Parliamentary Committees



Disability Services and Other Legislation (NDIS) Amendment Bill 2019

Report No. 17, 56th Parliament
Education, Employment and Small Business Committee
May 2019

Education, Employment and Small Business Committee

Chair	Ms Leanne Linard MP, Member for Nudgee
Deputy Chair	Mrs Jann Stuckey MP, Member for Currumbin
Members	Mr Bruce Saunders MP, Member for Maryborough
	Mrs Simone Wilson MP, Member for Pumicestone
	Mr Michael Healy MP, Member for Cairns
	Mr Nick Dametto MP, Member for Hinchinbrook

Committee Secretariat

Telephone	+61 7 3553 6657
Fax	+61 7 3553 6699
Email	eesbc@parliament.qld.gov.au
Technical Scrutiny Secretariat	+61 7 3553 6601
Committee webpage	www.parliament.qld.gov.au/EESBC

Acknowledgements

The committee acknowledges the assistance provided by the Department of Communities, Disability Services and Seniors and the Department of Justice and Attorney-General.

Contents

Abbreviations

Coroners Act	*Coroners Act 2003*
COAG DRC	Council of Australian Governments Disability Reform Council
DCDSS	Department of Communities, Disability Services and Seniors
DJAG	Department of Justice and Attorney-General
DSA	*Disability Services Act 2006*
GA Act	*Guardianship and Administration Act 2000*
IGA	Intergovernmental Agreement on Nationally Consistent Worker Screening
NDIS	National Disability Insurance Scheme
NDIS Act	*National Disability Insurance Scheme Act 2013* (Cwlth)
NDIS Commission	NDIS Quality and Safeguards Commission
NDIS QSF	NDIS Quality and Safeguarding Framework
PGA	*Public Guardian Act 2014*
Working with Children Act	*Working with Children (Risk Management and Screening) Act 2000*

Chair's foreword

This report presents a summary of the Education, Employment and Small Business Committee's examination of the Disability Services and Other Legislation (NDIS) Amendment Bill 2019.

The committee's task was to consider the policy to be achieved by the legislation and the application of fundamental legislative principles – that is, to consider whether the Bill has sufficient regard to the rights and liberties of individuals, and to the institution of Parliament.

The objectives of the Bill are to implement the urgent amendments necessary to facilitate Queensland becoming a 'participating jurisdiction' in the NDIS in July 2019, including support for the NDIS Commission to commence operations in Queensland. The amendments aim to ensure alignment between the *Disability Services Act 2006* and Commonwealth legislation, particularly in relation to the use of restrictive practices, and worker screening. In addition, the Bill amends the *Coroners Act 2003* to ensure reporting of deaths of certain NDIS participants to the Coroner, and the *Public Guardian Act 2014* to ensure community visitors can monitor services delivered to vulnerable people with disability.

It is pleasing that the next stage of implementation of the NDIS will occur this year. Work continues nationally through the Council of Australian Governments Disability Reform Council to oversee the transition to the NDIS, including the establishment of a national system for worker screening.

On behalf of the committee, I thank the organisations that made written submissions on the Bill. I also thank Parliamentary Service staff, the Department of Communities, Disability Services and Seniors and the Department of Justice and Attorney-General.

I commend this report to the House.

Ms Leanne Linard MP
Chair

Recommendations

The committee recommends the Disability Services and Other Legislation (NDIS) Amendment Bill 2019 be passed.

1 Introduction

1.1 Role of the committee

The Education, Employment and Small Business Committee (committee) is a portfolio committee of the Legislative Assembly which commenced on 15 February 2018 under the *Parliament of Queensland Act 2001* and the Standing Rules and Orders of the Legislative Assembly.[1]

The committee's primary areas of responsibility include:

- education
- industrial relations
- employment and small business
- training and skills development.

Section 93(1) of the *Parliament of Queensland Act 2001* provides that a portfolio committee is responsible for examining each bill and item of subordinate legislation in its portfolio areas to consider:

- the policy to be given effect by the legislation
- the application of fundamental legislative principles, and
- for subordinate legislation – its lawfulness.

The Disability Services and Other Legislation (NDIS) Amendment Bill 2019 (the Bill) was introduced into the Legislative Assembly on 28 March 2019 and referred to the committee for consideration. The committee is to report to the Legislative Assembly by 13 May 2019.

1.2 Inquiry process

On 1 April 2019, the committee invited stakeholders and subscribers to make written submissions on the Bill. Six submissions were received.

The committee received a written briefing about the Bill from the Department of Communities, Disability Services and Seniors (DCDSS) on 5 April 2019.

The committee received written advice from the department in response to issues raised in submissions, which included advice from the Department of Justice and Attorney-General (DJAG).

The committee held a public hearing on 29 April 2019. On the same day officials from the DCDSS and DJAG briefed the committee on the Bill, and on issues raised by stakeholders (see Appendix B for a list of witnesses and officials).

The submissions, correspondence from DCDSS and a transcript of the hearing and briefing are available on the committee's webpage.

1.3 Policy objectives of the Bill

The explanatory notes state that the purpose of the Bill is to:

- ensure that Queensland has made all urgent and critical amendments required to support the commencement of the operation of the NDIS Quality and Safeguards Commission (the NDIS Commission) from 1 July 2019
- ensure that the *Disability Services Act 2006* (DSA) operates in conjunction with the Commonwealth legislative framework to provide a strong quality and safeguards framework, in particular in relation to the authorisation of restrictive practices and worker screening

[1] *Parliament of Queensland Act 2001*, section 88 and Standing Order 194.

- ensure that existing quality and safeguards under the DSA continue to apply to disability services currently regulated under the DSA that will be outside of the National Disability Insurance Scheme (NDIS)
- strengthen the operation of Queensland's disability worker screening system (the yellow card system) during the transition to new NDIS worker screening
- amend the *Coroners Act 2003* (Coroners Act) to ensure that the deaths of certain NDIS participants must continue to be reported to the State Coroner
- amend the *Public Guardian Act 2014* (PGA) to ensure that community visitors (adult) and (child) must continue to visit visitable sites where certain NDIS participants are in order to protect the participants' rights and interests, and
- enable appropriate information sharing to occur with the NDIS Commission to assist with the performance of the NDIS commissioner's functions under the *National Disability Insurance Scheme Act 2013* (Cwlth) (the NDIS Act).[2]

1.4 Government consultation on the Bill

The explanatory notes state the Commonwealth Government undertook extensive consultation between February and April 2015 to assess regulatory impacts on participants, suppliers, and stakeholder groups of the NDIS Quality and Safeguarding Framework (NDIS QSF). A Decision Regulation Impact Statement was provided to the Council of Australian Governments Disability Reform Council (COAG DRC).

The explanatory notes state 'as the Bill effectively implements the NDIS QSF in Queensland, further extensive consultation has not been undertaken at this time'.[3]

1.5 Should the Bill be passed?

Standing Order 132(1) requires the committee to determine whether or not to recommend that the Bill be passed.

After examination of the Bill, including consideration of the policy objectives to be implemented, stakeholders' views and information provided by the department, the committee recommends that the Bill be passed.

