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| Department of Health and Human Services – Questions and answers |
| Amendments to the Disability Act 2006 |

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# Overview

The rollout to full scheme National Disability Insurance Scheme (NDIS) commenced in Victoria from 1 July 2019.

The *Disability (NDIS Transition) Amendment Act 2019* (the Act) makes necessary amendments to the *Disability Act 2006* to facilitate transition to the NDIS, and to the *Residential Tenancies Act 1997* (RTA) to meet Victoria’s obligations under the National Quality and Safeguards Framework and ensure safeguards for people with disability are maintained and strengthened during transition to the NDIS and in the future.

## How does this Act support worker screening to ensure workers who pose an unacceptable risk to people with a disability are excluded from working in the sector?

Work is continuing to establish both nationally consistent worker screening for workers under the NDIS and a registration and accreditation scheme for Victorian disability workers.

The Act supports the Secretary’s current functions by explicitly including a function which enables the Secretary to develop safety screening policies and share information about worker suitability while these new schemes are being established.

The Secretary will also need to share information with the Victorian NDIS worker screening unit and registration and accreditation schemes once these bodies commence.

Information sharing will prevent workers who have been found unsuitable to work in disability services from gaining employment in the disability sector in Victoria. This will ensure no diminution of safeguards while the Victorian NDIS Worker Screening Unit is being set up.

## Will the Act impact on the operation of the Disability Worker Exclusion Scheme?

The amendments will not impact on the operation of the Disability Worker Exclusion Scheme, known as DWES, as it relates to disability service providers providing services under the Disability Act.

That is, providers providing services under the Disability Act to state-funded clients, providing services funded through in-kind services and providing services to clients who have yet to transition to the NDIS, will be required to comply with the current DWES, including checking prospective workers against the Disability Worker Exclusion List and notifying the department’s DWES Unit of conduct which falls within the DWES notification criteria.

As part of interim arrangements, registered NDIS providers who seek to engage new staff from 1 July 2019 will need to check prospective workers against the Disability Worker Exclusion List before an offer of employment or engagement can be made as part of Victorian worker screening policy for transition. This will be a requirement of the NDIS (Practice Standards- Worker Screening) Rules.

## How does the Act support the Victorian Registration and Accreditation Scheme?

The Act enables information sharing of information relevant to worker suitability with the Disability Worker Registration Board and the Victorian Disability Worker Commission once these bodies commence operations. This will ensure that workers who have been assessed as being unsuitable to work with people with a disability will be unable to work in the disability sector in Victoria, not just be excluded from work with an NDIS provider or registered disability service provider.

# Provider registration

## How do providers register for the NDIS from 1 July 2019?

From 1 July 2019 new providers wishing to deliver NDIS supports and services in Victoria will apply for registration directly with the NDIS Commission. NDIS providers already registered with the National Disability Insurance Agency will have their registrations automatically transferred to the NDIS Commission.

## How will the Act facilitate a streamlined process for de-registration of providers?

The amendments provide the Secretary with a new power to revoke a disability service providers registration under the Disability Act, subject to complying with notice requirements, if the provider is a registered NDIS provider and has not received or has ceased receiving funds for the provision of disability services under the Disability Act. It also enables the Secretary to revoke the registration of NDIS providers who are not a party to a contract with the Secretary under the Disability Act.

De-registration from the Disability Act will alleviate the burden on providers to comply with two sets of standards, auditing requirements, safeguarding requirements and registration requirements.

The notice requirements also serve to protect clients by requiring providers to inform each of their clients about who regulates their service and the new safeguarding and complaint mechanisms and pathways which will apply once the provider is de-registered from the Disability Act.

## How does the Act reduce dual regulation?

The Act reduces dual regulation by Victoria and the Commonwealth.

The Act provides a streamlined process for disability service providers to be de-registered from the Disability Act when they are no longer providing services to Victorian funded clients.

The Act will also enable the Secretary to:

1. impose conditions on registration at any time (currently the Secretary can only impose conditions at the point of registration)
2. deem that certain providers are disability service providers and that these providers’ registration is limited to specific provisions of the Act
3. exempt a disability service provider from complying with any specific requirements of the Act.

These provisions will limit dual regulation under the Disability Act and other regulatory frameworks (such as the NDIS Commission) while ensuring that no gaps emerge in regulation of providers and safeguards for NDIS participants following transition.

# Restrictive practices

## What is the difference between a restrictive practice and a regulated restrictive practice?

A restrictive practice is any practice or intervention that has the effect of restricting the rights or freedom of movement of a person with a disability or an NDIS participant.

Regulated restrictive practices is a subset of restrictive practices. The Act amends the definitions to specify that regulated restrictive practice has the same meaning as in the NDIS (Restrictive Practices and Behaviour Support) Rules. This includes seclusion, mechanical restraint, chemical restraint, physical restraint and environmental restraint as defined below:

1. **seclusion**, which is the sole confinement of a person with disability in a room or a physical space at any hour of the day or night where voluntary exit is prevented, or not facilitated, or it is implied that voluntary exit is not permitted.
2. **chemical restraint**, which is the use of medication or chemical substance for the primary purpose of influencing a person’s behaviour. It does not include the use of medication prescribed by a medical practitioner for the treatment of, or to enable treatment of, a diagnosed mental disorder, a physical illness or a physical condition.
3. **mechanical restraint**, which is the use of a device to prevent, restrict, or subdue a person’s movement for the primary purpose of influencing a person’s behaviour but does not include the use of devices for therapeutic or non-behavioural purposes.
4. **physical restraint**, which is the use or action of physical force to prevent, restrict or subdue movement of a person’s body, or part of their body, for the primary purpose of influencing their behaviour. Physical restraint does not include the use of a hands-on technique in a reflexive way to guide or redirect a person away from potential harm/injury, consistent with what could reasonably be considered the exercise of care towards a person.
5. **environmental restraint**, which restrict a person’s free access to all parts of their environment, including items or activities.

