

Disability Services Amendment Regulation 2023

Human Rights Certificate

Prepared in accordance with Part 3 of the *Human Rights Act 2019*

In accordance with section 41 of the *Human Rights Act 2019*, I, Craig Crawford, Minister for Child Safety and Minister for Seniors and Disability Services, provide this human rights certificate with respect to the *Disability Services Amendment Regulation 2023* made under the *Disability Services Act 2006*.

In my opinion, the *Disability Services Amendment Regulation 2023*, as tabled in the Legislative Assembly, is compatible with the human rights protected by the *Human Rights Act 2019*. I base my opinion on the reasons outlined in this statement.

Overview of the Subordinate Legislation

In accordance with the agreed roles and responsibilities set out in the National Disability Insurance Scheme (NDIS) Quality and Safeguarding Framework (NDIS QSF), states and territories are responsible for the legislative and policy frameworks for authorising the use of regulated restrictive practices in the NDIS. The NDIS Quality and Safeguards Commission (NDIS Commission) is responsible for overseeing the use of behaviour support and restrictive practices, including by monitoring registered NDIS provider compliance with the conditions of registration relating to behaviour support plans (known as positive behaviour support plans in Queensland) and the reporting of use of regulated restrictive practices.

Queensland's current authorisation framework for the use of restrictive practices with adults with an intellectual or cognitive disability who receive disability services or NDIS supports or services is created under the *Disability Services Act 2006* (the Act) and the *Guardianship and Administration Act 2000* (GAA). Under the framework:

- the Queensland Civil and Administrative Tribunal (QCAT) has exclusive jurisdiction (under Chapter 5B of the GAA) to appoint guardians for a restrictive practice matter (those guardians have authority to consent to the use of restrictive practices with an adult with an intellectual or cognitive disability (except for containment or seclusion);
- QCAT has exclusive jurisdiction to consent to the use of containment or seclusion with an adult with an intellectual or cognitive disability;
- the Office of the Public Guardian (OPG) has authority to approve the short-term use of containment or seclusion with an adult with an intellectual or cognitive disability in an emergency in certain circumstances; and
- the chief executive of disability services has the authority to approve short-term use of all other restrictive practices.

Responsibility for the authorisation of restrictive practices is distributed across multiple agencies, with the decision-maker depending on the type of restrictive practice, length of time, and service setting. However, most restrictive practices are approved by guardians specifically

appointed to consent to the use of restrictive practices by QCAT or, in the case of containment and seclusion, by QCAT itself.

On commencement of the NDIS QSF in Queensland on 1 July 2019, residential aged care (RAC) providers were exempt from Commonwealth registration requirements, noting the aged care system is subject to an alternative quality and safeguarding framework. Queensland put in place a corresponding exemption, under section 12 of the *Disability Services Regulation 2017* (DSR), exempting RAC providers from the requirement to comply with Part 6 of the Act (which establishes the restrictive practices authorisation framework).

The Commonwealth exemption lapsed from 1 December 2020, and from 1 March 2021, RAC providers were required to obtain state or territory authorisation (where available) to use regulated restrictive practices with NDIS participants. This transition was the subject of considerable concern for the aged care sector, due to associated complexity and lack of clarity.

Given sectoral concerns, Queensland decided to temporarily retain its exemption, noting the inclusion of RAC providers in a reformed Queensland authorisation framework was being considered through the Positive Behaviour Support and Restrictive Practices (PBSRP) Review. The PBSRP Review is designed to move toward greater national consistency in authorisation processes for the use of restrictive practices in the provision of NDIS supports or services, guided by draft *Principles for Nationally Consistent Authorisation of Restrictive Practices* developed for jurisdictions by the NDIS Commission.

RAC providers are now subject to the same requirements under the *National Disability Insurance Scheme Act 2013* (Cth) and *National Disability Insurance Scheme (Restrictive Practices and Behaviour Support) Rules 2018* (Cth) (NDIS Rules) as other registered NDIS providers. These include that the use of restrictive practices may only occur pursuant to a behaviour support plan developed by a specialist behaviour support practitioner and lodged with the NDIS Commission, and that all use be reported to the NDIS Commission.