Recommendation 1

The committee recommends the Disability Services and Other Legislation (NDIS) Amendment Bill 2019 be passed.

[2] Explanatory notes, pp 1-2.

[3] Explanatory notes, p 14.

2 Examination of the Bill

2.1 Policy background

Since July 2016, transitional arrangements for the NDIS have been implemented in Queensland under a bilateral agreement between the Queensland and Commonwealth Governments. The transition of the NDIS is due to be completed by 30 June 2019, when Queensland will become a 'participating jurisdiction'[4] and the rollout according to local government areas is scheduled for completion. At that time 'responsibility for providing disability services, including funding, will move from the Queensland Government to the NDIS.'[5]

The regulatory framework for the NDIS and for transition of state and territory functions to the Commonwealth includes the following:

- *National Disability Insurance Act 2013* (Cwlth) (the NDIS Act)
- NDIS Quality and Safeguarding Commission (NDIS Commission), established under 2017 amendments to the NDIS Act, and scheduled to commence operation in Queensland from 1 July 2019
- NDIS Quality and Safeguarding Framework (Quality and Safeguarding Framework), agreed by the Council of Australian Governments in 2016; it
- Intergovernmental Agreements and related documents including the *Bilateral Agreement between Commonwealth and Queensland* (March 2016), *Heads of Agreement between the Commonwealth and Queensland Governments on the National Disability Insurance Scheme* (May 2013), *Intergovernmental Agreement on Nationally Consistent Worker Screening for the NDIS* and current negotiations on the Full Scheme Intergovernmental Agreement for operation of the NDIS in Queensland
- Commonwealth NDIS Rules, which are legislative instruments under the NDIS Act (Cwlth) that set out requirements for the NDIS.

Nationally, transitional arrangements for quality and safeguarding are overseen and agreed by the COAG DRC (Commonwealth, State, and Territory Ministers in disability and treasury portfolios).

The DCDSS written briefing explained that significant detail on the administration of the Quality and Safeguarding Framework is in the Commonwealth NDIS Rules. Two are of particular relevance to the Bill:

> *A number of NDIS Rules, particularly in relation to quality and safeguarding, will support the NDIS Commission's operations and will apply in Queensland to regulate providers. Of particular relevance to this Bill, are the NDIS (Practice Standards – Worker Screening) Rules 2018 ... and the NDIS (Restrictive Practices and Behaviour Support) Rules 2018.*
>
> *These Rules set out the national requirements for NDIS service providers in relation to worker screening and restrictive practices.*
>
> *Queensland must agree to the operation of these Rules before they apply in Queensland. This agreement is required to ensure that Queensland's legislative framework is capable of operating concurrently with the NDIS Act and Rules at commencement of full scheme NDIS.*[6]

DCDSS also advised that 'transitional arrangements for quality and safeguard under NDIS will be

---

4 Explanatory notes, p 1 & 2. A 'participating jurisdiction' under the *National Disability Insurance Act 2013* (Cwlth), is specified by the Commonwealth Minister in a legislative instrument, with the agreement of the relevant jurisdiction.

5 DCDSS,https://www.communities.qld.gov.au/disability/ndis-queensland/queensland-rollout-schedule, accessed 15 April 2019.

6 DCDSS, correspondence dated 5 April 2019, p 3.

supported by transitional provisions within relevant Rules and where necessary may need to be supported by appropriate provisions in state legislation', and that Queensland is working with the Commonwealth to agree on transitional arrangements. [7]

2.2 Overview of the Bill – Queensland transition to the National Disability Insurance Scheme

The Bill is intended to make the urgent and critical amendments needed to support commencement of the NDIS Commission from 1 July 2019. The Bill amends the following Acts:

- *Coroners Act 2003* (Coroners Act)
- *Disability Services Act 2006* (DSA)
- *Guardianship and Administration Act 2006* (GA Act)
- *Public Guardian Act 2014* (PGA)
- *Working with Children (Risk Management and Screening) Act 2000* (Working with Children Act)

The department advised the amendments in the Bill form stage one of a legislative review and are the:

> *… urgent and critical amendments to Queensland's legislative safeguard to support the commencement of the NDIS Quality and Safeguards Commission (NDIS Commission) in Queensland from 1 July 2019.*
>
> *Stage Two of the Review will progress amendments to further support full scheme operation of the NDIS in Queensland, including legislation to champion access and inclusion for people with disability and commence operation of nationally consistent NDIS worker screening in Queensland.*[8]

2.3 Disability Services Act amendments

2.3.1 Flexibility during transition

Queensland is currently negotiating the Full Scheme Intergovernmental Agreement (Full Scheme IGA) for operation of the NDIS in Queensland from 1 July 2019, and as noted above, is working with the Commonwealth on transitional arrangements including quality and safeguards.[9]

A number of the amendments in the Bill aim to provide flexibility about arrangements during the transition to full implementation of the NDIS by providing that certain matters may be prescribed in a regulation. Some of those proposed amendments raise the fundamental legislative principle issue of whether the legislation has sufficient regard to the institution of Parliament. Those provisions are discussed in chapter 3 of this report regarding fundamental legislative principles.

2.3.2 Objects of the Disability Services Act

Clause 4 would amend the objects of the DSA in section 6 by adding: 'to support the operation of the national disability insurance scheme in Queensland and ensure the quality and safety of disability services in the context of the national regulatory framework'.

2.3.3 Key terms amended

The Bill amends some key terms in the DSA, and inserts new terms relevant to the transition to the NDIS, including:

- *service provider* in section 13 is amended to replace 'a person' with 'an entity' providing services for people with a disability (clause 7)

---

7 DCDSS, correspondence dated 5 April 2019, p 3.

8 DCDSS, correspondence dated 5 April 2019, pp 1-2.

9 DCDSS, correspondence dated 5 April 2019, p 1.

- *funded service provider* – omitted from the DSA (clause 8)
- *NDIS non-government service provider* in section 16A is amended to add 'is an NDIS provider or registered NDIS provider, providing disability services prescribed by regulation' (clause 9)
- *NDIS provider* – the Dictionary refers to section 9 of the *National Disability Insurance Scheme Act 2013* (Cwlth) (clause 48)
- *registered NDIS provider* – as for NDIS provider above
- *relevant service provider* – section 140 is replaced to amend the application of part 6 (Positive behaviour support and restrictive practices) to a *relevant service provider.* Part 6 of the DSA will continue to apply to a provider who delivers disability services to an adult with an intellectual or cognitive disability. New section 140 specifies the following providers to which Part 6 will apply: an NDIS provider, a registered NDIS provider, the department, a service provider that receives funds from the department (and is not another department), and others prescribed by a regulation (clause 19).[10]

2.3.4 NDIS Quality and Safeguards Commission

2.3.4.1 Overview

The NDIS Quality and Safeguards Commission (the NDIS Commission) commenced operation in New South Wales and South Australia on 1 July 2018, and is planned to commence in Queensland, Australian Capital Territory, Northern Territory and Victoria on 1 July 2019. Commencement is planned for Western Australia in 2020. When operational in all states and territories the NDIS Commission 'will provide a single, national registration and regulatory system for NDIS provides that will set a consistent approach to quality and safeguards across Australia.'[11]

The Minister explained that the NDIS Commission:

> *… will register providers in Queensland and apply its monitoring, enforcement and complaints powers to those providers. Queensland will remain responsible for implementing some components of the NDIS quality and safeguards framework, including administering a worker screening system, authorising the use of restrictive practices and operating a community visitor function.*[12]

All NDIS providers and workers must comply with the NDIS Code of Conduct, and providers who register must meet NDIS Practice Standards. The NDIS Commission's quality and safeguards system also includes requirements for complaints management, incident management, worker screening, behaviour support and the use of restrictive practices.

