SUBMISSION TO THE SOCIAL POLICY SCRUTINY COMMITTEE (LEGISLATIVE ASSEMBLY OF THE NORTHERN TERRITORY)

National Disability Insurance Scheme (Authorisations) Bill 2019

Summary

The Community Visitor Program (CVP) considers that a robust and comprehensive framework for authorisation of restrictive practices is required in the Northern Territory disability sector. It is positive that there will be a legislative framework established by the National Disability Insurance Scheme (NDIS) (Authorisations) Bill 2019 ('the Bill') to authorise restrictive practices. This is an important step towards reaching the goal of reducing and ceasing the use of restrictive practices on people with disabilities.

By establishing this framework, the Northern Territory is moving in the right direction. In particular, by articulating the principles for service providers supporting people with behaviours of concern (section 5) and the Senior Practitioner's function to raise awareness and build capacity.

Nevertheless, the CVP considers that the Bill does not extend far enough to the most vulnerable people with disabilities in the NT. In the CVP's view, a framework for authorising and monitoring restrictive practices needs to cover the use of restrictive practices on all people with disabilities in the NT, including those who are not covered by the NDIS. The principles to protect the human rights of people with disabilities apply equally to this group, yet there are no safeguards to protect them in the Northern Territory.

Role of the CVP

The CVP has relevant expertise in frameworks for and monitoring of restrictive practices. The CVP is the statutory body established under the *Disability Services Act 1993* to review restrictive practices used in residential facilities operated by the Department of Health. This currently covers the Secure Care Facility (Alice Springs) and appropriate places operated by the Department of Health (such as the 'Cottages' in Darwin adjacent to the Darwin Correctional Centre, and another five houses). The CVP is required to review the use of restrictive practices consistent with the legislation on each visit to a residential facility. The CVP provides regular reports to the service

on quality and safety matters, including behaviour support plans and the use of restrictive practices.

The CVP is also the legislated body to review restrictive practices (seclusion and mechanical restraint) in approved mental health treatment facilities under the *Mental Health and Related Services Act 1998*.

The CVP regularly provides reports to the services using restrictive practices under these pieces of legislation and, each year, an annual report is tabled in the NT Legislative Assembly.

Principles

The CVP strongly supports the principles in the Bill. This is a positive articulation of the fundamental protections for people covered by the legislation.

In the CVP's view, the principles would be enhanced by including the right to regular review. Although this is inherent in how the framework is structured, it is a guiding principle for treatment and care in the *Disability Services Act 1993* and the National Disability Standards. As such, it is appropriate to explicitly state it in the principles of the legislation.

Statutory Framework for Restrictive Practice

The CVP is pleased that a statutory framework for more widespread authorisation of restrictive practice in the Northern Territory disability sector is being implemented. The CVP considers there is an urgent need for regulation of such practices. As it is consistent with NDIS definitions of restrictive practice, it also expands the scope of restrictive practices currently in place under the *Disability Services Act 1993*.

Expansion of Scope

Unfortunately, the Bill does not address the range of contexts within which restrictive practice is used on people with disabilities in the NT. In fact, the Bill has taken the narrowest approach of only being applicable to NDIS participants who have provider supports in place.

The CVP strongly considers that the Bill needs to be broader in scope, and extend to people with disabilities (adults and children) who are subject to restrictive practices at school, in detention facilities, in care facilities, out of home care, and in supported accommodation. This approach has been adopted in other Australian jurisdictions, either through legislation or policy. For example:

- The ACT legislation ensures that restrictive practices authorisation and monitoring is now in place in education, disability, child protection and other regulated settings.

- In NSW, some specialist accommodation disability providers are not regulated by NDIS Commission however are covered by the NSW restrictive practices authorisation framework.

- In SA, disability service providers must have safeguarding policies in place for services provided wholly or partly to any person with a disability.

