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**National Disability Services Submission to:**

**Persons with Disability (Regulation of Restrictive Practices) Bill Exposure Draft 2021**) Bill 2021

# **About NDS**

National Disability Services (NDS) is the peak body in NSW and Australia for non-government disability service providers. NDS has more than 400 members in NSW and over 1,100 members nationally. NDS provides information and networking opportunities to its members and policy advice to State, Territory and Commonwealth governments. We have a diverse and vibrant membership, comprised of small, medium and larger service providers, supporting thousands of people with disability. Our members collectively provide the full range of disability services, from supported independent living and specialist disability accommodation, respite and therapy to community access and employment.

NDS is committed to improving the disability service system to ensure it better supports people with disability and their families and carers, and to building a more inclusive community. NDS has a deep commitment to supporting the implementation of a successful NDIS and is supporting service providers across NSW as they work to thrive within the new landscape.

NDS welcomes the opportunity to comment on the Exposure Draft of the Persons with Disability (Regulation of Restrictive Practices) Bill. This submission was developed in consultation with NDS’ members who have used the current interim Restricted Practices Authorisation (RPA) process in NSW and addresses a selection of questions posed in relation to the Proposals in the draft Bill.

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# **Contextual overview**

NDS is pleased to learn that the draft Bill incorporates a number of issues that NDS raised with the interim NSW RPA process in the 2019 consultation.

NDS believes the proposed changes provide for more rigour around the current 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 proposes the following considerations –

* That adequate resourcing around the use of restrictive practices is available for both the Ageing and Disability Commission (ADC) in implementing their RPA approvals and monitoring processes and for NDIS providers, in their implementation of RPA’s.
* People subject to RPA be provided with decision making support in regard to the consent process and also inclusion in the panel meetings.

NDS would also advocate for a nationally consistent approach to the regulation 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 participants, their families and providers and also create double handling and additional red tape for those providers that operate across multi jurisdictions.

# **Responses to Exposure Draft**

**Q1 Do you agree with the proposed objects and principals of the Bill?**

NDS supports the proposed objects and principals outlined in the Bill, noting that they are supportive of the reduction and elimination of restrictive practices. We are concerned that the principles talk to “the use of restrictive practices to support a person with disability”. Given that restrictive practices by their very nature infringe a person’s human rights, the wording is at odds with the aim of the Bill to promote human rights and could potentially imply that the use of restrictive practices with people with disability is acceptable. This should be reworded to “the use of restrictive practices with people with disability”.

Given that many people who are subject to restrictive practices may share facilities and settings with others, we would suggest including a supplementary principle in the Bill to safeguard the rights and freedoms of any other people who may be potentially affected by a restrictive practice as follows –

* No impact for other people sharing the facilities and setting where a restrictive practice is being or will be used. If an impact is unavoidable, it should be minimal and specifically managed.

**Q2 Is the reporting framework for NSW Government agencies sufficiently robust?**

Based on the principles (enshrined in the Bill), any deliberate decision to set aside a person’s rights in relation to restrictive practice should only occur in a lawful and monitored way. This implies that RPA processes should therefore apply in all settings, such as education, hospitals (including mental health facilities), gaols, aged care facilities, community facilities (such as sporting clubs), and at home.

NDS would argue that NSW government agencies and those funded directly by the NSW government should be subjected to a RPA process and would strongly support this being included in the Bill.

Whilst requiring NSW Government agencies (and the non-government providers that they contract to deliver services) to report to the ADC on their processes to ensure that the principles in the Bill are taken into account is a step forward from the current situation, the Bill should be strengthened by requiring these agencies to demonstrate uphold these principles in implementing any restrictive practice.

**Q3 Do the Ageing and Disability Commissioner’s new responsibilities support the appropriate use and review of restrictive practices?**

NDS is of the view that the ADC is an appropriate body to oversee the authorisation processes that providers must follow, so that the rights of people with disability are central to processes and decisions. We are pleased to see the Bill highlight the function of the ADC in promoting the elimination and reduction of restrictive practices and the application of the principles in the Bill. We would suggest that the functions need to be expanded to include the development resources to include the provision of information for people with disability, providers, and families/ carers (particularly those who are likely to be Trusted Persons) about the processes around restrictive practices, consent and the guiding principles.

