Disability Services and Other Legislation Amendment Bill 2008

Explanatory Notes

Title of the Bill

Disability Services and Other Legislation Amendment Bill 2008.

General Outline

Objectives of the Bill

Purpose and general objective

The Bill will amend the *Disability Services Act 2006* and the *Guardianship and Administration Act 2000*, to create a legislative scheme to safeguard the rights of adults with an intellectual or cognitive disability who have 'challenging behaviour' and where restrictive practices may be required to manage their behaviour. The Bill aims to balance the rights of the adult with the need to protect the rights of others to live and work free of violent and other potentially damaging behaviour.

The scheme only applies to adults with an intellectual or cognitive disability who are in receipt of disability services provided or funded by Disability Services Queensland (DSQ).

The overall aim of the Bill is to drive service improvements to reduce or eliminate the use of restrictive practices; promote positive behavioural support; reduce the incidence of 'challenging behaviour'; and improve the quality of life for adults with an intellectual or cognitive disability.

In particular, restrictive practices are regulated in a way that:

- has regard to the human rights of the adult;
- is necessary for the safety of the adult or another and is the least restrictive option of ensuring their safety;
- is independently authorised and reviewed; and

- used within a broader context of a positive behaviour support system, focused on the adult's individual needs.

The provisions apply to adults who are supported to live in their community; in addition, there are provisions that deal with the use of restrictive practices:

- in a respite or community setting; and
- to respond in a short term way (for example, in an emergency), where there is an immediate and serious risk of harm.

Transitional provisions are included to allow relevant service providers up to 18 months to comply with the new requirements of the Bill.

Who the scheme applies to

The legislative scheme applies to protect adults with an intellectual or cognitive disability and 'challenging behaviour' who receive disability services from non-government service providers funded by DSQ and/or provided by DSQ ('a relevant service provider').

The term 'challenging behaviour' is not defined in the Bill. It is a term to describe behaviour of such intensity, frequency or duration that it places the adult or another person at serious risk of harm; and is often characterised by physical violence and/or serious property damage. Definitions which describe this term include:

- 'Culturally abnormal behaviour(s) of such intensity, frequency and duration that the physical safety of the person or others is likely to be placed in serious jeopardy, or behaviour which is likely to seriously limit the use of or result in the person being denied access to ordinary community facilities'.

(*source: Emerson, E. Challenging Behaviour, Analysis and intervention in people with severe intellectual disabilities. 2nd edition, Cambridge University Press, 2001*); or

- Behaviour of such intensity, frequency or duration as to threaten the quality of life and/or the physical safety of the individual or others and is likely to lead to responses that are restrictive, aversive or result in exclusion.

(*source: Challenging behaviour - a unified approach (June 2007) Royal College of Psychiatrists, British Psychological Society and Royal College of Speech and Language Therapists)*

'Restrictive practices' are defined in the Bill to mean:

- Containing or secluding the adult;
- Using chemical, mechanical or physical restraint on the adult; and
- Restricting access of the adult.

Examples include:

- confining the adult to their room during a period of aggression to prevent them hitting members of staff or co-tenants;
- administering medication prescribed to prevent the escalation of aggressive behaviour; or
- restricting access to a kitchen pantry to prevent obsessional eating.

Reasons why the proposed legislation is necessary

Scope of legislation

A small proportion of adults with an intellectual or cognitive disability, receiving disability services from a relevant service provider exhibit 'challenging behaviour'. In the course of caring for these adults, restrictive practices may be used from time to time to prevent harm or a risk of harm to the adult or another, such as support workers, family members, co-tenants and members of the public.

These adults generally do not have the capacity to consent to decisions around their care or treatment.

Legislative and policy environment

Restrictive practices constitute an infringement on the rights and liberties of the individual concerned and are potentially unlawful.

In Queensland, there is no specific legislation which regulates the use of restrictive practices in relation to adults with an intellectual or cognitive disability. This lack of regulation leaves limited protection for the individual against potential abuse or misuse of restrictive practices.

It also leaves service providers, and individuals acting on their behalf, potentially exposed to civil or criminal actions such as assault or deprivation of liberty. Whilst there could be cases where the application of restrictive practices is justified at law, this would depend on the individual circumstances. For example, if a person displays sudden violent behaviour which is likely to cause harm to another person, then restraint using

reasonable force that is necessary to defend against the risk of harm to that person may be used (see section 271 of the Criminal Code).

Report by the Honourable W J Carter QC (Challenging Behaviour and Disability – a targeted response) (the Carter Report)

The proper and effective support of people with an intellectual or cognitive disability with challenging behaviour has been an ongoing issue for the disability sector.

In 2006, the Honourable W J Carter QC was appointed to investigate options for a legislative and service response to adults with an intellectual or cognitive disability who present with challenging behavior.

The Carter Report identified that there was a general over-reliance on the use of restrictive practices in the disability sector. Criticism of the practices included:

- restrictive practices may have been at odds with the human rights principle and service delivery principles under the *Disability Services Act 2006*; and in some cases open to challenge under the law; and
- service responses may have been crisis or emergency driven because of a lack of suitable accommodation; and service responses may have failed to address the substantive causes of challenging behaviour.

On 22 May 2007, a full copy of the Carter Report was released together with a whole of Government response. Government supported in principle all 24 recommendations, based on a theme of 'fundamental process of reform, renewal and regeneration'. Most of the recommendations relate to the development of a new contemporary model for assessment and support of adults with an intellectual or cognitive disability and challenging behaviour.

Key features of the service model include:

- a Specialist Response Service – to undertake multi-disciplinary assessments and develop positive behaviour support plans; and assist disability service providers to comply with the legislation;
- a Mental Health Assessment and Outreach team – to provide mental health expertise where adults may have dual diagnosis of an intellectual or cognitive disability and a mental illness;
- development and recruitment of specialist staff;

- construction of purpose-built dwellings – to provide positive environments where individualised support can be provided; and
- a new Centre of Excellence – which will lead research and provide specialist knowledge and expertise in positive behaviour support.

Justice Carter's Report also recommended: *A legislative framework which will ensure that the use of any restrictive practice in the case of a person with intellectual disability and challenging behaviour is independently approved and properly regulated and which will provide adequate legislative support as required* (page 17 Carter Report).

The Bill underpins the new service model and implements those recommendations of the Carter Report that recommend the development of a legislative scheme. The Bill is based on the key principles of the Report.

How the objectives will be achieved

The Bill amends two existing Acts: (1) *Disability Services Act 2006;* and (2) *Guardianship and Administration Act 2000.*

A new part (Part 10A) is created in the *Disability Services Act 2006* for the purpose of this scheme. Amendments to the *Disability Services Act 2006* essentially:

- define restrictive practices and other important definitions for the scheme;
- state who can apply to use restrictive practices; and
- outline in what circumstances restrictive practices can be applied and to whom.

Amendments are also made to the *Guardianship and Administration Act 2000* to complement the amendments to the *Disability Services Act 2006*. The *Guardianship and Administration Act 2000* establishes a system for the substitute decision making for adults who have impaired decision-making. Amongst other matters, it establishes the Guardianship and Administration Tribunal (the Tribunal), Adult Guardian and provides for the Tribunal to appoint guardians for the adult.

For the purpose of this scheme, a separate chapter (Chapter 5B) is included in the *Guardianship and Administration Act 2000* and essentially these amendments provide for:

- the establishment of a new guardian for restrictive practice matters;

- a new power for the Tribunal to approve containment or seclusion (and other restrictive practices if used with containment or seclusion);
- approval or consent by an independent decision-maker for the use of restrictive practices; and
- decision-making criteria, and the processes for deciding applications.

Key principles

There are some key principles which underpin the Bill and must be considered before a decision can be made about whether or not to use a restrictive practice. These are:

(a) preventing harm (or a serious risk of harm) to the adult or another;

(b) using the least restrictive option for ensuring the safety of the adult or another as is possible in the circumstances;

(c) considering the human rights principle (including preventing abuse, neglect or exploitation of the adult);

(d) safeguarding the rights and liberties of the adult with an intellectual or cognitive disability;

(e) reducing or eliminating the use of restrictive practices; and

(f) focusing on development of the individual and enhancing their quality of life.

Key components of Bill

The main scheme provides that before the use of any restrictive practice, there are four main components: (a) Assessment (b) Positive Behaviour Support Plan; (c) Consent/Approval; and (d) Review and Monitoring.

(a) Assessment

The main purpose of the assessment is to:

- identify the relevant behaviour which may cause harm to the adult or others;
- gain a greater understanding of the person, their current and past circumstances and their goals and aspirations;
- develop hypotheses for the reasons for the behaviour and the factors contributing to it;

- make recommendations regarding strategies to meet the adult's needs and reduce the behaviour (positive strategies);
- make recommendations regarding strategies to manage the adult's behaviour (including the use of any restrictive practices, if required); and
- establish a baseline measure of the adult's behaviour against which the effectiveness of any subsequent intervention/s can be evaluated.

(b) Positive Behaviour Support Plan

A positive behaviour support plan is a core feature of the legislative and service model. A positive behaviour support approach is based on the assessment of the adult, the behaviour of concern, the environment and the interaction of these. A positive behaviour support plan contains intervention strategies that meet the person's needs, enhance their capabilities and quality of life and reduces the occurrence of the behaviour of concern.

It is a requirement that positive and proactive strategies must be implemented in conjunction with restrictive practices. In addition, strategies to reduce or eliminate the need for the use of the restrictive practices must also be implemented.

The importance of a positive behaviour support plan is that it provides a planned and multi-element approach to supporting the adult who is exhibiting challenging behaviour.

Relevant parties, such as the adult, the guardian or informal decision-maker for the adult, family members, advocates or key health care providers, are consulted during the assessment and planning process.

(c) Consent or approval

Before any restrictive practice can be used, it must be independently approved or consent obtained. Most decisions will be approved and/or reviewed by the Tribunal. The type of approval/consent required will depend on the type of restrictive practice proposed:

Restrictive Practice	Approval/Consent
• containment or seclusion	Guardianship and Administration Tribunal
• chemical restraint • mechanical restraint • physical restraint	Guardian for restrictive practice matters appointed by the Tribunal
• restricted access to objects	Guardian for restrictive practice matters or, if there is no guardian, an informal decision-maker, such as family member or close friend

If more than one type of restrictive practice is proposed, only one authorisation process (the 'highest' decision-maker and level of assessment) is required for the adult. For example, if seclusion is proposed as well as physical restraint – the relevant service provider must conduct a multi-disciplinary assessment of the individual and develop a positive behaviour support plan for the adult, which would include the use of both seclusion and physical restraint. The Tribunal would then decide whether or not to approve seclusion and/or physical restraint.

(d) Review and Monitoring

Restrictive practices must be regularly reviewed to ensure their continued relevance and effectiveness; and must be monitored to ensure they are being safely and properly implemented.

Any approval of restrictive practices must be time-limited (up to 12 months). This means that use of restrictive practices will be reviewed at least every 12 months or at the end of an approval, whichever is sooner. The type of review will depend on the type of restrictive practice proposed:

Restrictive Practice	Review person/body
• containment or seclusion	Guardianship & Administration Tribunal
• chemical restraint • mechanical restraint • physical restraint	Guardianship & Administration Tribunal will review decisions of the guardian for restrictive practice matters
• restricted access to objects	Service provider, through guidance by policy and procedures If a guardian for restrictive practices matters is appointed – review is by Guardianship and Administration Tribunal

In addition, an 'interested person' for the adult and certain others can apply to the Tribunal for a review at any time. For the practice of restricted access to objects, under the existing section 154 of the *Guardianship and Administration Act 2000,* the Tribunal may ratify or approve an exercise of power by an informal decision-maker. The Tribunal may also decide to appoint a guardian for restrictive practice matters.

For the use of any restrictive practice, the positive behaviour support plan must also include:

- the procedure for using the restrictive practice, including observations and monitoring measures; and
- the intervals at which the restrictive practice will be reviewed – this is guided by policy and procedures.

For monitoring and review purposes, a relevant service provider must also keep certain records, as prescribed in the *Disability Services Regulation 2006*, about the use of restrictive practices. Monitoring of the scheme is also achieved by:

- authorised officers appointed under the *Disability Services Act 2006*, who may investigate non-compliance;
- an investigative function for the Adult Guardian; and
- an inquiry/complaint function for the Community Visitor Program – the Bill requires a relevant service provider to notify the community

visitor program if restrictive practices have been approved/consented to on a 'visitable site'.

Additionally, section 233A of the Bill requires the legislative scheme as a whole to be reviewed after 1 July 2011, in order to review the efficacy and efficiency of the new provisions.

Some exceptions to the main scheme

The Bill includes special provisions for:

- respite/community access services (where either or both are the only disability service accessed by the adult); and
- short term approval (for example, in emergency situations), where there is an immediate and serious risk of harm to the adult or another.

Respite/community access services (where either or both are the only disability service accessed by the adult):

This situation refers to those adults within the target group who only receive a respite service and/or community access from DSQ or a DSQ funded non-government service. These clients live with their families and enter the DSQ system for short periods in order to receive respite and/or community access services. They do not receive any other disability service.

Consultation indicated that the requirements under the main scheme would prove too onerous for these services and the likely unintended outcome is that respite and community access service providers may consider it unviable to provide respite or community access to adults who exhibit challenging behaviour and their families, who are in most need of these services.

The proposed amendments aim to maintain adequate safeguards for the adult while providing flexibility for respite or community access services. The main differences between these provisions and the main scheme relate to:

- type of consent/approval (summarised in the table below);
- development of a 'respite/community access plan' for the adult – this plan is similar to a positive behaviour support plan but requires less detail; and
- a special provision for the use of fixed (daily) dose chemical restraint in a respite service only.

In summary, the proposed consent or approval process for the use of restrictive practices in respite and/or community access services is:

Restrictive practice	Approval/Consent
containment or seclusion	• Guardian for restrictive practice matters • Decisions of the guardian are subject to review by the Tribunal
chemical restraint (generally)	• Guardian for restrictive practice matters • Decisions of the guardian are subject to review by the Tribunal
fixed (daily) dose chemical restraint in respite services only	• Consent of informal decision-maker
physical or mechanical restraint	• If no guardian for restrictive practice matters -informal decision-maker
restricted access to objects	• If no guardian for restrictive practice matters - informal decision-maker

<u>Emergency (short-term approval):</u>

At times it may be necessary for a service provider to respond to a critical incident or adverse event where an unplanned response is required in order to prevent an immediate and serious risk of harm to the adult or another person. For example, the incident could involve an adult with an intellectual/cognitive disability and ‘challenging behaviour’ who, until very recently, lived with their family at home, and had not received any DSQ support or funding prior to coming into a service provided or funded by DSQ. Alternatively, the incident could involve an adult in receipt of DSQ support or DSQ funding who’s behaviour has suddenly escalated into ‘challenging behaviour’.

The Bill makes provisions to allow for short-term approval (up to three months) to be sought where there is an <u>immediate and serious risk of harm</u> to the adult or another person. Short term approvals can only be extended in exceptional circumstances.

Short-term approvals can be given by the Adult Guardian or the Chief Executive, DSQ, depending on the type of restrictive practice:

Restrictive Practice	Approval/Consent (up to 3 months)	Plan (within 14 days of any approval)
• containment or seclusion	Adult Guardian	'short-term plan' – defined in Bill
• chemical restraint • mechanical restraint • physical restraint • restricted access	Chief Executive, DSQ	'short-term plan' – defined in Bill

These provisions do not replace a 'true' emergency where there is an imminent risk of harm, where there is no time for an approval, and where the service provider must respond urgently to a critical incident out of, for example, necessity or a duty of care.

Locking of gates, doors and windows

The practice of locking gates, doors and windows occurs where the gates, doors or windows are locked because that adult does not have the skills to safely exit the premises without supervision.

This practice is not within the definition of a 'restrictive practice' for the purpose of this scheme, however, it is still regulated to ensure protection of a person's rights and liberties. It is different to the practice of 'containment' where the purpose is to manage a person's 'challenging behaviour', which requires approval by the Guardianship and Administration Tribunal. Application of the policy of locked gates, doors and windows is not a substitute for containing or secluding an adult as a response to challenging behaviour.

Under the Bill, a relevant service provider must keep and implement a policy and procedure on the practice of locking gates, doors and windows. The policy must be consistent with DSQ's policy and procedures.

Administrative cost to government implementation

Government has committed $113 million over four years from 2007-08 for a staged implementation of the new service and legislative model.

This funding will be directed to meet costs for:

- implementation of the legislation, including informing key stakeholders;
- additional workload for the Tribunal to process applications for approval and review of containment or seclusion approvals; or the appointment of guardians;
- additional workload for both the Office of the Adult Guardian and the Community Visitor Program;
- new Specialist Response Service teams (located across regions);
- new Mental Health Assessment and Outreach Team; and
- new Centre for Excellence for positive behaviour support.

Consistency with fundamental legislative principles

- *Legislative Standards Act 1992, section 4(2)(a)* – whether legislation has **sufficient regards to the rights and liberties of individuals**

<u>*1. Rights and liberties of persons whom restrictive practices may be used*</u>

(a) *Using restrictive practices under the main scheme (ie. other than for respite or community access services or if there is an immediate and serious risk of harm)*

Authorising restrictive practices under this scheme can be a significant intrusion on the rights of the adult. However, it is considered the Bill contains measures to limit the circumstances when restrictive practices may be justified. It provides proper safeguards for the adult while taking into account the need to protect the rights of others to live and work free of violent and other potentially damaging behaviour.

The Bill authorises the use of a restrictive practice only if-

(a) it is necessary to protect the adult with an intellectual or cognitive disability or another from harm;

(b) it is the least restrictive option to ensure the safety of the adult or another; and overall in the best interests of the adult;

(c) the adult has been assessed by an appropriately qualified or experienced person;

(d) a positive behaviour support plan has been developed for the adult and the restrictive practice is used in accordance with the plan (including implementing the positive strategies);

(e the use of practice has been approved by an independent decision maker having regard to legislative criteria; and

(f) the approval for the use of the practice is time limited and reviewed periodically.

For containment or seclusion, the service provider must also ensure the adult's reasonable needs are met (for example, bedding and clothing; and food and drink). In addition, service providers must keep and implement policies about the use of restrictive practices that are consistent with policies developed by DSQ. If a service provider does not comply with the policy, an authorised officer, appointed under *Disability Services Act 2006*, can investigate and enforce non-compliance.

- *Protection from harm and least restrictive option ((a)(b))*

In any decision to use restrictive practices, it must be demonstrated the restrictive practice is necessary for the safety of the adult or another person; and is the least restrictive option of ensuring their safety. 'Harm' has a limited definition.

- *Assessment and development of a positive behaviour support plan ((c) (d))*

The pre-requisites of assessment and planning processes are critical before any restrictive practices can be approved or used. Relevant parties, such as the guardian, family member, advocate or key health care provider, are consulted during this process. The assessment and planning process looks at the causes of the adult's challenging behaviour and identifies strategies to improve the adult's behaviour and their quality of life (see ***pages 6-7***).

- *Independent Decision-Maker ((e))*

All decisions about the use of restrictive practices are made independent to the service provider and are subject to strict legislative criteria. Most decisions about restrictive practices will be made and/or reviewed by the Tribunal (see ***pages 7-8).*** The Tribunal is a specialist body with extensive experience and expertise in dealing with people with an intellectual or

cognitive disability. Any decision from the Tribunal can be appealed to the Supreme Court.

For restricted access to objects; an informal decision-maker must consent to the use of the practice. However, it is considered there are adequate safeguards for the adult in this instance that are proportionate to the nature of the restrictive practice:

- the informal decision-maker must consider strict legislative criteria when making a decision to consent to the use of restricting access;
- the service provider must review the use of restrictive practices at least every 12 months;
- a person with sufficient interest in the adult who is not satisfied with decisions made by the informal decision-maker could apply to the Tribunal for the appointment of a guardian. If a guardian was appointed, only the guardian could consent to the restricting access; and
- under the existing *Guardianship and Administration Act 2000* (section 154), a decision of the informal decision-maker can be ratified or approved.

- *Time limited approvals, monitoring and review and appeals ((f))*

All approvals for restrictive practices are time-limited; and must be reviewed at least once every 12 months. For most restrictive practices, the Tribunal will conduct a formal review. An order by the Tribunal to approve the use of containment or seclusion, or to appoint a guardian for other restrictive practices, must not be for longer than 12 months; and must be reviewed by the Tribunal at least once during its duration. Also, a party interested in the welfare of the adult may apply to the Tribunal at any time to review a decision of the Tribunal or guardian.

Monitoring of the scheme is also achieved by:

- requiring service providers to keep records on the use of restrictive practices;
- authorised officers appointed under the Act, who may investigate non-compliance;
- an investigative function for the Adult Guardian; and

- an inquiry/complaint function for the Community Visitor Program.

The legislative scheme encourages and supports family members and other interested parties to remain involved in the development of plans for the adult and to participate in decision-making processes. Provision is also made for family or others to apply to the Tribunal to be appointed as a guardian to seek help and make representations about the use of restrictive practices for an adult who is the subject of a containment or seclusion approval.

(b) Using restrictive practices for respite or community access services

The Bill provides for a different regime for the limited circumstance if restrictive practices are used in the course of providing respite or community access services to an adult. This situation and justification for the special provision was discussed on ***page 10.***

For most restrictive practices (except for daily (fixed) dose medication in respite), the key principles must still be followed:

- it is necessary to protect the adult with an intellectual or cognitive disability or another from harm;
- it is the least restrictive option for ensuring the person's safey and overall in the best interests of the adult;
- the use of practice has been approved by an independent decision maker having regard to legislative criteria;
- the approval for the use of the practice is time limited and reviewed periodically; and
- the use restrictive practice complies with policy and procedures.

The main differences relate to the type of consent or approval and type of plan. The relevant service provider must develop a 'respite/community access plan' for the adult. This plan is similar to a positive behaviour support plan but requires less detail.

There is also a special provision for the use of daily (fixed) dose medication in a respite setting only – in this case, the service provider must obtain the consent of an informal decision-maker and comply with a policy. The reason for this exception is to allow for the continued use in respite of daily (fixed) dose medication, which has already been prescribed by a doctor; and where, often, the service provider is not in a position to know if the medication is being used primarily for behaviour control.

A service provider of occasional respite care is not in a position to try and influence the longer term management of behaviour for that adult and to determine the least restrictive option. Adults receiving respite usually do so for short periods only, and it would be impracticable to require a service provider to assess and develop a plan for an adult who they only see occasionally and for short periods. Service providers strongly indicated during consultation that it may become unviable for them to continue to provide respite if there were no lesser requirements for daily (fixed) dose medication in respite.

