

National Disability Insurance Scheme (Restrictive Practice and Behaviour Support) Rules 2018 [F2018L00632]

Purpose	Provides oversight relating to behaviour support, monitoring the use of restrictive practices within the National Disability Insurance Scheme (NDIS)
Portfolio	Social Services
Authorising legislation	<i>National Disability Insurance Scheme Act 2013</i>
Last day to disallow	15 sitting days after tabling (tabled Senate 18 June 2018)
Rights	Torture, cruel, inhuman and degrading treatment or punishment; liberty; rights of persons with disabilities (see Appendix 2)
Status	Seeking additional information

Conditions relating to the use of regulated restrictive practices by NDIS providers

1.131 The National Disability Insurance Scheme (Restrictive Practice and Behaviour Support) Rules 2018 (rules) sets out the conditions of registration that apply to all registered National Disability Insurance Scheme (NDIS) providers who use 'regulated restrictive practices' in the course of delivering NDIS support. A 'regulated restrictive practice' involves any of the following:

- (a) seclusion, which is the sole confinement of a person with disability in a room or a physical space at any hour of the day or night where voluntary exit is prevented, or not facilitated, or it is implied that voluntary exit is not permitted;
- (b) chemical restraint, which is the use of medication or chemical substance for the primary purpose of influencing a person's behaviour. It does not include the use of medication prescribed by a medical practitioner for the treatment of, or to enable treatment of, a diagnosed mental disorder, a physical illness or a physical condition;
- (c) mechanical restraint, which is the use of a device to prevent, restrict, or subdue a person's movement for the primary purpose of influencing a person's behaviour but does not include the use of devices for therapeutic or non-behavioural purposes;
- (d) physical restraint, which is the use or action of physical force to prevent, restrict or subdue movement of a person's body, or part of their body, for the primary purpose of influencing their behaviour. Physical restraint does not include the use of a hands-on technique

in a reflexive way to guide or redirect a person away from potential harm/injury, consistent with what could reasonably be considered the exercise of care towards a person.

- (e) environmental restraint, which restricts a person's free access to all parts of their environment, including items or activities.¹

1.132 The rules prescribe different conditions of registration of NDIS providers depending on the regulation of restrictive practices in a state or territory. Broadly, for those states and territories that prohibit the use of a restrictive practice, it is a condition of registration of the NDIS provider that the provider must not use the restrictive practice in relation to a person with a disability.² However, where the practice is not prohibited but rather is regulated by an authorisation process,³ registration is conditional upon the use of the regulated restrictive practice being authorised (other than a 'single emergency use'⁴), and the provider must lodge with the NDIS Quality and Safeguards Commissioner (Commissioner) evidence of that authorisation as soon as reasonably practicable after the use of the regulated restrictive practice.⁵

1.133 The rules also prescribe the conditions of registration where a 'behaviour support plan' is used in relation to a regulated restrictive practice. Behaviour support plans may only be developed by a NDIS behaviour support practitioner⁶ and are subject to certain conditions, including the requirement that all reasonable steps be taken to reduce and eliminate the need for the use of regulated restrictive practices.⁷ In particular, section 21 of the rules sets out the minimum content of behaviour support plans containing regulated restrictive practices, and provides that

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- 1 Section 6 of the National Disability Insurance Scheme (Restrictive Practice and Behaviour Support) Rules 2018 (rules).
 - 2 Section 8 of the rules.
 - 3 The rules note that an authorisation process may, for example, be a process under relevant State or Territory legislation or policy or involve obtaining informed consent from a person and/or their guardian, approval from a guardianship board or administrative tribunal or approval from an authorised state or territory officer.
 - 4 'Single emergency use' is not defined in the instrument but is described in the explanatory statement (ES) as 'the use of a regulated restrictive practice in relation to a person with disability, in an emergency, where the use of a regulated restrictive practice has not previously been identified as being required in response to behaviour of that person with disability previously'. See, ES, p. 9.
 - 5 Section 9 of the rules.
 - 6 'Behaviour support practitioner' is defined in section 5 of the rules to mean a person the Commissioner considers is suitable to undertake behaviour support assessments (including functional behavioural assessments) and to develop behaviour support plans that may contain the use of restrictive practices.
 - 7 See sections 18-20.

the registration of specialist behaviour support providers⁸ is subject to the condition a regulated restrictive practice must:

