

NEW SOUTH WALES
DRAFT GOVERNMENT BILL

Persons with Disability (Regulation of Restrictive Practices) Bill 2021

Explanatory note

Overview of Bill

The objects of this Bill are as follows—

- (a) to promote the reduction and elimination of the use of restrictive practices to support persons with disability,
- (b) to ensure that restrictive practices are used only to prevent persons with disability from harming themselves or others and to support positive outcomes for persons with disability,
- (c) to protect and promote the rights and the personal and social well-being of persons with disability, including the inherent right to respect for their worth and dignity as individuals,
- (d) to ensure persons with disability can live free from abuse, neglect and exploitation,
- (e) to regulate the use of certain restrictive practices by the providers of supports to persons with disability under the *National Disability Insurance Scheme Act 2013* of the Commonwealth (the *NDIS Act*).

A *restrictive practice* has the same meaning as in the *NDIS Act* and means a practice or intervention that has the effect of restricting the rights or freedom of movement of a person with disability. Examples include seclusion, chemical restraint, mechanical restraint, physical restraint and environmental restraint.

Outline of provisions

Part 1 Preliminary

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act.

Clause 3 sets out the objects and guiding principles of the proposed Act. The objects are set out in the Overview above and the guiding principles are as follows—

- (a) a person with disability and, where appropriate, the person's family and carers, are to be consulted and involved in decisions about the use of restrictive practices,
- (b) a person with disability is assumed to be capable of making decisions about the use of restrictive practices, unless it is established the person is not capable, and all reasonable steps should be taken to help a person with disability make decisions about the use of restrictive practices,
- (c) a person with disability is entitled to have a support person when being consulted or making decisions about the use of restrictive practices,
- (d) decisions about the use of restrictive practices to support a person with disability are to be made taking into account the person's wishes and the person's individual circumstances, including culture, language, age, gender, sexual orientation and religious beliefs,
- (e) the use of restrictive practices to support persons with disability is to be monitored and reviewed regularly,
- (f) the least restrictive practices should be used and restrictive practices should be used for the shortest time practicable.

A person exercising a function under the proposed Act must have regard to the objects and guiding principles.

Clause 4 provides that words used in the proposed Act are defined in the Dictionary.

Part 2 Functions of Ageing and Disability Commissioner and government sector agencies

Clause 5 specifies the functions of the Ageing and Disability Commissioner (the *Commissioner*). The Commissioner has the following functions under the proposed Act—

- (a) to promote the objects and guiding principles of the proposed Act,
- (b) to raise awareness and educate government sector agencies about the use of restrictive practices to support persons with disability,
- (c) to review decisions by authorisation panels that issue authorisations for the use of restrictive practices to support NDIS participants,
- (d) to monitor, assess and report on the use of restrictive practices by NDIS providers and government sector agencies,
- (e) to advise, and make recommendations to, the Minister for Families, Communities and Disability Services, at the Commissioner's own initiative or at the request of the Minister, on matters relating to the use of restrictive practices to support persons with disability.

The Commissioner's functions under the proposed Act extend to children with disability.

Clause 6 provides for the exchange of information between the Commissioner and various Commonwealth NDIS agencies and NSW government sector agencies.

Clause 7 imposes certain obligations on government sector agencies that use or propose to use restrictive practices on persons with disability. These government sector agencies are required to—

- (a) take into account the objects and guiding principles of the proposed Act, and
- (b) co-operate with the Commissioner in relation to the Commissioner's functions under the proposed Act, and
- (c) provide a report to the Commissioner every year in relation to the use of restrictive practices.

Part 3 Prohibited and authorised uses of restrictive practices

Clause 8 prohibits the restrictive practice of seclusion from being used by an NDIS provider on a child NDIS participant and enables the regulations to prohibit other restrictive practices. The registration of an NDIS provider under the NDIS Act is subject to the condition that the provider must not use a restrictive practice that is prohibited in New South Wales.

Clause 9 sets out the restrictive practices that may only be used by an NDIS provider on an NDIS participant if authorised under proposed section 10. These include certain regulated restrictive practices within the meaning of the NDIS Restrictive Practices Rules, such as chemical restraint, mechanical restraint, physical restraint and environmental restraint. The registration of an NDIS provider under the NDIS Act is subject to the condition that the use of a restrictive practice specified in the proposed clause must be authorised under the proposed Act.

Clause 10 provides that the use of a restrictive practice specified in proposed section 9 on an NDIS participant is authorised if—

- (a) the NDIS provider has obtained the NDIS participant's consent to the use and the consent has not been withdrawn, and
- (b) the use is in accordance with an authorisation issued by an authorisation panel, and
- (c) the use is in accordance with a behaviour support plan developed for the NDIS participant.

