National Disability Insurance Scheme (Authorisations) Act 2019 - Review of legislation

Discussion paper

NORTHERN TERRITORY GOVERNMENT

Contents

1. Purpose

The Restrictive Practices Authorisation Unit (Authorisation Unit) are starting a review of how the Northern Territory (NT) *National Disability Insurance Scheme (Authorisations) Act 2019* (the Act) works as well as a review of the role of the NT Senior Practitioner.

The Act establishes the legal role of the Senior Practitioner to authorise National Disability Insurance Scheme (NDIS) providers to use restrictive practices in the NT. The laws apply to adults and children who are registered NDIS participants. The participants must also have an interim (short term) or comprehensive (12 month) behaviour support plan that includes a restrictive practice. One or more NDIS service providers can use these restrictive practices.

The purpose of this discussion paper is so that key stakeholders can take part in the review of the Act. These stakeholders include:

- people with disability
- their carers and guardians
- NDIS service providers
- behaviour support practitioners.

1.1. Target audience

The target audience for this discussion paper are people who use or are affected by the Authorisation Unit and the NT restrictive practices authorisation process. This includes:

- NDIS register service providers who use behaviour support plans that include restrictive practices (implementing providers)
- behaviour support practitioners, who develop behaviour support plans and support providers to use the plans
- people with disability, their families and their guardians (public and community)
- other stakeholders including peak bodies and advocacy groups.

If you need more information about restrictive practices or the authorisation process, you can contact the RPAU on the contact details below.

Restrictive Practice Authorisation Unit, Department of Health

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2. Overview of *National Disability Insurance Scheme (Authorisations) Act 2019*

The Act provides a framework for the authorisation of restrictive practices for NDIS participants in the NT. The participants must have a behaviour support plan that includes restrictive practices being used by one or more NDIS service provider.

The Act:

- lists the guiding principles NDIS providers need to follow when delivering services to participants who show behaviours of concern
- explains the role of the Senior Practitioner. This includes:
    - developing guidelines to support NDIS providers in using restrictive practices
    - supporting providers to reduce and get rid of restrictive practices where possible by sharing information and providing education
- explains regulated restrictive practices and prohibited restrictive practices
- gives a framework for authorising restrictive practices. This includes conditions for when authorisation can be cancelled and for recommending alternate practices
- allows for decisions on authorisation to be reviewed by an internal reviewer appointed by the Chief Executive of the Department of Health or by the Northern Territory Civil and Administrative Tribunal (NTCAT).

The Act aligns with the *National Disability Insurance Scheme Act 2013* and rules, including the *National Disability Insurance Scheme (Restrictive Practices and Behaviour Support) Rules 2018* (the Rules). These are Australian Government laws that cover the regulation of restrictive practices and the role of the NDIS Commission across all states and territories.

The guiding principles of the Act uphold the rights of people with disability with behaviour support plans that include restrictive practices. They also meet the requirements of the *National Framework for Reducing and Eliminating the use of Restrictive Practices in the Disability Service Sector*.

Alongside the Act is the NT Restrictive Practices Authorisation Framework (the Authorisation Framework). This puts the Act into practice and explains the authorisation process to NDIS service providers.

2.1. Restrictive practices

A restrictive practice is any practice or intervention that restricts the rights or freedom of movement of a person with a disability.

Restrictive practices that need to be authorised are called regulated restrictive practices. These are listed in the Act and the Rules. There are five categories of restrictive practices. Table 1 explains these categories.

Table 1: Categories of restrictive practices

Category	Description
Seclusion	Where a person with a disability is confined on their own in a room or a physical space. It can be at any hour of the day or night and where their choice to leave is prevented or not supported. Or where they believe that they can't leave when they want to.
Chemical restraint	Using medication or chemicals specifically to change a person's behaviour. This doesn't include using medication prescribed by a doctor to treat, or to support treatment of: • a diagnosed mental disorder • physical illness • physical condition.
Mechanical restraint	Using a device to prevent, restrict, or minimise a person's movement specifically to change their behaviour. This doesn't include using devices for therapeutic or non-behavioural purposes.
Physical restraint	Using physical force to prevent, restrict or minimise movement of a person's body, or part of their body, to change their behaviour. Physical restraint doesn't include using a hands-on technique to guide or redirect a person away from potential injury or harm in a way that is clearly taking care of the person. **In the NT, we will not give authorisation to use supine (face up position) or prone (face down) restraint.**
Environmental restraint	Where a person's access is restricted to any part of their environment. This includes their personal belongings, other items or preferred activities.

