Parliamentary Committees

Disability Services (Restrictive Practices) and Other Legislation Amendment Bill 2013

Report No. 37

Health and Community Services Committee

February 2014

Health and Community Services Committee

Chair	Mr Trevor Ruthenberg MP, Member for Kallangur
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	Ms Lee Archinal, Principal Research Officer (part-time)
	Ms Kathleen Dalladay, Principal Research Officer (part-time)
	Ms Liz Sbeghen, Principal Research Officer (part-time)
	Ms Stephanie Cash, Executive Assistant
Technical Scrutiny Secretariat	Mr Peter Rogers, Research Director
	Mr Karl Holden, Principal Research Officer
	Ms Tamara Vitale, Executive Assistant
Contact details	Health and Community Services Committee Parliament House George Street Brisbane Qld 4000
Telephone	+61 7 3406 7688
Fax	+61 7 3406 7070
Email	hcsc@parliament.qld.gov.au
Web	www.parliament.qld.gov.au/hcsc

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Abbreviations and glossary

Note: terms below in italics are defined terms in legislation

Bill	Disability Services (Restrictive Practices) and Other Legislation Amendment Bill 2013
chemical restraint	see section 4.5.1 of this report
chief executive	Director General of the Department of Communities, Child Safety and Disability Services
the committee	Health and Community Services Committee
contain	*(1) **Contain** an adult with an intellectual or cognitive disability means physically prevent the free exit of the adult from premises where the adult receives disability services, other than by secluding the adult.* *(2) However, the adult is not contained if –* *(a) the adult is an adult with a skills deficit under part 15, division 1A; and* *(b) the adult's free exit from the premises is prevented by the locking of gates, doors or windows under that part .....*(section 123G Disability Services Act)
the department	Department of Communities, Child Safety and Disability Services
Disability Services Act	*Disability Services Act 2006*
funded service provider	*(1) A **funded service provider** is a service provider that receives funds from the department to provide disability services.* *(2) A funded service provider includes the department to the extent it provides disability services.* *(3) However, a funded service provider does not include another department receiving funds from the department.* (section 14 Disability Services Act)
harm	***harm** to a person means –* *(a) physical harm to the person; or* *(b) a serious risk of physical harm to the person; or* *(c) damage to property involving a serious risk of physical harm to the person.* (section 123E Disability Services Act)
Guardianship Act	*Guardianship and Administration Act 2000*

mechanical restraint	*(1)* ***Mechanical restraint,*** *of an adult with an intellectual or cognitive disability, means the use, for the primary purpose of controlling the adult's behaviour, of a device to –* *(a) restrict the free movement of the adult; or* *(b) prevent or reduce self-injurious behaviour.* *(2) However, the following are not mechanical restraint –* *(a) using a device to enable the safe transportation of the adult;* *Examples of devices used to enable safe transportation –* • *a cover over a seat belt buckle* • *a harness or strap* *(b) using a device for postural support;* *(c) using a device to prevent injury from involuntary bodily movements, such as seizures;* *(d) using a surgical or medical device for the proper treatment of a physical condition;* *(e) using bed rails or guards to prevent injury while the adult is asleep.* (section 123H Disability Services Act)
model positive behaviour support plan	*… means a plan of that name prepared by the chief executive and published on the department's website.*(clause 8 of the Bill, discussed in section 5.4 of this report)
NDS Qld	National Disability Services Queensland
physical restraint	***physical restraint****, of an adult with an intellectual or cognitive disability, means the use, for the primary purpose of controlling the adult's behaviour, of any part of another person's body to restrict the free movement of the adult.*(section 123E Disability Services Act)
positive behaviour support plan	see summary in sections 5.2 and 5.3 of this report
restricting access	***restricting access****, of an adult with an intellectual or cognitive disability, means restricting the adult's access, at a place where the adult receives disability services, to an object to prevent the adult using the object to cause harm to the adult or others.* (section 123E Disability Services Act)
restrictive practice	***restrictive practice*** *means –* *(a) containing or secluding an adult with an intellectual or cognitive disability; or* *(b) using chemical, mechanical or physical restraint on an adult with an intellectual or cognitive disability; or* (c) *restricting access of an adult with an intellectual or cognitive disability.* (section 123E Disability Services Act)
seclude	***seclude*** *an adult with an intellectual or cognitive disability means physically confine the adult alone, at any time of the day or night, in a room or area from which free exit is prevented.*(section 123E Disability Services Act)

Chair's foreword

On behalf of the Health and Community Services Committee of the 54th Parliament of Queensland, I present this report on the Disability Services (Restrictive Practices) and Other Legislation Amendment Bill 2013.

The Disability Services (Restrictive Practices) and Other Legislation Amendment Bill 2013 was introduced into the Legislative Assembly by the Minister for Communities, Child Safety and Disability Services on 20 November 2013. The committee was required to report to the Legislative Assembly by 3 February 2014.

The Bill amends the *Disability Services Act 2006* and the *Guardianship and Administration Act 2000* in relation to the use of restrictive practices by service providers that receive funding from the Queensland Government. Those people who are subject to restrictive practices generally have an intellectual or cognitive impairment and may have multiple disabilities. They are vulnerable people and it is therefore important that the use of practices which restrict their rights are used with great care.

In considering the Bill, the committee's task was to consider the policy to be given effect by the Bill, and whether the Bill has sufficient regard to the rights and liberties of individuals and to the institution of Parliament.

On behalf of the committee, I thank those who made written submissions on this Bill and who appeared as witnesses at the committee's public hearing. Thanks also to officials from the Department of Communities, Child Safety and Disability Services who briefed the committee, the committee's staff and the Technical Scrutiny secretariat.

I commend the report to the House.

Trevor Ruthenberg MP
Chair

Recommendations

1 Introduction and Overview of the Bill

1.1 Role of the committee

The Health and Community Services Committee (the committee) was established by resolution of the Legislative Assembly on 18 May 2012, and consists of government and non-government members.

Section 93 of the *Parliament of Queensland Act 2001* provides that a portfolio committee is responsible for considering:

- the policy to be given effect by the Bill, and
- the application of the fundamental legislative principles to the Bill.

1.2 Committee process

The Disability Services (Restrictive Practices) and Other Legislation Amendment Bill 2013 (the Bill) was introduced into the Legislative Assembly on 20 November 2013 by the Hon. Tracy Davis MP, Minister for Communities, Child Safety and Disability Services. The Bill was referred to the committee for examination. The committee was required to report to the Legislative Assembly by 3 February 2014.

Officers from the Department of Communities, Child Safety and Disability Services briefed the committee on 5 December 2013.

The committee called for submissions by notice on its website, and wrote to 117 stakeholder organisations to invite submissions. Seventeen submissions were received (see list at Appendix A).

The committee held a public hearing on 17 December 2013 at Parliament House, Brisbane and heard from nine witnesses (see list at Appendix B).

Transcripts of the briefing provided by the department on 5 December 2013 and the public hearing on 17 December 2013 are published on the committee's webpage. Submissions received and accepted by the committee are also published on the webpage at www.parliament.qld.gov.au/hcsc.

1.3 Policy objectives

The *Disability Services Act 2006* (the Disability Services Act) is intended to safeguard the rights of adults with a disability, including those with an intellectual or cognitive disability who exhibit challenging behaviour. Section 19 of the Disability Services Act sets out the human rights principle:

> *People with a disability have the same rights as other members of society and should be empowered to exercise their rights.*[1]

The Bill amends the Disability Services Act and the *Guardianship and Administration Act 2000* (the Guardianship Act) in relation to the use of *restrictive practices* by service providers that receive funding from the Queensland Government. Restrictive practices such as seclusion and restraint may be used in certain circumstances on adults with intellectual or cognitive disability in response to challenging behaviour. Such behaviour results in physical harm or a serious risk of physical harm to the adult or others.[2]

The Explanatory Notes indicate that the Bill is a response to a review of the regulatory framework (and Government service response) to address the needs of adults with intellectual or cognitive disability and challenging behaviour, improve their quality of life, and reduce and eliminate the use of restrictive practices. Those consulted during the review sought changes including non-legislative change. The Explanatory Notes state that the legislative changes identified in the review are:

1 *Disability Services Act 2006*, section 19(1)
2 Explanatory Notes, Disability Services (Restrictive Practices) and Other Legislation Amendment Bill 2013, p.1

> *… to improve the care and quality of life for adults with challenging behaviour; enhance protections for these adults; and streamline processes and reduce red tape for disability service providers.*[3]

1.4 Summary of amendments

1.4.1 Improved protection for clients

In summary, the Explanatory Notes state that the following amendments to the Disability Services Act and the Guardianship Act achieve the policy objective of improved protection for clients:

- positive *behaviour support approach* – emphasised for all adults with intellectual or cognitive disability and challenging behaviour, not just where restrictive practices are required
- *restrictive practice is not punishment* – outline that service providers should not use restrictive practices as punishment
- *reporting on use by service providers* – provide for reporting on the use of restrictive practices to enable monitoring and measuring effectiveness in reducing the use of restrictive practices, and
- *service provider required to provide a statement* – a statement must be provided to the adult and those close to the adult about the use of restrictive practices to enable understanding of the framework, complaints and participation in planning and decision making.[4]

1.4.2 Reduce red tape and streamline processes for service providers

In addition, the Explanatory Notes list the following amendments as reducing red tape for service providers:

- *amended definitions of restricted practices* – clarify that restricted practices are used to respond to behaviour that causes, or has the potential to cause harm, to make it easier to determine the practices that require authorisation
- *positive behaviour support plans* – reduce the prescriptive requirements
- *appointment of a guardian for a restrictive practice* – amend maximum appointment period from 12 months to two years
- *short term plan not required* – the requirement for a plan for a short term approval is removed
- *clarify when a short term approval can be sought* – to support the transition of an adult to new service providers
- *time-limited immunity from civil or criminal liability for service providers* – when a short term approval to use a restrictive practice has been sought, or the Adult Guardian's consent has been sought, and the request has not been approved or the approval or consent is not given before an existing approval or consent to use a restrictive practice expires
- *clarify definition of chemical restraint* – to exclude medication for a single instance of health care
- remove requirement for policies on the use of restrictive practices to be kept and implemented – policies will be monitored administratively.[5]

1.5 Should the Bill be passed?

Standing Order 132(1) requires the committee to recommend whether the Bill should be passed. The committee considered the Bill, information provided by the department in a briefing on 5 December 2013, evidence given at a public hearing on 17 December, and the information and views expressed in the 18 submissions received and accepted.

3 Explanatory Notes, p.1
4 Explanatory Notes, p.2
5 Explanatory Notes, p.2

After considering the policy issues discussed in the following chapters of this report, and considering whether the Bill has sufficient regard to the fundamental legislative principles, the committee decided to recommend that the Bill be passed.

Recommendation 1

The committee recommends that the Disability Services (Restrictive Practices) and Other Legislation Amendment Bill 2013 be passed.

2 Policy context and current regulation of restrictive practices

2.1 Carter Report

The current provisions (Part 10A) in the Disability Services Act and Guardianship Act regulating restrictive practices followed the recommendations of the Carter Report.[6] The Hon. W J Carter QC was commissioned to review the use of restrictive practices and proposed fundamental reform of the response by government and the disability sector to the proper care and support of persons with intellectual disability and challenging behaviour.

Justice Carter's detailed recommendations covered service delivery and co-ordination; assessment; a Centre for Best Practice; suitable accommodation options; staffing requirements; organisational arrangements; and a legislative framework to ensure that the use of any restrictive practice is independently approved and properly regulated.[7]

2.2 What is challenging behaviour?

Adults with an intellectual or cognitive disability may sometimes display behaviours that are challenging while in the care of disability service providers.[8] For a proportion of adults with intellectual and cognitive disabilities who display challenging behaviour, that have a high risk of harm to themselves or others, it will be in their best interests (and that of their carer's and others around them) for restrictive practices to be used.[9]

Although restrictive practices occur in response to challenging behaviour, evidence provided to the committee suggests that challenging behaviour may be a consequence of imposing restrictive practices.[10] Many instances of challenging behaviour can be seen, not as a failure of the person, but as means of communicating. Such behaviours are a legitimate response by individuals to difficult environments and should not be a reason for the applications of restrictions designed to change or manage their behaviour. It may be necessary for the service provider to examine how to change services, systems and environments as a means of changing behaviour.[11]

> *For many people with an intellectual disability or cognitive impairment, behaviour is a means of communicating. When a person engages in behaviour the service provider finds challenging, the person is usually trying to express themselves. They are saying, 'I do not like that', 'That's not what I need' or 'I'm in pain, help me'. Despite what a person might be trying to convey, if those supporting them do not understand what they are saying then the person's needs are unlikely to be met. Over time this lack of understanding becomes increasingly damaging. The vulnerability of the person ceases to be recognised and instead they are labelled as challenging. They become a person to be dealt with as opposed to a person to whom we should accord dignity and respect.*[12]

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6 Hon. W G Carter QC, *Challenging Behaviour and Disability: a targeted response*, July 2006, (Carter Report) accessed from http://www.communities.qld.gov.au/resources/disability/publication/positive-futures-investing-in-positive-futures-full-report.pdf

7 Carter Report, pp.9–11

8 *Draft Proposed National Framework for Reducing the Use of Restrictive Practices in the Disability Service Sector* (the 'Proposed National Framework'), Consultation Version, May 2013, p.1

9 Productivity Commission, *Disability Care and Support, Report No. 51*, Chapter 10, Delivering Disability Services, 2011, p.503, accessed from http://www.pc.gov.au/projects/inquiry/disability-support/report