Clause 11 deals with the circumstances in which an NDIS provider uses a restrictive practice without authorisation under the proposed Act.

Part 4 Consent to use of restrictive practices

Clause 12 sets out the requirements for an NDIS provider when seeking the consent of an NDIS participant to the use of a restrictive practice. An NDIS provider must seek consent from an appropriate trusted person for an NDIS participant if satisfied that the NDIS participant is not capable of giving consent to the use of a restrictive practice in particular circumstances.

Clause 13 defines who is an appropriate trusted person for an NDIS participant, which may include a parent, guardian, carer, close friend or relative of the NDIS participant.

Clause 14 sets out the meanings of *spouse* of an NDIS participant, a person who *has the care* of an NDIS participant and a *close friend or relative* of an NDIS participant.

Part 5 Authorisation of use of restrictive practices

Division 1 Issue of authorisations

Clause 15 provides for the issue of an authorisation to an NDIS provider to authorise the use of a restrictive practice on an NDIS participant. An authorisation may be issued by an authorisation panel only if—

- (a) the use is appropriate and necessary to prevent the NDIS participant from causing harm to themselves or another person, and
- (b) the use is contained in a behaviour support plan developed for the NDIS participant, and
- (c) the NDIS provider has obtained the NDIS participant's consent to the use and the consent has not been withdrawn.

Clause 16 provides that an authorisation panel is to consist of—

- (a) each NDIS provider proposing to use the restrictive practice on the NDIS participant, and
- (b) an NDIS behaviour support practitioner who—
 - (i) did not develop the behaviour support plan for the NDIS participant that contains the use of the restrictive practice, and
 - (ii) is not employed or engaged by an NDIS provider on the authorisation panel.

Clause 17 requires an NDIS provider to whom an authorisation is issued to notify, and provide certain information to, the NDIS participant and the Commissioner.

Division 2 Other documentation

Clause 18 requires an NDIS provider that uses, or proposes to use, restrictive practices to develop certain policies and procedures.

Clause 19 requires a behaviour support plan for an NDIS participant that contains the use of a restrictive practice to be developed by an NDIS behaviour support practitioner in consultation with the NDIS participant and the NDIS provider proposing to use the restrictive practice.

Part 6 Review of authorisations of use of restrictive practices

Clause 20 provides for an NDIS participant, an NDIS provider or another person with a genuine concern for the NDIS participant to apply to the Commissioner for a review of a decision of an authorisation panel in relation to the use of a restrictive practice.

Clause 21 provides for a decision of the Commissioner under proposed section 20 to be reviewed by the NSW Civil and Administrative Tribunal.

Part 7 Miscellaneous

Clause 22 protects NDIS providers, and persons acting under the direction of an NDIS provider, who are acting in accordance with the proposed Act from criminal and civil liability in certain circumstances.

Clause 23 protects the Commissioner and the Commissioner's staff who are exercising functions under the proposed Act in good faith from personal liability.

Clause 24 makes it an offence for a person to disclose information obtained in connection with the administration or execution of the proposed Act except in certain circumstances. The maximum penalty is 50 penalty units, currently \$5,500.

Clause 25 provides that the proposed Act binds the Crown.

Clause 26 provides for a review of the proposed Act within 5 years.

Clause 27 provides for the making of regulations under the proposed Act.

Schedule 1 Savings, transitional and other provisions

Schedule 1 deals with savings and transitional matters.

Dictionary

The Dictionary defines words used in the proposed Act.

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NEW SOUTH WALES
DRAFT GOVERNMENT BILL

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

No , 2021

A Bill for

An Act to regulate the use of restrictive practices on persons with disability in connection with the National Disability Insurance Scheme of the Commonwealth; to enable the Ageing and Disability Commissioner to oversee the use of restrictive practices; and for other purposes.

The Legislature of New South Wales enacts—

Part 1 Preliminary

1 Name of Act

This Act is the *Persons with Disability (Regulation of Restrictive Practices) Act 2021*.

2 Commencement

This Act commences on a day or days to be appointed by proclamation.