2.2. Prohibited restrictive practices

Prohibited restrictive practices are those practices that we won't authorise in the NT under any circumstances. These practices:

- don't meet best practice
- may be unlawful or unethical
- violate the United Nations Convention on the Rights of Persons with Disabilities
- could cause injury or death.

Table 2: Categories of restrictive practices that are prohibited in the NT

Category	Description
Aversion	Any practice or action that a person finds noxious, unpleasant or painful.
Overcorrection	Any practice where the response to an event or an issue is unequal to the event itself.
Misuse of medication	When medication is given to a person in a way that doesn't match the instructions of the doctor that prescribed it, specifically to change the person's behaviour, mood or arousal.
Denial of key needs	Any practice that stops a person from accessing basic needs or personal supports including: • family • friends • peers • advocates • possessions.
Practices related to degradation or vilification	Actions that: • are degrading or demeaning to the person • the person or their guardian see as harassment or vilification or defamation • are unethical.
Practices which limit or deny access to community, culture and language	Actions that limit a person's ability to take part or access community, culture and language, including denying them access to interpreters.
Seclusion of a person under the age of 18 years	This includes the isolation of a child or young person (under 18 years of age) in a place that they're not able to leave.

2.3. The authorisation process

NDIS providers need to apply for authorisation to use restrictive practices through the NT Restrictive Practices Authorisations online system. This system is monitored by the Senior Practitioner and the Authorisation Unit.

The Senior Practitioner reviews the providers request for authorisation and either authorises, rejects or asks for more information.

The Senior Practitioner then sends out a Notice of Authorisation to all those involved, including the provider and the participant. The Notice of Authorisation will explain which restrictive practices have been authorised and which ones haven't.

2.4. Types of authorisation

The Authorisation Framework covers two types of authorisation:

a) **Interim authorisation** – for a participant with an interim behaviour support plan that includes the use of a restrictive practice. A registered NDIS behaviour support practitioner must develop the interim behaviour support plan. An interim authorisation lasts for up to six months. An interim authorisation may be suitable after an incident or when a provider first sees the need for a restrictive practice.

b) **Authorisation** – for a participant that has a comprehensive behaviour support plan that includes the use of a restrictive practice. An authorisation lasts for up to 12 months. A registered NDIS behaviour support practitioner must develop the comprehensive behaviour support plan. They will do this after doing behaviour and other assessments.

2.5. Review of an authorisation decision

If a participant, their guardian, a behaviour support practitioner or the provider is not happy with the Senior Practitioner's decision, they can ask for a review of the decision.

You can ask for a review by applying to the Chief Executive of the Department of Health. The Chief Executive will appoint a suitable employee to do an internal review of the decision. You can find more details of the review process in section 5 of the Restrictive Practices Authorisations Framework.

If you are not happy with the outcome of the internal review, you can apply to NTCAT for a review of the Chief Executive's decision.

3. Review of operations of *National Disability Insurance Scheme (Authorisations) Act 2019*

3.1. The authorisation process

Since the Act started operating, the Senior Practitioner has had no major concerns with the NT authorisation process.

Feedback the Authorisation Unit has received shows that providers are happy with the authorisation process and the online system. The Authorisation Unit made changes to the length of time an application could be left open during the development process. They increased the number of days an application could be left in draft from five to seven days.

3.2. Experiences and what we've learnt so far

3.2.1. Positive outcomes

Increased knowledge in the sector of restrictive practices

There has been an increase in the number of requests for authorisation in the two years since the Act started. During the first year of the Act, 2019–20 there were 36 requests for authorisation while in the following year, 2020–21, we received 92 requests for authorisation.

