

Office of the Public Advocate (Queensland) Systems Advocacy

Submission to Department of Families, Housing, Community Services and Indigenous Affairs

Proposed National Framework for
Reducing the Use of Restrictive Practices
in the Disability Service Sector
(the 'Proposed National Framework')

June 2013

Public Advocate

The Public Advocate was established by the *Guardianship and Administration Act 2000* to undertake systems advocacy on behalf of adults with impaired decision-making capacity in Queensland. The primary role of the Public Advocate is to promote and protect the rights, autonomy and participation of Queensland adults with impaired decision-making capacity (the adults) in all aspects of community life.

More specifically, the functions of the Public Advocate are:

- Promoting and protecting the rights of the adults with impaired capacity;
- Promoting the protection of the adults from neglect, exploitation or abuse;
- Encouraging the development of programs to help the adults reach their greatest practicable degree of autonomy;
- Promoting the provision of services and facilities for the adults; and
- Monitoring and reviewing the delivery of services and facilities to the adults.¹

Position of the Public Advocate

I commend the Department of Families, Housing, Community Services and Indigenous Affairs for its examination of the issues associated with the use of restrictive practices in the disability service sector.

The use of restrictive practices is a significant infringement on a person's human rights, in particular the right to liberty and security of the person and the right not to be subject to cruel, inhuman or degrading treatment or punishment. It is also potentially unlawful and may give rise to criminal or civil liability. It is therefore imperative that both the ethical and legal issues are comprehensively explored and addressed before using restrictive practices.

People with intellectual disability or cognitive impairment exhibiting behaviours that may cause harm to themselves or others should have access to a comprehensive assessment that includes an identification of individual triggers that may lead to harmful behaviour and recommendations for positive and less restrictive strategies to prevent and/or manage their behaviour.

Any strategies generated in response to a person exhibiting behaviours that challenge the provision of support and services to that person must recognise that behaviour is usually a reflective response to issues within a person's environment and, in most cases, arises due to an inability to communicate effectively via other means. The issues impacting the person may be physiological or may relate to the physical environment, the people around them, the support they receive or any number of other variables preventing an effective response to their needs.

It is important that the person, their family/carers, their guardians and attorneys are involved at all stages in the assessment and plan development process, as well as being engaged for decision making.

The use of restrictive practices can only be justified when they are used as the last resort, to prevent significant harm to the person or others, in the least restrictive manner possible, and as part of a positive behaviour support approach.

¹ *Guardianship and Administration Act 2000*, Section 209.

Response to Proposed National Framework

Introduction

Australia is in the early stages of forming policy and program responses and pursuing the regulation of restrictive practices. Given this, and the fact that states and territories currently have responsibility for the provision of disability services, there exists a disparate approach to the policy, program and legislative response to restrictive practices across Australia.

I appreciate therefore that heading towards a nationally consistent approach will have challenges, and that utilising existing state and territory legislation and contractual arrangements in the interim is a sound approach.

Having said that, I have detailed below a number of concerns with this strategy, as well as providing supporting information and/or considerations that should be explored in developing a national framework, taking into account both interim and longer-term arrangements.

Commitment to not reducing current safeguards

Queensland's restrictive practices regulatory regime was introduced in 2008 as part of a broader system reform aimed at reducing and eliminating the use of restrictive practices. Central to the reforms was a focus on positive behaviour support.

The Report *Challenging Behaviour and Disability: A Targeted Response* (the Carter Report),² which was the impetus for these reforms, was adamant that any legislative framework for the use of restrictive practices should prohibit the use of restrictive practices unless they are independently approved as part of an individualised Positive Behaviour Support Plan consequential upon a comprehensive assessment of the individual and his/her needs.

The current Queensland regulatory framework contained in the *Disability Services Act 2006* (DSA) and the *Guardianship and Administration Act 2000* (GAA) contains a high level of safeguards when compared to some other states and territories. For example, consent to use restrictive practices is provided by an entity or person independent from the service provider seeking to use the practices. The Queensland Civil and Administrative Tribunal (QCAT) approves the practices of containment and seclusion (and other practices when used in addition to containment and/or seclusion), while the majority of other practices are consented to by guardians for restrictive practice matters. Importantly restrictive practices can only be approved if a functional assessment has been undertaken for the person, and where this assessment informs the development of a positive behaviour support plan, which is regularly reviewed.