These regulated restrictive practices can only be used by registered NDIS providers in accordance with the NDIS (Restrictive Practices and Behaviour Support) Rules and in line with Victoria’s authorisation process. All regulated restrictive practices must be authorised by an Authorised Program Officer and certain practices must also be approved by the Victorian Senior Practitioner. The NDIS (Restrictive Practices and Behaviour Support) Rules requires the use of regulated restrictive practices to be reported monthly to the NDIS Commission.

## What is the Commonwealth’s role in restrictive practices under the NDIS?

The NDIS Commission is responsible for a range of functions under the NDIS Quality and Safeguarding Framework. The NDIS Commission will provide leadership in relation to behaviour support and in the reduction and elimination of the use of regulated restrictive practices by NDIS providers.

The NDIS (Restrictive Practices and Behaviour Support) Rules sets out the conditions relating to the use of regulated restrictive practices that apply to all registered NDIS providers. These include the requirement to use an NDIS behaviour support practitioner to prepare a behaviour support plan containing a regulated restrictive practice, and the review, lodgement, and reporting requirements for when a regulated restrictive practice is used. It also includes the requirement to comply with the State’s authorisation process for the use of regulated restrictive practices and any prohibition issued by the State on the use of restrictive practices.

The NDIS Commission is responsible for regulating compliance with the NDIS (Restrictive Practices and Behaviour Support) Rules and has a range of regulatory powers to support this function, including investigations, undertakings, civil penalties and de-registration. In addition to overseeing the development and reporting of behaviour support plans containing regulated restrictive practices, the NDIS Commission will receive complaints about restrictive practices.

## What is Victoria’s role in restrictive practices under the NDIS?

The Victorian Government has committed to ensuring that safeguards are not diminished during and after transition to the NDIS. The National NDIS Quality and Safeguarding Framework will replace many existing quality and safeguarding measures in Victoria. The NDIS Commission will oversee restrictive practices, while states and territories will remain responsible for the authorisation and prohibition for the use of restrictive practices in their jurisdiction.

This means that in Victoria regulated restrictive practices will be used in accordance with a Victorian authorisation process. Registered NDIS providers must lodge evidence with the NDIS Commission to certify that the relevant authorisation process was applied.

Victoria already has an authorisation process under Part 7 of the Disability Act, which applies to disability service providers. It prescribes the requirements for the use of restrictive practices, including a process for authorisation by disability service providers.

The Act prescribes Victoria’s authorisation process which registered NDIS providers must meet before using regulated restrictive practices on NDIS participants, including the need for registered NDIS providers to appoint an Authorised Program Officer to authorise the regulated restrictive practice in accordance with the Disability Act.

The Act also strengthens safeguards by requiring additional approval by the Victorian Senior Practitioner for the use of seclusion, mechanical restraints and physical restraints by disability service providers or registered NDIS providers. The Victorian Senior Practitioner will have the power to issue a direction that sub-sets of regulated restrictive practices or the use of restrictive practices on a particular cohort require additional authorisation. The Victorian Senior Practitioner will also have the power to issue directions that prohibit the use of restrictive practices altogether or on a cohort of people such as people with psychosocial disability.

The Act enables the Victorian Senior Practitioner to notify the NDIS Commissioner of matters relating to the authorisation of restrictive practices. For example, cases where Victoria’s authorisation process is not being complied with by registered NDIS providers.

## When can a regulated restrictive practice be used?

A regulated restrictive practice can only be used if it is necessary to prevent the person from causing harm to themselves or to another person.

The use and form of the proposed regulated restrictive practice must also be:

* the option which is the least restrictive as is possible in the circumstances
* included in an NDIS behaviour support plan
* in accordance with the NDIS behaviour support plan
  + not applied for longer than the period of time necessary.

Before a regulated restrictive practice can be used it must be authorised by an Authorised Program Officer in accordance with Victoria’s authorisation process. The Act introduces additional requirements that must be met before a regulated restrictive practice can be authorised to be used on NDIS participants in Victoria. If seclusion, mechanical restraint and physical restraint is proposed to be used, additional approval is required by the Victorian Senior Practitioner. The Senior Practitioner may also direct that other forms of regulated restrictive practices, or that use of regulated restrictive practices on particular cohorts, must be approved by the Senior Practitioner.

## What is Victoria’s authorisation process for regulated restrictive practices on NDIS participants?

Victoria has an authorisation process prescribed in the Act for the use of regulated restrictive practices on NDIS participants. The Act requires registered NDIS providers to appoint an Authorised Program Officer to be approved by the Victorian Senior Practitioner. The Authorised Program Officer may authorise the use of a regulated restrictive practice on an NDIS participant if the Authorised Program Officer is satisfied that the proposed use of regulated restrictive practice is:

* necessary to prevent the NDIS participant from causing physical harm to themselves or another person
* the option which is the least restrictive of the NDIS participant as possible in the circumstances
* included in, and is in accordance with, the NDIS behaviour support plan
  + not applied for longer than necessary.

