



Government  
of South Australia

Department of Human Services

# **New NDIS Restrictive Practice Authorisation Process for South Australia**

## **Overview of amendments to Disability Inclusion Act**

### **Discussion Paper**

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## What is happening?

The State Government intends to introduce amendments to the [Disability Inclusion Act 2018](#) (Act) to provide for an NDIS Restrictive Practice Authorisation regime for South Australians with disability. The proposed amendments to the Act provide clarity for participants in the National Disability Insurance Scheme (NDIS) and the sector about restrictive practices.

Feedback is sought on the proposed amendments to the Act.

## Why do we need to change the Disability Inclusion Act?

There has been a lot of work focused on restrictive practices and the importance of keeping vulnerable people safe and protected. This has been through the:

- [National Framework for Reducing and Eliminating the Use of Restrictive Practices in the Disability Service Sector](#) (2014)
- [NDIS Quality and Safeguarding Framework](#) (2016)
- Department of Human Services Restrictive Practices Guide (developed with sector representatives) (2017).

At the Disability Ministers' Meeting on 24 July 2020, Ministers supported the national principles for restrictive practice authorisation (national principles) as a key milestone in the path to national consistency.

The proposed amendments to the [Disability Inclusion Act](#) create a streamlined legislative framework that provides greater protection and safeguards for NDIS participants who may be subject to the use of restrictive practices and for registered NDIS providers who administer them. It also enables South Australia to comply with the national principles for restrictive practices authorisation.

The proposal is founded on and guided by the [United Nations Convention on the Rights of Persons with Disabilities](#) and its intent to protect their rights, freedoms and inherent dignity, the [National Disability Strategy 2010-2020](#) and the [National Disability Insurance Scheme Act 2013](#) and Rules.

## NDIS regulated restrictive practices

Under the [National Disability Insurance Scheme \(Restrictive Practices and Behaviour Support\) Rules 2018](#) certain restrictive practices are subject to regulation. These include seclusion, chemical restraint, mechanical restraint, physical restraint and environmental restraint.

### Seclusion

Seclusion is the sole confinement of a person with disability in a room or a physical space at any hour of the day or night where voluntary exit is prevented, or not facilitated, or it is implied that voluntary exit is not permitted

### Chemical restraint

Chemical restraint is the use of medication or chemical substance for the primary purpose of influencing a person's behaviour. It does not include the use of medication prescribed by a medical practitioner for the treatment of, or to enable treatment of, a diagnosed mental disorder, a physical illness or a physical condition.

## **Mechanical restraint**

Mechanical restraint is the use of a device to prevent, restrict, or subdue a person's movement for the primary purpose of influencing a person's behaviour but does not include the use of devices for therapeutic or non-behavioural purposes.

## **Physical restraint**

Physical restraint is the use or action of physical force to prevent, restrict or subdue movement of a person's body, or part of their body, for the primary purpose of influencing their behaviour. Physical restraint does not include the use of a hands-on technique in a reflexive way to guide or redirect a person away from potential harm/injury, consistent with what could reasonably be considered as the exercise of care towards a person.

## **Environmental restraint**

Environmental restraint restricts a person's free access to all parts of their environment, including items or activities.

## **What is a restrictive practice?**

Some people with disability can sometimes exhibit behaviours of concern that place themselves or others at risk. To manage these risks in a way that ensures people are safe, it is sometimes necessary to place restrictions on these people. When this happens, it is known as a restrictive practice.

It is defined as any practice or intervention that has the effect of restricting the rights or freedom of movement of a person with disability, with the primary purpose of protecting the person or others from harm.

Under the NDIS, a restrictive practice can be implemented on an NDIS participant, including children in accordance with the person's positive behaviour support plan.

## **What is a prohibited practice?**

A Restrictive Practice differs from a Prohibited Practice. Some practices are prohibited and must never be used. A Prohibited Practice poses a significant and imminent risk to the safety and wellbeing, and the rights of a NDIS participant, with some practices resulting in death or significant injury.

Furthermore, some of these prohibited practices are not in keeping with contemporary clinical practice.

As part of the NDIS Quality and Safeguards Commission's role in regulating restrictive practices nationally an agreed list of prohibited practices has been developed with states and territories and includes the following prohibited practices:

- Physical restraint that has the purpose or effect of restraining or inhibiting a person's respiratory or digestive function
- Punitive approaches such as aversive practices which is any practice that might be experienced by a person as noxious or unpleasant and potentially painful
- Overcorrection, which is any practice where a person is required to respond disproportionately to an event, beyond that which may be necessary to restore a disrupted situation to its original condition before the event occurred
- Denial of key needs, which is withholding supports such as owning possessions, preventing access to family, peers, friends and advocates, or any other basic needs or supports.