I advocate strongly for a national approach to regulation that does not result in any diminishing of the safeguards currently in place in Queensland for people with disability. This must be an underlying premise for any national approach.

Concerns associated with individual contractual arrangements

As we progress towards a NDIS, many states and territories, including Queensland, are focusing on the importance of a person-centred approach to the provision of disability services, including the provision of individualised or self-directed funding.

Queensland launched the *Your Life Your Choice Self Directed Support Framework* in September 2012. It is a phased approach to self directed funding. The first stage implements a host provider model under which people with disability are provided with individual allocations of funding that are auspiced through host providers. These host providers work with the person to plan and purchase their support services.

² Hon Carter, W.J. 2006, *Challenging Behaviour and Disability: A Targeted Response*.

The next phase, enabled by amendments to the DSA to allow funding to be provided directly to individuals, will allow individuals to directly receive the funding into their own bank accounts and purchase their own services directly. These changes to the way funding is provided and services purchased will not only provide more choice and control for people with disability, and assist Queensland to move towards a NDIS, but will potentially lead to significant changes in the way disability services are funded and delivered. Increasingly ‘block funding’ of services will become a thing of the past. New services will enter the market and people will be purchasing their supports from a range of service providers, not just ‘disability services’ funded by the Department of Communities, Child Safety and Disability Services (‘the Department’).

While these reforms are welcome and integral for a person-centred approach to the provision of disability support, they do pose new challenges for maintaining quality standards and safeguards, particularly in relation to the use of restrictive practices.

In Queensland only ‘funded disability services’ are regulated by the restrictive practices regulatory regime. Therefore where a person with a disability directly purchases services from a provider that is not funded by the Department, the regulatory regime will not apply. This means that not only will the safeguards of this regime not apply to individuals accessing such services, but these services will also not receive the immunity from civil and criminal liability that is provided under the DSA if they use restrictive practices honestly and without negligence in accordance with the legislation.³

I am concerned about the increasing potential for the unregulated use of restrictive practices under direct funding models both in the current roll out of self-directed funding in Queensland and under a NDIS. Planning needs to start now in relation to how there will be continuing safeguards, including regulation of the use of restrictive interventions for vulnerable people with intellectual disability and cognitive impairment in Queensland and through Disability Care.

Definitions

While in general I am supportive of the restrictive practices definitions provided under the proposed national framework, I have a number of concerns that are outlined below.

“Other restrictive interventions”/ “Restrictive interventions”

Given that the proposed national framework applies to “restrictive interventions”, great care needs to be taken with defining the terms “restrictive interventions” and “other restrictive interventions”. This is because, while the overall aim is to reduce and eliminate restrictive interventions, the framework by implication also acknowledges and sanctions their use. There are some restrictive interventions that should never be sanctioned, and thus should not form part of the framework. Furthermore, restrictive interventions should be qualified by the fact that they should only ever be used (as a last resort) to protect a person from harm, or protect others from harm.

The term “other restrictive interventions” is defined to include “psycho-social restraints” and “consequence-driven” restrictive practices. Consequence-driven strategies or psycho-social restraints may include, for example, withdrawing personal items or activities or telling a person to stay in a particular physical position or part of a room or house until the person ‘behaves correctly’. The problem with these strategies is that they tend to be punitive in nature, highly susceptible to misuse or abuse, and there is little known about the long-term efficacy or impact of their use.

The use of such strategies is also highly problematic for people with impaired decision-making capacity who may not have the cognitive ability to understand the reason for the ‘punishment’ and thus understand what is required in terms of modifying their behaviour.

³ *Disability Services Act 2006*, Section 123ZZB

Such interventions also carry with them the suggestion that the person is the ‘problem’ as opposed to recognising the environmental influence and responding accordingly.

