



Persons with Disability (Regulation of Restrictive Practices) Bill 2021

Exposure Draft

Information Booklet January 2021

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Background

Introduction

The Minister for Families, Communities and Disability Services has released a draft law called the *Persons with Disability (Regulation of Restrictive Practices) Bill 2021*, for public comment. The draft law aims to improve protections for people with disability in NSW by:

- Giving the independent Ageing and Disability Commissioner the power to promote the rights of people with disability in relation to restrictive practices and to monitor and report on the use of restrictive practices,
- Regulating when restrictive practices can be used by NDIS providers and providing clear avenues of review around their use, and
- Requiring NDIS providers, hospitals, schools and other government services, to follow a common set of human rights-based principles.

About this information booklet

The purpose of this information booklet is to explain the draft law. We have included eleven questions throughout this booklet to help you to have your say. You can use these questions as a guide to providing your own feedback.

We have also translated this booklet into community languages and Easy Read versions. Easy Read booklets use simple language and pictures to explain the draft law. Copies of these booklets can be found on the [Restrictive Practices Bill page on the DCJ website](#).

How you can have your say

It's important that you have your say in the way disability law affects disability services and rights in NSW.

You can give your feedback by:

- Visiting the [Restrictive Practices Bill page on the DCJ website](#)
- Visiting [the Have Your Say website](#)
- Posting your written feedback to Policy, Reform and Legislation Team, Level 3, 2 Cavill Ave, Ashfield NSW 2131

- Emailing your feedback to policy@justice.nsw.gov.au
- Calling 1800 263 244

It's important that you provide your feedback within the consultation period. The consultation period opens at 9.00am on 22 January 2021 and closes at 11.59pm on 19 February 2021.

Why a new law is needed

About restrictive practices

Restrictive practices restrict the rights or freedom of movement of a person with disability, to protect the person or others from harm. These practices can include different types of restraints (chemical, mechanical, environmental or physical) or seclusion.

Restrictive practices need to be regulated as they can seriously limit the rights of people with disability and may pose risks to their health and well-being if used in the wrong way or for a long time. Restrictive practices should only be used as a last resort after other strategies have been considered and tried.

The current model

Restrictive practices are sometimes used by disability providers who are funded under the National Disability Insurance Scheme (NDIS). The law in Australia and NSW says that NDIS providers are not allowed to use restrictive practices without authorisation under NSW Government policy. Some settings that are not connected with the NDIS, like hospitals, have their own rules about restrictive practices which are set out in their specific laws and policies.

Under the NDIS, the NSW Government is responsible for making rules about authorising restrictive practices that NDIS providers use with NDIS participants in NSW. These rules are currently explained in two policy documents called the *NSW Restrictive Practices Authorisation Policy* and *NSW Restrictive Practices Authorisation Procedural Guide*. Under the policy, a restrictive practice in an NDIS setting in NSW can only be authorised if:

- the participant has a behaviour support plan that includes information about the restrictive practice and meets the NDIS Commission standards,
- authorisation is given by a Restrictive Practices Authorisation Panel, and
- informed consent is given by the participant or their guardian.

Purpose of the new law

The NSW Government has committed to the national goal of reducing and eliminating restrictive practices. This commitment is consistent with the United Nations Convention on the Rights of Persons with Disabilities (CRPD) and its aim to protect the rights, freedoms and dignity of people with disability. Australia has ratified and agreed to be bound by the terms of the CRPD under international law. Having strict rules in law about when restrictive practices can be used is the first step in achieving this goal.

The proposed law aims to formalise the current policy in law with further protections for people with disability. This means:

- rights and freedoms of people with disability are protected in law and any restrictions on those rights are strictly limited and authorised in line with human-rights based principles,
- there is clarity on legal limits within which restrictive practices can be used by NDIS providers, and
- the NSW authorisation process is consistent with National Restrictive Practices Authorisation Principles.

Previous consultation

The proposed law takes into account the feedback from a public consultation process held in 2019 on the *NSW Government Restrictive Practices Authorisation Consultation Discussion Paper*. During this process 332 people with disability, families, carers, service providers, and other interested people were involved in the consultation and we received formal submissions from 16 organisations.