2.3.4.2 Complaints

It is intended that from 1 July 2019, the NDIS Commission will be responsible for complaints by consumers about most providers of disability services; however, complaints about some services will continue to be the responsibility of the DCDSS.

---

10 Amendments relevant to the use of restricted practices such as containment and seclusion in Part 6 of the DSA are discussed in section 2.3.7 below.

11 NDIS Commission, *About the NDIS Quality and Safeguards Commission,* https://www.ndiscommission.gov.au/sites/default/files/documents/2018-07/NDIS%20Commission%20-%20Overview.pdf, accessed 12 April 2019

12 Minister for Communities and Minister for Disability Services and Seniors, Introductory speech, Record of Proceedings, 28 March 2019, p 833.

Clauses 10 to 12 propose amendments relevant to the change NDIS Commission's responsibility for complaints. Complaints about certain service providers, specified in clause 11, may continue to be made to the chief executive of the department; they are:

- the department
- a service provider that receives funds from the department to provide disability services, other than another department that is a service provider
- a service provider prescribed in a regulation

The part of clause 11 that provides for a regulation to prescribe service providers, and other regulation-making clauses to provide for flexibility during transition to full implementation of the NDIS, is discussed in chapter 3 of this report in relation to fundamental legislative principles.

2.3.5 Disability worker screening – Disability Services Act

2.3.5.1 Transition to NDIS Worker Screening check

Screening for people who work with adults with disability in Queensland is commonly known as the 'yellow card' system, which is similar to the 'blue card' for people working with children. People who work with children with disability are screened under the 'blue card' system.

'Yellow card' screening has continued during the transition to full scheme NDIS. Under the Intergovernmental Agreement on Nationally Consistent Worker Screening for the NDIS (the IGA), Queensland will retain responsibility for worker screening beyond 1 July 2019 until after finalisation of national policy documents under the IGA and further Queensland legislative amendments.[13]

2.3.5.2 Amendments to disability worker screening system

Clause 15 inserts new section 41A which provides that the worker screening sections of the DSA do not apply to an NDIS non-government service provider prescribed by regulation. Also, clause 17 amends section 46 to enable a regulation to provide that an NDIS non-government service provider is, or is not, engaging a person at a service outlet. This is considered in chapter 3.

2.3.5.3 Disqualifying offences

Clause 47 amends the disqualifying offences for a person who applies for a 'yellow card' to include bestiality, kidnapping, child stealing and abduction of a child under 16, and to amend the offences of rape and murder so they apply to offences against children and adults. The amendments are consistent with those in the Working with Children (Risk Management and Screening) and Other Legislation Amendment Bill 2018.[14]

2.3.6 Funding to people with a disability

Currently an individual funding agreement under the DSA may provide funds to enable people with a disability to obtain 'relevant disability services'. Clause 13 amends the definition of 'relevant disability services' to enable a regulation to prescribe those services. With transition to full implementation 'the role of the Queensland Government in funding disability supports will be reducing ...' and '.. it is envisaged there would not be the same need for individual funding agreements to be utilised under the DSA.' The capacity to prescribe services in a regulation could address unique situations in which continuity of support services required an individual funding agreement.[15]

---

13 DCDSS, correspondence dated 5 April 2019, p 6.

14 The Bill is currently before the Parliament.

15 Explanatory notes, p 16.

2.3.7 Use of restrictive practices in disability services

2.3.7.1 Legislative responsibility for use of restrictive practices

In her introductory speech, the Minister said that at full scheme Queensland will retain legislative responsibility for authorising the use of restrictive practices.[16] Part 6 of the DSA provides for the use of positive behaviour support and restrictive practices. A restrictive practice for Part 6 of the DSA is:

> ***restrictive practice*** *means any of the following practices used to respond to the behaviour of an adult with an intellectual or cognitive disability that causes harm to the adult or others –*
>
> *(a) containing or secluding the adult;*
>
> *(b) using chemical, mechanical or physical restraint on the adult;*
>
> *(c) restricting access of the adult.*
>
> *Note –*
> *Harm to a person includes physical harm to the person and a serious risk of physical harm to the person. See section 144, definition* harm.

The department advised that when the *NDIS (Restrictive Practices and Behaviour Support) Rules 2018* (Cwlth) are agreed they would apply in participating jurisdictions from 1 July 2019. Under the Rules, a condition of registration for NDIS providers who use restrictive practices is that use of restrictive practices is undertaken in accordance with State and Territory authorisation processes and a behaviour support plan. Queensland will therefore retain responsibility for legislation that prescribes the requirements registered NDIS providers must meet to be authorised to use a restrictive practice.[17]

2.3.7.2 Positive behaviour support plans

Under the DSA, a positive behaviour support plan is required. Consent or approval must be given to use restrictive practices.[18] The use of containment or seclusion may be authorised only if approved by QCAT. Detailed requirements are set out in the DSA.

A positive behaviour support plan must include matters required by the DSA. They include the circumstances in which the restrictive practice is to be used, why use of the practice is the least restrictive way of ensuring the safety of the adult or others, and the procedure for using the practice. For seclusion, chemical, mechanical or physical restraint the plan must state additional details, for example, the maximum period for which mechanical or physical restraint may be used on any one occasion.[19]

2.3.7.3 Authorisation to use containment or seclusion

New section 150A (inserted by clause 21) provides that a *relevant service provider*[20] is authorised to contain or seclude an adult with an intellectual or cognitive disability if:

- an assessment has been carried out under section 148 (an assessment is not required if the practice is used under a 'short term approval' or in the course of providing respite services or community access services)
- the relevant service provider may contain or seclude the adult under sections 151 to 154 (for example: it is necessary to prevent the adult's behaviour causing harm to themselves or others)

---

16 Record of proceedings, 25 March 2019, pp 833-34.

17 DCDSS, correspondence dated 5 April 2018, p 7.

18 There are exceptions to the approval process for respite care and community access services.

19 *Disability Services Act 2006*, section 150.

20 A *relevant service provider* is outlined in section 2.3.3 above.

- if the adult is subject of a containment or seclusion approval, any change in the positive behaviour support plan that has been made by the chief executive.

Currently, if containment and seclusion are to be authorised, the chief executive of the department must prepare a positive behaviour support plan. In her introductory speech, the Minister explained that at a later time non-government organisations would prepare positive behaviour support plans under the NDIS.