If restrictive interventions are going to be defined as “any intervention or practice that has the effect of restricting the rights or freedom of movement of a person” and be inclusive of “other restrictive interventions”, then this takes in both psycho-social or consequence-driven restrictive practices as well as an endless range of practices that may be categorised as constituting cruel, inhuman or degrading treatment. As a starting point these practices must be excluded from the framework.

Furthermore, the definition of restrictive intervention must be qualified. Practices such as seclusion, physical, chemical and mechanical restraint, as well as restricting access to objects should only be included as long as the primary purpose is to protect a person or others from harm (not as a form of punishment) or for any other reason such as convenience of staff.

The use of such strategies when they are not aimed at protecting the person or others from harm is highly problematic, and their justification and lawfulness is questionable.

I would therefore suggest narrowing the definition of “Restrictive intervention” to include “the use of seclusion, chemical restraint, mechanical restraint, and/or physical restraint with the primary purpose of protecting the person from harm, or protecting others from harm”.

Should there be a suggestion that other types of practices might be included within the national framework, then these should be individually considered and defined rather than allowing for an overly-inclusive category of practices described as “Other restrictive interventions”.

Mechanical restraint

The current definition of mechanical restraint in the proposed framework excludes devices for a therapeutic purpose. A footnote defines a therapeutic purpose to include safe travel such as seat belts during transportation. Strictly speaking, seat belts and other devices for safe transportation are not therapeutic in nature. I would suggest amending the definition of mechanical restraint to exclude both “devices for therapeutic purposes” and “devices to allow for safe transportation”.

Key Guiding Principles

I am generally supportive of the key guiding principles for the proposed national framework, but believe that there are some elements currently missing.

Consent and respect for autonomous decision making

At common law there is a presumption of capacity and adults are presumed to have capacity for decision making, including all aspects of daily decision-making and more complex matters and decisions.⁴

The presumption of capacity is central to the notion of autonomy and is also reflected in Queensland’s GAA, alongside the important principles that support maximising participation, minimal limitations and substituted judgement.⁵ Queensland’s restrictive practices regulatory regime in the DSA and GAA requires that there is a determination of lack of capacity for restrictive practice matters prior to the appointment of a guardian for restrictive practice matters or the approval of containment or seclusion by QCAT.

I am concerned that the proposed national framework does not emphasise the importance of protecting and maintaining a person’s autonomy or the presumption of decision-making capacity.

⁴ *Re Bridges* [2001] 1 Qd R 574; *Re T* [1992] 4 All ER 649, 664 (Lord Donaldson MR).

⁵ *Guardianship and Administration Act 2000*, Schedule 1, section 7.

In particular a guiding principle should be **maximum respect for a person's autonomy** including:

- Restrictive practices are utilised as a last resort, where the least restrictive practice possible is utilised;
- The presumption of capacity for decision-making is recognised and therefore a person's consent and participation in decision-making (with support if necessary) is sought prior to seeking a substitute decision on their behalf; and
- Where decisions about a person's health care, treatment or restrictive practices must be made on behalf of the person because they lack capacity to make the decision, then the appropriate decision maker must be engaged in decision-making and give consent where it is appropriate.

Community-based support arrangements

As Public Advocate I support the right of people with disability to access appropriate support and I oppose the placement of people with disability in environments and locations that do not enable inclusion and participation in community.

There is a great risk that people who are typically subject to restrictive interventions, that being people with intellectual disability or cognitive impairment and 'challenging behaviours', may be accommodated in congregate living arrangements that are highly regulated. These arrangements will often accommodate other people with intellectual disability or cognitive impairment who also have challenging behaviours and there may be little opportunities for individuals to access the community in an individualised participatory way.

Many of these settings are 'institutional' in nature, even if not by design, and offer limited opportunities for individuals to increase their autonomy, capability, participation and inclusion.

An important principle for the national framework should be a commitment to **community-based support arrangements** including:

- People with disability should not be subject to institutional-type accommodation and support services;
- People with intellectual disability or cognitive impairment must have opportunities to increase their autonomy, capability, participation and inclusion in the community; and
- There must be a focus on individualised planning and flexible responses that promote choice, and support existing connections with family, friends and/or community.

Core Strategies

I am generally supportive of the core strategies for the proposed national framework and offer the following suggestions.