The NDIS behaviour support plan must be in accordance with the requirements of the NDIS (Restrictive Practices and Behaviour Support) Rules.

There are additional requirements in the Act for when seclusion is proposed to be used including that the NDIS participant must:

* be supplied with appropriate bedding and clothing
* have access to adequate heating and cooling
* be provided with food and drink
  + be provided with adequate toilet arrangements.

Under the Act, an authorisation is in force until the authorisation is revoked, the NDIS behaviour support plan expires, or a new NDIS behaviour support plan is developed.

## What safeguards are in place to ensure restrictive practices are only used as a last resort?

Under the NDIS (Restrictive Practices and Behaviour Support) Rules, a regulated restrictive practice that is proposed to be used must be included in a NDIS behaviour support plan. As a condition of registration, the NDIS specialist behaviour support provider must ensure that a regulated restrictive practice must be used only as a last resort in response to risk of harm to the person with disability or others, and after the provider has explored and applied evidence-based, person-centred and proactive strategies.

Regulated restrictive practices included in the NDIS behaviour support plan must meet Victoria’s authorisation process in the Act before they are used. The Act also provides that use of regulated restrictive practices must not be authorised unless necessary to prevent harm to the NDIS participant or others.

## Who can authorise the use of a restrictive practice?

Under the Act, a registered NDIS provider that intends to use regulated restrictive practices (including compulsory treatment) on NDIS participants must appoint an Authorised Program Officer to authorise the use of a regulated restrictive practice. More than one Authorised Program Officer may be appointed.

If the regulated restrictive practice is in the form of seclusion, physical restraint or mechanical restraint, the Act requires the Authorised Program Officer to obtain additional approval from the Victorian Senior Practitioner for the use of those practices. Additional approval from the Senior Practitioner must also be obtained if the Senior Practitioner has issued a direction requiring the Senior Practitioner’s approval of the proposed form of regulated restrictive practice, or approval of the proposed use of the regulated restrictive practice on particular cohorts of people.

## Do Authorised Program Officers have to be registered? What are their qualifications?

Authorised Program Officers of registered NDIS providers do not have to be registered, however under the Act, their appointment must be approved by the Victorian Senior Practitioner.

Under the Act, Authorised Program Officers are appointed by a registered NDIS provider who must seek approval from the Victorian Senior Practitioner for the appointment. The application for approval must include the name and qualification of the proposed Authorised Program Officer and any other information requested by the Victorian Senior Practitioner.

The Victorian Senior Practitioner may decide to grant, refuse, or revoke the appointment of an Authorised Program Officer. If the Victorian Senior Practitioner refuses or revokes an appointment, the Victorian Senior Practitioner must notify the Commissioner to the NDIS Commission. The Victorian Senior Practitioner must also keep a register of the name and qualification of each Authorised Program Officer appointed.

The Act gives powers to the Victorian Senior Practitioner to set the minimum qualifications required, or training to be completed, by an Authorised Program Officer of a registered NDIS provider and any other matter by issuing a direction.

## What happens if the Victorian Senior Practitioner refuses to approve the appointment of an Authorised Program Officer?

Under the Act, the Victorian Senior Practitioner may refuse or revoke the approval of the appointment of an Authorised Program Officer of a registered NDIS provider if the Victorian Senior Practitioner considers it is appropriate to do so provided the Senior Practitioner has given written notice to the registered NDIS provider before deciding to do so. The notice must specify the proposed decision, the reasons for the decision and that the registered NDIS provider may make a written submission within 14 days after the notice is given.

The Victorian Senior Practitioner must also give written notice to the NDIS Commissioner.

The registered NDIS provider may apply to VCAT for a review of a decision by the Victorian Senior Practitioner to refuse or revoke the approval of the appointment for the Authorised Program Officer.

## Who is an independent person? Why do we need an independent person?

Under the Act, an independent person assists an NDIS participant to understand the proposed use of regulated restrictive practices on the NDIS participant and their right to seek VCAT review. An independent person must not be an NDIS provider or disability service provider, or a representative of these providers, which is providing services to the NDIS participant. The independent person must not have any interest in the provider which is providing disability services or NDIS services to the NDIS participant or have any responsibility in relation to the development of the NDIS participant’s behaviour support plan. This safeguard is required to ensure the independent person is free from influence from the service provider using the regulated restrictive practice on the NDIS participant.

## What is the role of the Public Advocate in relation to restrictive practices?

Under the Act, the Public Advocate can receive reports from the independent person if the person is not able to understand the proposal to use regulated restrictive practices and if the requirements of the Act, NDIS Act or NDIS (Restrictive Practices and Behaviour Support) Rules are not complied with. The Public Advocate may refer the matter to the Victorian Senior Practitioner, provide information to the NDIS Quality and Safeguards Commission, or initiate an application to VCAT within 28 days, to review the Authorised Program Officer’s decision to authorise the use of the regulated restrictive practice, or the Senior Practitioner’s decision to approve the use of the regulated restrictive practice.

## How can someone appeal the authorisation of a regulated restrictive practice?

Under the Act, if an Authorised Program Officer (or the Victorian Senior Practitioner) authorises the use of a regulated restrictive practice, the NDIS participant may apply to VCAT for a review of the decision to authorise the use. If the Senior Practitioner approves the use of a regulated restrictive practice, the NDIS participant may apply to VCAT for a joint review of the Authorised Program Officer and Senior Practitioner’s decisions. Review must be sought within 28 days after the day on which the NDIS participant is notified of the decision.