10 Queensland Advocacy Incorporated, Submission 15, p.11

11 Jodie Cook, Public Advocate, *Public Hearing Transcript*, 17 December 2013, p.16; Queensland Advocacy Incorporated, Submission 15, p.11; and Paul Ramcharan and others, *Experiences of restrictive practices: A view from people with disabilities and family carers*, A final research report to the Office of the Senior Practitioner, Victorian Department of Human services, 25 May 2009, p.11

12 Jodie Cook, Public Advocate, *Public Hearing Transcript*, 17 December 2013, p.16

2.3 What are restrictive practices?

The Disability Services Act specifies a number of restrictive practices that may be used by a disability service provider in response to an adult's behaviour that causes harm, for the purposes of reducing the risk of harm to the adult or others. The restrictive practices currently regulated under Part 10A of the Disability Services Act are:

- *containment* – prevents someone from leaving a particular premises
- *seclusion* – confines an adult in a room
- *chemical restraint* – medication
- *physical restraint*
- *mechanical restraint* – for example using a device to restrict the movement of an adult or to prevent self-injury
- *restricting access* to objects.[13]

2.4 Purpose of regulation of restrictive practices

The stated purpose of part 10A (Restrictive Practices) of the Disability Services Act is to –

> *protect the rights of adults with an intellectual or cognitive disability by regulating the use of restrictive practices by funded service providers in relation to those adults in a way that –*
>
> *(a) has regard to the human rights of those adults; and*
>
> *(b) safeguards them and others from harm; and*
>
> *(c) maximises the opportunity for positive outcomes and aims to reduce or eliminate the need for use of the restrictive practices; and*
>
> *(d) ensures transparency and accountability in the use of the restrictive practices.*[14]

The Disability Services Act regulates the use of restrictive practices by disability service providers by specifying certain conditions under which they may be considered. The restrictive practice framework requires that a positive behaviour support approach is used, with the aim to reduce or eliminate the need for use of restrictive practices.[15] It defines each of the restrictive practices and specifies requirements for the use of each practice. The use of restrictive practices is only considered appropriate if it is necessary to prevent adults with an intellectual and cognitive disability and challenging behaviour, from causing harm to themselves and others, and is the least restrictive way of ensuring the safety of adults and others.

The Disability Services Act also requires that disability service providers conduct an assessment of an adult by suitably qualified clinicians before a restrictive practice is used; develop a positive behaviour support plan; and seek the appropriate consent or approval for the use of the restrictive practice[16]. Regular reviews are undertaken of the approvals for the use of restrictive practices.[17]

Evidence provided to the committee indicated that the current legislation has contributed to a reduction in the use of restrictive practices and in some circumstances have led to their elimination.[18]

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13 Clare O'Connor, Department of Communities, Child Safety and Disability Services, *Public Briefing Transcript*, 5 December 2013, p.2

14 *Disability Services Act 2006*, section 123A

15 Clare O'Connor, Department of Communities, Child Safety and Disability Services, *Public Briefing Transcript*, 5 December 2013, p.2

16 Clare O'Connor, Department of Communities, Child Safety and Disability Services, *Public Briefing Transcript*, 5 December 2013, p.2

17 Clare O'Connor, Department of Communities, Child Safety and Disability Services, *Public Briefing Transcript*, 5 December 2013, p.2

18 Joanne Jessop, Multicap, *Public Hearing Transcript*, 17 December 2013, p.20; and Multicap, Submission 6, p.1

The Endeavour Foundation indicated that before the introduction of the restrictive services framework over 900 clients were subject to restrictive practices, which has reduced to 'well fewer than 100 currently'.[19] Multicap noted that it had 51 individuals who are subject to restrictive practices and approximately 33 individuals no longer subject to restrictive practices, either due to improvements in behaviours of concern or because they had moved services.[20]

The Centre of Excellence headed by Professor Nankervis leads research, development and training, to ensure that service providers are able to safely deliver restrictive practices for clients.[21] The department has a Specialist Response Service to help prepare positive behaviour support plans.[22]

2.5 Positive behaviour support plans

At present, 594 adults are subject to restrictive practices in Queensland, and have a positive behaviour support plan.[23] Under the Disability Services Act, funded service providers are required to develop a positive behaviour support plan following the assessment of an adult. The plan is intended to increase positive behaviour, reduce challenging behaviour, and eliminate as much as possible the need for use of a restrictive practice. A positive behaviour support plan must be developed before service providers consider, or gain approval or consent for, the use of restrictive practices.[24]

Section 123L of the Disability Services Act sets out requirements for a positive behaviour support plan. The department currently provides a suggested outline (template) for service providers and a checklist to assist service providers in ensuring that all required information is documented in a positive behaviour support plan.[25]

2.6 Current role of QCAT – Guardianship and Administration Act

The Queensland Civil and Administrative Tribunal (QCAT) currently considers applications for approval to use containment or seclusion, and reviews approvals under Chapter 5B of the Guardianship Act. In addition to QCAT's role under the Guardianship Act, QCAT may also consider applications for review of a review decision under the Disability Services Act.[26]

2.7 Regulation applies to funded service providers

The Disability Services Act applies to a *funded service provider,* which section 14 defines as a service provider that receives funds from that department to provide disability services. The definition includes the department to the extent that it provides disability services. The Bill includes an amendment to clarify the application of the Disability Services Act to funded service providers, discussed in section 3.3 below.

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19 Carol Bunt, Endeavour Foundation, *Public Hearing Transcript*, 17 December 2013, p.1

20 Joanne Jessop, Multicap, *Public Hearing Transcript*, 17 December 2013, p.20

21 Clare O'Connor, Department of Communities, Child Safety and Disability Services, *Public Briefing Transcript*, 5 December 2013, p.2

22 Clare O'Connor, Department of Communities, Child Safety and Disability Services, *Public Briefing Transcript*, 5 December 2013, p.2

23 Clare O'Connor, Department of Communities, Child Safety and Disability Services, *Public Briefing Transcript*, 5 December 2013, p.2

24 Department of Communities, Child Safety and Disability Services, Positive Futures Legislation, accessed from http://www.communities.qld.gov.au/resources/disability/key-projects/positive-futures/positive_futures_legislation, on 13 December 2013

25 Department of Communities, *Guide for developing a positive behaviour support plan, Chemical restraint, mechanical restraint and restricted access to objects*, accessed from http://www.communities.qld.gov.au/resources/disability/key-projects/positive-futures/documents/guide-positive-behaviour-support-plan.pdf on 13 December 2013, p.4

26 Section 212, *Disability Services Act 2006*

2.8 Proposed National Framework for Reducing the Use of Restrictive Practices in the Disability Service Sector

The Explanatory Notes state that a draft "National Framework for Reducing the Use of Restrictive Practices in the Disability Service Sector" is being developed through the Council of Australian Governments' Standing Council on Community, Housing and Disability Services. The draft National Framework focuses on "data collection; person-centred and evidence based planning and practices; and workforce development. It does not set out a detailed regulatory scheme for jurisdictions to adopt".[27]

When briefing the committee, the department advised that the draft National Framework provides high-level principles, and that the department had been involved in consultations on development of the proposed National Framework.[28]

27 Explanatory Notes, p.5

28 *Public Briefing Transcript*, 5 December 2013, p.5

3 Regulation of restrictive practices: purpose and principles

3.1 Introduction

Part 10A of the Disability Services Act regulates the use of restrictive practices on adults with an intellectual or cognitive disability by funded service providers. This chapter discusses proposed amendments to:

- the title and purpose of Part 10A, to reflect the other amendments in the Bill (clauses 4 and 5)
- clarify to whom the regulation of the use of restrictive practices applies (clause 6)
- insert new principles that apply to providing services to adults with an intellectual or cognitive disability if their behaviour causes harm to the adult or others (clause 7).

3.2 Title and purpose – use of restrictive practices

Clause 4 proposes to amend the title of Part 10A from "Use of restrictive practices" to "Positive behaviour support and restrictive practices". The Explanatory Notes state that the amendment is

> *to highlight the importance of positive behaviour support when providing disability services to adults with an intellectual or cognitive disability with behaviour that causes harm or a serious risk of harm to the adult or others.*[29]

UnitingCare Community describes the change in title of Part 10A as "a positive step forward"[30] and the Endeavour Foundation supports the focus on positive behaviour support for all service users not just those subject to restrictive practice.[31]

The Public Advocate suggests that the title of the division in which the positive behaviour support plan is located should also be changed, from "Important concepts for using restrictive practices" to "Important concepts for using a positive behaviour support approach". The Public Advocate states this would better fulfil the policy objectives of the Bill of "emphasising the need for a positive behaviour support approach for all adults with intellectual or cognitive disability and challenging behaviour in funded disability services not just where restrictive practices are required."[32]

3.3 Application of legislation and restrictive practices to funded service providers

3.3.1 Amendments

Clause 6 proposes to add a new subsection (3) to section 123B, to clarify to whom Part 10A applies. The new subsection provides that Part 10A applies to all disability services provided by a funded service provider, even if the disability services are not provided with funding received from the department. A number of submissions raised concerns about the proposed clarification, particularly in respect of adults with a disability who use 'self-directed' funding.

3.3.2 Impact on clients using self-directed funding

UnitingCare Community stated that the application of clause 6 is unclear, particularly in relation to providers who are "fulfilling the role of host provider for families and individuals who are self-directing their funding". Their submission states that it is unclear who would be responsible for developing a positive behaviour support plan if an individual purchases services from several providers.[33] National Disability Services Queensland also raised concerns about the impact on people

29 Explanatory Notes, p.6
30 UnitingCare Community, Submission 16, p.1
31 Carol Bunt, Endeavour Foundation, *Public Hearing Transcript*, 17 December 2013, p.1
32 Public Advocate, Submission 3, p.5
33 UnitingCare Community, Submission 16, p.3; positive behaviour support plans are discussed in Chapter 5 of this report

who choose self-directed services and said "Host Providers will need to apply the costs of compliance with the legislation, which in effect will come directly from the funding package of the individual".[34] Centacare said that some service providers currently have allocated funding for the development of positive support behaviour plans - the cost is not sourced from the individual's package.[35] Life Without Barriers was concerned that individuals may be financially disadvantaged and have less choice if only large service providers have the capacity and expertise to meet the legislative requirements.[36]

The committee notes the range of concerns raised by service providers and asks the Minister to inform the Legislative Assembly of her response to concerns raised in submissions about the impact of the amendments on clients who use self-directed services.

Recommendation 2

The committee recommends that, to address stakeholders' concerns, the Minister inform the Legislative Assembly during the second reading debate of the impact of the amendments of Clause 6 on clients who receive self-directed funding, particularly:

- whether the costs incurred by host providers to comply with the legislation will be paid from an individual's self-directed funding
- who would be responsible for preparation of a positive behaviour support plan for an individual who uses self-directed funding to purchase services from several service providers.

3.3.3 Unfunded service providers

The Adult Guardian considers that ensuring that the restrictive practices regime continues to apply to individuals who move from funded service providers to self-directed funding like Your Life Your Choice and the National Disability Insurance Scheme will "pose challenges".[37]

The Public Advocate stated that, as individualised or self-directed funding increases, there will be an increasing number of services which are not funded by the department. Regulation of the use of restrictive practices currently applies only to funded service providers. In this context Ms Cook said that:

> *There is an increasing potential for the unregulated use of restrictive practices under direct funding models both in the current roll-out of self-directed funding in Queensland and under the NDIS. Planning needs to start now in relation to how there will be continuing safeguards, including regulation of the use of restrictive interventions for people with impaired decision-making capacity, particularly those with intellectual disability or cognitive impairment, through the NDIS.*[38]

The committee notes that further work will be required to ensure that the use of restrictive practices is appropriately regulated as more clients receive self-directed funding, and less of the organisations providing services are directly funded by the department.

34 National Disability Services Queensland, Submission 17, p.8
35 Centacare, Submission 12, p.1
36 Life Without Barriers, Submission 11, p.2
37 Adult Guardian, Submission 7, p.2
38 Public Advocate, Submission 3, p.5

3.4 Principles for providing disability services

3.4.1 Amendments to principles

New principles for providing disability services are proposed to be inserted by clause 7. Proposed new section 123CA provides that a relevant service provider must provide disability services to the adult in a way that, in summary:

- promotes the person's development and physical, mental, social and vocational ability, and opportunities for participation and inclusion in the community
- responds to the adult's needs and goals
- ensures the person and their family and friends have an opportunity to participate in the development of strategies for the person's care and support
- involves positive behaviour support planning, informed by evidence-based best practice
- implements strategies to produce behavioural change, focussed on skills development and environmental design
- ensures transparency and accountability in the use of restrictive practices
- recognises that restrictive practices should only be used when necessary to prevent harm and if it is the least restrictive way to ensure safety
- recognises that restrictive practices should not be used punitively or in response to behaviour that does not cause harm to the adult or others
- aims to reduce the intensity, frequency and duration of behaviour that causes harm
- aims to reduce or eliminate the need to use restrictive practices
- if there is a positive behaviour support plan for the adult—ensures restrictive practices are only used consistent with the plan.