The main feedback people with disability and others told us were:

- They agreed that the overall aim should be to reduce and eliminate restrictive practices,
- They supported the proposed restrictive practices principles, which would require that restrictive practices are:
 - Person centred
 - The least restrictive option
 - In place for the shortest time
 - Monitored
 - Reviewed regularly.
- They wanted the principles to apply to NDIS supports and to government services,
- They want to participate more in restrictive practices discussions and decisions,

- They want decisions to be made locally by people they know and trust.
- They want an independent process where they can appeal against decisions.

You can read more about the key themes and findings in the *Restrictive Practices Authorisation in NSW – Consultation Findings Report* at <https://www.facs.nsw.gov.au/inclusion/disability/restrictivepracticesbill> .

2. What will the new law do?

2.1 Key points

- The Ageing and Disability Commissioner will have a new and important role in the oversight of restrictive practices authorisation in NSW.
- A common set of restrictive practices principles will be introduced which NSW government agencies and NDIS providers must apply in delivering their services to people with disability. NSW Government agencies that use or propose to use restrictive practices will be required to report annually to the ADC on their compliance with these principles.
- A formal authorisation process for the use of restrictive practices on NDIS participants will be established.
- A new ‘trusted person’ framework will be created that guides who can consent to a restrictive practice if the person with disability can’t make the decision.
- A clear review pathway will be established for authorisation decisions.

2.2 Proposals in the Draft Persons with Disability (Regulation of Restrictive Practices) Bill 2021

2.2.1 Objects and guiding principles

The primary objective of the Bill is to regulate the use of restrictive practices on NDIS participants with an overall aim of working towards reducing and eliminating restrictive practices. The objects include:

- using restrictive practices only when necessary to protect the person and others from harm, and
- promoting the human rights of people with disability so they can live free from abuse, neglect and exploitation.

Clause 3 of the Bill sets out guiding principles to help NSW Government agencies and NDIS providers protect people's rights when they use restrictive practices.

The principles reflect feedback from stakeholders received through the public consultation process which highlighted the importance of a person centred approach. The principles recognise the right of people with disability to be in control of their lives and to be involved and supported in the decision-making process. They also state that decisions about restrictive practices need to take into account individual circumstances and that restrictive practices should be the 'least restrictive' option, in place for the shortest time and monitored and reviewed regularly.

Question 1:

Do you agree with the proposed objects and principles of the Bill?

Under clause 7 of the Bill, all NSW Government Departments like NSW Health, the Department of Communities and Justice, the Department of Education and other government bodies that use restrictive practices will need to make sure that the services they provide to people with disability take into account the objects and guiding principles. This includes services that these agencies pay non-government services to provide, like assisted school transport and out-of-home care.

These agencies will then need to report on how they followed the objects and guiding principles every year to the Ageing and Disability Commissioner. The regulations will provide further detail on how agencies have to report to the Commissioner.

Question 2:

Is the reporting framework for NSW Government agencies sufficiently robust?

2.2.2 Role of the Ageing and Disability Commissioner

The office of the NSW Ageing and Disability Commissioner works with other government and non-government organisations to ensure any vulnerable older person or adult with disability is protected from abuse, neglect and exploitation.

Clause 5 of the Bill gives the Ageing and Disability Commissioner a number of new functions in relation to people with disability:

- promote the objects and guiding principles of the draft law
- educate NSW Government agencies on how to follow the restrictive practices principles set out in the draft law,
- oversee the authorisation processes that NDIS providers must follow and support people with disability to get involved and give their views,
- review decisions about the authorisation of restrictive practices when someone who is unhappy with the authorisation decision makes an application for a review, and
- report to the NSW Government on issues relating to how restrictive practices are used on people with disability.

The Commissioner will have the power to exchange information about the use of restrictive practices and any authorisations issued under the new law with other relevant NSW and Commonwealth Government bodies, including the NDIS Quality and Safeguards Commission and NDIS Launch Transition Agency.

