

Submission of the Office of the Public Guardian to the Legislative Assembly of the Northern Territory Social Policy Scrutiny Committee on the National Disability Insurance Scheme (Authorisations) Bill 2019

Introduction

The Office of the Public Guardian (OPG) welcomes the opportunity to provide a submission to the Social Policy Scrutiny Committee on the NDIS (Authorisations) Bill 2019 (the Bill). OPG shares a nationwide concern about persons with disability¹ subjected to behaviour modification through the use of restrictive practices and is committed to national and territory initiatives that aim to reduce and eliminate the use of restrictive practices on all persons with disability.

The use of restrictive practices is a serious infringement of a person's human rights and there must be strong legislative regulation of these practices in all service sectors with the aim of reducing and eliminating them in accordance with the United Nations Convention on the Rights of Persons with Disabilities and the National Framework for Reducing and Eliminating the Use of Restrictive Practices in the Disability Service Sector. It would not be a sufficiently robust framework to address this important human rights issue through policy and guidelines only.

The introduction of the Bill and its enactment will meet the Northern Territory's obligation under the NDIS Quality and Safeguarding Framework to establish a restrictive practice authorisation framework in the Northern Territory for NDIS service providers and participants. However the targeted scope of the Bill (NDIS service provider and NDIS participant specific) means that there will be many Territorians with a disability who receive services and supports from other service sectors (including aged care, education and health care services) who fall outside this framework and may be subject to restrictive practices without a clearly legislated authorisation or monitoring framework for the use of those practices.

The establishment of a Senior Practitioner role will provide much needed expertise and support to NDIS service providers applying restrictive practices. The OPG submits that this expertise is relevant to and should be applied across all service sectors who use restrictive practices, including aged care, education and health care services, to ensure a consistent and transparent approach to the use of restrictive practices for all persons with disability in the Northern Territory.

Monitoring and safeguarding of restrictive practices for all Northern Territory service sectors who use restrictive practices for a person with a disability could occur under the Community Visitor Program. This monitoring and safeguarding could occur in tandem or as an alternative to the monitoring and safeguarding that will be provided by the NDIS Quality and Safeguarding Commission to NDIS service providers and NDIS participants. An independent Community Visitor Program is a critical element to the safeguarding of vulnerable people in the Northern Territory.

Carefully considered and appropriately consulted Regulations and guidelines will be essential to address components of the authorisation framework that have not been addressed in the Bill, including response times for applications for authorisation and the emergency use of restrictive practices.

¹ The use of the term persons with disability in this submission includes all persons with impaired decision-making capacity who may be encompassed under the *Guardianship of Adults Act*.

Although OPG is disappointed by the lost opportunity for this authorisation framework to encompass all Northern Territory service sectors who use restrictive practices it is important to recognise that the requirement for comprehensive positive behaviour support plans in the Bill and the NDIS Rules will improve the quality of life of NDIS participants and reduce and eliminate the need for and use of restrictive practices in their lives.

Importance of legislative framework

The use of restrictive practices is a serious infringement of a person's human rights and the authorisation and regulation of these practices in relation to persons with disability must be embedded in legislation.

Legislation provides essential transparency and accountability of this important framework and ensures that it is not subject to amendment by the government of the day or in response to societal trends and norms without appropriate scrutiny by stakeholders and all elected members of the Legislative Assembly.

Scope of restrictive practice authorisation framework in the Bill

The lawful use of restrictive practices without legislative authorisation is a complex and uncertain legal area and places Territorians with disabilities at risk of harm and/or exploitation. Currently there is very limited legislative authority for the use of restrictive practices in Northern Territory service sectors, including disability, aged care, education and health services. The Bill and the introduction of the restrictive practices authorisation framework will provide legal certainty for NDIS service providers² encompassed by the framework. Unfortunately this framework will not extend to other service sectors who may use restrictive practices in relation to persons with disability and these persons remain at risk of harm and/or exploitation through the unauthorised and unmonitored application of restrictive practices.

The impact of a NDIS service provider specific framework has two significant implications:

1. There is inconsistency of authorisation and monitoring of the use of restrictive practices for NDIS participants and other persons with disability receiving services and supports from service sectors who are not NDIS service providers including aged care, education and health care services.
2. There is inconsistency of authorisation and monitoring of a NDIS participant through their different life stages and/or when they receive services and supports from service sectors who are not NDIS service providers. For example, the authorisation and monitoring of restrictive practices in relation to a NDIS participant changes for that individual as they move between the NDIS service provider (restrictive practices authorised and monitored) and an educational facility and/or a health care service (restrictive practices unauthorised and unmonitored).

OPG recommends the Bill be amended to allow the framework to encompass other service sectors including aged care, education and health care services. The inclusion of different service sectors could occur as a staged introduction with NDIS service providers being the first sector to be encompassed by the framework.

