



**NSW Department of
Communities and
Justice. A legislative
framework for regulating
the use of restrictive
practices on people with
disability.**

Submission

About National Disability Services

National Disability Services (NDS™) is Australia's peak body for disability service organisations, and Australia's biggest and most diverse network of disability service providers. Our valued members collectively operate several thousand services for more than 300,000 Australians with disability and employ a workforce of more than 100,000 people. NDS is committed to a sustainable and diverse disability service sector, underpinned by the provision of high-quality, evidence-based practices and supports that strengthen, safeguard, and provide greater choice for people with disability in Australia.

NDS acknowledges the traditional custodians of the lands, seas, skies, and waterways throughout NSW. We pay respect to elders past and present and recognise their deep and continuing connections with our shared country, culture, and community.

About this response

National Disability Services (NDS) welcomes the opportunity to provide a submission to the Communities and Justice Consultation Paper – A legislated framework for regulating the use of restrictive practices on people with disability. This submission was developed in consultation with NDS' members who have used the current interim Restricted Practices Authorisation (RPA) process in NSW. The proposed changes to the legislation in the consultation paper are more aligned with other jurisdictions than the current NSW model. These proposed changes would create more consistency of understanding and experience for people with disability, families, and providers.

In summary:

NDS believes the proposed changes provide for more rigor around the current Restrictive Practices Authorisation (RPA) process however where this creates more work, increases administrative burden, or requires further resources of providers there will be a risk that providers will struggle to achieve what is required. In response to this issue, NDS identifies the following important considerations for effective change:

- NDS supports the proposed changes to legislation in line with the response to Recommendation 6.35(b) of the [Disability Royal Commission Final Report](#) (relating to the legal frameworks for the authorisation, review, and oversight of restrictive practices).
- That adequate resourcing is available to NDIS providers, to support transition to a new model and for the proposed for Authorised Program Officers role.
- NDS supports and advocates for a nationally consistent approach to the authorisation of restrictive practices. Ideally processes for RPA would be consistent across the country enabling best practice approaches to be developed and implemented. The current fragmented system can create confusion for a person with disability, their families, and providers. The current system also creates double handling and additional red tape for those providers that operate across multi-jurisdictions.
- There should be information sharing and collaboration across relevant regulators to ensure efficient and effective oversight. This 'joined up' regulatory approach will minimise the risk of increased administrative burden for providers. Regulators include the (proposed) NSW Senior Practitioner, NSW Ageing and Disability Commission and the National NDIS Quality and Safeguarding Commission (NDIS Commission).

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Scope of submission

There are 12 proposals put forward by the NSW Department of Communities and Justice and 26 questions in relation to these proposals. NDS NSW held a member consultation to inform its submission responses below.

1. Responses to the consultation questions

Question 1: Should the proposed legislative framework cover the out of home care setting?

NDS response: Yes, NDS supports this. It is important from a human rights point of view that the out-of-home care setting be covered. NDS notes that there are [51 per cent of children in residential out-of-home care settings in NSW](#) who are NDIS participants.

Question 2: Should the proposed legislative framework cover any other setting?

NDS response: no other settings have been identified.

Question 3: What issues and challenges are raised by there being different frameworks for the authorisation of restrictive practices in the disability service provision setting and the aged care setting?

NDS response: There are different rules under the NDIS Act and the Aged Care Act for the use of and reporting the use of restrictive practices. This means there are multiple authorisation systems working across different sectors, leading to poor alignment and reduced harmonisation. NDS advocates for more consistent systems across the different sectors. There are many providers in NSW that work across both the aged care and disability settings. Having consistent frameworks will assist with consistency, less complexity and confusion, and less fragmentation of services.

NSW DCJ Proposal 1: Legislation should provide that the use of restrictive practices on NDIS participants in the disability service provision, health, education, and justice

settings should be governed by the principles recommended by DRC Recommendation 6.35(b).

Question 4: Do you support legislation requiring that restrictive practices on NDIS participants in the disability service provision, health, education, and justice settings should be governed by the principles recommended by DRC Recommendation 6.35(b)?