3.4.2 Stakeholders views

The majority of submissions support the proposed amendments to the principles in the Disability Services Act. For example, Queensland Advocacy Inc described the amendments in clause 7 as a positive change,[39] UnitingCare Community was "particularly supportive of the inclusion of principles outlining the way disability services are to be provided",[40] and the Endeavour Foundation welcomed the increased clarity of principles which will reduce the use of restrictive practices.[41]

While stakeholders supported the Bill, a number suggested that it may not strike the appropriate balance between streamlining processes for service providers and protecting the rights of vulnerable adults with an intellectual or cognitive disability who exhibit "challenging behaviours". For example, Jodie Cook, Public Advocate, said her support for the Bill is "qualified by the view that any streamlining of processes should not reduce safeguards".[42] Carers Queensland considered the Bill to have been "drafted from the perspective of, and supports, State funded service providers … as opposed to the perspective of the individual client".[43] Queensland Advocacy expressed concern that the aim of reducing compliance burdens for service providers has overshadowed any enhancements to rights and safeguards for adults, resulting in a "somewhat permissive attitude towards restrictive practices, notably in the immunity provisions".[44]

Most of the specific concerns raised about balancing streamlining for service providers with safeguards for the rights of adults with a disability are discussed in chapters 7 and 8 of this report.

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39 David Manwaring, Queensland Advocacy Inc., *Public Hearing Transcript*, 17 December 2013, p.12
40 UnitingCare Community, Submission 16, p.2
41 Endeavour Foundation, Submission 13, p.2
42 Jodie Cook, Public Advocate, *Public Hearing Transcript*, 17 December 2013, p.16
43 Carers Queensland Inc. Submission 5, p.5
44 David Manwaring, Queensland Advocacy Inc., *Public Hearing Transcript*, 17 December 2013, p.12

4 Amendments to definitions of restrictive practices

4.1 Introduction

The restrictive practices regulated by the Disability Services Act are defined in sections 123E, 123F, 123G and 123H. The Bill proposes amendments to some of these definitions and these are examined in this chapter. Amendments to the definition of *chemical restraint* are considered in detail at section 4.5 of this report.

4.2 Current definitions of types of restrictive practices

Some adults with a cognitive or intellectual disability may display challenging behaviour which could cause harm to themselves or others. There are three types of possible restrictive practice for adults with an intellectual or cognitive disability set out in the Disability Services Act: containment or seclusion, chemical, mechanical or physical restraint, and restricting access to an object. Restrictive practice types under the Disability Services Act are detailed in table 4.1.

Table 4.1: Summary of types of restrictive practice

Restrictive practice	
Containment	An adult is unable to physically leave the place where they receive disability services. This may include locking doors, windows or gates.
Seclusion	An adult is unable to physically leave a room or area where they receive disability services. This may include locking doors, windows or gates. The adult is placed on their own, at any time of the day or night.
Chemical restraint	The use of medicine for the primary purpose of controlling the adult's behaviour. This does not include using medication for treating a diagnosed mental condition or physical illness.
Mechanical restraint	The use of a device to either restrict the free movement of an adult or to prevent or reduce self-injurious behaviour. There are exceptions to this.
Physical restraint	The use of any part of another person's body to restrict the free movement of the adult with the aim of controlling the adult's behaviour.
Restricting access to objects	Limiting the adult's access to an object, for example a kitchen drawer with knives, at a place where the adult receives disability services. This can prevent the adult using the object to cause harm to themselves or others.

Source: Adapted from Queensland Civil and Administrative Tribunal, Restrictive practice types, 13 December 2013, p.1, accessed from http://www.qcat.qld.gov.au/matter-types/guardianship-for-adults-matters/guardian-for-restrictive-practices/restrictive-practice-types

4.3 Proposed amendments to the definitions of restrictive practices

Clause 8 of the Bill amends definitions of *restrictive practice*, *physical restraint*, *seclude* and *restricting access* provided in section 123E of the Disability Services Act. Clause 10 amends the definition of *contain* in section 123G and clause 11 amends the definition of *mechanical restraint* in section 123H.

The amendments to the definitions of *restrictive practice*, *physical restraint*, *seclude*, *restricting access*, *contain* and *mechanical restraint* and the insertion of notes into the definitions, are designed to provide clarity for service providers about what is a restrictive practice. The Explanatory Notes state that the amendments are to make it clear that it is necessary to seek authorisation for interventions when they are used to respond to the behaviour of an adult with an intellectual or cognitive disability that causes physical harm or a serious risk of physical harm to the adult or others

and not for interventions and practices used to assist a person with daily living or therapeutic activities, or used to keep an adult safe where the adult has a skills deficit.[45]

The amendments (in clause 8) insert the same note about *harm* to each of these definitions. The note defines harm to a person as including physical harm to the person and a serious risk of physical harm to the person and refers to the definition of harm provided earlier in section 123E of the Disability Services Act. The note, however, does not include reference to 'damage to property involving a serious risk of physical harm to the person' which is included at (c) of the definition of *harm*. Only parts (a) and (b) of the definition are included in the note.

The Explanatory Notes do not comment on why the full definition of harm has not been included in the notes inserted into the Disability Services Act. The committee considers that this drafting approach may lead to confusion rather than clarity, and create further ambiguity and uncertainty for service providers. This issue is considered further in the committee's consideration of fundamental legislative principles at chapter 8.

The Disability Services Act currently provides a number of examples of *restricting access* to objects. The Explanatory Notes state that clause 8 of the Bill amends the examples to make it clearer to service providers that *restricting access* means restricting access to an object (e.g. knives) in response to the behaviour of an adult that causes physical harm, or a serious risk of physical harm, to the adult or others.[46]

4.4 Stakeholder views on amendments to definitions

In her introduction speech, the Minister said the amendments to definitions aim to reduce "the confusion that service providers have identified around understanding when a restrictive practice is classed as a restrictive practice and, therefore, requires authorisation". The Minister explained that the lack of clarity has resulted in service providers applying for unnecessary approvals.[47]

In its briefing on the Bill for the committee, the department noted that the intent of the amendments to the definitions of restrictive practices was to:

> *make it very clear what is a restrictive practice and what is not, so simply guiding someone to prevent them from running into traffic makes good sense. People should not have to apply for an approval for that.*[48]

The Explanatory Notes provide additional examples to illustrate practices that are not considered restrictive practices but that, rather, are required to assist the adult with daily living or to keep an adult with a skills deficit safe.[49]

At the public hearing, Carol Bunt of the Endeavour Foundation noted the improvements in the clarity of the restrictive practices definitions, which she believes better explains some of the practicalities.[50] In its submission Queensland Advocacy Inc. also commended greater clarity provided through improved definitions and examples.[51]

45 Explanatory Notes p.7, Clause 8
46 Explanatory Notes p.7, Clause 8
47 Hon. Tracy Davis MP, Minister for Communities, Child Safety and Disability Services, Introduction speech, Disability Services (Restrictive Practices) and Other Legislation Amendment Bill, 20 November 2013, Queensland Parliament *Record of Proceedings* (Hansard), p.4054
48 Clare O'Connor, Department of Communities, Child Safety and Disability Services, *Public Briefing Transcript,* 5 December 2013, p.3
49 Explanatory Notes, p.7
50 Carol Bunt, Endeavour Foundation, *Public Hearing Transcript*, 17 December 2013, p.1
51 Queensland Advocacy Inc., Submission 15, p.10

The Adult Guardian noted in his submission that he supports the changes in the definitions to provide greater clarity.[52]

The AMA Queensland noted the amendments and supported in principle the importance of reducing confusion about when a restrictive practice should be classed as such and thus require authorisation. AMA Queensland stressed that "a lesser degree of oversight requires a higher degree of education around the use of restrictive practices" and that appropriate training for health professionals should always be considered.[53]

4.4.1 Guidance material

In its submission, UnitingCare Community noted that, while some clarity would be provided by the amendments to the definitions in clauses 8, 9, 10 and 11, "in the main" the detail of examples and explanation are in the Minister's introduction speech and the Explanatory Notes. UnitingCare Community calls for more "full and clear" guidance for service providers, families and others as well as advice about effective strategies. UnitingCare Community suggests that more detailed explanation, reasoning and supporting evidence could be provided in a practice guide or some other form of departmental advice for service providers.[54]

In its submission, Multicap indicated disappointment that the examples of *restricted access* continued to include restrictions due to "defined and documented medical diagnoses" such as food for someone with Prader-Willi.[55] In Multicap's view, these should be covered in a person's health care plan and not considered a restrictive practice.[56] At the public hearing, Joanne Jessop of Multicap noted that, while legislation can focus attention on practices and drive improvement, in her view, improvements in practice with regard to restrictive practices had also come about as a result of the increased resources and expertise that had been made available to the sector.[57]

Centacare, while welcoming the improved clarity of the amended definitions, noted that there was "still a level of ambiguity in the interpretation of some practices, specifically those that may fall under restricted access or duty of care". Centacare suggested that departmental guidelines expand on what constitutes a restrictive practice.[58] Quality Lifestyle Support also suggested that more detailed advice was required about what is, and is not, a restrictive practice.

National Disability Services Queensland (NDS Qld) supports the amendments to the definitions of restrictive practices and identified a number of issues in relation to physical restraint, chemical restraint and restricted access to objects that it considers require clarification.[59]

4.4.2 Committee comment

The committee acknowledges the complexity of defining restrictive practices that require authorisation and commends the aim of the amendments. The committee notes the importance of providing consistent and detailed advice for service providers in applying the requirements of the legislation in practice and the concerns expressed by service providers. The committee notes that the Minister has advised that, in addition to these legislative changes, the government will make a number of changes to policy, practice, education and training. The committee suggests that the Minister ask the department to give priority to developing a comprehensive practice guide on what constitutes a restrictive practice.

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52 Adult Guardian, Submission 7, p.2

53 AMA Queensland, Submission 8, p.2

54 UnitingCare Community, Submission 16, p.2

55 People with Prader-Willi syndrome can have an extreme and insatiable appetite.

56 Multicap, Submission 6, p.2

57 Joanne Jessop, CEO, Multicap, *Public Hearing Transcript*, 17 December 2013, p.23

58 Centacare, Submission 12, p.2

59 National Disability Services Queensland, Submission 17, pp.2&3

4.5 Definition of 'chemical restraint'

4.5.1 Amendments to definition of 'chemical restraint'

Under section 123F of the Disability Services Act, chemical restraint of an adult with an intellectual or cognitive disability means

> *(1) ……the use of medication for the primary purpose of controlling the adult's behaviour*
>
> *(2) However, using medication for the proper treatment of a diagnosed mental illness or physical condition is not chemical restraint.*
>
> *(3) To remove any doubt, it is declared that an intellectual or cognitive disability is not a physical condition.*
>
> *(4) In this section –*
>
> ***diagnosed,** for a mental illness or physical condition, means a doctor confirms the adult has the illness or condition.*
>
> ***mental illness** see the Mental Health Act 2000, section 12.*[60]

Clause 9 of the Bill amends the current definition of *chemical restraint* to clarify that chemical restraint is used for the primary purpose of controlling an adult's behaviour in response to behaviour of the adult that causes physical harm or a serious risk of physical harm to the adult or others, in line with the amendments to other definitions of restrictive practices to be made by clauses 8, 10 and 11 of the Bill and discussed at section 4.3 above.[61]

Clause 9 also amends section 123F to clarify that using medication, for example a sedative, prescribed by a medical practitioner to facilitate or enable an adult to receive a single instance of healthcare under the Guardianship Act is not an instance of chemical restraint.[62] The amendment inserts an example that is not chemical restraint, of sedating an adult before attending a dentist appointment.

The department advised the committee that there had been confusion about whether the use of medication in this circumstance constituted a restrictive practice. The department said it had been advised by the Adult Guardian that the use of prescribed medication in this way was not chemical restraint. Therefore, the amendment ensures that this is now reflected in the definition.[63]

4.5.2 Stakeholder views on amendments to definition of chemical restraint

Evidence given at the public hearing and in submissions indicated that stakeholders had concerns about the definition of *chemical restraint* and the proposed amendments.

The Public Advocate was particularly concerned about clause 9 of the Bill's amendment to the definition of *chemical restraint* to insert a subsection 2(b) into 123F to clarify that using medication, for example a sedative, prescribed by a medical practitioner to facilitate or enable the adult to receive a single instance of health care under the Guardianship Act was not *chemical restraint*. At the public hearing the Public Advocate advised the committee that she believed this amendment "may create uncertainty with respect to the definition of health care in the *Guardianship and Administration Act 2000*".[64] The Public Advocate explained in her submission that there is no specific

60 *Disability Services Act 2006*, section 123F
61 Explanatory Notes, p.7, Clause 9, Disability Services (Restrictive Practices) and Other Legislation Amendment Bill 2013
62 Explanatory Notes, p.7, Clause 9, Disability Services (Restrictive Practices) and Other Legislation Amendment Bill 2013
63 Clare O'Connor, Department of Communities, Child Safety and Disability Services, *Public Briefing Transcript,* 5 December 2013, pp.4&10
64 Jodie Cook, Public Advocate, *Public Hearing Transcript*, 17 December 2013, p.16

provision in the Guardianship Act that allows for sedation of adults to "facilitate health care" and that there had been no consultation on the amendment.[65]

The Public Advocate therefore recommended that this amendment not proceed until it is "subject to further consultation if and when amendments are made to the *Guardianship and Administration Act 2000*". If the amendment to the definition of *chemical restraint* goes ahead, her view was that the wording of the new subsection should be clarified by inserting that the medication is prescribed "for the specific purpose of facilitating or enabling" the adult to receive the health care.[66]

The Public Advocate also queried the appropriateness of the inserted example that is part of the new subsection 2(b) of section 123F. She argued that the example suggests that the sedation is not being used to receive the health care, but to facilitate transport to the health care provider because the adult's behaviour may otherwise cause harm to themselves or others. She said that this clearly meets the definition of *chemical restraint*.[67]

The Public Advocate also noted that the Queensland Law Reform Commission's recommendation, in its 2010 report *A Review of Queensland's Guardianship Laws,* that the issue of the administration of anti-libidinal medication be considered when the restrictive practices legislative framework was next reviewed are not addressed in the amendments proposed by the Bill.[68]