On 1 February 2021, the definition of ‘disability services’ under s 12 of the Act was amended by the *Disability Services and Other (Worker Screening) Amendment Act 2020* to exclude NDIS supports or services from the definition of ‘disability services’, with ‘NDIS supports and services’ defined separately. These amendments were necessary to facilitate the implementation of nationally consistent screening of workers engaged by NDIS providers.

An unintended consequence of these amendments is that Queensland’s exemption—which derives its scope in part from the definition of ‘disability services’—no longer applies to the provision of NDIS supports and services to an adult in RAC by an approved provider under the *Aged Care Quality and Safety Commission Act 2018* (Cth) (ACQSC Act). Consequently, RAC providers are technically required to comply with Queensland’s authorisation framework, both under the Act and in accordance with their NDIS registration requirements. This is a technical oversight only, noting the PBSRP Review is considering the orderly transition to the Act authorisation framework of restrictive practices use with NDIS participants by RAC providers.

The objective of the *Disability Services Amendment Regulation 2023* (the Amendment Regulation) is to correct this technical oversight, to ensure approved providers under the ACQSC Act continue to be temporarily exempted from the requirement to comply with part 6

of the Act in the provision of services which include NDIS supports or services to an adult in RAC as originally intended.

Human Rights Issues

Human rights relevant to the subordinate legislation (Part 2, Division 2 and 3 *Human Rights Act 2019*)

The enactment of the Amendment Regulation limits the following human rights protected under the *Human Rights Act 2019* (HRA):

- right to protection from cruel, inhuman or degrading treatment (section 17(b) and (c));
- right to freedom of movement (section 19);
- right to privacy (section 25a);
- right to liberty and security of person (section 29(1) and (3)); and
- right to humane treatment when deprived of liberty (section 30).

However, based on a proportionality assessment (set out below), any limitations of engaged rights are reasonable and compatible with human rights.

(a) the nature of the right

Section 17(b) of the HRA provides that a person must not be treated in a way that is cruel, inhuman or degrading. Whether an act or omission amounts to one or more of the elements of prescribed treatment (cruel, inhuman or degrading) will be a question of degree and turn on the circumstances of the case. Section 17(c) provides that a person must not be subjected to medical or scientific experimentation or treatment unless they have given their full, free and informed consent. This expands on article 7 of the ICCPR by providing that consent must be given for medical treatment, and that consent must be informed. The use of restrictive practices may be seen as interfering with these rights if not used appropriately. The proposal limits the right to not be treated in a way that is cruel, inhuman or degrading, for a small number of NDIS participants in RAC facilities in Queensland who will not be subject to the same level of regulatory protection as NDIS participants in other settings in relation to the use of restrictive practices. The proposal also limits the right to protection against medical treatment unless a person has given full, free and informed consent. Under the aged care regulatory framework, a person or body appointed under the law of a state or territory can provide informed consent for the use of restrictive practices with NDIS participants in RAC facilities in Queensland where the person lacks capacity to consent.

Section 19 of the HRA provides that every person lawfully within Queensland has the right to move freely within Queensland and to enter and leave it and has the freedom to choose where to live. This clause is modelled on article 12 of the ICCPR. It reflects the negative obligation on the State under article 12 of the ICCPR to not act in a way that would unduly restrict the freedom of movement but is not intended to impose positive obligations on the State to take positive actions to promote free movement (e.g., the provision of free public transport services). The use of restrictive practices, in particular practices which restrict a person's free access to all parts of their environment, may be seen as interfering with this right if not used appropriately. The proposal limits the right to move freely for a small number of NDIS

participants in RAC facilities in Queensland who will not be subject to the same level of regulatory protection as NDIS participants in other settings in relation to the use of restrictive practices.

Section 25(a) of the HRA provides that a person has the right not to have the person's privacy, family, home or correspondence unlawfully or arbitrarily interfered with. The scope of the right to privacy is very broad. For example, the right to privacy protects the individual against interference with their physical and mental integrity. The use of restrictive practices, in particular physical and mechanical restraint, may be seen as interfering with the right to protection against interference with a person's physical integrity if not used appropriately. The proposal limits the right to a person's privacy for a small number of NDIS participants in RAC facilities in Queensland who will not be subject to the same level of regulatory protection as NDIS participants in other settings in relation to the use of restrictive practices.

