

4 July 2024

Committee Secretary
Community Support and Services Committee
Parliament House
George Street
Brisbane Qld 4000

Via email: cssc@parliament.qld.gov.au

Re: Disability Services (Restrictive Practices) and Other Legislation Amendment Bill 2024

Thank you for the opportunity to make a submission on the Disability Services (Restrictive Practices) and Other Legislation Amendment Bill 2024 (the Bill).

As you would be aware, as the Public Advocate for Queensland, I undertake systemic advocacy to promote and protect the rights and interests of Queensland adults with impaired decision-making ability.¹ There are several conditions that may affect a person's decision-making ability, including intellectual disability, acquired brain injury, mental illness, neurological disorders (such as dementia) or alcohol and drug misuse.

It is terrific to be at this stage of introducing a new, Senior Practitioner led, restrictive practices authorisation framework for people with disability in Queensland. Since assuming my role as Public Advocate in August 2021, I have advocated for this development. I have also advocated for the extension of the Senior Practitioner's restrictive practices role into other fields beyond disability services, such as the aged care sector.

As noted above, my role concerns advocacy on behalf of adults with cognitive disability, and therefore my submission will not address the Bill's provisions regarding children.

In my submission, I will refer, for the sake of ease, to the proposed new sections of the *Disability Services Act 2006* (largely provided for in cl 14 of the Bill).

New authorisation requirement and process

The new scheme (through the proposed new section 140) would apply to certain 'service providers that provide disability services or NDIS supports or services to a person with disability', including registered NDIS service providers, funded service providers, the department itself, and other service providers prescribed by regulation. The proposed section 140(4) makes clear the new process would apply to the provision of 'disability services or NDIS supports or services to a person with disability' even where these are funded through a variety of sources.

In terms of the restrictive practices covered by the scheme, the authorisation scheme to be established by the Bill applies to any 'regulated restrictive practice' which is defined (in section 142) to mean five kinds of restrictive practices (chemical, mechanical, environmental and physical restraint, and seclusion).

¹ *Guardianship and Administration Act 2000* (Qld) s 209.

The foundational requirement for a disability services restrictive practice to be authorised is contained in proposed new section 144(2), which states that 'Generally, the use of a regulated restrictive practice in relation to a person with disability should be authorised under a restrictive practice authorisation.' I suggest that this be strengthened, possibly borrowing from the Victorian legislation to this effect.

In Victoria's *Disability Act 2006*, section 135 provides that: 'Except as provided for in sections 137 and 145, a disability service provider or a registered NDIS provider must not use a regulated restrictive practice on a person in respect of whom this Part applies unless an authorisation under section 136 for the use of the regulated restrictive practice is in force'.

Similarly, it should be made clear in the *Disability Services Act* that restrictive practices for a person with a disability must only be used if authorised under the Act.

Regulation must not enable regularisation

A key challenge with the development and implementation of this new restrictive practices authorisation model is that this must not become a way of regularising the use of restrictive practices. The aim must be to reduce and eliminate their usage.

The Bill contains a number of important principles in this regard (for example, new sections 141(2)(j) and 176(1)(a)) and this will also be a key feature of the Senior Practitioner's role (section 200AB). The Senior Practitioner will carry significant responsibility for leading the reduction and elimination of restrictive practices usage.

Consequences of non-compliance

It is unclear what the legal consequences will be for a provider or person who uses a regulated restrictive practice that is not authorised under section 145 (and does not come within other exceptions found in the Bill such as under section 146 when an existing authorisation ends and a new one is applied for). Any unauthorised use of restrictive practices would then be left to other laws (such as assault and deprivation of liberty). Section 162(2)(d) specifies that there could be criminal and civil liability for the continued use of a regulated restrictive practice if an application to the Senior Practitioner is refused. But the legislation is silent generally on the consequences for the unauthorised use of a restrictive practice.

By contrast, there are other offence provisions created in the Bill, such as breaching limitation orders (for example, sections 188T(8) and 188U(5)). I recommend that there be a specific offence provision for the use of unauthorised restrictive practices, such as can be found in the *Disability Act* in Victoria, which lists a penalty of 240 penalty units regarding such an offence.²

A similar offence provision should also be created for the use of restrictive practices outside the parameters of an approved behaviour support plan.

The creation of such offence provisions would make it clear that the use of unauthorised restrictive practices is serious. Further, it would likely lead to greater compliance with the legislation. Expecting a person with disability to be able to commence proceedings under existing civil laws (where they would need to be the plaintiff) or criminal laws (where they would be expected to make a complaint to police) would be onerous, if not impossible, in many circumstances.

