

Serial 83
National Disability Insurance Scheme (Authorisations) Bill 2019
Ms Fyles

A Bill for an Act to provide for the authorisation of restrictive practices for
participants in the National Disability Insurance Scheme

NORTHERN TERRITORY OF AUSTRALIA

NATIONAL DISABILITY INSURANCE SCHEME (AUTHORISATIONS)
ACT 2019

Act No. [] of 2019

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NORTHERN TERRITORY OF AUSTRALIA

Act No. [] of 2019

An Act to provide for the authorisation of restrictive practices for participants in the National Disability Insurance Scheme

[Assented to [] 2019]
[Introduced [] 2019]

The Legislative Assembly of the Northern Territory enacts as follows:

Part 1 Preliminary matters

1 Short title

This Act may be cited as the *National Disability Insurance Scheme (Authorisations) Act 2019*.

2 Commencement

This Act commences on the day fixed by the Administrator by *Gazette* notice.

3 Definitions

In this Act:

affected person, see section 21(2).

approved form means a form approved under section 32.

authorisation means an authorisation to apply a restrictive practice to a participant in accordance with a behaviour support plan.

aversive means a practice or action that may be experienced by a person as noxious, unpleasant or painful.

behaviour support plan means a plan:

- (a) developed by an NDIS behaviour support practitioner in accordance with the NDIS Rules for a participant; and
- (b) that describes the strategies to be used in supporting the participant's behaviour.

*Note for definition **behaviour support plan***

A behaviour support plan may also integrate relevant orders such as orders in relation to supervision, monitoring or management conditions of the participant.

CEO means the Chief Executive Officer.

chemical restraint, see paragraph (b) of the definition **regulated restrictive practice** in rule 6 of the NDIS Rules.

denial of key needs, see section 6.

environmental restraint, see paragraph (b) of the definition **regulated restrictive practice** in rule 6 of the NDIS Rules.

guidelines means the guidelines made by the Senior Practitioner under section 12.

internal reviewer means a public sector employee appointed under section 23(1) to review a reviewable decision and to make a recommendation to the CEO under section 25(2).

interim authorisation means an authorisation to apply a restrictive practice to a participant in accordance with an interim behaviour support plan.

interim behaviour support plan means an interim behaviour support plan within the meaning of the NDIS Rules.

mechanical restraint, see paragraph (b) of the definition **regulated restrictive practice** in rule 6 of the NDIS Rules.

misuse of medication means the administration to a person, contrary to the instructions of the prescriber, of medication prescribed for the purpose of influencing the person's behaviour, mood or arousal levels.

NDIS Act means the *National Disability Insurance Scheme Act 2013* (Cth).

NDIS behaviour support practitioner, see rule 5 of the NDIS Rules.

NDIS provider, see section 9 of the NDIS Act.

NDIS Rules means the *National Disability Insurance Scheme (Restrictive Practices and Behaviour Support) Rules 2018* (Cth).

overcorrection means a practice where the response to an event is disproportionate to the event itself.

Example for definition overcorrection

Making a child or young person clean an entire room because they tipped their meal on the floor.

participant, see section 9 of the NDIS Act.

physical restraint, see paragraph (b) of the definition **regulated restrictive practice** in rule 6 of the NDIS Rules.

restrictive practice, see section 7.

reviewable decision, see section 21(1).

seclusion, see paragraph (b) of the definition **regulated restrictive practice** in rule 6 of the NDIS Rules.

Senior Practitioner means the Senior Practitioner appointed under section 9.

Tribunal affected person, see section 28(2).

Note for section 3

The Interpretation Act 1978 contains definitions and other provisions that may be relevant to this Act.

4 Application of Act

- (1) This Act applies in relation to NDIS providers who seek to apply restrictive practices to participants in the delivery of services to participants.
- (2) If a participant is also a person to whom Part 4 of the *Disability Services Act 1993* applies, this Act prevails.