Following the review, VCAT may:

* confirm the decision to authorise or approve the use of the regulated restrictive practice and dismiss the application
* order the registered NDIS provider to request a review of the NDIS behaviour support plan by an NDIS behaviour support practitioner
  + direct that the regulated restrictive practice not be used on the NDIS participant.

## What happens when a regulated restrictive practice is used, and it is not authorised?

The Act addresses the authorisation of regulated restrictive practices on NDIS participants in an emergency, when an NDIS participant:

* does not have a NDIS behaviour support plan which provides for the use of regulated restrictive practices or
  + if the use has not been authorised by the Authorised Program Officer (or approved by the Victorian Senior Practitioner where required).

A regulated restrictive practice may be used if the person in charge of the relevant registered NDIS provider believes there is an emergency because there is an imminent risk of the NDIS participant causing serious physical harm to themselves or others, and it is necessary to use a regulated restrictive practice to prevent that risk.

The regulated restrictive practice that is used must be the option which is the least restrictive as possible in the circumstances and must be authorised by the person in charge of the registered NDIS provider and notified to the Authorised Program Officer without delay.

If an Authorised Program Officer has not been appointed for the registered NDIS provider, an Authorised Program Officer must be appointed as soon as practicable if the provider intends to continue the use of regulated restrictive practices. Continued use must be authorised by the Authorised Program Officer and if required, approved by the Senior Practitioner in accordance with the Act.

## Is it an offence if a regulated restrictive practice is used for an NDIS participant and it is not authorised?

As a condition of registration under the NDIS (Restrictive Practices and Behaviour Support) Rules, a registered NDIS provider cannot use regulated restrictive practices unless it is in accordance with the State or Territory authorisation process.

Given that Victoria has an authorisation process, the registration of a registered NDIS provider is subject to the condition that the use of a regulated restrictive practice (other than in an emergency) must be authorised in accordance with Victoria’s authorisation process.

There are a range of consequences under the NDIS Act for failure to comply with this condition. This includes undertakings, civil penalties, imposition of additional conditions on registration, suspension of registration or de-registration.

## What powers in relation to NDIS providers will the Victorian Senior Practitioner have?

The Act provides additional powers to the Victorian Senior Practitioner in relation to registered NDIS providers. The special powers of the Victorian Senior Practitioner have been extended to the use of restrictive practices and compulsory treatment by registered NDIS providers. These include:

* to visit and inspect any place (other than a place or part of a place used as a private residence that is not an NDIS dwelling) where services are provided under the NDIS
* to see any person during a visit or inspection who is subject to any restrictive practice or compulsory treatment
* to request an NDIS provider to provide information about any restrictive practice or compulsory treatment
* to advise the NDIS participant of any authorisation or direction given to a registered NDIS provider about the use of restrictive practices
* to notify the NDIS Commissioner of any matter relating to an NDIS provider that has come to the Victorian Senior Practitioner’s attention
* to prohibit the use of restrictive practices or a specified form of restrictive practice on NDIS participants or persons belonging to a specified class of NDIS participants
  + to request a registered NDIS provider or a member of staff or management of a registered NDIS provider to provide any reasonable assistance required by the Victorian Senior Practitioner to perform or exercise a power, duty or function.

Additionally, in relation to the use of regulated restrictive practices by registered NDIS providers, the Victorian Senior Practitioner will have the power:

* to approve the use of regulated restrictive practice in the form of seclusion, physical restraint or mechanical restraint, and require the use of a specified restrictive practice or specified class of restrictive practice to be approved by the Victorian Senior Practitioner
* to require the use of regulated restrictive practice on a specified class of persons to be approved by the Victorian Senior Practitioner
* to issue directions that a form of regulated restrictive practice requires the Victorian Senior Practitioners approval
* to receive a matter referred by the independent person and/or Public Advocate
* to prohibit the use of a specified restrictive practice or the use of a specified class of restrictive practice
* to regulate the use of a specified restrictive practice or the use of a specified class of restrictive practice
  + to prohibit or regulate the use of a specified restrictive practice or specified class of restrictive practice on a person belonging to a specified class of NDIS participants.

## What are the reporting requirements for regulated restrictive practices?

The NDIS (Restrictive Practices and Behaviour Support) Rules require registered NDIS providers to provide monthly reports to the NDIS Commissioner regarding the use of regulated restrictive practices by the provider. The report must be in the form approved by the NDIS Commissioner and include any information and be accompanied by any documents required by the NDIS Commissioner.

The Victorian Senior Practitioner also has the power to require NDIS providers to report to the Victorian Senior Practitioner and provide information as required.

## Can the Victorian Senior Practitioner share information with the NDIS Quality and Safeguards Commission?

The NDIS Commission will have oversight of behaviour support including the preparation of NDIS behaviour support plans and the reporting of regulated restrictive practices. Victoria will remain responsible for the authorisation of regulated restrictive practices. This function will be monitored by the Victorian Senior Practitioner.