## What is a behaviour support and a behaviour support plan?

Under the NDIS it is a requirement that a behaviour support plan must be developed if there are behaviours of concern and there are certain conditions that a registered provider must meet. The full details of those conditions are outlined in the [National Disability Insurance Scheme \(Restrictive Practices and Behaviour Support\) Rules 2018](#). There are also requirements under [the National Disability Insurance Scheme \(Provider Registration and Practice Standards\) Rules 2018](#) and the [National Disability Insurance Scheme \(Quality Indicators\) Guidelines 2018](#).

The goal of behaviour support in the NDIS is to improve quality of life outcomes for people. The aim of positive behaviour support is to reduce and eliminate restrictive practices. There is a primary emphasis on upholding the rights of the person with disability by looking to support the person through evidence-informed, person-centred strategies reflected in a behaviour support plan. There may be limited circumstances in which a regulated restrictive practice is used. The Rules specify that any use of restrictive practices must be:

- Used only in response to a risk of harm to the person with disability or others, as a last resort
- Authorised in accordance with any state or territory legislation and/or policy requirements
- In proportion to the risk of harm and used only for the shortest possible time.

A Specialist Behaviour Support Provider/Practitioner must ensure each participant, their family, carers and other support network and stakeholders (which may include a Guardian or a GP) are engaged in discussions about the **need** for restrictive practices and **understand** the risks associated with their use, and are engaged in the development of the behaviour support plan.

## Use of restrictive practices under the NDIS

Restrictive practices including physical restraints and seclusion prevents a person from exercising their rights. NDIS providers may use restrictive practices to protect the safety of their clients or other people including families, support workers or other members of the community.

Restrictive practices can also be overused or misused. They might be used:

- Without proper authorisation
- Without knowing that something is a restrictive practice
- For too long and without being regularly reviewed
- For reasons other than keeping people safe
- As a form of abuse and neglect
- Due to lack of training, knowledge, or reflection about less restrictive alternatives.

Under the NDIS, any regular and ongoing use of a restrictive practice is implemented in accordance with a positive behaviour support plan and authorised by the state and territory in which the use occurs. Where an NDIS provider uses a restrictive practice other than in accordance with a behaviour support plan or state or territory authorisation, it must take all

reasonable steps to obtain a behaviour support plan and obtain state authorisation as soon as reasonably possible.<sup>1</sup>

Current practice does not support the use of restrictive practices to respond to behaviours of concern.

Restrictive practices can have a serious impact on the health and wellbeing of people with disability. Restrictive practices carry risks including death, and physical and psychological harm to individuals and staff. They can infringe human rights and impact negatively on the relationship between individuals and staff e.g. relationships between support workers and people using their supports may become coercive.

This is one of the reasons why Australia has made a commitment to reducing and eliminating the use of restrictive practices for people with disability.

## The current NDIS restrictive practice authorisation process

South Australia uses a guardianship model to regulate restrictive practices for NDIS participants who may be subject to them, whereby a guardian is given the power to consent to restrictive practices, unless there is use of force, or detention, in which case additional powers must be approved through an application to the South Australian Civil and Administrative Tribunal.

The introduction of the NDIS has resulted in an increase in the number of applications for guardianship orders. This is problematic as it contravenes the guiding principle of the [GAA](#), whereby existing informal arrangements that have been working well are supported.

## National Principles

Disability Ministers have been working together nationally with the NDIS Quality and Safeguards Commissioner to develop principles for nationally consistent restrictive practices authorisation. Key elements include:

- A streamlined legislative authorisation process with the objective to reduce and eliminate restrictive practices
- People with disability (including children) have the same protections and rights to be free from abuse, neglect and exploitation
- All regulated restrictive practices are authorised
- Decisions are informed by experts experienced in positive behaviour support, and restrictive practices
- Conflicts of interest are mitigated between those involved in decision making on the use of restrictive practices, people with disability, and their support networks. This includes authorisation decisions being independent from guardianship frameworks.

An Analysis of South Australia's Restrictive Practices Authorisation process shows the current process **does not** meet the national principles.

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<sup>1</sup> [NDIS \(Restrictive Practices and Behaviour Support\) Rules 2018](#)

## **What are the proposed changes to the Disability Inclusion Act?**

The amendments to the Act will provide a new restrictive practices authorisation regime for participants in the NDIS and provides an operational structure for the new role of the Senior Authorising Officer.

The purpose of this Bill is to:

- Provide for the regulation of restrictive practices for all participants of the NDIS
- Create the new role of the Senior Authorising Officer to:
  - Educate NDIS service providers on the authorisation processes
  - Oversee the training and accreditation of officers within NDIS providers and oversight of low-level authorisation by a provider
  - Authorise higher-risk restrictive practices
  - Provide guidelines on authorisation and prohibited practices
  - Provide ongoing sector education and training with a focus on the reduction and elimination of restrictive practices, based on best practice, including emerging new practice evidence.
- Provide for the review of decisions
- Capture and record the authorisation of restrictive practices that are deemed to be necessary, and associated information gathering and sharing provisions.