5 Principles

- (1) The principles to be taken into account by NDIS providers in delivering services to participants with behaviour that has the potential to cause harm to themselves or others are that:
 - (a) participants are individuals who have the inherent right to respect for their human worth and dignity; and

- (b) participants, whatever the origin of the participant's disability, nature, type and degree of disability, have the same basic human rights as other members of Australian society; and
 - (c) participants have the same rights as other members of Australian society to realise their individual capacities for physical, social, emotional and intellectual development; and
 - (d) participants have the same right as other members of Australian society to services that will support their attaining a reasonable quality of life; and
 - (e) participants and their families have the same right as other members of Australian society to participate in decisions that affect their lives; and
 - (f) participants receiving services have the same right as other members of Australian society to be able to determine their own best interests in relation to those services, including the right to exercise choice and control; and
 - (g) participants have the same right as other members of Australian society to be connected to family, community, culture and country; and
 - (h) participants have the same right as other members of Australian society to engage as equals and actively participate in decisions that will affect their lives, support and care to the full extent of their capacity, including in the provision of behaviour support; and
 - (i) participants receiving services have the same right as other members of Australian society to receive those services in a manner that results in the least restriction of their rights and opportunities; and
 - (j) participants receiving services should actively participate in decisions about their lives, support and care including behaviour support that is informed by evidenced-based best practice.
- (2) The service must be provided in a way that:
- (a) aims to reduce or eliminate the need to use restrictive practices; and
 - (b) recognises that:
 - (i) restrictive practices should occur in limited and specific circumstances; and

- (ii) restrictive practices should be used as a last resort; and
- (c) utilises the least restrictive practice for the shortest period of time practical in the circumstances; and
- (d) ensures transparency and accountability in the use of restrictive practices; and
- (e) recognises that restrictive practices should not be used punitively or in response to behaviour that does not cause harm to the participant or others; and
- (f) ensures that any restrictive practices are only used in a way that is consistent with a behaviour support plan or an interim behaviour support plan for the participant.

6 Meaning of *denial of key needs*

- (1) ***Denial of key needs*** means to prevent a person's access to basic needs or personal supports.
- (2) In subsection (1), personal supports includes the following:
 - (a) family;
 - (b) friends;
 - (c) peers;
 - (d) advocates;
 - (e) possessions.

7 Meaning of *restrictive practice*

Restrictive practice means any practice or intervention that has the effect of restricting the rights or freedom of movement of a person with a disability, and includes the following:

- (a) seclusion;
- (b) chemical restraint;
- (c) mechanical restraint;
- (d) physical restraint;
- (e) environmental restraint.

8 Application of Criminal Code

Part IIAA of the Criminal Code applies to an offence against this Act.

Note for section 8

Part IIAA of the Criminal Code states the general principles of criminal responsibility, establishes general defences, and deals with burden of proof. It also defines, or elaborates on, certain concepts commonly used in the creation of offences.

Part 2 Senior Practitioner

9 Appointment of Senior Practitioner

- (1) The Minister must appoint a public sector employee to be the Senior Practitioner.
- (2) The Minister must be satisfied that the employee has the qualifications, clinical experience and personal qualities necessary to exercise the Senior Practitioner's powers and perform the Senior Practitioner's functions.

10 Functions

The Senior Practitioner has the following functions:

- (a) to promote the reduction and elimination of the use of restrictive practices by NDIS providers to the greatest extent possible;
- (b) to ensure to the greatest extent possible that the rights of participants who may be subject to restrictive practices are protected;
- (c) to develop guidelines to support NDIS providers in relation to the use of restrictive practices;
- (d) to support NDIS providers to develop and deliver practice innovation in the reduction and elimination of restrictive practices according to the intent of the legislation in relation to the National Disability Insurance Scheme;
- (e) to ensure that the authorisation of restrictive practices is compatible with the *United Nations Convention on the Rights of People with Disabilities 2006*;
- (f) to disseminate information and provide education about restrictive practices and the rights of participants;

- (g) to provide high level authoritative advice in relation to contemporary clinical practice developments occurring at national or international levels in relation to the safe elimination or reduction of restrictive practices;
- (h) to build capacity in the disability service sector through increasing the level of awareness and understanding of restrictive practices within the sector and contributing to a reduction in the use of restrictive practices;
- (i) to develop and foster extensive and effective relationships with a diverse group of persons or entities that have an interest in or would be affected by the use of restrictive practices in the disability service sector to influence practice and enable positive change.