(c) *using restrictive practices if there is an immediate and serious risk of harm (short term approvals)*

The Bill also provides for a different regime for using restrictive practices in situations involving an immediate and serious risk of harm. Short-term approvals may be given by the Adult Guardian (for containment or seclusion) or the Chief Executive of DSQ (for other restrictive practices). At times it will be necessary for a service provider to respond in an emergency situation and therefore it is considered necessary to have a short-term approval process for emergency situations.

It is considered these short-term approval provisions provide adequate safeguards for the adult by:

- requiring time-limited approvals (no longer than 3 months unless exceptional circumstances);
- the decision-maker must consider legislative criteria;
- a short-term plan must be developed and provided to the decision-maker (for approval) within 14 days of any short-term approval decision;
- the approval can be subject to other conditions;
- if the Chief Executive makes a short-term approval, they must notify the Adult Guardian and others consulted in the decision;
- any short-term approval can be reviewed by the Tribunal; and
- the community visitor program is notified of the approval (to assist with their inquiry/complain function and reports on restrictive practices).

2. Rights and liberties of individuals – locking of gates, doors and windows

The Bill provides for the practice of locking gates, doors and windows to prevent physical harm being caused to an adult with a skills deficit (for example, an adult who cannot leave the premises unsupervised because he or she lacks road safety skills). This practice is not within the definition of a 'restrictive practice' for the purpose of this scheme. However, it is still regulated to ensure protection of the adult. This practice impacts on the adult's rights and liberties as they are effectively prevented from exiting the premises at times. However, this impact must be balanced with the purpose of the practice, which is to ensure the adult's safety. An adult with a skills deficit is unable to exit the premises safely without supervision. Having regard to this objective, it is considered the impact on the adult is justifiable.

Also, the Bill provides immunity from liability for this practice. The immunity extends beyond the adult with a skills deficit and allows the locking of gates, doors and windows in relation to any other person living at the premises. While this does impact on other co-residents, the extended immunity is considered justifiable.

The adult with a skills deficit often lives with other residents in a community setting with shared accommodation. The policy for shared accommodation is to provide suitable accommodation, which allow adults with similar physical, emotional, social and support needs to reside together. Given this service environment, if the gates, doors or windows are locked for the safety of the adult with a skills deficit, this may also impact on the freedom of other clients living with that adult. The Bill takes this into account by ensuring there are sufficient protections for the rights of other residents living with the adult. In particular:

- the service provider must keep and implement a policy on the practice - this policy must be consistent with DSQ's policy, which will detail how to minimise the impact on other residents (for example, by giving other residents a key activation device so they can freely exit the premises);
- the policy must outline procedures which demonstrate the practice is the least restrictive option for the adult with a skills deficit – this would include making sure the doors were locked for the shortest possible time; and
- to obtain the benefit of the immunity, the service provider must (among other things) act honestly and without negligence and

take reasonable steps to minimise the impact of locking gates, doors and windows on other people living with the adult with a skills deficit. The immunity also makes it clear that this practice cannot be used to effectively contain an adult with 'challenging behaviour' (this would require Tribunal approval).

By including the practice in legislation, it allows DSQ to regulate and monitor the practice. Under the *Disability Services Act 2006*, an authorised officer has powers to investigate and enforce non-compliance. This could include the issuing of a compliance notice and/or cancellation or suspension of funding.

3. Confidentiality provisions

The Bill enables the Adult Guardian to obtain information necessary to make an informed decision as to whether to give a short-term approval to use containment or seclusion. This provision could allow the Adult Guardian to obtain confidential information about a person, however, is considered justifiable as there are adequate safeguards to protect the individual:

- the information that can be obtained is limited to that necessary to make an informed decision; and
- the Adult Guardian is prevented from disclosing the information under section 249 of the *Guardianship and Administration Act 2000.*

Also new provisions facilitate the disclosure of medical information by certain health care providers for the purpose of assessments and development of plans. This will allow a service provider to access confidential information about the adult in some cases. Access to this confidential information is important for the adult's best interests and relevant for a comprehensive assessment of the adult; and to understand all of the adult's needs and possible causes for their challenging behaviour. The provisions are considered justifiable as they balance the need for this information, with providing appropriate safeguards to prevent misuse of this information. In particular:

- the information can only be obtained for a limited purpose; and
- the service provider is prevented from disclosing the information other than in the limited circumstances prescribed in the Bill (for example, to discharge a function under another law or for a

proceeding in a court or tribunal). It is an offence for the service provider not to comply.

4. Transitional provisions

The Bill allows the service provider (and individuals acting on their behalf) up to 18 months from commencement to comply with all of the new requirements. The legislative scheme is about driving a culture of change in the use of restrictive practices in the disability sector; and to effectively implement the scheme, adequate provision must be made for:

- service providers to conduct an assessment and develop a positive behaviour support plan for the adult – more complex cases could take at least 3-4 months per adult;
- recruitment of specialist and skilled staff;
- service providers to develop policies and procedures about the use of restrictive practices; and
- for the Tribunal to hear and decide applications for containment and/or seclusion or appoint a guardian for other restrictive practice matters.

In the meantime, service providers can lawfully use restrictive practices provided they satisfy a number of requirements, aimed at protecting the adult. These requirements include notification to DSQ if containment or seclusion is being used; assessment of the adult within certain time periods if there is no guardian appointed to approve restrictive practices; carrying out of monitoring in relation to the use of the restrictive practice to ensure the safety of the adult; and keeping and implementing policies in relation to the use of the restrictive practice.

- *Legislative Standards Act 1992,* section 4(3)(a) – whether legislation **makes rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review**

1. Approval to use restrictive practice given by the Tribunal or substitute decision-maker (main scheme)

Approval to use restrictive practices will be made by the Tribunal (for containment or seclusion), a guardian for restrictive practice matters appointed by the Tribunal (for chemical, mechanical or physical restraint) or an informal decision-maker (for restricting access, if there is no guardian). All decisions are subject to strict legislative criteria.

The Tribunal will provide an oversight in relation to most restrictive practices. The ability of the Tribunal to approve and review the use of containment and seclusion; and review the decisions of guardians is not considered to be the use of an administrative power affecting the rights and liberties or obligations of an individual, given that the Tribunal is a quasi-judicial body.

However, it may be considered that the extension of a guardian's power to consent to the use of other restrictive practices is making the rights and liberties or obligations of an adult dependent on administrative power. A guardian is appointed by the Tribunal to make decisions for an adult with impaired capacity and can make decisions for an adult that the adult does not agree with. Decisions made by a guardian already impact upon the rights and liberties of an adult but are justified on the basis that without a guardian appointed, an adult's needs or interests will not be adequately met or protected.

The proposed legislative scheme provides a transparent and open process regarding the appointment of guardian and decisions made by a guardian. The Tribunal is required to review a guardian's decisions at least every 12 months. Legislative criteria regulate how decisions by guardians are made and there are internal and external processes available for the review of a decision by a guardian. The power of a guardian is sufficiently defined and is subject to appropriate review.

An informal decision maker will only be making decisions about restricted access and their powers are also sufficiently defined and subject to appropriate review, given the nature of the decisions (see **page 15***)***.

2. Short term approvals

Short-term approvals are given by either the Adult Guardian (for containment or seclusion) or the Chief Executive of DSQ (for other restrictive practices). The purpose of short-term approvals was explained earlier (see **page 11**). It is considered that these provisions sufficiently define the administrative power and provide appropriate review, including:

- the decision-maker must consider legislative criteria when deciding a short-term approval, including deciding whether to approve a short-term plan;
- there are time-limited approvals (they cannot be longer than 3 months unless there are exceptional circumstances);

    - in deciding whether or not to make a short-term approval, the decision-maker must consult with the adult, their guardian or informal decision-maker;
    - the adult or the guardian/informal decision-maker for the adult, who was consulted, or the effected service provider, can apply to the Tribunal to review any decision about a short-term approval (to approve/refuse);
    - if a short-term approval is given, the service provider must within 14 days of the approval, develop a 'short-term plan' and provide it to the decision-maker for approval;
    - the decision not to approve a short-term plan can be reviewed by the Tribunal; and
    - if the Chief Executive makes a short-term approval, they must notify the Adult Guardian and others consulted in the decision.

- *Legislative Standards Act 1992*, section 4(3)(g) – whether legislation **adversely affecting the rights and liberties, or impose obligations, retrospectively**

It is proposed to provide appropriate legal protection for disability service providers who had applied restrictive practices prior to the commencement of the legislation in certain circumstances.

The immunity relates to the use of restrictive practices at any time before the amendment commences. The Minister for Disability Services provided public notice of the intention to provide appropriate legal protection in Parliament on 22 May 2007.

These provisions have been developed to address the current lack of clear authority and transparent decision-making with regards to the use of restrictive practices. As the Carter Report acknowledges, restrictive practices can be a necessary strategy for managing challenging behaviour in certain situations. It is considered the retrospective immunity provisions provide appropriate safeguards to ensure a service provider would only get the legal benefit of these provisions for the proper use of restrictive practices. These provisions are not intended to condone those practices which will always remain unlawful or to allow the use of restrictive practices for punishment purposes.

A service provider will only receive legal protection if:

    - they acted honestly and without negligence; and

    - they demonstrated the restrictive practice was necessary for safety and the least restrictive option; and
    - within a reasonable time before using the restrictive practice, they assessed the adult to identify the causes of their harmful behaviour; and developed positive strategies to meet the adult's needs; and
    - they carried out monitoring in relation to the use of restrictive practices.

- *Legislative Standards Act 1992*, section 4(3)(h)—whether legislation **confers immunity from proceeding or prosecution only with adequate justification**

Generally, the Bill provides for four types of immunities:

- *retrospective immunity* – for the use of restrictive practices before the commencement of the Bill;
- *transitional immunity* – for the use of restrictive practices for 18 months from the commencement of the Bill;
- *prospective immunity* – for the use of restrictive practices after the (18 month) transitional period; and
- *immunity for locking of gates, doors and windows* – for the practice of locking, gates, doors and windows generally.

The aim of these immunity provisions is to clearly outline the circumstances when restrictive practices may be lawfully applied; and they provide legal certainty/guidance to staff and services as to when restrictive practices may be justified. These immunity provisions only authorise restrictive practices where it can be demonstrated, among other things, that it is for the safety of the adult and overall in the individual's best interests.

1. *Use of restrictive practices (prospective immunity)*

The Bill confers prospective civil and criminal immunity on DSQ funded and provided service providers who may use restrictive practices after the commencement of the Bill (after the transitional period). The Bill also confers similar immunity provisions on an individual who is acting for a DSQ funded or provided service.

A DSQ funded or provided service provider is not criminally or civilly liable for using restrictive practices if the service provider:

- act honestly and without negligence; and

- uses the restrictive practice in accordance with all of the requirements under the Bill. This means that to lawfully use the restrictive practice the service provider must comply with all of the requirements outlined in the Bill. The use of restrictive practices can only be authorised as part of an individualised model of care and support and a positive behaviour support plan.

A similar immunity provision applies to an individual acting for the service provider. The individual is not criminally or civilly liable for using the restrictive practice if they:

- act honestly and without negligence; and
- use the restrictive practice in accordance with the relevant consent or approval, or they reasonably believe they are acting in compliance with the relevant consent or approval; and
- use the restrictive practice in compliance with the positive behaviour support plan, or they reasonably believe they are acting in compliance with the positive behaviour support plan.

For the reasons outlined in **pages 13-16,** it is considered that this immunity is justified as there are sufficient safeguards to protect the adult.

2. *Locking of gates, doors and windows immunity*

For locking doors or windows a service provider is not civilly or criminally liable for locking, gates, doors provided provided they:

- act honestly and without negligence; and
- keep and implement a policy (consistent with DSQ's policy) on this practice;
- the gates, doors and windows are locked in compliance with the policy; and
- the service provider takes reasonable steps to minimise the impact of locking gates, doors and windows on a person living at the premises.

A similar immunity provision applies for an individual acting for a service provider provided they acted in compliance with, or reasonably believes they are acting in compliance with, the provider's policy about the locking of gates, doors and windows. For the reasons outlined above in **pages 17 and 19** it is considered this immunity is justified as it provides appropriate

protections for the adult with a skills deficit, as well as other residents who may live with that adult.

3. Giving confidential information to a guardian or informal decision-maker

The Bill provides that a service provider is not criminally or civilly liable or liable under an administration process or professional code of conduct for the provision of confidential information to a substitute decision-maker. This is justified as the Bill requires a service provider to give certain confidential information to a substitute decision-maker to enable the substitute decision-maker to make an informed decision about the use of the restrictive practice by the service provider. Given that a service provider may be subject to privacy laws or professional codes of conduct, the service provider should be protected from providing that confidential information to the substitute decision-maker.

Further, any information that is provided to a substitute decision-maker is subject to a duty of confidentiality. A guardian is already subject to a duty of confidentiality under the provisions of section 249 of the *Guardianship and Administration Act 2000*. This Bill imposes a similar obligation on the informal decision-maker when the informal decision-maker is required to make a decision about a restrictive practice matter (**section 80ZT**).

- *Legislative Standards Act 1992*, section 4(4)(a) – whether legislation allows the **delegation of legislative power in appropriate cases to appropriate persons**

The Bill requires a service provider to keep and implement a policy on the use of restrictive practices and this policy must be consistent with DSQ's policy and procedures. These provisions delegate legislative power to DSQ as DSQ's policy will state some requirements that a service provider must comply with, as part of any immunity.

Requiring service providers to comply with a policy is considered reasonable as the policy will include technical detail and is more practical and flexible than legislation; and can easily be modified as circumstances require. The Bill specifies matters that the policy must address and these mainly relate to the proper implementation of restrictive practices (for example how staff are skilled to use restrictive practices); and provide more detail as to how the requirements in the Bill can be complied with (for example when to conduct a review of a restrictive practice or how to monitor restrictive practices).

In addition, service providers must ensure the policy is kept up to date and easily accessible to staff, guardians, informal decision makers or advocates for the adult.

Consultation

A total of 58 targeted consultation sessions on an exposure draft of the Bill were held across the State, with separate sessions for service providers; families and advocates; peak bodies, key government agencies, unions, and DSQ staff. Up to 800 persons participated in the consultations which occurred between October 2007 – January 2008 and 15 written submissions were provided.

Consultation participants indicated their support for the key principles and intent of the Bill. Broad support was provided for the development of a legislative basis to regulate restrictive practices to:

- safeguard the rights of adults who exhibit challenging behaviour;
- require that, for a restrictive practice to be approved, it must be demonstrated as the least restrictive practice;
- require that any use of restrictive practices be in the context of positive behaviour support;
- recognise the important role of families and guardians in decision-making;
- provide protections to service providers who comply with the strict requirements;
- recognise a culture of change is needed to reduce the use of restrictive practices; and
- acknowledge that a culture of change depends on an accessible, responsive and highly skilled service infrastructure.

Notes On Provisions

Part 1 - Preliminary

Division 1 -Introduction

Short Title

provides that the short title of the Bill is the *Disability Services and Other Legislation Amendment Act 2008***.**

Commencement

provides that the Bill commences on a day to be fixed by proclamation.

Part 2 - Amendment of *Disability Services Act 2006*

Act amended in part 2

Clause 3 provides that this part amends the *Disability Services Act 2006*.

Amendment of s5 (Act does not affect other rights or remedies)

Clause 4 amends section 5 of the *Disability Services Act 2006* and provides that section 5 does not apply for sections 123ZZB, 123ZZC, 214C, 214D, 242 to 244 and 246. Section 5 provides that the *Disability Services Act 2006* does not affect or limit a civil right or remedy. The effect of this clause is that some sections in the Bill (listed above) provide protection from any criminal or civil liability provided certain requirements under the Bill are met.

Amendment of s 6 (Objects of Act)

Clause 5 amends section 6 of the *Disability Services Act 2006* to reflect the broad objects of this legislative scheme which is to safeguard the rights of adults with an intellectual or cognitive disability including by regulating the use of restrictive practices by funded service providers in relation to those adults –

- where it is necessary to protect a person from harm; and
- with the aim of reducing or eliminating the need for use of restrictive practices.

Importantly this scheme is not about authorising restrictive practices per se but rather only authorising restrictive practices in limited circumstances, where it can be justified as part of an individualised model of care and support. The overall aim is to reduce or eliminate the reliance on restrictive practices, promote positive behavioural support and improve the quality of life for the adult.

Amendment of s 7 (How objects are mainly achieved)

Clause 6 amends section 7 to provide for how the objects of this scheme will mainly be achieved by:

- stating requirements for when funded service providers may use restrictive practices in relation to adults with an intellectual or cognitive disability

Insertion of new pt 10A

Clause 7 inserts a new part (part 10A – Use of Restrictive Practices) into the *Disability Services Act 2006* for the purpose of this scheme.

Part 10A Use of restrictive practices

Division 1 Preliminary

123A Purpose of pt10A

New section 123A provides that the purpose of this part is to regulate the use of restrictive practices by funded service providers in relation to adults with an intellectual or cognitive disability, in a way that-

- has regard to the human rights of those adults; and
- safeguards them and others from harm; and
- maximises the opportunity for positive outcomes and aims to reduce or eliminate the need for use of the restrictive practices; and
- ensures transparency and accountability in the use of the restrictive practices.

123B Service providers to which pt 10A applies

Section 123B defines the scope of the scheme and provides that this part applies to a funded service provider who provides disability services to an adult with an intellectual or cognitive disability (***a relevant service provider***).

Some of these terms are already defined in the *Disability Services Act 2006:*

- 'funded service provider' is defined in section 14;
- 'disability services' is defined in section 12;
- 'disability' is defined in section 11.

The effect of this section is that the scheme only applies to:

- Adults;
- Who have an intellectual or cognitive disability and 'challenging behaviour'; and
- Who are receiving disability services from a 'relevant service provider'.

All of the above must be present for the scheme to apply.

1. Adult

Adult - means a person 18 years or older

2. Intellectual or cognitive disability

Adult with an intellectual or cognitive disability – is defined in new section 123E to mean an adult with a disability which is attributable to an intellectual or cognitive impairment, or a combination of these impairments. 'Disability' is defined in section 11 of the *Disability Services Act 2006*. However, the terms 'intellectual disability' or 'cognitive disability' are not defined further in the Act.

The term includes adults who have an acquired brain injury, and adults who have either an intellectual or cognitive disability and a diagnosed mental illness ('dual diagnosis' adult);

3. Challenging behaviour

The term 'challenging behaviour' is not defined in the Bill (see **page 2**) and instead the Bill refers to the essence of challenging behaviour in referring to:

- behaviour of such nature, intensity, frequency or duration that the behaviour causes harm or is likely to cause harm to the adult or others, such as staff, carers and co-tenants.

These adults have impaired decision-making capacity and are not able to make decisions on their own regarding their care and support.

4. Relevant service provider

- A 'relevant service provider' means DSQ as a service provider, or a non-government service provider who receives funds (wholly or partly) from DSQ to provide disability services. It does not include another department receiving funds from DSQ.

Some examples of what is covered by the Bill are:

- Adult with an intellectual or cognitive disability living at home but receiving community support service from DSQ – the scheme applies to the DSQ service provider (and safeguards the adult) while they are delivering the disability service to the adult. It does not apply to the family member.

- Adult with an intellectual or cognitive disability residing in a hostel but DSQ provides a residential support program – the scheme applies to the DSQ worker while they are providing the residential service to the adult. It does not apply to the owner or manager of the hostel.

*Some examples of what is **not** covered by the Bill are:*

- Adult with an intellectual or cognitive disability living at home being cared for by a family member (and not receiving a disability service from DSQ or a funded non-government service provider);
- Adult with an intellectual or cognitive disability residing in a boarding house or hostel (and not receiving a disability service from DSQ or a funded non-government service provider);
- Adult with an intellectual or cognitive disability when receiving a service from Queensland Health (For example, a patient in a Queensland Health residential care facility);
- Adults who have a disability other than an intellectual or cognitive disability (For example, an adult who has a physical disability, but no intellectual or cognitive disability);
- Children with a disability, including an intellectual or cognitive disability, and who may or may not exhibit challenging behaviour.

123C Principles for performing functions etc.

Section 123C provides that this section applies to a person, including a relevant service provider, who performs a function, or exercises a power, under this part; and that despite section 18, the person must have regard to the human rights principle in performing the function or exercising the power.

The human rights principle is that people with a disability have the same human rights as other members of society and should be empowered to exercise their rights. For other parts of the *Disability Services Act 2006*, it says persons are ‘encouraged’ to have regard to the human rights principle.

The effect of this section is that it requires any person (including a DSQ provided or funded service) to consider the human rights principle when performing a function or exercising a power for the purpose of this scheme.

123D Explanation of operation of pt 10A

The purpose of section 123D is to explain generally the circumstances in which a relevant service provider may be authorised to use a restrictive practice in relation to an adult with an intellectual or cognitive disability.

Restrictive practices can potentially amount to civil or criminal actions such as assault or deprivation of liberty/false imprisonment. The Bill allows a service provider, or a person acting on behalf of the service provider, to lawfully use restrictive practices in limited circumstances. The main requirements (not the only ones) are summarised in this section. This section does not apply to the special provisions of respite/community access services or short term approvals.

A relevant service provider is authorised to use a restrictive practice if it is:

- necessary to prevent harm to the adult or others;
- the least restrictive way of ensuring the safety of the adult or others;
- complies with the positive behaviour support plan for the adult (this includes implementing the positive strategies); and
- applied in accordance with the relevant approval/consent:
  - (a) For *containment and/or seclusion* (and any other restrictive practices if required in addition or containment and/or seclusion) – approved by the Guardianship and Administration Tribunal;
  - (b) For *chemical, physical or mechanical restraint* (and restricted access if required in addition) – consent of the guardian appointed by the Tribunal for restrictive practice matters for the adult;
  - (c) For *restricted access* – consent of an informal decision-maker (or if there is a guardian for restrictive practice matters for the adult – consent of the guardian).

Restrictive practices can only be approved alongside strategies for increasing the adult's positive behaviour. This should lead to a reduction in the need to use restrictive practices.

There are also special circumstances for services funded only to provide respite and/or community access; and the use of restrictive practices in the short-term (for example, because of an emergency, where there is an immediate and serious risk of harm).

123E Definitions for pt 10A

Section 123E sets out key terms for the operation of the scheme. Some of these terms are discussed below.

- ***Adult with an intellectual or cognitive disability*** – this was discussed in **section 123B.**
- ***Chemical restraint (fixed dose)*** means chemical restraint using medication that is administered at fixed intervals and times – this definition is used for the purpose of daily or (fixed dose) medication used in a respite service.
- ***Community access services* -** means disability services that are:

  (a) community access services provided to an adult with an intellectual or cognitive disability who only receives respite services and/ or community access from a relevant service provider; and

  (b) funded as community access services by the department or the Commonwealth.

This relates to the special provisions in the Bill relating to the use of restrictive practices in a respite or community access setting. For the purpose of these special provisions, a respite (or community access) service must be a service that is funded by DSQ or the Commonwealth to only provide respite and/or community access for the adult with an intellectual or cognitive disability.