Providers have identified the administrative burden of double reporting of the same information to both FACS and the NDIS Commission regarding Behaviour Support Plans. NDS would support an information sharing protocol between ADC and the NDIS Commission regarding the lodgment of Behaviour Support Plans (BSPs) to reduce duplication of reporting by providers and between agencies.

Providers across NSW have reported to date that the availability of independent specialists has not been adequate, particularly in regional areas. In order to support the appropriate use and review of restrictive practices the ADC will need to be responsible for recruiting, training and maintaining an adequate pool of independent skilled behaviour support practitioners to be available as panel members. Additional measures will need to be developed for regional areas. Providers have identified that availability via zoom or other virtual options may help address the availability issue they currently face.

To ensure optimal supported decision making is available for people with disability, additional training targeting those who may come before a panel would be critical. At this point it is unclear who would be responsible for this necessary training.

In collaboration with the NDIS Commission, the ADC should promote the reduction/ elimination of restrictive practices, and develop best practice resources.

**Q4 Is the framework for gaining the NDIS participant’s consent sufficiently robust and practical?**

In an environment where providers have a limited budget to run RPA panels and seeking consent has not always been a focus in the past, allowing the authorisation panel to ensure proper consent processes have occurred prior to issuing any authorisation may be open to failure, without some safeguards in place to maximise a focus on achieving informed consent. It would assist if resources were developed that Trusted Persons/ or the participant could sign to indicate informed consent is sought and given.

There may be instances where a Trusted Person is unable/unwilling to consent. A clear process that can be implemented where there may not be a Trusted Person or the Trusted Person/s refuse to consent to any proposed BSP is required.

The current NCAT position regarding consent is not aligned to this draft legislation that supports the use of a Trusted Person for people not subject to formal guardianship orders. NCAT currently requires that if a person subject to a RPA is unable to consent, then only a formally appointed guardian with a restrictive practices function can consent. Feedback indicates that this has resulted in delays in obtaining consent, increases in applications to NCAT and confusion amongst participants, guardians, family members and providers. Ensuring that there is clarity for all involved in the process about when a Trusted Person is able to consent to the use of RPA and when they are not will be essential.

**Q5 Do you think the Bill provides enough support for people with disability to make decisions for themselves?**

Clause 12 (1) is unclear about the elements required to establish that the participant or Trusted Person has given informed consent. Providers may be unclear about what it is and what it means (in terms of information) a provider must include in order to obtain informed consent. Guidance about how to enable informed consent to be given would support this requirement. Similarly the nature of the evidence that the RPA panel or the ADC may need is not clear. Given that this is a requirement in the Bill it will be important to ensure that either the Bill or the Regulations provide clarification on this issue.

**Q6 Are there any other safeguards that should be put in place around the trusted person framework?**

Resources on how to identify who is a Trusted Person would be useful for providers in identifying the correct contact to save time in the RPA process. It would be of value to have a form they sign to say they consent and are aware of the nature and effect of the BSP.

Further guidance on who determines if the Trusted Person has the necessary skill set to understand the purpose and effect of a BSP is required to ensure that appropriate safeguarding. Resources to explain the ins and outs, consequences and gravity of their decision and the implications of giving and withdrawing consent for a restrictive practice will be required.

**Q7 Do you think having an independent behaviour support practitioner on the authorisation panel provides enough independence and expertise?**

Having an independent specialist on each panel certainly offers more opportunity for oversight of decision making and transparency. There is currently an issue with availability of independent practitioners, including those with expertise across complex support needs. Their availability would need to be secured to enable this framework to work. Some providers have suggested the importance of conducting a trial of this proposed RPA process to identify any weaknesses and gaps that may be barriers to implementation of the new process. The Bill notes that a review is proposed in 5 years. Structured interim reviews should be included in the Bill, with the requirement for a report out of these reviews to be publically available.

Whilst the inclusion of an independent behaviour support practitioner as part of the panel is a positive step forward however they are still a minority within the panel membership numbers. Identifying how the ADC will monitor the independence of the behaviour support practitioner will be required. Some providers have identified a risk that even an independent practitioner may face conflict of interest issues that may practically be difficult to manage particularly in regional and more remote areas. This would need to be balanced when an independent practitioner with particular expertise in a particular condition or area (e.g. polydipsia) would be useful to include on a panel.