- be clearly identified in the behaviour support plan;
- if the state or territory in which the regulated restrictive practice is to be used has an authorisation process – be authorised in accordance with that process;
- be used only as a last resort in response to risk of harm to the person with disability or others, and after the provider has explored and applied evidence-based, person-centred and proactive strategies; and
- be the least restrictive response possible in the circumstances to ensure the safety of the person and others; and
- reduce the risk of harm to the person with disability or others; and
- be in proportion to the potential negative consequence or risk of harm; and
- be used for the shortest possible time to ensure the safety of the person with disability or others.⁹

1.134 Where an NDIS provider provides support or services in accordance with a behaviour support plan that includes the use of a restrictive practice, registration as a provider is conditional on the regulated restrictive practice being used in accordance with the behaviour support plan.¹⁰

1.135 The rules also set out registration requirements where the use of a regulated restrictive practice may be unauthorised by state or territory law but be in accordance with a behaviour support plan, and vice versa. In particular:

- where the NDIS provider uses a regulated restrictive practice pursuant to an authorisation process but not in accordance with a behaviour support plan (described as the 'first use' in the rules), and the use of such practices will or is likely to continue, the NDIS provider must take all steps to develop an interim behaviour support plan within one month after the use of the regulated restrictive practice and a comprehensive behaviour support plan within six months;¹¹
- where the NDIS provider uses a regulated restrictive practice that is not authorised pursuant to an authorisation *and* is not in accordance with a

8 A specialist behaviour support provider is defined in section 5 of the rules to mean a registered NDIS provider whose registration includes the provision of specialist behaviour support services.

9 Section 21(3) of the rules.

10 Section 10 of the rules.

11 Section 11 of the rules.

behaviour support plan, and the use of such practices will or is likely to continue, the NDIS provider must (relevantly) obtain authorisation for the ongoing use of the regulated restrictive practice and take all reasonable steps to develop an interim behaviour support plan within one month and a comprehensive behaviour support plan within six months;¹² and

- where the NDIS provider uses a regulated restrictive practice that is not in accordance with a behaviour support plan but authorisation is not required in the state or territory, and the use will or is likely to continue, the NDIS provider must take all reasonable steps to develop an interim behaviour support plan within one month and a comprehensive behaviour support plan within six months that covers the use of the regulated restrictive practice.¹³

Compatibility of the measure with the prohibition on torture, cruel, inhuman or degrading treatment or punishment

1.136 Australia has an obligation not to subject any person to torture or to cruel, inhuman or degrading treatment or punishment.¹⁴ The prohibition on torture, cruel, inhuman and degrading treatment or punishment is absolute and may never be subject to any limitations. The UN Committee on the Rights of Persons with Disabilities (UNCRPD) has stated that Australia's use of restrictive practices may raise concerns in relation to freedom from torture and cruel, inhuman or degrading treatment or punishment, and has recommended that Australia take immediate steps to end such practices.¹⁵

1.137 The statement of compatibility acknowledges that the rules engage the prohibition on torture, cruel, inhuman or degrading treatment or punishment,¹⁶ and also acknowledges the concerns raised by the UNCRPD about the unregulated use of restrictive practices.¹⁷

1.138 The statement of compatibility emphasises the minimum requirements in behaviour support plans that include the use of regulated restrictive practices (summarised above at [1.133]) and also emphasises that behaviour support plans

12 Section 12 of the rules.

13 Section 13 of the rules.

14 Article 7 of the International Covenant on Civil and Political Rights; article 15 of the Convention on the Rights of Persons with Disabilities; articles 3-5 Convention against Torture and other Cruel, Inhuman, Degrading Treatment or Punishment; article 37 of the Convention on the Rights of the Child.

15 Committee on the Rights of Persons with Disabilities, *Concluding observations on the initial report of Australia*, adopted by the committee at its tenth session, CRPD/C/AUS/CO1(2013) [35]-[36].

16 Statement of compatibility (SOC) p. 29.

17 SOC, p. 28.

'must contain strategies that aim to reduce and eliminate the use of restrictive practices, both in the long-term and in the short-term'.¹⁸ It also states that the oversight of behaviour support plans (including lodging the plans with the Commissioner and reviewing the plans every 12 months) and the obligations on behaviour support providers 'act as a safeguard against inhumane treatment'.¹⁹ However, while the safeguards that ensure regulated restrictive practices are (for example) 'proportionate' or the 'least restrictive response' are important, they would not be of assistance where the practice amounted to torture, cruel, inhuman or degrading treatment or punishment. This is because, as noted earlier, Australia's obligations in relation to torture, cruel, inhuman or degrading treatment or punishment are absolute.

