



Government of South Australia
Department of Human Services

Public Consultation Outcomes

Disability Inclusion (Restrictive Practices – NDIS) Regulations 2021

July 2021



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Executive summary

In May 2021, the *Disability Inclusion (Restrictive Practices-NDIS) Amendment Bill 2021* was passed by the South Australian parliament. The amendments establish a legislative framework for the authorisation of restrictive practices by NDIS service providers for NDIS participants in South Australia.

A public consultation process commenced on the YourSAy online platform on 3 June 2021 to seek feedback about the draft *Disability Inclusion (Restrictive Practices-NDIS) Regulations 2021*. The consultation closed on 2 July 2021. During this period:

- 507 respondents raised their awareness of the restrictive practices authorisation regime by visiting this site
- 178 respondents informed themselves by viewing or downloading content from the site
- 16 respondents engaged in the consultation by asking a question, leaving a comment or taking the survey (some contributed in more than one way).

The Department of Human Services provided seven webinars over the course of two weeks for community members, NDIS participants and NDIS service providers. These webinars were offered both during business hours and after hours to meet the needs of shift workers and families.

The broad community consultation was complemented by ten targeted workshops, meetings and forums for NDIS service providers and other key stakeholders. These included NDIS service providers focused on supporting children and Aboriginal and Torres Strait Islander people.

The department engaged JFA Purple Orange to conduct two workshops with people with disability, their families and carers. One workshop occurred in the Adelaide metropolitan area and another in a regional location. In addition, the department offered a session for people with disability.

Across the feedback received from all stakeholders, there were some areas of broad agreement and similar points of clarification were made. Where this occurred, the regulations were redrafted to reflect this feedback. In other areas, there was notable variance in the feedback provided, indicating that there was no clear consensus. For example, the feedback about the frequency of reporting varied from monthly to annually.

The consultation feedback was considered in the context of national requirements, restrictive practices regimes in other states and territories, and the objectives of the legislation. The regulations were redrafted as follows:

- To clarify restrictions on storage areas that are not considered to be environmental restraints
- To provide further clarity about the use of chemical restraints
- To clarify that the definition of Level 2 mechanical restraints was not limited to restrictive clothing
- To increase the number of Level 1 restrictive practices that constituted a Level 2 restrictive practice
- To clarify that written notices about the use of restrictive practices by NDIS service providers may only relate to a period not exceeding 3 months
- To prescribe that a person's nominated advocate could appeal a reviewable decision.

Not all feedback that was provided in this consultation process related to the regulations. The consultation process elicited feedback that will shape the drafting of the restrictive practice guidelines. These guidelines will provide the next level of detail about how restrictive practices may be used by NDIS service providers in South Australia. The guidelines will be the focus of the next phase of public consultation.

The consultation process demonstrated that there was a strong community support to provide safeguards for people with disability, and to ensure that restrictive practices were only used as a last resort. The consultation process showed a clear commitment from NDIS service providers to work closely with the department to establish a restrictive practices authorisation system that:

- Protects people with disability
- Is fair and accountable
- Is simple for people to understand and use
- Will reduce the use of restrictive practices over time.

Public consultation process

The public consultation on the draft regulations is a part of the Department of Human Services' phased approach to consultation on the new authorisation regime for restrictive practices. Each stage has involved:

- Broad community consultation
- Targeted consultation with NDIS service providers, peak bodies, and statutory authorities
- Consultation with people who have lived experience of disability and their families.

The consultation on the *Disability Inclusion (Restrictive Practices-NDIS) Amendment Bill 2021* elicited feedback on the Bill, but also provided valuable content that has informed the development of the draft regulations. Similarly, the consultation on the regulations has elicited feedback about the regulations, and information that will shape the development of the guidelines. This phased approach to consultation allows each piece of work to cascade into the next and provide further detail. Importantly, it maintains an ongoing dialogue with key stakeholders about this important area of work.

