from the Senior Practitioner on whether a restrictive practice is involved in an individual's care.
- The Senior Practitioner should have the power to undertake an initial assessment and make a determination about whether there is a restrictive practice involved in an individual's care.
- Determinations and guidelines issued by the Senior Practitioner should be subject to external review.

### **Question 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?**
- **Should the Senior Practitioner have the power to require a behaviour support practitioner to 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?**
- **Should there be any specific provisions relating to consultation in the development of a BSP, in addition to the requirements in the NDIS Rules?**

### **Question 9: Is there anything else the proposed framework should do to improve the quality of BSPs?**

In principle, Legal Aid NSW supports legislating to improve the quality of BSPs and generally supports the Senior Practitioner having the powers proposed. Legal Aid NSW

supports giving the Senior Practitioner the power to require that a BSP practitioner have certain qualifications. This is for two reasons:

- i) any constraint on a person's liberty is a serious matter; and
- ii) compliance with the regulatory regime around restrictive practices is complicated and requires knowledge and expertise.

However, Legal Aid NSW also holds concerns that this could lead to a shortage of appropriately qualified behaviour support practitioners to prepare BSPs that comply with the proposed framework.

### Should consent be required for authorisation?

Legal Aid NSW recognises the limitations of the existing 'consent-based-model' in NSW,<sup>42</sup> as raised in the consultation paper. In our experience, under the current model, in most cases, consent to restrictive practices is given by a substitute decision maker. Substitute decision makers can often feel pressured by service providers to consent to the use of restrictive practices and can feel disempowered to challenge their use.

We are however also concerned about moving to a framework in which consent would not be a requirement for authorisation. In particular, the proposed framework would require behaviour support practitioners to merely 'consult' a person upon whom restrictive practices may be used. We are concerned that this approach does not recognise or protect the legal capacity of people with disabilities.

Legal Aid NSW recognises that any decision on the use of restrictive practices is a complex balancing exercise, which requires the decision maker to weigh up the promotion of the "dignity of risk"—allowing individuals to make choices and take risks—and the responsibility to minimise harm or protect people from immediate danger.

Legal Aid NSW recognises the work of disability advocacy groups on reducing and eliminating the use of restrictive practices and promoting the inclusion, independence, and self-determination for people with disabilities. We recommend that DCJ works closely with the disability community in developing the proposed authorisation model and the requirements for BSPs.

At a minimum, Legal Aid NSW recommends requirements to:

- document the views of the person consulted in the BSP;

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<sup>42</sup> NSW Government, *The NSW Restrictive Practices Authorisation Policy* (Policy, June 2019) and the NSW Government, *Restrictive Practices Authorisation Procedural Guide* (Procedural Guide, June 2019).



- document the other strategies that have been and will be explored and applied as alternatives to the restrictive practice.
- require an 'independent person' to be available to explain the proposed use of the restrictive practice, and to inform the person the review options available to them, as per the Victorian model.<sup>43</sup>

### Recommendation 13

- DCJ should work with the disability community to develop the authorisation model and requirements for BSPs.

### Recommendation 14

BSPs should be improved by:

- a) documenting the views of the person consulted in the BSP;
- b) documenting the other strategies that have been and will be explored and applied as alternatives to the restrictive practice.
- c) requiring an 'independent person' to be available to explain the proposed use of the restrictive practice, and to inform the person the review options available to them, as per the Victorian model.

## BSP Funding

Our lawyers have practical concerns about the State Government imposing additional requirements onto the NDIS system, and the impact that this will have on NDIS participants. The disability sector in NSW is already under-funded, under-resourced and reliant on the use of private disability service providers.

For the proposed framework to be effective, NDIS participants must be appropriately funded to meet the additional authorisation and review requirements. In our view, the proposed framework needs to address the interaction with Chapter 3 of the *National Disability Insurance Scheme Act 2013* (Cth), (**NDIS Act**) which deals with participants and their plans.

Currently, if an NDIS participant requires a BSP, they must apply to the NDIA for funding for a practitioner to assess, prepare and implement a BSP. If the NDIA approves funding

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<sup>43</sup> *Disability Act 2006* (Victoria), s 140.

for a BSP, this is set out in a participant's statement of participant supports (SOPS), which is contained within a participant's plan.<sup>44</sup>

If a Senior Practitioner were to prescribe additional and/or more detailed information be included in a participant's BSP, the participant would likely need additional funding to engage a behaviour support practitioner to complete this work. However, under the NDIS Act, once a SOPS has been approved for a participant, there are limited pathways for the participant to seek additional BSP funding.