To illustrate this concern, an adult with a disability living in a remote Aboriginal community who has not been able to secure a provider to deliver any service on their NDIS plan but is subject to restraints would not be covered by the provisions of the Bill. Similarly, a child with a disability who is not eligible for the NDIS but whose behaviour is being managed at school by restricting their free exit from the classroom would not be covered by the provisions of the Bill. A young person with FASD in an out of home care residence who does not have a NDIS plan but is being restrained to manage behaviours of concern would not be covered by the provisions of the Bill.

While such interventions would require considerable oversight and authorisation if the person is covered by the Bill, for those who are not, the use of even prohibited practices would continue unregulated and not subject to review.

The CVP considers this to be an urgent issue to be addressed, preferably through legislative means (either in the Bill or an amendment to the *Disability Services Act 1993*). The legislation could include provision for the Senior Practitioner to take referrals from interested parties, to review and investigate whether restrictive practice is occurring, to provide education, and to refer matters to another relevant independent authority.

Clarity Regarding Prohibited Practices

It is a positive step that the Bill makes clear that aversion, overcorrection, misuse of medication, denial of key needs (clearly defined in section 6) and harassment or vilification are prohibited in the framework. The CVP also considers the prohibition of 'practices or actions which limit or deny access or participation to community, culture and language, including the denial of access to interpreters' (s17(f)) and prohibition of the use of seclusion for children (s17(g)) are very important protections for people with disabilities.

With respect to the use of seclusion for children, the CVP has been advocating for many years for this outcome in relation to mental health services. It is pleasing to see this now being recognised clearly as a prohibited practice in disability services. The CVP further notes, however, that if a child with a disability does <u>not</u> have a NDIS plan with provider supports in place, the seclusion of such a child would not be prohibited under NT legislation.[1]

[1] The CVP also notes, however, that if the child were detained in an approved mental health treatment facility, the practice of seclusion would remain lawful. It is inherently contradictory to prohibit the use of seclusion in one setting, but not others that may impact on the child. More comments on the application of the Bill as it relates to people in mental health settings is noted in the 'Other' section below.

Protection of people's right to freely access their family, including extended family, kin and people in their community is particularly important in the NT, especially as it relates to Aboriginal and Torres Strait Islander persons with disabilities. This is another significant protection in the Bill that the CVP is keen to see maintained in the legislative framework.

'Social control' and 'punitive' practices

The CVP notes that the list of prohibited restrictive practices includes provision for 'any other restrictive practice prescribed by regulation' (s17(h)). It is positive that this subsection has been included to enable further additions to the list as the disability sector in the NT builds capacity.

In the consultation process, the CVP advocated for the inclusion of 'social control' (that is, implying a person cannot engage in activities, access or contact by the use of verbal threats) and any practices that are 'punitive' as separate categories of prohibited practice. 'Punitive' could be defined as practices that would be considered punishment for any behaviours of concern, such as denying the person the opportunity to engage in their daily routine or access to the community in response to behaviour that has occurred. The CVP regards these two categories as worthy of being added explicitly to the prohibited practices listed in s17.

Role of the Senior Practitioner

The CVP notes the establishment a Senior Practitioner function within the NT public service. This is a very positive step in oversighting the use of restrictive practice and building awareness and capacity within the disability sector in the NT.

Independence of the Role

Unfortunately, the NDIS (Authorisations) Bill 2019 and explanatory statement is silent on the independence of the Senior Practitioner (either in the legislation, or how this may be achieved structurally within the NT public service). It states only that the Senior Practitioner will be a 'public sector employee', however there are no provisions to ensure that this employee will not be an employee of the Department of Health. Without explicit clarification within the Bill or the Explanatory Statement, this suggests that the role may be based with the Department of Health.

From experience, the CVP considers that the independence of such a position from the Department of Health is a critical component of an effective quality and safeguards framework. The use of restrictive practices is a matter of human rights (rather than 'healthcare'). The need for separate operational and oversight functions is evident in NDIS implementation nationally; the NDIS Quality and Safeguards Commission is the independent agency tasked with oversight of behaviour support and restrictive practice.

