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The Disability Trust submission in response to the NSW Department of Community and Justice's Consultation paper: A legislative framework to regulate restrictive practices.

The Disability Trust welcomes legislative changes that increase safeguarding and quality of service for people with disability and would like to see this achieved whilst also reducing duplication of reporting and red tape for providers. Many providers operate across a number of jurisdictions and are required to comply with multiple and sometimes conflicting rules and regulation. This can mean less resources are available for supporting people whilst the focus on complex compliance requirements increases.

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

Answer- Yes

- A shared understanding, definitions and processes across sectors will benefit overall safeguarding for people.
- Will help to minimise the systemic barrier for people who have intersection with several different sectors who could be our most vulnerable i.e. young people in out of home care with disabilities.

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

Answer-The aged care setting

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?

Answer:

- Duplication of processes, support needs, time and roles
- Differences in understanding or application of legislation can lead to gaps that create risk for people.
- Financial burden to orgs having to interface with multiple sectors.
- Administrative burden on organisation and clinicians

- Burden on persons funding, family, guardians interacting with multiple systems and settings.

Proposal 1: Legislation should provide that the use of restrictive practices on NDIS participants in the disability service provision, health, education and justice settings should be governed by the principles recommended by DRC Recommendation 6.35(b).
Proposal 2: The legislation should require government agencies in the health, education and justice settings to provide an annual report to the Senior Practitioner on their, and their contractors', compliance with the principles.

<u>Question 4:</u> 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)?

Answer:

- The Disability Trust agrees with the principles of last resort, response to serious risk of harm, supported decision making, least restrictive option to ensure safety, proportionate to risk, and shortest timeframe possible.

It is important that there is some independence in decision making and review of restrictive practices, however some further definition and consideration to what constitutes independence is important.

<u>Question 5:</u> Are there any other principles that should be considered?

Answer:

- Consent - ensuring that the person is supported in the decision or has well-informed decision-making assistance or substitute decision making is required. This includes ensuring the person and the key support people are consulted. This also aligns with Behaviour Support Rules.
- Person's right to participate in the authorisation process – In NSW and ACT currently people or their delegates can attend the authorisation panel to be involved in the decision making about the restrictive practices.

<u>Question 6:</u> Should a legislative framework prohibit any practices? If so, which practices and in which settings?

Answer:

- Align with the NDIS position statement "Practices that present a high risk of harm to NDIS participants" as well as practices that are currently prohibited across NSW- e.g- Seclusion of a child or young person. This is also aligned with the list of prohibited practices endorsed by Disability Reform Council.
- Coercive control- is a criminal offence that aligns itself with NSW law (July 2024).

Proposal 3: The NDIS definitions of restrictive practices should be adopted for the NSW legislative framework for restrictive practices.
Proposal 4: The Senior Practitioner should have the power to issue guidelines that clarify how the definitions apply in different situations.

<u>Question 7:</u> Do you agree that:

Answer:

- **The framework should use the NDIS definitions of restrictive practices?** Yes – NDIS definitions of restrictive practices should be utilised.

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

  Caution with the application of these definitions in different settings/scenarios e.g. 'Safe travel' and 'non-intentional risk'. Safe travel and 'non-intentional risk behaviours' could be examples of how the definitions are contextualised and these differences have often caused confusion regarding how these practices are safeguarded for the person.

<u>Question 8:</u> 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 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?

Answer:

- Having extra or different expectations across states may add burden to the process of suitability, strain on the availability of practitioners, and differences across states and territories which may create challenges in alignment of best practice. Any prescriptions for additional information from the Senior Practitioner should align with current requirements for inclusion under NDIS rules.

- The qualifications and suitability of practitioners and information included in behaviour support plans needs to be aligned with the NDIS Quality and Safeguards Capability Framework and Module 2A in the NDIS Practice Standards and Quality Indicators. It would be beneficial for the Senior Practitioner to have strong communication and relationships with the Commission and NDIA to work collaboratively if there are practice or quality concerns with individual practitioners or plans.
- **Should there be any specific provisions relating to consultation in the development of a BSP, in addition to the requirements in the NDIS Rules?**
  No

<u>Question 9:</u> Is there anything else the proposed framework should do to improve the quality of BSPs?

Answer:

Other states/territories that adopt this model include educational opportunities e.g. Communities of Practice, webinars, professional development opportunities. There should also be a focus on the role of collaboration in the plan development phase and authorisation space. Current NSW practice is built around one panel per organisations – the quality of BSP's, this process, and experience could also include a focus on the role of collaboration between the practitioner, implementing providers and sectors.

The framework could include resources and requirements for accessibility of the plan, language used and suitability for support staff to read, understand and interpret.

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

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

<u>Question 10:</u> 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?**

  Answer:
  Benefits – timely authorisation process, feedback to all participants in real time, streamline reporting processes (i.e. nil concerns that in the future the plan may be 'un'authorised by the Senior Practitioner and effect reporting/implementation)
  Risks – relying on the APO who may have varying levels of knowledge and also have competing priorities or a conflict of interest

- **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?**

  Benefits- More oversight into decision making by APO's- opportunity for capacity building and education for APO's.
  Risks- time it would take for the authorising process may extend the period of times plans aren't implemented and RP's are unauthorised.