Providing a way for providers to request authorisation

The Act provides a formal way for providers to request authorisation to use restrictive practices with NDIS participants. In the past, there was no legal requirement for service providers in the NT to report the use of restrictive practices. This is unless they were supporting a person who was subject to orders under Part IIA of the *Criminal Code Act 1983* (NT). Part IIA gives the Supreme Court the power to make orders in relation to mental impairment and unfitness to be tried. The narrow focus of the Part IIA made it difficult to keep NDIS participants safe who weren't covered by these conditions. The current process for requesting authorisation under the Act means:

- there is more transparency around the support providers are delivering
- training needs are identified
- gaps in delivering positive behaviour support are highlighted.

Supporting provider engagement

The small disability sector in the NT allows us to use a different approach for capacity building. The size of the sector allows us to develop relationships with individual providers. This, in turn, helps us to provide training and restrictive practices and behaviour support. Our capacity building has included structured training sessions with a variety of providers as well as a more tailored approach when meeting with individual providers and giving them information that is specific to their organisation's needs.

Providers are regularly in contact with the Authorisation Unit about requests for authorisation or seeking information about identifying restrictive practices. These contacts, as well as more structured training sessions, provide ongoing educational opportunities for providers and practitioners.

The Authorisation Unit is available through face to face, phone, email and online meetings.

Working towards getting rid of restrictive practices

Under the Act, providers must deliver a service that aims to reduce and get rid of the need to use restrictive practices. Also, where providers are using restrictive practices, they must make sure:

- that they're in place to keep the participant or others safe
- that it's time limited
- it's specific to the situation
- that it can be safely used
- it's used as a last resort.

When supporting a participant, providers must take into account the principles in the Act. This includes supporting a participant to make decisions about their lives such as behaviour support and to live with the least restriction.

Providers continue to develop the skills needed to identify, report, reduce and eliminate restrictive practices in the NT. The Authorisation Unit will keep working with providers to meet the aims of the Act.

3.2.2. Challenges

Cross over with NDIS roles

The Authorisation Unit works closely with the NDIS Quality and Safeguards Commission (the Commission) supporting providers and practitioners with behaviour support and restrictive practices.

The close working relationship between the Commission and the Authorisation Unit means there is a challenge to make sure the different roles of the two are clearly defined. Providers need to understand the different responsibilities of the Commission and the Authorisation Unit. The Authorisation Unit and the Commission are overcoming this challenge by using a 'no wrong door approach' when it comes to provider inquiries.

Limited behaviour support practitioners

The Authorisation Unit also supports behaviour support practitioners. Behaviour support practitioners develop behaviour support plans and support providers to use the plans.

Access to behaviour support services for people with disability, particularly in rural and remote Australia, is limited and can be affected by workforce shortages. The small number of behaviour support practitioners in the NT is also adding to limited services to remote and very remote areas. Travel times and distances complicate the issue. Reports show that some providers are experiencing long wait times for the development and completion of behaviour support plans because of the small number of behaviour support practitioners and their large caseloads.

As the sector develops and there are more practitioners working, participants will have more options when choosing a behaviour support practitioner.

Provider consultation with participants

Under the Act, an application for an authorisation or interim authorisation must show that the provider has consulted on the use of a restrictive practice with the person with a disability and:

- their family, carers and guardians
- other relevant people.

Providers use the RPA-2B Evidence of Consultation form (RPA-2B) to show that they have consulted with the participant and significant others about the possibility of using a restrictive practice. Providers need to submit the RPA-2B as part of a request for authorisation. Providers need to do these consultations separately to those the behaviour support practitioner may do. Consultation should include meetings to discuss what the restrictive practice is, how it is used and why.

The challenge for the Authorisation Unit is that this legal requirement is not always met to begin with. Any extra work the Authorisation Unit then does to help providers to make sure they have met the requirements of RPA-2B can delay the processing of authorisation requests.

Providers continue to develop a greater understanding of what is involved in the consultation process. Recently the Authorisation Unit updated its RPA-2B form to include more guidance for providers. The Authorisation Unit will keep supporting providers to improve the quality of consultations with the participants they support.

3.3. Stakeholder engagement

The Authorisation Unit has done a number of provider and behaviour support practitioner engagements. These have included a series of information and training sessions on restrictive practices and the authorisation process with providers across the NT. Some of these sessions were done in person and others as online training sessions. Sessions are developed to meet the individual circumstances of providers and practitioners.

Engagement has also been ongoing with behaviour support practitioners ranging from one to one discussions, to regular community of practice forums both in Darwin and Alice Springs.

