THE LAW SOCIETY
OF NEW SOUTH WALES

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Regulation of Restrictive Practices Bill Consultation
Policy, Reform and Legislation Team
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By email: Policy@justice.nsw.gov.au

To whom it may concern,

Draft Persons with Disability (Regulation of Restrictive Practices) Bill 2021

Thank you for the opportunity to provide feedback on the draft Persons with Disability (Regulation of Restrictive Practices) Bill 2021 (Bill). The Law Society's Elder Law, Capacity & Succession and Human Rights Committees contributed to this submission.

We understand the Bill is proposed in accordance with the NDIS Quality and Safeguarding Framework's conferral on states and territories of the responsibility for the development of a regulatory framework for the use of restrictive practices by registered NDIS providers and behavioural support practitioners.[1]

As currently drafted, the Bill will require NDIS providers to comply with a detailed consent regime around restrictive practices, while requiring government sector agencies to take into account the objects and guiding principles of the Bill. The result will be that restrictive practices in relation to non-NDIS participants with disability continue to be governed by other laws and principles, such as the Quality of Care Principles 2014 (Cth) made pursuant to the *Aged Care Act 1997* (Cth).

While reform that brings legislative clarity around restrictive practices is welcome, we are concerned that this duality of regimes will create anomalies, may be discriminatory and may, in practice, be difficult to implement. For example, it may result in different consent regimes applying to different residents in the same care facility. We consider that a uniform consent regime around restrictive practices should apply to any person with disability in New South Wales.

Our responses to relevant discussion questions are set out below.

1. Do you agree with the proposed objects and principles of the Bill?
We suggest the objects and guiding principles be amended to include reference to the importance of obtaining full, prior and informed consent before a restrictive practice is used.

[1] See *National Disability Insurance Scheme Act 2013* s 181H(f); *National Disability Insurance Scheme (Restrictive Practices and Behaviour Support) Rules* 2018 Pt 2 Div 2.

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While there are requirements and mechanisms in the Act for obtaining consent, we consider a reference to consent in the guiding principles is warranted.

We also suggest amending the objects to include reference to Australia's obligations under the Convention on the Rights of Persons with Disabilities (CRPD). The CRPD is referenced in the companion paper, but not in the draft Bill itself.

In relation to clause 3(2)(f), we suggest amending the section to clarify that restrictive practices should be used only as a matter of last resort and not before all other options have been considered and exhausted.

2. Is the reporting framework for NSW Government agencies sufficiently robust?

In clause 7(6)(b), there is a need to clarify for what purpose the regulations may exempt a government agency from including specific information in a report. As currently drafted, this clause may lead to concerns around transparency and accountability regarding the use of restrictive practices.

In relation to clause 7(5), we suggest there should be a requirement for agencies to report on the number of authorisations of restrictive practices and the number of emergency uses.

3. Do the Ageing and Disability Commissioner's new responsibilities support the appropriate use and review of restrictive practices?

In clause 5(1)(d) it is not clear from the Bill or the companion paper how oversight responsibilities will be shared between the Ageing and Disability Commissioner and the Quality and Safeguards Commission. Given the nature of restrictive practices and the vulnerability of NDIS participants (especially in circumstances where they are effectively detained), the Ageing and Disability Commissioner should ideally have own-motion powers to undertake investigations or inspections in relation to use of restrictive practices.

We suggest that it needs to be clear that the definition of "relevant information" in clause 6(3) includes the reasons for any justification for the need for the use of a restrictive practice.

4. Is the framework for gaining the NDIS participant's consent sufficiently robust and practical?

<u>Meaning of consent</u>

We suggest clause 12 be amended to clarify that the information provided to assist the NDIS participant in deciding whether or not to consent to the use of a restrictive practice must include information sufficient to enable the participant to give properly informed consent in the sense of understanding the risks and benefits of the use of that practice.