3 Objects and guiding principles of Act

- (1) The objects of this Act are as follows—
 - (a) to promote the reduction and elimination of the use of restrictive practices to support persons with disability,
 - (b) to ensure that restrictive practices are used only to prevent persons with disability from harming themselves or others and to support positive outcomes for persons with disability,
 - (c) to protect and promote the rights and the personal and social well-being of persons with disability, including the inherent right to respect for their worth and dignity as individuals,
 - (d) to ensure persons with disability can live free from abuse, neglect and exploitation,
 - (e) to regulate the use of restrictive practices by NDIS providers to support NDIS participants for the purposes of the NDIS Restrictive Practices Rules.
- (2) The guiding principles for the use of restrictive practices to support persons with disability are as follows—
 - (a) a person with disability and, where appropriate, the person's family and carers are to be consulted and involved in decisions about the use of restrictive practices,
 - (b) a person with disability is assumed to be capable of making decisions about the use of restrictive practices, unless it is established the person is not capable, and all reasonable steps should be taken to help a person with disability make decisions about the use of restrictive practices,
 - (c) a person with disability is entitled to have a support person when being consulted or making decisions about the use of restrictive practices,
 - (d) decisions about the use of restrictive practices to support a person with disability are to be made taking into account the person's wishes and the person's individual circumstances, including culture, language, age, gender, sexual orientation and religious beliefs,
 - (e) the use of restrictive practices to support persons with disability is to be monitored and reviewed regularly,
 - (f) the least restrictive practices should be used and restrictive practices should be used for the shortest time practicable.
- (3) When exercising a function under this Act, a person must have regard to the objects and guiding principles of this Act.
- (4) The objects and guiding principles of this Act are intended to give guidance in the administration of this Act and do not create, or confer on a person, a right or entitlement enforceable at law.

4 Definitions

- (1) The Dictionary defines words used in this Act.
Note. The *Interpretation Act 1987* contains definitions and other provisions that affect the interpretation and application of this Act.
- (2) In this Act, a reference to an NDIS provider in relation to an NDIS participant means an NDIS provider who provides supports to the NDIS participant under the plan for the NDIS participant that has effect under the NDIS Act.

Part 2 Functions of Ageing and Disability Commissioner and government sector agencies

5 Functions of Ageing and Disability Commissioner

- (1) The Commissioner has the following functions—
 - (a) to promote the objects and guiding principles of this Act in relation to the use of restrictive practices to support persons with disability,
 - (b) to raise awareness and educate government sector agencies about the use of restrictive practices to support persons with disability,
 - (c) to review decisions by authorisation panels that issue authorisations for the use of restrictive practices,
 - (d) to monitor, assess and report on the use of restrictive practices by NDIS providers and government sector agencies to which section 7 applies,
 - (e) to advise and make recommendations to the Minister, at the Commissioner's own initiative or at the request of the Minister, on matters relating to the use of restrictive practices to support persons with disability.
- (2) The functions of the Commissioner under this Act extend to children with disability.

6 Exchange of information

- (1) The Commissioner may provide relevant information to a relevant body for the purposes of enabling or assisting the relevant body to exercise the relevant body's functions.
- (2) A relevant body may provide relevant information to the Commissioner for the purposes of enabling or assisting the Commissioner to exercise the Commissioner's functions.
- (3) In this section—

relevant body means the following—

 - (a) the Commissioner of the National Disability Insurance Scheme Quality and Safeguards Commission of the Commonwealth,
 - (b) the National Disability Insurance Scheme Launch Transition Agency of the Commonwealth,
 - (c) a government sector agency.

relevant information means information held by the Commissioner or a relevant body about the following—

 - (a) the use of a restrictive practice on a person with disability, including information about obtaining the consent of the person with disability,
 - (b) authorisations required under this Act for the use of restrictive practices on NDIS participants,
 - (c) other matters prescribed by the regulations.

7 Obligations on government sector agencies using restrictive practices

- (1) This section applies to a government sector agency that uses or proposes to use a restrictive practice on a person with disability (a **relevant government sector agency**).
- (2) A relevant government sector agency must take into account the objects and guiding principles of this Act when—

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- (a) developing and implementing policies about the use of restrictive practices on a person with disability, and
 - (b) providing, or arranging for the provision of, services that include the use of restrictive practices to a person with disability.
- (3) A relevant government sector agency must co-operate with the Commissioner and provide information or assistance that the Commissioner reasonably requires to exercise the Commissioner's functions under this Act.
- (4) A relevant government sector agency must, within the period of 4 months after 30 June in each year—
 - (a) prepare a report for the year ended on that 30 June, and
 - (b) provide the report to the Commissioner.
- (5) The report must—
 - (a) address how the objects and guiding principles of this Act were taken into account during the year by the relevant government sector agency, as required under subsection (2), and
 - (b) extend to services that include the use of restrictive practices on a person with disability that are provided by a person or body engaged by the relevant government sector agency.
- (6) The regulations may make provision for or with respect to—
 - (a) the manner and form in which a report is required to be prepared, including the information required to be included and the matters required to be addressed in a report, and
 - (b) exempting a relevant government sector agency, or a class of relevant government sector agency, from a requirement to include specified information or to address specified matters in a report.