The Act allows the Victorian Senior Practitioner to provide information to the NDIS Commissioner if the authorisation process is not being complied with by registered NDIS providers. The Act also enables the Victorian Senior Practitioner to provide information to the NDIS Commissioner on other relevant matters. The Victorian Senior Practitioner may:

* notify the NDIS Commissioner of any matter relating to an NDIS provider that has come to the Victorian Senior Practitioner’s attention during exercising a power or performing a function or duty under the Disability Act
* give written notice to the NDIS Commissioner if the Victorian Senior Practitioner revokes or refuses to approve the appointment of an Authorised Program Officer of a registered NDIS provider
* lodge evidence with the NDIS Commissioner or the registered NDIS provider that the proposed use of regulated restrictive practice is authorised by the Authorised Program Officer (or approved by the Victorian Senior Practitioner where required)
  + give written notice to the NDIS Commissioner that a certificate has been given by the Victorian Senior Practitioner to certify that the NDIS participant has an intellectual disability, is residing in an SDA enrolled dwelling and treatment plan has been approved by the Victorian Senior Practitioner for the purposes of supervised treatment orders.

In relation to an NDIS participant subject to a supervised treatment order or an interim supervised treatment order, the Victorian Senior Practitioner may give written notice to the NDIS Commissioner if:

* VCAT makes an interim supervised treatment order or a supervised treatment order
* the Victorian Senior Practitioner approves a material change made to a treatment plan
* VCAT confirms a variation to a treatment plan that involved a material change
  + the supervised treatment order is varied or revoked or expires.

The Victorian Senior Practitioner must also give written notice to the NDIS Commissioner if an assessment order is made or an assessment order is revoked. Assessment orders are made if necessary to detain a person with an intellectual disability to prevent a significant and imminent risk of harm to another person in order to develop a treatment plan to make an application for a supervised treatment order.

## Can an NDIS participant be detained subject to a supervised treatment order?

Yes, an NDIS participant can also be subject to a supervised treatment order granted by VCAT and can only be detained in accordance with the compulsory treatment provisions in Division 5 of Part 8 of the Disability Act, as amended by the Act. To obtain a supervised treatment order, the NDIS participant must have an intellectual disability, be residing in an SDA enrolled dwelling under an SDA residency agreement and have a treatment plan attaching an NDIS behaviour support plan approved by the Victorian Senior Practitioner and pose a significant risk of harm to others which cannot be substantially reduced by a less restrictive means.

The Victorian Senior practitioner may give written notice to the NDIS Commissioner that a certificate has been given by the Victorian Senior Practitioner to certify that the NDIS participant has an intellectual disability, is residing in an SDA enrolled dwelling and the participant’s treatment plan has been approved by the Victorian Senior Practitioner.

In the case of the proposed use of regulated restrictive practices on NDIS participant’s subject to supervised treatment orders, the NDIS participant’s treatment plan must include a NDIS behaviour support plan prepared by an NDIS behaviour support practitioner, approved by the Victorian Senior Practitioner and lodged with the NDIS Commission.

## What safeguards are in place to ensure that people are not detained arbitrarily?

In Victoria, a person with an intellectual disability can only be detained under the Disability Act if a supervised treatment order has been made by the VCAT under Part 8 of the Disability Act. This Act allows these provisions to also apply to NDIS participants in Victoria.

The Disability Act provides a robust framework to regulate the use of supervised treatment. There are requirements that must be met before an application for an order can be made, regular reporting and procedural safeguards.

For an application for a supervised treatment order to be made to VCAT, the NDIS participant must have an intellectual disability, be residing in an SDA enrolled dwelling under an SDA residency agreement and have a treatment plan (attaching an NDIS behaviour support plan) approved by the Victorian Senior Practitioner.

VCAT can only make a supervised treatment order if satisfied that:

1. the person has previously exhibited a pattern of violent or dangerous behaviour causing serious harm to another person or exposing another person to a significant risk of serious harm
2. there is significant risk of serious harm to another person which cannot be substantially reduced by using less restrictive means
3. the services to be provided to the person in accordance with the treatment plan will be of benefit to the person and substantially reduce the significant risk of serious harm to another person
4. the person is unable or unwilling to consent to voluntarily complying with a treatment plan to substantially reduce the significant risk of serious harm to another person
5. it is necessary to detain the person to ensure compliance with the treatment plan and prevent a significant risk of serious harm to another person.

## Why is there such a regulatory burden on providers for the use of restrictive practices?

There are robust legislative requirements to protect the rights of people with a disability who are subject to the use of restrictive practices, by ensuring that regulated restrictive practices are used in accordance with the Disability Act. This is because the use of regulated restrictive practices constitutes a significant intrusion on a person’ s rights, including in some cases, a person’s liberty.

The Act makes amendments to the regulation of restrictive practices in disability settings to reflect the new oversight responsibilities of the NDIS Commission and the remaining role of the Victorian Government in authorising the use of regulated restrictive practices. The Victorian Senior Practitioner has functions with respect to approval of the use of regulated restrictive practices under the NDIS and is also empowered to prohibit the use of restrictive practices.

The Act also makes amendments with respect to compulsory treatment, creating a process for registered NDIS providers to seek authorisation to use supervised treatment and to obtain assessment orders, as disability service providers currently do under the Disability Act.

The purpose of the amendments is to ensure that the protections for people with a disability are not diminished for the majority who will transition over to the NDIS and to ensure that the new and greater protections provided to NDIS participants as a result of the Act with respect to restrictive practices and compulsory treatment are replicated for those people with disability whose services remain regulated under the Disability Act.

# Community visitors

## Who are community visitors

Community visitors play a critical role within Victoria’s existing quality and safeguards to protect the rights of people with a disability.