Section 29(1) of the HRA provides that every person has the right to liberty and security. Section 29(3) provides that a person must not be deprived of the person's liberty except on grounds, and in accordance with procedures, established by law. Each provision contains internal limitations. It is not deprivation of privacy or liberty that is prohibited, but rather deprivation which is arbitrary or unlawful. The notion of arbitrary interference extends to those interferences which may be lawful, but are unreasonable, unnecessary, and disproportionate. The use of restrictive practices, in particular seclusion, may be seen as interfering with the right to liberty if not used appropriately. The proposal limits the right to a person's liberty for a small number of NDIS participants in RAC facilities in Queensland who will not be subject to the same level of regulatory protection as NDIS participants in other settings in relation to the use of restrictive practices.

Section 30 of the HRA provides that every person deprived of liberty must be treated with humanity and with respect for the inherent dignity of the human person. The use of restrictive practices may be seen as interfering with this right if not used appropriately. The proposal limits the right to human treatment for a small number of NDIS participants in RAC facilities in Queensland who will not be subject to the same level of regulatory protection as NDIS participants in other settings in relation to the use of restrictive practices.

The Amendment Regulation prospectively reinstates the exemption for RAC providers from the requirement to comply with Queensland's authorisation framework for the use of restrictive practices with NDIS participants. As at 31 December 2021, there were 917 NDIS participants in RAC facilities in Queensland. Restrictive practices may be used with a proportion of these participants, including the use of containment and/or seclusion in some cases. This means that restrictive practices use with a small number of NDIS participants in RAC facilities in Queensland will not be subject to the same level of regulatory protection as use with NDIS participants in other settings. This limits the human rights identified above.

(b) the nature of the purpose of the limitation, including whether it is consistent with a free and democratic society based on human dignity, equality, and freedom

The purpose of the limitation on human rights is to mitigate the significant and potentially adverse operational impacts on RAC providers from having to immediately comply, without any transitional period, with two overlapping authorisation regimes under the Commonwealth's aged care framework and Queensland's authorisation framework for the use

of restrictive practices with adults with an intellectual or cognitive disability who receive NDIS supports or services. The aged care framework is discussed below. Reduction of the regulatory burden on providers pursuant to the Amendment Regulation is considered to be proper purpose that is consistent with a free and democratic society based on human dignity, equality and freedom.

(c) the relationship between the limitation and its purpose, including whether the limitation helps to achieve the purpose

The reinstatement of the exemption will achieve the purpose identified above. It is a condition of registration for registered NDIS providers that they comply with a state or territory authorisation process (if available). By reinstating the exemption, RAC providers will not immediately have to comply, without any transitional period, with two overlapping authorisation regimes under the Commonwealth's aged care framework and Queensland's authorisation framework for the use of restrictive practices with adults with an intellectual or cognitive disability who receive NDIS supports or services.

(d) whether there are any less restrictive and reasonably available ways to achieve the purpose

While consideration was given to not reinstating the exemption, this was not deemed appropriate as it would not achieve the purpose stated above. Given the anticipated reform of Queensland authorisation framework pursuant to the PBSRP Review, it has been determined that temporary reinstatement of the exemption is the most appropriate and balanced approach.

This approach balances the need for NDIS participants in RAC to receive the same level of regulatory protection as NDIS participants in other settings with the need to support the orderly transition of RAC providers to Queensland's authorisation framework. It is noted that, if the exemption were not reinstated, RAC providers would be required to immediately comply with a framework which is often subject to criticism due to its complexity. In the meantime, both the NDIS and aged care regulatory frameworks will continue to apply to the use of restrictive practices with NDIS participants in RAC who are dual participants of both systems.

NDIS Quality and Safeguards

The NDIS Commission has oversight over the use of regulated restrictive practices under the NDIS. Under the NDIS Rules, there five types of regulated restrictive practices: seclusion, chemical restraint, mechanical restraint, physical restraint and environmental restraint.

