Authorisation of Restrictive Practices in NSW

August 2019

# About PWDA

**People with Disability Australia** (PWDA) is a leading disability rights, advocacy and representative organisation of and for all people with disability. We are the only national, cross-disability organisation - we represent the interests of people with all kinds of disability. We are a non-profit, non-government organisation.

PWDA’s primary membership is made up of people with disability and organisations primarily constituted by people with disability. PWDA also has a large associate membership of other individuals and organisations committed to the disability rights movement.

We have a vision of a socially just, accessible and inclusive community, in which the human rights, belonging, contribution, potential and diversity of all people with disability are recognised, respected and celebrated with pride. PWDA was founded in 1981, the International Year of Disabled Persons, to provide people with disability with a voice of our own.

PWDA is a NSW and national peak organisation and founding member of Disabled People’s Organisations Australia (DPO Australia) along with Women With Disabilities Australia, First Peoples Disability Network Australia, and National Ethnic Disability Alliance. Disabled Peoples Organisations (DPOs) are organisations that are led by, and constituted of, people with disability. The key purpose of DPO Australia is to promote, protect and advance the human rights and freedoms of people with disability In Australia by working collaboratively on areas of shared interests, purposes, strategic priorities and opportunities.

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# Introduction

1. PWDA welcomes the New South Wales (NSW) Government’s consultation on Restrictive Practices Authorisation (RPA) and is pleased to contribute this submission to the consultation. As the peak representative body for people with disability in NSW, we wish to make the following key points.
2. The focus of the system in NSW should be on regulating and eliminating restrictive practices, rather than authorising them. With this in mind, the principles guiding the regulation, rather than authorisation, of restrictive practices in NSW should be the rights articulated in the United Nations Convention on the Rights of People with Disability (CRPD), in particular:
	1. Article 15 – Freedom from torture or cruel, inhuman or degrading treatment or punishment[[1]](#footnote-1)
	2. Article 12 – Equal recognition before the law.[[2]](#footnote-2)
3. Article 15 places a clear onus on States to eliminate restrictive practices, which by their very nature limit freedom of movement and thought, can be painful and degrading, and can be used as punishment.
4. With respect to Article 12, people with disability must be supported to decide whether restraints may be used on us, rather than having this decided for us through a substitute decision maker such as a Guardian. Guardianship is an instance of our lack of equal recognition before the law.[[3]](#footnote-3) The NSW government must provide supports to enable us to make decisions.
5. If it is genuinely impossible to determine our will and preference despite the availability and provision of all decision making supports, then decisions must be made by reference to our rights, not any ‘best interests’ test or substitute decision model. Even with the best of intentions, both families and service providers may have a conflict of interest with regard to restrictive practices being implemented.
6. Regulation of restrictive practices should be required in any setting where a service provider is delivering a service (for example, correctional facilities, out of home care, schools, medical facilities, disability services, community organisations). Currently, there is very little regulation in many of these settings, and while events take place that for other members of the public might constitute a crime, for people with disability they often go unreported or are managed as service incidents. Unauthorised and unregulated restrictive practices often constitute abuse or violence.

# General comments

1. A number of key terms go undefined in the current *Restrictive Practices Authorisation Policy* (the Authorisation Policy).[[4]](#footnote-4) This includes ‘unethical’, ‘shortest time possible’, and ‘least restrictive’.[[5]](#footnote-5) These are crucial terms and concepts that anyone wanting to use the policy or challenge a restrictive practice authorisation would need defined.
2. The list of prohibited practices in the Authorisation Policy is missing the critical issue of financial management being used to control behaviour.[[6]](#footnote-6) Incentivising and disincentivising a behaviour using financial rewards or punishments can be and frequently is restrictive and abusive. It is something many people with disability in NSW experience or have experienced. This is something that must be addressed in a new policy.
3. It is essential that a program is established and funded to provide decision making supports for people with disability who need it. It must be available to people who have had, or are at risk of having, their right to legal recognition before the law violated, including by cases of guardianship and financial management. PWDA outlined this is our submissions to the NSW Law Reform Commission’s review of the *Guardianship Act 1987*.[[7]](#footnote-7)
4. The RPA process and policy highlights the need for independent, rights-based advocacy. It is a highly technical policy, and in addition, it would require a person with disability who wished to challenge it to voice their concerns to a formal panel chaired by a manager of their service provider, from whom they may fear reprisals or withdrawal of service. This is an extremely difficult situation without support, and for some people it is impossible. Advocacy and representation must be built into the process.
5. There must also be an onus on the panel to provide any documentation or hearings in formats accessible to the person with disability, for example, Easy Read, or translation in their preferred language.