Community visitors are volunteers appointed by Governor in Council under the Disability Act and managed by the Office of the Public Advocate. They visit residential services to inquire into the quality of services and standard of care provided to residents. These residential services include:

* short term accommodation such as respite services
* longer term accommodation in group homes
* residential institutions
  + residential treatment facilities.

Provisions relating to community visitors, such as appointment, functions, inspection powers and reporting requirements are set out in the Disability Act.

## Will there still be a community visitor program after NDIS transition?

A national review of community visitor schemes is being led by the Commonwealth Government in collaboration with states and territories to identify the role of community visitors within the National NDIS Quality and Safeguards Framework.

Pending the outcomes of the review, the Act amends the Disability Act to ensure that community visitors can still visit NDIS participants living in a Specialist Disability Accommodation (SDA) enrolled dwelling provided under an SDA residency agreement under Part 12A of the *Residential Tenancies Act 1997* (RTA), or a tenancy agreement under the Part 2 of the RTA by request, and NDIS participants in short term accommodation.

## What will be the role of community visitors in the NDIS?

The community visitors will maintain their existing powers and functions. The Act makes amendments to insert new provisions so that community visitors have powers and functions in respect of NDIS dwellings which reflect their powers and functions regarding residential services under section 30 of the Disability Act.

Community visitors will continue to inquire into:

1. the appropriateness and standard of premises for the accommodation
2. the adequacy of opportunities for inclusion and participation by residents in the community
3. whether the accommodation is being provided in accordance with the applicable Acts
4. whether information is being provided to residents as required by the Residential Tenancies Act (RTA), Disability Act or NDIS Act (as the case requires)
5. any case of suspected abuse or neglect of a resident
6. the use of restrictive practices and compulsory treatment
7. any failure to comply with the provisions of the RTA, Disability Act or NDIS Act (as the case requires)
8. any complaint made to a community visitor.

## Can community visitors visit NDIS properties?

After transition to the NDIS, group homes in Victoria providing residential services will transition to new arrangements for SDA. Amendments will be made to the Disability Act by the Disability Services Safeguards Act when the relevant provisions of the Act are proclaimed to commence (proposed to be 1 July 2019 or as soon as possible thereafter), removing SDA enrolled dwellings from regulation under the Disability Act.

NDIS participants residing in SDA enrolled dwellings will have access to tenancy rights through provisions of the Residential Tenancies Act (RTA). SDA residents can choose either an SDA residency agreement under new Part 12A of the RTA or a tenancy agreement under Part 2 of the RTA.

Amendments made to the RTA by the new Part 12A provides community visitors with a right of entry to an SDA enrolled dwelling under Part 12A. The Act maintains the community visitors’ powers and functions in relation to the SDA enrolled dwelling and enables community visitors to also visit NDIS Short Term Accommodation Assistance properties.

## Can community visitors visit an SDA resident on a tenancy agreement under Part 2 of the RTA?

The Act introduces new provisions which allow an SDA resident on a tenancy agreement under Part 2 of the RTA, or a person on an SDA resident’s behalf with the SDA resident’s consent, may request a visit from a community visitor.

A community visitor may enter only those areas of the SDA enrolled dwelling allowed by the SDA resident, or person on behalf of the resident, requesting the visit.

## What can community visitors do?

Community Visitors play a critical role in safeguarding people with a disability.

The community visitors‘ role is to :

* visit and inspect residential services and NDIS dwellings
* access information to fulfil the requirements of their role
  + make inquiries and see residents/NDIS participants.

Community visitors can inspect any document relating to any resident/NDIS participants which is not a medical record.

This includes personal files, support plans, incident reports and behaviour support plans. A medical record can be viewed only with the consent of the resident/NDIS participant or that person’s guardian.

Community Visitors can report their concerns to the relevant body for a matter.

## What has changed in the role of the Community Visitors Board?

The Community Visitor Board consists of the Public Advocate and two community visitors elected in accordance with the regulations. The functions of the Board are to represent community visitors, prepare and circulate publications explaining the role of community visitors, supervise the training of community visitors, report a matter to the Public Advocate or the Minister and prepare an annual report to be tabled in Parliament. The Board may refer a matter to a more appropriate body.

The NDIS Commission will replace many quality and safeguarding measures relating to the provision of support to NDIS participants by NDIS providers. Consequently, additional bodies have been included for referral by the Board to deal with NDIS related matters.

In addition to the current bodies listed under the Disability Act, the Act allows the Community Visitor Board to refer a matter to the NDIS Commission, the National Disability Insurance Agency and the Director of Consumer Affairs Victoria.

# Disability Services Commissioner

## What will be the role of Disability Services Commissioner after NDIS transition?

From 1 July 2019, the NDIS Commission will receive incident reports from and complaints about registered NDIS providers providing services to NDIS participants. However, the NDIS Commission’s jurisdiction relates only to matters occurring after 1 July 2019 and once a provider becomes a registered NDIS provider.

The Act will ensure there are no gaps in complaints and investigation avenues for people with disability post transition to the NDIS Commission.

The Act amends the functions and powers of the Disability Services Commissioner to ensure they continue to apply in relation to a former disability service provider or a former regulated service provider when the Disability Services Commissioner is considering complaints or conducting investigations under the Disability Act that commenced before the provider transitioned to the NDIS.