11 Powers

The Senior Practitioner may do all things necessary or convenient to be done for, or in relation to, the performance of the Senior Practitioner's functions.

12 Guidelines

- (1) The Senior Practitioner may make guidelines for this Act, including guidelines in relation to the use of restrictive practices.
- (2) In developing guidelines under this section, the Senior Practitioner must consult with relevant persons or entities in the disability service sector and community members as appropriate.

13 Delegation

- (1) The Senior Practitioner may delegate the Senior Practitioner's powers and functions under this Act to a public sector employee.
- (2) The Senior Practitioner must be satisfied that the employee has the qualifications, clinical experience and personal qualities necessary to exercise the Senior Practitioner's powers and perform the Senior Practitioner's functions.

Part 3 Authorisation for restrictive practices

14 Application for authorisation or interim authorisation

- (1) An NDIS provider may apply to the Senior Practitioner for an authorisation or interim authorisation.

- (2) An application for an authorisation or interim authorisation must:
- (a) be made in the approved form; and
 - (b) include the following:
 - (i) particulars of the restrictive practice proposed to be applied to the participant;
 - (ii) a copy of the behaviour support plan or interim behaviour support plan that specifies the proposed restrictive practice;
 - (iii) information that shows the provider has engaged in consultation about the proposed use of a restrictive practice with:
 - (A) the participant; and
 - (B) the participant's family, carers, guardian or other relevant person;
 - (iv) particulars of the NDIS provider who will apply the restrictive practice to the participant;
 - (v) particulars of any restrictive practice previously applied to the participant over the 12 month period before the date of the application;
 - (vi) any other information the NDIS provider considers relevant to the application;
 - (vii) any other information as prescribed by regulation.
- (3) The Senior Practitioner may request further information from the NDIS provider making the application.
- (4) If the Senior Practitioner requests further information, the NDIS provider making the application must provide the information within 28 days after the request is made.
- (5) If the information is not provided to the Senior Practitioner within 28 days, the application lapses.
- (6) The Senior Practitioner may inspect the place where the restrictive practice is to be applied to the participant before deciding the application.

15 Authorisation or refusal to authorise restrictive practice

- (1) The Senior Practitioner must consider the application and decide whether to:
 - (a) grant the authorisation or interim authorisation; or
 - (b) refuse to grant the authorisation or interim authorisation; or
 - (c) propose an alternative restrictive practice for the authorisation or interim authorisation.
- (2) As soon as reasonably practicable after making a decision under subsection (1), the Senior Practitioner must give written notice of the decision and the Senior Practitioner's reasons for the decision to:
 - (a) the NDIS provider who made the application for the authorisation or interim authorisation; and
 - (b) the participant.

16 Grounds to authorise a restrictive practice

The Senior Practitioner may grant an authorisation or interim authorisation if:

- (a) the behaviour support plan or interim behaviour support plan is consistent with the principles of this Act; and
- (b) the behaviour support plan or interim behaviour support plan is consistent with the guidelines; and
- (c) the restrictive practice is necessary to prevent harm to the participant or others; and
- (d) the restrictive practice is the least restrictive approach reasonably available for the participant.

17 Prohibited restrictive practices

The following restrictive practices may not be authorised by the Senior Practitioner:

- (a) aversion;
- (b) overcorrection;
- (c) misuse of medication;
- (d) denial of key needs;

- (e) practices for the purpose of harassment or vilification or actions that are unethical, degrading or demeaning to a person or may be perceived by the person or the person's guardian as harassment or vilification;
- (f) practices or actions which limit or deny access or participation to community, culture and language, including the denial of access to interpreters;
- (g) in relation to a person under the age of 18 years – seclusion;
- (h) any other restrictive practice prescribed by regulation.