While Queensland Advocacy Inc. generally supported the amendments to definitions to provide greater clarity, its view is that the amendment to the definition of chemical restraint should be "reassessed and made more specific", as the inserted phrasing "could be interpreted too widely, resulting in unnecessary and or illegal chemical restraint".[69]

The Adult Guardian welcomed the clarification regarding the use of sedatives provided by clause 9.[70]

The Endeavour Foundation recommended that further consideration be given to the issues of identification and reduction of chemical restraints by medical practitioners. It argues that this requires improved communication and education about restrictive practice.[71] In her evidence at the public hearing, Carol Bunt explained that:

> *It can be a fine line between medication and chemical restraint, and we do need it identified by those medical practitioners. At times there is an unwillingness to identify it as chemical restraint. Therefore, if you have not got it identified, how can you then put together a plan to reduce its use?*[72]

In its submission, Multicap noted the "ongoing disagreement and confusion, with different medical practitioners and specialists, members of QCAT, Adult Guardian, and families often having differing views".[73] Multicap welcomed the clarification that a single dose of medication to facilitate healthcare was not considered a restrictive practice.[74] The Queensland Law Society also indicated concerns about the role of medical practitioners and their understanding of restrictive practices and the legislative framework, including behaviour support plans.[75]

65 Public Advocate, Submission 3, p.9
66 Public Advocate, Submission 3, p.10
67 Public Advocate, Submission 3, p.10
68 Public Advocate, Submission 3, p.19
69 Queensland Advocacy Inc., Submission 15, p.3
70 Adult Guardian, Submission 7, p.2
71 Endeavour Foundation, Submission 13, p.6
72 Carol Bunt, Endeavour Foundation, *Public Hearing Transcript*, 17 December 2013, p.6
73 Multicap, Submission 6, p.2
74 Multicap, Submission 6, p.2
75 Quality Lifestyle Support, Submission 14, p.8

The issue of who can appropriately approve and administer a chemical restraint was raised by the Queensland Council for Civil Liberties. It recommended that the Bill specify this to be an independent and appropriately qualified physician.[76] The committee notes that the appropriate prescribing and administration of medication is already regulated by other legislation.

4.5.3 Committee comment

The committee noted the Public Advocate's concerns about the amendment to the definition of chemical restraint to insert a subsection 2(b) into 123F to clarify that using medication, for example a sedative, prescribed by a medical practitioner to facilitate or enable the adult to receive a single instance of health care under the Guardianship Act is not *chemical restraint*. On 17 December 2013, after the public hearing, the committee asked the department for comment on the interaction of the proposed definition of *chemical restraint* and Guardianship Act definition of *health care* and the suggestion from the Public Advocate that the amendment not proceeds until further consultation is undertaken.

The department advised the committee that the term 'single instance' had been used to "clarify that where a sedative is required for the primary purpose of enabling health care to take place, the giving of that medication is part of the health care provided to the adult". The amended definition means that, for people with impaired capacity, the single use of the medication will be considered part of the *health care* being provided to the adult. Therefore, consent to administer the medication will be dealt with under the legislative framework for gaining consent for health care as established in the Guardianship Act rather than under the restrictive practices framework provided by the Disability Services Act.[77]

The department notes that, in the Guardianship Act, *health care* is defined at Schedule 2. Consent to the use of medication to facilitate or enable the provision of health care to an adult with impaired capacity is dealt with under section 66 of that Act unless sections 63 (Urgent health care), 63A (Life-sustaining measures in an acute emergency) or 64 (Minor uncontroversial health care) apply. If those sections apply, no consent is required. Unless no consent is required, the person who consents to the health care for the adult under section 66 would also consent to the giving of the sedative to facilitate or enable the provision of the health care. The department's response advises that the amendment to the definition of *chemical constraint* in the Bill "does not alter in any way the current consent regime under the GAA or allow a service provider to give a medication prescribed for an adult in a manner other than in compliance with the prescription."[78]

Recommendation 3

The committee recommends that the Minister inform the Legislative Assembly during the second reading debate of her response to concerns about possible confusion regarding the interaction of Clause 9(2) of the Bill, which would amend the definition of *chemical constraint*, with the definition of *health care* under the *Guardianship and Administration Act 2000.*

76 Queensland Council for Civil Liberties, Submission 10, p.2

77 Email from Clare O'Connor, Executive Director, Department of Communities, Child Safety and Disability Services, *Correspondence*, 17 January 2014, Attachment - 'Response to question 6', p.1

78 Email from Clare O'Connor, Executive Director, Department of Communities, Child Safety and Disability Services, *Correspondence*, 17 January 2014, Attachment - 'Response to question 6', p.2

5 Positive behaviour support plans

5.1 Introduction

The Bill proposes amendments to section 123S of the Disability Services Act (Development of positive behaviour support plan following assessment) and section 123ZF (Requirements for development of positive behaviour support plan – assessment and consultation) to require the chief executive and service providers to have regard to a model positive behaviour support plan in developing an adult's positive behaviour support plan.[79]

5.2 What is a behaviour support plan?

Clause 13 of the Bill proposes to replace current section 123L of the Disability Services Act to provide that a positive behaviour support plan for an adult with an intellectual or cognitive disability is a plan that describes the strategies to be used to:

- meet the adult's needs
- support the adult's development of skills
- maximise opportunities through which the adult can improve their quality of life
- reduce the intensity, frequency and duration of the adult's behaviour that causes harm to the adult or others.[80]

5.3 What a plan must include

Proposed new section 123L(2) provides that a positive behaviour support plan must include at least:

- the intensity, frequency, duration and consequences of the previous behaviour of the adult
- the early warning signs and triggers for previous behaviour, if known
- positive strategies that must be attempted before using a restrictive practice
- for each proposed restrictive practice:
  - the circumstances in which the restrictive practice is to be used
  - why use of the restrictive practice is the least restrictive way of ensuring the safety of the adult and others
  - the procedure for using the restrictive practice, included how it will be monitored to ensure the adult's proper care and treatment
  - any other measures that must happen while the restrictive practice is being used to ensure that the adult is safeguarded from abuse, neglect and exploitation
  - a description of the anticipated positive and negative effects on the adult of using the restrictive practice
  - how often the use of the restrictive practice will be reviewed by the relevant service provider
- for seclusion, the maximum period it may be used at any one time and the maximum frequency of the seclusion
- for chemical restraint
  - details of medication to be used and any available information about it, including for example, possible side effects
  - the dose, route and frequency of administration including the circumstances in which 'as needed' medication may be administered
  - if the medication has been reviewed by the treating doctor, the date of the most recent review
  - name of the treating doctor

79 Explanatory Notes, p.7
80 Explanatory Notes, p.13

- for mechanical and physical restraint, the maximum period for which it may be used at any one time.

A number of requirements of the plan are proposed to be removed from the Disability Services Act to ensure that the plans contain necessary details only and are useable for support workers in practice.[81] The requirements proposed to be removed include the suitability of the environment for adults who are to be secluded or contained and details about assessment outcomes.[82]

5.3.1 Quality and length of positive behaviour support plans

The department advised the committee that positive behaviour support plans can currently be up to 100 to 150 pages, creating difficulty for support workers and decision makers in using them.[83] The department advised that amendments to the prescriptive requirements had the potential to reduce the size of plans to 20 pages whilst still taking account of a person's needs.[84]

Submitters had divergent views about the length of positive behaviour support plan documents. Some considered that plans tend to be long and repetitive and do little to recognise adult's needs.[85] Others suggested that a plan should not be judged on its size and that the complexity of an individual adult's needs may necessitate a long plan.[86] It was suggested that, currently, positive behaviour support plans tend to focus on compliance rather than best practice and meeting an individual's needs.[87] The Adult Guardian stated that a plan should suit the interests and requirements for each individual for whom a plan is required.[88]

A number of submitters indicated that reduction in red tape was a positive development and supported the requirement to continue to undertake assessments but not include the clinical detail in the plan.[89] Multicap considered that current plans offer a good 'whole of life' commentary and emphasised the value of historical, environmental and contextual information that is important in improving quality of life.[90]

5.3.2 Consultation in development of behaviour support plan

The Queensland Law Society suggested that there was a need "to ensure that the adult and interested persons are involved in decision making and providing feedback for the adult's positive behaviour support plan".[91] At a minimum, it was proposed that "the adult, the adult's support network and treating doctors be involved and provide feedback for consideration". [92] While there would not always be consensus on plans, the Queensland Law Society argued there should be an opportunity for family or others in the person's network to have input into a plan. An amendment to

81 Explanatory Notes, p.8
82 See section 123L, *Disability Services Act 2006*
83 Clare O'Connor, Department of Communities, Child Safety and Disability Services, *Public Briefing Transcript*, 5 December 2013, pp.3–5
84 Clare O'Connor, Department of Communities, Child Safety and Disability Services, *Public Briefing Transcript*, 5 December 2013, p.5
85 Quality Lifestyle Support, Submission 14, p.3; Uniting Care Community, Submission 16, p.2
86 Carol Bunt, Endeavour Foundation, *Public Hearing Transcript*, 17 December 2013, p.1
87 Quality Lifestyle Support, Submission 14, p.3; Professor Nankervis, Department of Communities, Child Safety and Disability Services, *Public Briefing Transcript*, 5 December 2013, p.3; and Multicap, Submission 6, p.3
88 Adult Guardian, Submission 7, p.3
89 Queensland Advocacy Inc. Submission 15, p.10; National Disability Services Queensland, Submission 17, p.1; Carers Queensland, Submission 5, p.7; Anti-Discrimination Commission Queensland, Submission 4, p.2; and UnitingCare Community, Submission 16, p.2
90 Multicap, Submission 6, p.3; National Disability Services Queensland, Submission 17, p.4
91 Karen Williams, Queensland Law Society, *Public Hearing Transcript*, 17 December 2013, p.9
92 Karen Williams, Queensland Law Society, *Public Hearing Transcript*, 17 December 2013, p.9

the Bill "would signal the intention that there be broader consultation by listing the people to be notified and involved".[93]

5.3.3 Committee view

The committee considers that it would be beneficial for adults who have a positive behaviour support plan and people in their support network and treating doctors to have the opportunity to participate in the development of the plan. It therefore recommends an amendment to clause 13 to this effect.

Recommendation 4

The committee recommends that the Minister introduce an amendment to clause 13, to provide that the adult, people in their support network such as family members, and the adult's treating doctor, are encouraged, and are given the opportunity, to participate in the development of the adult's positive behaviour support plan.

5.3.4 Review of positive behaviour support plan

Proposed new section 123L (clause 13) requires that a positive behaviour support plan include the intervals at which use of the restrictive practice will be reviewed by the relevant service provider using the restrictive practice (proposed section 123L(2()(vi)). Some stakeholders noted that there was no positive obligation in the legislation to actually undertake a review.[94]

5.4 Model positive behaviour support plan

5.4.1 Amendments

Clause 8 of the Bill proposes to add a definition in section 123E of the Disability Services Act for a *model positive behaviour support plan*. Clause 8 provides that a *model positive behaviour support plan* means "a plan of that name prepared by the chief executive and published on the department's website".

Currently there is no requirement for a model plan in the Disability Services Act. The proposed model plan would replace a template the department has developed for service providers, which includes the current requirements of section 123L of the Disability Services Act.

5.4.2 Consultation and transitional arrangements

The department advised that it is in the process of developing guidelines and a model plan (or template) for a positive behaviour support plan based on best practice.[95] The committee has not seen a copy of the draft model positive behaviour support plan, and understands that a consultation on a draft with service providers commenced in December 2013.[96] A number of submitters support the introduction of a model plan to provide guidance in the development of positive behaviour support plans.[97]

National Disability Services Queensland (NDS Qld) submitted that the draft model positive behaviour support plan released in December 2013 does not address a range of considerations raised by service

93 Karen Williams, Queensland Law Society, *Public Hearing Transcript*, 17 December 2013, p.12

94 Jodie Cook, *Public Hearing Transcript,* 17 December 2013, p.19; Cole Naylor, Endeavour Foundation, p.3

95 Explanatory Notes, p.3; and Professor Karen Nankervis, Department of Communities, Child Safety and Disability Services, *Public Briefing Transcript*, 5 December 2013, p.7

96 National Disability Services Queensland, Submission 17, p.3

97 National Disability Services Queensland, Submission 17, p.3; Public Advocate, Submission 3, p.14; Anti-Discrimination Commission Queensland, Submission 4, p.2; Queensland Advocacy Inc., Submission 15, p.10; and Centacare, Submission 12, p.1

providers in consultations. The NDS Qld submission details a variety of concerns which NDS Qld has raised with the department. Life Without Barriers also suggested that the draft model plan was inadequate and did not provide adequate information or strategies to enhance an individual's quality of life.[98]

Clause 18 of the Bill would amend section 123S of the Disability Services Act to provide that, in developing a positive behaviour support plan following assessment, the chief executive must "have regard to model positive behaviour support plan …". Three submissions sought clarification of the meaning of "have regard to" in this context.[99]

A number of submitters sought clarification of the transition requirements for the model plan, in particular whether current positive behaviour support plans would be required to be re-written after amendments are passed and commenced.[100]

5.4.3 Committee view

The committee encourages the Minister to ensure that the department consults fully with service providers and disability advocacy organisations about the proposed model positive behaviour support plan.

In light of stakeholders concerns about the potential administrative burden of replacing existing positive behaviour support plans with new versions, the committee recommends that the Minister inform the Legislative Assembly about proposed transitional arrangements, and particularly any requirements for revision or re-writing of existing positive behaviour support plans.