Part 3 Prohibited and authorised uses of restrictive practices

8 Prohibited restrictive practices

- (1) The use of seclusion by an NDIS provider on an NDIS participant who is a child is prohibited.
- (2) The use of other restrictive practices that are prescribed by the regulations by an NDIS provider on an NDIS participant is prohibited.

Note. The registration of an NDIS provider under the NDIS Act is subject to the condition that the provider must not use a restrictive practice that is prohibited in New South Wales.

9 Restrictive practices requiring authorisation

- (1) The following restrictive practices may be used by an NDIS provider on an NDIS participant only if the use is authorised under section 10—
 - (a) a regulated restrictive practice,
 - (b) for an NDIS participant who is an adult—seclusion,
 - (c) other restrictive practices prescribed by the regulations.

Note. The registration of an NDIS provider under the NDIS Act is subject to the following conditions—

- (a) the use, other than a single emergency use, of a restrictive practice specified in this section must be authorised under section 10 of this Act,
 - (b) the NDIS provider must lodge evidence that the use is authorised with the Commissioner of the NDIS Quality and Safeguards Commission of the Commonwealth.
- (2) In this section—

regulated restrictive practice has the same meaning as in the NDIS Restrictive Practices Rules but does not include—

 - (a) seclusion, or
 - (b) a regulated restrictive practice prescribed by the regulations.

Note. Seclusion, chemical restraint, mechanical restraint, physical restraint and environmental restraint are regulated restrictive practices under the NDIS Restrictive Practices Rules.

10 Authorisation of use of restrictive practices

- (1) The use of a restrictive practice specified in section 9 on an NDIS participant is *authorised* if—
 - (a) the NDIS provider has, in accordance with this Act, obtained the NDIS participant's consent to the use and the consent has not been withdrawn, and
 - (b) the use is in accordance with an authorisation issued by an authorisation panel for the NDIS participant, and
 - (c) the use is in accordance with a behaviour support plan developed for the NDIS participant in accordance with section 19 and the NDIS Restrictive Practices Rules.
- (2) Despite subsection (1)(a), the consent of an NDIS participant to the use of a restrictive practice is not required if the use is in accordance with an interim authorisation issued by an authorisation panel in the circumstances described in section 15(4).

11 Emergency use of restrictive practices

- (1) This section applies to the use of a restrictive practice specified in section 9 on an NDIS participant that is not authorised under section 10.

- (2) An NDIS provider who uses a restrictive practice to which this section applies must consider whether or not the use of the restrictive practice in relation to the NDIS participant will, or is likely to, continue to be necessary.
- (3) If the NDIS provider considers that the use of the restrictive practice in relation to the NDIS participant will, or is likely to, continue to be necessary, the NDIS provider must obtain an authorisation as soon as practicable, but no later than 1 month after the unauthorised use.

Note. Under Chapter 4, Part 3A of the NDIS Act, the use of a restrictive practice that is not authorised under section 10 of this Act is a reportable incident.

Part 4 Consent to use of restrictive practices

12 Procedure for obtaining consent from NDIS participant

- (1) An NDIS provider seeking to obtain consent to the use of a restrictive practice from an NDIS participant must provide the NDIS participant with information to assist the NDIS participant in deciding whether or not to consent to the use of the restrictive practice.
- (2) The information provided to the NDIS participant must be readily understandable by the NDIS participant.
- (3) Without limiting the circumstances in which an NDIS participant is taken to refuse or withdraw consent, an NDIS participant is taken to refuse or withdraw consent to the use of a restrictive practice if the NDIS participant—
 - (a) indicates, by whatever means, that the NDIS participant does not want the restrictive practice to be used, or
 - (b) has previously indicated, in similar circumstances, that the NDIS participant did not want the restrictive practice to be used and has not subsequently indicated to the contrary.
- (4) An NDIS participant is not capable of giving consent to the use of a restrictive practice if the NDIS participant is not capable of—
 - (a) understanding the general nature and effect of the restrictive practice, or
 - (b) indicating whether or not the NDIS participant consents or does not consent to the use of the restrictive practice.
- (5) If an NDIS provider is satisfied that the NDIS participant is not capable of giving consent to the use of a restrictive practice in particular circumstances—
 - (a) the NDIS provider is to seek the consent to the use of the restrictive practice from an appropriate trusted person for the NDIS participant, and
 - (b) for that purpose, a reference in this Act to an NDIS participant in relation to the use of the restrictive practice includes a reference to an appropriate trusted person for the NDIS participant in the particular circumstances.
- (6) An appropriate trusted person from whom consent to the use of a restrictive practice on an NDIS participant is sought must, without limitation, consider the following in deciding whether or not to consent—
 - (a) the wishes of the NDIS participant,
 - (b) the health and safety of the NDIS participant.
- (7) The regulations may make provision for or with respect to—
 - (a) the procedure to be followed by an NDIS provider when seeking consent to the use of a restrictive practice on an NDIS participant, and
 - (b) the manner and form in which consent to the use of a restrictive practice on an NDIS participant may be given or withdrawn.

