advocacy for inclusion

Submission in

Response to Consultation Paper on the Proposed Model, Powers and Functions of the ACT Office of the Senior Practitioner

Advocacy for Inclusion

March 2018

About Advocacy for Inclusion

Advocacy for Inclusion acknowledges the Ngunnawal people as the traditional owners of the land on which we work.

Advocacy for Inclusion is a non-for-profit Disabled People's Organisation (DPO) community organisation in the Australian Capital Territory (ACT), Australia. We provide individual and systemic advocacy services to people with disabilities to promote their human rights and inclusion in the community. We act with and on behalf of individuals in a supportive manner, or assist individuals to act on their own behalf, to obtain a fair and just outcome for the individual concerned.

Advocacy for Inclusion works within a human rights framework and acknowledges the *United Nations Convention on the Rights of Persons with Disabilities*, and is signed onto the *ACT Human Rights Act*.

Contact details:
2.02 Griffin Centre
20 Genge Street
Canberra City ACT 2601

Phone: 6257 4005
Fax: 6257 4006
Email: info@advocacyforinclusion.org
ABN: 90 670 934 099

Policy Officer: Bonnie Millen

March 2018

Introduction

Advocacy for Inclusion is a not-for-profit non-government community organisation in the Australian Capital Territory. We provide individual, self and systemic advocacy services to people with disabilities to promote their human rights and inclusion in the community. We work directly with some of the most isolated people with disabilities who are subjected to a range of restrictive practices.

We have fought a continuous argument that restrictive practices are fundamentally violations of human rights. They can cause physical and psychological pain and discomfort, deprivation of liberty, alter thought processes and deprive a person of their right to choice and control in their lives.[1] These practices can have significant adverse impacts on the person's mental and physical health and wellbeing.[2] It also denies a person basic respect for their inherent dignity as human beings.

Advocacy for Inclusion do not support the consultation recommendations or proposed outline for the ACT Office of the Senior Practitioner (OSP). Advocacy for Inclusion hopes this submission will result in more accessible and equitable protections for people with disabilities to reduce restrictive practices of the United Nations *Convention on the Rights of Persons with Disabilities*. We believe the proposed model goes against the grain of what the NDIS is designed to implement – to provide people with disabilities full choice and control in their lives.

In our experience, people with disability who display 'challenging behaviour' or 'behaviours of concern' may be subjected to restrictive practices or medical interference in a variety of settings, including: supported accommodation and group homes; rehabilitation centres; mental health facilities; hospitals; prisons; and schools.[3] Restrictive practices are often used to manage 'challenging' behaviours which may have escalated to aggression or agitation, but which have arisen out of unmet needs.

"If somebody is violent, they are not being violent because they are a nasty person. They are being violent because they are frustrated. They feel no purpose in life ... They do not know where they are. They feel disoriented. They may feel very depressed. They may be suffering psychosis. They may be losing their words. They may not be able to communicate. You put all those things together and think of how you would react and then you can start to translate it into your own behaviour".[4] [5]

Advocacy for Inclusion's experience tells us that it is a practice widely hidden from the broader community. A key feature missing from the current system is accountability measures. Because restrictive practices have serious consequences and are a form of violence, these practices must be strictly accounted for and monitored, yet they are not. Support systems and services must be drastically improved so that people with disabilities are better supported to communicate and have their needs met in order to prevent the use of restrictive practices in the first place.

The National Safeguards and Quality Framework

Reducing and eliminating the use of restrictive practices is consistent with the United Nations Convention on

---

[1] CRPD Civil Society. (2012). *Disability rights now: Civil society report to the United Nations Committee on the Rights of Persons with Disabilities*.
[2] Spivakovsky, C. (2012). *Restrictive Interventions in Victoria's Disability Sector Issues for Discussion and Reform*. http://www.publicadvocate.vic.gov.au/file/Restrictive%20interventions%20discussion%20paper.
[3] Justice Connect and Seniors Rights Victoria, *Submission 120*; PWDA and Disability Rights Research Collaboration, *Submission 111*; National Association of Community Legal Centres and Others, *Submission 78*; Children with Disability Australia, *Submission 68*; Central Australian Legal Aid Service, *Submission 48*; Public Interest Advocacy Centre, *Submission 41*; Office of the Public Advocate (Vic), *Submission 06*; Office of the Public Advocate (Qld), *Submission 05*. See also Victorian Law Reform Commission, *Guardianship*, Final Report No 24 (2012) 318
[4] Senate Committee on Community Affairs, Parliament of Australia, *Care and Management of Younger and Older Australians Living with Dementia and Behavioural and Psychiatric Symptoms of Dementia* (2014).
[5] Commonwealth, *Committee Hansard*, Senate, 17 July 2013, 31 (Mr Glenn Rees)

the Rights of Persons with Disabilities (CRPD) [6] and its commitment to protect the rights, freedoms and inherent dignity of people with disability. Australia ratified and agreed to be bound by the terms of the CRPD under international law.