The public consultation process opened on the YourSAy platform on 3 June 2021 and closed on 2 July 2021. The process provided multiple means for stakeholders to engage, so that respondents could determine what they wanted to contribute and how. Respondents could engage by:

- Reading documents and resources, including Easy Read versions of documents
- Making comments and asking questions in public forums, including through social media and via the YourSAy platform
- Making comments and asking questions in private via email
- Completing a simple survey – this survey was available online and in hard copy
- Participating in online forums and webinars
- Participating in face-to-face forums.

During the consultation period, 507 respondents raised their awareness of the authorisation regime by visiting the YourSAy site. Of these, 178 respondents informed themselves by viewing or downloading documents from the site, and 16 respondents engaged by asking a question, leaving a comment or taking the survey. Some contributed in more than one way.

The department provided seven webinars over the course of two weeks for community members, NDIS participants and NDIS service providers. These webinars were offered both during business hours and after hours to meet the needs of shift workers and families.

The community consultation was complemented by ten targeted workshops, meetings and forums for NDIS service providers and other key stakeholders. These included NDIS service providers focused on supporting children and Aboriginal and Torres Strait Islander people.

The department engaged JFA Purple Orange to conduct two workshops with people with disability and their families. One workshop occurred in the Adelaide metropolitan area and another in a regional location. In addition, the department offered a session for people with disability.

Easy Read documents were provided to assist people with disability and low literacy to understand the authorisation regime and the issues under consultation. Earlier versions of the Easy Read documents were updated with newer versions on YourSAy during the consultation process. While the updated documents were visually identical to the earlier versions, they were tagged to provide additional accessibility for people opening the documents with screen readers and Augmentative and Alternative Communication (AAC) devices.

Stakeholders who provided a written submission to the Bill consultation were contacted and invited to contribute to the draft regulations. The organisations that were identified in the draft regulation as parties who must be consulted with for the guidelines were also contacted and invited to contribute.

Level 1 and Level 2 restrictive practices

There was broad support for the identification of certain practices as Level 1 or Level 2 restrictive practices, although some recognised that this approach differed from other jurisdictions. Only one respondent expressed concerns about this approach, identifying that the impact of restrictive practices was situational and unique to an individual. The consultation with people with lived experience of disability highlighted the importance of education and professional development to ensure that service providers interpreted these levels accurately and consistently.

The tiered approach reflected that:

- While all restrictive practices were intrusive, some were riskier and had a greater impact on a person's rights and liberties than others
- The same practice could be experienced differently by people with disability depending on their past experiences and individual needs. For example, there was agreement that locking away an ipad had greater impact when it was used as an AAC device than when it was used solely for recreation purposes.

There was also broad agreement with the practices that had been identified as Level 1 and Level 2 restrictive practices in the draft regulations.

Respondents sought further clarification about the definition of Level 1 and Level 2 chemical restraints, particularly whether Level 2 polypharmacy was in relation to all medications, or only medications that were used to manage behaviours of concern. Respondents also indicated that NDIS service providers generally did not prescribe medications or perform medical procedures. The regulation was redrafted to reflect this feedback.

Respondents noted the potential for inconsistencies in the definitions of environmental restraints by state and national authorities, and the impact that this may have for reporting and authorisation processes. One respondent identified that it should not be assumed that all storage and record keeping areas should not be accessible to NDIS participants. A minor edit to the regulations was drafted to reflect this.

Respondents identified that the definition of Level 2 mechanical restraints only referred to restrictive clothing and should include other mechanical restraints such as the use of helmets and splints to limit behaviours of concern. The regulation was redrafted to reflect this feedback.

Some respondents identified that many NDIS participants had multiple Level 1 restrictive practices, and this may be dependent on how restrictive practices were counted (eg. whether multiple items locked away in a cupboard was considered one or multiple restrictive practices). They indicated that the threshold of matters that could be authorised by Authorised Program Officers should be raised to increase the value of investment in the role for NDIS service providers. The regulation was redrafted to reflect this feedback.