These amendments will also ensure that in relation to matters that have not commenced, but which arose in the 24 months prior to a provider transitioning to the NDIS, the Disability Services Commissioner may consider the complaint or investigate the matter. The exception is systemic investigations across two or more providers. The Disability Service Commissioner may not undertake such an investigation unless it commenced before each provider transitions to the NDIS.

The Disability Services Commissioner will continue to provide oversight of investigations and hear complaints for state-funded disability clients and people yet to transition to the NDIS and for in-kind services.

The Disability Services Commissioner will work with the NDIS Commission to ensure there is no wrong door and that matters are heard by the appropriate body.

## How will people know who to complain to if they have a problem with a service?

Disability service providers are required to ensure that their clients are provided with complaint information as part of their service practice. The remaining state-funded disability service providers are required as part of their registration under the Disability Act to provide clients with information about complaints.

NDIS providers are also required to let people know that information will be provided about who they can complain to post 1 July 2019. An amendment has been made in the Act that enables the Secretary to require that providers provide information about safeguards if they are de-registered due to the NDIS transition.

## Can the Disability Services Commissioner and the NDIS Commissioner share information about investigations?

The Disability Services Commissioner can share information with the NDIS Commission under section 132ZB of the Disability Act. The NDIS Commission also has capacity to share information with relevant bodies, subject to the NDIS Act requirements . The NDIS Commission is developing information sharing protocols with the relevant state and territory statutory bodies.

## Who will investigate deaths of people with a disability in Victoria post transition

Deaths of NDIS participants will be reportable incidents to the NDIS Commission from 1 July 2019. This is in addition to the powers of the Victorian Coroner to inquire into certain deaths in Victoria.

The Disability Services Commissioner will continue to have oversight of deaths of state-funded disability clients under a current referral from the Minister. The Disability Services Commissioner will continue to be able to investigate deaths of state- funded clients and provide recommendations. In addition, the Disability Services Commissioner will provide an annual report identifying the themes in deaths of disability clients over the 2018-19 period.

## How will outstanding Disability Services Commissioner investigations be resolved given services will be transitioning to the NDIS?

The Act amends the functions and powers of the Disability Services Commissioner to ensure they continue to apply in relation to a former disability service provider or a former regulated service provider when the Disability Services Commissioner is conducting investigations under the Act that have not concluded at the time the provider transitions to the NDIS.

These amendments will also ensure that in relation to matters that arose in the 24 months prior to a provider ceasing to be a disability service provider or regulated service provider, irrespective of whether an investigation had commenced, that the Disability Services Commissioner may investigate the matter.

Once a service has transitioned to the NDIS, any new matters that occur after 1 July 2019 that require investigation will be the responsibility of the NDIS Commission.

## What happens to Disability Services Commissioner investigations into a department delivered services when the service has transferred to one of the five new service providers?

Five government providers have entered commercial contracts with the Victorian Government to deliver Supported Independent Living services and Short Term Accommodation Assistance services. The five new providers will continue to come under Victorian quality and safeguarding obligations until such time as the service no longer receives state funding, at which time those obligations will transition to the NDIS Commission.

It is anticipated that there will be outstanding Disability Services Commissioner investigations about matters that have occurred pre-transfer but need to be resolved post-transfer of the service. In these cases, the Disability Services Commissioner has the power to continue to investigate.

The department has put in place measures to support the Disability Services Commissioner’s investigations over this period of change and will work closely with the new provider to ensure any recommendations from the Disability Services Commissioner’s investigations are implemented in the service post-transfer.

## What role will the Disability Services Board have post transition?

The Disability Services Board is the governance mechanism for the operations of the Disability Services Commissioner and provides advice and guidance to the Disability Services Commissioner. The Board also has the function of providing advice to the Minister on the disability complaints system and the operations of the Disability Services Commissioner under the Disability Act.

Members of the Board represent people with a disability, service providers, or have knowledge and expertise that would benefit the Board and are appointed for a period of three years. The current terms of the members will expire in July 2019. The Board will need to be re-appointed for the same period of time that the Disability Services Commissioner continues operations. The Minister appoints the members of the Board and it is important that during this time of transition to new arrangements, members with the necessary knowledge and expertise are able to continue.

The Act amends section 20(6) of the Disability Act to insert (6A) enabling a member to be extended once for a period not exceeding 3 years.

# Information sharing

## How will the information sharing provisions support the transition to full scheme?

The information sharing provisions have been amended to enable a person to use, transfer or disclose specified information for any purpose for or with respect to the NDIS or its implementation to the National Disability Insurance Agency, NDIS Commission and NDIS providers.

The information which may be shared now includes:

* Information about persons who are or were providing disability services, regulated services or services under the NDIS, including current and former disability service providers, regulated service providers or NDIS providers.
* Information about people who received or are receiving disability services, regulated disability services or services under the NDIS and
  + Information about incidents, complaints, use of restrictive practices and compulsory treatment and compliances with standards.

The purpose of these provisions is to:

* ensure all necessary information may be shared as appropriate
* ensure a seamless transition and no gaps in regulation of services
  + ensure that rights of people with a disability are protected and safeguarded.

The Secretary will also need to share information about worker screening with the Victorian NDIS worker screening unit and registration and accreditation schemes once these bodies commence.

## Can the Victorian Senior Practitioner share information with the NDIS Commissioner?

The NDIS Commission will have oversight of behaviour support and the use of regulated restrictive practices including the preparation of behaviour support plans and the reporting of regulated restrictive practices. Victoria will remain responsible for the authorisation of regulated restrictive practices. This function will be monitored by the Victorian Senior Practitioner.