The terms ‘respite’ and ‘community access’ are not defined in the Bill or the *Disability Services Act 2006* – these are defined in the Commonwealth-State/Territory Disability Agreement (CSTDA) and associated guidelines. The CSTDA is the agreement between the Commonwealth Government and States and Territories; and provides the national framework for disability services and determines disability funding.

The use of the defined term ‘relevant service provider’ in subsection (a) means that the respite or community access service must be receiving at least partial CSTDA funding from DSQ for respite or community access (i.e. if the service was solely funded by the Commonwealth for respite or community access or by other State and Commonwealth program, it would not be captured by these amendments).

- ***Containment or seclusion approval –*** is the term used in the Bill to describe an order made by the Guardianship and Administration Tribunal for the use of containment and/or seclusion (and other restrictive practices if required in addition to containment and/or seclusion). A containment or seclusion approval must not be longer than 12 months (see **clause 22, section 80Y**).
- ***guardian for a restrictive practice (general) matter***
- ***guardian for a restrictive practice matter***
- ***guardian for a restrictive practice (respite) matter***

These terms are defined to recognise a new matter for guardians appointed by the Guardianship and Administration Tribunal for the purposes of this scheme. Under the Bill, a guardian will be able to be appointed by the Tribunal for the specific purpose of making decisions about restrictive practices.

A 'guardian for a restrictive practice (general) matter' is the term used to define a guardian appointed by the Tribunal to decide whether or not to consent to:

- physical restraint;
- mechanical restraint; or
- chemical restraint.

A 'guardian for a restrictive practice (respite) matter' is the term used to define a guardian appointed by the Tribunal for the special circumstance of a respite and/or community service.

The term 'guardian for a restrictive practice matter' is used in the Bill to refer to a guardian who is appointed means a guardian for a restrictive practice (general) matter, or a guardian for a restrictive practice (respite) matter, for the adult.

These guardians can be appointed up to 12 months and must follow strict legislative criteria when making decisions about the use of restrictive practices. Their decisions are reviewed by the Guardianship and Administration Tribunal (see **clause 22, section 80ZD**)

- ***Harm*** – the definition of harm is limited to mean physical harm or a serious risk of physical harm to the adult or another. It also includes damage to property where it involves a serious risk of physical harm to the person.

A relevant service provider must demonstrate (among other things) that the restrictive practice is necessary to prevent harm to the adult or another.

- ***Informal decision-maker –*** this is consistent with the definition of an 'informal decision-maker' in the *Guardianship and Administration Act 2000*. An informal decision-maker is someone within the adult's support network who makes decisions for adults without a formal appointment. This includes a member of the adult's family, close friends of the adult or another person the Tribunal decides. This does not include a paid carer for the adult. Under the Bill, the informal decision-maker can consent to the practice of restricted access, and some other restrictive practices in the special provision for respite/community access services.

- ***Least restrictive*** – for use of restrictive practice means the restrictive practice must impose the minimum limits on the freedom of the adult as is practicable in the circumstances. The term 'practicable in the circumstances' could take into account the environment and resources of a particular service provider.

A relevant service provider must demonstrate (among other things) that the restrictive practice is the least restrictive way of preventing harm to the adult or another.

- ***Physical restraint*** – see **page 36**

- ***Positive behaviour support plan*** – is defined in **section 123L**. Generally, any use of restrictive practices must be included in this plan, which (among other things) details the procedures for restrictive practices, as well as positive strategies for the adult.

- ***Respite or community access plan*** – is defined in **section 123ZP** and is the plan required for the use of restrictive practices in a respite and/or community access setting – it is similar to a positive behaviour support plan but requires less detail.

- ***Respite services –*** means disability services that are:

  (a) respite services provided to an adult with an intellectual or cognitive disability who only receives respite services and/ or community access from a relevant service provider; and

  (b) funded as respite services by the department or the Commonwealth.

This relates to the special provisions in the Bill relating to the use of restrictive practices in a respite or community access setting. For the purpose of these special provisions, a respite (or community access) service must be a service that is funded by DSQ or the Commonwealth to only provide respite and/or community access for the adult with an intellectual or cognitive disability.

The terms 'respite' and 'community access' are not defined in the Bill or the *Disability Services Act 2006* – these are defined in the Commonwealth-State/Territory Disability Agreement (CSTDA) and associated guidelines. The CSTDA is the agreement between the Commonwealth Government and States and Territories; and provides the national framework for disability services and determines disability funding.

The use of the defined term 'relevant service provider' in subsection (a) means that the respite or community access service must be receiving at least partial CSTDA funding from DSQ for respite or community access (i.e. if the service was solely funded by the Commonwealth for respite or community access, or by any other state and Commonwealth program such as Home and Community Care, it would not be captured by these amendments).

- ***Restricting access*** – see **further below.**
- ***Restrictive practices*** means the following practices:
    - containing or secluding the adult;
    - using chemical, mechanical or physical restraint on the adult; and
    - restricting access of the adult.

These terms are further defined in the Bill – some are defined in this section and others are defined in separate sections. These definitions are 'threshold' definitions and are important to capture what practices will be regulated by the Bill. If a service provider proposes to use one or more of these restrictive practices, as defined in the Bill, they must comply with all of the new requirements in the Bill before they can lawfully use the practice.

The practice of locking, gates, doors and windows (discussed in **clause 8**) is not considered a 'restrictive practice' for the purpose of this scheme.

- ***Physical restraint*** – the definition is intended to cover the use of any part of a person's body to prevent, restrict or subdue the movement of

the adult with an intellectual or cognitive disability for the primary purpose of controlling the adult's behaviour.

Example of 'physical restraint'

D is a young woman with an intellectual disability and autism spectrum disorder . Certain stimuli or events can promote a severe and intense reaction from her when they occur unexpectedly. In the past she has repeatedly hit her fist against her face and head causing bleeding, a broken nose and extensive scarring. Strategies for assisting D to self regulate her response to these events and stimuli have been attempted, with mixed success. When these preventative approaches are unsuccessful and D begins hitting herself, support staff may hold D's arm and hand to her side (with the minimum force necessary and calmly interacting with D) until the unpleasant/fearful stimuli can be removed. This intervention prevents further physical damage and trauma to D and provides an opportunity for D to listen and respond to the staff's prompts to relax and calm down.

- ***Restricting access –*** means restricting the adult's access at a place (where disability services are provided) to objects that may cause harm to the adult or others.

Example of 'restricted access'

F is a young adult with Prader-Willi syndrome and an intellectual disability. The consequence of Prader-Willi is often an inability to regulate the desire to eat. If given free access to food, F will eat to the point where he is at risk of gorging or choking. On a number of occasions F consumed a range of plastic food packaging requiring hospitalisation and surgery. When staff are not present to monitor the situation, certain cupboards in the kitchen are locked to reduce these risks. Other co-tenants have keys to these cupboards to minimise the impact of this strategy on their rights. The restricted access protects F's physical health and wellbeing and enables F to engage in other activities without constantly seeking food.

- ***Seclude –*** means physically confining the person alone, at any time, of the day or night, in a room or area from which free exit is prevented. The important part of this definition (which distinguishes it from the definition of 'contain') is the element of isolation. Seclusion includes the concept of 'exclusionary time-out'.

Example of 'seclude'

(B) is an adult with an intellectual disability and has episodes of hitting/punching his co-tenants and staff and placing them at significant

risk of harm. On several occasions, co-tenants have required medical care as have several staff. Assessments have identified that B's challenging behaviour is precipitated by anxiety. When observed to be anxious, support staff instruct B in a range of relaxation exercises designed to reduce his levels of agitation. On occasions, B's anxiety levels can continue to escalate. In response, support staff direct B to an external court yard by himself for a specified period of time until he has calmed down. During this period of seclusion, B is unable to leave the area of his own accord. The seclusion is effective in protecting co-tenants and staff from harm while providing an opportunity for B to become calm.

- ***short-term approval*** **–** means an approval given for the use of restrictive practices in an emergency (where there is immediate and serious risk of harm). It is given by either the Adult Guardian or Chief Executive of DSQ, depending on the type of restrictive practice.
- ***short-term plan*** – is defined in **section 123ZM** and describes the type of plan required for a short-term approval.
- ***support network*** for an adult – is defined in the *Guardianship and Administration Act 2000* (schedule 4) and consists of the following people:
    - members of the adult's family;
    - close friends of the adult; or
    - other people the Guardianship and Administration Tribunal decides provide support to the adult.

123F Meaning of chemical restraint

Section 123F defines chemical restraint – it is intended to cover the use of medication to primarily control the person's behaviour, such as to sedate the person. It is not intended to cover the use of medication to properly treat a medical cause. The definition deals with the <u>use</u> of medication and does not cover the prescription of medication. The *Health* (*Drugs and Poisons) Regulation 1996* covers the prescription and administration of drugs that may be used as chemical restraint.

'Medication' is not defined in the Bill and takes its ordinary meaning and includes prescription medicine, "off-label" prescription of medication, and use of natural medicines. It also incudes the prescription of daily dose medication and 'PRN' medication (medication as and when needed).

What is covered by 'chemical restraint'

The term 'chemical restraint' means the use of medication for the primary purpose of controlling the adult's behaviour. That is, if a drug has the dual purpose of treating the person's health condition and controlling the person's behaviour then it will only be considered 'chemical restraint' if it can be shown that the primary purpose was to control the person's behaviour.

What is **not** covered by 'chemical restraint'

However, the use of medication for the proper treatment of a diagnosed mental illness or physical condition is not chemical restraint.

For example, a person has a diagnosed mental illness, as well as an intellectual disability. The person's psychiatrist has prescribed anti-psychotic medication for the proper treatment of the person's mental illness. One of the effects of the medication is that the person's behaviour is controlled. Because the medication is being used for the proper treatment of a diagnosed mental illness, it is not chemical restraint.

'Diagnosed' for a mental illness or physical condition, means a doctor confirms the adult has the illness or condition. To remove any doubt, an intellectual or cognitive disability is not a physical condition. "Mental illness' is defined in section 12 of the *Mental Health Act 2000*.

Example of 'chemical restraint'

Person C has an acquired brain injury and is receiving a DSQ funded accommodation service. C has a history of extensively damaging his home including the destruction of furniture and fittings, windows, doors, walls, and ceilings. During such an episode, C threw chairs and kitchen knives, injuring cotenants and support staff, as well as C himself. Assessment has identified a number of reliable 'early warning' signs which occur prior to an episode of property destruction. When support staff observe these specific signs, C is administered medication prescribed by a psychiatrist which, as a result of its sedative effects, reduces the escalation in his behaviour. The medication de-escalates the behaviour, resulting in fewer incidents and overall a safer and more stable living environment for all residents.

123G Meaning of contain

Section 123G defines what is meant by 'contain'- this definition is important because it is intended to capture the situation where the free

movement of an adult with an intellectual or cognitive disability is restricted in order to contain and control the impact and consequences of managing the adult's 'challenging behaviour'.

In the Bill, 'contain' is distinguished from the practice of 'locking of gates, doors and windows'. The latter term is used to describe the situation where the free movement of adults with an intellectual or cognitive disability is restricted for the purpose of ensuring the adult's safety and providing a safe environment. For example, a gate may be locked at times for someone with no traffic awareness where it has been ascertained that the adult does not have sufficient skills to enter safely onto a public roadway or footpath without the support of a carer.

The distinction is important for immunity purposes but more importantly to ensure that service providers do not use the practice of locking of gates, doors and windows as an alternative to what is in fact 'containment'.

Under the Bill, it will be lawful for a relevant service provider to lock gates, doors and windows if they develop and implement policies and procedures consistent with DSQ's policy and procedures on the locking of gates, doors and windows (this is discussed in more detail in **clause 8).** For lawful use of containment, the issues for managing the adult's behaviour are more complex and the Bill requires a more rigorous authorisation and review process, including a multi-disciplinary assessment of the adult and approval and review by the Guardianship and Administration Tribunal.

What is covered by 'contain'

'Contain' means physically preventing the free exit of the adult from premises where the adult receives disability services. It does not include 'secluding' the adult, which has a separate definition.

What is **not** covered by 'contain'

The adult is not contained if—

- the adult is an adult with a skills deficit (see **clause 8 - new part 15, division 1A**); and
- the adult's free exit from the premises is prevented by the locking of gates, doors or windows under that part.

'Premises' is defined in the *Disability Services Act 2006* (schedule 7) to include:

- a building or other structure; and

- a part of a building or other structure; and
- a vehicle; and
- a caravan.

Section 123G of the Bill extends this definition, for the purposes of defining ‘contain’, to include the land around a building or other structure. The modified definition then goes on to exclude a vehicle – this is to prevent the locking of person in a vehicle to be captured as containment.

<u>Example of ‘contain’</u>

Person A has an intellectual disability who enjoys outings in the community. He has road safety skills and knows the local community. A has a history of unprovoked assaults on members of the public when in the community without staff support. These assaults have required medical services and have led to police involvement. Several assaults have resulted in members of the public being hospitalised. When A displays the recognisable early signs of wishing to leave the house unaccompanied (eg. vocalisations and pacing near the front gate), the perimeter gates of the yard are locked. The containment prevents A from accessing the community unaccompanied and assaulting members of the public.

123H Meaning of mechanical restraint

Section 123H defines ‘mechanical restraint’ to mean the use, for the primary purpose of controlling the adult’s behaviour, of a device to either -

(a) restrict the free movement of the adult; or

(b) prevent or reduce self injurious behaviour.

Subsection (b) is added to capture the use of mechanical devices which might not be considered restrictive to the adult but are used to prevent self-injurious behaviour. For example - the use of head gear to prevent an adult, who repeatedly hits their head against a wall for sensory purposes, from injuring themselves.

<u>What could be considered ‘mechanical restraint’</u>

Examples of devices which may be used to control a person’s behaviour include:

- a bodysuit – *for example, to prevent sexualised behaviour*;

- a splint – *for example, to prevent the adult from suffocating by constantly placing their hand down their throat*;
- headgear or another device placed over the head or face;
- a harness or strap; or
- mittens or gloves (*example below*).

Example of 'mechanical restraint'

E is a 31 year old woman with an intellectual disability. She periodically attends a DSQ provided respite service. E displays a form of self injurious behaviour where she will pick the skin off her hands and arms. This has resulted in bleeding, serious infections requiring medical attention and irreversible damage to E's skin. When E begins to engage in the behaviour, support staff apply cotton mittens secured around her wrists to prevent serious injury. While the restraint is in use staff engage E in conversation and quiet activity until the attempts to pick have ceased at which point the mittens are removed. At times, E will immediately return to the picking behaviour and the mittens will be reapplied.

What it is **not** mechanical restraint

The definition lists a number of devices which are not considered to be 'mechanical restraint' and therefore are not regulated in the Bill. The devices which are excluded mainly relate to mechanical restraints used for therapeutic or medical purposes, or to enable safe transportation of the adult.

The following devices are not mechanical restraint—

- using a device to enable the safe transportation of the adult. *For example, a cover over a seat belt buckle or a harness or strap. It would not include, for example, the use of shackles as of type of device to enable safe transport*;
- using a device for postural support – *for example, a back brace to provide postural support for an adult who had scoliosis*;
- using a device to prevent injury from involuntary bodily movements, such as seizures. *For example, a leg brace on a person with cerebral palsy to prevent muscular contractions*;
- using a surgical or medical device for the proper treatment of a physical condition or injury – *for example, a splint to treat an adult's broken arm*; or

- using bed rails or guards to prevent injury while the adult is asleep.

123I Requirement to keep and implement a policy

Section 123I defines what is meant in the Bill by a requirement for a relevant service provider to 'keep and implement' a policy about use of a restrictive practice. Under the Bill a relevant service provider must keep and implement a policy on the use of any restrictive practice. 'Keep and implement a policy' is defined in this section to mean:

- prepare the policy and keep it up-to-date; and
- implement and comply with the procedures and other matters stated in the policy; and
- keep a copy of the up-to-date policy at premises where the restrictive practice is used; and
- ensure a copy of the up-to-date policy is available for inspection by-
    - staff of the relevant service provider; and
    - guardians, informal decision makers or advocates for the adult.

The intent of the definition is to ensure that the policy is a flexible document that can be modified as circumstances require; practical for staff; and accessible for monitoring purposes. The last requirement is to ensure staff supporting the adult and those people within the adult's support network are aware of the policy and its content.

Division 6 outlines the requirements about the content of the policy.

Division 2 Important concepts for using restrictive practices

This division describes two key concepts before a service provider can use a restrictive practice under the main scheme:

- ensuring the adult is assessed; and
- development of a positive behaviour support plan.

123J Assessment of an adult

Section 123J describes the process for an assessment of the adult. The policy, which service providers must keep, may also outline further details about the process of assessment. Before a restrictive practice can be used in relation to an adult with an intellectual or cognitive disability, the adult must be assessed. The only exception to this is where restrictive practices are used under a short-term approval or in the course of providing respite or community access services**.**

An ‘assessment’ means an assessment by 1 or more ‘appropriate qualified or experienced persons’ for the following purposes-

(a) making findings about the nature, intensity, frequency and duration of the behaviour of the adult that causes harm to the adult or others;

(b) developing theories/hypothesis about the factors that contribute to the adult’s behaviour; and

(c) making recommendations about appropriate strategies for—

- (i) meeting the adult’s needs and improving the adult’s capabilities and quality of life (positive strategies); and
- (ii) reducing the intensity, frequency and duration of the adult’s behaviour that causes harm to the adult or others; and
- (iii) managing the adult’s behaviour that causes harm to the adult or others to minimise the risk of harm.

An ‘appropriately qualified or experienced’ person is defined in **section 123K.**

The section also lists who must conduct the assessment:

- For *containment or seclusion* - the adult must be assessed by two or more appropriately qualified persons who have qualifications or experience in different disciplines (referred to as a ‘multi disciplinary assessment’);
- For *chemical, physical or mechanical restraint* - adult must be assessed by at least 1 appropriately qualified or experienced person;
- For *restricting access* – the adult must be assessed either by the relevant service provider proposing to use the restrictive practice; or an appropriately qualified or experienced person.

A proper individualised assessment of the individual is a key feature for the legislative (and service) model, as proposed in the Carter Report. It is required in order to understand the causes of the person's challenging behaviour; to determine appropriate interventions to meet the person's needs; improve their capabilities; and reduce the frequency and intensity of their behaviour. The assessment considers all aspects of the individual which may be contributing to their challenging behaviour, which includes a:

- biological component (eg. disability, genetic predisposition);
- psychological component (eg. cognitive factors); and
- social component (eg. culture, surroundings).

As part of the assessment, a recommendation may be made about the use of a restrictive practice to manage or control a person's behaviour, where it is considered necessary for the safety of the adult or another person; and it is the least restrictive option to ensure their safety.

From a clinical perspective, there are three intended outcomes for an assessment:

- collect sufficient information to produce a coherent formulation to understand the person and their needs and goals;
- develop strategies which will provide a good fit for the person in their environment; and
- establish a 'baseline' measure against which the effectiveness of subsequent strategies can be evaluated .

123K Who is appropriately qualified or experienced to assess an adult

Section **123K** defines who could be an appropriately qualified or experienced person to assess the adult. Ultimately, it will be the decision-maker who will make an assessment as to whether it was an adequate assessment by a suitably qualified or experienced person.

An example of a suitably qualified or experienced person could be a person who holds a recognised certificate (or higher) in behavioural sciences (such as applied behaviour analysis), combined with relevant experience working with people with an intellectual or cognitive disability and challenging behaviour.

123L What is a positive behaviour support plan

Section 123L defines a positive behaviour support plan. After an assessment is conducted as required for certain restrictive practices (see **section 123J**), a positive behaviour support plan must be prepared for the adult, if a restrictive practice is proposed. This ensures that any proposed restrictive practice is only considered as part of a wider positive behaviour support program for the adult, focused on their individual needs. The plan must be developed in consultation with significant others.

Section 123L sets out the minimum requirements that must be include in the plan. The plan is an important document for decision-making and authorisation processes, as well as a practical document to guide service providers and their staff as to when they may apply a restrictive practice. The definition of the plan broadly covers the following topics:

TOPIC	DETAIL
About the adult	Description of the relevant adult and background, including name of any guardian/informal decision-maker
About the relevant service providers	Description of each relevant service provider providing disability services - provide a complete picture to the decision-maker of all of the disability services being provided to the adult. It is also important to identify which service provider is authorised to use a restrictive practice in accordance with the plan
Forensic or involuntary treatment order	List the requirements of a known current order made under the Mental Health Act 2000 – to provide a complete picture and facilitate a consistent service response. Includes details of treatment the adult (who has a dual diagnosis) may be receiving from an authorised psychiatrist
Consultation	Who was consulted in the development of their plan and their views – there are minimum requirements for consultation
Details of 'challenging behaviour'	Details of the adult's relevant behaviour which may cause risk of harm to the adult or another person
Findings of the assessment	Includes who conducted the assessment, findings/theories and their recommendations for positive strategies and restrictive practices; and a description of previous strategies used and their effectiveness
Previous strategies used	Any strategies that must be attempted before using the restrictive practice

Positive strategies	For meeting the adult's needs and reducing their 'challenging behaviour' which causes harm to the adult or another person
Strategies to eliminate/reduce restrictive practices	List the strategies which aim to eliminate or reduce restrictive practices
Procedure for using restrictive practice	Includes: • the name of the relevant service provider who will use the restrictive practice; • how the service provider will support and supervise staff in implementing the plan; • any strategies that must be attempted before using the restrictive practice; • the procedure for using the restrictive practice, including any observations and monitoring, and any other measures necessary to ensure the adult's proper care; and treatment, that must take place while the restrictive practice is being used; • a description of the anticipated positive and negative effects on the adult of using the restrictive practice; • a demonstration of why use of the restrictive practice is the least restrictive way of ensuring the safety of the adult or others; and • the intervals at which use of the restrictive practice will be reviewed

Also, depending on the type of restrictive practice, there are additional requirements:

RESTRICTIVE PRACTICE	FURTHER DETAILS
Containment	• Description of adult's accommodation and its suitability for implementing the plan
Seclusion	• Description of the place where the adult will be secluded and its suitability; and • Maximum period for which seclusion may be used at any one time and maximum frequency
Chemical restraint	• Name of the medication to be used and any available information about the medication (eg possible side effects); • Dose, route (method e.g. orally), and frequency (including any maximum per 24 hour period); • For medication as and when needed ('PRN' medication) – the circumstances in which it may be administered; and • Name of adult's treating doctor • Note: the term 'adult's treating doctor' is not defined in the Bill but is meant to refer to a doctor who has some ongoing relationship with the adult
Mechanical or physical restraint	• Maximum period for which the restraint may be used

Division 3 Containment and seclusion

Subdivision 1 Requirements for containing or secluding an adult

123M Containing or secluding an adult under containment or seclusion approval

Section 123M outlines the circumstances when it is lawful for a relevant service provider to use containment or seclusion generally. A service provider will not be civilly or criminally liable for the use of containment or seclusion if they comply with all the requirements in the Bill.