13 Appropriate trusted person for NDIS participant

- (1) In this Act, *appropriate trusted person* for an NDIS participant means—
 - (a) for an NDIS participant who is a child—
 - (i) the person who has parental responsibility for the NDIS participant within the meaning of the *Children and Young Persons (Care and Protection) Act 1998*, or

- (ii) if the child is in the care of the Secretary of the Department of Communities and Justice under the *Children and Young Persons (Care and Protection) Act 1998*—the Secretary, or
 - (b) for an NDIS participant who is in the care of the Secretary of the Department of Communities and Justice under the *Guardianship Act 1987*—the Secretary, or
 - (c) for an NDIS participant who has a guardian—the NDIS participant’s guardian, but only if the instrument appointing the guardian provides for the guardian to consent to the use of restrictive practices on the NDIS participant under this Act, or
 - (d) in any other case—a person determined in accordance with the following hierarchy of persons, in descending order—
 - (i) the NDIS participant’s spouse, if any, but only if the relationship between the NDIS participant and the spouse is close and continuing and the spouse does not have a guardian,
 - (ii) a person who has the care of the NDIS participant,
 - (iii) a person who previously had the care of the NDIS participant, but only if the relationship between the NDIS participant and the person is close and continuing,
 - (iv) a close friend or relative of the NDIS participant.
- (2) If there is more than one person on the same level of the hierarchy specified in subsection (1)(d), an NDIS provider is to take into account the wishes of the NDIS participant in deciding which person to seek consent from as an appropriate trusted person for the NDIS participant.
- (3) An NDIS provider may seek consent from a person who is lower in the hierarchy specified in subsection (1)(d) than another person (the **higher person**), as an appropriate trusted person for an NDIS participant, if—
- (a) the higher person declines in writing to be an appropriate trusted person, or
 - (b) the NDIS provider is satisfied that the higher person is—
 - (i) not capable of being an appropriate trusted person, or
 - (ii) not suitable to be an appropriate trusted person, taking into account the wishes of the NDIS participant.

14 Meanings of “spouse”, “having the care” and “close friend or relative” of NDIS participant

- (1) For the purposes of section 13(1)(d)(i), a person is the *spouse* of an NDIS participant if the person is legally married to the NDIS participant, including if the person is—
- (a) the NDIS participant’s husband, wife or de facto partner, or
Note. “De facto partner” is defined in section 21C of the *Interpretation Act 1987*.
 - (b) the NDIS participant’s spouse under Aboriginal or Torres Strait Islander customary law.
- (2) However, if more than one person qualifies as a spouse of an NDIS participant, the NDIS participant’s spouse is taken to be the last person to qualify as a spouse.
- (3) For the purposes of section 13(1)(d)(ii) and (iii) and without limiting the ordinary meaning, a person **has the care** of an NDIS participant if the person provides, or arranges the provision of, domestic services and support to the NDIS participant on a regular basis, other than for remuneration, whether or not from the NDIS participant.

- (4) However, if an NDIS participant resides in an institution, such as a hospital, nursing home, group home, boarding house or hostel—
 - (a) a person who provides care for the NDIS participant at the institution does not, merely because of that fact, have the care of the NDIS participant, and
 - (b) the person who had the care for the NDIS participant immediately before the NDIS participant began residing in the institution continues to have the care of the NDIS participant.
- (5) For the purposes of section 13(1)(d)(iv), a person is a *close friend or relative* of an NDIS participant if—
 - (a) the person maintains a close personal relationship with the NDIS participant through frequent personal contact and a personal interest in the NDIS participant's welfare, or
 - (b) the person is a relative of the NDIS participant according to Aboriginal or Torres Strait Islander kinship relationships and culture.
- (6) However, a person is not taken to be a close friend or relative of an NDIS participant if the person receives remuneration, whether or not from the NDIS participant, for, or has a financial interest in, services that the person performs for the NDIS participant in relation to the NDIS participant's care.
- (7) In this section—
remuneration does not include a carer's payment from the Commonwealth.

