

Response: A legislative framework to regulate restrictive practices

LIFE WITHOUT BARRIERS

Life Without Barriers welcomes the opportunity to comment on the proposed legislative framework to regulate restrictive practices in NSW. We recognise the importance of the NSW Government's exploration of this issue in line with the NDIS Review recommendation for all Governments to urgently address the reduction and elimination of restrictive practices. Life Without Barriers makes this submission as an experienced provider of NDIS funded disability services across Australia and a significant provider of out-of-home care in NSW.

Life Without Barriers has considered the consultation paper, the proposals and the questions. We have elected not to answer every question but in place set out our input into the proposed framework against themes below, indicating where a comment relates to a specific question or proposal.

Restrictive practices generally

Life Without Barriers recognises the continued barriers people with disability face in enacting their human and legal rights and is committed to partnering with people to live with dignity and self-determination. We acknowledge that restrictive practices impact on an individual's rights to freedom, autonomy and dignity as enshrined in the UN Convention on the Rights of Persons with Disabilities. This makes it vital for legislation to ensure any authorisation or application of restrictive practices is applied through a human rights lens, preserving not only safety and wellbeing, but inherent worth. Regulation of restrictive practices must manifest principles of a least restrictive approach and seek to reduce and, where possible, fully eliminate the need for restrictive practices for the person with disability.

Life Without Barriers recognises the considerable investment and exploration by the Disability Royal Commission (DRC) and people with disability who gave evidence and insight into their experiences with restrictive practices. The DRC final report elevated the view that there are systematic drivers to the prevalence of the use of restrictive practices for people with disability. Life Without Barriers agrees that the goal should be the reduction if not elimination of restrictive practices in settings where people with a disability require behaviour support.

Consultation **question 2** asks whether the proposed legislative framework should cover other settings. In addition to the discussion on out-of-home care below, Life Without Barriers submits that the principles in DRC recommendation 6.35(b) recognise the risk restrictive practices represent to a person's human rights and that these should be applied wherever a NDIS funded behaviour support plan is implemented and that further consideration should be given to whether the proposed framework could realistically be implemented where restrictive practices are used outside the NDIS. In saying this, Life Without Barriers recognises there may be some complexities to managing NDIS funded supports delivered or accessed in settings that are not disability settings, and that addressing how restrictive practices occur separately to the scheme requires enquiry of some breadth. Life Without

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Barriers is unable to comment further on those settings listed in the consultation paper at this point, however supports consideration being given to how the principles of 6.35(b) could be embedded in all settings where restrictive practices occur.

Restrictive practices in out-of-home care

Children in out-of-home care needing behaviour support experience intersecting vulnerabilities and barriers which make effective person-focused safeguarding imperative.

A review of the policies, legislation and processes guiding restricted practices in out-of-home care is needed that includes consideration of whether including out-of-home care in the proposed legislative framework is viable. There are currently safeguards in place that recognise the profundity of authorising restrictive practices for children in out-of-home care, however there is the potential for these to be strengthened, more clearly regulated and easier for decision-makers to consistently apply.

There is a concern that introducing a new behaviour support model to out-of-home care settings may not be successful and sustainable when the overall effectiveness of the NSW child protection system is currently in review. However, a greater concern is that not including this setting as the proposed legislation is developed and implemented may mean that the issue of restrictive practices in out-of-home care remains unreviewed.

As the consultation paper notes, there is a significant group of children in out-of-home care who receive behaviour support through their NDIS plans. Consideration also needs to be given to children whose behaviour support is provided through their out-of-home care provider, with any restrictive practice authorised through a DCJ implemented policy separate to that regulating restrictive practice under an NDIS funded behaviour support plan. Regardless of whether out-of-home care is included in the proposed framework, or the existing mechanisms are reformed separately, there is value in ensuring that a single safeguarding and regulatory framework applies to all children in out-of-home care requiring behaviour support, regardless of NDIS involvement. This would avoid different rules applying to different cohorts of children and confusion as to how a practice must be approved, and potentially reduce the risk of children being inadequately managed, their needs not effectively met and their rights protected.