A relevant service provider may contain or seclude an adult with an intellectual or cognitive disability only if the containment or seclusion—

- is necessary to prevent the adult's behaviour causing harm to the adult or others; and
- is the least restrictive way of ensuring the safety of the adult or others; and
- complies with a containment or seclusion approval made by the Guardianship and Administration Tribunal; and
- (unless it is an interim order*) complies with a positive behaviour support plan for the adult – this must include implementing the positive strategies in the plan; and
- the relevant service provider keeps and implements a policy (and procedure) about the use of containment or seclusion – if there is an inconsistency between part of the policy and the Tribunal approval, the service provider must follow the terms of the Tribunal approval; and
- meet the adult's reasonable needs (for example: bedding, clothing and food) (see **section 123Z).**

A requirement to implement the plan (including the positive strategies) as well as any restrictive practice means that restrictive practices can only be approved alongside strategies for increasing the adult's positive behaviour. This should lead to a reduction in the need to use restrictive practices.

This section does not apply to the lawful use of containment or seclusion for the short-term (up to three months) or for those services funded only to provide respite and/or community access.

* The Guardianship and Administration Tribunal may give an interim order under **section 80ZR** of the *Guardianship and Administration Act 2000* in special circumstances. The order may contain conditions.

123N Containing or secluding an adult for respite or community access services

Section 123N outlines the circumstances when a relevant service provider may lawfully use containment or seclusion when the only service they are funded to provide is respite and/or community access. This reason for this special circumstance is explained on **page 10.**

A relevant service provider may contain or seclude an adult with an intellectual or cognitive disability when providing respite and/or community services only if the containment or seclusion—

- is necessary to prevent the adult's behaviour causing harm to the adult or others; and
- is the least restrictive way of ensuring the safety of the adult or others; and
- complies with the consent of a guardian appointed by the Guardianship and Administration Tribunal for restrictive practice (respite) matters; and
- complies with a respite/community access plan for the adult – this includes implementing the positive strategies in the plan; and
- they keep and implement a policy (and procedure) about the use of containment or seclusion; and
- they meet the adult's reasonable needs (for example: bedding, clothing and food).

These requirements are essentially the same as for the use of containment or seclusion in the ordinary case. However, the main differences are:

- that consent to use containment or seclusion is from a guardian for restrictive practice (respite) matters - usually it is the Guardianship and Administration Tribunal; and

- the type of plan that is developed – usually it is a positive behaviour support plan that must be developed.

123O Containing or secluding an adult under short term approval

Section 123O deals with the use of containment or seclusion where there is an immediate and serious risk of harm. This situation was described on **page 11**.

This section does not affect what the service provider can do in an initial emergency where there is an imminent and serious risk of harm to the adult or another. In this case, the service provider and staff would need to take whatever minimum action that is reasonably necessary to prevent harm to the adult or another.

This section deals with the situation where after the initial emergency, the service provider has identified that the continued use of containment or seclusion is necessary. The short-term approval provides time for the service provider to apply to DSQ for a full assessment of the individual and develop a plan; and make an application to the Guardianship and Administration Tribunal. The policy and procedures, which the service provider must keep and implement, may also guide service providers as to when a short-term approval maybe required.

A relevant service provider may contain or seclude an adult with an intellectual or cognitive disability in the short-term (up to three months) only if —

- there is an immediate and serious risk of harm; and
- it is necessary to prevent the adult's behaviour causing harm to the adult or others; and
- it is the least restrictive way of ensuring the safety of the adult or others; and
- complies with the consent of the Adult Guardian – this includes the development of a 'short-term' plan within 14 days of approval; and
- the relevant service provider keeps and implements a policy (and procedure) about use of containment or seclusion; and
- the relevant service provider meets the adult's reasonable needs (for example: bedding, clothing and food).

The main differences to the main scheme are:

- the additional criteria to demonstrate (immediate and serious risk);
- consent comes from the Adult Guardian; and
- requirement to develop a ‘short-term plan’.

Subdivision 2 Multi disciplinary assessment and development of positive behaviour support plan

123P Application of sdiv 2

Section 123P provides when subdivision 2 applies. It applies where

- a relevant service provider wishes to contain or seclude an adult with an intellectual or cognitive disability; and
- they do not have a current containment or seclusion approval (if they have a containment or seclusion approval, they must apply to change the positive behaviour support plan – see **subdivision 3**)

It does not apply for short-term approvals or the special circumstance of respite and/or a community access service.

Before an application can be made to the Guardianship and Administration Tribunal, two preliminary steps must first happen:

- a multi-disciplinary assessment of the individual; and
- development of a positive behaviour support plan.

Under the Bill, these decisions must be made by the chief executive DSQ. Section 228 of the *Disability Services Act 2006* allows the chief executive to delegate this power to an appropriately qualified person who is a public service employee. In practice, is intended this role will be delegated to the DSQ Specialist Response Service Team, who are appropriately qualified and experienced persons in the assessment and planning of adults within the target group.

If after both these decisions are made, containment or seclusion is considered necessary for safety of the adult or another and it is the least restrictive option, a joint application, with the funded service provider,

must be made to the Guardianship and Administration Tribunal. If DSQ is the service provider, DSQ makes a sole application to the Tribunal.

123Q Chief executive to decide whether multi disciplinary assessment of adult will be conducted

Section 123Q provides that the chief executive (DSQ) must decide whether to conduct a multidisciplinary assessment of the adult. This applies whether DSQ is the service provider or when a funded non-government service provider notifies DSQ they wish to contain or seclude the adult.

Subsection (2) lists the mandatory criteria that must be considered by the chief executive – the chief executive may decide to conduct a multi disciplinary assessment of the adult if the chief executive considers it may be necessary for the relevant service provider to contain or seclude the adult to safeguard the adult or others from harm.

Subsection (3) requires the chief executive to consult with and consider the views of certain people in deciding whether to conduct a multi disciplinary assessment of the adult:

- the adult;
- if the adult has a guardian or informal decision maker—the guardian or informal decision maker;
- each relevant service provider providing disability services to the adult;
- if the chief executive is aware that a forensic or involuntary treatment order is in force for the adult— the authorised psychiatrist for the treating health service for the adult under the *Mental Health Act 2000*;
- any other person considered by the chief executive to be integral to the chief executive's decision. For example, a family member who is part of the adult's support network, a key health care provider or an advocate for the adult.

Consultation with the adult and those within the adult's support network is integral in making an informed decision about whether to conduct a multi-disciplinary assessment.

Subsection (4) provides that that the chief executive is not required to consult with an informal decision-maker if the chief executive was not aware, or could not reasonably be expected to be, aware, the person is an informal decision maker for the adult; or after taking all reasonable steps,

the chief executive cannot locate the person. The definition of an 'informal decision-maker' (see **section 123E**) can be wide and this subsection ensures that any consultation is practical in the circumstances.

123R Notice of decision not to conduct assessment

Section 123R provides the action that the chief executive must follow if the decision is not to conduct a multi disciplinary assessment of the adult. A decision not to conduct a multi-disciplinary assessment essentially means that containment or seclusion was not considered necessary or the least restrictive option.

The chief executive must give the following persons a decision notice about the decision—

- the relevant service provider;
- the adult; and
- a guardian or informal decision maker for the adult who was consulted by the chief executive.

A 'decision notice' is defined in the Bill. The effect of a decision notice is that any of those consulted in the decision will be given notice of the decision and reasons, and can apply for an internal review of the decision.

123S Development of positive behaviour support plan following assessment

Section 123S applies if the chief executive decided to conduct a multi-disciplinary assessment and after that assessment, it is considered that containment or seclusion may be necessary for the safety of a person and is the least restrictive option.

The section provides that the chief executive must develop a positive behaviour support plan for the adult and sets out the process for a decision to develop a positive behaviour support plan. **Section 123L** outlined the minimum requirements to be included in a positive behaviour support plan.

Subsection (2) provides the criteria that the chief executive must consider in developing a positive behaviour support plan, having regard to the findings, theories and recommendations of the persons who assessed the adult. The chief executive must be satisfied—

- the adult's behaviour has previously resulted in harm to the adult or others; and
- it is necessary for the relevant service provider to contain or seclude the adult to safeguard the adult or others from harm; and
- containing or secluding the adult is the least restrictive way of ensuring the safety of the adult or others.

Subsection (3) provides that where any other restrictive practice is proposed, as well as containment and/or seclusion, all the restrictive practices must also be included in the plan. This allows the one plan for the adult to be developed. The recommendations around the use of any restrictive practice must be based on the assessment described in **section 123J**.

Subsection (4) provides that the chief executive must consult with, and consider the views of significant others consulted (that is, those required to be consulted under **section 123Q(3)**).

Subsection (5) provides additional consultation requirements for the use of chemical restraint – the chief executive must consult with the adult's treating doctor and inform the adult's treating doctor about the findings of the assessment and proposed (positive) strategies to meet the adult's needs and reducing the adult's 'challenging behaviour'. This enables the doctor to make an informed decision about the use of chemical restraint.

Subsection (6) provides the process if the chief executive makes a decision <u>not</u> to develop a positive behaviour support plan. A decision not to develop a positive behaviour support plan essentially means, that after considering the findings of the multi-disciplinary assessment, containment or seclusion is not considered necessary for safety of the adult or another, or the least restrictive option.

The chief executive must provide a decision notice (defined in the Bill) to:

- the relevant service provider;
- the adult; and
- a guardian or informal decision maker for the adult who was consulted by the chief executive.

The effect of this subsection is that these people will be given notice of the decision, reasons for the decision; and can apply for an internal review of the decision not to develop a positive behaviour support plan.

123T Participation of psychiatrist in development of plan – adult subject to forensic order or involuntary treatment order

Section 123T deals with the additional requirements where a decision is made to develop a plan and the chief executive of DSQ is aware that a forensic or involuntary treatment order is in place for the adult. A forensic or involuntary treatment order is made under the *Mental Health Act 2000.*

The section requires the chief executive to ensure the authorised psychiatrist is given the opportunity to participate in the development of the positive behaviour support plan.

This accounts for the situation where the adult has an intellectual or cognitive disability and a mental illness. If the adult is subject to a forensic or involuntary treatment order, this means they are receiving treatment from an authorised psychiatrist under the *Mental Health Act 2000*. A forensic or involuntary treatment order may order the use of restraint or seclusion in particular circumstances. This requirement to involve the authorised psychiatrist in the planning process helps to improve a consistent service response between the treatment of the adult under the *Mental Health Act 2000* and the use of any restrictive practices under this scheme.

Subdivision 3 Changing a positive behaviour support plan

123U Application of sdiv 3

Section 123U provides this subdivision applies where there is a current containment or seclusion approval in place; and the relevant service provider wants to change some aspect of the positive behaviour support plan.

123V Who may change positive behaviour support plan

Section 123V provides that the positive behaviour support plan for the adult may be changed only by the chief executive (not the service provider). However, the process is set up so that any significant changes, such as an increase in use of restrictive practices or change in a service provider, will still need to be approved by the Guardianship and Administration Tribunal.

123W When chief executive must decide whether positive behaviour support plan should be changed

Section 123W requires the chief executive to decide whether a change to the adult's positive behaviour support plan should be made if—

- a relevant service provider asks the chief executive, in writing, to make a change to the plan; or
- the chief executive becomes aware that a forensic order or involuntary order has been made for the adult.

A change can lead to a review of a current containment or seclusion approval by the Guardianship and Administration Tribunal or a new application to the Tribunal.

The section also provides examples of when a change may be required or requested:

- if there is a change in a service provider – this would require a new application to the Tribunal (as an approval attaches to individual service providers);
- the relevant service provider wants to change a matter stated in the positive behaviour support plan – the conditions of the Tribunal approval will help to determine whether the change can be made by the chief executive or by the Tribunal. For example, the Tribunal may make an order with the condition that if aspect "y" of the positive behaviour support plan changes, that the plan must be brought back before the Tribunal for their consideration;
- the current approval for containment or seclusion approval is about to expire and the service provider to which the approval applies wishes to apply for a new approval – this would need to go back to the Tribunal for approval.

123X Requirements for chief executive's decision about whether change should be made

Section 123X sets out the circumstances when the plan may be changed by the chief executive and the process for deciding whether to make the change.

The intention of this section is to enable the chief executive to make minor and not significant changes to the positive behaviour support plan. Any significant changes would have to be decided by the Guardianship and

Administration Tribunal. Also, what changes the chief executive can make will depend on the approval of the Tribunal and any conditions of the approval.

The chief executive may decide a change should be made to the plan only if satisfied the change would not—

- increase the risk of the adult's behaviour causing harm to the adult or others; or
- decrease the extent to which the adult's needs are met or the adult's capabilities and quality of life are improved.

If any change had the potential effect of increasing the risk of behaviour or decreasing the positive strategies, these would be considered significant changes and require the approval of the Tribunal.

In deciding whether or not to make the change, the chief executive may:

- decide whether or not to conduct all or part of a multi disciplinary assessment; or
- consult any of the persons listed in **section 123Q(3)** as the chief executive considers appropriate in the circumstances. However, if the change is being made because the adult is subject to a forensic or involuntary treatment order, the chief executive must consult an authorised psychiatrist for the treating health service for the adult under the *Mental Health Act 2000.*

Subsection (4) makes it clear that if the Tribunal gives any directions about conducting an assessment or consulting, the chief executive must comply with these directions.

123Y Action of chief executive after deciding whether change should be made

Section 123Y sets out the process if the chief executive decides a change to the adult's positive behaviour support plan should be made.

Subsection (1) provides that the first step is to determine whether the change requires an application to the Guardianship and Administration Tribunal (either a new application or an application for a review of the current approval); and provides guidance as to what changes may need to go to the Tribunal.

Subsection (2) lists the circumstances where the change always requires an application to the Tribunal:

- if the change is inconsistent with the terms of an existing containment or seclusion approval (*for example; seclusion is approved for 15 minutes but it is proposed to increase it to a maximum period of 30 minutes; or there is a change in a relevant service provider*); or
- an existing containment or seclusion approval is about to expire and the relevant service provider proposes to apply for a further approval.

Subsection (3) provides for the process if the chief executive decides that the change does not require an application to the Tribunal. The chief executive must make the change and give a copy of the amended plan to the following—

- the Tribunal – this means that the Tribunal has notice of this decision and can initiate a review of that amended plan if they are of the view the change should be made by the Tribunal;
- the adult;
- if the adult has a guardian or informal decision maker—the guardian or informal decision maker; and
- the relevant service provider to which an existing containment or seclusion approval applies.

Subsection (4) provides that the chief executive is not required to give a copy of the amended plan to a person who is an informal decision maker for the adult if they can not be,or reasonably expected to be, identified or located and reasonable attempts have been made to identify or locate the informal decision-maker. This is to make the consultation provisions workable given the broad definition of ‘informal decision-maker’ (see **section 123E).**

Subsection (5) provides that as soon as practicable after making the decision whether the change requires an application to the Tribunal, the chief executive must give a notice (‘prescribed notice’) to either:

- the relevant service provider who requested the change; or
- if the chief executive had to decide whether a change should be made because a subsequent forensic or involuntary treatment order has been made under the *Mental Health Act 2000* - the director of mental health and the relevant service provider.

This allows the affected service provider (or director of mental health in some cases) to apply to the Tribunal to seek a review of the chief executive's decision.

A 'prescribed notice' must state whether the change should be made to the plan and if so, whether the change requires an application to the Tribunal. A 'prescribed notice' is different from a 'decision notice' where the decision is subject to an internal review.

Subdivision 4 General requirements for containment or seclusion

123Z Relevant service provider to ensure adult's needs are met

Section 123Z requires that if containment or seclusion is approved, the relevant service must also ensure the adult's basic and reasonable needs are met during the period of containment or seclusion, by ensuring the provision of the following:

- sufficient bedding and clothing;
- sufficient food and drink;
- access to adequate heating and cooling;
- access to toilet facilities; and
- the adult's medication as prescribed by a doctor.

Division 4 Use of restrictive practices other than containment or seclusion

This division deals with the requirements for the lawful use of other restrictive practices (chemical, mechanical or physical restraint or restricting access). If any of these restrictive practices is required, in addition to containment and/or seclusion, authorisation must come from the Guardianship and Administration Tribunal (except in the case of short term approvals, respite/community access services).

Subdivision 1 Requirements for using chemical, mechanical or physical restraint, or restricting access

123ZA Using chemical, mechanical or physical restraint, or restricting access, with consent of guardian etc.

Section 123ZA outlines the circumstances when it is lawful for a relevant service provider to use chemical, mechanical, physical restraint and/or restricting access generally. A service provider will not be civilly or criminally liable for the use of one or more of these ‘other restrictive practices’ if they comply with all the requirements listed.

This section does not apply to the lawful use of chemical, mechanical or physical restraint or restricting access in the short-term; or in a respite and or community access environment.

A relevant service provider may use chemical, mechanical, physical restraint or restrict access of an adult with an intellectual or cognitive disability only if —

- it is necessary to prevent the adult’s behaviour causing harm to the adult or others; and
- it is the least restrictive way of ensuring the safety of the adult or others; and
- complies with a positive behaviour support plan for the adult – this must include implementing the positive strategies in the plan; and
- complies with the relevant consent/approval:
    - For *chemical, mechanical or physical restraint* – consent of a guardian appointed by the Tribunal for restrictive practice matters; or
    - For *restricted access* - consent an informal-decision maker or if there is a guardian, for restrictive practice matters, consent of the guardian;
    - Where containment and/or seclusion is also being used – approval of the Guardianship and Administration Tribunal; and
- the relevant service provider keeps and implements a policy (and procedure) about use of the restricitive practice.

A requirement to implement the positive strategies in the plan as well as any restrictive practice, means that restrictive practices can only be approved and used alongside strategies for increasing the adult's positive behaviour, which should lead to a reduction in the use restrictive practice/s.

This section is similar the lawful use of containment or seclusion but the main differences are:

- who approves the use of the restrictive practice: If it is chemical, mechanical or physical restraint - it is the guardian appointed by the Tribunal specifically for restrictive practice matters. If it is restricting access - consent must be obtained from either a guardian for restrictive practice matters or, if there is not one appointed, an informal decision-maker; and
- who conducts the assessment and plan – the service provider must arrange for an assessment and develop the plan (for containment or seclusion, this must be done by the chief executive DSQ). Also, for chemical, mechanical or physical restraint, the assessment must be done by at least one appropriately qualified or experienced person (for containment or seclusion, it must be a 'multi-disciplinary assessment'). For restricting access, the assessment must be done by either at least one appropriately qualified or experienced person, or by the service provider.

123ZB Using chemical, mechanical or physical restraint, or restricting access, for respite or community access services

Section 123ZB outlines the circumstances when a relevant service provider may lawfully use chemical, mechanical or physical restraint, or restrict access in the course of providing respite or community access. This section applies to a relevant service provider who is funded only to provide respite and/or community access for the adult (and the adult does not receive any other disability service).

This reason for this special circumstance is explained on page 10.

A relevant service provider may use chemical, mechanical or physical restraint on, or restrict access of, an adult with an intellectual or cognitive disability when providing respite and/or community services if it—

- is necessary to prevent the adult's behaviour causing harm to the adult or others; and

- is the least restrictive way of ensuring the safety of the adult or others; and
- complies with a 'respite/community access plan' for the adult – this must include implementing the positive strategies in the plan; and
- complies with the consent of a guardian for restrictive practice respite matters (for physical or mechanical restraint restricting access, if there is no guardian, an informal decision-maker can consent); and
- before using the restrictive practice, complies with the requirements in **division 5;** and
- the relevant service provider keeps and implements a policy about the use of restrictive practices.

The main difference between these requirements and the main scheme is the type of consent and type of plan required to be developed.

Subsection (3) provides that this section does not apply if the adult is on a containment or seclusion approval (made by the Tribunal). This is because an adult who is the subject of a containment or seclusion approval would be receiving other disability services and likely to receiving more permanent support from DSQ or a DSQ funded service.

Subsection (4) also provides for one exception for the use of chemical restraint during the course of respite or community access. This relates to the use of fixed dose medication in the course of providing respite services. This is explained in **section 123ZC**.

123ZC Using chemical restraint (fixed dose) for respite services

A special provision is made for the use of daily (fixed) dose medication in a respite setting only – in this case, the service provider must obtain the consent of an informal decision-maker and comply with a policy to lawfully use the restrictive practice. The exception does not apply to the use of prescribed daily (fixed) dose or PRN ('as and when needed') medication in a community access setting, or to the use of medication prescribed PRN in a respite service.

The reason for this exception is to allow for the continued use in respite of daily (fixed) dose medication, which has already been prescribed by a doctor; and where, often, the service provider is not in a position to know if the medication is being used primarily for behaviour control. Nor is the service provider of occasional respite care in a position to try and influence

the longer term management of behaviour for that adult and to determine the least restrictive option. Adults receiving respite usually do so for short periods only, and it would be impracticable to require a service provider to assess and develop a plan for an adult who they only see occasionally and for short periods. Service providers strongly indicated during consultation that it may become unviable for them to continue to provide respite if there were no lesser requirements for daily (fixed) dose medication.

123ZD Using chemical, mechanical or physical restraint, or restricting access under short term approval

Section 123ZD deals with the use of chemical, mechanical or physical restraint or restricting access in an emergency - where there is an immediate and serious risk of harm. This situation was described on **page 11**.

This section does not affect what the service provider can do in an initial emergency where there is an imminent and serious risk of harm to the adult or another. In this case, the service provider and staff would need to take what minimum action is reasonably necessary to prevent harm to the adult or another.

This section deals with the situation where after the initial emergency, the service provider has identified that the continued use of chemical, mechanical or physical restraint, or restricting access, is necessary. The short-term approval provides time for the service provider to conduct a proper assessment of the individual and develop a positive behaviour support plan; and make an application to the Guardianship and Administration Tribunal for the appointment of a guardian for restrictive practice matters.

The policy and procedures, which the service provider must keep and implement, will also guide service providers as to when a short-term approval may be required. Restricting access can also be approved in the short-term but it is unlikely that this restrictive practice would be used in this type of situation.

If there is no guardian for restrictive practice matters, a short-term approval must be given by the chief executive DSQ. A short-term approval can only be made for up to three months.

The section provides that a relevant service provider may use chemical, mechanical or physical restraint (or restricting access) in relation to an

adult with an intellectual or cognitive disability in the short-term (up to three months) if —

- there is immediate and serious risk of harm; and
- the use is necessary to prevent the adult's behaviour from causing harm to the adult or others; and
- it is the least restrictive way of ensuring the safety of the adult or others; and
- it complies with the consent of the short-term approval – this includes the development of a 'short-term' plan within 14 days of approval; and
- the relevant service provider keeps and implements a policy about use of the restrictive practice.