People with disability who are supported by disability service providers in the ACT and engage in 'challenging behaviours' that are perceived to be harmful to themselves or others are at risk of being subjected to restrictive practices.

In our perspective, the discussion of the ACT OSP and NDIA Senior Practitioner is allowing the continued method of restrictive practice rather than seeking to prevent and limit their use or seeking alternative solutions to environmental factors that may cause individuals to behave in a manner that appears agitated or aggressive, particularly if communication barriers are present.

Under the NDIS, disability service providers should be play a significantly smaller role in the lives of people with disabilities as self-directed disability support is further implemented. The question of how the use of restrictive practices by non-regulated providers of support should be prevented monitored and investigated under the NDIS Quality and Safeguards Framework.[7] The proposed ACT OSP and NDIS Senior Practitioner is accommodating service providers far more than the people with disabilities facing no choice and control in the use of restrictive practices. It fundamentally loses sight of preventing and limiting restrictive practices in the ACT.

Not all people with disability receive support through the NDIS, and people with disability in the ACT experience restrictive practices in numerous environments including schools, mental health facilities, within prisons and hospitals.[8] Under the ACT Office of the Senior Practitioner, and indeed the NDIS Senior Practitioner, there is a need for an overarching balance between ACT service providers, advocacy organisations, ACT and Federal government strategy addressing violence and abuse of people with disability in general.

While it is recognised by Advocacy for Inclusion that disability service providers are often challenged to provide a safe and therapeutic service for clients who have complex high support need, as well as providing the safest possible work environment for staff. It has been recognised internationally and domestically that restrictive practice can be significantly reduced, and at best, eliminated.

Consistent with the CRPD, people with disabilities accessing disability services in the ACT should be active participants in decisions about their own lives, support, care. Allowing service providers to apply and request restrictive practices to placed in individual NDIS plans without *choice and control* is not allowing active decision-making by the person. Maximum respect for a person's autonomy and recognition of an individual's right is paramount.

Proposed Functions and Powers of the ACT OSP

It is also acknowledged that the use of restrictive practices in NDIS-funded disability services in the ACT will be overseen by the ACT OSP and the NDIS Senior Practitioner. It is also acknowledged that the ACT OSP legislation must comply with the National Disability Insurance Scheme Act 2013, the National Disability Insurance Scheme Amendment (Quality and Safeguards Commission and Other Measures) Bill 2017, and the

[6] Australia has agreed to be bound the International Covenant of Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) as well as other major human rights instruments, including: Convention on the Rights of Persons with Disabilities; Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment; Convention on the Rights of the Child; and Convention on the Elimination of all forms of Discrimination against Women. Australia also supports the United Nations Declaration on the Rights of Indigenous Peoples (Source: Australian Human Rights Commission).

7 https://engage.dss.gov.au/ndis-qsf/

[8] Civil Society CRPD Parallel Report Group, Disability Rights Now: Civil Society Report to the United Nations Committee on the Rights of Persons with Disabilities (2012), People with Disability Australia <http://www.pwd.org.au/documents/project/undrc/CRPD-CivilSocietyReport2012.doc>

NDIS Rules as issued from time to time by the Minister for Department for Social Services under the NDIS Act 2013.

It is anticipated that the proposed functions and powers of the ACT OSP will govern the use of restrictive practices affecting people with disabilities to ensure their access to disability services is in accordance with human rights principles. Throughout the consultation paper, it is blatantly clear that the NDIS OSP will hold legislative power over the Territory OSP decisions and thus providing service providers power over individuals and advocacy organisations. This is problematic and thus where Advocacy for Inclusion is sceptical of how much power the NDIA should have over matters that the ACT OSP is overseeing and monitoring.

However, whilst it is understandable that the Commonwealth legislation will override ACT legislation in light of conflict between Federal and Territory, it is troubling that the ACT OSP powers will extend to schools and other educational settings, children and young people, community mental health and non-federal community aged care, yet it is not extended to disability service provided supported living accommodation and congregate living arrangements where restrictive practices are rife. Instead disability service providers can apply and request for restrictive practices where they deem necessary, in which is a clear indicator that individual human rights will not upheld under the CRPD.

Engaging with the CRPD as a Human Rights Territory

It is troubling to notice that in respect of NDIS service delivery in the ACT, a provider wanting to implement restrictive practices under an NDIS participant's support plan will be required to become an NDIS provider under this framework. This is a contradiction in preventing restrictive practices in the ACT and places power in the hands of the service provider than ever before.