Question 3:

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

2.2.3 Restrictive practices that can and cannot be authorised

The draft Bill defines restrictive practices consistent with the Commonwealth definition in NDIS services. It also outlines the types of practices that can be authorised in NSW.

Under the Commonwealth NDIS Rules, there are five categories of restrictive practices that are called 'regulated restrictive practices'. These are:

1. Seclusion, including things like keeping a person in a room by themselves.
2. Chemical restraint, including things like giving a person medicine to keep them calm and not self-harm.

3. Mechanical restraint, including things like putting on wheelchair brakes so that a person can't move independently.
4. Physical restraint, which includes things like holding a person's arms to stop them from doing things that could harm them or someone else.
5. Environmental restraint, which includes things like locking a cupboard to stop a person getting something they want.

Clause 9 of the Bill states that these regulated restrictive practices can only be used if they are authorised under the new law.

Clause 8 sets out certain restrictive practices that are prohibited and cannot be authorised by the new law, such as the use of seclusion for children who are NDIS participants. Other types of restrictive practices can be added to this category by regulations in the future.

2.2.4 Authorisation process for NDIS providers

The Bill establishes the authorisation process that NDIS providers must follow in order to use a restrictive practice on an NDIS participant. The aim of this part of the draft law is to ensure that restrictive practices are only used when they are genuinely needed to prevent harm, when they are safe, and when informed consent has been given. The authorisation process will only apply in NDIS services and for NDIS participants.

Clause 10 outlines the requirements for a restrictive practice to be authorised under the proposed law:

- the restrictive practice must be part of a behaviour support plan developed by a NDIS behaviour support practitioner;
- the NDIS participant must have consented to the restrictive practice; and
- the use of the restrictive practice must be in accordance with an authorisation issued by an authorisation panel.

2.2.4.1 Consent and the trusted person framework

Consistent with the feedback received during public consultation, consent will remain at the heart of the authorisation process. The new law will presume in the first instance that the person with disability has decision making ability and can either provide or refuse consent, with support if required.

Part 4 provides for the process an NDIS provider must follow in order to gain consent for the use of restrictive practices. Restrictive practices can't be authorised without consent. In exceptional circumstances, interim authorisations may be issued where the NDIS provider is making ongoing attempts to get consent. The authorisation panel will ensure that proper consent processes have been followed before issuing any authorisation.

An NDIS provider seeking an NDIS participant's consent must provide the participant with easily understandable information relevant to their decision. An NDIS participant that has consented to a restrictive practice may withdraw their consent at any time. They may indicate by any means they like that they do not want the restrictive practice to be used.

The draft Bill creates a new 'trusted person' framework that guides who can consent to a restrictive practice if the person with disability is not able to make the decision themselves. The trusted person framework is based on the feedback from the public consultation that people want decisions to be made by people that they know and trust. Clause 13 outlines appropriate trusted persons for children and adults and, in some cases, the order in which the NDIS provider should approach them. These are:

- The person with parental responsibility, where the NDIS participant is a child.
- The NDIS participant's guardian with a restrictive practices function, if there is any.
- If the NDIS participant is an adult and doesn't have an appointed guardian, the following people can be approached to appropriate trusted persons in this order:
 1. The NDIS participant's spouse, where the spouse is not under guardianship and the relationship is close and continuing (including de facto relationships and marriages under Aboriginal or Torres Strait Islander customary law).
 2. A person who has cared for the person with disability, if the relationship is close and continuing.
 3. A close friend or relative of the NDIS participant, if that person maintains a close personal relationship and personal interest in their welfare.

The definitions of these appropriate trusted persons are based on existing definitions in the Guardianship Act 1987.

Question 4:

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

Question 5:

Do you think the Bill provides enough support for people with disability to make decisions for themselves?

Question 6:

Are there any other safeguards that should be put in place around the trusted person framework?

2.2.4.2 Authorisation Panels

Clause 16 provides for the Authorisation Panels that will be set up by NDIS providers who want to use a restrictive practice. Each Panel will have to include the relevant NDIS providers and an independent behaviour support practitioner who is registered with the NDIS.