1.139 There are also particular questions in circumstances where the regulated restrictive practice may be used against a disabled person not in accordance with a behaviour support plan and/or without authorisation. It is possible that a disabled person could be subject to a regulated restrictive practice without authorisation or a behaviour support plan (and the accompanying safeguards), and the NDIS provider could still obtain registration as a provider so long as the provider is subsequently authorised and develops a behaviour support plan.²⁰ There is limited information provided in the statement of compatibility that specifically addresses how the NDIS provider registration scheme will ensure that the regulated restrictive practices used without authorisation or a behaviour support plan do not amount to torture, cruel, inhuman or degrading treatment or punishment. Further information as to the safeguards to prevent such practices in breach of Australia's obligations occurring in the first instance, rather than requirements imposed after the practice has occurred, would be of assistance in determining human rights compatibility.

1.140 Questions also arise in circumstances where an NDIS provider engages in a 'single emergency use' of the regulated restrictive practice without authorisation.²¹ 'Single emergency use' is not defined in the rules. The explanatory statement indicates that 'single emergency use' refers to a practice 'that has not previously been identified as being required in response to behaviour of that person with a disability previously'.²² The explanatory statement provides the following example:

For example, if a person suddenly presents with behaviour that poses a risk of harm to themselves and immediate steps have to be taken to protect them from that harm, the emergency use of a restrictive practice may be required. An example would be where a person receives

18 SOC, p. 30.

19 SOC, pp. 30-31.

20 See section 12 of the rules.

21 Section 9 of the rules.

22 ES, p. 9.

unexpected news causing them distress and in their distress they are about to run out onto a busy highway and the disability worker has to stand in front of him and physically restrain him by grabbing his wrists to prevent him from running onto the road.²³

1.141 While the explanatory statement appears to indicate that a 'single emergency use' is restricted to certain circumstances (such as where immediate steps need to be taken to protect a person from harm), those restrictions and safeguards do not appear in the rules. It is not clear from the information provided what safeguards there are in place to prevent the 'single emergency use' occurring in circumstances where that practice may amount to torture, cruel, inhuman or degrading treatment or punishment.

Committee comment

1.142 The preceding analysis indicates that the use of regulated restrictive practices may engage Australia's absolute obligation not to subject persons to torture, cruel, inhuman or degrading treatment or punishment.

1.143 The committee seeks the advice of the minister as to the compatibility of the rules with this right, including:

- **safeguards to prevent regulated restrictive practices (including 'first use' of a regulated restrictive practice and 'single emergency use' of a regulated restrictive practice) amounting to torture, cruel, inhuman or degrading treatment or punishment; and**
- **whether the rules could be amended to include safeguards to prevent regulated restrictive practices (in particular 'first use' regulated restrictive practices and 'single emergency use' regulated restrictive practices) amounting to torture, cruel, inhuman or degrading treatment or punishment.**

Compatibility of the measure with multiple other rights relating to the protection of persons with disabilities

1.144 The statement of compatibility also acknowledges that the use of regulated restrictive practices engages the following rights in the Convention on the Rights of Persons with Disabilities (see Appendix 2):

- the right to equal recognition before the law and to exercise legal capacity;²⁴
- the right of persons with disabilities to physical and mental integrity on an equal basis with others;²⁵

23 ES, p. 9.

24 CRPD, Article 12.

25 CRPD, Article 17.

- the right to liberty and security of the person;²⁶
- the right to freedom from exploitation, violence and abuse;²⁷ and
- the right to freedom of expression and access to information.²⁸

1.145 Each of these rights may be subject to permissible limitations provided the limitation addresses a legitimate objective, is effective to achieve (that is, rationally connected to) that objective and is a proportionate means to achieve that objective.

1.146 The objective of the rules is stated to be to oversee behaviour support and 'the reduction and elimination of restrictive practices in the NDIS'.²⁹ While this is capable of being a legitimate objective for the purposes of international human rights law, the statement of compatibility provides limited information as to the importance of these objectives in the context of the particular measure. This is particularly significant given that the rules regulate the use of restrictive practices, that is, are directed toward oversight of their use rather than explicitly eliminating their use. Further information as to whether regulating the use of restrictive practices is a legitimate objective in circumstances where the ultimate objective is to eliminate such practices would therefore be of assistance. The same information would assist in determining whether the measures are rationally connected to the objective.