We note that once the New Framework Plans<sup>45</sup> commence, participants will not be able to seek a variation to their SOPS. This means that participants who require additional funding for a varied BSP will need to undertake a new needs assessment, which is a lengthy process that could affect all aspects of their NDIS plan.

### Recommendation 15

- NDIS participants should be funded to meet any additional authorisation and review requirements required under the restrictive practices legislation.
- The proposed framework needs to address the interaction with Chapter 3 of the National Disability Insurance Scheme Act 2013 (Cth), which deals with participants and their plans.

## Group Homes

Legal Aid NSW is also concerned about how the framework will be applied in group homes with NDIS participant residents.

There are certain restrictive practices that cannot be put in place in a group home without impacting on every person in a group home, for example, alarms or locks on all exits in the property. In our experience, disability service providers may put such restrictive practices in place even if they are not required for all residents at the home.

Under the proposed framework, if a Senior Practitioner or APO were to approve a BSP with restrictive practices for one resident in a group home, this could create a situation where a disability service provider cannot implement the BSP, without breaching their obligations to other residents in the group home.

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<sup>44</sup> *National Disability Insurance Scheme Act 2013* (Cth) s 32D.

<sup>45</sup> Under amendments to the *NDIS (Getting the NDIS back on track) Act 2024* (Cth) participants will commence receiving New Framework Plans.

In some circumstances, the practical consequences of not approving a restrictive practice could be worse than approving a restrictive practice that is not justified. For example, a resident may need to leave the supported accommodation if restrictive practices are not approved. This could then 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.

For our clients who are unable to secure a room in supported accommodation, there are limited options. In our experience, 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, due to a lack of suitable accommodation.

#### **Recommendation 16**

- DCJ should give consideration to how the proposed framework will impact on NDIS participants residing in group homes and include measures to ensure the framework does not have unintended consequences for these participants.

#### **Question 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?**
- **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?**

#### **Question 11: Are there alternative approaches to authorisation that would be preferable to these models?**

#### **Question 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?**

#### **Authorisation by APOs**

One of the barriers to the effective monitoring of the use of restrictive practices is the sheer number of restrictive practices being used and reported. The final report of the DRC found that in the 2021-22 reporting period the NDIS Commission reported 1.4

million unauthorised uses of restrictive practices against 8,830 participants.<sup>46</sup> Sharing the workload of monitoring and approving restrictive practices could help provide for a higher quality of oversight.

The benefit of APOs being either employed by or contracted by the disability service provider is that they may be more familiar with the provider, the proposed restrictive practices, the physical environment in which restrictive practices would be used, and the client and their individual circumstances.

Legal Aid NSW agrees that APOs should be permitted to be consultants to multiple providers. This would allow them to increase their skills by being involved in more authorisations processes and would give them a greater degree of independence from individual providers.

However, under a consultant model, there is still a risk that the APOs may not be, or may not be perceived to be, independent from the service provider. For these reasons, Legal Aid NSW supports a two-step model in which APOs provide preliminary approval and the Senior Practitioner provides final approval.

In relation to the proposed partially delegated model, we note that the impact of a restrictive practice can vary significantly depending on an individual's specific circumstances, needs, and vulnerabilities. If the proposed framework were to prescribe different categories of restrictive practice, it should take into account the fact that what may be deemed a relatively minor intervention for one person could have severe or unintended consequences for another.

### Recommendation 17

- Legal Aid NSW supports a two-step model of authorisation of restrictive practices, to share the workload of monitoring and approving restrictive practices across APOs and the Senior Practitioner, and to ensure the independence of the final decision maker.

## APO Funding

Legal Aid NSW has concerns about how the proposed APO model will be funded. We are concerned that if the NSW government adopts an APO model, it will expect NDIS participants to pay for APOs through their individual NDIS funding. As discussed above at question 8, if NDIS participants are not adequately funded to meet the requirements

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<sup>46</sup> *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (Final Report, September 2023) vol 6, 487.

of the proposed framework, then this could act as a barrier to NDIS participants receiving the disability support they need.

We also note that under section 10 of the NDIS Act, NDIS funding can only be used to purchase NDIS supports declared by the NDIS rules to be NDIS supports.<sup>47</sup> Under the current list, specialist behaviour support must be provided by professionals with specialist skills in positive behaviour support. Accordingly, APOs would need to be specially trained behaviour support practitioners for NDIS participant to use NDIS funding.