<u>Question 11:</u> Are there alternative approaches to authorisation that would be preferable to these models?
Answer:

A panel process prior to authorisation with an APO, the person, BSP and all implementing providers– this could strengthen decision making,

ensure some independence in the process, and afford the opportunity for the person's voice to be part of the process. It would also assure BSP and all implementing providers are aligned with understanding and implementation of the plan. The process and decisions around authorisation should be documented and recorded.

<u>Question 12:</u> 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?

- There is demonstrated breadth of skill and experience in restrictive practice in the sector. Expecting smaller, newer, less experienced organisations to have the knowledge and expertise regarding restrictive practices is unrealistic and potentially creates risks for the person. Having suitably skilled and qualified (endorsed?) APO's who can operate across several providers can provide sector support and capacity building for smaller orgs, which ultimately is the best safeguard for the person. There is a cost and resourcing impact if APO's were to operate across several providers.

Proposal 6: The Senior Practitioner and APO should have a discretion to determine the duration of an authorisation, up to 12 months.
Proposal 7: There should be an emergency use process for restrictive practices before a BSP has been prepared and authorisation given, which should replace the interim authorisation process.
Proposal 8: The Senior Practitioner should have the power to cancel an authorisation of restrictive practices where:

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

<u>Question 13:</u> Do you support the proposed duration of authorisation and emergency use proposals for restrictive practices?

Answer:
Yes – this is all reasonable. Authorisation should not extend past the end of the behaviour support plan. This aligns with the NDIS Commission requirements and (more importantly for the person) to ensure that approval is based on a recent and updated FBA.

<u>Question 14:</u> Are there any additional grounds on which the Senior Practitioner should be able to cancel an authorisation?

Answer:

- Misuse of the restrictive practice.
- Substantiated significant complaint about the restrictive practice.
- Withdrawal of consent for the practice.
- The practice has increased risk for the person in some way.

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

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

<u>Question 15:</u> Should authorisation decisions:

- be open to internal review?
- be reviewable at NCAT?
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Answer: Yes

<u>Question 16:</u> 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?

Answer:
Yes – as the implementing provider there are certain risks (including WHS, financial, and best practice related) that need to be considered.

<u>Question 17:</u> Should a person have a right to request the service provider review the BSP at any time?

Answer

- Yes- A person should have the right to request a review at any time, however the service provider can consider the request taking into account available resources including, funding, capacity, risk, availability.

Proposal 10: The Senior Practitioner should have powers to investigate the misuse of restrictive practices, on receipt of a complaint and on its own motion.
Proposal 11: The Senior Practitioner should have the following powers to respond to the misuse of a restrictive practice:

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

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

Answer: Yes- this provides an additional safeguard for participants.

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

Answer:

- Yes – this provides an addition safeguard. It is important that these processes are aligned with the Quality Safeguards Commission to ensure streamlined reporting, and collaborative approach to safeguarding for the person.

<u>Question 20:</u> How should interaction with the NDIS complaints framework be managed?

Answer:

- Collaboration with each agency to avoid duplication of information, timely responses to complaints, and consideration of resources in managing these issues. This should align with current procedures for organisations responding to complaints across other jurisdictions.

<u>Question 21:</u> 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?

Answer:

Sharing of information, and balancing right to privacy, should be considered in relation to the level of risk to the person. It is important to seek consent and inform the person where practical as a benchmark for ethical practice, acknowledging immediate or serious harm would impact on the need to share without consent. Other bodies include:

- Child protection
- Justice
- Health
- Education
- NSW Trustee and Guardian
- The NDIA/Q&SC

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

Answer:

It is a balance here between the safeguarding for the person and the additional administrative burden of duplicate reporting. It would be ideal with the Senior Practitioner reporting requirements aligned with the well-

established Commission requirements/process. Whilst good oversight may strengthen the safeguarding of people, duplicate reporting and data entry may weaken safeguards by diverting operational/quality resources and also creating the opportunity for error with navigating multipole systems.

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

- *developing and providing information, education and advice on restrictive practices to people with disability, their families and supporters, and the broader community,*
- *developing guidelines and standards, and providing expert advice, on restrictive practices and behaviour support planning*.
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<u>Question 23:</u> Do you agree the Senior Practitioner should have the proposed education and guidance functions?

Answer:

Yes – ensuring strengthening of existing resources and alignment with current best practice, Commission and other existing educational resources.

Training and education for APO's should also be a function of the Senior Practitioner- ensuring alignment or avoiding duplication with training requirements across other jurisdictions.

<u>Question 24:</u> 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?

Answer:

This needs to be aligned with the NDIS Commission. There is possibility that state-based organisations can have different operating rules across states and territories which would be difficult to manage. Allowing the Senior Practitioner to refer to The Commission for breaches under the NDIS legislative framework empowers the Senior Practitioner to use

their scope and knowledge to provide this information to be assessed and processed in this way.

<u>Question 25:</u> 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?

Answer: Yes

<u>Question 26:</u> Are there any other functions which the Senior Practitioner should have? Should providers in the disability service provision setting be subject to any other requirements?

Answer:

Consider a requirement to implement strategies that are recommended for increasing likelihood of fading the RPs? Ie that a subsequent approval process takes into consideration what has been done in the previous authorisation period to reduce the need?

For further information relating to this submission please contact:

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