The CVP would like to draw attention to frameworks in place in the ACT, in which the Office of the Senior Practitioner has been established within the Community Services portfolio and has formal links with the ACT Human Rights Commission. This jurisdiction has also promoted the need for independent 'Disability Community Visitors' as a quality and safeguards measure, to visit places and raise concerns that may require investigation.

With respect to independence, the Office of Disability is located within the Department of Health. If the Senior Practitioner were to be operationally aligned with the Office of Disability, it would compromise the independence of the role. If the Senior Practitioner were to be located within the Department of Health, it would exercise functions relating to authorisation of restrictive practices within facilities operated by the Department of Health. This occurs by virtue of section 4(2) of the current Bill, in which the authorisation and review process applies to the Secure Care Facility (Alice Springs) and appropriate places operated by the Department of Health (such as the 'Cottages' in Darwin, adjacent to the Darwin Correctional Centre).

It is important that the Bill identifies further protections for the independence of the functions of the Senior Practitioner. With respect to how this independence may be secured within the Bill, the CVP notes that both the *Disability Services Act 1993* and the *Mental Health and Related Services Act 1998* provide that the Minister cannot appoint a person who has a contract from the agency delivering services. This currently means that the role is located within a statutory independent office in the Attorney-General's Department.

Capacity Building and Awareness Raising Functions

The CVP notes significant resourcing will be required to support implementation of the framework and capacity building requirements amongst NDIS providers. There will need to be considerable work undertaken with the sector to raise awareness about restrictive practices in general, the NT authorisation framework, the role of the NDIS Quality and Safeguards Commission, and the interaction between NT and NDIS quality systems.

Capacity building and awareness raising will be a major challenge in the NT. A range of resources and training materials in English, easy English, pictorially and in language will be required. As there is limited to no support for staff to be paid to attend training in a behaviour support plan under the NDIS price guide, there will also need to be consideration of training support direct to service providers across the NT.

The CVP considers that the Senior Practitioner will also need to assist people who may not be covered by the scope of the legislation (such as those not eligible for NDIS or do not have a plan approved with supports in place). These people will need to have their concerns raised with another relevant statutory authority, such as the Health and Community Services Complaints Commission.

The CVP notes the above in relation to how the functions under the Bill will be operationalised and enabled in practice, in particular the need for funding to support the Senior Practitioner's capacity to delivery on their legislated mandate.

Qualifications

The CVP notes the provisions in section 9 relating to the appointment of the Senior Practitioner. The CVP considers that there needs to be greater articulation in the Bill that the Senior Practitioner requires qualifications and experience *in behaviour support*.

The rationale for this is that the NT is recognised as a State/Territory that requires considerable capacity building in the area of behaviour support and restrictive practice. The unique challenges of the NT, including providing behaviour support in a culturally safe manner in remote communities, means that the Senior Practitioner must be very experienced behaviour support practitioner. As such it is imperative that the legislation establishes very clearly the specific qualifications and experience required of the Senior Practitioner to lead the NT in this area.

Application for People on a Supervision Order (Criminal Code)

Section 4(2) of the NDIS (Authorisations) Bill 2019 notes that the new legislation will 'prevail' in relation to a NDIS participant who is also a person to whom Part 4 of the *Disability Services Act 1993* applies.

The CVP has a visiting, inspection and complaints resolution function for residents under the *Disability Services Act 1993*. At present, the behaviour support function is provided by the Specialist Support and Forensic Disability Unit (SSFDU) in the Office of Disability. Some (but not all residents) have a NDIS plan approved.

The CVP considers that there needs to be more clarity in how Part 4 will continue to operate if the Bill comes into effect. It may be useful to state that it prevails 'to the extent of any inconsistency'.

Part 4 of the *Disability Services Act 1993* establishes the framework for the use of restrictive practices and the development and review of behaviour support plans. It includes definitions of restrictive practices. In the main, the CVP considers that the definitions in the Bill (as articulated in the NDIS Rules) are more comprehensive. Nevertheless, Part 4 also establishes other protections for residents of facilities operated by the Department of Health, such as specific requirements in developing a plan (s36), review processes (ss39-40), penalties and obligations of staff relating to the use of restrictive practices in facilities (s41), emergency use of restrictive practices including notification (s42) and recording of its use (ss43-44).