One respondent advocated for the introduction of communicative restrictive practices, where a person is required to communicate in a particular way (eg. through audio verbal methods) rather than their preferred methods of communication such as sign language or gestures. This feedback was not incorporated as the Bill consultation had indicated strong support for South Australia to be nationally consistent with the types of restrictive practices defined by Section 6 of the *NDIS (Restrictive Practices and Behaviour Support) Rules 2018*. These definitions of restrictive practices had been finalised in the Bill which was passed on 11 May 2021.

Similarly, another respondent queried whether consideration had been given to the inclusion of psycho-social restrictive practices. This refers to the use of interpersonal interactions such as verbal control, psychological pressure or social exclusion to manage behaviours of concern. This was not incorporated in the regulations about Level 1 and 2 restrictive practices. It will be reflected in the draft guidelines about the use of psycho-social pressures and physical force to implement restrictive practices. This aligned with the feedback seeking further clarity about the use of force.

A respondent suggested the Senior Authorising Officer should be supported by a panel of independent assessors to support multi-disciplinary decision-making, particularly for Level 2 restrictive practices. This feedback was not incorporated in the regulations, but it was noted that the Senior Authorising Officer would be supported by an authorising team including allied health professionals.

Risk of harm

This regulation prescribes additional behaviours that constitute a risk of harm, in addition to the behaviours identified in the Bill (the use of force, implied or actual self-harm, behaviour that increase the likelihood of harm to others). A query was made about the behaviour referred to in the draft regulations relating to the risk of harm that may result from distributing bodily fluids through smearing, spitting and other means. The discussion was able to clarify this query, and no changes were required to this regulation.

Two consultation groups involving people with lived experience of disability identified that this provision was broad and may allow for different interpretations. They highlighted the importance of education and training for the sector to ensure consistent interpretation and application of the “risk of harm” threshold. The department supports this view and will ensure that the sector has the necessary information, tools and supports to transition to the new authorisation regime.

Detention

The meaning of detention outlined in draft regulation 7 attracted a high level of interest and feedback. The feedback indicated general support for the two limited exceptions to detention that were identified:

- The temporary confinement of a person due to an emergency to prevent serious harm and for the purpose of de-escalation and regulation
- The locking of external gates and doors for residential premises where NDIS services are provided on a 24 hour basis, where the prescribed person does not have the supports to leave safely.

Some respondents identified that the proposed 2 hour maximum was too long, as such incidents tended to occur for much shorter periods of time. Others suggested that a 2 hour period of time was acceptable as a maximum period, as long as the guidelines provided additional details about best practice.

Respondents also suggested that the guidelines provide additional advice that the prolonged usage of seclusion (eg. daily, or several times in a day) should trigger further planning as to whether it was more appropriate to seek orders for special powers of detention through the South Australian Civil and Administrative Tribunal (SACAT). Respondents sought further clarification about the interface between Level 2 environmental restrictions as identified in the regulation, and special powers of detention under the *Guardianship and Administration Act*. These will be addressed in the guidelines.

Prohibited restrictive practices

There was strong support to prohibit the types of physical restraints that were prescribed in the draft regulations. Some respondents supported the prohibition of corporal punishment for children under this regulation, while others indicated that the prohibited practices should be the same for everyone. One respondent noted that while corporal punishment should be prohibited as a punishment that was inconsistent with children's human rights, it should not be considered a restrictive practice.

Respondents varied on whether other practices or specific objects / equipment should be prohibited. One respondent suggested that specific items such as spithoods, shackles and any form of locked cuffs should be banned from use. Another respondent highlighted the importance of including prohibited practices that were relevant in other jurisdictions, such as those within youth justice environments. Overall, there were not strong views expressed about this issue across the consultation respondents.

Some feedback was provided that the seclusion of children should be prohibited. These responses were balanced with other feedback about the operational effect of such a regulation. Respondents identified that seclusion could be an effective time-limited external control on a child or adult's behaviour while they learnt and practiced how to recognise signs of dysregulation, and the use of self-regulation strategies.

There was considerable debate about whether the use of punitive practices should be prohibited. While there was broad support for the principle that punishment had no place in positive behaviour strategies, there was recognition that an action (such as cancelling an activity) might be done for a punitive purpose, or it may be done for a protective or other purpose. Some respondents suggested that the guidelines provide greater clarity about this issue at a practice level.