Recommendation 5

The committee recommends that the Minister inform the Legislative Assembly of the proposed timing of introduction of provisions about positive behaviour support plans, and specifically respond to stakeholders' concerns about whether and when service providers would be required to re-write existing positive behaviour support plans to be consistent with the model positive behaviour support plan.

98 Life Without Barriers, Submission 11, p.2

99 Centacare, Submission 12, p.1; Multicap, Submission 6, p.3; and National Disability Services Queensland, Submission 12, p.1

100 Multicap, Submission 6, p.3; UnitingCare Community, Submission 16, p.3; and National Disability Services Queensland, Submission 17, p.4

6 Approval to use a restrictive practice and service provider immunity

6.1 Current approval or consent to use of a restrictive practice

The source of approval to use a restrictive practice varies according to the nature of the restrictive practice, and the type of services being provided for the adult for whom the restrictive practice is to be applied. Decisions about use of the most serious restrictions are made by QCAT, and other decisions are made by a guardian for restrictive practices (who is appointed by QCAT), the Adult Guardian, the chief executive of the department, or an informal decision maker (e.g. a relative). The summary below of who may approve or consent to the use of each type of restrictive practice in different settings is based on information provided to the committee by the department.[101]

Containment or seclusion

- Approval to use containment or seclusion on an adult who receives accommodation or community support services is decided by QCAT (except for short term approval).
- If only disability respite or community access services are provided, a guardian for a restrictive practice (respite) matter may consent to the use of containment or seclusion.
- Short-term approval, for up to six months, may be given by the Adult Guardian if the adult's behaviour has previously resulted in harm and there is an immediate and serious risk that the adult's behaviour will cause harm if the approval is not given, and containment or seclusion is the least restrictive way of ensuring safety.[102]

Physical, mechanical or chemical restraint

- If accommodation services are provided, a guardian for a restrictive practice (general) matter appointed by QCAT may consent to use of physical, mechanical or chemical restraint.
- If only disability respite or community access services are provided, a guardian for a restrictive practice (respite) matter may consent, or if there is no guardian, an informal decision maker may consent to physical, mechanical or fixed dose chemical restraint.
- In an emergency where there is no guardian for a restrictive practice (general) matter or the guardian has not made a decision, the chief executive of the department may give a short term approval to use physical, mechanical or chemical restraint.

Restricting access to objects

- If accommodation services are provided, a guardian for a restrictive practice (general) matter appointed by QCAT may consent to restricting an adult's access to objects
- If there is no guardian, an informal decision maker may consent.
- If only disability respite or community access services are provided, a guardian for a restrictive practice (respite) matter may consent, or if there is no guardian, an informal decision maker may consent to restricting an adult's access to objects.
- In an emergency, if there is no guardian for a restrictive practice (general) matter or the guardian has not made a decision, the chief executive of the department may give a short term approval to restrict access to objects.

The Bill does not change who may approve the use of a restrictive practice, but it proposes changes to some of the matters that must be considered in making a decision. It also extends immunity for service providers for up to 30 days while an application for approval to use a restrictive practice is considered.

101 See table prepared by Department of Communities, Child Safety and Disability Services at Appendix C
102 See section 80ZH, *Guardianship and Administration Act 2000*

6.2 Containment and seclusion – additional matters QCAT may consider

Clause 41 proposes to add a new subsection (2) to section 80W of the Guardianship Act. The proposed subsection lists additional matters the tribunal may consider when deciding whether to give approval to use containment or seclusion. No changes are proposed to the current matters that the tribunal must consider. The additional matters reflect those that the Bill removes as required content for a positive behaviour support plan.[103] In summary, the additional matters that QCAT may consider are:

- the findings, theories and recommendations of those who assessed the adult
- if there was a difference of opinion between those who assessed the adult, how it was taken into account in developing he positive behaviour support plan
- the views of those consulted during assessment and development of the positive behaviour support plan about the use of containment or seclusion
- the way that staff who implement the positive behaviour support plan will be supported and supervised.

6.3 Short term plan and short term approval to use a restricted practice

6.3.1 Current requirements

Under the Guardianship Act, the Adult Guardian may give a short term approval (up to six months) to use containment or seclusion. Currently a short term plan must be submitted for approval.[104] The Disability Services Act provides for the chief executive of the department to give a short term approval for a restrictive practice other than containment or seclusion. A short term plan must be submitted within 14 days of the short term approval and the chief executive decides under section 123ZN whether to approve the short term plan.

The current required content of short term plan is at least: a description of the adult's behaviour that causes harm, including the consequences of the behaviour; a description of the restrictive practices used; the reasons for using the restrictive practices, and a demonstration of why using the restrictive practices is the least restrictive way of ensuring the safety of the adult or others.[105]

6.3.2 Requirement for short term plan omitted

Clauses 23 and 46 propose amendments to the Disability Services Act and the Guardianship Act to remove requirements for a short term plan in connection with a short term approval. Clause 46 amends section 80ZH and 80ZK of the Guardianship Act to remove references to a short term plan, replaces section 80ZI and omits 80ZJ about short term plans. The definition of *short term plan* is omitted from the dictionary in both the Guardianship Act and the Disability Services Act. Clause 23 omits references to a short term plan from section 123ZD regarding the use of restrictive practices under a short term approval, and from record keeping requirements in the Disability Services Act.

The Explanatory Notes state:

> *Service providers have noted that the multi-layered approval process to obtain short term approval (requiring an approval and then the development of a short term plan) involves duplication of information provided to the decision maker and can result in delays in receiving approvals.*
>
> *The requirement for a short term plan as part of the short term approval process has been removed to reduce the regulatory burden associated with seeking a short term*

103 Explanatory Notes, p.14
104 Sections 80ZH to 80ZJ, *Guardianship and Administration Act 2000*
105 Section 123ZM, *Disability Services Act 2006*

> *approval. However, the legislation retains the same minimum requirements that the Adult Guardian must be satisfied of in providing a short term approval.*[106]

The Endeavour Foundation, Multicap and Centacare supported removal of the requirements for a short term plan as a positive step toward reduction of administrative requirements.[107] Carers Queensland supports the minimisation of administrative process that are duplicated, but cautions about reducing processes necessary for competent decision making and professional and culturally responsive service delivery.[108]

6.4 Short term approval of containment or seclusion – proposed service provider

6.4.1 Amendments

Clause 47 proposes to replace section 80ZI of the Guardianship Act with a new section to enable the Adult Guardian to give short term approval (of up to six months) to use containment or seclusion on an adult to whom the service provider is not providing services, but proposes to do so. The Adult Guardian would need to be satisfied of the same matters as for other short term approvals, which are set out in section 80ZH.

The Department advised the committee that where there is consent to the use of restrictive practice and the person moves to a new service provider:

> *… it is difficult under the legislation – I think it is impossible – for them to immediately apply for a short-term approval, so we want to remove that block and make it easier for people to move and have the proper protections in place.*

The Explanatory Notes state that the new provision:

> *will allow a service provider who will be providing services to an adult, where the use of containment or seclusion is needed to keep the adult or others safe from harm, to apply for that approval so it is in place when the adult starts receiving disability services from the new provider.*[109]

6.4.2 Stakeholders views and recommendations

A number of stakeholders raised issues about a short term approval for a service provider who has not begun providing services. Service providers support the concept, advocacy organisations raised concerns about possible assumptions that the same restrictive practices would be required in a different environment, and others suggested that the issues would be resolved if a positive behaviour support plan and approval for the use of restrictive practice was attached to the individual rather than the service provider.

Assumption that restrictive practices are required

Queensland Advocacy Inc argued that clause 47 may pre-empt the use of restrictive practices which are not needed. It cited an example where a change of service provider was proposed for a person who had been subject to containment for 24 hours a day and seclusion for up to 12 hours a day, and expressed concern that clause 47 will allow a service provider to assert the need to use restrictive practices without any onus of proof.[110]

> *At an urgent QCAT hearing to stop the transition to a new service provider both the (department) and the old service provider expressed concerns that the new service*

106 Explanatory Notes, p.15
107 Endeavour Foundation, Submission 13, p.2; Multicap, Submission 6, p.2; Centacare, Submission 12, p.2;
108 Carers Queensland Inc., Submission 5, p.7
109 Explanatory Notes, pp.15–16
110 QAI, Submission 15, p.9

> *provider did not propose to use restrictive practices and that these restrictive practices were needed to keep both the community and the person safe. The new service provider, however, wanted to wait until after they had undertaken their own assessment and had a chance to become familiar with the person before deciding on whether to use restrictive practices or not. The new service provider has never seen the need to use or even to apply for the use of restrictive practices.*[111]

In light of those concerns, Queensland Advocacy Inc suggested that there should be a requirement for review, within 30 days, of the need for a restrictive practice that is approved before the service provider delivers services.[112]

Clarification – "positive behaviour support plan being implemented"

The Public Advocate suggested it is unclear whether, for a new service provider to have immunity from liability, it would be required to be implementing a positive behaviour support plan developed by the previous service provider, or a new one developed by the new service provider.[113] This issue of "implementing a positive behaviour support plan" arises more broadly in relation to the capacity of service providers to use restrictive practices prior to approval and to have immunity and is discussed in section 6.5 below.

An alternative approach

Some stakeholders suggested that issues that arise when a person changes service providers, obtains services for the first time, or uses self-directed funding, could be addressed if authorisation to use a restrictive practice (and the positive behaviour support plan), attached to the individual rather than to the service provider. For example, Multicap believes "the plan should follow the individual on their life journey".[114]

The Queensland Law Society recommended that:

> *To assist with portability issues and to ensure resource efficiency, we also consider that the support plan (similar to forensic orders) should attach to the person, not to the service provider … there is a marked rigidity in having the plan attach to the service provider … clarifying that QCAT orders (for example) are to be attached to the person would reduce red tape as it reduces the need to have orders for numerous guardians and service providers.*[115]

6.4.3 Committee view

The committee notes the concerns raised by stakeholders about approval to use a restricted practice before a service is provided, and also notes that there may be emergent circumstances where the safety of the adult and others may be at risk if a restrictive practice is not used. The committee suggests that the Minister consider adding further safeguards to ensure that the rights of vulnerable adults with a disability are adequately protected.

The committee encourages the Minister to consider future arrangements for self-directed funding and the NDIS, in particular, the option of positive behaviour support plans and approvals for the use of a restrictive practice attaching to an individual rather than to a service provider.

111 David Manwaring, Queensland Advocacy Inc., *Public Hearing Transcript*, pp.13–14
112 Queensland Advocacy Inc., Submission 15, p.7
113 Public Advocate, Submission 3, p.13
114 Multicap, Submission 6, p.3
115 Queensland Law Society, Submission 9, p.3

6.5 Restrictive practices may be used while awaiting short term approval or consent

6.5.1 Use of containment or seclusion while awaiting Adult Guardian's short term approval

Clause 17 inserts proposed section 123OA in the Disability Services Act to enable a relevant service provider who has sought a short term approval from the Adult Guardian to use containment or seclusion, and the request has not been decided. The service provider may use containment or seclusion until the Adult Guardian notifies the service provider of their decision, or for 30 days from the application, whichever is earlier. The adult's consent is not necessary before use of containment or seclusion.

6.5.2 Use of other restrictive practices while awaiting the chief executive's short term approval

Clauses 22 and 24 propose amendments to the Disability Services Act which would enable a *relevant service provider* to use restrictive practices (other than containment or seclusion) without express approval in specified circumstances. In summary those clauses provide that:

- chemical, mechanical or physical restraint, or restricting access to an object, may be used if an application for short term approval has been made to the chief executive of the department and the decision has not been made (clause 24, proposed section 123ZDA)
- chemical, mechanical or physical restraint, or restricting access to an object, may be used if the Adult Guardian is the guardian for a restrictive practice matter, the service provider has asked the Adult Guardian for consent at least 30 days before the existing consent ends, and the Adult Guardian has not made a decision (clause 22, proposed section 123ZCA).

Stakeholders raised significant concerns about these clauses (in combination with clauses 17 and 30) regarding the rights of adults with a disability and the needs of service providers. Broadly, the proposed amendments were supported by service providers. Concerns raised about the impact on rights of adults with a disability of the combined effect of those clauses are discussed in relation to immunity for service providers at section 6.6 below. Discussion of other specific concerns follows.

6.5.3 Stakeholder concerns about clarity of the amendments

The proposed amendments which enable the use of a restrictive practice before it is authorised specifies the circumstances, one of which is that "a positive behaviour support plan or a respite/community access plan for the adult is being implemented" (clause 17, proposed section 123OA(1)(c) and clause 24, proposed section 123ZDA(1)(c)). Some stakeholders sought clarification of this sub-clause.[116]

The Public Advocate submitted that it is unclear whether it is intended that a service provider will have developed a positive behaviour support plan before applying for a short term approval and is implementing that plan.[117] In its submission Life Without Barriers described situations where it is unlikely that a positive behaviour support plan would be in place, so that it was "being implemented", for example:

- an adult has recently commenced using the service
- a restrictive practice is urgently required due to emergent behaviour.[118]

In addition, when a short term approval is sought by a proposed service provider (see section 6.4 above), it is unclear whether the positive behaviour support plan that is "being implemented" is

116 For example, Submissions 3, 11, 12
117 Public Advocate, Submission 3, p.11
118 Life Without Barriers, Submission 11, p.3

intended to be the plan developed by the previous service provider, or if the proposed service provider is to develop a plan before it provides services to the person.[119]

In light of the concerns raised, the committee recommends that the Minister clarify the meaning of proposed sections 123OA(1)(c) and 123ZDA(1)(c). The committee considers it important that the circumstances in which a service provider may use a restricted practice without express authority are clearly understood, and that the consequent scope of immunity for service providers is unambiguous.