1.147 As to proportionality, the statement of compatibility identifies several safeguards, including the minimum requirements for the use of regulated restrictive practices in behaviour support plans, and reporting and monitoring requirements. All of these safeguards are relevant in determining the proportionality of the measure. The requirement that the use of any regulated restrictive practice pursuant to a behaviour support plan be the 'least restrictive', as a matter of last resort and proportionate are particularly relevant. However, it is not clear from the information provided who determines whether a measure is the 'least restrictive' and 'proportionate', the criteria that are relevant to making such a determination, and whether there is any oversight of such a determination.

1.148 There are also questions as to proportionality in circumstances where the use of the regulated restrictive practice occurs not in accordance with a behaviour support plan or without authorisation. In that circumstance, it is not clear what safeguards would be in place to ensure that use of the regulated restrictive practice occurs in a manner compatible with the human rights outlined above. This includes what safeguards would be in place to ensure that any use of the restrictive practice

26 CRPD, article 14; ICCPR, article 9; CRC, article 37.

27 CRPD, article 16.

28 CRPD, article 21.

29 ES, p. 1; SOC, p. 32.

(including but not limited to the 'first use' and a 'single emergency use') occurs in the least rights restrictive manner possible. It would appear that there would be other, less rights restrictive, approaches which could be taken by the rules, such as requiring *all* use (including 'first use' and 'single emergency use' practices) to be the subject of authorisation and behaviour support plans.

Committee comment

1.149 The preceding analysis indicates that the use of regulated restrictive practices engages the right to equal recognition before the law and to exercise legal capacity, the right of persons with disabilities to physical and mental integrity on an equal basis with others, the right to liberty and security of the person, the right to freedom from exploitation, violence and abuse, and the right to freedom of expression and access to information.

1.150 The committee seeks the advice of the minister as to the compatibility of the use of regulated restricted practices with these rights, including:

- whether the measure is aimed at achieving a legitimate objective for the purposes of human rights law;
- how the measure is effective to achieve (that is, rationally connected to) that objective;
- whether the limitation is a reasonable and proportionate measure to achieve the stated objective;
- information as to safeguards to ensure that the 'first use' of a regulated restrictive practice and any 'single emergency use' occurs in a manner that is compatible with human rights;
- whether the rules could be amended to include safeguards to ensure regulated restrictive practices (in particular 'first use' regulated restrictive practices and 'single emergency use' regulated restrictive practices) occur in a manner that is compatible with the human rights discussed in the preceding analysis.

Record keeping requirements

1.151 The rules also prescribe record keeping requirements in relation to the use of regulated restrictive practices, including a requirement to record the details of the names and contact details of the persons involved in the use of the regulated restrictive practice and of any witnesses.

Compatibility of the measure with the right to privacy

1.152 Article 22 of the CRPD guarantees that no person with disabilities shall be subjected to arbitrary or unlawful interference with their privacy.³⁰ The right to

30 See also article 17 of the International Covenant on Civil and Political Rights.

privacy includes respect for private and confidential information, particularly the storing, use and sharing of such information, and the right to control the dissemination of information about one's private life.

1.153 As the record keeping requirements relate to the storing and use of information (including personal information) the measures engage and limit the right to privacy. The right to privacy is not addressed in the statement of compatibility.

1.154 The statement of compatibility explains that the reporting and record keeping requirements 'allow appropriate action to be taken in response to any issues raised and to inform future policy development, education and guidance to providers, participants and their support networks'.³¹ The record keeping requirements appear to be rationally connected to this objective.

1.155 As to proportionality, limitations on the right to privacy must be accompanied by adequate safeguards. There is limited information in the explanatory statement or statement of compatibility as to the safeguards that apply to the information stored pursuant to the record keeping requirements, such as requirements to keep records secure and confidential, or penalties for unauthorised disclosure. Further information as to these matters would assist in determining whether the limitation on the right to privacy is proportionate.

Committee comment

1.156 The preceding analysis indicates that the record keeping requirements relating to the use of regulated restrictive practices may engage and limit the right to privacy.

1.157 The committee seeks the advice of the minister as to the proportionality of the limitation on the right to privacy. In particular, the committee seeks information as to the safeguards that would apply to protect the right to privacy.

31 SOC, p. 28.