18 Alternative restrictive practice

- (1) If, under section 15(1)(c), the Senior Practitioner proposes an alternative restrictive practice, the NDIS provider who made the application for the authorisation or interim authorisation may respond to the proposal within 28 days after the proposal is made.
- (2) The Senior Practitioner must consider the response and decide whether to:
 - (a) grant an authorisation or interim authorisation for the alternative restrictive practice; or
 - (b) refuse to grant the authorisation or interim authorisation for the alternative restrictive practice.
- (3) As soon as reasonably practicable after making a decision under subsection (2), the Senior Practitioner must give written notice of the decision and the Senior Practitioner's reasons for the decision to:
 - (a) the NDIS provider who made the application for the authorisation or interim authorisation; and
 - (b) the participant.

19 Period of authorisation and interim authorisation

- (1) An authorisation is effective for 12 months from the date the authorisation is made, unless otherwise specified by the Senior Practitioner in the authorisation.
- (2) An interim authorisation is effective for 6 months from the date the authorisation is made, unless otherwise specified by the Senior Practitioner in the authorisation.

20 Revocation of authorisation and interim authorisation

- (1) The Senior Practitioner may revoke an authorisation or interim authorisation at any time.
- (2) If the Senior Practitioner revokes an authorisation or interim authorisation, the Senior Practitioner must give written notice of the revocation and the Senior Practitioner's reasons for the revocation to:
 - (a) the NDIS provider who made the application for the authorisation or interim authorisation; and
 - (b) the participant.

Part 4 Review of authorisation decisions**21 Reviewable decisions**

- (1) A **reviewable decision** is a decision under section 15(1)(a) or (b), 18(2)(a) or (b) or 20(1).
- (2) An **affected person**, for a reviewable decision, is:
 - (a) the NDIS provider who made the application for the authorisation or interim authorisation; or
 - (b) the NDIS behaviour support practitioner for the behaviour support plan or interim behaviour support plan; or
 - (c) the participant or the participant's guardian.

22 Application for review of authorisation decisions

- (1) An affected person for a reviewable decision may apply to the CEO for an internal review of the decision.
- (2) Subject to subsection (3), the application must be made within 28 days after written notice of the decision is given to the affected person.
- (3) However, if the reviewable decision is a decision to authorise a restrictive practice, an affected person mentioned in section 21(2)(c) may make the application at any time during the period of the authorisation or interim authorisation.
- (4) The application must be in the approved form.
- (5) The making of an application under this section does not stay the operation of the reviewable decision.

23 Appointment of internal reviewer

- (1) The CEO may appoint a public sector employee to review the reviewable decision and to make a recommendation under section 25(2) to the CEO in relation to the decision.
- (2) The CEO must be satisfied that the employee has the qualifications, clinical experience and personal qualities necessary to review the reviewable decision.
- (3) The CEO must give written notice of the appointment of an internal reviewer to each affected person for the decision.
- (4) The CEO must, at the same time as giving a notice to each affected person under subsection (3), give a copy of the notice to the internal reviewer.

24 Review of decision by internal reviewer

- (1) On receipt of an application under section 22 or a copy of a notice under section 23(4), the internal reviewer must review the Senior Practitioner's decision.
- (2) However, in the circumstances mentioned in subsection (3), the internal reviewer may reject an application under section 22 without reviewing the decision.
- (3) The circumstances for rejecting an application under subsection (2) are that the internal reviewer is satisfied that:
 - (a) the application is frivolous or vexatious; or
 - (b) the application was made after the period allowed by section 22 for making the application had expired; or
 - (c) the application relates to a matter that is the subject of an application to a court or tribunal.
- (4) Without limiting subsection (3)(a), an application is frivolous or vexatious if, at the time the application was made:
 - (a) another application under section 22 for an internal review of the same decision had been made by another person; and
 - (b) a decision has been made under section 26 on the other application or the other application has been rejected under subsection (2).

25 Conduct of review by internal reviewer

- (1) In reviewing the decision, the internal reviewer must:
 - (a) take into account any matter prescribed by regulation for this section; and
 - (b) follow the procedures, if any, for review prescribed by regulation; and
 - (c) comply with the rules of natural justice.
- (2) After reviewing the decision, the internal reviewer must make a recommendation to the CEO on whether to:
 - (a) affirm the decision; or
 - (b) vary the decision; or
 - (c) set aside the decision and substitute a new decision.