Positive behaviour support

There should be a much stronger focus on functional assessment and the provision and practice of positive behaviour support in the proposed national framework. The emphasis tends to be skewed towards the use of restrictive interventions, as opposed to clearly distinguishing restrictive interventions as being the very last resort following the implementation of other strategies arising from assessment and positive behaviour support planning.

This approach encompasses but is distinct from a person-centred approach, which should also be emphasised. A person-centred approach is integral to the way a NDIS should operate – putting a person with disability at the centre of their supports and services – where their supports and services are designed around them, their aspirations, goals and needs, and they have maximum opportunities to make choices and plan their services and supports.

A positive behaviour support approach, the benefits of which are well established in the literature, is an approach to support that is derived from social, behavioural and biomedical science and that is applied to achieve improved quality of life for people with intellectual disability or cognitive impairment and, associated with this, a reduction in challenging behaviours.

It involves the use of comprehensive functional assessments, strategies to address deficient environmental conditions and, in doing so, enables environments to be adjusted or designed in ways that are better targeted to individual needs thus reducing the need for the individual to engage in ‘challenging behaviours’. These lifestyle changes are achieved through the implementation of multi-component positive behaviour support plans.⁶ The aim is to address the underlying factors contributing to the person engaging in challenging behaviour, and decrease the use of restrictive practices, while improving the adult’s overall quality of life.

This approach should form the centrepiece of the national framework and, at the least, should be a separate strategy.

Support to make choices and exercise rights

People with disability who are subject to restrictive interventions are often highly vulnerable and there is a significant potential for their human rights to be violated and for abuse to occur. This potential will only increase under a NDIS, where there will be greater challenges in relation to safeguarding vulnerable people’s rights in a market-based approach to the provision of disability services.

Apart from appropriate safeguards and quality standards implemented as part of a NDIS, people with disability, particularly those who are more vulnerable such as those with impaired decision-making capacity, must be supported to exercise their rights and keep themselves safe.

A core strategy for all states and territories, working closely with DisabilityCare, must be to start developing strategies, resources and tools to assist people with disability, including people with impaired decision-making capacity to exercise choice and control, make decisions about whether they are getting good outcomes from the services and supports they purchase, and protect themselves from abuse, neglect and exploitation.

This approach should be part of a range of strategies aimed at the prevention of abuse, neglect and exploitation of people with disability.

Use of data to inform practice

I strongly agree with the focus on the use of data to inform practice. Monitoring the use of restrictive practices is the only way to measure whether strategies for reducing and eliminating the use of restrictive practices are working, and arguably the only way to really reduce and eliminate restrictive practices. Monitoring and data collection must start as soon as possible for this reason.

⁶ Grey, I.M. McLean, B. 2007, “Service User Outcomes of Staff Training in Positive Behaviour Support Using Person Focused Training: A Control Group Study”, *Journal of Applied Research in Intellectual Disability*, (20), 7.

Closing remarks

Thank you for the opportunity to comment on the proposed national framework for reducing the use of restrictive practices in the disability services sector.

The importance of this piece of work cannot be under-emphasised given the risks for individuals arising from the use of restrictive practices. For this reason, restrictive practice use must always be a practice of last resort and only ever applied following comprehensive assessment and the development and implementation of a person-centred positive behaviour support approach.

In developing a national framework, attention must be given to ensuring appropriate safeguards for people with disability. There must also be consideration for how these will be ensured under the types of contractual service delivery arrangements that are likely to arise with the implementation of a NDIS.

There must also be a strong focus on individual autonomy and ensuring that the right of the individual to make choices regarding their support is upheld. For this reason the individual and their families/carers must be active in any decisions regarding restrictive practice use.

I look forward to further opportunities to contribute to the development of this framework and once again commend the Department of Families, Housing, Community Services and Indigenous Affairs for its leadership of this significant piece of work.



Jodie Cook

Public Advocate (Queensland)

Office of the Public Advocate (Queensland)

Website www.publicadvocate.qld.gov.au

Email public.advocate@justice.qld.gov.au

Write to GPO Box 149, BRISBANE QLD 4001

Telephone (07) 3224 7424

Fax (07) 3224 7364