> *This service will be provided by non-government organisations under the NDIS. To reflect the important safeguard that this legislative provision provides, the bill retains the current legislative requirement, but acknowledges that a review of these provisions will be required within 12 months from commencement to ensure that Queensland is able to effectively transition this service to a capable market based response consistent with the principles of choice and control under the NDIS. This approach will enable my department to work closely with the NDIS Quality and Safeguards Commission to ensure the market's readiness and capacity to provide this service before changes are made to the role of the chief executive.*[21]

The review to which the Minister referred is required under clause 42 and includes review of legislation related to positive behaviour support plans in Part 6 of the DSA.

2.3.7.4 Requirements for use of chemical, mechanical or physical restraint or restricting access

New section 165A (inserted by clause 22) authorises a relevant service provider to use chemical, mechanical or physical restraint on, or restrict the access of, an adult with an intellectual cognitive disability. The criteria that must be met are similar to those outlined above in relation to containment or seclusion. Generally, assessment is required under section 148, and the restrictive practices may be used in accordance with the current requirements in sections 166 to 171 and any changes made to the positive behaviour support plan under section 174.

2.3.7.5 Use of restrictive practices for respite services or community access services

The DSA[22] sets out requirements that a relevant service provider must comply with before using a restrictive practice while providing respite services or community access services to an adult with an intellectual or cognitive disability.

The Bill makes minor changes to terminology, and provides for regulations to prescribe additional requirements for the content of a respite or community access plan (clause 23), and other requirements that a relevant service provider must comply with (clause 24). These provisions are discussed in relation to fundamental legislative principles in chapter 3 of this report.

2.3.7.6 Immunity from liability – locking gates, doors and windows

Division 2, Part 8 of the DSA (sections 216 to 220) currently provides for circumstances where relevant service providers lock gates, doors, and windows at premises where disability services are delivered to adults with an intellectual or cognitive disability. A relevant service provider is not civilly or criminally liable if the only reason for locking is to prevent physical harm to an adult with a skills deficit. Clause 34 amends section 216 to apply the immunity to NDIS providers, registered NDIS providers, the department, other service providers that are not another department, and another service provider prescribed by regulation.

Clause 46 inserts transitional provisions for this Bill; new sections 362 to 364 provide for transitional arrangements in relation to restrictive practices and locking gates, doors and windows, which are considered in chapter 3.

---

21 Record of proceedings, 25 March 2019, p 834.

22 DSA, sections 180 – 184.

2.3.7.7 Stakeholder views and department's advice

Submissions from Queensland Advocacy Incorporated (QAI) and Queenslanders with Disability Network (QDN) support a consistent national framework that aims to eliminate use of restrictive practices.[23] Currently the Commonwealth, states, and territories have agreed that states and territories will regulate the requirements for NDIS providers who use restrictive practices, until a nationally consistent approach is developed.

The Public Advocate's submission noted the Bill makes amendments to reflect agency roles and responsibilities from 1 July 2019 and to reflect the necessary intersections between Queensland and Commonwealth legislation. It also notes the Bill provides flexibility to ensure Queensland legislation can operate effectively with the *NDIS (Restrictive Practices and Behaviour Support) Rules 2018* (Cwlth) which are yet to be agreed for operation in Queensland.[24]

DCDSS advised that jurisdictions currently have different approaches to regulating the use of restrictive practices. The *NDIS Quality and Safeguarding Framework* (QSF) acknowledges that national consistency for restrictive practices is a key element of the QSF, and the complexity of interactions between Commonwealth, state and territory legislation means national consistency is unlikely be achieved before 'full scheme'. A statutory function of the NDIS Commissioner is to assist states and territories to develop a regulatory framework in relation to behaviour support and the reduction and elimination of the use of restrictive practices. DCDSS advised that work has commenced between jurisdictions, coordinated by working groups that report to the COAG Disability Reform Council. (COAG DRC).[25]

2.3.8 Minister to review specified sections of the Disability Services Act

Clause 43 inserts new section 241AA in the DSA, to require the Minister to review specified provisions of the DSA. The review must be completed within one year after commencement of those provisions. They are:

- new section 32A Application of Part 3 (Complaints about the delivery of disability services by particular service providers)
- amended section 140 Application of Part 6 (Positive behaviour support and restrictive practices)
- the chief executive's functions under Part 6, Division 3 -
  - subdivision 2 (Multidisciplinary assessment and development of positive behaviour support plan) and
  - subdivision 3 (Changing a positive behaviour support plan).

Stakeholder views and department's advice

The Public Guardian raised the importance of ongoing consultation during the review and submitted that one year after commencement was insufficient time for consultation and to allow for adequate transition before the review commenced.[26] The department noted that the consultation process for the proposed Ministerial reviews would be determined at a later time.[27]

---

23 Submissions 3 and 4

24 Submission 5, p 4.

25 DCDSS, correspondence dated 5 April 2019, p 4.

26 Submission 1, pp 6-7.

27 DCDSS, correspondence dated 5 April 2019, p 3.

2.4 Deaths in care - reportable deaths under the Coroners Act

2.4.1 Reportable deaths

The Coroners Act requires certain deaths to be reported to the Coroner or police, including a requirement for a *relevant service provider* to report a *death in care*. Section 7 sets out a duty to report a death that appears to be a reportable death, and section 9 defines a *death in care.*

Legislative amendments in 2016 to support the initial transition to the NDIS significantly expanded the definition of *death in care* with respect to NDIS participants and in effect included any NDIS participant living in a residential service.[28]

2.4.2 Amendments

2.4.2.1 Duty to report a death

Clauses 50 and 51 propose to amend the Coroners Act to ensure that the deaths of certain NDIS participants must continue to be reported to a coroner or a police officer.[29] The explanatory notes state the amendments aim to be consistent with the `original scope of coronial jurisdiction for deaths in care of people with disability in that it is focused on those people in receipt of high levels of support and care.'[30]

Clause 50 amends section 7 so a *relevant service provider* has a duty to report a *death in care* regardless of whether someone else has or may report the death.

2.4.2.2 Meaning of 'death in care'

The department advised that amendments made in 2016 for transition to the NDIS:

> *… significantly extended coronial jurisdiction under the Coroners Act. Effectively the death of any NDIS participant who was living in a residential service was a death in care. This is too broad and not consistent with the original (i.e. pre-NDIS) definition of death in care which aimed to capture the most vulnerable persons with disabilities in receipt of very high levels of care and support.*[31]

Clause 51 amends the meaning of *death in care* in section 9(1)(e). The department advised:

> *..the revised definition of death in care will be restricted to the death of an NDIS participant who was not living in a private dwelling or an aged care facility and was receiving or entitled to receive a relevant class of supports from a registered NDIS provider.*[32]

Generally, the death of a person who lived with and primarily received care from their family, or lived alone, would not be a *death in care*.[33] If a deceased person received *a restrictive practice* or *specialist disability accommodation*, the person was living in *a private dwelling* if the person lived with relations.[34] Therefore, the death of a person who received a *restrictive practice* or *specialist disability accommodation* would be a *death in care* if they lived alone.

