

EXPLANATORY STATEMENT

Issued by the authority of the Commissioner of the NDIS Quality and Safeguards Commission

National Disability Insurance Scheme Act 2013

National Disability Insurance Scheme (Code of Conduct) Rules 2018

Purpose

The *National Disability Insurance Scheme (Code of Conduct) Rules 2018* (the instrument) establish the “NDIS Code of Conduct” as described in section 73V of the *National Disability Insurance Scheme Act 2013* (NDIS Act). The instrument sets out the requirements that NDIS providers, and persons employed or otherwise engaged by NDIS providers, must comply with in the course of providing supports or services to persons with disability. Section 73V is a civil penalty provision, which is contravened if a person fails to comply with a requirement in the NDIS Code of Conduct.

Background

Section 73V of the NDIS Act comes into effect on 1 July 2018 as part of a package of amendments in the *National Disability Insurance Scheme Amendment (Quality and Safeguards Commission and Other Measures) Act 2017* (Amendment Act). The Amendment Act amend the NDIS Act to establish the NDIS Quality and Safeguards Commission (including the office of the Commissioner of the NDIS Quality and Safeguards Commission).

One aspect of the NDIS Quality and Safeguards Framework, which was published by the Disability Reform Council on 9 December 2016 and is largely implemented by the Amendment Act, was for providers and workers providing NDIS supports to people with disability to be subject to a code of conduct in order to promote safe and ethical service delivery. The NDIS Code of Conduct will set expectations for NDIS providers and individual workers, shape the behaviour and culture of those providers and workers, and empower consumers in relation to their rights.

Subsection 73V(1) of the NDIS Act, as amended, provides that the National Disability Insurance Scheme rules may make provision for or in relation to a code of conduct that applies to either or both NDIS providers and persons employed or otherwise engaged by NDIS providers. Rules made for this purpose are to be known as the “NDIS Code of Conduct”: subsection 73V(2). Subsection 73V(3) imposes a civil penalty of 250 penalty units where a person is subject to a requirement in the NDIS Code of Conduct and fails to comply with the requirement.

The NDIS Code of Conduct explicitly states the standards and obligations that people with disability and the Australian community can expect of NDIS providers and workers delivering NDIS supports and services. It is intended to have a preventative effect, by setting out expectations of providers and workers, and a corrective effect through sanctions provided in section 73V of the NDIS Act.

The NDIS Code of Conduct will be supported by the NDIS Code of Conduct Guidance, which will comprise the *NDIS Code of Conduct: Guidance for Workers*, and the *NDIS Code of Conduct: Guidance for Providers* (as amended from time to time). These materials are available on the NDIS Quality and Safeguards Commission's website at <http://www.ndiscommission.gov.au>.

In making this instrument, the Commissioner of the NDIS Quality and Safeguards Commission has had regard to the need to ensure the financial sustainability of the NDIS as required by subsection 209(3) of the NDIS Act.

Section 4 of the *Acts Interpretation Act 1901* (AI Act) concerns the exercise of power between the passing and commencement of an Act. It applies if, at a time (the start time), an Act will confer a power to make an appointment or to make an instrument of legislative or administrative character, and either (a) the Act will commence at the start time, or (b) the Act will be amended by another Act that commences at the start time: subsection 4(1). Subsection 4(2) of the AI Act permits, in limited circumstances, the power to be exercised before the commencement of the Act. These circumstances include, bringing the appointment or instrument into effect, bringing the Act concerned into operation, making the Act concerned or the other Act as amended fully effective at or after the start time of the Act concerned. Subsection 4(3) of the AI Act authorises anything to be done before the start time for the purpose of enabling the exercise of the power, or of bringing the appointment or instrument into effect, as if the relevant commencement had occurred. Paragraph 13(1)(a) of the *Legislation Act 2013* provides that the AI Act applies to any instrument so made as if it were an Act and as if each provision of the instrument were a section of an Act. The instrument of appointment of the Commissioner of the NDIS Quality and Safeguards Commission and the Minister's delegation instrument operate subject to section 4 of the AI Act.

This instrument is a legislative instrument for the purposes of the *Legislation Act 2003*.

Commencement

The instrument commences on 1 July 2018 (immediately after the instrument of appointment of the Commissioner of the NDIS Quality and Safeguards Commission and the delegation instrument to the Commissioner commence).

Consultation

Rules made for the purposes of subsection 73V(1) are Category D National Disability Insurance Scheme rules under section 209 of the NDIS Act. Subsection 209(7) of the NDIS Act provides that the Minister must not make Category D rules unless each host jurisdiction has been consulted in relation to the making of the rules.

The Commissioner of the NDIS Quality and Safeguards Commission, as the delegate of the Minister for Social Services and the rule-maker for the instrument, consulted all host jurisdictions in the development of the instrument.

The Commonwealth has also undertaken a public consultation process through the website <https://engage.dss.gov.au/ndis-code-of-conduct-consultation/> and targeted

consultations with a range of peak bodies representing people with disability and carers, providers of services for people with disability and workers providing supports or services to people with disability.

Regulation Impact Statement (RIS)

A RIS is not required for this instrument (OBPR ID 16842).