Legal Aid NSW is also concerned that the proposed framework would require disability service providers to bear the cost of employing APOs. Legal Aid NSW is concerned that disability service providers may not have the capacity to employ APOs and this may limit the availability of NDIS providers who can accept participants with restrictive practices, especially in regional or rural areas. This could impact on long term care arrangements, particularly for NDIS participants residing in supported independent living.

One option could be to form a restrictive practices panel, in addition to the APO model. The panel could be used in circumstances where a participant is unable to access an APO due to limitations in their NDIS funding, or due to a lack of APOs in their area.

#### **Recommendation 18**

- NDIS participants should not be required to bear the cost of administering the proposed framework through their individual NDIS funding.
- The proposed framework must be accompanied by sufficient funding to ensure it does not act as a barrier to NDIS participants receiving disability support.

#### **Authorisation of restrictive practices in non-NDIS settings**

In this submission, Legal Aid NSW recommends enacting restrictive practices legislation, which would apply to the use of restrictive practices in any setting, on any person with a disability.

We recognise that the proposed authorisation models are tailored to the disability service provision setting, and these may not be suitable models for all other settings where restrictive practices are used.

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<sup>47</sup> *National Disability Insurance Scheme Act 2013* (Cth) s 10.

An alternative option would be to introduce a restrictive practices panel to make decisions about whether to authorise the use of restrictive practices in circumstances where the person who would be subject to the restrictive practices is not an NDIS participant.

#### **Recommendation 19**

- The NSW Government should introduce a restrictive practices panel, to act as the decision maker in the use of restrictive practices outside of the NDIS.
- The restrictive practices panel should be empowered to make decisions in circumstances where an APO is unavailable.

### **Question 13: Do you support the proposed duration of authorisation and emergency use proposals for restrictive practices?**

#### **Duration of authorisation**

Legal Aid NSW supports the proposed 12 month maximum duration and supports the application process described in the Consultation Paper.

#### **Duration of emergency use**

Legal Aid NSW is concerned that the requirement to seek authorisation “as soon as reasonably practicable” is not sufficiently clear and that the proposal contemplates that providers will continue to use unauthorised restrictive practices for months before an APO or the Senior Practitioner makes a decision about their use. We submit that the framework should contain clear and specific timeframes for providers to seek authorisation, and for APOs and Senior Practitioners to make decisions.

#### **Recommendation 20**

- The proposed framework should contain clear and specific timeframes for providers to seek authorisation, and for Authorised Program Officers and Senior Practitioners to make decisions.

### **Question 14: Are there any additional grounds on which the Senior Practitioner should be able to cancel an authorisation?**

Legal Aid NSW supports the grounds set out in Proposal 8. In addition to these grounds we recommend including a catch-all misuse provision.

### Recommendation 21

- The Senior Practitioner should have the power to cancel an authorisation of restrictive practices where the relevant provider has otherwise engaged in misuse of the restrictive practice.

### Question 15: Should authorisation decisions:

- **be open to internal review?**
- **be reviewable at NCAT?**

Our view is that both internal and external review options are an essential safeguard and will promote trust in the proposed framework.

Legal Aid NSW is concerned that there is a risk of long delays at the internal review stage due to the existing widespread and frequent use of restrictive practices. The Senior Practitioner's Office will need to be well resourced to respond to requests for review.

To further mitigate this risk, we recommend that there be a deemed negative decision where the complainant hasn't received a response from the Senior Practitioner within a certain time period.

Legal Aid NSW also recommends including options for internal and external review in relation to guidance given by the Senior Practitioner about whether a specific practice is or is not a restrictive practice in a specific circumstance.

### Recommendation 22

- Authorisation decisions should be open to internal review by the Senior Practitioner and review at NCAT.
- Senior Practitioner's Guidelines should be open to internal review and review at NCAT.
- To address the risk of long delays in the internal review process, there should be a deemed negative decision where the complainant has not received a response from the Senior Practitioner within 28 days.

### Question 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?

Legal Aid NSW recommends that service providers be given the right to seek review of a decision not to authorise a restrictive practice.



While there was a broad agreement in the DRC that restrictive practices should be limited and should be used for as a short a time as possible, some participants spoke about times where their use is appropriate to reduce the risk of harm.<sup>48</sup>

There may be times where, after considering the specific circumstances, potential outcomes, and alternative options, a decision-maker finds that the use of restrictive practices is appropriate.