Subdivision 2 Assessment and development of positive behaviour support plan

123ZE Application of sdiv 2

Section 123ZE provides for when this subdivision applies. This subdivision applies if—

- a relevant service provider proposes to use chemical restraint, mechanical restraint or physical restraint on, or restrict access of, an adult with an intellectual or cognitive disability; and
- the adult is not the subject of a containment or seclusion approval; and
- containment or seclusion is not proposed.

If the adult is already subject to a containment or seclusion approval (whether it relates to the relevant service provider or another service provider), any additional use of restrictive practices must go through the chief executive, DSQ and approved by the Guardianship and Administration Tribunal. Similarly, if a relevant service provider wishes to use chemical, mechanical or physical restraint or restricting access, as well as containment or seclusion, this must all be approved by the Tribunal. This allows the for the one authorisation process for the adult.

This subdivision does not apply to short term approvals or using restrictive practices in respite/community access setting.

123ZF Requirements for development of positive behaviour support plan—assessment and consultation

Section 123ZF states the requirements for developing a positive behaviour support plan for the adult. It sets out assessment and planning process, including who should be consulted. The minimum requirements of a positive behaviour support plan are listed in section **123L.**

Subsection (2) provides that the relevant service provider must—

- ensure the adult is assessed (see **section 123J** for more detail); and
- consult and consider the views of particular people:
    - the adult;
    - any guardian or informal decision maker for the adult;
    - any other relevant service provider providing disability services to the adult; and
    - any another person considered by the service provider to be integral to the development of the plan. For example, a family member who is part of the adult's support network, a key health care provider, or an advocate for the adult. The policy which the service provider must keep and implement may also guide who else should be consulted.

Also, if the service provider is aware that the adult is also being treated under a forensic or involuntary treatment order (made under the *Mental Health Act 2000*), the service provider must ensure that the authorised psychiatrist is given the opportunity to participate in the development of the positive behaviour support plan for the adult. This helps for a consistant service response between the treatment of the adult under the *Mental Health Act 2000* and the use of any restrictive practices under this scheme.

Subsection (3) provides for an additional consultation requirement where chemical restraint is proposed. The relevant service provider must:

- consult the adult's treating doctor; and
- inform the adult's treating doctor about the findings of the assessment, including the recommendations for any restrictive practices and (positive) strategies to meet the adult's needs and reduce their 'challenging behaviour'.

This subsection is important to ensure the adult's treating doctor is fully informed when making a decision whether or not to prescribe medication to control a person's behaviour.

Subsection (4) makes it clear that recommendations for the use of mechanical or physical restraint, proposed in the positive behaviour support plan, must be supported by the assessment. For chemical restraint, this has to be as prescribed by the adult's treating doctor.

123ZG Changing a positive behaviour support plan

Section 123ZG provides for the process for changing a positive behaviour support plan that provides for use of chemical restraint, mechanical restraint or physical restraint, or restricting access.

The relevant service provider may change the plan only if—

- for a change relating to use of *chemical restraint*—the relevant service provider has consulted the adult's treating doctor; or
- for a change involving *mechanical or physical restraint* —the change is supported by the recommendations of an appropriately qualified or experienced person (see **section 123K** for definition); and
- a guardian for a restrictive practice (general) matter for the adult consents to the change.

For restricting access, a positive behaviour support plan may be changed by the relevant service provider only if a guardian for a restrictive practice matters consents to the change, or if there is no guardian, an informal decision maker for the adult consents to the change.

123ZH Requirement for relevant service provider to consider whether plan should be changed

This section applies where a positive behaviour support plan for an adult has been developed under this scheme and subsequently a forensic or involuntary treatment order is made under the *Mental Health Act 2000* and the service provider becomes aware that such an order has been made for the adult.

Subsection (2) provides that the relevant service provider must consider whether the positive behaviour support plan should be changed.

Subsection (3) provides that in deciding whether the positive behaviour support plan should be changed, the relevant service provider must—

- consult an authorised psychiatrist for the treating health service for the adult under the *Mental Health Act 2000*; and
- consider the psychiatrist's views about the use of any restrictive practice provided for in the plan.

This refers to where the adult has an intellectual or cognitive disability and a mental illness. If the adult is subject to a forensic or involuntary treatment order, this means they are receiving treatment from an authorised psychiatrist under the *Mental Health Act 2000*. A forensic or involuntary treatment order may order the use of restraint or seclusion in particular circumstances. This requirement to involve the authorised psychiatrist in the planning process helps to prevent any conflict that may occur between the treatment of the adult under the *Mental Health Act 2000* and the use of any restrictive practices under this scheme.

Subdivision 3 Requirements if adult subject to forensic or involuntary treatment order

This subdivision deals with the situation where the adult may also have a mental illness and is receiving treatment by an authorised psychiatrist under the *Mental Health Act 2000*. It also relates to other consultation sections in the Bill which aim to help ensure that any treatment the adult may receive under a forensic or involuntary treatment order is taken into account when any restrictive practices are proposed under this scheme. This scheme only governs the use of restrictive practices by a DSQ funded or provided service (and those engaged by them) while the adult is receiving a disability service. It does not apply to the use of restrictive practices in other settings, such as in an authorised mental health service - this is governed by the *Mental Health Act 2000*.

123ZI Requirement for relevant service provider to notify guardian

This section applies where the authorised psychiatrist has been consulted in the development or changing of the plan and the authorised psychiatrist

does not agree with the use of a restrictive practice provided for in the plan for the adult.

As soon as practicable after consulting with the authorised psychiatrist, the relevant service provider must notify the relevant decision-maker on the differing views of the authorised psychiatrist regarding the use of the restrictive practice. The decision-maker must then consider the differing views (this is outlined in **clause 22** – amendments to the *Guardianship and Administration Act 2000*).

123ZJ Requirement for relevant service provider to notify director of mental health

Section 123ZJ applies if:

- a relevant service provider develops or changes a positive behaviour support plan; and
- a guardian for a restrictive practice (general) matter, or an informal decision maker, for the adult consents to the use of a restrictive practice by the relevant service provider in relation to the adult; and
- the service provider is aware that forensic or involuntary treatment order is in place for the adult.

The relevant service provider must as soon as is practicable give notice to the director of mental health the terms of consent; and provide a copy of the positive behaviour support plan, if asked by the director of mental health.

If the director of mental health does not agree with the guardian's decision, they are able to apply to the Tribunal for a review of that decision (under the amendments to the *Guardianship and Administration Act 2000*)**.**

Subdivision 4 Short term approvals given by chief executive

This subdivision deals with the use of chemical, mechanical or physical restraint or restricting access in the short-term (up to three months). This situation was explained on **page 11.** If there is no guardian for restrictive practice matters, the chief executive DSQ must make the decision. Section 228 of the *Disability Services Act 2006* allows the chief executive to delegate this power to an appropriately qualified person who is a public

service employee. In practice, it is intended this power will be delegated to an appropriate senior person who will be accessible in the regions.

123ZK Short term approval for use of restrictive practices other than containment or seclusion

Section 123ZK sets out the criteria that the chief executive (DSQ) must consider in deciding whether or not to approve the use of chemical, mechanical or physical restraint (or restricting access) in the short term. The section also sets out who must be consulted in this decision and who should be notified of this decision. The Adult-Guardian decides the use of containment and/or seclusion in the short-term (see **clause 22, Part 4**).

Subsection (2) provides the criteria that the chief executive must be satisfied of before making a decision. The chief executive may only make an approval if-

- the adult is not the subject of a containment or seclusion approval – if this was the case, the service provider must obtain the approval of the Tribunal; and
- there is no guardian for a restrictive practice (general) matter for the adult – if this was the case, the service provider must obtain the consent of that guardian; and
- there is an immediate and serious risk that, if the approval is not given, the adult's behaviour will cause harm to the adult or others;
- use of the restrictive practice is the least restrictive way of ensuring the safety of the adult or others; and
- if chemical restraint is proposed - the service provider must have consulted and considered the view of the adult's treating doctor.

Subsection (3) makes it clear that if the chief executive has given a previous short-term approval for the adult, the chief executive cannot give another short-term approval for the adult unless there are exceptional circumstances, such as there has been a change in the service provider or location of the adult.

Subsection (4) lists those people that must be consulted in deciding whether to give a short-term approval. Where practicable in the circumstances, the chief executive must consult and consider the views of:

- the adult,

- guardian or informal decision maker for the adult; and
- if the chief executive is aware that there is a forensic or involuntary order in place under the *Mental Health Act 2000*-the authorised psychiatrist responsible for the treatment of the adult under that Act.

The consultation provision aims to balance the need to consult significant others with the need to make a quick decision given the nature of the situation.

Subsection (5) sets out what the chief executive must do after deciding whether to give a short-term approval or not. As soon as practicable after making this decision, the chief executive must give the relevant service provider notice of the decision (that is, refusal or approval). If the approval is given the notice must state —

- the conditions to which it is subject – see **section 123ZM** for the conditions that must always be included; and
- the period for which it has effect – it cannot be any longer than three months unless there are exceptional circumstances.

Subsection (6) lists those persons that must also be notified if a short-term approval is given; and subsection (7) lists what has to be included in the notice. The chief executive must give notice of the approval to the following persons within 7 days after giving the approval—

- the Adult Guardian;
- any person consulted by the chief executive in the decision.

Notification to the Adult Guardian and others assists in ensuring the decision is transparent and more accountable.

Subsection (8) allows a person who has been given a notice of a decision (either to give a short-approval or a refusal to give a short-term approval) to apply to the Guardianship and Administration Tribunal for a review. The Tribunal will consider the application and make an order it considers appropriate. An application to the Tribunal does not automatically stay the original decision of the chief executive. This review by an independent body allows for a more transparent and accountable decision-making process for short-term approvals.

123ZL Period for which short term approval has effect

Section 123ZL specifies that a short-term approval must not be longer than 3 months. This cannot be extended unless there are exceptional circumstances (see **section 123ZK (3)**). This section also specifies the circumstances where a short-term approval automatically ends:

- where a guardian for restrictive practices is appointed by the Guardianship and Administration Tribunal;
- the Tribunal gives a containment or seclusion approval;
- the relevant service provider does not comply with the requirement to develop a 'short-term plan' (see **section 123ZM(1)(a)**); or
- the chief executive does not approve the 'short-term plan' (see section **123ZN**).

123ZM Conditions of short term approval

Section 123ZM provides the conditions which must be stated on any short term approval given by the chief executive. In addition, the approval may be subject to other conditions considered appropriate by the chief executive.

Any short-term approval must be subject to the condition that within 14 days after receiving notice of the short term approval decision, the relevant service provider must give the chief executive a 'short-term plan. The chief executive then reconsiders the short-term approval in light of the short-term plan (see **section 123ZN**).

A 'short-term plan' is defined in this section to mean a plan stating at least the following—

- a description of the behaviour of the adult that causes harm to the adult or others, including the consequences of the behaviour;
- a description of the restrictive practices used in relation to the adult;
- the reasons for using the restrictive practices; and
- a demonstration of why using the restrictive practice is the least restrictive option for the safety of the adult or others.

123ZN Chief executive's decision about approving short term plan

Section 123ZN sets out the process for deciding whether or not to approve a short-term plan for the adult. This section applies if the chief executive has given a short-term approval (under **section 123ZK**) and as a necessary condition of that approval, the service provider has given the chief executive a short term plan.

As soon as practicable after receiving the short term plan, the chief executive must decide whether to approve it. In making this decision, the section sets out the criteria that must be considered. Before a short-term plan can be approved, the chief executive must be satisfied of the following:

- the information in the short-term plan is consistent with the information considered by the chief executive in deciding whether to give the relevant short term approval; and
- there is an immediate and serious risk that, if the short term approval does not continue, the adult's behaviour will cause harm to the adult or others; and
- use of the restrictive practices is in compliance with the short term approval and the plan is the least restrictive way of ensuring the safety of the adult or others.

After making a decision, the chief executive must, as soon as practicable, notify the relevant service provider about the decision. If the chief executive does not approve the short term plan, the relevant service provider may apply to the Tribunal for a review of that decision. Upon review, the Tribunal may make the order it considers appropriate.

Division 5 Use of restrictive practices for respite services or community access services

123ZO Purpose of div 5

Section 123ZO provides for when division 5 applies. This division prescribes the requirements that must be complied with before a relevant service provider uses a restrictive practice in the course of providing respite

services or community access services to an adult with an intellectual or cognitive disability. The reason for these special provisions was explained earlier on **page 10.**

This division does not apply for the use of chemical restraint (fixed dose) (see **section 123ZC).**

123ZP Requirement to develop respite / community access plan

Section 123ZP provides that the service provider must develop a ‘respite or community access plan’ for the adult. A ‘respite/community access’ plan is similar to a positive behaviour support plan but requires less detail. This section lists the minimum requirements that must be included in a respite/community access plan:

TOPIC	DETAIL
About the adult	Description of the relevant adult and background
Details of 'challenging behaviour'	Details of the adult's relevant behaviour which may cause risk of harm to the adult or another person
Description restrictive practices proposed	Description of restrictive practices and reasons for using the restrictive practice
Procedure for using restrictive practice	This includes: • any strategies that must be attempted before using the restrictive practice; • the procedure for using the restrictive practice, including any observations and monitoring, and any other measures necessary to ensure the adult's proper care during the restrictive practice; and • demonstration as to why it is the least restrictive way of ensuring the safety of the adult or others
Positive strategies	A description of the positive strategies that will be used to • meet the adult's needs and improve the adult's capabilities and quality of life; and • reduce the intensity, frequency and duration of the adult's behaviour that causes harm to the adult or others

Also, depending on the type of restrictive practice, there are additional requirements:

RESTRICTIVE PRACTICE	FURTHER DETAILS
Containment	• Description of the place where the adult will be contained
Seclusion	• Description of the place where the adult will be secluded; and • Maximum period for which seclusion may be used at any one time (and maximum frequency)
Chemical restraint	• Name of the medication to be used and any available information about the medication, including, for example, information about possible side effects; • Dose, route (method), and frequency of administration. For PRN medication (that is, medication as and when needed) – the circumstances in which it may be administered; and • Name of adult's treating doctor
Mechanical or physical restraint	Maximum period for which the restraint may be used

In developing the respite/community access plan, relevant people must be consulted (see **section 123ZR**) and any relevant information obtained during this process (section **123ZQ**) must be included in the plan.

123ZQ Obtaining information about the adult

Section 123ZQ provides that in developing a respite / community access plan, the relevant service provider must obtain any information available and relevant for identifying the following:

- the adult's needs;
- the behaviour of the adult that causes harm to the adult or others, including the consequences of the behaviour; and

- the factors contributing to that behaviour.

This information is obtained from the consultation process described in **section 123ZR**.

123ZR Consultation

Section 123ZR provides who must be consulted in the development of a respite / community access plan for an adult. The relevant service provider must consult with, and consider the views of, the following:

- the adult;
- if the adult has a guardian or informal decision maker—the guardian or informal decision maker;
- any other relevant service provider providing disability services to the adult; and
- any other person considered by the relevant service provider to be integral to the development of the plan, such as a family member who is part of the adult's support network, a key health care provider or an advocate for the adult

This consultation process helps to ensure that relevant information is gathered for the respite/community access plan.

123ZS Risk assessment

Section 123ZS also introduces the concept of a 'risk assessment' for the use of restrictive practices in a respite or community access service. The relevant service provider must identify, and keep a record of the risks associated with the provision of respite services or community access services to the adult by the relevant service provider; and the procedures the relevant service provider will implement to mitigate those risks.

Examples of possible risks include:

- the adult's behaviour causing harm to another client of the relevant service provider;
- the staff of the relevant service provider not being adequately trained to manage the behaviour of the adult; or
- the physical environment in which the services are provided not being adequate to accommodate the needs of the adult.

A policy, which the service provider must keep, must (among other things) include details about how to carry out a risk assessment for the adult (see **section 123ZV(4)**).

Division 6 Policy about use of restrictive practices

123ZT Application of div 6

This division applies if another section authorises a relevant service provider to use a restrictive practice if the relevant service provider keeps and implements a policy about use of the restrictive practice.

Under the scheme, a service provider must keep and implement a policy in relation to the use of all restrictive practices (including for respite/community access service and for short-term approvals).

Requiring services to have a policy allows more practical detail to be given to service providers and their staff around the assessment and planning processes, and guidance around the safe and proper use of restrictive practices. A policy must be developed within the framework of the Bill and if there is any inconsistency with the policy and Bill, the Bill provision applies to the extent of any inconsistency.

123ZU Policy must be consistent with department's policy

Section 123ZU provides that the relevant service provider must keep and implement a policy about use of the restrictive practice that is consistent with the DSQ's policy about use of the restrictive practice.

Note – a requirement to 'keep and implement' a policy is defined in **section 123I** and includes development of procedures and keeping the policy up to date.

123ZV Requirements for content of department's policy

Section 123ZV provides that DSQ must have a policy about use of each type of restrictive practice and lists the minimum topics that policy must address.

Subsection (2) lists what minimum topics need to be addressed for the use of restrictive practices under the main scheme (that is, other than in the

course of providing respite or community access services; or under a short term approval):

Topic	Detail
Positive behaviour support plan	How this plan should be developed – this only applies to the proposed use of restrictive practices other than containment or seclusion. For containment or seclusion, the plan must be developed by DSQ. This includes further information about who should be consulted (note - there are mandatory consultation provisions in the Bill)
Review of restrictive practices	Details about the review of restrictive practices (this can include medication reviews). • For the use of chemical, mechanical or physical restraint – the review must occur at least once during the currency of the guardianship appointment (a guardian for restrictive practice matters can be appointed for up to 12 months). • For restricted access – review must happen at least every 12 months. • For containment or seclusion – review will be conducted by DSQ but that must happen at least once during the period of the containment or seclusion approval (which can be made for up to 12 months). Note: In addition, details around review must be included in a positive behaviour support plan. Also, there will be formal reviews conducted by the Tribunal at the end of a containment or seclusion approval, or upon review of the appointment of a guardian for restrictive practice matters.

Skills and knowledge of person using the restrictive practice	Procedures on how the individual who will be using the restrictive practice will: • know about the requirements for the lawful use of the restrictive practice; and • have the skills and knowledge to use the restrictive practice appropriately. Skilled staff is critical to the proper and safe use of restrictive practices. A detailed authorisation process will not be effective without appropriate persons to be able to properly implement and give effect to the approval/consent.
Monitoring use of restrictive practice	Procedures on how the use of the restrictive practice should be monitored to prevent abuse, neglect or exploitation. Note – the plan itself must include certain details about this.
Minimum impact on other co-residents	For restricted access, where that practice may impact on other co-residents, the policy must detail how the service provider will minimise the impact on those other persons.

Subsection (3) lists the minimum requirements for developing a policy about the use of restrictive practices under a short term approval:

Topic	Detail
Short-term approval	Detail of procedures to: • develop a short-term plan; • ensure an individual has knowledge of the requirements for lawful use of the restrictive practice and the appropriate skills to use the practice appropriately; and • monitor the use of the restrictive practice.

Subsection (4) lists the minimum requirements for developing a policy about the use of restrictive practices in the course of providing respite and/or community access services:

Topic	Detail
Respite/community access plan	Detail of procedures of how to: • develop a respite/community access plan; and • carry out a risk assessment for the adult (defined in section 123ZS) Note - no plan is required for the use of fixed dose chemical restraint in a respite service.
Skills and knowledge of person using the restrictive practice	Procedures on how the individual who will be using the restrictive practice: • will know about the requirements for the lawful use of the restrictive practice; and • has the skills and knowledge to use the restrictive practice appropriately.
Monitoring use of restrictive practice	Procedures on how the use of the restrictive practice should be monitored to prevent abuse, neglect or exploitation.
Minimum impact on other co-residents	For restricted access, where that practice may impact on other co-residents, the policy must detail how the service provider will minimise the impact on those other persons.

Subsection (5) makes it clear that these are only minimum requirements and do not limit the matters that can be included in the policy. Subsection (6) requires that the policy has appropriate regard to linguistic and cultural diversity and Aboriginal tradition and Island custom.

123ZW Requirements for publication of department's policy etc.

Section 123ZW requires that a copy of DSQ's policy must be available free of charge to relevant service providers and that it must be kept:

- at the department's head office and regional offices;
- at other places considered appropriate; and
- be published on the department's website on the internet.

Division 7 Review of particular chief executive decisions

123ZX Application of div 7

Section 123ZX provides for when this division applies – if the chief executive is required to make a decision and give a decision notice. A requirement to give a decision notice effectively means that the decision to which it relates can be internally reviewed.

The decision not to conduct a multi-disciplinary assessment (**section 123R**) and the decision not to develop a positive behaviour support plan (**section 123S(6)** can be internally reviewed (within DSQ) by an 'interested person' (defined in the next section).

Note – any decisions to conduct a multi-disciplinary assessment and positive behaviour support plan are not reviewable as they involve a proposal to use containment or seclusion. In these cases, it is the Tribunal that will make the final decision on whether or not to approve the use of containment or seclusion. Any decision of the Tribunal can be appealed to the Supreme Court.

123ZY Definitions for div 7

Section 123ZY defines key terms for the purpose of this division -

- 'interested person' for a relevant decision, means a person to whom the chief executive is required to give a decision notice to; and
- 'relevant decision' is defined in **section 123ZX**.

123ZZ Application for review

Section 123ZZ sets out the process if an interested person wants to apply for a review of the original decision. An application must be made within 28 days after the interested person receives a decision notice about the decision. However, the chief executive may extend the time for applying for the review. Also, an interested person may apply to the chief executive to review the decision even if the chief executive has not given the interested person a decision notice.

Any application for review must be in the approved form and accompanied by enough information to enable the chief executive to decide the application.

123ZZA Review of relevant decision

Section 123ZZA sets out the process for a internal review.

Unless the chief executive made the decision personally, the chief executive must ensure the application is not dealt with by-

- the person who made the original decision; or
- a person in a less senior office than the person who made the original decision.

Within 28 days after receiving the application for review, the chief executive must review the original decision and make a decision (called the 'review decision'). The chief executive may:

- confirm the original decision; or
- amend the original decision; or
- substitute another decision for the original decision.

Immediately after deciding the application, the chief executive must give the interested person a notice stating the review decision; and the reasons for the review decision.

Division 8 Miscellaneous provisions

Subdivision 1 Immunity for use of restrictive practices

Offence provisions have not been included in this Bill because the purpose of the scheme is to make lawful what would potentially otherwise be an unlawful practice under the criminal code and also in civil law. As offence provisions already exist it is possible to prosecute a service provider, or an individual acting on their behalf, who do not comply with this new legislative scheme. The immunity provisions will not prevent a criminal or civil prosecution being successful if the service provider or an individual fails to comply with the new legislative scheme.