The department advised that some people in receipt of these supports (the *relevant class of supports*) may not live with other people because of their high support needs, which also makes them very vulnerable due to their potential isolation.[35]

---

28 DCDSS, correspondence dated 5 April 2019, p 11.

29 Explanatory notes, p 4.

30 Explanatory notes, p 4.

31 DCDSS, correspondence dated 5 April 2019, p 12.

32 DCDSS, correspondence dated 5 April 2019, p 12.

33 Explanatory notes, p 24.

34 Explanatory notes, p 24.

35 DCDSS, correspondence dated 5 April 2019, p 12.

The following definitions are relevant to the proposed amendments to a *death in care:*

- *private dwelling* – in summary proposed subsection 9(3A) provides that a person is living in a private dwelling (and therefore a death would not be a death in care) if the dwelling was used or principally used as a separate residence for the deceased person and one or more of their relations and if any of the following apply -
  - an approved *restrictive practice* was used at the dwelling in relation to the deceased person immediately they died, or
  - specialist positive behaviour support was provided at the dwelling under the deceased person's participation plan, and the support involved use of a *restrictive practice*, or
  - speciality disability accommodation was provided at the dwelling under the participant's plan.

  If none of these apply, it is a private dwelling if either:
  - the deceased person and one or more of their relations, or
  - the deceased person alone

  use the dwelling as a separate residence.
- *participant* – not amended by the Bill; has the meaning given by the NDIS Act, section 9
- *registered NDIS provider* – clause 53 inserts in the dictionary, 'see the *National Disability Insurance Scheme Act 2013* (Cwlth), section 9'
- *relevant class of supports* – means any of the following classes of supports under the NDIS Act:
  - high intensity daily personal activities
  - assistance with daily life tasks in a group or shared living arrangement
  - specialist positive behaviour support that involves the use of a restrictive practice
  - specialist disability accommodation (clause 51(4)).

  The relevant classes of support are likely to be provided to people who require high levels of support and assistance.[36]
- *restrictive practice* means any of the following practices used to respond to the behaviour of an adult with an intellectual or cognitive disability that causes harm to the adult or others:
  - containing or secluding the adult;
  - using chemical, mechanical or physical restraint on the adult;
  - restricting access of the adult (DSA, section 144).

2.4.2.3 Issues raised by stakeholders and department's advice

Scope of amended definition of 'death in care'

Submitters raised concerns about the scope of the amended definition of *death in care.*[37] Queenslanders with Disability (QDN) submitted that the proposed definition will narrow the scope and requirements to report a death in care and may lead to unintended consequences. The Public Advocate stated that the potential narrowing of the definition may lead to fewer protections and safeguards for vulnerable Queenslanders.[38] Some submitters recommended the definition should be expanded to include any person with disability, regardless of where they live and whether or not they are an NDIS participant.[39]

---

36 DCDSS, correspondence dated 5 April 2019, p 12.

37 Submissions 2, 3, 4, and 5.

38 QDN, submission 3, p 5; Public Advocate, submission 5, p 4.

39 PWDA, submission 2, p 6; QDN, submission 3, p 5.

People with disability in aged care facilities

QAI argued that the definition of a death in care should extend to deaths of people with disability in aged care facilities.[40]

DJAG advised that the inclusion of aged care facilities would not be consistent with the original coronial jurisdiction of a death in care.[41] DJAG also advised that a death in an aged-care facility that was a healthcare related death would still be reportable under the Coroners Act.[42]

Relevant class of supports

The Public Advocate said the NDIS does not have strong working definitions for the *relevant class of supports* in the definition of a *death in care,* `leaving them open to variable interpretation'.[43] The QDN submission noted there were 37 categories of support and the lack of operational definitions may lead to situations where people receive the same supports, but they are classified differently; as a result, the supports provided may not fall within the definition of the *relevant class of supports*.[44]

DJAG noted stakeholder concerns in relation to the `narrowing' of death in care and, as already noted, advised that the policy intent of the amendments is to retain the original coronial jurisdiction.[45] DJAG stated that the *relevant classes of support* that apply to the definition of death in care align with the support and care arrangements that would have been captured under the original (i.e. pre-NDIS) scope of a coroners' jurisdiction for deaths in care.[46]

Residential services

The Public Advocate was also concerned about the safeguards that would apply to people with disability who live in a level 3 accredited boarding house accommodation (accredited under the *Residential Services (Accreditation) Act 2002).* Level 3 accredited residential services are those that provide personal care services, and continue to be included in the definition of a *death in care*:

> *We also have concerns … whether there will still be incentives for accommodation providers to maintain that accreditation when they will be able to get funding from the NDIS without it. We are not sure what the incentives are for people to maintain that kind of accreditation. Therefore, they can slip out of the visiting and reporting net if they do not maintain their accommodation accreditation. At this point, we do not know where it is going to land.*[47]

2.4.2.4 Committee comment

The committee notes stakeholder concerns about the proposed definition of a *death in care*.

The committee notes the comments made by the Public Advocate about potential confusion among service providers about when a death must be reported to the Coroner. The committee sees value in continuing consultation and education with service providers in the disability sector about when a death is a reportable *death in care* under the Coroners Act.

The committee notes that the impact of full implementation of the NDIS will become clearer over time. It will be only after a period of implementation that it will be apparent whether some concerns raised, for example, those regarding accredited residential services, eventuate.

---

40 QAI, submission 4, p 10.

41 DCDSS, correspondence dated 24 April 2019, pp 15, 20.

42 Ms Kim Chandler, DJAG, public briefing, Brisbane, 29 April 2019, p 3.

43 Public Advocate, submission 5, p 6.

44 QDN, submission 3, p 6.

45 DCDSS, correspondence dated 24 April 2019, p 20.

46 DCDSS, correspondence dated 24 April 2019, pp 15, 20.

47 Public hearing, Brisbane, 29 April 2019, p 2.

2.5 Public Guardian

2.5.1 Community visitors and 'visitable sites'

The Public Guardian's community visitors monitor services and investigate and resolve complaints at a *visitable site*, which is defined in the *Public Guardian Act 2014* (PGA).

Currently, *visitable sites* for adults include residential disability services, authorised mental health services, the forensic disability service, level 3 accredited residential services and a place, other than a private dwelling house, prescribed in a regulation.[48] In preparation for the NDIS, the definition of *visitable site* was significantly extended in 2016 to include any place where an NDIS participant with impaired capacity lives.[49]

2.5.2 Definition of a `visitable site' amended

The department advised that the current definition of *visitable site* is too broad and not consistent with the original (pre-NDIS) definition of *visitable site*, which aimed to capture the `most vulnerable people with disability who require very high levels of care and support'.[50]

Clause 62 proposes to amend the definition of a *visitable site* for the CVP (adult) to premises, other than a *private dwelling house*, where a *funded adult participant* lives, and receives a *relevant class of supports* that are provided by a registered NDIS provider.[51] A *relevant class of supports* would have the same meaning in both the Coroners Act and the PGA (see section 2.4.2.2 above regarding the amended definition of *death in care*).