# What principles should guide restrictive practices authorisation?

1. The Authorisation Policy and Restrictive Practices Authorisation Procedural Guide are not adequately focused on eliminating restrictive practices. The purpose of the policy is given as outlining “the minimum requirements for the authorisation of restrictive practices by NDIS registered providers and Behaviour Support Practitioners.”[[8]](#footnote-8) While the document does also note that authorisation does not constitute consent, consent is later defined as contingent on capacity, with reference to guardianship. Therefore, consent is positioned as contingent, whereas it should be essential. If consent is not given alternatives must be sought and found.
2. This focus on authorisation, rather than elimination, in the Authorisation Policy, clearly indicates why the guiding principle of such a policy must be Article 15 of the CRPD, Freedom from torture or cruel, inhuman or degrading treatment or punishment. This Article states that: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his or her free consent to medical or scientific experimentation.”[[9]](#footnote-9)
3. Restrictive practices, using the definition of the Authorisation Policy, are those which “have the effect of restricting the rights or freedom of movement of a person with disability.”[[10]](#footnote-10) This is a form of degrading treatment or punishment, and, where chemical restraint is used, potentially a form of medical experimentation. We concur with the Australian Government’s Senate Standing Committee on Community Affairs which has expressed that in many cases of restrictive practice deemed to be a necessary therapeutic or personal safety intervention, what is in fact happening is assault and unlawful deprivation of liberty.[[11]](#footnote-11)
4. Therefore, panels must seriously consider the quality of behaviour support plans in terms of their work toward eliminating restrictive practices.
5. Where consent is not obtained for restrictive practices, but rather permission is obtained under guardianship programs and laws, this constitutes abuse. Guardianship is a form of substitute decision making, meaning it is there in place of the provision of the supports needed for people with disability to exercise choice, consent, or lack thereof. This violates Article 12 of the CRPD, the right to equal recognition before the law, which states that “States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.”[[12]](#footnote-12) The General Comment on Article number 12 elaborates further that: “there are no permissible circumstances under international human rights law in which a person may be deprived of the right to recognition as a person before the law, or in which this right may be limited… even in public emergency.”[[13]](#footnote-13)
6. PWDA has previously noted the ways in which guardianship violates this right to equal recognition before the law and continues to call for supported decision making to be legislated.
7. In brief, the principles that guide regulation of restrictive practices in NSW and elsewhere should be:
	1. the reduction and elimination of restrictive practices, consistent with our right to freedom from torture or cruel, inhuman or degrading treatment or punishment including medical experimentation, and
	2. equal recognition before the law, meaning that restrictive practices must not be used without consent, and every effort should be made to support decision making, not for the purposes of obtaining consent, but so that the person is able to make as informed a decision as possible, free from undue influence, about matters affecting their life.
8. Finally, it is critical that authorisation panels be free from bias and conflict of interest, which is not possible in the current policy, for reasons outlined below.

# How should people participate in restrictive practices authorisation?

1. With the imperatives of both elimination and supported decision making in mind, it is essential that people with disability are provided with every support to participate in and decide on the regulation and possible authorisation of restrictive practices.
2. Currently, section 4.2 of the Authorisation Policy states that people should be engaged ‘to the extent possible’ in the process. This qualification is not in line with supported decision making, but instead relies on judgements of a person’s capacity. Instead, the person should be supported to be engaged, and to make decisions, at all stages of a process that impacts their rights or the denial thereof.
3. Part of this support should include the availability of independent disability advocacy for anyone who wants or needs it during the RPA process. PWDA notes with concern that advocacy is not mentioned at all in the current Authorisation Policy, despite forming a key part of the NDIS Quality and Safeguarding Framework.[[14]](#footnote-14)
4. While the current Authorisation Policy contains no detail on inclusion of family members in RPA, we note that the consultation paper asks how family and carers should participate in RPA. PWDA would encourage families to be involved in supporting their family member to express their will and preferences and develop their decision-making capacity. Families can also be powerful advocates on behalf of their family member with disability. However, we also recognise the conflict of interest that families might have with the person with disability, whose rights must be upheld in all circumstances. We caution against substitute decision making being seen as benign because it is being performed by a family member.
5. Families, like people with disability, may also be subject to pressure from services to consent to restrictive practices due to fear of reprisal or of the provider withdrawing services.
6. PWDA recommends a full overhaul of restrictive practices in NSW with priority given to CRPD compliance. However, at a minimum we recommend that the panels be fully independent of service providers, and include people trained in supported decision making and the human rights of people with disability.

# Where should restrictive practices authorisation be required?

1. Should be required in all settings except the home, where restrictive practices, without informed consent, may constitute violence or abuse, and should be dealt with under relevant domestic and family violence laws.