The Authorisation Unit has also done stakeholder engagement in conjunction with the NDIS Commission. These sessions were run with behaviour support practitioners and NDIS registered providers.

The Authorisation Unit is setting up processes to engage aged care providers who are also registered NDIS providers supporting NDIS participants. The Authorisation Unit will help providers who are working across the aged care and disability sectors to use the authorisation process.

Plans are also underway to engage participants, family members and guardians in urban, rural and remote areas. The Authorisation Unit has started visiting remote regions and will continue to do so.

3.4. Sector development and capacity building

The Authorisation Unit has created a community of practice group and meetings are happening on a regular basis with behaviour support practitioners in Darwin, Alice Springs and surrounding areas. The community of practice is held quarterly. The Authorisation Unit holds combined group forums twice a year with behaviour support practitioners either online or in person across the NT. Individual forums are also held with practitioners in Darwin and Alice Springs.

The Authorisation Unit provides training to service providers about the authorisation process, identifying restrictive practices and behaviour support. This training aims to meet the individual needs and context of each provider. This training has also been provided in partnership with the Commission.

The Authorisation Unit has presented at National Disability Services NT forums in Darwin, Tennant Creek, Katherine, and Nhulunbuy. It has also provided information to support transitioning residential aged care providers to the NDIS.

Work is underway to develop online training modules on restrictive practices and the authorisation process.

Do you have any feedback or comments about the operation of the *NDIS (Authorisations) Act 2019*?

4. The role of the NT Senior Practitioner

The Act explains the role of the Senior Practitioner, which includes:

- authorising the use of restrictive practices
- rejecting inappropriate requests for restrictive practices
- producing and sharing policies, standards and guidelines to:
    - encourage best practice
    - lead sector capacity building
    - improve awareness to minimising the use of restrictive practices
- recording the authorisation of restrictive practices that are deemed to be necessary.

The Senior Practitioner and the Authorisation Unit are within the Office of the Chief Health Officer, Department of Health.

Do you have any feedback about the role of the NT Senior Practitioner?

Do you have any comments about the independence of the role of the Senior Practitioner?

5. Proposed changes and additions

5.1. Non-intentional risk behaviours

5.1.1. What are non-intentional risk behaviours?

Non-intentional risk behaviour describes a person's actions or behaviour caused by a physical condition or an involuntary response to a feeling of discomfort. Non-intentional risk behaviour also includes behaviours a person with disability does when they don't have any awareness of safety in their environment. Where their actions can cause accidental injury to themselves or others. Non-intentional risk behaviours can be a result of:

- **Physiological or neurological conditions**

  For example, tardive dyskinesia, Parkinson's like conditions or reflexive jerky movements that may cause the participant or others around them to be accidently injured or at risk of slips, trips or falls.

- **Unsafe actions**

  For example, behaviours that place the participant at risk by mistake such as not having knife safety skills, touching a hot stove or going through a gate towards a road without any road safety awareness.

5.1.2. What could this mean for NDIS registered providers?

You would need a functional behaviour assessment to decide whether a behaviour is a non-intentional risk behaviour. If the behaviour is decided to be non-intentional, practices you use to manage the non-intentional behaviour won't need authorisation in the NT. While these identified non-intentional risk behaviours won't need authorisation in the NT, they will need a risk mitigation and management plan to keep the participant safe.

NDIS registered providers will also need to report any restrictive practices used to manage any non-intentional behaviours to the NDIS Commission. Additionally they need to make sure they continue to meet their obligations under the Rules.

5.1.3. What does this mean for participants?

The safety of participants is a priority in all areas of behaviour support. Any behaviours that are decided to be non-intentional risk behaviours will still need a risk mitigation and management plan to make sure the participant is safe. Providers will still need to make sure they meet their obligations as NDIS registered providers.

There is a possibility to change the laws to include a non-intentional risk behaviour clause or change the NT Restrictive Practices Authorisation Framework to explain when authorisation is, or isn't, needed for non-intentional risk behaviours.

Should practices used for the management of non-intentional risk behaviours be exempt from needing authorisation in the NT? Do you have any further thoughts or comments?

Making a submission

Your comments and feedback will help us to the review how the Act is working.

Your feedback is welcome by **30 September 2022**

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