Clause 62 would also define *private dwelling house* to be consistent with the proposed definition of *private dwelling* in the Coroners Act. The explanatory notes state that the revised definition of private dwelling house:

> *.. clarifies that any living arrangement where an adult, with impaired capacity for a personal matter or a financial matter, or with an impairment, lives and primarily receives care and support from, their family or on their own is excluded from the definition of* visitable site. *However, if the adult receives a restrictive practice, or specialist disability accommodation, then* private dwelling house *means a living arrangement where the adult lives with their family.*[52]

Clause 67 extends the definition of *residential facility* to include accommodation for a child, under the child's participation plan, for respite services to ensure that child accommodation services that provide respite services for children with disability continue to be visitable under the NDIS.[53]

2.5.3 Stakeholder views and department response – 'visitable site'

Submitters raised the same concerns about the proposed definition of *visitable site* as they raised about the amended definition of a *death in care*.[54] The QDN and the Public Advocate were concerned the proposed definition of *visitable site* may lead to fewer protections and safeguards for vulnerable people.[55]

The definition of *visitable sites* includes a definition of *relevant classes of support*. The Public Advocate's submission acknowledged the four classes of support in that definition (of 37 classes

---

48 *Public Guardian Act 2014,* section 39. Accredited residential services are boarding houses accredited under the *Residential Services (Accreditation) Act 2002.*

49 DCDSS, correspondence dated 5 April 2019, p 13.

50 DCDSS, correspondence dated 5 April 2019, p 13.

51 Clause 62(3).

52 Explanatory notes, p 26.

53 Explanatory notes, p. 28.

54 QDN, submission 3; QAI, submission 4; and Public Advocate, submission 5.

55 Public Advocate, submission 5, p 4; QDN, submission 3, p 7.

under the NDIS) may cover the majority of people previously protected by being at a *visitable site*. However, the Public Advocate said:

> *The definition also creates a situation where a community visitor may visit a residential facility where multiple people with disability reside, however the facility is only classified as 'visitable' due to the class of support provided to 1 or 2 residents. In these circumstances the process of conducting a visit becomes very difficult, as will the process associated with reporting deaths in care, which may create significant confusion for providers and result in visitors not visiting sites or deaths in care not being reported.*[56]

The Public Guardian was concerned that including the *relevant class of supports* in the PGA, rather than the regulation, could reduce flexibility about the definition of a *visitable site* if the NDIS later changed the definitions.[57]

The department advised development of the proposed definition of *visitable site* aimed:

> *..to identify as closely as it is currently possible to do, the classes of supports that registered NDIS providers will provide to NDIS participants requiring high levels of support and care. It is considered that these classes of support (i.e. relevant classes of support) broadly align with the types of support and care arrangements that would have been captured under the original (i.e. pre-NDIS) scope of a visitable site.*[58]

The DJAG also advised there is 'continuing flexibility to prescribe other places as *visitable site* should the need arise.[59] As noted above, the existing definition of *visitable site* in section 39 of the PGA includes 'a place, other than a private dwelling house, that is prescribed under a regulation'.

2.5.3.1 Other amendments

The Bill enables the Public Guardian or a community visitor to request information from the NDIS Agency or NDIS Commission that the Public Guardian or community visitor consider necessary or convenient to perform their functions.[60] The Bill also enables a community visitor to refer an adult's complaint or a child's concerns or grievances to the NDIS Commissioner.[61]

To enable the Public Guardian to identify visitable sites, the Bill requires particular registered NDIS providers to give information to the Public Guardian.[62]

Clause 74 inserts new sections 190 to 196 that provide for transitional arrangements in relation to matters that had started before commencement of the proposed amendments in the Bill. These include for example, inquiries, existing complaints, and requests for visits to former visitable sites, and proceedings for offences in relation to a former visitable site.

2.6 Guardianship and Administration Act amendments

The Bill makes minor amendments to the GA Act including amending the existing definition of `relevant service provider'.[63] The Bill replaces the definition of 'relevant service provider' with a cross-reference to the amended definition in section 140 of the DSA; section 140 defines terms that apply to service providers' use of positive behaviour support and restrictive practices. In addition, the Bill omits references to 'funded' service providers.

---

56 Public Advocate, submission 5, p 5.

57 Public Guardian, submission 1, pp 4-5.

58 DCDSS, correspondence dated 24 April 2019, p 18.

59 DCDSS, correspondence dated 24 April 2019, p 19.

60 Clauses 61, 64 and 69.

61 Clauses 63 and 68.

62 Clauses 66 and 71; explanatory notes, pp 27, 28.

63 Clauses 55 and 56.

The Bill includes a power to make a regulation to provide for any matters not sufficiently dealt with by the Bill for transition to the amended Act. The regulation-making power is considered in chapter 3.

2.7 Working with Children (Risk Management and Screen) Act amendments

The Bill proposes amendments to the Working with Children Act that are:

> *...necessary to provide the flexibility necessary as Queensland continues to operate existing screening systems beyond 1 July 2019, during transition to implementation to nationally consistent NDIS worker screening.*[64]

The amendments in clause 77 enable a regulation to make provision:

- to delay the application of a provision about screening by up to a year in relation to a new NDIS non-government service provider or the employment of a person by such a provider, or delay the application of a provision in relation to a new employee
- for a matter in relation to a service provider becoming a former NDIS non-government service provider or a person becoming a former employee.

Clause 78 inserts a transitional regulation making power. Clause 79 amends Schedule 1 (which provides for employment that is 'regulated' and subject to screening, to enable a regulation to provide that employment is regulated, despite the provisions in Schedule 1. Regulation-making powers are discussed in chapter 3.

[64] Explanatory notes, p 32.

3 Compliance with the *Legislative Standards Act 1992*

3.1 Fundamental legislative principles

Section 4 of the *Legislative Standards Act 1992* states that 'fundamental legislative principles' are the 'principles relating to legislation that underlie a parliamentary democracy based on the rule of law'. The principles include that legislation has sufficient regard to:

- the rights and liberties of individuals, and
- the institution of Parliament.

The committee has examined the application of the fundamental legislative principles to the Bill. The committee brings the following issues to the attention of the Legislative Assembly.

3.2 Rights and liberties of individuals

Section 4(2)(a) of the *Legislative Standards Act 1992* requires that legislation has sufficient regard to the rights and liberties of individuals.

Clauses 40, 41, 65, 66 70 and 71 all raise issues of whether the legislation has sufficient regard to the rights of individuals. Those provisions are summarised below, along with a summary of the justification provided in the explanatory notes for the potential departure from fundamental legislative principles.

3.2.1.1 Penalties

Clauses 66 and 71 provide for penalties for failure to comply with requirements to provide information, with a maximum of 25 penalty units ($3623.75). The explanatory notes state that the penalties are comparable to other similar offences.

The committee is satisfied that the offences and penalties are proportionate, given the objectives of the Bill to protect vulnerable people.