Our lawyers also noted that determining whether a practice is a restrictive practice or not can be complex. There may be times where the service provider seeks approval of a restrictive practice, and the APO or Senior Practitioner forms the view that approval is not required because in their view the practice is not a restrictive practice. The service provider should have a right to seek review in these circumstances.

In our view, a right of review for service providers could also reduce the use of unauthorised restrictive practices and emergency use of restrictive practices.

### **Recommendation 23**

- Service providers should have a right to seek review of a decision not to authorise restrictive practices.

### **Question 17: Should a person have a right to request the service provider review the BSP at any time?**

Legal Aid NSW supports this right. We note that there may need to be some limits placed on the frequency with which people can seek reviews of BSPs so that the process does not become too onerous on the decision-maker.

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

Legal Aid NSW supports giving the Senior Practitioner complaints handling and investigation functions both on receipt of a complaint and on its own motion. Legal Aid NSW agrees with the reasons set out in the proposal.

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<sup>48</sup> *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (Final Report, September 2023) vol 6, 433.

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

Legal Aid NSW supports this proposal.

**Question 20: How should interaction with the NDIS complaints framework be managed?**

We note that complaints to the Senior Practitioner may overlap with complaints handled by the NDIS Quality and Safeguards Commission. In our view, the risk of overlap is preferable to the risk that comes with too narrowly circumscribing the types of complaints that each body can handle.

**Question 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 will hold personal and health information about persons with disabilities in NSW who may be subject to restrictive practices. The restrictive practices legislation should contain provision to protect this information and ensure it is not inappropriately used or disclosed. Where possible, the Senior Practitioner should seek the consent of the person concerned before sharing information.

Legal Aid NSW appreciates there will be circumstances where the Senior Practitioner needs to share information without the consent of the person concerned, to give effect to a decision, or under its investigative function. The circumstances in which the Senior Practitioner is permitted to share information should be clearly defined.

In our view, the Senior Practitioner should be empowered to share information relating to its determinations, decisions, and guidance with other oversight bodies. The sharing of information between oversight bodies, particularly information about the misuse of restrictive practices, will be necessary to achieving the purposes of reducing and eliminating the use of restrictive practices across the disability support sector.

If the Senior Practitioner becomes aware of information that falls within the statutory responsibility of other oversight bodies, then the Senior Practitioner should be empowered to share that information with the oversight body.

The relevant oversight bodies will vary in each matter depending on the setting in which restrictive practices are being used, and may include the:

- NDIS Quality and Safeguards Commission,
- NSW Ageing and Disability Commission,
- Office of the Children's Guardian,
- NSW Department of Education,
- Inspector of Custodial Services,

- Mental Health Commission of NSW,
- Official Visitors Program.

#### *Recommendation 24*

- The restrictive practices legislation should clearly define circumstances in which the Senior Practitioner can share information with other oversight bodies.

#### **Question 23: Do you agree the Senior Practitioner should have the proposed education and guidance functions?**

Legal Aid NSW supports giving the Senior Practitioner education and guidance functions.

Legal Aid NSW recommends that the Senior Practitioner also be empowered to give guidance on the use of restrictive practices in other settings where the legislation would apply, including the health setting, education setting, and justice setting.

As discussed above, in our view the legislation should provide protection to people with disabilities in all settings, and accordingly our position is that the education Senior Practitioner's education and guidance functions should be expanded beyond disability service provision.

#### *Recommendation 25*

- The Senior Practitioner should have the proposed education and guidance functions.
- The Senior Practitioner should be empowered to give guidance on the use of restrictive practices in non-NDIS settings.

#### **Question 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?**

Legal Aid NSW lawyers do not act for NDIS service providers and so we do not have direct experience of the existing sanctions under NDIS legislation. However, Legal Aid NSW is concerned that, under the existing law, there is limited recourse for individuals who have been subject to the misuse of restrictive practices.

Legal Aid NSW's view is that if a person has been subject to the unauthorised use of restrictive practices, but they are unable to evidence resulting injury, loss, or damage, they should be able to access nominal damages.

### *Recommendation 26*

- Individuals who have been subject to the unauthorised use of restrictive practices should have recourse to apply for nominal damages.

### **Question 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?**

Legal Aid NSW's view is that the general law is sufficient.

### *Recommendation 27*

- The proposed framework should not include a legislated immunity.