Explanation of the provisions

Preamble

The Preamble sets the overall policy objectives for the NDIS Code of Conduct. It is derived in part from the NDIS Quality and Safeguarding Framework, available on the Department of Social Services website at <https://www.dss.gov.au/disability-and-carers/programs-services/for-people-with-disability/ndis-quality-and-safeguarding-framework>.

Part 1 - Preliminary

Section 1 provides how the proposed instrument is to be cited, that is, as the *National Disability Insurance Scheme (Code of Conduct) Rules 2018* (the instrument).

Section 2 provides that the instrument commences on 1 July 2018.

Section 3 provides the authority for the instrument, that is, the *National Disability Insurance Scheme Act 2013* (NDIS Act).

Section 4 provides definitions for terms used in the instrument, including a signpost definition for “Code-covered person”.

Part 2 – NDIS Code of Conduct

Subsection 5(1) provides that Part 2 is made for the purposes of section 73V of the NDIS Act, which provides that the National Disability Insurance Scheme rules may make provision for or in relation to a code of conduct that applies to NDIS provider and/or persons employed or otherwise engaged by NDIS providers. Rules made for this purpose are to be known as the “NDIS Code of Conduct”.

Subsection 5(2) defines the phrase “Code-covered person” for the purposes of the instrument. This includes NDIS providers (whether or not they are registered NDIS providers) and all persons employed or otherwise engaged by an NDIS provider.

Subsection 5(3) requires Code-covered persons to comply with the NDIS Code of Conduct at section 6 of the instrument.

Section 6 sets out the substantive requirements of the NDIS Code of Conduct, with which Code-covered persons must comply, in the course of providing supports or services to persons with disability.

The Code of Conduct Guidance for NDIS providers and workers provides guidance on factors that may be relevant when considering compliance with the Code. It also provides information and examples about what the NDIS Code of Conduct means in practice.

Where a person is subject to a requirement under the NDIS Code of Conduct, failure to comply with the requirement amounts to a civil penalty under subsection 73V(3) of the NDIS Act. The penalty is 250 penalty units.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

National Disability Insurance Scheme (Code of Conduct) Rules 2018

The instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the legislative instrument

The NDIS Code of Conduct outlined in this instrument will apply to all NDIS providers, regardless of whether they are registered. It promotes the health, safety and wellbeing of persons with disability, by setting out acceptable, appropriate and ethical conduct for NDIS providers and persons employed or otherwise engaged by them, delivering supports or services in the NDIS market.

The NDIS Code of Conduct is important to:

- empower people with disability in relation to their rights;
- outline expectations for providers and individual workers;
- shape the behaviour and culture of organisations; and
- provide a mechanism to enforce consequences if Code-covered persons do not meet expectations.

The NDIS Code of Conduct is designed to work alongside other elements of the quality and safeguarding arrangements to promote a safe and skilled workforce within the National Disability Insurance Scheme (NDIS).

Providing quality supports involves not only the right capabilities but also the right attitudes. Workers and providers will need to be familiar with the principles underpinning the NDIS, respect the rights of people with disability, aim to prevent harm and respond appropriately if harm occurs. NDIS providers are expected to assist and support workers in meeting their obligations under the Code of Conduct.

Human rights implications

The obligations in the NDIS Code of Conduct are fundamental to the rights of people with disability set out in the *United Nations Convention on the Rights of Persons with Disabilities* (CRPD). They are also broad to account for the diversity of people with disability and their support requirements.

The CRPD recognises the barriers that people with disability may face in realising their rights. While the rights under all human rights treaties apply to everyone, including people with disability, the CRPD applies human rights specifically to the context of people with disability.

Article 4(3) of the CRPD states that ‘in the development and implementation of legislation and policies to implement the present Convention, and in other decision-making processes concerning issues relating to persons with disabilities, State Parties shall closely consult with and actively involve persons with disabilities, including children with disabilities, through their representative organisations’.

The preamble of the CRPD, and the general principles and obligations set out in Articles 3 and 4 reflect the need for the respect for the inherent dignity, individual autonomy (including the freedom to make one’s own choices and the independence of the person), the need for people with disability to be able to participate fully and effectively and be included in society, the need for respect for difference and acceptance of people with disability as part of human diversity and providing people with disability the opportunity to be involved actively in decision-making processes about policies and programmes, including those directly concerning them.

The relevant human rights which are promoted by this instrument are those related to the provision of services through the NDIS including the rights of persons with disability to choose their living arrangements and be included in the community (CRPD, article 19), to personal mobility (article 20), to enjoy the highest attainable standard of health (article 25), to habilitation and rehabilitation (article 26) and to an adequate standard of living for themselves and their families (article 28).

Article 16(3) also obliges States Parties to ensure that, in order to prevent the occurrence of all forms of exploitation, violence and abuse, that all facilities and programmes designed to serve persons with disability are effectively monitored by independent authorities. The NDIS Code of Conduct will be used to prevent exploitation, violence and abuse by Code-covered persons.

The NDIS Code of Conduct and the compliance and enforcement provisions under the *National Disability Insurance Scheme Act 2013*, are necessary measures to ensure the protection and safety of people with disability in situations of risk.

Conclusion

This instrument is compatible with human rights as it forms part of an overall legislative scheme designed to deliver improved quality and safeguards for people with disability receiving supports or services from NDIS providers.

Graeme Head, Commissioner of the NDIS Quality and Safeguards Commission