3.2.1.2 Information sharing

Clauses 65 and 70 allow the Public Guardian to share confidential information from some reports to the NDIS Commissioner. Clauses 40 and 41 allow the chief executive to disclose information to the NDIS Commissioner.

The committee is satisfied that the amendments to the scope of disclosure and use of confidential information is justified, having regard to the purposes of the NDIS scheme.

3.2.1.3 Yellow card

Clause 47 expands the range of disqualifying offences to rape and murder of an adult, bestiality, kidnapping of a child (non-family), kidnapping for ransom, child-stealing (non-family) and abduction of a child under 16. Clause 46 provides that the additional disqualifying offences will include convictions and offences dating from prior to commencement of the amendments.

The committee notes that these amendments are consistent with recent amendments to the Working with Children Act, and that the retrospective application is considered justified to ensure all yellow card holders are subject to the same criteria to protect people with disabilities.

3.2.1.4 Sites a community visitor may enter

Clauses 62 and 67 amend the definitions of visitable site and residential facility, meaning a community visitor can enter sites not previously listed in the DSA, without notice.

The committee notes these amendments are required as part of the transition to full implementation of the NDIS and is satisfied the powers of entry are justified.

3.2.1.5 Protection against self-incrimination

Clauses 66 and 71 state that service providers do not have to give the Public Guardian requested information if there is a reasonable excuse. A reasonable excuse, for the purposes of the DSA, is if the provision of information may incriminate the person. The committee is therefore not concerned with any potential breach of fundamental legislative principle.

3.3 Institution of Parliament - regulation making powers

Section 4(2)(b) of the *Legislative Standards Act 1992* requires legislation to have sufficient regard to the institution of Parliament. Section 4(4) of the *Legislative Standards Act 1992* states:

> *Whether a Bill has sufficient regard to the institution of Parliament depends on whether, for example, the Bill –*
>
> *(a) allows for the delegation of legislative power only in appropriate cases and to appropriate persons; and*
> *(b) sufficiently subjects the exercise of a delegated legislative power to the scrutiny of the Legislative Assembly; and authorises the amendment of an Act only by another Act.*

The Bill contains a number of clauses which provide for regulation-making powers:

- three clauses insert a general transitional regulation-making power in each of the *Disability Services Act 2006* (DSA), the *Guardianship and Administration Act 2000* (GA Act), and the *Working with Children (Risk Management and Screening) Act 2000* (Working with Children Act)
- fifteen clauses insert regulation-making powers in the DSA allowing for various matters to be prescribed by regulation.

These regulation-making powers raise issues of whether the legislation has sufficient regard to the institution of Parliament.

3.3.1 General transitional regulation-making powers

Clauses 46, 57 and 78 all provide for a broad transitional regulation-making power, respectively inserting section 366 in the DSA, section 275 in the GA Act, and section 590 in the Working with Children Act. The three provisions are identical:

> *(1) A regulation (a **transitional regulation**) may make provision about a matter for which—*
>
> *(a) it is necessary to make provision to allow or facilitate the doing of anything to achieve the transition from the operation of this Act as it was in force immediately before the commencement to the operation of the amended Act; and*
> *(b) this Act does not make provision or sufficient provision.*
>
> *(2) A transitional regulation may have retrospective operation to a day not earlier than the day of commencement.*
>
> *(3) A transitional regulation must declare it is a transitional regulation.*
>
> *(4) A transitional regulation may only be made within 2 years after the commencement.*
>
> *(5)This subdivision and any transitional regulation expire 3 years after the day of commencement.*

Transitional regulation-making powers may be considered as an inappropriate delegation of legislative power, depending on any constraints on the power. The form of transitional regulation-making power regarded as most objectionable has the following elements:

- it is expressed to allow for a regulation that can override an Act
- it is so general as to allow for a provision about any subject matter, including those that should be dealt with by an Act as opposed to subordinate legislation
- it is not subject to any other control, for example, a sunset clause.

The justification for the transitional regulation-making powers in the explanatory notes is:

> *The inclusion of a transitional regulation making power of this nature is considered necessary to address operational and practical issues that might arise in the implementation of full scheme NDIS.*[65]

The transitional regulation-making powers in clauses 46, 57 and 78 are broad, and allow a regulation to be retrospective. A regulation may be made within two years from commencement, and any transitional regulation would be subject to a sunset clause (subsection (5) above) and expire three years after commencement.

3.3.1.1 Transition to full implementation of the NDIS

The committee is aware of some of the complexities of transition to full implementation of the NDIS. They include for example that: the estimated number of people (and their needs) who will receive NDIS funding is not known, as eligibility is broader than the previous state funding model. Also, the intergovernmental agreement for full scheme operation is currently being negotiated, and agreement to some Commonwealth NDIS Rules have not been finalised. Stakeholders also highlighted that the ways the service provider market will respond to emerging consumer needs under the NDIS is still evolving.

The NDIS is a complex national regulatory system. The transition process is also complex. Queensland will commence 'full scheme' implementation of the NDIS in July 2019. The Commonwealth, and New South Wales and South Australia - the two jurisdictions that are currently at 'full scheme' - have also adopted transitional regulation-making powers to facilitate transition to the NDIS. The DCDSS advised that the Commonwealth NDIS Act:

> *… allows the Minister to make legislative instruments (Rules) that provide the further necessary detail on the operation of the scheme. The NDIS Act outlines that Rules can be made if required or permitted by the NDIS Act or if they are necessary or convenient to carry out or give effect to the NDIS Act. The NDIS Rules should be read in conjunction with the NDIS Act*.[66]

New South Wales has a broad regulation-making power, including regulations of a savings or transitional nature, for the purposes of the *Disability Inclusion Act 2014* (NSW) and the *National Disability Insurance Scheme (Worker Checks) Act 2018* (NSW). South Australia also has a broad regulation making power to provide for, or relating to, the transition to the NDIS, under the *Disability Inclusion Act 2018* (SA).

3.3.1.2 Committee comment

In light of the range of national NDIS implementation matters yet to be resolved, and uncertainty about the level of NDIS participation by consumers and service providers, the committee accepts that a general transitional regulation-making power is required. The committee notes that a transitional regulation may be made only in the two years after commencement of the relevant sections, and that any regulations made will expire three years after commencement. While the time when a regulation would expire is long at three years after commencement, the committee considers that the complexity of NDIS transition may require this timeframe.

3.3.2 Regulation making powers for specified matters - Disability Services Act

The regulation-making powers that would be inserted in the DSA are summarised below, along with a summary of the justification given in the explanatory notes about the potential breach of fundamental legislative principles for each regulation-making power.

---

[65] Explanatory notes, p 14.

[66] DCDSS, answer to questions taken on notice, received 30 April 2019, p. 2.

3.3.2.1 Complaints

Clause 11 inserts new section 32A, with the effect that complaints may be made about the department, service providers funded by the department and other service providers prescribed by regulation. The clause also provides that a regulation can be made to provide that the complaints provisions of the DSA do not apply in relation to the delivery of particular disability services.