Consultation on the guidelines

Draft regulation 9 identified organisations that should be consulted for the restrictive practices guidelines. The department contacted these organisations to alert them to this regulation, and invited them to contribute to the consultation process. No concerns were raised about this regulation.

Skills and qualifications of Officers

The draft regulations prescribe that the Senior Authorising Officer and the Authorised Program Officers must have tertiary qualifications that are relevant to their legislative functions, such as qualifications in allied health, nursing, education, law or a disability-specific or behaviour-specific discipline. In addition:

- The Senior Authorising Officer must also have experience and knowledge in leading human services reforms and initiatives, and
- The Authorised Program Officers must have extensive experience and knowledge in behaviour interventions and supports.

There was broad support for these regulations, and some respondents provided additional suggestions such as:

- The Senior Authorising Officer should have experience in Positive Behaviour Support, be qualified in reflective supervision practices, be registered with the Australian Health Professional Regulation Agency (AHPRA), have minimum Continuing Professional Development (CPD) requirements annually, and be experienced in working with children.
- The Authorised Program Officers should have experience working with children (including deaf children), have empathy with deaf adults, and experience in Positive Behaviour Support.

In some consultations, there were concerns about whether prescribing such detailed requirements limited the number of appropriate candidates, particularly for NDIS service providers. For others, the qualifications identified aligned with existing roles within their organisation that were likely to be nominated as Authorised Program Officers in future.

In one consultation, the respondents advocated for the Senior Authorising Officer and the Authorised Program Officers to have an understanding of the impact of systemic racism and colonisation for Aboriginal and Torres Strait Islander people, and the impact that this may have on the experience of restrictive practices for Aboriginal NDIS participants. Similarly,

some respondents highlighted the importance of understanding intergenerational and developmental trauma.

The consultations with people with lived experience of disability identified that Authorised Program Officers and the Senior Authorising Officer should have lived experience of disabilities. While recognising the importance of formal qualifications, they identified qualities that were more difficult to regulate but were no less important: “courage, honesty, integrity and compassion”, the ability to relate to people, and “a strong values base and moral compass”. They highlighted the importance of mediation and conflict resolution skills, and experience with using various types of assistive technologies.

The regulations as drafted provided sufficient breadth to accommodate a breadth of skills and qualifications that were agreed across the respondents. The feedback about Positive Behaviour Support, cultural knowledge and trauma-awareness to ensure client-centred practice will be incorporated into the guidelines. This will ensure that they inform the implementation of the authorisation regime in its entirety.

Frequency and details of reporting

Draft regulations 12 and 13 prescribe requirements about the information that should be provided in a written notice to NDIS participants about the use of authorised restrictive practices. There was broad support for the department’s efforts to balance the accountability and transparency of such reporting requirements, and the administrative burden that this may impose. No concerns were raised about the draft regulations outlining the details in written notices.

There was notable variance in the feedback about the preferred frequency of reporting about the authorisation of Level 1 restrictive practices by the Authorised Program Officers, and reporting about the usage of restrictive practices by NDIS service providers. Survey feedback varied from reporting every 3 months to every 12 months.

Some respondents suggested that the reporting frequency should align with the current monthly reporting required by the *NDIS (Restrictive Practices and Behaviour Support) Rules 2018* and occur within a month, rather than “as soon as possible”. Others suggested that Level 2 restrictive practices should have a more frequent rate of reporting than Level 1 practices, and that reporting should be more frequent for interim behaviour support plans. One respondent indicated that each authorisation of Level 1 restrictives practices should be reported to the Senior Authorising Officer when it was given.

Taking into account the existing national reporting requirements and the variance in consultation feedback:

- The reporting of Level 1 authorisations by the Authorised Program Officers was maintained at a 6 monthly period
- Written notices about the use of restrictive practices by NDIS service providers may only relate to a period of time not exceeding 3 months.