NDS response: NDS agrees with the [DRC Recommendation 6.35\(b\)](#). NDS agrees with the Senior Practitioner model in disability service provision. NDS proposes that there should be no additional reporting for providers to the Senior Practitioner. There should be information sharing and collaboration across relevant regulators to ensure efficient and effective oversight. Regulators include the (proposed) NSW Senior Practitioner, NSW Ageing and Disability Commission and the National NDIS Quality and Safeguarding Commission (NDIS Commission). This 'joined up' regulatory approach will minimise the risk of increased administrative burden for providers. There are already substantive reporting requirements to the NDIS Quality and Safeguards Commission. The model should ensure that it upholds the rights of people with disability, that it streamlines processes and keeps the regulatory burden to a minimum.

DCJ Proposal 2: The legislation should require government agencies in the health, education, and justice settings to provide an annual report to the Senior Practitioner on their, and their contractors', compliance with the principles.

Question 5: Are there any other principles that should be considered?

NDS response: no other principles were identified.

Question 6: Should a legislative framework prohibit any practices? If so, which practices and in which settings?

NDS response: There are a list of prohibited practices that have been endorsed by the Disability Reform Council ([Consultation Paper Appendix B: Consultation List of prohibited practices endorsed by Disability Reform Council](#)). These practices should be prohibited in the new legislation. No other practices and no other settings have been identified by NDS.

DCJ Proposal 3: *The NDIS definitions of restrictive practices should be adopted for the NSW legislative framework for restrictive practices.*

DCJ Proposal 4: *The Senior Practitioner should have the power to issue guidelines that clarify how the definitions apply in different situations.*

Question 7: *Do you agree that:*

- *the framework should use the NDIS definitions of restrictive practices?*
- *the Senior Practitioner should have the power to issue guidelines that clarify how the definitions apply in different situations?*

NDS response: NDS agrees with the use of the NDIS definitions of restrictive practices. This will ensure national consistency and familiarity for providers. It also aligns with other jurisdictions and will assist with record keeping and data collection. There are many providers that work across different states and territories, so national consistency is especially important.

NDS agrees that the Senior Practitioner should be able to issue guidelines that clarify how the definitions apply in different settings.

Question 8: *What role should the Senior Practitioner play in regulating behaviour support plans? For example:*

- *Should the Senior Practitioner have the power to prescribe additional and/or more detailed information for inclusion in the BSP? If so, what information?*

NDS response: NDS supports the role of the Senior Practitioner to include powers to prescribe additional or more detailed information to be included in a BSP where changes provide further safeguards for participants. As changes may delay authorisation, and plan implementation they, should be limited to those that are essential and necessary.

- *Should the Senior Practitioner have the power to require a behaviour support practitioner have certain qualifications and the Senior Practitioner's approval before they can prepare a BSP which will be used to authorise the use of a restrictive practice? If so, what should the additional qualifications and criteria for approval be?*

NDS response: The sector has called for improved behaviour support planning and the need for improvement in behaviour support plans has been identified by

the NDIS Commission. While defining certain qualifications for practitioners may have an impact on the quality of plans, the approach is also likely to introduce inconsistency across jurisdictions and be disruptive to the practitioner market. Having state-based requirements would also create additional steps for onboarding. It is preferred that any changes are national, consistent and provide for transition and support the upskilling of existing practitioners where needed.

If there are proposed suggestions by the NSW DCJ about the qualifications required by behaviour support practitioners, consideration must be given to how the supply of practitioners will be supported and developed. There is a current [shortage of behaviour support practitioners](#), and the requirement of a qualification could further impact this. [NDS State of the Disability Sector](#) data from 2024 showed that 98 percent of NSW providers had difficulty recruiting for behaviour support practitioners, and 69 percent reported difficulty with retention. Behaviour support practitioners currently do a self-assessment, overseen and endorsed by an appropriate supervisor that is then submitted for a decision on suitability to the NDIS Commission under the [Behaviour Support Capability Framework](#).

Consistency across jurisdictions is essential for people who work across different states and territories and to simplify the complexity of behaviour support provision in Australia. Victorian Senior Practitioner provides learning opportunities for Authorised Program Officers (APOs) as well as practitioners. This could be replicated in NSW and nationally, for consistency across Australia.

- *Should there be any specific provisions relating to consultation in the development of a BSP, in addition to the requirements in the NDIS Rules?*

NDS response: The legislation should include consultation with the person with disability and their support network. Where consented to this must be involved in all stages of behaviour support planning. The NDIS Rules address consultation with the person with disability comprehensively.