If a panel is unable to reach a unanimous decision about the use of a restrictive practice, NDS suggests a new panel should be constituted.

NDS has recommended previously that RPA panels should include a lawyer with expertise in promoting human rights and that ideally all panel members should be independent of the matters under consideration, and have specific expertise in relation to the design and implementation of restrictive practices and the rights of people with disability.

Issues related to the timeliness of decision making and clear roles and responsibilities of the panel in terms of providing information to the provider who will be implementing the restrictive practice would be required given the requirements in the draft Bill.

**Q8 Does the draft Bill provide enough opportunities for people with disability, and their support people, to be involved in the decision making process?**

NDS would suggest that the Bill include that resources, support, training, and supported decision making resources be identified as a function of the ADC and that this be appropriately funded. Currently the draft Bill identifies that participation in RPA decisions and assumed capacity on behalf of people with disabilities as principles but is quiet on who is responsible for supporting this where this is required.

**Q9 Does the authorisation framework provide enough balance between the rights of the person with disability and the responsibilities of their service provider?**

Navigating the sometimes complex situation of reducing/ eliminating the use of restrictive practices, and the ongoing need for all persons in a setting to be safe including staff is a difficult balance. As expertise increases in the sector, and best practices become better known, reduction and then elimination will be a more achievable goal in many cases. However, for some people, the reduction of restrictive practices may be the most realistic goal. NDS considers that these judgements require skilled RPA panel members to ensure decision-making about reduction and elimination is consistently applied.

As indicated sharing of data, development of best practice resources, and consultation with the sector by the ADC will be important in ensuring that an appropriate balance is achieved.

Whilst not in the remit of the ADC, it will also be important to ensure that NDIS participants have the appropriate budget in their NDIS plans to support the development and review of comprehensive behaviour support plans, that appropriate funding in plans is available to support implementing providers to put in place positive behaviour support strategies to reduce the use of restrictive practices (noting that these may require additional staffing resources at the beginning) but also enable them to meet their WH&S obligations which extend to staff and other participants.

We would suggest that protocols being developed between the ADC, NDIA and the NDIS Commission around information and resourcing that enables the use of unauthorised restrictive practice and/or recommendations by an RPA panel to be taken into account in developing participant plans. This may necessitate a plan review.

**Q10 Are the Commissioner’s and NCAT’s powers to review restrictive practices sufficient?**

NDs would support the review and appeal of decisions of RPA panels through the ADC and NCAT. Appealable decisions should relate to the process of decision-making, e.g. application of all principles, adequacy of evidence, and involvement of participant.

# **Considerations in developing regulations**

NDS recognises that many of the process issues that are concerning providers will be dealt with by way of regulations. In developing these we would suggest that the following be considered:

* Definitions of regulated restrictive practices mirror the exact definitions provided by the NDIS to reduce confusion for providers. Multiple reference points can complicate matters. These are referenced in Clause 9 of the Bill but further definitions are required.
* Guidance as to how providers are able to assess a participant’s capacity to consent to a restrictive practice. Given the necessary weight on involving the participant in the RPA process and the assumption that people with disability have capacity to consent, it will be important to ensure that providers understand in what circumstances consent is not able to be given.
* Guidance around in what circumstances a person subject to RPA or Trusted Person can withdraw consent. Providers have raised that this is an area that needs clear guidelines. Often restrictive practices are indicated at times of elevated stress or crisis and a participant may well may well object to the restrictive practice they have already consented to. This would also be important information to be provided to the person/Trusted Person at the time consent is given.
* Clarifying the roles and responsibilities of the RPA panel members. It will be important to identify who is responsible for providing information about the RPA process and ensuring that the participant and their Trusted Person (where required) are supported to attend the panel. The draft Bill indicates that the panel is responsible for consulting with the participant, providing the participant with a copy of their behaviour support plan in addition to reasons for the use of the restrictive practice and alternatives that may be available. The regulations should identify which role on the panel is responsible for these activities, taking into account which panel member would have the skills and expertise necessary. This may be by identifying the functions of a panel convener and who may fulfil this role.
* In circumstances where there are two providers involved in implementing a behaviour support plan (e.g. a SIL provider and a Community Participation provider), identifying whether it is possible for one panel to be convened and how this could be managed to reduce the impact on a participant and minimise duplication.