Restrictive practices can also be used in the absence of any 'challenging behaviour' and constitute power misuse by support staff and be used to degrade, control, or coerce a person with disability.[9] It can also be used for convenience or for cost effectiveness i.e. restrictive practices may be cheaper in the short term than implementing additional supports. We have worked with consumers who were once chemically restrained frequently to manage 'challenging' behaviours. Once they moved into a home of their choice and into a situation that better catered for their personal needs restriction became rare.

Case study 1[10] [11]

Zafir lives in shared accommodation and attends 'day program' three days a week. It is noted that was showing behaviours in both environments which were then treated with sedative medications (PRN medication). These were to be given PRN (when required) in both environments.

Advocacy intervention by Advocacy for Inclusion uncovered as to why Zafir was given PRN medication after it was noted that PRN medication was given regularly without any explanation. When the service provider and day program were approached about the increased PRN, they suggested that he was being aggressive and non-responsive to directions.

It was confirmed that there were no records of what was occurring for Zafir at the time PRN medication was administrated, or whether other attempts of identifying the issue where made. It therefore suggests that PRN medication was the first form of addressing Zafir's behaviour.

[9] CRPD Civil Society. (2012). *Disability rights now: Civil Society report to the United Nations Committee on the Rights of Persons with Disabilities*.

[10] This case study is an abstract version to Zafir's Story (p.22) Advocacy for Inclusion – Submission to the Senate Inquiry into violence, abuse and neglect against people with disability

[11] Both case studies indicate why restrictive practices are often a drastic action towards 'challenging behaviours' that can be easily resolved without medicating an individual.

Upon further investigation through individual advocacy, it was revealed that support worker at the day program was being physically, emotionally and racially abusive to Zafir. It was also found that Zafir's housemate's father was also being abusive and threatening towards Zafir.

Once the perpetrator was removed from Zafir's life and he felt safe whilst at the day program, PRN was no longer provided on a daily basis. Support workers at both Zafir's home and day program now try to identify the issue and look at other ways to support Zafir when he is feeling distressed and upset rather than use restrictive methods as a 'calming' mechanism.

Since the daily PRN, it is reported that Zafir has received PRN's in past 6 months. PRN's continue to be the last resort after other strategies and approaches have been exhausted.

Zafir now accesses the community on a regular basis with support and enjoys doing so, whereas this was not previously an option for him due to his 'challenging behaviours' and community access was very restricted.

Case Study 2

Lisa lived in an array of support shared accommodation. She was subjected to violent behaviour from other housemates and retaliated as a result of the abuse. Communication was also a barrier. Lisa also suffered painful menstrual cycles, which caused her much pain and distress during this time.

Lisa was then prescribed PRN medication to address her behaviour. Lisa was also moved from one shared living arrangement to another so she never was able to feel settled and become familiar with her housing and her housemates.

With intervention by an individual advocate and communication methods in place, the issues were resolved as to why Lisa was reacting in a negative manner. Lisa was supported to live independently on her own and able to feel settled and safe in her own environment the need for restrictive practice reduced dramatically. With Lisa's medical condition finally being diagnosed and appropriately managed, there has been no need for PRN's to be administrated.

Lisa now enjoys going out and participating in activities outside the home, which was previously not an option for her due to her 'challenging behaviours'.

A person with disability's vulnerability to restrictive practices comes not only from the presence of perceived 'challenging behaviours' but also out of a relationship of dependence, which creates a power imbalance and which can be misunderstood and misused. The statement "where the use of restrictive practices is deemed necessary, in the context of a broader positive behaviour support plan…"[12], the question raises whether or not the person with the disability is provided with the choice and control of the implementation of restrictive practice on their lives and wellbeing.

A fundamental principle of Australia's rule of law is that people with disabilities, as all adults, have the right to make decisions that affect their lives and have their decision-making capacity respected. The Australian Law Reform stated "...the common law recognises—as a "long cherished" right—that all adults must be presumed

[12] Consultation Paper on the Proposed ACT Office of the Senior Practitioner, p. 5

to have capacity until the contrary is proved. Where capacity is contested at law, the burden of proof lies with the person asserting the incapacity".[13]

The proposed consultation does not clearly position people with disabilities as the decision maker over their own lives and supports. People with disabilities must be respected as people who know their own best interests and who make decisions about their own lives. This is more consistent with Article 3 of the CRPD: "respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons".

The consultation of the proposed ACT OSP does not capture Australia's obligations, nor the ACT Human Rights commitment, to eliminate the restrictive practices imposed on people with disabilities. The proposed ACT OSP must make clear that eliminating restrictive practices is not only consistent with human rights principles in the ACT but is necessary in order to promote and fulfil human rights, as per Australia's international obligations.

Further, the ACT has signed on to the Optional Protocol to the *Convention Against Torture* (OPCAT) just recently. Australia is already party to the United Nations Convention against Torture.[14] When developing the proposed ACT OSP, the ACT Government must anticipate its own obligations to the OPCAT to assist in developing a framework approach that remains relevant and compliant with human rights obligations in the future.