Question 9: Is there anything else the proposed framework should do to improve the quality of BSPs?

NDS response: The Senior Practitioner could provide guidance to ensure that written behaviour support plans are able to be understood easily by frontline workers. This would assist with workers and people with disability who have lower levels of literacy. This could make behaviour support plans easier to implement and be effective. In 2018, an [Ai Group survey](#) showed that 39 percent of employers reported low levels of literacy affecting their business.

The Senior Practitioner could provide professional development at affordable rates. They could develop workforce pathways to support formal study and advertise approved or supported formal study pathways.

DCJ Proposal 5: A Senior Practitioner model should be structured to use APOs as part of the authorisation process.

An APO should:

- *have operational knowledge of how the BSP and proposed restrictive practice would be implemented,*
- *be required to meet prescribed professional standards set by the Senior Practitioner, and,*
- *be approved by the Senior Practitioner.*

Question 10: Should APOs be empowered to either:

- *authorise particular categories of restrictive practices without separate Senior Practitioner authorisation (a partially delegated model). If so, what categories of restrictive practices should be able to be authorised by APOs? Should these be prescribed by legislation, or through class or kind orders?*
- *provide preliminary approval of restrictive practices, with final authorisation provided in all cases by the Senior Practitioner (a two-step model)?*

What would be the benefits and risks of the above models?

NDS response: In Victoria, the APO can approve chemical and environmental restrictive practices. A behaviour support plan is sent to the Senior Practitioner. All other restrictive practices require approval from the APO and the Senior Practitioner. NDS recommends a national consistent approach to the approval of restrictive practices. It is important that there is still a consultative and collaborative approach to approval of restrictive practices.

Question 11: Are there alternative approaches to authorisation that would be preferable to these models?

NDS response: If there is a panel, it would be useful to have one single panel for all implementing providers. Current RPA panels in NSW have an independent specialist. These panels and the independent specialist are funded by NSW Department of Communities and Justice. The independent specialist can look at plan quality and make recommendations or conditions of authorisation. It is important that this function is not lost, and the independence maintained by the Senior Practitioner. For example, the model in the ACT has all implementing providers at the same panel. A national consistent approach is recommended by NDS.

For smaller providers that have less resources, the independent specialist can be a good mechanism for strengthening the understanding of restrictive practices and positive behaviour support plans. A strong education/capacity building programs for implementing providers is critical. This could be done by the Senior Practitioner.

Question 12: Should APOs be required to be employed by a single provider? Or should APOs be permitted to be consultants to a number of providers? If so, what safeguards should there be in relation to this?

NDS response: The APO is an unfunded position and therefore a cost to implementing providers.

In NDS [State of the Disability Sector Report 2024](#), 86 percent of providers in NSW are worried they will not be able to continue to provide NDIS services at current prices. The cost of new APO positions without a funding source would impact financial sustainability. There would be a cost whether the APO is employed by the organisation, or they are a consultant. If using APOs, NDS recommends that providers receive new funding support for these positions. APOs are proposed to have a working knowledge of the context of the

organisation. There needs to be more information on the job specifications for this role.

DCJ Proposal 6: The Senior Practitioner and APO should have a discretion to determine the duration of an authorisation, up to 12 months.

DCJ Proposal 7: There should be an emergency use process for restrictive practices before a BSP has been prepared and authorisation given, which should replace the interim authorisation process.

Question 13: Do you support the proposed duration of authorisation and emergency use proposals for restrictive practices?

NDS response: NDS supports the proposed duration of authorisation. These are consistent with NDIS legislation. If the Senior Practitioner model is used, it should mean that authorisations can happen much quicker. Currently in NSW, there is often delays with getting a panel set up, as the independent specialist has to be booked in advance. There are also lengthy delays with NCAT applications, so the APO and Senior Practitioner approval process would alleviate this. This would also reduce the need for providers to report to the NDIS Commission on the use of unauthorised restrictive practices. An example from a NSW provider said it took eight months to have a guardianship application processed and approved.