RAC providers that use regulated restrictive practices with NDIS participants in their facilities will be required to obtain NDIS registration and comply with certain conditions of that registration. The NDIS Rules set out conditions relating to the use of regulated restrictive practices that apply to all registered NDIS providers, including:

- the development of behaviour support plans by a specialist behaviour support provider that covers the use of regulated restrictive practice;
- that use of regulated restrictive practices is in accordance with a behaviour support plan;
- that the provider gives regular reports on the use of regulated restrictive practices to the NDIS Commissioner; and
- that the provider keep written information relating to the use by the provider of regulated restrictive practices in relation to persons with disability.

The *NDIS (Code of Conduct) Rules 2018*, which help to prevent exploitation, violence and abuse by NDIS providers and workers, also apply to RAC providers providing services to NDIS participants. Anyone can raise a complaint about potential breaches of the NDIS Code of Conduct. When NDIS providers, or persons employed or otherwise engaged by NDIS providers, are found to have breached the NDIS Code of Conduct, the Commissioner is able to take a range of actions as appropriate, including education, compliance and enforcement action or prohibiting them from operating in the NDIS market.

Aged Care Quality and Safeguards

For all RAC residents, including NDIS participants, the use of restrictive practices is also regulated under Commonwealth aged care legislation (primarily the *Aged Care Act 1997* and the *Quality of Care Principles 2014*), with oversight by the ACQSC. The aged care framework regulates the same restrictive practices as the NDIS framework, with the definitions under the aged care framework aligned with those under the NDIS.

There are a range of safeguards under the aged care regulatory framework for RAC recipients (including NDIS participants), including:

- that restrictive practices are only used as a last resort to prevent harm to the RAC recipient or other persons, and after consideration of the likely effect on the RAC recipient;
- that restrictive practices are only used in proportion to the risk of harm, in the least restrictive form, and for the shortest period possible;
- that a behaviour support plan for the adult is included in the care and services plan for the RAC recipient developed by the RAC provider;
- that informed consent for the use of a restrictive practice is obtained from the RAC recipient or, in circumstances where a person lacks capacity, from that person's 'restrictive practices substitute decision-maker' (defined as a person or body, appointed under the law of a state or territory who can give informed consent);
- the requirement for RAC providers to report incidents of non-compliance to the ACQSC under the serious incident reporting scheme; and
- the requirement for RAC providers to provide data to the National Aged Care Mandatory Quality Indicator Program, including quality indicators related to physical restraint and medication management.

A recent QCAT decision has confirmed QCAT may appoint a guardian to consent to the use of restrictive practices on behalf of an RAC resident, including an NDIS participant, under the aged care framework. This may include the appointment of Queensland's Public Guardian. In making an appointment, QCAT must comply with the strong safeguards in the GAA and must also apply the HR Act. While this framework is considered problematic, particularly for containment and seclusion, it nevertheless provides an authorisation framework for the affected cohort if the exemption is reinstated.

(e) the balance between the importance of the purpose of the limitation and the importance of preserving the human right, taking into account the nature and extent of the limitation.

While I note that the reinstatement of the exemption has the potential to cause some meaningful impacts on the human rights mentioned above, I consider the importance of the purpose of mitigating against the significant and potentially adverse operational impacts on RAC

providers from having to comply with two overlapping authorisation regimes, and particularly without appropriate transitional arrangements, outweigh the need to preserving these rights.

(f) any other relevant factors

The objective of the Amendment Regulation is to correct a technical oversight which arose as an inadvertent consequence of unrelated legislative drafting. It does not change current practice, with RAC providers and relevant decision-makers largely operating on the understanding that the exemption has continued to apply unchanged to the use of restrictive practices with people with disability in RAC facilities.

Conclusion

I consider that the *Disability Services Amendment Regulation 2023* is compatible with the *Human Rights Act 2019* because it limits human rights only to the extent that is reasonable and demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

CRAIG CRAWFORD
MINISTER FOR CHILD SAFETY AND
MINISTER FOR SENIORS AND DISABILITY SERVICES

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