# Who should make decisions about restrictive practices authorisation?

1. Currently, the Authorisation Policy allows for NDIS providers to convene an “RPA mechanism” that comprises a senior manager of that service, along with a specialist Behaviour Support Practitioner.[[15]](#footnote-15) Additional panel members “may be included according to an individual NDIS provider’s preference.”[[16]](#footnote-16) This constitutes a grave conflict of interest. The manager of the service provider, who chairs the RPA panel, clearly has both real and perceived bias toward the interests of the service itself rather than being impartial or acting in the interests of the person with disability.
2. Additionally, there appears to be no guarantee that the Behaviour Support Practitioner is truly independent. Particularly in small communities, rural and remote areas, it is likely that the Behaviour Support Practitioner and provider would have a working relationship, potentially one that has financial or other benefits for either party.
3. PWDA therefore strongly recommends that the panel be convened independently of the provider.

# Conclusion

1. People with disability need and deserve a thorough, CRPD compliant overhaul of RPA and associated systems in NSW, rather than minor changes to a flawed system.
2. In undertaking this task, key considerations and goals include:
	1. Full and transparent engagement with the NDIS Quality and Safeguarding Framework and the NDIS Quality and Safeguards Commission
	2. CRPD compliance
	3. A supported decision-making model that is legislated and funded
	4. Independent review panels
	5. Consistent treatment of restrictive practices across service settings, including but not limited to out of home care, schools, pre-schools and after school care, medical facilities, disability services, community organisations, and places of detention.
3. Disabled people’s organisations and representatives must be partners in the design and implementation of such an overhaul. Without this partnership, it is likely that underlying drivers of restrictive practices, which are so often abusive, will continue.
1. United Nations Department of Economic and Social Affairs *Article 15 -*  *Freedom from torture or cruel, inhuman or degrading treatment or punishment* available: <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/article-15-freedom-from-torture-or-cruel-inhuman-or-degrading-treatment-or-punishment.html> [↑](#footnote-ref-1)
2. United Nations Department of Economic and Social Affairs *Article 12 – Equal Recognition Before the Law*, available: <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities/article-12-equal-recognition-before-the-law.html> [↑](#footnote-ref-2)
3. PWDA, 2017a. *NSW Law Reform Commission Review of the Guardianship Act 1987, Question Paper 3: The role of guardians and financial managers*, available: <https://pwd.org.au/resources/library/submissions/submission-archive-2017/> [↑](#footnote-ref-3)
4. NSW Government 2019, *Restrictive Practices Authorisation Policy*, available: <https://www.facs.nsw.gov.au/download?file=592755> [↑](#footnote-ref-4)
5. Ibid. pp.7-8. [↑](#footnote-ref-5)
6. Ibid. p. 7. [↑](#footnote-ref-6)
7. People with Disability Australia, 2016 *NSW Law Reform Commission Review of the Guardianship Act 1987 Question Paper 1: Preconditions for Alternative Decision Making Arrangements*, available: <https://pwd.org.au/resources/library/submissions/submission-archive-2016/>

People with Disability Australia, 2017b *NSW Law Reform Commission Review of the Guardianship Act 1987 Question Paper 2: Decision Making Models,* available: <https://pwd.org.au/resources/library/submissions/submission-archive-2017/> [↑](#footnote-ref-7)
8. Op.Cit. [↑](#footnote-ref-8)
9. Op.Cit. [↑](#footnote-ref-9)
10. Op.Cit. [↑](#footnote-ref-10)
11. Senate Standing Committee on Community Affairs, 2015 *Report: Violence, abuse and neglect against people with disability in institutional and residential settings, including the gender and age related dimensions, and the particular situation of Aboriginal and Torres Strait Islander people with disability, and culturally and linguistically diverse people with disability*, p. 114, available: <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Violence_abuse_neglect/Report> [↑](#footnote-ref-11)
12. Op.Cit. [↑](#footnote-ref-12)
13. Committee on the Rights of Persons with Disabilities, General Comment No. 1 (2014), Article 12: Equal recognition before the law, 11th sess, UN Doc CRPD/C/GC/1, 19 May 2014. Available:: <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/GC.aspx> [↑](#footnote-ref-13)
14. Department of Social Services 2016, *NDIS Quality and Safeguarding Framework,* available:<https://www.dss.gov.au/sites/default/files/documents/04_2017/ndis_quality_and_safeguarding_framework_final.pdf> pp.33-35. [↑](#footnote-ref-14)
15. Op.Cit. [↑](#footnote-ref-15)
16. Ibid. [↑](#footnote-ref-16)