Part 5 Authorisation of use of restrictive practices

Division 1 Issue of authorisations

15 Issue of comprehensive and interim authorisations

- (1) An authorisation panel may issue an authorisation for the use of a restrictive practice by an NDIS provider on an NDIS participant.
- (2) An authorisation may be a comprehensive authorisation or an interim authorisation.
- (3) An authorisation panel may issue an authorisation for the use of a restrictive practice by an NDIS provider on an NDIS participant only if the panel is satisfied that—
 - (a) the use is appropriate and necessary to prevent the NDIS participant from causing harm to themselves or another person, and
 - (b) the use is contained—
 - (i) for a comprehensive authorisation—in a comprehensive behaviour support plan developed for the NDIS participant, or
 - (ii) for an interim authorisation—in an interim behaviour support plan developed for the NDIS participant, and
 - (c) the NDIS provider has, in accordance with this Act, obtained the NDIS participant's consent to the use and the consent has not been withdrawn.
Note. An NDIS provider may be required to seek the consent of an appropriate trusted person for an NDIS provider who is not capable of giving consent. See section 12(5).
- (4) The consent of the NDIS participant to the use of a restrictive practice is not required for the purposes of subsection (3)(c) for an interim authorisation if the authorisation panel is satisfied that—
 - (a) the NDIS provider has made all reasonable efforts to obtain consent from the NDIS participant and is continuing to make all reasonable efforts to obtain consent, and
 - (b) the NDIS participant has not previously refused consent or withdrawn consent.
- (5) Before deciding whether or not to issue an authorisation for the use of a restrictive practice on an NDIS participant, an authorisation panel must—
 - (a) consult with the NDIS participant, and
 - (b) provide the NDIS participant with a copy of the behaviour support plan developed for the NDIS participant, and
 - (c) provide the NDIS participant with the following information—
 - (i) the reasons that the restrictive practice is required to be used,
 - (ii) information about any practice that is available as an alternative to the use of the restrictive practice.
- (6) The information provided to the NDIS participant under subsection (5)(c) must be readily understandable by the NDIS participant.
- (7) An authorisation must be in writing and may be issued unconditionally or subject to conditions.
- (8) Unless sooner revoked, an authorisation remains in force for the period specified in the authorisation, not exceeding—
 - (a) for a comprehensive authorisation—12 months from the date of issue, or
 - (b) for an interim authorisation—6 months from the date of the first use of the restrictive practice.

- (9) An interim authorisation may not be renewed.
- (10) An authorisation panel may revoke an authorisation if satisfied that—
 - (a) the NDIS provider to whom the authorisation is issued has failed to comply with a condition of the authorisation, or
 - (b) for an interim authorisation—a comprehensive authorisation is issued for the use of the restrictive practice on the NDIS participant.

16 Constitution of authorisation panels

- (1) An NDIS provider seeking an authorisation is to convene an authorisation panel to decide whether or not to issue an authorisation for the use of a restrictive practice on an NDIS participant.
- (2) An authorisation panel is to consist of—
 - (a) each NDIS provider proposing to use the restrictive practice on the NDIS participant, and
 - (b) an NDIS behaviour support practitioner who—
 - (i) did not develop the behaviour support plan for the NDIS participant that contains the use of the restrictive practice concerned, and
 - (ii) is not employed or engaged by an NDIS provider on the panel.
- (3) A decision of an authorisation panel to issue an authorisation for the use of a restrictive practice on an NDIS participant must be unanimous.
- (4) The regulations may make provision for or with respect to the practice and procedures of authorisation panels.

17 Notice of authorisations

- (1) An NDIS provider to whom an authorisation is issued must, within 3 days of the issue of the authorisation—
 - (a) notify the NDIS participant to whom the authorisation relates, and
 - (b) provide the NDIS participant with information about the procedures for the handling of complaints, review by the Commissioner under Part 6 and administrative review by the Tribunal under the *Administrative Decisions Review Act 1997*.
- (2) The information must be readily understandable by an NDIS participant to whom it is provided.
- (3) Within 7 days of being issued with an authorisation for an NDIS participant, the NDIS provider must notify the Commissioner and provide the Commissioner with the following—
 - (a) the behaviour support plan developed for the NDIS participant,
 - (b) the name and contact details of the NDIS behaviour support practitioner who was a member of the authorisation panel that issued the authorisation as referred to in section 16(2)(b),
 - (c) other material that the NDIS provider gave to the authorisation panel that issued the authorisation, including information about how the NDIS provider obtained the consent of the NDIS participant to the use of the restrictive practice to which the authorisation relates.