Recommendation 6

The committee recommends that the Minister inform the Legislative Assembly during the second reading debate of the intended operation of proposed sections 123OA(1)(c) and 123ZDA(1)(c) to clarify the circumstances in which a service provider may use a restricted practice without express authority, particularly if there is no positive behaviour support plan or the adult is transferring to a new service provider, and the consequent scope of immunity for service providers.

6.5.4 Period a restrictive practice may be used while awaiting approval or consent

As noted above, a service provider may use a restrictive practice for up to 30 days while waiting for the Adult Guardian's decision on approval, or consent; and while waiting for the chief executive's short term approval. The Explanatory Notes describe the safeguards in place during the period while awaiting a short term approval or consent from either the Adult Guardian or the chief executive:

> *However, during this period, the service provider may only use the restrictive practice where use of the practice is necessary to prevent the adult's behaviour causing physical harm or a serious risk of physical harm to the adult or others; is the least restrictive way of ensuring the safety of the adult or others; and a positive behaviour support plan or respite/community access plan is being implemented for the adult.*[120]

If containment or seclusion are used during the 30 day period, clause 17 also requires that section 123Z (Relevant service provider to ensure adults needs are met) is complied with.

6.5.5 Committee comment

The committee recognises that there may be good reasons that, on occasion, a decision on a short term approval or consent may not be reasonably made within 30 days of the expiry of an earlier approval or consent. The committee considers, however, that it is desirable that the shortest possible time is taken for decisions on matters that have the effect of imposing restrictions on vulnerable adults. Given stakeholder concerns about potential time delays to consider a short term approval to use a restricted practice, the committee seeks further information from the Minister about steps to ensure that delays are kept to a minimum, while ensuring appropriate decision making.

6.6 Service provider immunity from civil and criminal liability

6.6.1 Extension of existing protection from liability

Clause 30 proposes amendments to section 123ZZC of the Disability Services Act to extend the current protection from criminal and civil liability for individuals who, acting for a relevant service provider, use restrictive practices. The immunity would apply during the 30 day periods that the Bill proposes to authorise the use of a restrictive practice, while awaiting approval or consent (discussed

119 Life Without Barriers, Submission 11, p.13

120 Explanatory Notes, pp.9, 10 & 11, describing clauses 17, 22 & 24

above in section 6.5), as well as during a period of consent or approval to use the restrictive practice. The immunity for service providers enables restrictions to be placed on an adult with an intellectual or cognitive disability which, in other circumstances, may be a criminal offence or a cause of civil action.

The Explanatory Notes explain clause 17 (and clauses 22 and 24) as an amendment which:

> *… addresses feedback from service providers about delays in obtaining short term approvals to use restrictive practices as this can create periods of time where a service provider and their staff do not have immunity from civil and criminal liability in the use of restrictive practices. Due to individual circumstances, delays might arise due to a range of factors (such as the absence of relevant information on the justification of a restrictive practice; need for further professional advice on the adult's needs; or the number of approval/consent applications received at the same time).*[121]

The amendments proposed by clause 17 would, in effect, authorise the use of containment or seclusion before it is approved by the Adult Guardian or QCAT. Clauses 22 and 24 propose similar authorisation for the use of other restrictive practices while waiting for decisions of the Adult Guardian or the chief executive of the Department of Communities, Child Safety and Disability Services.

The committee notes that the a *relevant service provider* will have immunity from civil or criminal liability during the period of up to 30 days, pending a decision on a short term approval, or consent where the Adult Guardian is the guardian for the restrictive practice. During the public briefing on the Bill the Department told the committee that it would "be working with the office of the Adult Guardian to monitor the extent that the new immunity provisions are relied on".[122]

Recommendation 7

The committee recommends that the Minister inform the Legislative Assembly during the second reading debate what steps will be taken by Government to ensure that decisions on short term approvals and consents by the Adult Guardian and short term approvals by the chief executive are made in the shortest time possible that is consistent with sound decision making.

6.6.2 Stakeholder views about immunity

Service providers generally supported the extension of immunity from civil or criminal liability until the sooner of a notice of decision or 30 days. The chief executive of Multicap told the committee that:

> *The immunity for service providers has been an ongoing challenge. It is essential that organisations can practice in a way that is safe with their staff while maintaining the human rights of the individuals that we support …*
>
> *… the immunity issues for us come from areas that are outside our control. So, while our staff might do all that is required under the legislation from their point of view around writing plans, getting them to the guardians, putting in the short-term approvals, the approval of those short –term approvals and the consent of new plans through the Adult Guardian are outside our control.* [123]

121 Explanatory Notes, p.9 for clause 17, pp.10–11 for clauses 22 and 24
122 Clare O'Connor, *Public Briefing Transcript*, 5 December 2013, p.4
123 Joanne Jessop, Multicap, *Public Hearing Transcript,* 17 December 2013, p.20

Other stakeholders raised concerns about the potential impact on the rights of adults who are subject to restrictive practices. The Queensland Law Society proposed that the statement given to an adult and their family (discussed in chapter 7) include information about legal advice and advocacy services to move the balance of rights toward protection of the adult who is subject to restrictive practices.[124]

Queensland Advocacy Inc.'s submission acknowledged service provider concerns about the consequences of not receiving timely approvals and agreed that change is necessary, but "this change should not be to the detriment of the rights of those subject to restrictive practices".[125] The submission noted that no service provider has been prosecuted, even when the use of a restrictive practice was not approved. The arguments against the proposed provisions include that no other Australian jurisdiction provides legislation immunity without scrutiny of the use of restrictive practices, and that the legal doctrine of necessity and workplace health and safety legislation offer protections to service providers. In addition, Queensland Advocacy Inc.'s submission argues that the proposed immunity for service providers is inconsistent with the proposed purposes of Part 10A of the Disability Services Act.[126]

The Public Advocate said:

> *… allowing immunity for a service provider to use practices without someone having an opportunity to independently look at whether it is an appropriate response to the situation is potentially damaging. I think it runs a very serious risk to the person that practices are being put in place without having been considered for the context around that person.*[127]

The Public Advocate suggested that instead of the proposed 30 day immunity provisions the legislation could allow decision makers to make an interim short-term approval or interim consent with conditions; this could still enable immunity while ensuring an independent judgement about the appropriateness of those practices.[128] An interim approval could, for example, be provided in an emergency by telephone for a period of 7 or 30 days, and a short-term approval based on documents considered at a later time.[129]

In a similar vein, Queensland Advocacy Inc recommended that, instead of extending the existing immunity for service providers, the legislation should provide for interim emergency orders to allow the use of restrictive practices for up to 30 days.[130]

6.6.3 Committee's consideration of legislative standards – the rights and liberties of individuals

Section 4 of the *Legislative Standards Act 1992* requires that Queensland legislation have sufficient regard to fundamental legislative principles. The committee considered whether the amendments which allow the use of restrictive practices, particularly containment and seclusion, without approval or consent, have sufficient regard to the rights and liberties of adults who may be subject to restrictive practices. In considering this, the committee noted that rights and liberties are not absolute, and that the rights of people working with adults with "challenging behaviour" must also be considered.

Other considerations included that the Disability Services Act and the Guardianship Act set out clear processes for consent or approval to use restrictive practices. Decisions are made by a person

124 Karen Williams, Queensland Law Society, *Public Hearing Transcript,* 17 December 2013, p.10
125 Queensland Advocacy Inc., Submission 15, p.13
126 Queensland Advocacy Inc., Submission 15, pp.13–15
127 Jodie Cook, Public Advocate, *Public Hearing Transcript,* 17 December 2013, p.18
128 Jodie Cook, Public Advocate, *Public Hearing Transcript,* 17 December 2013, p.16
129 Chair, and Jodie Cook, *Public Hearing Transcript,* 17 December 2013, p.19
130 Queensland Advocacy Inc., Submission 15, p.15 and supplementary submission dated 10 January 2014.

independent of the *relevant service provider* and apply in specified circumstances, for example, that there is an immediate and serious risk of harm, and that the restrictive practice is the least restrictive way of ensuring the safety of the adult and others.

The committee noted that approval to use a restrictive practice must be based on a *positive behaviour support plan* (or *respite/community access plan*). It also noted that the Bill places time limits on the period during which a restrictive practice may be used while awaiting a new consent or new short term approval. Another safeguard for the rights of adults who are subject to restrictive practices is that section 123Z of the Disability Services Act must be complied with, to ensure that the adult is given sufficient bedding, clothing, food and drink, and access to adequate heating and cooling, access to toilet facilities and prescribed medication. The committee also noted that the immunity from liability applies only where a service provider acts honestly and without negligence.

The committee accepts that there are circumstances where it is appropriate to use restrictive practices, at short notice, in response to the "challenging behaviour" of an adult with an intellectual or cognitive disability to protect the adult and others from harm. It also notes that a service provider may consider it necessary to use a restrictive practice after an approval has expired but before a decision has been made by the relevant decision maker.

6.6.4 Committee comment

The committee was concerned to ensure that the Bill represents an appropriate balance between the rights and liberties of adults with an intellectual or cognitive disability and the rights of service providers and others to be protected from harm. The committee considers that on balance most of the provisions of proposed sections 123OA (clause 17), 123ZCA (clause 22) and 123ZDA (clause 24) have sufficient regard to the rights and liberties of individuals.

The committee remained concerned about whether it is proportionate to enable a restrictive practice to be used for a period of up to 30 days without express approval. The committee did not have information about the time usually taken by the Adult Guardian and the chief executive of the Department of Communities, Child Safety and Disability Services to make decisions.

The committee notes that the Explanatory Notes state that delays in obtaining approvals and consent to use restrictive practices place service providers at risk of using restrictive practices without immunity.[131]

To assist Members of the Legislative Assembly to consider whether the Bill strikes an appropriate balance of the rights of adults subject to restrictive practices, and the concerns of service providers, the committee recommends that the Minister to provide further information during the second reading debate about the policy underpinning the immunity provisions.

Recommendation 8

The committee recommends that the Minister inform the Legislative Assembly in the second reading debate about the policy considerations that led to introduction of the immunity provisions in the Bill, in particular the considerations and any incidents that informed the 30 day period for immunity while restrictive practices may be used before approval or renewal of consent.

131 Explanatory Notes, p.4

6.7 Guardian for restrictive practice may be appointed for up to two years

6.7.1 Amendment

Currently a guardian for a restrictive practice may be appointed for up to one year. Clause 43 proposed to amend section 80ZD of the Guardianship Act to enable an appointment to be for up to two years. The Explanatory Notes state that service providers had raised concerns that the process for appointing and reviewing the appointment of guardians for a restrictive practice matter diverts resources from the care of clients.[132]

6.7.2 Stakeholder views

Service providers generally supported enabling a guardian for a restrictive practice to be appointed by QCAT for up to two years.[133] Queensland Advocacy Inc advised the committee that in their experience the appointment of a restrictive practice guardian has had little involvement from the service provider, and the resource issues "arise when the service provider challenges either the appointment or the decision of a guardian".[134] A further concern raised by Queensland Advocacy Inc is that a two year appointment presumes that restrictive practices will need to be used for two years.

6.8 Consent by a guardian for a restrictive practice (general)

A guardian for a restrictive practice, appointed by QCAT, is required by the Guardianship Act to consider a number of matters before deciding to give consent to the use of a restrictive practice.[135] A *restrictive practice (general) matter* is a restrictive practice other than containment or seclusion and other than a restrictive practice used in the course of respite or community access services.[136]

Clause 44 of the Bill inserts a new subsection in section 80ZE of the Guardianship Act to add matters that the guardian may consider when deciding whether to consent to the use of a restrictive practice. Like the additional matters that QCAT may consider under amended section 80W when considering approval of containment or seclusion, the additional matters reflect those which the Bill removes as requirements for a positive behaviour support plan.

132 Explanatory Notes, p.14
133 For example, Submissions 11, 16 and 17
134 David Manwaring, Queensland Advocacy Inc., *Public Hearing Transcript,* 5 December 2013, p.14
135 *Guardianship and Administration Act 2000*, section 80ZE for a guardian for a restrictive practice (general) matter, and section 80ZF for a guardian for a restrictive practice (respite) matter.
136 Section 80OU, *Guardianship and Administration Act 2000*

7 Reporting and accountability for the use of restrictive practices

7.1 Accountability and transparency

As noted in chapter 2, regulation of the use of restrictive practices was recommended by Justice Carter in his 2006 report. There had been recognition that there was an absence of legislative support for what were seen as necessary interventions in the perceived best interests of the person and others, as well as the recognition of significant historical abuses of the rights of adults with an intellectual disability who exhibited challenging behaviours.

In this context, it is important to ensure that the legislative scheme enables the lawful use of restrictive practices that impinge on an adult's rights, but also ensures that there is adequate accountability, transparency and scrutiny to ensure that abuses do not occur. Several submitters and witnesses questioned whether the Bill provides for sufficient accountability and transparency about decisions to use, and the use of, restrictive practices on adults with an intellectual or cognitive disability. The Queensland Law Society said:

> *… in our view the use of restrictive practices should have safeguards within so that decisions about the adult are transparent, reviewable and involve independent scrutiny and advocacy.*[137]

7.2 Requirement to give a statement about use of restrictive practices

7.2.1 Amendments

Clause 31 proposes to insert new section 123ZZCA in the Disability Services Act to require a relevant service provider to give a statement about the use of restrictive practices to the adult and an interested person (someone with a sufficient and continuing interest in the adult).