With emergency approvals, there are recommendations that a behaviour support plan should be developed as soon as possible. The legislation proposes that the provider is then required to report to the Senior Practitioner on a monthly basis on the use of emergency restrictive practices. Providers currently have reporting requirements to the NDIS Commission. NDS advocates that there should be no extra reporting requirements for providers. Where there are emergency approvals of restrictive practices, there should also be clear guidelines about how soon a behaviour support plan should be developed to ensure participants are kept safe. For reporting, it should be the same data that goes to the Senior Practitioner and the NDIS Commission. This would be improved with shared reporting.

DCJ Proposal 8: *The Senior Practitioner should have the power to cancel an authorisation of restrictive practices where:*

- *the Senior Practitioner has determined there is no longer a need for the restrictive practice,*
- *the Senior Practitioner requests evidence to demonstrate the restrictive practice is still needed and the provider fails to provide sufficient evidence,*
- *the authorisation was obtained by materially incorrect or misleading information or by mistake,*
- *the relevant provider has contravened a condition of the authorisation, or*
- *the relevant service provider has contravened a provision of the legislation*

Question 14: *Are there any additional grounds on which the Senior Practitioner should be able to cancel an authorisation?*

NDS response: There are no other additional grounds identified on which the Senior Practitioner should be able to cancel an authorisation.

DCJ Proposal 9: *An affected person, the NDIS provider and any other person who has a genuine concern for the welfare of the person may seek review of an authorisation decision. The review rights would be:*

- *first to the Senior Practitioner for internal review,*
- *then to the NSW Civil and Administrative Tribunal*

Question 15: *Should authorisation decisions:*

- *be open to internal review?*
- *be reviewable at NCAT?*

NDS response: Yes, NDS supports this approach. This is consistent with practice in the ACT, Victoria, South Australia, and the Northern Territory.

Question 16: *Should rights to seek review be limited to the person or a person concerned for their welfare? Should the service provider have a right to seek review of a decision not to authorise a restrictive practice?*

NDS response: NDS would support this.

Question 17: *Should a person have a right to request the service provider review the BSP at any time?*

NDS response: NDS supports this. It may have some funding implications if there are no funds available in people's NDIS plans. A process to support a review could include Senior Practitioner support. It is proposed that authorisation for existing practices remain in place whilst a review is sought and undertaken.

DCJ Proposal 10: *The Senior Practitioner should have powers to investigate the misuse of restrictive practices, on receipt of a complaint and on its own motion.*

Question 18: *Should the Senior Practitioner have complaints handling and investigation functions either on receipt of a complaint, on its own motion, or both?*

NDS response: NDS would support that the Senior Practitioner should have complaints handling and investigation functions on receipt of a complaint and on its own motion. Whatever is determined needs to align with the other regulatory bodies – the NDIS Commission, the NSW Ageing and Disability Commission and the NSW Children's Guardian.

DCJ Proposal 11: *The Senior Practitioner should have the following powers to respond to the misuse of a restrictive practice:*

- *direct the provider to do / cease doing something in relation to behaviour support or the use of the restrictive practice,*
- *cancel an authorisation,*
- *refer the matter to the NDIS Commission, police, or another relevant entity.*

Question 19: *Do you agree the Senior Practitioner should have the proposed powers to respond to misuse of a restrictive practice?*

NDS response: NDS supports this function where the proposed complaints handling, and investigation function of the Senior Practitioner would focus on rectifying the misuse of the restrictive practice. Where this is not appropriate, a referral to the NDIS Commission or other relevant entity is a streamlined approach. The Senior Practitioner and the NDIS Commission's work should complement each other.

Question 20: How should interaction with the NDIS complaints framework be managed?

NDS response: NDS proposes that there should be no additional reporting for providers to the Senior Practitioner. There should be information sharing and collaboration across relevant regulators to ensure efficient and effective oversight. Regulators include the (proposed) NSW Senior Practitioner, NSW Ageing and Disability Commission and the National NDIS Quality and Safeguarding Commission (NDIS Commission). This 'joined up' regulatory approach will minimise the risk of increased administrative burden for providers. There are already substantive reporting requirements to the NDIS Quality and Safeguards Commission. The model should ensure that it upholds the rights of people with disability, that it streamlines processes and keeps the regulatory burden to a minimum.