<u>'Trusted person'</u>

Under clause 12(5) the NDIS provider has sole authority to determine whether the NDIS participant has the capacity to give consent. While the NDIS provider may be in a position to monitor capacity closely, there is a risk that systemic or institutional factors may contribute to an incorrect assessment.

Clause 13 determines who is the appropriate 'trusted person' entitled to give consent where the NDIS participant lacks capacity to do so. Unless a duly authorised guardian has been appointed, there is no judicial or quasi-judicial oversight of the issue of capacity, or of the suitability of the 'trusted person'. We have concerns that this may increase the risk of elder abuse or disability abuse at the hands of a family member, carer or friend in the role of 'trusted person'.

In our view, where the NDIS participant's capacity to consent is in question, the matter should be brought before the NSW Civil and Administrative Tribunal and any 'trusted person' should be appointed and authorised by the Tribunal.

We note that the *National Disability Insurance Scheme (Restrictive Practices and Behaviour Support) Rules 2018* (Cth) authorise, and contemplate, the use of a tribunal as part of a state or territory based consent regime (see the note to Rule 9). We recommend that the Tribunal adopt and apply the definition of 'restrictive practices' set out in the Rules, noting that it has done so in recent decisions under the existing regime: see for example *HZC* [2019] NSWCATGD 4.

In its decision in *HZC*, the Tribunal noted that its involvement in appointing the person entitled to consent to restrictive practices ensures clarity around their role while also minimising the scope of the restrictive practices that are authorised:

> 34 The Tribunal has for several years recognised that decision making about the use of restrictive practices is a matter which it should recognise as a specific function which might be assigned to a guardian, so that the guardian's role in making decisions about such matters is clear and to avoid the use of plenary orders, as required by s 15(4) of the Act.

The Tribunal's involvement in appointing the 'trusted person' would also ensure transparency of process, that restraints are based on the least restrictive option and that their impact is monitored and reviewed as appropriate in the circumstances: see *SZH* [2020] NSWCATGD 28 at [7].

We note that the concept of the 'trusted person' has similarities with the concept of the 'person responsible' to consent to medical and dental treatment under Part V of the *Guardianship Act 1987* (NSW). In the experience of our members, restrictive practices can involve a more serious level of intervention which carries a greater risk of physical and/or psychological impact than the impact of medical or dental treatment, and accordingly, we consider a more robust consent regime is warranted.

<u>Consent to the authorisation of a restrictive practice</u>
Clause 15(3)(2) requires an authorisation panel to obtain the consent of the NDIS participant before issuing an authorisation. Clause 15(5) requires the NDIS participant to be provided with information about the proposed authorisation including the behaviour support plan. We suggest clarifying that, in cases involving the consent of a 'trusted person' on behalf of the NDIS participant, the 'trusted person' should be provided with the information required under clause 15(5).

<u>Consent to the use of a restrictive practice</u>
In relation to clause 10(1)(a), we suggest there should be a requirement for regular review to confirm that the consent of the NDIS participant (or the 'trusted person') remains. The frequency of review should depend on the circumstances and the severity and impact of the restrictive practice.

In addition, clause 15(10) should be amended to clarify that an authorisation panel may revoke an authorisation if consent to the use of the practice is withdrawn.

<u>Use of a restrictive practice without consent</u>
In relation to clause 10(2), in our view stricter criteria should apply before restrictive practices may be applied under an interim authorisation without consent. We suggest clause 15(4)(a) be amended to the effect that the restrictive practice is only authorised if the NDIS provider has made all reasonable efforts to determine whether consent is given, refused or withdrawn.

In relation to an emergency use, clause 11(3) should be amended to require authorisation to be obtained within a shorter period of time than 1 month after the unauthorised use. In our view, a report or justification should be lodged within 1-2 days.

7. Do you think having an independent behaviour support practitioner on the authorisation panel provides enough independence and expertise?