Since the ratification, the ACT Government is now in a position to monitor places of detention and other deprivations of liberty that assist in meeting Australia's obligations under OPCAT. This includes places of congregate living arrangements and institutional settings that are operated by disability services.

Advocacy for Inclusion commend the existing Victorian[15] and South Australian[16] models, which prevent restrictions on people's liberty or freedom of movement, as useful in informing a State and Territory approach to restrictive practices that explicitly addresses detention in schools, residential treatment facilities and correctional institutions. Similar approaches can be adopted in the ACT.

It is suggested that a continued series of discussion between the ACT OSP and people with disability, disability service providers and advocacy organisations be held to consider all issues relating to use of the use of and protection from restrictive practices. Such interchange would include examination of the relationship between restrictive practices used in the ACT and torture, the ACT's obligations under OPCAT and the utilization of evidence of restrictive practices.

Recommendation 1: The proposed ACT OSP engage with the CRPD more strongly as restrictive practices inherently violate a person's human rights, including:

Article 3: respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons;

Article 14: Liberty and security of person;

Article 15: Freedom from torture or cruel, inhuman or degrading treatment or punishment;

Article 16: Freedom from exploitation, violence and abuse;

---

[13] Australian Law Reform Commission (Law Reform Commission), 'For your information: Australian Privacy Law and Practice' (Law Reform Commission Report No. 108), August 2008, p. 2344, http://www.alrc.gov.au/sites/default/files/pdfs/publications/108_vol3.pdf

[14] *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).

[15] *Disability Act 2006 (Vic)* pt 8

[16] Disability Services and OPA (SA); Guardianship and Administration Act 1993 (SA).

Article 17: Protecting the integrity of the person.

Recommendation 2: Development of a continuous roundtable or working group established between the ACT OSP and people with disabilities, disability service providers and advocacy organisations to strengthen proactive collaboration and discussion towards reducing and eliminating restrictive practices in the ACT.

Data collection and monitoring

Advocacy for Inclusion commends the inclusion of accountability and transparency through reporting and monitoring measures for the ACT OSP. It is welcoming that the proposed investigative and reporting powers will not encroach on those of investigative and reporting bodies (including Official Visitors) with existing powers and functions in disability. There is a need for a strong complaints mechanism to put in place to allow people with disabilities to exercise their right to challenge decisions that involve them and their lives.

To enhance accountability and transparency, legislative frameworks must be introduced to mandate service providers to report all instances of restrictive practices to an independent statutory body, whether it may mean the ACT OSP or the NDIS Special Practitioner. If such measures are not developed, it is questionable that the National Framework could serve its purpose.

Article 31 of the CRPD – statistics and data collection – requires that "States Parties undertake to collect appropriate information, including statistical and research data, to enable them to formulate and implement policies to give effect to the present Convention." Statistics and data collection should be used to identify and address the barriers experienced by people with disabilities in exercising their human rights, and data should be disseminated to people with disabilities. This is highly relevant to the issue of restrictive practices, as practices that fundamentally violate human rights in the ACT. Information should be disaggregated to assess issues facing particular groups of people with disabilities, who may face heightened barriers to accessing their rights through experiencing multiple, or intersecting, disadvantage.

Article 33 of the CRPD – national implementation and monitoring – outlines states parties' obligations in regards to national implementation and monitoring. This includes the establishment of focal points and coordination within government to facilitate action in different sectors and at different levels for the implementation of the CRPD. It involves the establishment of independent mechanisms to promote, protect and monitor implementation of the CRPD. The government is also required to fully involve people with disabilities and their representative organisations in the monitoring process. Restrictive practices violate human rights and so must be monitored in accordance with CRPD Article 33 in order to work towards implementation of the CRPD.

Recommendation 3: Establish a complaints mechanism to allow people with disabilities to make complaints or to appeal decisions of restrictive practices that involve them and their lives. This should not be identical to the NDIS Appeals, instead a separate entity.

Conclusion

Advocacy for Inclusion welcomes the work towards an ACT OSP to address restrictive practices yet remain sceptical of the overarching powers provided to the NDIA Senior Practitioner where service providers can apply to use restrictive practices. This proposal could play a key role in advancing the human rights of people with disabilities in the ACT, particularly those most vulnerable to human rights abuses such as restrictive practices under disability services.

The current proposal shows good promise however substantial work is needed to ensure that the human rights of people with disabilities are the focal point and to ensure that dated and negative views of disability are not reinforced. A clear vision of eliminating restrictive practices must be the ultimate aim, in acknowledgement that restrictive practices are violations of human rights. The framework should outline robust strategies, including

the development of legislative frameworks, to improve accountability and transparency around these very serious practices.

Advocacy for Inclusion is thankful to be a part of this consultation and looks forward to further developments on the implementation of the ACT OSP.