The proposed new section requires that the statement must contain:

- why the service provider is considering using restrictive practices
- how the adult and the interested person can be involved and express their views in relation to the use of restrictive practices
- who decides whether restrictive practices will be used
- how a complaint may be made or a review of the use of restrictive practices sought.

The proposed section also requires the service provider to explain the statement to the adult in a way that is mostly likely to be understood and has regard to the person's age, culture, disability and communication ability.

The Explanatory Notes state that the purpose of proposed new section 123ZZCA is:

> *… to ensure that the adult, family members and others in the adult's support network are aware why a service provider is considering that any restrictive practice might be necessary; how they can be involved in planning and decision making and express their views; who will make the decision whether or not to authorise the restrictive practice; and what the avenues for complaint, review and redress are.*[138]

The department told the committee that during the department's review of the regulation of restrictive practices the feedback

> *… emphasised the need to involve families and the adult's network as early as possible and to empower them to exercise their rights and to make sure that they understand*

137 Karen Williams, Queensland Law Society, *Public Hearing Transcript*, 17 December 2013, p.8
138 Explanatory Notes, p.13

what the restrictive practice is and how it might be used and who would be making the decision and what avenues there are for complaint and review.[139]

7.2.2 Stakeholder views

Generally stakeholders supported the requirement in clause 31 for a statement about the use of restrictive practices. For example the Public Advocate said it was "an excellent addition to the legislation"[140]. The Queensland Law Society, the Anti-Discrimination Commission Queensland, and Queensland Advocacy Inc. supported the provision.[141]

Queensland Advocacy Inc supported the requirement for a statement and suggested that clarification was needed that the statement is given to the adult and relevant others before the service provider applies for approval to use a restrictive practice.[142] The committee suggests that the Minister provide information to clarify this during the second reading debate.

Some service providers sought clarification of the requirements for a statement and were concerned about the potential resourcing issues, including the development of individualised statements or communication in a way appropriate to each individual.[143]

The Queensland Law Society suggested further amendment to require the statement to include contact details for independent advocacy for the adult, including disability advocacy services, legal services and the Queensland Law Society.[144] Queensland Advocacy Inc said, in discussing short term approvals and service provider immunity (discussed in chapter 6), that there should be "greater legislative emphasis on the need for the adult to be provided with legal representation and/or advocacy".[145]

The committee considers that there is merit in the statement required under proposed section 123ZZCA including brief information about where an adult and/or people in their support network can seek assistance with advice and advocacy. It therefore recommends that the Bill be amended to include, in the required content of a statement about the use of restricted practices, contact information about advocacy and advice services.

Recommendation 9

The committee recommends that the Minister introduce an amendment to clause 31, proposed section 123ZZCA(3) to provide that a statement about the use of restrictive practices include contact details for relevant disability advocacy and legal advice services.

7.3 Monitoring the use of restrictive practices and reporting by service providers

7.3.1 Proposed reporting by service providers about the use of restrictive practices

Clause 36 inserts proposed new section 123ZZJ in the Disability Services Act, to require a *relevant service provider* who uses a restrictive practice to give the department information prescribed under a regulation about the use of the restrictive practice. Proposed new section 123ZZK (also inserted by clause 36) sets out who may be given the information about restrictive practices provided under

139 Clare O'Connor, *Public Briefing Transcript*, 5 December 2013, p.3
140 Jodie Cook, Public Advocate, *Public Hearing Transcript*, 17 December 2013, p.17
141 Submissions 4, 9, 15
142 Queensland Advocacy Inc., Submission 15, p.6
143 Submissions 11 and 12
144 Karen Williams, Queensland Law Society, *Public Hearing Transcript*, 17 December 2013, p.9
145 David Manwaring, Queensland Advocacy Inc. *Public Hearing Transcript*, 17 December 2013, p.13

proposed section 123ZZJ. Information may be given to QCAT, the Adult Guardian, the Public Advocate and the relevant service provider.

At the committee's public briefing the department said there was strong support during the department's review, for introducing reporting. Clare O'Connor noted the need to improve reporting on the use of restrictive practices:

> *At the moment we do some manual collection of data. However, I think that we could do a lot better, and reporting was one of the things envisaged originally but not implemented. So we are very keen to look at the Victorian Reporting system, for example, where they do monitor the type of restrictive practices used and its frequency for each service provider.*[146]

Submissions from the Anti-Discrimination Commission Queensland, UnitingCare Community, Public Advocate and Queensland Advocacy Inc. also pointed to the Victorian web-based reporting and data collection as useful.[147] Web-based reporting system was noted as an option that may impose the least burden on service providers.[148]

It was suggested that the legislation should require the department to report annually on the use of restrictive practices,[149] or that de-identified information should be publicly reported.[150]

7.3.2 Consultation on proposed reporting requirements

Stakeholders generally supported the provision to require reporting on the use of restrictive practices. A number of stakeholders have questioned the nature of the proposed reporting requirements from the perspective of the potential reporting burden on service providers. The Endeavour Foundation, UnitingCare Community, National Disability Services Queensland, Life Without Barriers, and others sought to be consulted and given more information about the information requirements that are proposed to be in a regulation so that the impost on the organisation is known.[151]

Queensland Advocacy Inc also sought information on the data that would be collected and suggested that data should be publicly accessible if de-identified.[152] One issue it highlighted is that monitoring of the quality of positive behaviour support plans has the potential to contribute to improvements in plans and a reduction in the use of restrictive practices.[153]

7.3.3 Department's advice about proposed reporting requirements

In view of the concerns raised by service providers about the proposed reporting requirements and the potential administrative burden, the committee sought the department's comments. The department advised that it:

> *is currently working on developing specifications for a web based reporting system. This will be undertaken in consultation with service providers with the aim of making it as simple and easy as possible. The Department will also undertake consultation with the disability sector on the actual requirements of reporting. Web based reporting will be the preference but the Department will be considering whether there also needs to be a*

146 Clare O'Connor, *Public Briefing Transcript*, 5 December 2013, p.3
147 Submissions 4, 16, 3, 15
148 UnitingCare Community, Submission 16 and NDS Qld, Submission 17
149 Public Advocate, Submission 3, p.19
150 Queensland Advocacy Inc., Submission 15, p.3
151 Carol Bunt, Endeavour Foundation, *Public Hearing Transcript*, 17 December, p.1
152 David Manwaring, Queensland Advocacy Inc., *Public Hearing Transcript*, 17 December, p.14
153 Nick Collyer, Queensland Advocacy Inc., *Public Hearing Transcript*, 17 December, p.15

> *paper based option for its smaller service providers who may not have an IT system in their service.*
>
> *The aim of the system will be to make sure that the data that is provided is necessary and meaningful and that reporting is easy for service providers to undertake. The Department will be looking to the reporting experience in Victoria, where they have …. a well-established statutory reporting regime. ….*
>
> *The introduction of reporting, which will include reporting on outcomes for clients, will help provide evidence on the implementation of positive behaviour support plans. The additional transparency around the care of clients that comes with reporting will also help ensure plans are being properly implemented.*[154]

The committee appreciates the department's response.

Recommendation 10

The committee recommends that the Minister inform the Legislative Assembly in the second reading debate of the expected timing of consultation with the disability sector about reporting requirements that are proposed to be included in a regulation.

7.3.4 Giving information about the use of restrictive practices to others

As noted above proposed section 123ZZJ enables the chief executive to give information about the use of restricted practices to other bodies. The Queensland Law Society proposed that the classes of people who may receive information about the use of restrictive practices should be extended to include the adult (where appropriate), the adult's support network and the adult's treating doctors and health care professionals.[155]

7.4 Requirement to keep and implement a policy omitted

The Disability Services Act currently requires service providers to keep and implement a policy about the use of the restrictive practice that is consistent with the department's policies and procedures.[156] Clause 29 of the Bill removes this requirement. The Explanatory Notes state:

> *… the requirement for these policies will be dealt with administratively and will continue to be monitored through the department's Human Services Quality Framework. The removal of the (requirement) eliminates some unnecessary complexity from the legislation, without compromising client safeguards.*

Several stakeholders commented that auditing every three years (and a 'maintenance' audit at 18 months) was not sufficient. For example, the Anti-Discrimination Commission Queensland was concerned it does not provide a sufficient level of scrutiny that positive behaviour support plans are being implemented and monitored for effectiveness.[157] The Public Advocate was concerned that regular review of the use of restrictive practices should be included in the new procedure required by service providers.[158]

154 Department of Communities, Child Safety and Disability Services, Response to committee questions, 7 January 2014, p.1
155 Queensland Law Society, Submission 9, p.3
156 *Disability Services Act 2006*, p.190
157 Anti-Discrimination Commission Queensland, Submission 4, p.3
158 Public Advocate, Submission 3, p.16

The committee notes the concerns raised and suggests the Minister ensure that the department provides clear guidance to service providers about review of the use of restrictive practices, and the implementation of positive behaviour support plans.

8 Fundamental legislative principles

8.1 Restrictive practices without approval or consent and immunity from civil and criminal liability

Clauses 17, 22 and 24 of the Bill propose amendments to the Disability Services Act to enable service providers to use a restrictive practice, including containment and seclusion, while waiting for the outcome of an application for a short term approval from the Adult Guardian or the chief executive of the Department of Communities, Child Safety and Disability Services.

Clause 30 proposes amendments to extend existing immunity from liability for service providers. Whether those clauses have sufficient regard to the rights and liberties of individuals is discussed in chapter 6 of this report.

8.2 Information about clients to be provided to the department

Clause 36 inserts proposed section 123ZZJ into the Disability Services Act to provide that a *relevant service provider* using a restrictive practice on an adult with an intellectual or cognitive disability must give information to the chief executive of the department. The information to be provided is to be prescribed in a regulation. Proposed section 123ZZK enables the chief executive of the department to give that information to QCAT, the Adult Guardian, the Public Advocate and the service provider. Stakeholder's views about the information that will be required are discussed in chapter 7, along with the Department's response to questions raised about the proposed regulation.

The committee considered whether the reporting of information and its provision to the bodies specified in proposed section 123ZZK may impact on the rights of an adult with a disability to privacy and confidentiality. While it is difficult to assess fully any potential impact on the rights of individuals as the information to be required is proposed to be specified in a regulation, the committee noted that that the information is to be given only to statutory bodies and to the service provider who gave the department the information.

The provision of information about clients:

> *… is limited to statutory bodies and service providers with a role in ensuring the rights of adults subject to restrictive practices are upheld, and who are bound by legislative requirements that limit the disclosure of confidential information.*[159]

8.2.1 Committee view

The committee considers that clause 36 strikes an appropriate balance between the rights and liberties of an adult with an intellectual or cognitive disability and the benefits that may be realised by more systematic monitoring and reporting on the use of restrictive practices. The committee had regard to the statutory confidentiality requirements that apply to the bodies to which information may be given.

8.3 Clear and precise drafting – definitions of restrictive practices

The amendments to the Disability Services Act are intended to make it clearer to service providers which practices are, and are not, *restrictive practices* for which approval is required. The drafting approach used is to insert a note into the relevant definition in section 123 of the Disability Services Act, and in one instance, to insert an example.

The *Acts Interpretation Act 1954* provides that a note in an Act (unlike an editor's note or an endnote), and an example in an Act, form part of the Act.

159 Explanatory Notes, Disability Services (Restrictive Practices) and Other Legislation Amendment Bill 2013, p.4

Notes and examples that are part of an Act are therefore used when interpreting the Act.

The committee considers that the example added to the definition of *chemical restraint* by clause 9 of the Bill is potentially helpful in clarifying the circumstances in which the administration of medication is, or is not, a *restrictive practice.*

8.3.1 Notes in the definitions of restrictive practices

Clauses 8, 9, 10 and 11 insert notes into the definitions of restrictive practice, physical restraint, restricting access, seclude, chemical restraint, contain, and mechanical restraint. In each definition, the note to be inserted states:

> *Note –*
>
> *Harm to a person includes physical harm to the person and a serious risk of physical harm to the person. See section 123E, definition harm.*

The definition of *harm* in section 123E of the Disability Services Act is:

> ***harm*** to a person means-
> (a) physical harm to the person; or
> (b) a serious risk of physical harm to the person; or
> (c) damage to property involving a serious risk of physical harm to the person.

While the notes inserted by the Bill refer to the definition of harm in section 123E of the Disability Services Act, the notes mention only two of the three limbs of the definition of *harm*. It is questionable whether the insertion of a Note about *harm* in some definitions in the section which already defines the term *harm* is successful in providing clarity. It is not clear why only the first two of the three elements of the definition of *harm* – physical harm and a serious risk of physical harm are used.

The committee considers that the drafting approach used may lead to confusion rather than clarity, and create further ambiguity and uncertainty for service providers.