26 Decision by CEO on internal review

- (1) After receiving a recommendation under section 25(2), the CEO must:
 - (a) affirm the decision; or
 - (b) vary the decision; or
 - (c) set aside the decision and substitute a new decision.
- (2) In making a decision under this section, the CEO is not bound by the recommendation made by the internal reviewer.

27 Notice of decision of CEO

- (1) As soon as reasonably practicable after making a decision under section 26, the CEO must give written notice of the decision to the following persons:
 - (a) the applicant for the internal review;
 - (b) each person who could have applied for an internal review of the reviewable decision under section 22.
- (2) The notice must state the following:
 - (a) the CEO's decision and the reasons for it;

- (b) details of the right the person has under this Act to apply to the NTCAT for a review of the CEO's decision.

28 Review by NTCAT

- (1) The NTCAT has jurisdiction to review a decision under section 26.
- (2) A **Tribunal affected person** for the decision is the applicant under section 22 and any other person who could have applied under that section for an internal review of the reviewable decision.
- (3) A Tribunal affected person for the decision made under section 26 may apply to the NTCAT for a review of the decision.

Part 5 Miscellaneous matters

29 Protection from liability

- (1) A person is not civilly or criminally liable for an act done or omitted to be done by the person in good faith in the exercise of a power or performance of a function as any of the following:
 - (a) the CEO;
 - (b) the Senior Practitioner;
 - (c) an internal reviewer.
- (2) Subsection (1) does not affect any liability the Territory would, apart from that subsection, have for the act or omission.
- (3) In this section:

exercise, of a power, includes the purported exercise of the power.

performance, of a function, includes the purported performance of the function.

30 Offence to disclose certain information

- (1) A person commits an offence if:
 - (a) the person obtains information in the course of performing a function connected with the administration of this Act or exercising a power under this Act; and
 - (b) the information is confidential and the person is reckless in relation to that circumstance; and
 - (c) the person intentionally engages in conduct; and

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- (d) the conduct results in the disclosure of the information and the disclosure is not:
 - (i) for a purpose connected with the administration of this Act, including a legal proceeding arising out of the operation of this Act; or
 - (ii) to a person who is otherwise entitled to the information; and
 - (e) the person is reckless in relation to the result and circumstance mentioned in paragraph (d).

Maximum penalty: 200 penalty units or imprisonment for 2 years.

- (2) Strict liability applies to subsection (1)(a).
- (3) If the information mentioned in subsection (1) relates to a person, it is a defence to a prosecution for an offence against that subsection if the person has consented to the disclosure of the information.

Note for section 30

In addition to the circumstances mentioned in this section, a person who discloses information mentioned in this section will not be criminally responsible for an offence if the disclosure is justified or excused by or under a law (see section 43BE of the Criminal Code).

31 Misleading information

- (1) A person commits an offence if:
 - (a) the person intentionally gives information to another person (the **recipient**); and
 - (b) the information is misleading and the person has knowledge of that circumstance; and
 - (c) the recipient is acting in an official capacity and the person has knowledge of that circumstance.

Maximum penalty: 200 penalty units or imprisonment for 2 years.

- (2) A person commits an offence if:
 - (a) the person intentionally gives a document to the recipient; and
 - (b) the document contains misleading information and the person has knowledge of that circumstance; and

- (c) the recipient is acting in an official capacity and the person has knowledge of that circumstance.

Maximum penalty: 200 penalty units or imprisonment for 2 years.

- (3) It is a defence to a prosecution for an offence against subsection (2) if the person, when giving the document:

(a) draws the misleading aspect of the document to the recipient's attention; and

(b) to the extent to which the person can reasonably do so – gives the recipient the information necessary to remedy the misleading aspect of the document.

- (4) In this section:

acting in an official capacity, in relation to a recipient, means the recipient is exercising powers or performing functions under, or otherwise related to the administration of, this Act.

misleading information means information that is misleading in a material particular or because of the omission of a material particular.

32 Approved forms

The CEO may approve forms for this Act.

33 Regulations

The Administrator may make regulations under this Act.