Division 2 Other documentation

18 Policies and procedures for NDIS providers

- (1) An NDIS provider that uses, or proposes to use, a restrictive practice on an NDIS participant must develop, maintain and make available policies and procedures about the following—
 - (a) the use and authorisation of restrictive practices,
 - (b) the process of obtaining consent from an NDIS participant,
 - (c) the handling of complaints about authorisations.
- (2) The policies and procedures must be readily understandable by each NDIS participant to whom the policies and procedures apply.

19 Behaviour support plans containing use of restrictive practices

- (1) A behaviour support plan for an NDIS participant that contains the use of a restrictive practice must be developed by an NDIS behaviour support practitioner.
- (2) In developing a behaviour support plan for an NDIS participant, the NDIS behaviour support practitioner must consult with the NDIS participant and the NDIS provider proposing to use a restrictive practice on the NDIS participant.

Part 6 Review of authorisations of use of restrictive practices

20 Application for review by Ageing and Disability Commissioner

- (1) The following persons may apply to the Commissioner for review of a decision of an authorisation panel to issue or refuse to issue, or to revoke or refuse to revoke, an authorisation for the use of a restrictive practice by an NDIS provider on an NDIS participant—
 - (a) the NDIS participant,
 - (b) the NDIS provider,
 - (c) another person who, in the opinion of the Commissioner, has a genuine concern for the NDIS participant.
- (2) On receiving an application for review, the Commissioner may—
 - (a) require the authorisation panel to provide the Commissioner with relevant material, including any material the panel relied on to make the panel's decision, and
 - (b) provide the parties with an opportunity to make submissions.
- (3) The Commissioner may refuse to deal with an application for review on the grounds prescribed by the regulations.
- (4) Following a review of an authorisation panel's decision, the Commissioner may—
 - (a) affirm the panel's decision, or
 - (b) set aside the panel's decision, including by revoking an authorisation, and remit the matter to the panel for further consideration.
- (5) As soon as practicable after determining a review, the Commissioner must notify the parties in writing of—
 - (a) the outcome of the review and the reasons for the Commissioner's decision, and
 - (b) the right to have the Commissioner's decision administratively reviewed by the Tribunal under section 21.
- (6) An application to the Commissioner for review of an authorisation panel's decision does not affect the operation of the decision under review or prevent the taking of action to implement that decision.
- (7) The regulations may make provision for or with respect to reviews under this section, including the following—
 - (a) the practice and procedure for making an application for review and the conduct of a review,
 - (b) the matters the Commissioner must or may consider in determining a review,
 - (c) the grounds on which the Commissioner may or may not set aside an authorisation panel's decision,
 - (d) the period within which an application for review must be made by an applicant or determined by the Commissioner.
- (8) Section 53 of the *Administrative Decisions Review Act 1997* does not apply in relation to a decision on a review made by the Commissioner under this section.

21 Review by Tribunal of certain decisions of Ageing and Disability Commissioner

- (1) An application may be made to the Tribunal for an administrative review under the *Administrative Decisions Review Act 1997* of a decision made by the Commissioner under section 20.

- (2) An application may be made by the following persons—
 - (a) the NDIS participant,
 - (b) the NDIS provider,
 - (c) a person who made the application for review under section 20(1)(c).
- (3) An application must be made within 28 days after receiving notice of the Commissioner's decision on a review under section 20.
- (4) The Commissioner may, at the request of the Tribunal or at the Commissioner's own initiative, provide the Tribunal with any advice or material provided to the Commissioner by an NDIS behaviour support practitioner.

Part 7 Miscellaneous

22 Protection from liability for NDIS providers

- (1) This section applies to an NDIS provider or a person acting under a duly given direction of an NDIS provider.
- (2) A person to whom this section applies is immune from any civil or criminal liability that arises as a consequence of the use of a restrictive practice on an NDIS participant by the person if—
 - (a) the use of the restrictive practice on the NDIS participant was authorised under this Act or the person believed on reasonable grounds that the use was authorised under this Act, and
 - (b) the person's actions were reasonable in the circumstances.

23 Personal liability

- (1) A protected person is not personally subject to any liability for anything done—
 - (a) in good faith, and
 - (b) for the purpose of exercising functions under this Act.
- (2) The liability instead attaches to the Crown.
- (3) In this section—

done includes omitted to be done.

liability means civil liability and includes action, claim or demand.

protected person means the following—

 - (a) the Commissioner,
 - (b) a member of the staff of the Commissioner,
 - (c) a person acting under the direction of the Commissioner.