For a restrictive practice to be authorised, the NDIS provider and the independent practitioner need to agree that it's the best thing to do in the short term to prevent the NDIS participant from causing harm to themselves or another person. The independent practitioner will support NDIS providers to learn about and try other strategies first.

Question 7:

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

2.2.4.3 People with disability – having their say

Under clause 15 of the Bill, the authorisation panel will have to invite the person with disability (and their support person if needed) to get involved in the discussion about the restrictive practice. They can get involved in whatever way they want, including going to the panel meetings, choosing a support person to go on their behalf, or by giving their view outside of the panel meetings. The authorisation panel must give the person with disability any relevant information to them including the behaviour support plan, the reasons the restrictive practice is required to be used and any information about alternative options. The information must be provided in a way that the person with disability can understand it.

Question 8:

Does the draft Bill provide enough opportunities for people with disability, and their support people, to be involved in the decision-making process?

2.2.4.4 Interim authorisations

In situations where there is a clear and immediate risk of to the person with disability or others and there is no behaviour support plan in place, restrictive practices may need to be used. If an NDIS provider needs to use a restrictive practice in an emergency without authorisation and will likely need to keep using it, clause 11 provides that the NDIS provider must get authorisation within 1 month.

Interim authorisations can be issued under clause 15 of the Bill. They require an interim behaviour support plan and can only last for maximum of 6 months from the date of the first use of the restrictive practice, unless cancelled earlier, and cannot be renewed.

2.2.4.5 Comprehensive authorisations

Comprehensive authorisations can be issued under clause 15 of the Bill. They require a comprehensive behaviour support plan developed for the NDIS participant. They may be issued for a maximum of 12 months, unless cancelled earlier.

Under clause 17, NDIS providers must notify the person with disability as soon as possible within 3 days of any authorisation being issued. They must also notify the Ageing and Disability Commissioner within 7 days of any authorisation being issued and provide all information considered in the authorisation process.

Question 9:

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

2.2.4.6 Complaints and Appeals

Part 6 of the Bill establishes a clear review pathway for decisions to authorise restrictive practices.

First stage – NDIS providers

Complaints and concerns about restrictive practices should always go directly to the NDIS provider to start off with. In most cases, the provider should be able to quickly and easily fix the problem. The proposed law requires NDIS providers that use restrictive practices to develop policies, procedures about the use and authorisation of restrictive practices and have a complaints handling process.

If the problem can't be sorted out with the NDIS Provider, the proposed law includes a process for independent review. It also requires that NDIS providers must advise NDIS participants of their rights for review.

Second stage - Ageing and Disability Commissioner

If a person with disability, someone close to them or the NDIS provider themselves are unhappy with a decision of an authorisation panel, they can ask the Ageing and Disability Commissioner to review it.

The Commissioner will then conduct a review. The Commissioner may agree with the decision of the authorisation panel or send the matter back to the panel for further consideration.

Following a review, the Commissioner must write to the NDIS provider, the NDIS participant and anyone else involved on their behalf and tell them about the decision. The Commissioner must also advise everyone involved of their further review rights to the NSW Civil and Administrative Tribunal.

Third stage - NSW Civil and Administrative Tribunal

If someone is unhappy with the Commissioner's decision, the proposed law provides that they may apply to the NSW Civil Administrative Tribunal to have it reviewed. They have 28 days from being told of the Commissioner's decision to do this.

The review by the NSW Civil and Administrative Tribunal will follow their normal review process set out in the *Civil and Administrative Tribunal Act 2013*.

Question 10:

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

2.2.5 Other matters

Part 7 of the Bill makes some general provisions including protecting NDIS providers from liability for restrictive practices used where they comply with the new law and have not acted negligently.

The Bill protects information by making it an offence under clause 24 to disclose any information received under the new law except where you have someone's consent or another lawful reason applies.

Part 7 also provides a general power to make regulations about other matters necessary for the operation of the draft Bill and for a review of the new law after 5 years to see whether its meeting its objectives.

There is a Dictionary at the end of the Bill which defines the terms used in the Bill.

Question 11:

Do you have any other comments on the Bill?