The Act allows the Victorian Senior Practitioner to provide information to the NDIS Commissioner if the authorisation process is not being complied with by registered NDIS providers. The Act also enables the Victorian Senior Practitioner to provide information to the NDIS Commissioner on other relevant matters. The Victorian Senior Practitioner may:

* notify the NDIS Commissioner of any matter relating to an NDIS provider that has come to the Victorian Senior Practitioner’s attention during exercising a power or performing a function or duty under the Disability Act
* give written notice to the NDIS Commissioner if the Victorian Senior Practitioner revokes or refuses to approve the appointment of an Authorised Program Officer
  + lodge evidence with the NDIS Commissioner or the registered NDIS provider that the proposed use of regulated restrictive practice is authorised by an Authorised Program Officer (and approved by the Victorian Senior Practitioner where required)

In relation to an NDIS participant subject to a supervised treatment order or an interim supervised treatment order, the Victorian Senior Practitioner may give written notice to the NDIS Commissioner if:

* a certificate has been given by the Victorian Senior Practitioner to certify that the NDIS participant has an intellectual disability, is residing in an SDA enrolled dwelling and a treatment plan has been approved by the Victorian Senior Practitioner for the purpose of supervised treatment orders.
* Victorian Civil and Administrative Tribunal (VCAT) makes an interim supervised treatment order or a supervised treatment order
* the Victorian Senior Practitioner approves a material change made to a treatment plan
* VCAT confirms a variation to a treatment plan that involved a material change
  + the supervised treatment order is varied or revoked or expires.

The Victorian Senior Practitioner must also give written notice to the NDIS Commissioner if an assessment order is made or an assessment order is revoked.

These amendments will ensure that the rights of people with a disability subject to these practices are protected post transition.

# Amendments to other Acts

# Changes to the Mental Health Act

## Is there a reduction in protections for people receiving mental health services ?

The Act does not reduce protections for people receiving mental health services. The Act removes duplication and the effect of the Act is to make it clear that the NDIS Commission will regulate mental health service providers where or to the extent that they are providing NDIS funded services. To support this, the Mental Health Complaints Commissioner can refer complaints or relevant parts of complaints to the NDIS Commission.

## If a person has a complaint about an NDIS mental health service who do they refer it to?

If a complaint relates to any NDIS funded service, the matter should be referred to the NDIS Commission. If a complaint refers to mental health services funded by the State, the complaint should be referred to the Mental Health Complaints Commissioner. To assist those receiving services, the Mental Health Complaints Commissioner and the NDIS Commission are able to refer complaints to each other where those complaints are more appropriately dealt with by the other body.

# Changes to the Jurisdiction of the Health Complaints Commissioner

## If I have a complaint about my disability service provider can the Health Complaints Commissioner deal with my complaint?

Amendments are being made to the *Health Complaints Act 2016* to avoid duplication with transition to the NDIS scheme and make it clear that if your complaint relates to health services provided by an NDIS funded service provider, the complaint should be referred to the NDIS Commission.

If the Health Complaints Commissioner receives a complaint relating in whole or part to health services provided by an NDIS funded service provider, the Health Complaints Commissioner must refer that complaint or relevant part of the complaint to the NDIS Commission to manage it. The Health Complaints Commissioner may provide relevant information to the NDIS Commission, including copies of relevant interim or relevant prohibition orders relating to a provider of NDIS funded services.

In addition, where a complaint is made under the *Health Records Act 2001*, the Health Complaints Commissioner may refer the matter to the NDIS Quality and Safeguards Commission to manage.

# Changes to the Jurisdiction of the Commission for Children and Young People

## What powers will the Commission for Children and Young People retain?

Victorian protections are maintained for children with the move to the NDIS scheme. The Commission for Children and Young People will be able to exercise its powers to conduct inquiries under the *Commission for Children and Young People Act 2012* to protect children receiving services in Victoria under the NDIS Scheme.

Further, relevant NDIS Service providers providing services to children in Victoria will be subject to the reportable conduct scheme and the child safe standards. Amendments are also being made to enable the Commission for Children and Young People to share relevant information with the NDIS Commission to protect children.

# Changes to the Disability Services Safeguards Act 2018

## Why are changes required to how the Victorian Disability Worker Commission employs staff?

Currently, the *Disability Services Safeguards Act 2018* does not allow the Victorian Disability Worker Commission to employ staff under the Public Administration Act 2004. This means Commission staff would not be guaranteed the same conditions and entitlements as Victorian Public Service (VPS) staff.

## Will the changes in the Act mean that Victorian Disability Worker Commission staff will lose some of their independence?

No. This amendment does not impact on the independence of the entity or its statutory decision making. The Commission will still employ staff directly and staff will not be employees of a government department.

## What are the benefits of proposed amendments to how the Victorian Disability Worker commission employs staff?

The proposed amendments will ensure:

* that Commission staff have the same entitlements as Victorian Public Servants and are covered by the Victorian Public Service Enterprise Agreement 2016
* the Commission can attract and recruit skilled and experienced staff
  + VPS staff are not disadvantaged by moving to the Commission.

## Are these amendments consistent with the employment powers of other independent Victorian regulators and oversight bodies?

The amendments will ensure the Commission’s employment powers are consistent with other independent Victorian regulators and oversight bodies, including:

* the Commission for Children and Young People
* the Victorian Ombudsman
  + the Independent Broad-based Anti-Corruption Commission.

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