Generally, the aim of these immunity provisions is to clearly outline the circumstances when restrictive practices may be lawfully applied by a relevant service provider; and they provide legal certainty to the relevant service provider, and those acting on their behalf, as to when restrictive practices may be justified. These immunity provisions are not a 'blanket immunity' and only authorise restrictive practices where (among other things) it can be demonstrated that it is for the safety of the adult and/or others; and overall in the adult's best interests. The immunity provisions fall into four different categories:

- retrospective immunity provisions (use of restrictive practices prior to commencement of Bill);
- transitional immunity provisions (use of restrictive practices for 18 months from commencement of the Bill);
- prospective immunity provisions (use of restrictive practices after the 18 month transitional period); and
- immunity provisions for the practice of locking of gates, doors and windows.

This subdivision relates to the prospective immunity provisions. There a separate prospective immunity provisions for a relevant service provider and for an individual acting for a relevant service provider.

123ZZB Immunity from liability—relevant service provider

Section 123ZZB provides for the immunity for a relevant service provider. The section states that a relevant service provider is not criminally or civilly liable if the relevant service provider, acting honestly and without negligence, uses a restrictive practice under this part. This means that the service provider must comply with all the requirements as outlined in this Part, depending on the type of restrictive practice**,** before being able to lawfully apply the restrictive practice.

123ZZC Immunity from liability—individual acting for relevant service provider

Section 123ZZC sets out the immunity provisions which relate to an individual acting for a relevant service provider. Essentially, these provisions provide immunity for an individual if they act, or reasonably believe they are acting, in accordance with the relevant consent/approval and plan.

The individual is not criminally or civilly liable for using the restrictive practice if the individual acts honestly and without negligence in compliance with-

For containment or seclusion:

- For containment or seclusion – the containment or seclusion approval for the adult + positive behaviour support plan;
- For containment or seclusion under an interim order made under **section 80ZR** of the *Guardianship and Administration Act 2000* – the containment or seclusion approval + interim order;
- For containment or seclusion in the course of providing respite/community access – consent of a guardian for a restrictive practice (respite) matter for the adult + respite/community access plan;
- For containment or seclusion under a short-term approval – the short-term approval + ‘short-term’ plan.

For chemical, physical or mechanical restraint or restricted access:

- For chemical, mechanical or physical restraint, or restricted access – the positive behaviour support plan + either a containment or seclusion approval (if approved by the Tribunal with either

containment and/or seclusion); or otherwise, the consent of the relevant decision-maker;

- For physical or mechanical restraint, or chemical restraint (excluding fixed dose chemical restraint in respite), or restricting access, in the course of providing respite or community access –consent of a guardian for restrictive practice matters or, if no guardian, consent of an informal decision maker, + the respite/community access plan;
- For fixed dose chemical restraint in respite only – consent of informal decision-maker;
- For chemical, mechanical or physical restraint, or restricted access under a short-term approval – the short-term approval + plan.

An individual is taken to be acting in compliance with an approval or plan if the individual reasonably believes he or she is acting in compliance with the approval or plan.

Subdivision 2 Requirements for relevant service providers

This subdivision lists various requirements for a relevant service provider about the provision of information to decision-makers, keeping of records and notification requirements around the use of restrictive practices. A relevant service provider must comply with these requirements.

If these requirements are not followed, section 161 of the *Disability Services Act 2006*, provides that a funded non-government service provider may be given a compliance notice requiring the provider to remedy a contravention of a requirement under this subdivision.

123ZZD Requirement to give information to guardian or informal decision maker

This section enables a guardian or informal decision-maker access to relevant and necessary information in order to make a decision about chemical, physical or mechanical restraint, or restricted access. It does not apply to a decision about the use of fixed dose chemical restraint during respite.

The relevant service provider must provide the guardian or informal decision-maker with a copy of the positive behaviour support plan; any assessment or other information used to develop the plan and if the relevant service provider is aware that a forensic order or involuntary treatment order is in place - the terms of the order.

If chemical, physical or mechanical restraint, or restricted access is proposed during the course of respite/community access, the relevant service provider must provide the guardian or informal decision-maker with a copy of the respite/community access plan and any information used to develop the plan.

The service provider is protected from civil or criminal liability, or liability under any administrative process for the giving of the information, provided they acted honestly and without negligence. In addition, the service provider is protected from being in breach of any code of professional etiquette or ethics or accepted standards of professional conduct.

A guardian or informal decision-maker who gains confidential information, including through this section, is subject to confidentiality requirements (see section 249 of the *Guardianship and Administration Act 2000* for guardians; or **section 80ZT** for informal decision-makers). The decision-making criteria is governed under the amendments to the *Guardianship and Administration Act 2000.*

123ZZE Requirement to keep records and other documents

This section requires the relevant service provider to make and keep records around the use of restrictive practices. Records are important for monitoring, review and enforcement purposes. The types of records to be kept will be prescribed in the *Disability Services Regulation 2006* and will include the requirement to keep records detailing, for example:

- the type of restrictive practice used and the period of time it was used for;
- when it was used;
- who applied the restrictive practice;
- the reasons why it was used; and
- the effect on the person’s behaviour.

In addition, the relevant service provider must keep at the premises where disability services are provided to the adult, a copy of the relevant plan for the adult and/or any relevant approval/order.

123ZZF Notification requirements about approvals given for use of restrictive practices

This section sets out when a relevant service provider must notify the Community Visitor Program and chief executive of DSQ about the use of restrictive practices.

Notifications for chief executive DSQ

The chief executive DSQ will not be aware of all decisions to consent to chemical, physical or mechanical restraint or restricted access, especially where a funded non-government service provider proposes to use these practices.

For containment or seclusion (and other restrictive practices used with containment or seclusion), the chief executive DSQ will be aware of all decisions, as a joint application with the funded non-government service provider must be made to the Tribunal for approval.

For other restrictive practices, this decision will be made by a guardian for restrictive practices matters, or in the case of restricted access, an informal decision-maker (referred to in this section as ‘limited restrictive practice approvals’). For monitoring the use of these restrictive practices, the chief executive must know that such a decision has been made. The chief executive DSQ is responsible for administering the *Disability Services Act 2006* and under that Act, authorised officers can be appointed to monitor, investigate and enforce non-compliance with the *Disability Services Act 2006.*

This section therefore requires the relevant service provider to notify the chief executive DSQ if the guardian has consented to the use of chemical, physical or mechanical restraint, or an informal decision maker has consented to the use of restricted access. Notification is not required for the use of these restrictive practices under a short term approval.

The notification must be provided in the approved form; and be provided within 21 days after the consent is provided. Only one notice must be provided per service outlet – therefore, if restrictive practices have been approved for more than one adult at that service outlet, only one notification is required. The service provider must also notify the chief

executive if there are no longer any approvals at that service outlet relating to the use of restrictive practices.

Notifications for the Community Visitor Program:

The community visitor program is established under the *Guardianship and Administration Act 2000* and has an inquiry and complaint function; and will regularly visit a ‘visitable site’. After the visit, the community visitor will prepare a report regarding various matters (described in section 224 of the *Guardianship and Administration Act 2000)*. A ‘visitable site’ is defined in section 222 of that Act (and amended in **clause 27**). It is important that the community visitor visit the sites where restrictive practices are being used so that their reports may be used when the plans are being reviewed by the Tribunal. The Community Visitor Program may not know of a site, without notice from the relevant service provider.

This section requires the relevant service provider to notify the community visitor program if any restrictive practices, including under a short term approval, has been approved or consented to at a visitable site (referred to in this section as a ‘restrictive practice approval’). The notice must be provided within 21 days of the approval or within 14 days of the approval, if it is a short term approval. The notice must state the name and address of the visitable site and note the approval has been given in relation to that site. Only one notification per visitable site is required.

Subdivision 3 Confidentiality provisions

123ZZG Definitions for sdiv 3

Section 123ZZG lists key definitions for the purpose of this subdivision, which facilitates the exchange, and protection, of confidential medical information between certain health care providers.

123ZZH Relevant service provider may request confidential information from health professional or chief executive (health)

Section 123ZZH facilitates the disclosure of medical information by certain health care providers for the purpose of assessments and development of plans. This will allow a service provider to access confidential information about the adult in some cases. Access to this confidential information is important for the adult’s best interests and

relevant for a comprehensive assessment of the adult; and to understand all of the adult’s needs and possible causes for their challenging behaviour.

Examples of information which could be relevant to an assessment or development of plan could be:

- Treatment plans made under the *Mental Health Act 2000*;
- Blood tests and results;
- Medication regimes – past and current ;
- Allergy testing results and treatment;
- Electroconvulsive therapy information;
- Neurological and neurophsychological assessments and reports;
- Genetic testing results;
- Surgeries;
- Psychological assessments and reports – psychometric testing, inventories and others
- Occupational therapy assessments and reports;
- Speech and language pathology assessment and reports; and
- Physiotherapy assessments and reports.

The relevant service provider must demonstrate it is relevant information for the purpose of an assessment and/or plan; and a health care provider must be satisfied of this before the information can be provided. If a health professional provides the information, they are protected from any liability and disciplinary action for the giving of that confidential information. This includes being protected from being in breach of any professional etiquette or ethics or accepted standards of professional conduct.

A service provider receiving confidential information under this section must protect its confidentiality – see **section 123ZZI.**

123ZZI Relevant service providers must maintain confidentiality

The effect of section 123ZZI is to protect the confidentiality of information disclosed by the health professional under section 123ZZH. The relevant service provider is prevented from disclosing the information to anyone else other than in the limited circumstances stated in the section (for

example, to discharge a function under another law or for a proceeding in a court or tribunal). It is an offence for the service provider not to comply with this requirement.

Insertion of new pt 15, div 1A

Clause 8 inserts a new part 15, division 1A, which deals with the practice of locking of gates, doors and windows.

Part 15

Division 1A Locking of gates, doors and windows

This practice is not within the definition of a 'restrictive practice' for the purpose of this scheme. However, it is still regulated to ensure protection of a person's rights and liberties. The Bill authorises a service provider to lock gates, doors and windows to prevent physical harm being caused to an adult with a skills deficit (for example, an adult who can not leave the premises unsupervised because he or she lacks road safety skills).

This practice must be distinguished from the practice of 'containment' which is used to effectively manage a person's 'challenging behaviour' and requires a multi-disciplinary assessment, development of a positive behaviour support plan and the approval of the Guardianship and Administration Tribunal.

214A Application of div 1A

This division which deals with locking of gates, doors and windows applies only if:

- a relevant service provider locks gates, doors or windows at premises where disability services are provided:
- to adults with an intellectual or cognitive disability; and
- the only reason the gates, doors or windows are locked is to prevent physical harm being caused to an adult with a skills deficit.

Importantly, the purpose of locking the gates, doors or windows must be to prevent a risk of physical harm to the adult and the only reason for the locking of gates, door or windows must be to prevent physical harm being caused to the adult who has a 'skills deficit'. This term is further defined in section 214B.

An example of locking of gates, doors and windows is:

An adult with an intellectual disability has no road safety skills and is unable to navigate the crossing of a road safely. The adult is fascinated with the sound of cars and will approach moving cars to touch them. The adult's house is situated on a main road and as a result the front gate/fence is locked from the inside to prevent the adult wandering onto the road.

214B Definitions for div 1A

Section 214B defines what is meant by the term 'an adult with a skills deficit' – this is an adult with an intellectual or cognitive disability who cannot safely exit the premises where disability services are provided to the adult without supervision; and the only reason the adult cannot safely exit the premises without supervision is because:

(a) the adult lacks road safety skills; or

(b) the adult is vulnerable to abuse or exploitation by others; or

(c) the adult is unable to find his or her way back to the premises.

Also, a regulation may prescribe other purposes.

214C Immunity from liability—relevant service provider

The Bill provides immunity from liability for the practice of locking of gates, doors or windows in prescribed circumstances. Section 214 C provides an immunity provision for service providers who may lock gates, doors and windows. Section 214D provides a similar immunity for an individual acting for a relevant service provider.

For locking doors or windows a service provider is not civilly or criminally liable for locking, gates, doors provided they:

- act honestly and without negligence; and
- keep and implement a policy (consistent with DSQ's policy) on this practice;

- the gates, doors and windows are locked in compliance with the policy; and
- the service provider takes reasonable steps to minimise the impact of locking gates, doors and windows on a person living at the premises

This immunity extends beyond the adult with a skills deficit and allows the locking of gates, doors and windows in relation to any other person living at the premises. However, part of obtaining the immunity, requires the service provider to demonstrate that they have taken reasonable steps to minimise the impact of locking gates, doors and windows on a person living at the premises, such as the use of a key activation device so they can freely exit the premises. The immunity also makes it clear that this practice, cannot be used to effectively contain an adult with challenging behaviour (this would require Tribunal approval).

214D Immunity from liability—individual acting for relevant service provider

Section 214D provides criminal or civil protection for an individual acting on behalf of the service provider. The individual is not liable for locking of gates, doors or windows if they acted in compliance with, or reasonably believed they acted in compliance with, the provider's policy about the locking of gates, doors and windows.

214E Department's policy about locking of gates, doors and windows

Section 214E outlines the minimum requirements the department must have in their policy about the locking of gates, doors and windows. The service provider must keep and implement a policy that is consistent with the department's policy.

The policy must:

- outline procedures which demonstrate the practice is necessary to prevent physical harm to the adult and is the least restrictive option for ensuring the safety of the adult– this could include making sure the doors were locked for the shortest possible time; and
- be culturally appropriate.

A copy of the department's policy must be available free of charge and be located at the head office and regional offices. It must also be published on the department's internet site.

Amendment of s 222 (Confidentiality of other information)

Clause 9 amends the existing section 222 of the *Disability Services Act 2006*. The effect of this amendment is to protect the disclosure of confidential information which might be obtained by a person working for the department in conducting a multi-disciplinary assessment or developing a positive behaviour support plan.

Insertion of new s 233A

Clause 10 inserts a new section 233A (**Review of *Guardianship and Administration Act 2000***), which deals with the review of this legislative scheme. This scheme will be reviewed when the *Disability Services Act 2006* must be reviewed under section 233 of that Act, which is 5 years from commencement of the Act. The review is required to take place after 1 July 2011.

Amendment of pt 16, div 2 hdg (Transitional provisions)

Clause 11 makes a consequential amendment as a result of transitional provisions being included in the Bill.

Insertion of new pt 16, div 3

Clause 12 inserts a new part 16, division 3 which deals with transitional provisions.

Division 3 Transitional provisions for Disability Services and Other Legislation Amendment Act 2008

The Bill allows the service provider (and individuals acting on their behalf) up to 18 months from commencement of the Bill to comply with all of the new requirements. The legislative scheme is about driving a culture of

change in the use of restrictive practices in the disability sector; and to effectively implement the scheme, adequate provision must be made for:

- service providers to conduct an assessment and develop a positive behaviour support plan for the adult – more complex cases could take at least 3-4 months per adult;
- service providers to develop policies and procedures about the use of restrictive practices; and
- for the Tribunal to hear and decide applications for containment and/or seclusion or appoint a guardian for other restrictive practice matters.

In the meantime, service providers can lawfully use restrictive practices provided they satisfy a number of requirements as outlined in the Bill. However, after the 18 month transitional period, a relevant service provider cannot use restrictive practices unless they comply with the requirements in Part 10A.

This division also deals with the lawful use of restrictive practices prior to commencement of the Bill (**sections 242 and 243**).

Subdivision 1 Preliminary

241 Interpretation

Section 241 lists key definitions for the purpose of part 16, division 3.

Subdivision 2 Immunity from liability for use of restrictive practices before commencement

Subdivision 2 deals with immunity from liability, in certain circumstances, where restrictive practices may have been applied prior to the commencement of the Bill.

242 Immunity of previous service provider

Section 242 provides that a relevant service provider is not criminally or civilly liable for using a restrictive practice before the commencement of the Bill if:

- they acted honestly and without negligence; and
- demonstrated the restrictive practice was necessary for safety and the least restrictive option; and
- within a reasonable time before using the restrictive practice, they assessed the adult to identify the causes of their harmful behaviour; and developed positive strategies to meet the adult's needs;
- they carried out monitoring in relation to use of the restrictive practices to ensure the safety of the adult.

243 Immunity of individual acting for previous service provider

Section 243 provides that an individual acting for the relevant service provider is not criminal or civilly liable for the use of restrictive practices before the commencement of the Bill if:

- they acted honestly and without negligence; and
- use of restrictive practices was necessary, or the individual reasonably believed use of restrictive practices was necessary, to prevent the adult's behaviour causing harm to the adult or another person.

Subdivision 3 Immunity from liability for use of restrictive practices during transitional period

Subdivision 3 deals with the use of restrictive practices during the transitional period – which is 18 months from the commencement of the Bill. These provisions balance providing time to enable service providers to be resourced to effectively implement the scheme, with providing appropriate safeguards for the adult during this transitional period.

244 Immunity of relevant service provider

Section 244 provides that a relevant service provider is not criminally or civilly liable for using a restrictive practice during the transitional period if:

- they act honestly and without negligence; and
- use of the restrictive practice is necessary to prevent the adult's behaviour causing harm to the adult or others and is the least restrictive way of ensuring their safety; and
- either if there is an 'authorised guardian' for the adult - the restrictive practice is used in compliance with the consent of the authorised guardian; or otherwise—the relevant service provider assesses the adult (under **section 245**); and
- they carry out monitoring in relation to use of the restrictive practice to ensure the safety of the adult; and
- during the transitional period they keep and implement a policy about the use of restrictive practices, which must be consistent with DSQ's policy. The requirement for what has to be included in the policy is discussed at **section 249**.

This requirement to keep and implement a policy commences after the end of the 'compliance period' and continues until the end of the transitional period. The 'compliance period' is defined in **section 241** and means:

- For *containment or seclusion, or restricted access* – a policy must be kept and implemented after 6 months from the day the restrictive practice is first used or after commencement of the Bill;
- For *other restrictive practices* – a policy must be kept and implemented after 9 months from the day the restrictive practice is first used or after commencement of the Bill.

In addition, for *containment or seclusion* - the service provider must notify the Chief Executive DSQ in the approved form of the containment or seclusion. This must happen within 60 days after first containing or secluding the adult. This allows the Chief Executive time to commence the multi-disciplinary assessment of the adult and develop a positive behaviour support plan.

'An authorised guardian' for an adult is defined in section 241 and effectively means a guardian who was appointed under the *Guardianship and Administration Act 2000*, prior to the commencement of the Bill; and

their appointment authorised them to make decisions around the use of restrictive practices. If there is no authorised guardian then the service provider must arrange for an assessment as described in **section 245.**

For the special circumstance of the use of fixed dose chemical restraint in the course of providing respite – the relevant service provider must act honestly and without negligence and keep and implement a policy within the required time.

There are certain circumstances when the service provider can no longer rely on the transitional provisions. These are listed in **section 248**.

245 Requirement to assess adult if no authorised guardian

This section requires an assessment of the adult if there is no authorised guardian for the adult (as defined in section 241 and explained above). During the 'compliance period', the service provider must assess the adult to identify:

- the nature and causes of the adult's behaviour; and
- strategies for managing the adult's behaviour as well as (positive) strategies for meeting the adult's needs.

For *containment or seclusion or restricted access* – this means that the assessment must happen by the end of <u>6 months</u> from when the restrictive practice is first used or from commencement of the Bill. For *other restrictive practices* – the assessment must happen by the end of <u>9 months</u> from when the restrictive practice is first used or from commencement of the Bill.

There is no need for this requirement if there is an 'authorised guardian' appointed for the adult, as there are sufficient safeguards for the adult through the Tribunal process and the *Guardianship and Administration Act 2000*.

246 Immunity for individual acting for relevant service provider

Section 246 provides a similar immunity to that for a relevant service provider in **section 244** except this section applies to an individual who, acting for the relevant service provider, uses restrictive practices during the transitional period. The individual is not criminal or civilly liable for the use of restrictive practices if:

- they act honestly and without negligence; and

- (except for fixed dose chemical restraint in a respite service) the use of restrictive practices was necessary, or the individual reasonably believed use of restrictive practices was necessary, to prevent the adult's behaviour causing harm to the adult or another person.

This is similar to the other immunity provisions in the Bill relating to the individual.

247 Relationship of subdivision with pt 10A

Section 247 just makes it clear this subdivision, dealing with transitional arrangements, does not limit part 10A, which deals with the main scheme. Therefore, for example, a service provider could make a joint application with DSQ to the Tribunal under the main scheme during this transitional period (providing that they had undertaken an assessment and developed a positive behaviour support plan etc in accordance with the requirements of the main scheme).

248 Circumstances in which subdivision stops applying

Section 248 lists the circumstances when the transitional provisions no longer apply – essentially these provisions stop applying when the relevant decision-maker under the main scheme (in part 10A) makes a decision about whether to approve or not approve the restrictive practice.

Subdivision 4 Other provisions

249 Requirements for department's policy about use of restrictive practices during transitional period

Section 249 sets out the minimum requirements that must be included in the department's policy for the use of restrictive practices during the transitional period: for

Topic	Detail
Assessment of adult	Detail procedures on how to assess the adult to comply with **section 245**
Skills and knowledge of person using the restrictive practice	Procedures on how the individual who will be using the restrictive practice will: • know about the requirements for the lawful use of the restrictive practice; and • have the skills and knowledge to use the restrictive practice appropriately.
Monitoring use of restrictive practice	Procedures on how the use of the restrictive practice should be monitored to prevent abuse, neglect or exploitation.
Review use of the restrictive practice	Procedures on how to review the use of restrictive practice at least every 9 months – this is to ensure that a restrictive practice can be reviewed at least once during the 18 month transitional period.
Minimum impact on other co-residents	For restricted access, where that practice may impact on other co-residents, the policy must detail how the service provider will minimise the impact on those other persons.

A service provider must keep and implement a policy that is consistent with the department's policy (see **section 244**). This type of policy must be kept and implemented only during the transitional period.

250 Short term approvals not to be given during transitional period

Section 250 provides that the short term approval provisions (in **sections 123O** and **123ZD** and part 10A, division 4, subdivision 4) do not apply during the transitional period. This is because the transitional provisions are considered adequate to deal with the ongoing use of restrictive

practices, whether there is an emergency (an immediate or serious risk of harm) or otherwise.

Amendment of sch 7 (Dictionary)

Clause 13 makes consequential amendment to schedule 7 of the *Disability Services Act 2006* as a result of amendments in this Bill.

Part 3 Amendment of Guardianship and Administration Act 2000

The *Guardianship and Administration Act 2000* (the GAA) is an Act, that amongst other matters, establishes the Guardianship and Administration Tribunal (the tribunal) and the Office of the Adult Guardian (the adult guardian), as well as providing for the tribunal to appoint a guardian or administrator to manage the personal and financial affairs of adults with impaired capacity.