The explanatory notes state that flexibility is required to ensure there is no unnecessary duplication of complaints functions between Queensland and the NDIS Commission as the full scheme NDIS is implemented, and to ensure a consumer has an avenue of complaint.[67]

In addition, the notes state that a regulation will be subject to scrutiny by the Legislative Assembly and:

> *.. will be subject to the operation of the provisions which prescribe the Objects of the Act and the definition provision which outlines the extent of the disability services to which the Act applies. This will require any subordinate legislation to be developed within the boundaries of these provisions.*[68]

Further, the Bill inserts new section 241AA in the DSA to require the Minister to complete a review of section 32A within a year of commencement; the review would include consideration of whether the regulation-making power was still required to facilitate implementation of the NDIS.[69]

3.3.2.2 Funding to people with a disability

Clause 13 amends the definition of *relevant disability services* in section 37, to enable services to be prescribed by regulation.

The rationale for the regulation-making power is again to provide for circumstances that may arise in the transition to full implementation of the NDIS. The Queensland Government's role in funding will be reduced, and 'it is envisaged there would not be the same need for individual funding agreements'.[70]

3.3.2.3 Worker screening

Clause 15 inserts new section 41A, which provides that the worker screening provisions of the DSA do not apply to NDIS non-government service providers prescribed by a regulation. In addition, clause 42 amends section 239 to provide that a regulation may be made to delay the application of worker screening to a new NDIS non-government service provider and specified people, and provide appropriate transitional arrangements where regulations of this nature are made.

The explanatory notes for clauses 15 and 42 state that a flexible approach to transition to the NDIS worker screening check is needed. Finalisation of arrangements to transition to national worker screening is subject to the agreement by Queensland to the operation of the *National Disability Insurance Scheme (Practice Standards – Worker Screening) Rules.* The ability to amend the scope of screening provides:

> *.. the opportunity for Queensland to determine an appropriate transition strategy and to be able to expand the scope of screening under the blue card and yellow card systems, if required, to move towards the approach that will be adopted under the new NDIS worker screening check.*[71]

3.3.2.4 Restrictive practices

Clause 19 replaces section 140 which lists particular types of service providers whose use of restrictive practices is regulated by the DSA, and enables a regulation to specify additional service providers. Also,

---

67 Explanatory notes, p 6.

68 Explanatory notes, p 6.

69 Explanatory notes, p 6.

70 Explanatory notes, p 6.

71 Explanatory notes, p 17.

clause 23 amends section 181 to provide that a respite/community access plan for an adult with an intellectual or cognitive disability is a plan stating certain listed matters, as well as any other matter prescribed by regulation.

Clauses 25, 26, 27 and 28 amend sections 191, 193, 194 and 195 to provide that a *relevant service provider*, other than a relevant service provider prescribed by regulation, must comply with certain requirements, including giving statements about the use of restrictive practices. The effect of the amendments is that a regulation may provide that these requirements do not apply to particular service providers.

As with a number of other provisions of the Bill, the explanatory notes state that flexibility is needed in relation to these clauses. The review of certain sections of the amended Act required by new section 241AA and will apply to amended section 140 (clause 19). For clauses 23, 25, 26, 27 and 28, flexibility is needed in particular as the NDIS (Restrictive Practices and Behaviour support) Rules 2018 (Cwlth) are not yet agreed for operation in Queensland.[72]

3.3.2.5 Authorised officers

Clauses 30, 31, 32 and 33 amend sections 200E, 200M, 200S and 200W with the effect that a regulation may exclude provisions of the DSA from authorised officers' enforcement powers.

The explanatory notes state this flexibility is required to ensure that the powers apply only where required and ensure there is no unnecessary duplication of the functions and powers of the NDIS Commissioner.[73]

3.3.2.6 Locking of doors, gates and windows

Clause 34 replaces section 216 and lists particular service providers to which immunity from liability for locking doors, gates, and windows applies, and enables a regulation to specify additional service providers to which it would apply.

In addition to a need for flexibility, the explanatory notes state that this provision will be subject to review under new section 241AA of the amended Act.

3.3.2.7 Committee comment

The committee notes the significant number of provisions in the Bill which enable a regulation to provide for additional matters in the DSA during transition to the full NDIS. As summarised above, many of the regulation-making powers would enable specification of service providers to which provisions of the DSA would apply. It could be argued that the creation of so many provisions for matters to be dealt with by regulation collectively means that the Bill does not show sufficient regard to the institution of Parliament.

The department advised:

> *The Bill does not intend to delegate extensive policy within subordinate legislation. Rather, the majority of regulation making provisions are limited in nature and specific in their application*.[74]

The committee notes that the clause 43 provides for a review of proposed sections 32A, 140 and 216, and the chief executive's functions under part 6, division 3, subdivisions 2 and 3 (relating to positive behaviour plans).

The process of transition from disability support services provided by states, territories and the Commonwealth to a single national scheme is complex, and is understandably taking considerable time. The complexity of transition to full scheme NDIS relates not only to creation of a single scheme, but also to the fundamental change of focus to increase consumer choice in how services are delivered.

---

72 Explanatory notes, p 9.

73 Explanatory notes, p 10.

74 DCDSS, Answer to question on notice, received 30 April 2019.

That change requires continuing adjustment by consumers, service providers and government agencies to deliver services based on consumer need.

In light of the complexity of the NDIS transition, and the required review of some provisions within a year of commencement, the committee considers that in the exceptional circumstances of NDIS implementation, the regulation making powers have sufficient regard to the institution of Parliament.

The committee does not, however, consider that such a large number of regulation-making powers is generally acceptable, and wishes to emphasise that this Bill is considered to be exceptional.

3.3.3 Explanatory notes

Part 4 of the *Legislative Standards Act 1992* requires that an explanatory note be circulated when a Bill is introduced into the Legislative Assembly, and sets out the information an explanatory note should contain.

Explanatory notes were tabled with the introduction of the Bill. The notes are fairly detailed and contain the information required by Part 4 and a sufficient level of background information and commentary to facilitate understanding of the Bill's aims and origins.

The committee notes however, that the explanatory notes did not identify the specific clause(s) being discussed, when identifying the potential issues of fundamental legislative principle. The committee encourages the department to ensure that the fundamental legislative principles section of future explanatory notes specifies the clause numbers that are discussed.

Appendix A – Submitters

Sub #	Submitter
1	Office of the Public Guardian
2	People with Disability Australia
3	Queenslanders with Disability Network
4	Queensland Advocacy Incorporated
5	Office of the Public Advocate
6	AEIOU Foundation

Appendix B – Witnesses at public hearing and officials at public briefing

Office of the Public Advocate

- Ms Mary Burgess, Public Advocate for Queensland

Queenslanders with Disability Network

- Ms Michelle Moss, Business and Operations Manager

Department of Communities, Disability Services and Seniors

- Ms Helen Ferguson, Assistant Director-General, Strategic Policy and Legislation
- Ms Elizabeth Bianchi, Executive Director, Legal Policy and Legislation
- Ms Kira Vardanega, Director, NDIS Legal Policy

Department of Justice and Attorney-General

- Ms Kim Chandler, Director, Strategic Policy and Legal Services