We suggest considering subsection 137(2)(g), *Children and Young Persons (Care and Protection) Act 1998* and Division 4, *Children and Young Persons (Care and Protection) Regulation 2022* (the care legislation), which concern the implementation behaviour support in out-of-home care, in addition to the Children's Guardian legislation referenced in the paper, which primarily concerns evidence of sound policy and procedures for accreditation purposes. An out-of-home care provider's compliance with the care legislation, the behaviour support policy, and other prescribed behaviour support requirements, is a contractual as well as an accreditation requirement.

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The care legislation does not reference restrictive practices but lists prohibited behaviour management practices and requires a behaviour support plan to be approved by the out-of-home care agency's Principal Officer where it includes the administration of a psychotropic drug. Restrictive practices are included in the DCJ policy, but the policy is ambiguous as to whether those other than psychotropic drugs need to be approved by the Principal Officer and is silent as to the process for developing and approving behaviour support plans involving other forms of restrictive practices. In its out-of-home care program, Life Without Barriers implements sound procedures around behaviour support and employs behaviour specialists that support case managers and carers to implement strategies. Despite such efforts across the out-of-home care sector, the proposed model of Approved Program Officers (APO) and Senior Practitioner has the potential to increase consistency and rigour in safeguarding. In other jurisdictions, Life Without Barriers has found out-of-home care and disability settings being safeguarded by the same restrictive practices framework generally fosters good practice and ensures consistent implementation and oversight of behaviour support in both.

Between the disability and out-of-home care sector there is a disparity in the terms used, the prescription of prohibited practices, approval processes and the way behaviour support plans are developed, including difficulties where a plan is required to be approved in accordance with both existing schemes. Life Without Barriers supports consistent terminology used in all behaviour support settings, and behaviour support plans being of the same content and quality. More consistency across settings in how plans are developed and approved would make it easier for a plan to travel with a person if they transition from out-of-home care to a disability setting.

Some differences between disability settings and out-of-home care settings will pose challenges to aligning the regulation of the two. Differences include out-of-home care being provided in private homes by carers who are volunteers rather than disability trained staff and out-of-home care being otherwise regulated by a different framework to disability settings. The differences are not complete barriers to aligning restrictive practice approaches across the two settings but will complicate doing so effectively.

The biggest barrier to introducing a new behaviour support framework to out-of-home care settings is the resourcing and change management required. The introduction of any new way of working has costs, and the proposed framework would require existing staff to be up skilled and APO positions funded. The cost of adopting a new behaviour support framework is out of scope of the current funding contract. Ideally APOs would be recruited who understand the out-of-home setting and its broader regulatory milieu, and the Senior Practitioner's office would require expertise in behaviour support in an out-of-home care setting. While there are agencies that provide both out-of-home care and disability services,

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the funding arrangements and broader regulatory and accrediting systems for each prohibit the sharing of resources and processes across programs.

Restrictive practices in disability settings

The proposed authorisation structure

Life Without Barriers generally supports the proposed model involving APOs sitting in or working for providers and an independent Senior Practitioner having seen positive outcomes under this model in disability settings in Victoria, the ACT, South Australia and Tasmania. Observations and rough data collected from Life Without Barriers disability programs in other jurisdictions indicates that the use of restrictive practices is decreasing with APOs committed to removing restrictive practices from behaviour support plans when there are alternative measures available to ensure the safety of the person and others or the behaviour of concern has reduced or ceased. Staff or consultants currently involved in approving behaviour support plans including restrictive practices comment that they are more confident that the implemented plan is appropriate when it has been reviewed by another qualified person independent of the service provider. While the current restrictive practice panels draw on the expertise of and share the decision across multiple persons, the proposed model creates a more definite check and balance mechanism and an additional tier of expertise or authority to decision-making.

Defining restricted and prohibited practices

Life Without Barriers supports state legislation being consistent with the NDIS legislation and guidance, including the definitions of restrictive practices (**question 7**). Such consistency supports practitioners to understand requirements and ensures key principles recognised in each instrument are understood and embedded in practice. Life Without Barriers supports the legislative framework prohibiting those practices set out in Appendix B of the consultation paper (**question 6**). Prohibiting practices gives practitioners a clear 'do not' list which strengthens commitment to appropriate strategies and reinforces that there are responses to a person in vulnerable circumstances that are never justified.