24 Disclosure of information

- (1) A person must not disclose information obtained in connection with the administration or execution of this Act unless the disclosure is made—
 - (a) with the consent of the person from whom the information was obtained, or
 - (b) in connection with the administration or execution of this Act, or
 - (c) for the purposes of legal proceedings arising out of this Act or of a report of the proceedings, or
 - (d) in accordance with a requirement imposed under the *Ombudsman Act 1974*, or
 - (e) with other lawful excuse.Maximum penalty—50 penalty units.
- (2) Proceedings for an offence under this section may be dealt with summarily before the Local Court.

25 Act to bind Crown

This Act binds the Crown in right of New South Wales and, in so far as the legislative power of the Parliament of New South Wales permits, the Crown in all its other capacities.

26 Review of Act

- (1) The Minister is to review this Act to determine whether the policy objectives of the Act remain valid and whether the terms of the Act remain appropriate for securing those objectives.
- (2) The review is to be undertaken as soon as possible after the period of 5 years from the commencement of this section.
- (3) A report on the outcome of the review is to be tabled in each House of Parliament within 12 months after the end of the period of 5 years.

27 Regulations

The Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.

Schedule 1 Savings, transitional and other provisions

Part 1 General

1 Regulations

- (1) The regulations may contain provisions of a savings or transitional nature consequent on the commencement of—
 - (a) a provision of this Act, or
 - (b) a provision amending this Act.
- (2) A savings or transitional provision consequent on the commencement of a provision must not be made more than 2 years after that commencement.
- (3) A savings or transitional provision made consequent on the commencement of a provision is repealed 2 years after that commencement.
- (4) A savings or transitional provision made consequent on the commencement of a provision may take effect before that commencement but not before—
 - (a) for a provision of this Act, the date of assent to this Act, or
 - (b) for a provision amending this Act, the date of assent to the amending Act.
- (5) A savings or transitional provision taking effect before its publication on the NSW legislation website does not—
 - (a) affect the rights of a person existing before that publication in a way prejudicial to the person, or
 - (b) impose liabilities on a person for anything done or omitted to be done before that publication.
- (6) In this clause—

person does not include the State or an authority of the State.

Part 2 Provision consequent on enactment of this Act

2 Existing instruments of appointment for guardians

A guardian of an NDIS participant is taken to have the function of giving consent to the use of a restrictive practice under this Act, as referred to in section 13(1)(c), if, on the commencement of that provision, the instrument appointing the guardian provides for the guardian to have functions in relation to giving consent to the use of a restrictive practice, however described.

Dictionary

section 4

adult means a person who is 18 years of age or older.

appropriate trusted person for an NDIS participant—see section 13.

authorisation means an authorisation issued by an authorisation panel under section 15.

authorisation panel means a panel constituted under section 16.

authorised use of a restrictive practice—see section 10.

behaviour support plan has the same meaning as in the NDIS Restrictive Practices Rules.

Note. Under the NDIS Restrictive Practices Rules, a behaviour support plan means a comprehensive behaviour support plan or interim behaviour support plan.

child means a person who is under 18 years of age.

close friend or relative of an NDIS participant, for section 13—see section 14.

Commissioner means the Ageing and Disability Commissioner.

function includes a power, authority or duty and **exercise** a function includes perform a duty.

government sector agency means the following—

- (a) a government sector agency within the meaning of the *Government Sector Employment Act 2013*,
- (b) a local health district or a statutory health corporation within the meaning of the *Health Services Act 1997*,
- (c) another person or body constituted by or under an Act or exercising public functions that is prescribed by the regulations for the purposes of this definition.

guardian has the same meaning as in the *Guardianship Act 1987*.

having the care of an NDIS participant, for section 13—see section 14.

NDIS Act means the *National Disability Insurance Scheme Act 2013* of the Commonwealth.

NDIS behaviour support practitioner has the same meaning as in the NDIS Restrictive Practices Rules.

NDIS participant means a participant within the meaning of the NDIS Act.

Note. Section 12(5) of this Act provides that if an NDIS participant is not capable of giving consent to the use of a restrictive practice, consent may be obtained from an appropriate trusted person for the NDIS participant. For that purpose, a reference in this Act to an NDIS participant includes the NDIS participant's appropriate trusted person.

NDIS provider means a registered NDIS provider within the meaning of the NDIS Act.

NDIS Restrictive Practices Rules means the *National Disability Insurance Scheme (Restrictive Practices and Behaviour Support) Rules 2018* of the Commonwealth.

objects and guiding principles of this Act—see section 3.

person with disability means a person with disability within the meaning of the *Disability Inclusion Act 2014* and includes an NDIS participant.

restrictive practice has the same meaning as in the NDIS Act.

seclusion has the same meaning as in section 6(a) of the NDIS Restrictive Practices Rules.

spouse of an NDIS participant, for section 13—see section 14.

Tribunal means the Civil and Administrative Tribunal.