Under clause 16, the authorisation panel includes each NDIS provider proposing to use the restrictive practice on the NDIS participant and an NDIS behaviour support practitioner who did not develop the behaviour support plan for the NDIS participant, and is not employed or engaged by an NDIS provider on the panel. We have concerns about including NDIS providers on the panel, given the potential for conflict of interest where decisions about restrictive practices may have operational and/or cost implications for the provider. Consideration could be given to excluding NDIS providers from the panel, and requiring instead that they be consulted.

9. Does the authorisation framework provide enough balance between the rights of the person with disability and the responsibilities of their service provider?

Clause 15(3)(a) requires that an authorisation should not be issued unless the proposed restrictive practice is "appropriate and necessary to prevent the NDIS participant from causing harm to themselves or another person". Consideration should be given to the imminence of the threat required to justify the authorisation. We suggest also adding a requirement that it be the least restrictive option and a last resort.

10. Are the Commissioner's and NCAT's powers to review restrictive practices sufficient?

We consider it is important for Part 6 to provide for an advocate for the NDIS participant. While clause 20(1)(c) allows a third party (which could be a family member) to appeal the decision, that third party is under no obligation to act on instructions from the NDIS participant or even in their best interests.

We suggest the NDIS participant should be offered a lawyer or other trained advocate to assist during the appeal process. In the experience of our members, appeal avenues are not accessible to persons with mental capacity issues unless there is a procedure in the legislation for a lawyer or advocate to assist them.

We also note that appropriate additional resourcing of the Commissioner, NCAT and the Public Guardian may be needed.

See also our response to Question 4.

11. Do you have any other comments on the Bill?

<u>Prohibited restrictive practices</u>

While we support the prohibition in clause 8(1) on the use of seclusion on children, we note it is unclear from the Bill, the Explanatory note and the companion paper why this prohibition only applies to children, and not to adults.

<u>Behaviour support plan</u>

In relation to clause 19(2), we suggest the behaviour support practitioner should also consult with family members, carers and any 'trusted person' as appropriate, when developing a behaviour support plan.

<u>Whistleblower provisions</u>

We suggest clause 18 should include a requirement that an NDIS provider that uses, or proposes to use, a restrictive practice on an NDIS participant must develop whistleblower policies and protections allowing anonymous complaints to the NDIS Quality and Safeguards

Commission and/or the Ageing and Disability Commissioner. We note that s 13 of the *Ageing and Disability Commissioner Act 2019* (NSW) enables a person to make an anonymous report to the Commissioner.

'Protected person'

We note the term 'protected person' is defined in s 23 to mean the Ageing and Disability Commissioner, the Commissioner's staff or a person acting under the Commissioner's direction. This usage may be misleading or confusing given that the term is defined differently in s 25D of the *Guardianship Act 1987* (NSW).

Regulations

We note that the Bill would require several key issues to be clarified by the regulations, for example:

- the grounds on which the Commissioner may overturn a decision are not specified in the Act, but are to be prescribed by the regulations: cl 20(7)(a);
- the grounds on which the Commissioner may refuse to hear a review are deferred to the regulations: cl 20(3); and
- the time within which an application for review may be made is to be set out in the Regulations: cl 20(7)(d).

Our view is that these are key issues which should be clarified in the Bill itself. In relation to the time limit within which an application for review may be made, we query whether it is appropriate for there to be a time limit at all, given this may impose an arbitrary procedural barrier to review for a person likely in need of substantial assistance to access legal remedies.

Reform of the Guardianship Act

This Bill concerns processes for supported and substitute decision-making in relation to persons with disability. We encourage the NSW government to implement the recommendations in the NSW Law Reform Commissions' Report on its Review of the Guardianship Act 1987 (Report 145) concerning these matters.

If you have any further questions in relation to this letter, please contact Sue Hunt, Principal Policy Lawyer on (02) 9926 0218 or by email: sue.hunt@lawsociety.com.au.

Yours sincerely,

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President