The tribunal has various functions including, but not limited to, the appointment of guardians and administrators to manage the personal and financial affairs of adults with impaired capacity. The tribunal may also make declarations, orders or recommendations, or give directions or advice to guardians or other substitute decision-makers or about other related matters.

The tribunal may appoint a guardian to make a personal decision for an adult, only when the tribunal is satisfied that the adult has impaired decision-making capacity for the matter and there is a need for a decision to be made in relation to the adult about that matter, and without the appointment of a guardian the adult's needs or interests will not be adequately met or protected.

Subject to the terms of the guardian's appointment, a guardian is authorised to do anything in relation to a personal matter that the adult could have done, if the adult had capacity for the matter. A guardian must comply with the general principles set out in Schedule 1 of the GAA, when making a decision for the adult, and if the decision is a health care decision, the health care principle, also set out in Schedule 1 of the GAA, must also be complied with.

Orders appointing a guardian must be reviewed by the tribunal at least every 5 years to ascertain whether the need for a further appointment is necessary and if the guardian has acted competently.

The adult guardian is a statutory officer whose role is to protect the rights and interests of adults with impaired capacity for a matter. The adult guardian is given various functions, which include but are not limited to: acting as a guardian if appointed by the tribunal, investigating complaints and allegations of abuse, neglect or exploitation of adults with impaired capacity and seeking help or making representations for an adult with impaired capacity.

The following amendments to the GAA, complement and follow the previous amendments to the *Disability Services Act 2006* (the DSA) to provide for the consent or approval by an independent decision-maker for a relevant service provider to use a restrictive practice to manage the challenging behaviour of an adult with an intellectual or cognitive disability. This is achieved by including a new chapter 5B into the GAA that deals specifically with the approval and consent of the use of restrictive practices. As the general provisions of the GAA will also apply to this chapter, other sections of the GAA have been amended in consequence of the new chapter 5B.

Act amended in pt 3

Clause 14 states that this part amends the *Guardianship and Administration Act 2000.*

Amendment of s 12 (Appointment)

Clause 15 amends section 12. Section 12 provides for the tribunal's authority to appoint a guardian for a personal matter for an adult with impaired decision making capacity and sets out the criteria the tribunal must be satisfied of before an appointment is made. Section 12 is amended by the inclusion of a provision that states that section 12 does not apply for the appointment of a guardian for a restrictive practice matter under chapter 5B. The authority of the tribunal to appoint a guardian for a restrictive practice matter is included in the new chapter 5B created by this Bill at clause 22, section 80ZD (Appointment). It is necessary to include a separate section dealing with the appointment of a guardian for a restrictive practice matter because of the different criteria that need to be satisfied before such an appointment can be made, such as the requirement the

adult's behaviour has resulted in previous harm to the adult or others or the use of the restrictive practice is in accordance with the positive behaviour support plan developed for the adult.

Amendment of s 13 (Advance appointment)

Clause 16 amends section 13. Section 13 provides for the advance appointment of a guardian for an individual who is aged 17 ½ years and who has impaired decision making capacity. Section 13 is amended by the inclusion of a provision that states section 13 does not apply for the appointment of a guardian for a restrictive practice matter under chapter 5B. The authority of the tribunal to appoint a guardian for a restrictive practice matter in advance for an individual aged 17 ½ years is included in clause 17 which inserts section 13A. It is necessary to include a separate section dealing with an advance appointment of a guardian for a restrictive practice matter because of the different criteria that need to be satisfied before an advance appointment can be made, such as the requirement that the adult's behaviour has resulted in previous harm to the individual or others or the use of the restrictive practice is in accordance with the positive behaviour support plan developed for the adult.

Insertion of new s 13A

Clause 17 inserts a new section 13A (Advance appointment – guardian for restrictive practice matter). This section is the alternative section to the current section 13, which by virtue of clause 16 above does not apply to a guardian appointed in advance for a restrictive practice matter. The new section 13A provides the tribunal with the authority to appoint a guardian for a restrictive practice matter under chapter 5B for an individual before the individual is 18 years. The advance appointment can be made when the individual is at least 17 ½ years but not 18 years. Before the tribunal may appoint a guardian in advance, the tribunal must be satisfied that the individual's behaviour has previously resulted in harm to the individual or others. Also, the tribunal must be satisfied that when the individual turns 18 years: the individual will have impaired capacity for the matter; and there is a reasonable likelihood that there will be a need for a decision about restrictive practices and without the appointment the individual's behaviour will likely cause harm to the individual or to others, or the individual's interests would not be adequately protected.

Having impaired capacity for the matter could mean the individual does not understand that his or her behaviour causes harm to his or herself or others

(or he or she can not control the behaviour) and that there is a need to use positive strategies or support, combined with restrictive practices in a planned and coordinated response to reduce or eliminate the behaviour and improve the quality of life of the individual.

Section 13A further provides that the appointment does not commence until the individual turns 18 years and will end on the day the tribunal orders but not later than the day the individual turns 19 years. The tribunal may make the order on the terms it considers appropriate. Section 13A further provides who may make the application to the tribunal. This includes, the individual, an interested person for the individual (such as a family member, close friend or advocate), a relevant service provider under chapter 5B, the chief executive of Disability Services Queensland (DSQ), the adult guardian or the director of mental health (if the individual is subject to a forensic order or involuntary treatment order under the *Mental Health Act 2000*).

Amendment of s 26 (Automatic revocation)

Clause 18 amends section 26(1). Section 26(1) describes the circumstances where an appointment of a guardian or administrator will be automatically revoked, for example, when the guardian or administrator becomes a paid carer or service provider for the adult. Section 26 is amended by the inclusion of a provision that extends the circumstances when the appointment of a guardian will be automatically revoked. The amendment provides that the appointment of a guardian for a restrictive practice matter under the new chapter 5B, will be automatically revoked if the tribunal makes an order that approves the use of containment or seclusion for that adult under the new chapter 5B. When the tribunal makes an order that approves the use of containment or seclusion, the tribunal must also take into account other restrictive practices that are being used and the approval to use these other restrictive practices is included in the containment or seclusion approval (refer to the new section 80X). Therefore, there is no longer a need for the appointment of a guardian for a restrictive practice matter.

Amendment of s 28 (Periodic review of appointment)

Clause 19 amends section 28. Section 28 provides for the periodic review of the appointment of a guardian and administrator and refers to the usual period of review for the appointment of a guardian or administrator as not being more than 5 years (except where the administrator is the public

trustee or a trustee company under the *Trustee Companies Act 1968)*. Section 28 is amended by the inclusion of a provision that states section 28 does not apply for the appointment of a guardian for a restrictive practice matter under chapter 5B. The reason for section 28 not being applicable is that under the new section 80ZD, a guardian for a restrictive practice matter may not be appointed for more than 12 months and this is different to the appointment of a guardian under section 12 of the GAA, which can be up to 5 years. The periodic review of an appointment of a guardian for a restrictive practice matter under chapter 5B is dealt with in the new section 29(2).

Amendment of s 29 (Other review of appointment)

Clause 20 amends section 29. Section 29 provides the authority for the persons named in that section to apply to the tribunal for a review of an appointment of a guardian or administrator during the term of the appointment. This review is in addition to the periodic review that takes place under section 28. Section 29 is amended by the inclusion of another subsection that provides for who may apply for a review of an appointment of a guardian for a restrictive practice matter under chapter 5B and this includes: the adult; an interested person for the adult (such as a family member, close friend or advocate); a relevant service provider who provides disability services to the adult; the chief executive of DSQ; the adult guardian and the director of mental health (but only if the individual is subject to a forensic order or involuntary treatment order under the *Mental Health Act 2000*).

Section 29 is further amended by inserting a new section 29(2) that provides for the periodic review of an appointment of a guardian for a restrictive practice matter under the new chapter 5B. This new subsection states that the tribunal must review the appointment of a guardian for a restrictive practice matter under the new chapter 5B at least once before the term of the appointment ends. This review, which may be initiated by the tribunal, will most likely occur just prior to the term of the appointment ending. This subsection does not preclude any of the other persons named in new section 29(1)(c) from applying to the tribunal for a review at any other time during the term of the appointment of the guardian for a restrictive practice matter.

Amendment of s 33 (Power of guardian or administrator)

Clause 21 amends section 33. Section 33(1) describes the powers of a guardian to make personal decisions for an adult with impaired capacity. A guardian is authorised to do, in accordance with the terms of the guardian's appointment, anything in relation to a personal matter that the adult could have done if the adult had capacity for the matter. Section 33 is amended by the inclusion of a provision that provides that the power of a guardian as set out in section 33 is subject to the provisions of the sections 80ZE and 80ZF. The new sections 80ZE and 80ZF provide the criteria, which must be satisfied before the guardian for restrictive practice (general) matters and the guardians for restrictive practice (respite) matters may consent to the use of a restrictive practice by the relevant service provider. Because the power of a guardian under section 33 to make a decision is quite broad, it is necessary to refer to the limitations in the new sections 80ZE and 80ZF, that are placed on the exercise of the power of a guardian for a restrictive practice matter to make a decision to consent to the use of a restrictive practice.

Insertion of new ch 5B

Clause 22 inserts a new chapter 5B titled, 'Restrictive practices'. This chapter provides the authorisation and consent process to enable a relevant service provider to use a restrictive practice to manage the behaviour of an adult who has an intellectual or cognitive disability where it is likely to cause harm to the adult or others. This chapter is to be read with the new part 10A (Use of restrictive practices) in the DSA.

Chapter 5B Restrictive practices

Chapter 5B enables the tribunal to give approval for a relevant service provider to contain or seclude an adult (and use other restrictive practices if used in conjunction with containment and seclusion) and to review that approval. The tribunal is also given the authority to appoint a guardian for a restrictive practice matter and to review the appointment. This chapter also enables the adult guardian to approve the use of containment or seclusion of an adult in certain circumstances and provides criteria for

decision-makers when making a decision about a restrictive practice matter.

Part 1 Preliminary

Part 1 of chapter 5B is titled 'Preliminary'.

80R Application of ch 5B

The new section 80R (Application of ch 5B) clarifies who this chapter applies to. This chapter applies to an adult with an intellectual or cognitive disability who receives disability services from a funded service provider within the meaning of the DSA. The meaning of 'an adult with an intellectual or cognitive disability', 'disability services', 'funded service provider' and 'relevant service provider' are defined terms in the GAA but are linked to the definitions for these terms provided in section 123E of the DSA.

80S Purpose of ch 5B

The new section 80S (Purpose of ch 5B) describes the purpose of the chapter which is to enable the tribunal to give approval for a relevant service provider to contain or seclude an adult (and to also approve the use of other forms of restrictive practices if the service provider proposes to use containment or seclusion) and to review the approval. The chapter will also enable the tribunal to appoint a guardian for a restrictive practice matter and to review that appointment. The adult guardian will be authorised to consent to the use of particular restrictive practices on a short term basis. The chapter will also provide criteria for an informal decision-maker to consider when consenting to the use of particular restrictive practices.

80T Effect of ch 5B on substitute decision maker's ability to make health care decision

The new section 80T (Effect of ch 5B on substitute decision maker's ability to make health care decision) provides that chapter 5B does not limit the extent to which a substitute decision maker, such as a statutory health

attorney, attorney, guardian, tribunal or court may make a health care decision in relation to an adult to whom chapter 5B does not apply. This means that the substitute decision maker's authority to make a health care decision for an adult to whom this chapter does not apply, is not affected by the provisions in chapter 5B.

80U Definitions for ch 5B

The new section 80U (Definitions for ch 5B) provides definitions of the key terms that are used in the legislation. Many of the key terms are linked to their meanings in the DSA and a reference to the applicable section in the DSA is provided. Some of the important key terms that are defined in the DSA include: chemical restraint, chemical restraint (fixed dose), contain, seclude, physical restraint, mechanical restraint, harm, least restrictive, relevant service provider, adult with intellectual and cognitive impairment, short term plan, positive behaviour support plan, respite services, community access services and respite/community access plan.

Some of the terms defined in the new section 80U include:

- active party;
- containment or seclusion approval;
- restrictive practice matter;
- restrictive practice (general) matter; and
- restrictive practice (respite) matter.

Part 2 Containment or seclusion approvals

Part 2 of chapter 5B is titled, 'Containment or seclusion approvals'.

Division 1 of part 2 of chapter 5B is titled, 'Giving containment or seclusion approvals'.

80V When tribunal may approve use of containment or seclusion

The new section 80V (When tribunal may approve the use of containment or seclusion) provides the authority of the tribunal to give approval for a relevant service provider to contain or seclude an adult. The tribunal may give the approval subject to conditions that are to be stated in the order. The new section 80V(2) provides the tribunal must be satisfied of all the following criteria before the tribunal may give the approval:

- the adult has impaired capacity for making decisions about restrictive practice matters. This could mean that the adult does not understand that his or her behaviour causes harm to his or herself or others (or he or she can not control the behaviour) and that there is a need to use positive strategies or support and restrictive practices in a planned and coordinated response to reduce or eliminate the behaviour and improve the quality of life of the adult; and
- there is a need for the adult to be contained or secluded because previous behaviour has resulted in harm to the adult or others and without the approval there is a reasonable likelihood that the adult's behaviour will cause harm to the adult or others; and
- a positive behaviour support plan (as described in section 123L of the DSA) has been developed for the adult and that this plan incorporates the use of containment or seclusion; and
- the use of containment or seclusion to manage the behaviour of the adult is the least restrictive option to ensure the safety of the adult or others; and
- the adult has been adequately assessed by appropriately qualified persons in the development of the positive behaviour support plan (note that section 123J of the DSA describes the assessment of an adult and section 123K of the DSA describes who is an appropriately qualified person); and
- the implementation of the plan will result in a reduction or elimination of the risk of the adult's behaviour causing harm and an improvement in the quality of life of the adult in the long-term; and
- the positive behaviour support plan includes appropriate arrangements for the observation and monitoring of the containment or seclusion.

The tribunal may make an order that provides for the approval of containment and seclusion on its own initiative or upon an application that

is made under the new section 80ZO. This approval given by the tribunal is known as a ‘containment or seclusion approval’.

80W Matters tribunal must consider

The new section 80W (Matters tribunal must consider) provides criteria the Tribunal must consider before it may give an approval for a relevant service provider to use containment or seclusion. The tribunal is required to consider each of the following:

- the suitability of the environment in which the adult will be contained or secluded;
- the terms of a forensic order or involuntary treatment order made under the *Mental Health Act 2000* and the views of an authorised psychiatrist for the relevant authorised health service under that Act about the containment or seclusion (if the tribunal is aware of the existence of the order);
- the strategies and/or restrictive practices that have been previously used to manage or reduce the behaviour of the adult and the effectiveness of those strategies or practices; and
- the type of disability services provided to the adult.

80X When tribunal may approve use of other restrictive practices

The new section 80X (When tribunal may approve use of other restrictive practices) provides that where the tribunal has already given a containment or seclusion approval (an approval under the new section 80V) or is about to give a containment or seclusion approval, and the service provider intends to use other restrictive practices, such as mechanical, chemical or physical restraint or restricted access (see section 123E of the DSA for definitions of these terms), the tribunal must include the approval to use other restrictive practices as part of the containment or seclusion approval. Therefore, if a containment or seclusion approval is given or is about to be given, the tribunal is the decision-maker who approves the use of the other restrictive practices and the guardian for restrictive practice (general) matters will not be appointed.

Section 80X also provides that the Tribunal must be satisfied of all the criteria set out in new section 80V and consider all the criteria set out in the new section 80W before the tribunal may make the order giving approval

for the relevant service provider to use other restrictive practices. In addition, if the proposed other restrictive practice is chemical restraint, the tribunal must also consider the views of the adult's treating doctor about the use of the chemical restraint. When the tribunal is taking into account the criteria in section 80V and considering the criteria in section 80W, a reference to containment or seclusion is to be read as if it were a reference to the other restrictive practices in relation to the adult.

As a consequence of this section, when a positive behaviour support plan is developed for the adult (under the provisions of chapter 10A of the DSA), the positive behaviour support plan must include all restrictive practices to be used to manage the behaviour of the adult, so that there is only ever to be one plan and one approval for the adult. The decision-maker, type of assessment and type of plan to be developed will always revert to the higher level.

Division 2 of part 2 of chapter 5B is titled, 'Period of containment or seclusion approval'

80Y Period for which containment or seclusion approval has effect

The new section 80Y (Period for which containment or seclusion approval has effect) provides that the maximum period of time for a containment or seclusion approval by the tribunal is to be no more than 12 months. The Carter Report recommended a maximum period of time for an approval should be 6 months. However, this maximum period of 12 months will allow the tribunal some flexibility when giving a containment or seclusion approval. When the circumstances of the matter before the tribunal are developing or constantly changing, the period of the approval will be for a shorter duration, for example, 3 months or 6 months. Once the circumstances of the matter stabilise and there are no expected changes in the adult's situation, the period of the approval may be longer, such as 12 months. The experience of the Tribunal in relation to these types of matters has been that where the circumstances of the adult are very stable, there has not been a need to review the appointment before 12 months. The new section 80Y does not prevent a person from applying to the Tribunal before the approval ends for a review (refer to the new section 80ZA below) nor prevent the automatic revocation of a containment or seclusion approval (refer to the new section 80ZY below).

80Z Automatic revocation of containment or seclusion approval

The new section 80Z (Automatic revocation of containment or seclusion approval) provides that a containment or seclusion approval will automatically end if the adult dies or in relation to the relevant service provider, if the adult stops receiving disability services from that provider. There is a requirement for the relevant service provider to notify the tribunal if either the adult dies or the adult stops receiving services from that service provider.

Division 3 of Part 2 of chapter 5B is titled, ‘Reviewing a containment or seclusion approval’.

80ZA When containment or seclusion approval may be reviewed

The new section 80ZA (When containment or seclusion approval may be reviewed) provides that the tribunal may review the containment or seclusion approval at any time on its own initiative or on the application of any of the persons mentioned in 80ZA(b). The persons who may apply for a review include: the adult, an interested person for the adult (such as a family member, close friend or advocate), a relevant service provider to which the approval applies, the chief executive (DSQ), the adult guardian and the director of mental health (but only if the individual is subject to a forensic order or involuntary treatment order under the *Mental Health Act 2000*).

80ZB Review process

The new section 80ZB (Review process) describes how the tribunal will conduct a review of a containment or seclusion approval. The tribunal may conduct the review in the way it considers appropriate. At the end of the review, the tribunal must revoke the containment or seclusion approval unless it is satisfied it would give the containment or seclusion approval if a new application for approval was made. If the tribunal is satisfied it would give the containment or seclusion approval, the tribunal may continue the order giving the approval, change the order giving the approval or make an order giving a new approval. The requirement of the tribunal to consider the review application as if it were a new application, involves the tribunal complying with sections 80V, 80W and 80X.

Part 3 Guardians for a restrictive practice matter

Part 3 of chapter 5B is titled, 'Guardians for a restrictive practice matter'.

80ZC Application of pt 3

The new section 80ZC (Application of pt 3) provides that part 3 does not apply if a containment or seclusion approval is in effect in relation to an adult. This is because the new section 80X provides that if a containment or seclusion approval is in effect, the approval of other restrictive practices must be decided by the tribunal and form part of the containment or seclusion approval.

80ZD Appointment

The new section 80ZD (Appointment) enables the tribunal to appoint a guardian for a restrictive practice matter. A restrictive practice matter is defined to mean a restrictive practice (general) matter and a restrictive practice (respite) matter. These terms are further defined in section 80U. A restrictive practice (general) matter refers to restrictive practices other than containment or seclusion (ie. mechanical restraint, physical restraint, chemical restraint and restricted access) that are used by a relevant service provider in the provision of disability services, except for respite services or community access services if these are the only disability services being provided. A restrictive practice (respite) matter refers to the use of any restrictive practice by a relevant services provider when the only disability services being provided to the adult are respite services or community access services.

Before a guardian for a restrictive practice matter is appointed, the tribunal must be satisfied that:

- the adult has impaired decision capacity for the matter. This could mean that the adult does not understand that his or her behaviour causes harm to his or herself or others (or he or she can not control the behaviour) and that there is a need to use positive strategies or support and restrictive practices in a planned and coordinated response to reduce or eliminate the behaviour and improve the quality of life of the adult; and

- the adult's behaviour has previously resulted in harm to the adult or others; and
- there is a need for a decision about a restrictive practice matter; and
- without an appointment the adult's behaviour is likely to cause harm to the adult or others and the adult interests will not be adequately protected.

The tribunal may make the appointment on terms that it considers appropriate, for example, restrict the appointment to just one type of restrictive practice or require the guardian to provide regular reports to the tribunal. The maximum period the tribunal may make the appointment is 12 months but the duration of the appointment is subject to sections 26 (Automatic revocation) and 31 (Appointment review process) of the GAA. Section 26 provides that the appointment of a guardian ends upon the happening of certain events stipulated in section 26. Section 31 provides that upon the application to the tribunal by any of the persons described in the new section 29(2), the tribunal will review the appointment of the guardian for a restrictive practice matter and may renew, revoke or make a new appointment or remove an appointee. Under section 31, the tribunal must consider the review application as if the review application was a new application, so that the tribunal must be satisfied of the matters set out in the new section 80ZCD.

80ZE Requirements for giving consent—guardian for restrictive practice (general) matter

The new section 80ZE (Requirements for giving consent – guardian restrictive practice (general) matter) states the requirements for a guardian for restrictive practice (general) matter when consenting to the use of a restrictive practice (other than containment or seclusion) in relation to the adult by a relevant service provider. This section does not apply when the only disability services being provided to the adult are respite services or community access services. In this circumstance, the new section 80ZF applies.

Before the guardian for a restrictive practice (general) matter may consent to the use of the restrictive practice (other than containment or seclusion) by the relevant service provider, the service provider must develop a positive behaviour support plan for the adult that incorporates the use of the restrictive practice and the plan complies with the requirements of section

123L of the DSA. The guardian for a restrictive practice (general) matter may give the consent subject to conditions.

Before the guardian for a restrictive practice (general) matter gives the consent, the guardian must be satisfied:

- the previous behaviour of the adult has resulted in harm to the adult or others; and
- there is a reasonable likelihood that if the consent is not given, the adult's behaviour will cause harm to the adult or others; and
- a positive behaviour support plan (as described in section 123L of the DSA) has been developed for the adult and that this plan incorporates the use of a restrictive practice other than containment or seclusion; and
- the use of the restrictive practice in compliance with the positive behaviour support plan is the least restrictive option to ensure the safety of the adult or others; and
- the adult has been adequately assessed by an appropriately qualified person in the development of the positive behaviour support plan (note that section 123J of the DSA describes the assessment of an adult and section 123K of the DSA describes who is an appropriately qualified person); and
- the use of the restrictive practice is supported by the recommendations of the appropriately qualified person; and
- if the restrictive practice is chemical restraint, the relevant service provider has consulted with the adult's treating doctor when developing the positive behaviour support plan; and
- the implementation of the plan will result in a reduction or elimination of the risk of the adult's behaviour causing harm and an improvement in the quality of life of the adult in the long-term; and
- the positive behaviour support plan includes appropriate arrangements for the observation and monitoring of restrictive practices.