Recommendation 11

The committee recommends that the Minister inform the Legislative Assembly during the second reading debate of the rationale for using only two of the three 'limbs' of the definition of *harm* in section 123E in Notes inserted in definitions of various *restrictive practices* which are also in section 123E of the *Disability Services Act 2006.*

Appendices

Appendix A – List of Submissions

Sub #	Submitter
001	Teralba Association Inc
002	Options Communication Therapy and Training Centre Pty Ltd
003	Office of the Public Advocate
004	Anti-Discrimination Commission Queensland
005	Carers Queensland Inc
006	Multicap
007	Office of the Adult Guardian
008	Australian Medical Association Queensland
009	Queensland Law Society
010	Queensland Council for Civil Liberties
011	Life Without Barriers
012	CentaCare
013	Endeavour Foundation
014	Quality Lifestyle Support
015	Queensland Advocacy Incorporated
016	UnitingCare Community
017	National Disability Services Queensland
018	Name withheld

Appendix B – Witnesses at public hearings and briefings

Public briefing – 5 December 2013, Brisbane
Department of Communities, Child Safety and Disability Services • Ms Clare O'Connor, Executive Director, Disability Services • Mr Jason Kidd, Director, Strategic and Legal Policy, Disability Services • Ms Bronwen McNeill, Manager, Legal Services • Professor Karen Nankervis, Executive Director, Centre of Excellence for Behaviour Support, The University of Queensland
Department of Justice and Attorney-General • Ms Leanne Clare, Director Strategic Policy

Public hearing – 17 December 2013, Brisbane
Endeavour Foundation • Ms Carol Bunt, General Manager Client Services • Mr Cole Naylor, Social worker
Queensland Law Society • Ms Annette Bradfield, President • Ms Karen Williams, Elder Law Committee Member • Mr Matt Dunn, Principal Policy Solicitor
Queensland Advocacy Inc • Mr David Manwaring, Solicitor • Mr Nick Collyer, Systems Advocate
Ms Jodie Cook, Public Advocate, Office of the Public Advocate
Ms Joanne Jessop, Chief Executive Officer, Multicap

Appendix C – Approval or consent for different restrictive practices in different service settings[160]

Restrictive practice, source context, and approval/consent	Changes to approval/consent & clause no
Containment or Seclusion Where an adult is receiving accommodation support or community support services (including in combination with respite or CAS) **Approval** from QCAT	*Reduced requirements of positive behaviour support plan* In deciding an approval, QCAT needs to consider the positive behaviour support plan that has been developed for the adult. Clause 13 amends the requirements for a positive behaviour support plan in section 123L of the *Disability Services Act 2006 (DSA)* to help ensure that only information that is useful for service providers in providing care and support to the adult is included in the plan, and that plans reflect best clinical practice. Clause 18 also requires that regard be had to a model best practice positive behaviour support plan, that will be prepared by the Centre of Excellence for Clinical Innovation and Behaviour Support in the Department, when positive behaviour support plans are being developed. *Additional requirements to consider* Clause 41 amends section 80W (Matters tribunal must consider) of the *Guardianship and Administration Act 2000* (GAA) to insert additional matters QCAT may consider when giving approval to use containment or seclusion. These additional considerations reflect some matters that the Bill removes as legislative requirements for a positive behaviour support plan but which are matters that QCAT may consider when deciding an approval.
Containment or Seclusion Where an adult is receiving respite and/or community access service/s (CAS) only **Consent** from guardian for a restrictive practice (respite) matter - QCAT appointed.	*Additional requirements to consider* Clause 44 inserts additional requirements to section 80ZE (Requirements for giving consent – guardian for restrictive practice (general) matter) of the GAA to insert additional matters the guardian may consider when deciding to consent to a restrictive practice. These additional considerations reflect some matters that the Bill removes as legislative requirements for a positive behaviour support plan but are still matters that a guardian for a restrictive practice (general) matter may consider when deciding whether to consent to the use of the restrictive practice. *Increase period of appointment* Clause 43 amends section 80ZD (Appointment) of the GAA to increase the period that QCAT may appoint a guardian for a restrictive practice matter from 12 months to 2 years.

160 Prepared by the Department of Communities, Child Safety and Disability Services, and reformatted for publication

Restrictive practice, source context, and approval/consent	Changes to approval/consent & clause no
Containment or Seclusion Short term approval in response to an emergency (where there is immediate and serious risk of harm) - all services types **Short term approval** from the Adult Guardian.	<u>Removal of short term plan</u> Clause 47 omits sections 80ZI (Conditions to which section 80ZH approval is subject) and 80ZJ (Adult guardian's decision about whether to approve short term plan) of the GAA which require a short term plan to be developed as part of a short term approval. There is currently a two staged process for obtaining a short term approval in the legislation, involving an initial approval, on the condition that a service provider submits a short term plan to the decision maker within 14 days. The requirement for a short term plan as part of the short term approval process has been removed to reduce the regulatory burden associated with seeking a short term approval. However, the legislation retains the same minimum requirements that the Adult Guardian must be satisfied of in providing a short term approval. <u>Additional circumstances where a short term approval can be sought</u> Clause 47 inserts a new section 80ZI into the GAA to allow the Adult Guardian to give a short term approval for containment or seclusion to a disability service provider who is not, but will be, providing services to an adult with an intellectual or cognitive disability. Currently under the GAA, where there is an existing containment or seclusion approval in place for one service provider, a new service provider cannot apply for a short term approval until the adult starts receiving services from the new provider, and stops receiving services from the other provider. Likewise, in a respite or community access settings, if there is a restrictive practice (respite) guardian appointed for the adult, and the client transfers to a new service, a short term approval from the Adult Guardian cannot be sought. This means the new service provider will need to obtain the consent of the appointed guardian to use containment or seclusion. However, in some cases, it can take time to prepare the necessary documents to obtain a guardian's consent. This means there could be a period where there is no authorisation to use restrictive practices in place when the new service provider start providing services, as it will take time for the new service provider to prepare the necessary documents to obtain the consent from the existing guardian. This change will remove these obstacles in relation to new service providers seeking short term approvals from the Adult Guardian and allow new service providers to undertake appropriate pre-planning and ensure that all appropriate authorisations are in place prior to the client receiving services from the new provider.

Restrictive practice, source context, and approval/consent	Changes to approval/consent & clause no
Physical, Mechanical or Chemical Restraint Where an adult is receiving accommodation support or community support services (including in combination with respite or CAS) **Consent** from a guardian for a restrictive practice (general) matter- QCAT appointed.	*Reduced requirements of positive behaviour support plan* In deciding the consent, the guardian needs to consider the positive behaviour support plan that has been developed for the adult. Clause 13 amends the requirements for a positive behaviour support plan in section 123L of the *Disability Services Act 2006 (DSA)* to help ensure that only information that is useful for service providers in providing care and support to the adult is included in the plan, and that plans reflect best clinical practice. Clause 25 of the Bill also requires that regard be had to a model best practice positive behaviour support plan, that will be prepared by the Centre of Excellence for Clinical Innovation and Behaviour Support in the Department, when positive behaviour support plans are being developed. *Additional requirements to consider* Clause 44 inserts additional requirements to section 80ZE (Requirements for giving consent – guardian for restrictive practice (general) matter) of the GAA to insert additional matters the guardian may consider when deciding to consent to a restrictive practice. These additional considerations reflect some matters that the Bill removes as legislative requirements for a positive behaviour support plan but are still matters that a guardian for a restrictive practice (general) matter may consider when deciding whether to consent to the use of the restrictive practice. *Increase period of appointment* Clause 43 amends section 80ZD (Appointment) of the GAA to increase the period that QCAT may appoint a guardian for a restrictive practice matter from 12 months to 2 years.
Physical, Mechanical or Chemical Restraint Where an adult is receiving respite and/or community access service/s (CAS) only **Consent** from guardian for a restrictive practice (respite) matter- QCAT appointed; OR If there is no guardian for restrictive practice (respite) matter, then **consent** from an informal decision-maker for the adult. **For physical and mechanical restraint** - if there is no guardian for restrictive practice (respite) matter, then **consent** from an informal decision-maker for the adult. **For chemical restraint (generally)** - **Consent** from guardian for a restrictive practice (respite) matter- QCAT appointed **For chemical restraint (fixed dose) in respite only** - if there is no guardian for restrictive practice (respite) matter, then **consent** from an informal decision-maker for the adult.	*Increase period of appointment* Clause 43 amends section 80ZD (Appointment) of the GAA to increase the period that QCAT may appoint a guardian for a restrictive practice matter from 12 months to 2 years.

Restrictive practice, source context, and approval/consent	Changes to approval/consent & clause no
Physical, Mechanical or Chemical Restraint Short term approval in response to an emergency (where there is immediate and serious risk of harm) - all services types **Short term approval** from the Chief Executive of DCCSDS (or delegate) – if there is no guardian for a restrictive practice (general) matter, or there is but the guardian has not made a decision in relation to the use of the practice.	*Removal of short term plan* Clause 28 omits sections 123ZM (Conditions of short term approval) and 123ZN (Chief executive's decision about approving short term plan) of the *Disability Services Act 2006* (DSA) which remove the requirement for a short term plan to be developed as part of a short term approval. There is currently a two staged process for obtaining a short term approval in the legislation, involving an initial approval, on the condition that a service provider submits a short term plan to the decision maker within 14 days. The requirement for a short term plan as part of the short term approval process has been removed to reduce the regulatory burden associated with seeking a short term approval. However, the legislation retains the same minimum requirements that the Adult Guardian must be satisfied of in providing a short term approval. Additional circumstances where a short term approval can be sought Clause 26 amends section 123ZK (Short term approval for use of restrictive practices other than containment or seclusion) of the DSA to make it easier for a new disability service provider to apply for a short term approval to the Chief Executive of physical, mechanical or chemical restraint or restricting access to objects where an adult with intellectual or cognitive disability transfers to the new service provider. Currently, where an adult is receiving services from a disability service provider and that provider has the consent of a guardian for a restrictive practice (general) matter to use a restrictive practice in relation to the adult, a new service provider cannot get a short term approval for the use of that same practice. In most cases, the only option is for the new service provider to obtain the consent to use the practice from the appointed guardian. However, it can take time to prepare the necessary documents, including updating or developing a positive behaviour support plan, to obtain a guardian's consent. This means the new service provider may go for a period without any authorisation in place, or certainty about what action they can take to keep the adult or others safe in their service. This amendment removes this impediment to a new service provider seeking a short term approval from the Chief Executive.
Restricting access to objects Where an adult is receiving accommodation support or community support services (including in combination with respite of CAS) **Consent** from guardian for a restrictive practice (general) matter- QCAT appointed; OR	*Reduced requirements of positive behaviour support plan* In deciding the consent, the guardian or informal decision maker needs to consider the positive behaviour support plan that has been developed for the adult. Clause 13 amends the requirements for a positive behaviour support plan in section 123L of the *Disability Services Act 2006 (DSA)* to help ensure that only information that is useful for service providers in providing care and support to the adult is

Restrictive practice, source context, and approval/consent	**Changes to approval/consent & clause no**
If there is no guardian for restrictive practice (general) matter, then **consent** from an informal decision-maker for the adult.	included in the plan, and that plans reflect best clinical practice. Clause 25 of the Bill also requires that regard be had to a model best practice positive behaviour support plan, that will be prepared by the Centre of Excellence for Clinical Innovation and Behaviour Support in the Department, when positive behaviour support plans are being developed. *Additional requirements to consider* Clause 44 inserts additional requirements to section 80ZE (Requirements for giving consent – guardian for restrictive practice (general) matter) of the GAA to insert additional matters the guardian may consider when deciding to consent to a restrictive practice. These additional considerations reflect some matters that the Bill removes as legislative requirements for a positive behaviour support plan but are still matters that a guardian for a restrictive practice (general) matter may consider when deciding whether to consent to the use of the restrictive practice. *Increase period of appointment* Clause 43 amends section 80ZD (Appointment) of the GAA to increase the period that QCAT may appoint a guardian for a restrictive practice matter from 12 months to 2 years.
Restricting access to objects Where an adult is receiving respite and/or community access service/s (CAS) only **Consent** from guardian for a restrictive practice (respite) matter- QCAT appointed; OR If there is no guardian for a restrictive practice (respite) matter, then **consent** from an informal substitute decision-maker for the adult.	*Increase period of appointment* Clause 43 amends section 80ZD (Appointment) of the GAA to increase the period that QCAT may appoint a guardian for a restrictive practice matter from 12 months to 2 years.
Restricting access to objects Short term approval in response to an emergency (where there is immediate and serious risk of harm)- all services types **Short term approval** from the Chief Executive of DCCSDS (or delegate) – if there is no guardian for a restrictive practice (general) matter, or there is but the guardian has not made a decision in relation to the use of the practice.	*Removal of short term plan* Clause 28 omits sections 123ZM (Conditions of short term approval) and 123ZN (Chief Executive's decision about approving short term plan) of the DSA which remove the requirement for a short term plan to be developed as part of a short term approval. There is currently a two staged process for obtaining a short term approval in the legislation, involving an initial approval, on the condition that a service provider submits a short term plan to the decision maker within 14 days. The requirement for a short term plan as part of the short term approval process has been removed to reduce the regulatory burden associated with seeking a short term approval. However, the legislation retains the same minimum requirements that the Adult Guardian must be satisfied of in providing a short term approval.

Restrictive practice, source context, and approval/consent	Changes to approval/consent & clause no
	<u>Additional circumstances where a short term approval can be sought</u> Clause 26 amends section 123ZK (Short term approval for use of restrictive practices other than containment or seclusion) of the DSA to make it easier for a new disability service provider to apply for a short term approval to the Chief Executive of physical, mechanical or chemical restraint or restricting access to objects where an adult with intellectual or cognitive disability transfers to the new service provider. Currently, where an adult is receiving services from a disability service provider and that provider has the consent of a guardian for a restrictive practice (general) matter to use a restrictive practice in relation to the adult, a new service provider cannot get a short term approval for the use of that same practice. In most cases, the only option is for the new service provider to obtain the consent to use the practice from the appointed guardian. However, it can take time to prepare the necessary documents, including updating or developing a positive behaviour support plan, to obtain a guardian's consent. This means the new service provider may go for a period without any authorisation in place, or certainty about what action they can take to keep the adult or others safe in their service. This amendment removes this impediment to a new service provider seeking a short term approval from the Chief Executive.