If the Bill remains NDIS service provider specific it is foreseeable that the Northern Territory Government will need to draft further legislation to authorise and monitor the use of restrictive practices in relation to

² OPG notes that if a NDIS participant is being treated under the *Mental Health and Related Services Act*, the Bill is still applicable for the use of all restrictive practices that are not covered under the *Mental Health and Related Services Act*.

persons with disability who receive services and supports from other service sectors including aged care, education and health care services.

Expertise and accountability of the Senior Practitioner

Clause 9(2) of the Bill provides that the Minister must be satisfied that the Senior Practitioner has qualifications, clinical experience and personal qualities necessary to exercise the Senior Practitioner's powers and perform the Senior Practitioner's functions. OPG submits that experience in the disability service sector is an essential criteria for the position of Senior Practitioner.

The Senior Practitioner holds a fundamental position in relation to the registration of NDIS service providers who apply restrictive practices to NDIS participants and also in the context of the Northern Territory Government's commitment to the reduction and elimination of restrictive practices in the disability service sector. OPG submits that the Bill should include a requirement that the Senior Practitioner prepare an Annual Report and that this should be tabled in the Legislative Assembly to provide transparency and accountability for this important position and office.

The expertise of the Senior Practitioner will provide much needed guidance and support to NDIS service providers applying restrictive practices. OPG submits that this expertise is relevant to and should be applied across all service sectors who use restrictive practices, including aged care, education and health care services. This will ensure a consistent and transparent approach to the use of restrictive practices in the Northern Territory and to ensure Territorians with disability who are subject to restrictive practices have consistent protection and monitoring of these practices.

Operational aspects of the Bill to be addressed in the Bill or through Regulations or guidelines

The Bill provides a framework for the authorisation of restrictive practices by NDIS service providers for NDIS participants. OPG notes that greater detail is required in relation to aspects of the framework and if timing constraints prevent them being included in the Bill they should be addressed through appropriately consulted Regulation and guidelines including:

- The interaction and information sharing between the Senior Practitioner and the NDIS Commission. OPG submits that an application for authorisation should include details of any interactions the NDIS service provider has had with the Commission over the previous 12 months including the number of reportable incidents, any complaints made to the Commission about the service provider and the outcome of these complaints.
- The period in which the Senior Practitioner is required to respond to an application for authorisation or interim authorisation. Timing is an essential component of responding to the needs of persons with disability who are displaying behaviour that may require the use of a restrictive practice and the OPG submits that the Bill include time frames in which the Senior Practitioner must respond to applications under the Bill.
- In circumstances of emergency a NDIS service provider may be required to use a restrictive practice for a participant while they await the determination of their application for authorisation. The Bill does not address any circumstances or time period in which this may be permitted (without legal liability) for the NDIS service provider or a process whereby an urgent application for authorisation may be made³.

³ OPG notes that this inclusion is most appropriately addressed in the Bill and not in Regulations or guidelines.

- In relation to the restrictive practice category of 'seclusion' the NT has very few (if any) service providers who can provide an appropriate and safe environment in which to seclude a person with disability. The authorisation of this restrictive practice must necessarily consider the environment in which a person would be secluded and how the service provider would meet appropriate supervision requirements of seclusion.

Monitoring and safeguarding under the Northern Territory Community Visitor Program

Monitoring and safeguarding of restrictive practices for all Northern Territory service sectors who use restrictive practices for a person with a disability could occur under the Community Visitor Program. This monitoring and safeguarding could occur in tandem or as an alternative to the monitoring and safeguarding that will be provided by the NDIS Quality and Safeguarding Commission to NDIS service providers and NDIS participants.

Concluding comments

OPG congratulates the Office of Disability on their efforts in preparing the Bill and developing an important authorisation framework to safeguard the human rights of NDIS participants in the Northern Territory. The requirement for comprehensive positive behaviour support plans in the Bill and the NDIS Rules will improve the quality of life of NDIS participants and reduce and eliminate the need for and use of restrictive practices in their lives.

The introduction of a restrictive practices authorisation framework is necessary to meet the Northern Territory's obligation under the NDIS Quality and Safeguarding Framework. Depending on time constraints of meeting this obligation, OPG strongly recommends the Northern Territory Government take this opportunity to amend the Bill so that the framework can apply to the authorisation of restrictive practices across all service sectors, including aged care, education and health care services and not only NDIS service providers.

In the event that time constraints do not allow amendment of the Bill, OPG recommends the Legislative Assembly pass the Bill in its current form and submits that the Bill has sufficient regard to the rights and liberties of individuals and has sufficient regard to the institution of Parliament.

OPG recommends that where possible all other submissions made to the Committee by OPG be incorporated into the Bill (depending on time constraints) or appropriately consulted Regulations and guidelines.

Further, OPG has considered the submissions of the NT Community Visitor Program and supports those submissions and in particular in relation to the inclusion of social control and punitive practices in the definition of prohibited practices, the requirement for independence of the Senior Practitioner and clarity regarding the interaction between the Bill and the *Disability Services Act*.

Thank you for the opportunity to provide this submission to the Committee.



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