Question 21: To which bodies should the Senior Practitioner have the power to share information and in what circumstances should the Senior Practitioner be permitted to share information?

NDS response: NDS advocates that the Senior Practitioner should have the power to share information with any bodies that would facilitate thorough investigations. This could include, but is not limited to, the NDIS, the NDIS Commission, NSW Police and the NSW Official Community Visitors, health bodies, child protection services, education institutions and other regulatory bodies. NDS advocates for clear rules for sharing of information, ensuring that information sharing is conducted in a structured, transparent, and legally compliant manner.

Question 22: Are the means by which the Senior Practitioner would have visibility of the use of restrictive practices by NDIS providers proposed in this Paper sufficient? If not, what additional information should providers be required to report to the Senior Practitioner? How can reporting burden to the Senior Practitioner and the NDIS Commission be minimised?

NDS response: Providers currently have reporting requirements to the NDIS Commission. There are reporting requirements for the use of restrictive practices

and the use of unauthorised restrictive practices. NDS proposes that there should be no additional reporting for providers to the Senior Practitioner. If there are shared systems between the Senior Practitioner and the NDIS Quality and Safeguarding Commission (NDIS Commission), then this will not increase administrative burden for providers.

DCJ Proposal 12: *The Senior Practitioner should have the following functions:*

- *developing and providing information, education, and advice on restrictive practices to people with disability, their families and supporters, and the broader community,*
- *developing guidelines and standards, and providing expert advice, on restrictive practices and behaviour support planning.*

Question 23: *Do you agree the Senior Practitioner should have the proposed education and guidance functions?*

NDS response: NDS agrees with the proposed education and guidance functions. Some may have overlap with the NDIS Commission. These are consistent with the functions of the Senior Practitioners in Victoria, ACT, the Northern Territory and Tasmania. The education and guidance function will enhance capacity and capability building of practitioners in delivering supports.

Question 24: *Should the Senior Practitioner have the power to impose sanctions for the misuse of restrictive practices, or are existing sanctions for misuse of restrictive practices sufficient? How should the interaction between sanctions provided for under NDIS legislation and the proposed framework be managed?*

NDS response: NDS advocates strongly against duplicative regulatory powers. Instead, it is recommended that the Senior Practitioner have a referral function to the NDIS Commission regarding the misuse of restrictive practices, rather than duplication by the NDIS Commission. Existing sanctions for the misuse of restrictive practice are sufficient.

Question 25: *Should the proposed framework provide for a legislated immunity from liability from the use of restrictive practices where the use was in accordance with an authorisation and done in good faith?*

NDS response: NDS agrees that there should be a legislated immunity that is consistent with other jurisdictions.

Question 26: Are there any other functions which the Senior Practitioner should have? Should providers in the disability service provision setting be subject to any other requirements?

NDS response: NDS advocates that their providers in disability service provision should not be subject to any other requirements.

Conclusion

NDS believes the proposed changes provide for more rigor around the current Restrictive Practices Authorisation (RPA) process however where this creates more work, increases administrative burden, or requires further resources of providers there will be a risk that providers will struggle to achieve what is required. In response to this issue, NDS identifies the following important considerations for effective change:

- NDS supports the proposed changes to legislation in line with the response to Recommendation 6.35(b) of the [Disability Royal Commission Final Report](#) (relating to the legal frameworks for the authorisation, review, and oversight of restrictive practices).
- That adequate resourcing is available to NDIS providers, to support transition to a new model and for the proposed for Authorised Program Officers role.
- NDS supports and advocates for a nationally consistent approach to the authorisation of restrictive practices. Ideally processes for RPA would be consistent across the country enabling best practice approaches to be developed and implemented. The current fragmented system can create confusion for a person with disability, their families, and providers. The current system also creates double handling and additional red tape for those providers that operate across multi-jurisdictions.
- There should be information sharing and collaboration across relevant regulators to ensure efficient and effective oversight. This 'joined up' regulatory approach will minimise the risk of increased administrative burden for providers. Regulators include the (proposed) NSW Senior Practitioner, NSW Ageing and Disability Commission and the National NDIS Quality and Safeguarding Commission (NDIS Commission).

As a peak body with expertise at a national and NSW level, NDS brings its experience and provider engagement to detailing its recommendations contained in this submission.

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February 2025