The consultation with people with lived experience of disabilities were united in advocating for people with disability to be placed at the centre of the regulations. They identified that information should be shared with them to the greatest extent possible, at every stage of the process. Some respondents in these consultations identified that the frequency of ongoing notifications for the use of restrictive practices should be set according to the wishes of the person with disabilities.

Review of decisions

Section 23Z of the Bill states that a person to whom a reviewable decision relates is able to apply to SACAT to review the decision. Additionally, the draft regulations also allow the family members and guardians of the person to seek a review, as well as NDIS service providers. There was general support for this regulation, with a suggestion that the prescribed person's nominated advocate should also be able to seek a review by SACAT on their behalf. The regulation was redrafted to reflect this feedback.

Other feedback

The consultation elicited feedback that could not be incorporated in the regulations for a number of reasons:

- The feedback was not consistent with the the legislation that had already been passed by parliament in May 2021, or existing NDIS legislative requirements
- There was no power in the legislation to create a regulation on that issue
- The feedback related to implementation processes, including the development of ICT systems
- The feedback reflects practice guidance that could be incorporated in the guidelines.

Cultural and collectivist perspectives

One consultation group identified the challenge of reconciling Aboriginal ways of understanding cultural relationships and connectedness to country (the absence of which could manifest in ways that are perceived as behaviours of concern), and individualised ways of understanding behaviour through functional behavioural assessments. They

highlighted the challenge of navigating these different perspectives when it came to funding, providing interventions and conceptualising behaviour.

Several consultation groups discussed the challenge of an individualised approach to authorisation, while recognising that many restrictive practices occurred in group settings such as shared housing. Consultations with people with lived experiences of disabilities and their families identified that this was particularly the case in accommodation arrangements for young people.

One respondent highlighted that ethical decision making about restrictive practices may differ when people are in supported independent living, in their own funded, rented or owned home, or in shared specialist disability accommodation.

Related to this, some groups identified the importance of providing guidelines about rebuilding relationships after there had been an incident of physical restraint or seclusion. This was identified for the person who had been restrained or secluded, and also others who may have witnessed or been impacted by it.

Priority cohorts

One consultation group raised the importance of supporting NDIS participants to appeal decisions that they disagreed with, particularly children and young people. More broadly, there was feedback that people who had a legally appointed formal guardian (such as via the *Guardianship and Administration Act 1993* or *Children and Young People Safety Act 2017*) should have greater visibility and prioritisation in this regime. It was noted by the respondents that this did not necessarily mean escalating restrictive practices for this cohort to the Senior Authorising Officer.

Search provisions

Some consultation groups discussed the provisions in the Bill about searching prescribed persons for unsafe objects, with some respondents expressing their concerns about the potential for the provisions to be misused. They identified that the person should be able to identify a preferred person to undertake the search (where possible). They also sought clarification about what should be done if items such as illicit drugs were found in a search. The use of restrictive practices to manage drug and alcohol related behaviours was also raised.

Consent

Some respondents identified the importance of clarifying the role of consent in the scheme. While the Bill does not require consent for the authorisation of restrictive practices, respondents indicated the importance of providing further guidance about consent in the guidelines.

Supporting consistency

Several consultation groups and respondents highlighted the importance of consistency between national and state requirements, particularly in relation to defining different restrictive practices. One respondent highlighted the importance of the Senior Authorising Officer's role in ensuring consistency of authorisation by Authorised Program Officers, and practices by NDIS service providers. The consultation with people with lived experience of disability and their carers emphasised the importance of this consistency given that an NDIS participant could have up to 30 staff members working with them across a range of supports.

One consultation group queried the ability to refer authorisations that were technically Level 1 restrictive practices to the Senior Authorising Officer if there was something risky or contentious about the matter that required additional advice. More broadly, this issue reflected broader feedback from the stakeholders about the importance of ongoing relationships between the Senior Authorising Officer, the Authorised Program Officers, NDIS service provider, and people with disability in the development of the authorisation regime.

Next steps

The draft regulations were redrafted to reflect the consultation feedback, for approval by Cabinet. The draft guidelines are scheduled for release for public consultation in August 2021.