² *Disability Act 2006* (Vic) s 149.

Workload of the Senior Practitioner

Under the Bill, there will not be local restrictive practices authorisers, as there are in Victoria. Instead, the Senior Practitioner will be responsible for authorising all regulated restrictive practices. This decision will have major implications for the workload of the Senior Practitioner and their office.

This is especially so with the inclusion of environmental restraints as restrictive practices. This means that current data available for Queensland in relation to the number of restrictive practices authorised under existing mechanisms is of limited utility in projecting the number of applications to be considered by the Senior Practitioner.

The Senior Practitioner will be responsible not only for authorising restrictive practices, but must also consult with the person concerned and those around them (section 160) and receive complaints (section 183).

I will just make the comment here that this is a very substantial amount of work for the proposed new office.

Functions and powers of the Senior Practitioner

The Senior Practitioner is given the power to authorise restrictive practices that meet certain criteria (section 158). The main functions of the Senior Practitioner are to include: 'considering applications for, and giving, restrictive practice authorisations' (section 200AB). Further functions include the development of guidelines, publication of data, and 'monitoring and receiving complaints about the compliance of relevant service providers with the framework for the use of regulated restrictive practices'.

The Senior Practitioner has powers provided by the amended *Disability Services Act 2006*, which include being able to do 'all things necessary or convenient to be done' in performance of their functions (section 200AC). The Senior Practitioner can also provide a 'show cause' notice to a provider (section 169) which can lead to the withdrawal of authorisation for the use of restrictive practices.

I note that Victoria gives its Senior Practitioner more explicit powers such as to 'give directions' and to visit premises and order the discontinuation of restrictive practices.³ There should be consideration given to expanding the powers of the Senior Practitioner in Queensland in the same way.

The power of the Senior Practitioner to cancel a restrictive practices authorisation is limited to three situations in the Bill (sections 168 and 172). It would be worth adding in a new generic ground for cancellation, along the lines that there is no longer a need for the use of a regulated restrictive practice (possibly added to section 168 and utilising the terminology of section 158(a)).

Time period for the development of behaviour support plan

Section 179 outlines timeframes in which a service provider must develop interim and comprehensive behaviour support plans, within 1 month and 6 months respectively. Although this may align with timeframes in the *National Disability Insurance Scheme (Restrictive Practices and Behaviour Support) Rules 2018*, my opinion is that these time periods are too long when one considers the important safeguarding role played by properly developed behaviour support plans.

³ *Disability Act 2006* (Vic) ss 24, 27.

Review of behaviour support plans

Behaviour support plans are to be reviewed at least annually (section 181). It will be important for the Senior Practitioner to develop expectations regarding the rigour with which such reviews are required to be conducted.

Senior Practitioner's disclosure of information

Under section 200, the Senior Practitioner may give information regarding the use of restrictive practices to certain parties, such as the Public Guardian or the NDIS Commissioner. It would be useful for my functions as the Public Advocate, and would assist any potential collaborations with the Senior Practitioner concerning systemic restrictive practices issues, to include the Public Advocate as a person to whom the Senior Practitioner can provide such information.

This would be similar to the provision found in the *Public Guardian Act 2014*, where the Public Advocate is specifically listed as a person who can be provided with information regarding the Public Guardian's community visitor (adult) program.⁴

Senior Practitioner's role in other restrictive practices

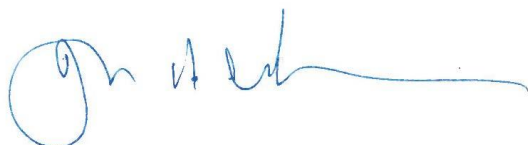
I fully support the new role of the Senior Practitioner and the change that this brings in terms of how restrictive practices are authorised in Queensland for adults with disability.

However, as I have noted above, I have advocated for, and will continue to advocate for, the Senior Practitioner's role to be extended to authorising restrictive practices in other areas, such as aged care, health, and the National Injury Insurance Scheme. In these areas, restrictive practices are subject to inadequate regulation and oversight.

Thank you again for the opportunity to make a submission on the Disability Services (Restrictive Practices) and Other Legislation Amendment Bill 2024.

Should you wish to discuss any of the matters I have raised in this submission further, please do not hesitate to contact my office via email public.advocate@justice.qld.gov.au or phone 07 3738 9513.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'John Chesterman', with a long horizontal flourish extending to the right.

John Chesterman (Dr)
Public Advocate

⁴ *Public Guardian Act 2014* (Qld).