## **What do the proposed changes mean in practice?**

The amendments aim to create a more streamlined risk-based authorisation process for South Australia. It enables a graduated level of authorisation in line with the level of risk or intrusiveness.

That means the Senior Authorising Officer will be able to approve authorising officers with requisite skills and experience within a registered NDIS provider who may use restrictive practices while delivering NDIS supports.

However, it is also flexible enough to allow service providers to fulfil their duty of care to their staff and ensure the participant is not at risk of harm to themselves and others. It also enables smaller service providers to seek authorisation from the Senior Authorising Officer for lower-risk restrictive practices where they are unable to engage an appropriately skilled person if required.

The authorisation process will also offset some of the significant amount of time that is taken away from providing supports to people with disability to report unauthorised restrictive practices to the NDIS Quality and Safeguards Commission.

## How are NDIS participants protected?

An authorisation process, to be outlined in legislation, provides the strongest safeguards for people with disability and would ensure any restrictive intervention can only be used:

- As a last resort, and
- When there is a risk of harm to the person or others, and
- If the use is the least restrictive way of ensuring the safety of the person or others, and
- Is proportionate to the potential negative consequence, and
- The use is in accordance with an NDIS behaviour support plan, and
- Its use is not prohibited.

In addition, the creation of the Senior Authorising Officer role within the Act reflects a preventative approach towards building sector capacity to deliver the least restrictive support services and move towards reducing and eliminating restrictive practices.

## What is detention and what practices are considered detention under the amendments to the *Disability Inclusion Act 2018*?

Detention is broadly defined in the proposed amendments to the [Disability Inclusion Act 2018](#) and includes:

- Any direct or indirect curtailment of a person's ability to leave a premises whether physical or by other means
- A requirement that a person be and remain in premises or a part of premises
- Refusal or limitation of access to means of leaving e.g. unable to get access to a wheelchair.

This means seclusion and some environmental restraints, such as use of overnight curfews or locking doors for limited periods, would be considered 'detention'.

However, the proposed amendments to the [Disability Inclusion Act 2018](#) allows for sophisticated regulations to be drafted to exclude practices which are not intended to be captured as 'detention'.

The proposed new regime does not seek to authorise detention. For example, directing where someone is to reside will remain the responsibility of South Australian Civil and Administrative Tribunal (SACAT) through its powers under the [Guardianship and Administrative Act 1993](#) (Guardianship Act).

Therefore, we are seeking your views on the types of restrictive practices (environmental or seclusion as defined under the NDIS and outlined in the [Regulated Restrictive Practices Guide](#) issued by the NDIS Commission that **should not be captured** as 'detention' and would require the authorisation under the *Disability Inclusion Act 2018* by either the authorised program officer or the senior authorising officer and those that should be classed as 'detention' and require an order by SACAT under the [Guardianship Act](#).

## **Get involved**

Read the draft *Disability Inclusion (Restrictive Practices-NDIS) Amendment Bill 2020* and the frequently asked questions and consider the following discussion questions:

- 1. In what circumstances may restrictive practices be needed? What rules and safeguards should be applied? Should the same rules and safeguards apply to all people?**
- 2. Are there any other principles that should guide restrictive practices authorisation in South Australia?**
- 3. Aside from the agreed national list of prohibited practices, are there any other restrictive practices that should not be allowed?**
- 4. What restrictive practices are less intrusive?**
- 5. What restrictive practices are more intrusive?**
- 6. How should people participate in the restrictive practice authorisation?**
- 7. Is a tiered approach to authorisation of restrictive practices based on risk and level of intrusiveness, the right approach?**
- 8. What types of practices should not be defined as detention in the regulations? For example: locking the door overnight or maybe during the day.**
- 9. What skills and experience does an authorised program officer and senior authorising officer (decision makers) need to authorise restrictive practices?**
- 10. What conditions should be met to authorise the use of restrictive practices? Does it change depending on the level of intrusiveness?**
- 11. What information should decision makers use when deciding whether to authorise the use of a restrictive practice?**
- 12. How should the quality and consistency of restrictive practices authorisation decision be monitored?**
- 13. Are there any further comments?**

## How can your input influence the decision?

Your feedback will be considered and will influence the final policy direction ahead of the proposed Bill's introduction to Parliament early in 2021 and will be drawn upon to support the development of regulations, policy, planning, development frameworks and guidelines.

## Provide your feedback by:

- Joining the online discussion at YourSAy
- Providing a written submission to [DHSSADisabilityReformIGR@sa.gov.au](mailto:DHSSADisabilityReformIGR@sa.gov.au)
- Posting your comments to:

Department of Human Services  
Disability Access and Inclusion  
RE: NDIS Restrictive Practices  
PO BOX 292  
ADEALIDE SA 5000

Closing date: **5pm, Friday 29 January 2021**

## Contact details

For general inquiries, please email us at [DHSSADisabilityReformIGR@sa.gov.au](mailto:DHSSADisabilityReformIGR@sa.gov.au)