For any resident (or planned resident) of facilities run by the Department of Health with a NDIS plan, there needs to be greater clarity that these provisions of Part 4 of the *Disability Services Act 1993* will not be superseded by the NT restrictive practices authorisation framework proposed in the Bill.

Avenues for Review

The CVP supports the current arrangements for internal and independent review of decisions made by the Senior Practitioner. In particular, any form of independent review is very important and it is pleasing to see provision for this in the Bill.

The CVP draws attention, however, to the proposal that independent review of decisions in such a specialised area is by the NTCAT. By contrast, in the *Disability Services Act 1993*, section 40 provides for the establishment of a Review Panel. The Review Panel's membership (s70) requires that the Panel is comprised of a lawyer, a person with a special interest or expertise in people with a disability (including a provider of services to persons having a complex cognitive impairment), and a person representing the interests of the community. Provision for statutory independence of members of the Panel is also included.

The CVP has advocated for many years for the establishment of the Review Panel as an essential component of a robust quality and safeguards framework. As noted in CVP annual reports for the past few years, unfortunately the Review Panel has not been constituted. Nevertheless, the legislative framework is already established to cover a specialised independent review process.

As section 4(2) indicates that the Bill 'prevails' over Part 4 of the *Disability Services Act 1993*, it appears that the Review Panel is no longer the relevant panel for any person with a NDIS plan who may reside in a residential facility operated by the Department of Health.

The CVP considers that a specialist Review Panel model (and the additional safeguards in its membership along the lines of section 70 of the *Disability Services Act 1993*) is a preferable model for independent review of decisions made under the proposed NT restrictive practices authorisation framework.

Other Matters

The CVP provides the following additional information to improve the NDIS (Authorisations) Bill 2019.

Appointments

- That the legislation provide for appointment of an interim Senior Practitioner by the CEO, in case of unexpected resignation or illness. Refer to s51 of the *Disability Services Act 1993* for a comparable 'interim appointment' section.

- That the legislation provide for resignation and termination of appointment of the Senior Practitioner by the Minister.

Legislative Drafting

- The definition of behaviour support plan includes a note that it may also 'integrate relevant orders such as orders in relation to supervision, monitoring or management conditions of the participant'. It would be preferable to have clearer guidance under what legislation such orders may be made. This may be more appropriately explicitly stated elsewhere in the Bill rather than in a definition note for 'behaviour support plan'.

- That the name of the legislation be reconsidered. In the CVP's view, it is more appropriate to refer to 'Restrictive Practices' in the title (instead of 'Authorisations'), as the legislation covers broader issues related to behaviour support and associated use of restrictive practices. The authorisations component of the framework is important, but not the defining purpose of the legislation.

Application to Mental Health

- The CVP notes comments provided at the public hearing to the effect that the Bill does not extend to the use of restrictive practices on people with mental illness. The Bill does not clarify how this legislation interacts with the *Mental Health and Related Services Act 1998* (MHRSA).

- The CVP considers that NDIS participants with a mental illness are subject to this Bill. If the participant with a mental illness is subject to restrictive practices implemented by a NDIS provider, under the *National Disability Insurance Scheme (Restrictive Practices and Behaviour Support) Rules 2018* (Cth) the participant must have a positive behaviour support plan developed to authorise any possible future use of such practices.

- A person who is a patient or being assessed under the MHRSA may be subject to the use of seclusion or mechanical restraint (ss61-62). This person must be in an approved mental health treatment facility (that is, Royal Darwin Hospital or Alice Springs Hospital). The CVP considers that if a NDIS participant with a mental illness is in an approved treatment facility, if this participant is accompanied by NDIS provider staff, the provider staff will be bound by the legislative operation of the Bill when implemented. Nevertheless, this would not affect the legislative basis that would authorise the use of seclusion or mechanical restraint by staff of the approved treatment facility.