Authorised Program Officers

It is essential that the APO understand behaviour support practices and plans and understands the content of each plan they approve and the setting in which it will be implemented (**proposal 5**). Life Without Barriers has some concerns around the proposal that an APO meet "prescribed professional standards" noting that currently in Australia there is a dearth of specific Positive Behaviour Support courses and qualifications and currently practitioners come from a range of disciplines. Additionally, too strict a requirement can be problematic for regional and rural services where the pool of professionals is smaller. It may be appropriate for the legislation to give the Senior Practitioner discretion to issue guidelines

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for the qualifications or experience required of an APO, rather than requiring that such direction be given or prescribing specific requirements. The requirement for the Senior Practitioner to approve all APOs is an unnecessary administrative burden given the other mechanisms ensuring APOs are adequately qualified and oversighted.

Senior Practitioner

As referenced above, the proposed model introduces an additional tier of expert scrutiny which supports confidence in decision-making and strengthens oversight. Life Without Barriers strongly supports the Senior Practitioner being charged with providing education and guidance to behaviour support practitioners and staff working with people needing behaviour support more broadly, as well as people with disability, their families and communities (**question 22**). In jurisdictions where a Senior Practitioner has already been established, Life Without Barriers has seen value in the guidance, education and information that they and their office provide. An important role that the Senior Practitioner's office can play is the collection of data, including lived experience insights from people with disability, which will help track the use of restrictive practices in NSW as well as inform when approaches might need to be reformed. The Senior Practitioner should be empowered to conduct reviews of implemented behaviour support plans to identify areas of improvement in quality of plans and their implementation. An additional benefit to a Senior Practitioner is their capacity to share learnings and work toward practices and approaches being consistent across all jurisdictions with Senior Practitioners in other jurisdictions.

In relation to **questions 19, 20, 23 and 24** Life Without Barriers supports the Senior Practitioner being able to investigate the misuse of restrictive practices, either following a complaint or of its own motion. However, there is the potential for duplication of the functions of the NDIS Commission and as such the legislation should prescribe when an issue or complaint will be referred from the Senior Practitioner to the NDIS Commission. Life Without Barriers does not support the Senior Practitioner imposing sanctions for misuse of restrictive practices given that this power already sits with the Commission.

Consultation and Review

The consultation paper sets out challenges to the current 'consent model' and its observations are consistent with those of Life Without Barriers. Life Without Barriers suggests that ensuring the requirement of consultation under the NDIS Rules is meaningfully part of the behaviour support plan's development is more important in ensuring person-centred practice than focusing on consent. Life Without Barriers' experience of the 'independent person' model is that it is not always effective in supporting the person with disability to understand the purpose of the plan. Life Without Barriers would support a requirement that the behaviour support plan include a summary of how the requirement to

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consult was met, and that the Senior Practitioner be empowered to seek further information if unsatisfied when reviewing a plan that adequate consultation occurred.

Any review period or duration of an authorisation prescribed in the legislation (**question 13**) must be evidence based. Consideration should be given to whether 12 months is long enough from a clinical perspective to see a meaningful change in complex behaviours of concern and for phase out or step-down strategies to be appropriately implemented. We suggest that 24 months might be a more appropriate timeframe, with the capacity for a review to occur earlier should the person's needs change.

It is important that the person with disability or a person concerned with their welfare and wellbeing be able to seek review of authorisation decisions and Life Without Barriers supports the inclusion of review by the Senior Practitioner in the first instance, followed by review by the NSW Civil and Administrative Tribunal (**question 15**). The grounds for review should include a failure to ensure the person was adequately consulted during the plan development stage. Including this avenue of review in the framework arguably addresses concerns around moving away from a consent-based approach. Consideration should be given to barriers concerned people might face in seeking a review, including what positive obligations providers or the Senior Practitioner should have in supporting them to know review is available and submit any application.

Life Without Barriers strives to ensure the organisation's efforts are person-centred and informed by the rights of people we support and appreciates the opportunity to comment on the proposed model. While provider input is essential, Life Without Barriers trusts that consultation on this framework has included people with lived experience of restrictive practices and their advocates, noting that this might require some adjustment to the usual consultation process.

Please reach out if you have any questions about this submission by emailing Sophie Clarke, Senior Policy and Advocacy Lead [REDACTED]

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