The guardian is also required to consider the following matters when deciding whether to consent to the use of the restrictive practice by the relevant service provider:

- the suitability of the environment in which the restrictive practice will be used;

- the terms of a forensic order or involuntary treatment order made under the *Mental Health Act 2000* and the views of an authorised psychiatrist for the relevant authorised health service under that Act about the use of the restrictive practice (if the guardian is aware of the existence of the order);
- if the restrictive practice is chemical restraint, the views of the adult's treating doctor about the use of the chemical restraint;
- the strategies and/or restrictive practices that have been previously used to manage or reduce the behaviour of the adult and the effectiveness of those strategies or practices; and
- the type of disability services provided to the adult.

80ZF Requirements for giving consent—guardian for restrictive practice (respite) matter

The new section 80ZF (Requirements for giving consent – guardian for restrictive practice (respite) matter) states the requirements for a guardian for restrictive practice (respite) matter when consenting to the use of a restrictive practice in relation to the adult by a relevant service provider. A guardian for a restrictive practice (respite) matter has the authority to make decisions about the use of any restrictive practice in relation to the adult by a relevant service provider in the course of providing respite service or community access services. Respite services and community access services are defined in the DSA (section 123E) and involve the provision of these services in the absence of any other disability services being provided. This section does not apply if respite services or community access services are provided as well as accommodation support (or another disability service).

The guardian for a restrictive practice (respite) matter may consent to the use of the restrictive practice by the relevant service provider if it is in compliance with a respite/community access plan developed for the adult in accordance with section 123ZP(2) of the DSA. The guardian for a restrictive practice (respite) matter may give the consent subject to conditions.

Before the guardian for a restrictive practice (respite) matter gives the consent, the guardian must be satisfied:

- there is a reasonable likelihood that if the consent is not given, the adult's behaviour will cause harm to the adult or others; and

- the relevant service provider has complied with the DSA, part 10A, division 5; and
- the implementation of the respite/community access plan will result in a reduction or elimination of the risk of the adult's behaviour causing harm and an improvement in the quality of life of the adult in the long-term; and
- the respite/community access plan includes appropriate arrangements for the observation and monitoring of the use of the restrictive practice.

However, if the restrictive practice proposed to be used is chemical restraint (fixed dose) (which means the medication is prescribed as at fixed intervals and times), the guardian for restrictive practice (respite) matter need only be satisfied there is a reasonable likelihood that if the consent is not given, the adult's behaviour will cause harm to the adult or others.

Part 4 Short term approval of adult guardian for use of particular restrictive practices

Part 4 of chapter 5B is titled 'Short term approval of adult guardian for use of particular restrictive practices'.

This part enables the adult guardian to approve the use of containment or seclusion (and other restrictive practices) under a short term approval. This is not a true emergency situation where the service provider's duty of care or the doctrine of necessity would authorise the service provider to take action to protect the adult or others from harm. The provisions of this part would apply where it is identified that there is a need to use containment or seclusion for the longer term and there is no current containment or seclusion approval. The maximum 3 month period of the approval will allow the service provider sufficient time to arrange for an assessment of the adult by appropriately qualified or experienced person/s; to develop a positive behaviour support plan for the adult and have the matter considered by the Tribunal. This part also includes provisions that provide appropriate safeguards to protect the adult's rights and interests and allow for accountability of decision-making by the adult guardian.

80ZG Application of pt 4

The new section 80ZG (Application of pt 4) provides that part 4 does not apply for an adult if there is a containment or seclusion approval in existence. If the tribunal has already made an order giving approval for a relevant service provider to contain or seclude an adult and the circumstances change requiring a new approval, the service provider must go back to the tribunal for a new approval and the adult guardian can not give the short term approval. Also, this part does not apply where containment and seclusion is proposed to be used for respite services or community access services only and a guardian for a restrictive practice (respite) matter is appointed (refer to sections 80ZD and 80ZF).

80ZH When adult guardian may give short term approval for use of containment or seclusion

The new section 80ZH (When adult guardian may give short term approval for use of containment or seclusion) describes the circumstances the adult guardian must be satisfied of before giving short term approval for a relevant service provider to contain or seclude an adult. The adult guardian must be satisfied that the adult has impaired capacity for making decisions about the use of restrictive practices in relation to the adult. This could mean that the adult does not understand that his or her behaviour causes harm to his or herself or others (or he or she can not control the behaviour) and that there is a need to use positive strategies or support and restrictive practices in a planned and coordinated response to reduce or eliminate the behaviour and improve the quality of life of the adult.

The adult guardian must also be satisfied that the adult's behaviour has previously resulted in harm to the adult or others and there is an immediate and serious risk that if the approval is not given, the adult's behaviour will cause harm to the adult or others. Further, the restrictive practice proposed must be the least restrictive option to ensure the safety of the adult or others. If it is possible to do so in the circumstances, the adult guardian must also consult with the persons described in section 80ZH(2).

A short term approval may only be for a maximum period of 3 months. If the adult guardian has given a previous short term approval for the adult, the adult guardian may give another short term approval only if satisfied that exceptional circumstances exist, such as there has been a change in the service provider or location of the adult.

A short term approval will end if the relevant service provider does not comply with the conditions imposed by section 80ZI (that is the requirement to develop a short term plan and any other conditions imposed by the adult guardian) or the adult guardian does not approve the short term plan under sections 80ZI and 80ZJ.

The relevant service provider or a person consulted under section 80ZH(2) by the adult guardian or the relevant service provider may apply to the tribunal to seek a review of the adult guardian's decision and the tribunal may make an order that it considers appropriate.

80ZI Conditions to which s 80ZH approval is subject

The new section 80ZI (Conditions to which s80ZH approval is subject) describes the conditions of a short term approval given by the adult guardian. The relevant service provider has 14 days after receiving notice of the approval to give to the adult guardian a short term plan for the adult. A short term plan is described in section 123ZM(2) of the DSA. The adult guardian may also impose other conditions the adult guardian considers appropriate.

80ZJ Adult guardian's decision about whether to approve short term plan

The new section 80ZJ (Adult guardian's decision about whether to approve short term plan) describes the requirements for the adult guardian after the adult guardian has received a short term plan from the relevant service provider pursuant to the requirement in section 80ZI. As soon as practicable after receiving the short term approval, the adult guardian is required to consider the short term plan and whether to approve the plan. Before the plan is approved the adult guardian must be satisfied of the criteria set out in section 80ZJ(3). The adult guardian is required to notify the relevant service provider of the adult guardian's decision as soon as practicable after making the decision. If the adult guardian does not approve the short term plan, the relevant service provider may apply to the tribunal and the tribunal may make an order that the tribunal considers appropriate.

80ZK When adult guardian may give short term approval for use of other restrictive practices

The new section 80ZK (When adult guardian may give short term approval for use of other restrictive practices) provides that if the adult guardian has given a short term approval under section 80ZH (for containment and seclusion) and the relevant service provider intends to use other restrictive practices under a short term approval, the adult guardian is the decision-maker who is to approve these other restrictive practices. Where the relevant service provider only intends to use restrictive practices (other than containment or seclusion) under a short term approval, the decision maker is the chief executive (DSQ) (see part 10A, division 4, subdivision 4 of the DSA) or a guardian for a restrictive practice (general) matter, if this guardian has already been appointed by the tribunal.

The matters the adult guardian must be satisfied of before approving the other restrictive practices under a short term approval are the same as those required for approval of containment and seclusion under section 80ZH. The relevant service provider must also provide to the adult guardian a short term plan (or amended short term plan) within 14 days of the approval being given and the adult guardian must consider whether to approve the short term plan in accordance with section 80ZJ. If the proposed restrictive practice is chemical restraint, the adult guardian must be satisfied that the relevant service provider has consulted with and considered the views of the adult's treating doctor. Section 80ZK also provides for the circumstances when the short term approval will end.

80ZL Right of adult guardian to information for making decision

The new section 80ZL (Right of adult guardian to information for making decision) provides the authority of the adult guardian to access relevant and necessary information for deciding whether to give approval under part 4 (for short term approval). The rights of the adult guardian to access information are similar to those rights of a guardian to access information under section 44 of the GAA. As the adult guardian is not acting as a guardian when giving a short term approval, it is necessary for the adult guardian to be able to access all relevant information and be fully informed before the adult guardian makes the decision to approve the use of a restrictive practice under a short term approval. This section provides that the adult guardian has the right to all information that the adult would be entitled to have if the adult had capacity and that is necessary to make an informed decision.

This section also provides that the person who has custody or control of the information the adult guardian has requested must provide the information to the adult guardian unless the person has a reasonable excuse. The adult guardian has a right to apply to the tribunal should the person refuse to give the information to the adult guardian as requested. It is a reasonable excuse for a person to refuse to give the information to the adult guardian if the information might tend to incriminate the person. However, the right to information by the adult guardian overrides any restriction in an Act or common law about disclosure of confidential information and claims of confidentiality or privilege, including legal professional privilege.

80ZM Requirement for adult guardian to give notice of decision

The new section 80ZM (Requirement for adult guardian to give notice of decision) provides that the adult guardian must give written notice of a short term approval under part 4 to the adult, relevant service provider, tribunal, chief executive (DSQ), a guardian for a restrictive matter (general) matter for the adult and any other person the adult guardian has consulted under section 80ZH(2). The notice to be provided must state the name of the adult, the name of the relevant service provider, the terms of the adult guardian's approval and reasons for giving the approval.

Part 5 Tribunal proceedings

Part 5 of chapter 5B is titled, 'Tribunal proceedings'.

Division 1 of part 5 of chapter 5B is titled, 'General'.

80ZN Relationship with ch 7

The new section 80ZN (Relationship with ch 7) clarifies which sections in chapter 7 of the GAA apply to tribunal proceedings about restrictive practice matters under chapter 5B. Chapter 7 contains provisions about tribunal proceedings including procedures, applications, confidentiality orders, dispute resolution and other matters. Most of the provisions in chapter 7 will apply to tribunal proceedings that concern restrictive practice matters under chapter 5B and those that do not apply have been specifically excluded. Those sections that have been excluded are excluded because they are not relevant for the purposes of making decisions about a

restrictive practice matter or alternative provisions have been included, which are set out below in divisions 2 and 3 of part 5 of chapter 5B.

Division 2 of part 5 of chapter 5B is titled, 'Applications'

80ZO Who may apply for a containment or seclusion approval

The new section 80ZO (Who may apply for a containment or seclusion approval) provides that the chief executive (DSQ) may apply to the tribunal for approval of containment or seclusion and if the relevant service provider is a DSQ funded non-government service provider, then the application must be joint with this relevant service provider. For matters involving the approval of containment and seclusion, the provisions of the new chapter 10A in the DSA, require the chief executive (DSQ) to be responsible for the assessment of the adult and development of the positive behaviour support plan. Given this responsibility, the chief executive (DSQ) will always be involved in applications to the tribunal for a containment or seclusion approval.

80ZP Who may apply for appointment of guardian for restrictive practice matter

The new section 80ZP (Who may apply for appointment of guardian for restrictive practice matter) describes who may apply to the tribunal for the appointment of a guardian for a restrictive practice matter. This includes, the adult, an interested person for the adult (such as a family member, close friend or advocate), a relevant service provider providing disability services to the adult, the chief executive (DSQ), the adult guardian or the director of mental health (but only if the adult is subject to an involuntary treatment order or forensic order under the *Mental Health Act 2000).*

These two new sections will not prevent a person from applying to the tribunal under section 115 of the GAA for a declaration, order, direction, recommendation or advice in relation to an adult about a restrictive practice matter. Also, section 154 will allow an application to be made to the tribunal regarding the ratification or approval of the exercise of power by an informal decision-maker.

Division 3 of part 5 of chapter 5B is titled 'Other matters.'

80ZQ Who is an *active party*

The new section 80ZQ (Who is an active party) describes who is an active party for a proceeding under chapter 5B (Restrictive practices). This section is a substitute for section 119 of the GAA, which by virtue of the new section 80ZN does not apply to chapter 5B proceedings. Active parties include: the adult, the applicant, the chief executive (DSQ), a current guardian or administrator, a relevant service provider providing disability services to the adult, the adult guardian, the director of mental health (but only if the adult is subject to an involuntary treatment order or forensic order under the *Mental Health Act 2000*) and a person joined as a party to the proceeding by the tribunal.

An active party is given certain rights under the GAA, which are different from an interested person or other party participating in a tribunal proceeding. For example, an active party has a right to access documents and information before and during a tribunal hearing and also has a right to receive a copy of the decision and reasons for decision of the tribunal.

80ZR Interim orders

The new section 80ZR (Interim orders) provides for when the tribunal may make an interim order under chapter 5B. This section is a substitute for section 129 of the GAA, which by virtue of the new section 80ZN does not apply to chapter 5B proceedings. The tribunal may make an interim order if satisfied on reasonable grounds that there is an immediate risk of harm to the adult or others and using the restrictive practice is the least restrictive way of ensuring the safety of the adult or others. An interim order may be made without a hearing and deciding the proceeding or otherwise complying with the requirements of this Act. The period of the interim order must not be more than 3 months. There is no provision to extend the order beyond 3 months.

An interim order is unlike a short term approval that is made by the adult guardian. For an interim order, the tribunal will have received an application about the restrictive practice matter.

Part 6 Miscellaneous provisions

Part 6 of chapter 5B is titled, ‘Miscellaneous provisions’.

80ZS Requirements for informal decision makers—consenting to use of restrictive practices

The new section 80ZS (Requirements for informal decision makers – consenting to use of restrictive practices) describes the requirements for informal decision makers when deciding to consent to the use of restrictive practices in certain circumstances. An informal decision maker is someone within the adult's support network who makes decisions for the adult without a formal appointment. This includes a member of the adult's family, close friends of the adult or other persons the tribunal decides support the adult. This does not include a paid carer for the adult as defined in schedule 4 of the GAA.

An informal decision maker may, under the provisions of part 10A of the DSA, consent to the use of the following restrictive practices by relevant service providers:

- restricted access (other than in the course of respite services or community access services). This is an approval under the main scheme; and
- mechanical restraint, physical restraint or chemical restraint (fixed dose) or restricted access during the course of respite services or community access services.

Sections 80ZS(2) and (3) set out the criteria the informal decision-maker must be satisfied of before consenting to the use of a restrictive practice. One of these criteria includes the informal decision-maker complying with the general principles in Schedule 1 of the GAA. Whilst section 11 of the GAA provides that a person or other entity who performs a function or exercises a power under the GAA must apply the general principles, it is not clear that this section also applies to informal decision makers. This new section will clarify that an informal decision maker must apply the general principals when considering a decision to approve the use of a restrictive practice.

Other criteria that the informal decision maker must be satisfied of include that the adult's behaviour has previously resulted in harm to the adult or others and if the consent is not given there is the reasonable likelihood the adult's behaviour will cause harm to the adult or others. Also the restrictive practice must be in compliance with the plan that has been developed by the service provider for that respective restrictive practice and type of service provided and if the plan is implemented there will be a reduction or elimination in the risk of the adult's behaviour causing harm and the adult's

quality of life will be improved. For the approval of restricted access, the informal decision maker must also consider the terms of the forensic order or involuntary treatment order under the *Mental Health Act 2000*, if aware that an order is in existence.

When the disability service provided is respite or community access only and the restrictive practice is chemical restraint (fixed dose), then the requirements for the development of a respite/community access plan do not apply.

80ZT Informal decision makers must maintain confidentiality

The new section 80ZT (Informal decision makers must maintain confidentiality) describes the responsibility of an informal decision maker who gains confidential information about an adult who has an intellectual or cognitive disability because of their role under the new chapter 10A in the DSA and the new chapter 5B of the GAA. The informal decision maker must not disclose the information to anyone other than under the provisions provided in the new section 80ZT(3).

80ZU Review of ch 5B

The new section 80ZU (Review of ch 5B) provides that chapter 5B is to be reviewed by the Minister responsible for administering this Act in conjunction with the review of the DSA by the Minister responsible for administering the DSA under section 233A of the DSA. The review will be conducted when the DSA is reviewed under section 233 of the DSA, which is 5 years from commencement of the Act. It is intended that this review will take place in 2010/11.

Amendment of s 82 (Functions)

Clause 23 amends section 82 to extend the functions of the tribunal to include the giving of approvals under chapter 5B for the use by a relevant service provider of a restrictive practice in relation to an adult to whom chapter 5B applies and reviewing the approvals. This is a new function of the tribunal created under chapter 5B.

Amendment of s 98 (Annual report)

Clause 24 amends section 98 to extend the matters the tribunal must include in their annual report. The tribunal must now also report on the

number of applications, approvals and orders that are made under the new chapter 5B. This reporting requirement will assist the tribunal and other agencies to assess and report on the use of restrictive practices by relevant service providers.

Amendment of s 118 (Tribunal advises persons concerned of hearing)

Clause 25 amends section 118 to extend the persons to whom the tribunal must give a notice of hearing. Section 118 currently lists the persons who the tribunal may provide a notice of hearing to. For a proceeding under chapter 5B, as well as the people already referred to in section 118, the tribunal must also provide a notice of hearing to the chief executive (DSQ), the director of mental health (if the adult is subject to a forensic order or involuntary treatment order under the *Mental Health Act 2000*, if the tribunal is aware of the existence of the order) and a relevant service provider providing disability services to the adult.

Amendment of s 174 (Functions)

Clause 26 amends section 174 to extend the functions of the adult guardian to include the approval of a restrictive practice under chapter 5B, part 4. This includes the giving of an approval to use containment or seclusion (and other restrictive practices) under a short term approval. This is a new function of the adult guardian created under chapter 5B.

Amendment of s 222 (Definitions for ch 10)

Clause 27 amends section 222 by providing for a new definition of ‘private dwelling house’. The definition of private dwelling house is relevant for chapter 10 of the GAA (Community visitors). Under chapter 10, a community visitor has an inquiry and complaint function and will regularly visit a ‘visitable site’. After a visit, the community visitor will prepare a report to the chief executive regarding the various matters described in section 224 of the GAA.

A visitable site is defined in section 222 of the GAA to mean a place, other than a private dwelling house, where a consumer (adult) lives or receives services and that is prescribed under a regulation. A ‘private dwelling house’ is defined to mean premises that are used, or are used principally, as a separate residence for 1 family or person. As a result of this definition,

when an adult lives alone and receives disability services, a community visitor may not visit that private dwelling house.

However, there are a group of adults with an intellectual or cognitive disability who receive disability services from a relevant service provider and who live alone because of the nature of their behaviours. For some of these adults it may be necessary for the relevant service provider to use a restrictive practice and approval to use the restrictive practice under the provisions of chapter 5B may be given. Under the current definition, the community visitor may not visit the premises where these groups of adults reside.

As it is considered important for the community visitor to visit these premises to undertake their functions, the definition of 'private dwelling house' for the purposes of chapter 5B matters has been changed, so that it will now include a private dwelling house where only 1 person lives. This means that where a relevant service provider has been given approval or consent to use a restrictive practice on an adult who lives alone, the community visitor will be able to regularly visit that house to carry out the community visitor's functions.

For those adults who live alone and are not subject to restrictive practices approved under chapter 5B, the community visitor will not visit that private dwelling house.

Amendment of s 230 (Reports by community visitors)

Clause *28* amends section 230 to extend the list of parties to whom the chief executive may provide a copy of the community visitor's report. If the restrictive practice is being used at the visitable site, the chief executive may also provide a copy of the report to the tribunal, the guardian or administrator for an adult in relation to whom the restrictive practice is being used or the chief executive (DSQ). The community visitor's report may contain useful and relevant information to inform decision makers about the effectiveness and appropriateness of the use of restrictive practices and therefore, this information should be provided to these additional persons.

Clause 29 amends the GAA by inserting a new part 8 in chapter 12. Part 8 is titled, 'Transitional provisions for Disability Services and Other Legislation Amendment Act 2008'.

Part 8 Transitional provisions for Disability Services and Other Legislation Amendment Act 2008

265 Powers of guardians—use of restrictive practices

The new section 265 (Powers of guardians – use of restrictive practices) provides that a guardian who is appointed before the commencement of this section and immediately before the commencement section had, in accordance with the terms of the appointment, the authority to make decisions for the adult about the use of a restrictive practice (as defined in section 80U), may despite the provisions of chapter 5B continue to make decisions for the adult about the use of the restrictive practice. However, the authority of the guardian to continue to make decisions about the use of a restrictive practice will end at the earlier of either the day when the guardian's appointment is reviewed by the tribunal or 18 months from the commencement of this section.

266 Short term approvals not to be given during transitional period

The new section 266 (Short term approvals not to be given during transitional period) provides that the authority of the adult guardian to give a short term approval in accordance with chapter 5B, part 4 does not commence until after 18 months from the date of commencement of this section.

Amendment of sch 2 (Types of matters)

Clause 30 amends section 2 in schedule 2 which describes the types of personal matters about which a guardian may make decisions. This clause extends the types of personal matters to also include:

- a restrictive practice matter under chapter 5B; and
- seeking help and making representations about the use of restrictive practices for an adult who is the subject of a containment or seclusion approval under chapter 5B.

Chapter 5B enables the tribunal to appoint a guardian for a restrictive practice matter. A guardian for a restrictive practice matter is subject to strict requirements before they can make a decision about the use of a

restrictive practice matter. Given the specific appointment and requirements associated with this power, a new type of personal matter, being ‘a restrictive practice matter under chapter 5B’ has been included.

It is also considered necessary to include another type of personal matter, that of ‘seeking help and making representations about the use of restrictive practices for an adult who is the subject of a containment or seclusion approval under chapter 5B’. A situation may arise where the tribunal has given approval for the relevant service provider to contain or seclude an adult and there is no guardian appointed to make decisions about other matters for the adult or the adult has no advocate. If for example, the tribunal determines that there is a need for a person to help the adult or make representations on behalf of the adult in relation to the use of restrictive practices, because there is no-one else appointed or available to do this and the interests of the adult will not be protected without the appointment, the tribunal may appoint a person to be guardian for the adult to seek help and make representations about the use of containment or seclusion. The person appointed guardian would be appointed by the tribunal pursuant to the provisions of section 12 of the GAA. In accordance with section 14(2) of the GAA, the adult guardian would only be appointed as guardian if no other appropriate person was available for that appointment. Family members and close friends of the adult would be considered for appointment before the adult guardian.

Amendment of sch 4 (Dictionary)

Clause 31 amends schedule 4 (dictionary) to include the new definitions referred to in the new section 80U for the purposes of chapter 5B.

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