

## **EXPLANATORY STATEMENT**

Issued by the authority of the Minister for Social Services

*National Disability Insurance Scheme Act 2013*

*National Disability Insurance Scheme (Restrictive Practices and Behaviour Support)  
Rules 2018*

### **Purpose**

The *National Disability Insurance Scheme (Restrictive Practice and Behaviour Support) Rules 2018* (instrument) are made under sections 73H and section 209 of the *National Disability Insurance Scheme Act 2013* (the Act). This instrument provides that the Minister may, by legislative instrument, prescribe matters required or permitted by this Act to be prescribed or which are necessary or convenient to be prescribed in order to carry out or give effect to this Act.

This instrument is about the NDIS Commission's role in overseeing behaviour support and the reduction and elimination of restrictive practices in the NDIS.

Section 73H of the Act provides that the NDIS rules may determine that each registration, or each registration included in a specific class of registration, is taken to include one or more specified conditions.

The *National Disability Insurance Scheme (Restrictive Practice and Behaviour Support) Rules 2018* (instrument) are made to set out the conditions that apply to all registered NDIS providers in relation to the use of regulated restrictive practices and behaviour support services.

### **Background**

The National Disability Insurance Scheme (NDIS) is designed to provide people with disability the reasonable and necessary supports they need to live their lives and achieve their goals. Ensuring that supports are quality and safe is important to the everyday quality of life of people with disability receiving supports or services under the NDIS.

The *National Disability Insurance Scheme Amendment (Quality and Safeguards Commission and Other Measures) Act 2017* (Amendment Act) contains a package of amendments to the Act, implementing much of the NDIS Quality and Safeguards Framework (Framework), which was published by the Disability Reform Council on 9 December 2016. The NDIS Quality and Safeguards Commission (Commission), an independent national body, is established by the Amendment Act to protect and prevent people with disability from experiencing harm arising from poor quality or unsafe supports or services under the NDIS. The Amendment Act also created the office of the Commissioner of the Commission: NDIS Act: section 181C (as amended).

This instrument is informed by the Framework and the National Framework for Reducing and Eliminating the Use of Restrictive Practices in the Disability Service Sector (the Restrictive Practices Framework). These Frameworks highlighted the need to establish a range of protections to uphold the human rights of people with disability and ensure the reduction and elimination of restrictive practices.

A small proportion of people with disability may need additional supports to address behaviours of concern that are of such intensity, frequency or duration that the safety of the person or others is placed in jeopardy; or may cause a risk of harm more broadly. In these circumstances, providers, families and carers need to understand the underlying functions of the behaviours and implement strategies (such as positive behaviour support strategies) to assist the person to decrease the behaviours of concern. Such behaviours can typically be managed by understanding the issues underlying the behaviours and identifying more productive ways for the person to have their needs met. Depending on the needs of the person, a range of supports may be able to improve the person's quality of life, including an opportunity to build social skills, participate in activities, develop communication skills, and by making environmental adjustments (such as reducing loud noises).

In limited circumstances, and as a last resort, a restrictive practice may be used. A restrictive practice is an intervention such as seclusion, chemical, physical, mechanical or environmental restraint, which has the effect of restricting the rights or freedom of movement of a person with disability. There may be circumstances in which restrictions are put in place to address particular conditions, for example, a person with Prader-Willi syndrome who, in some situations, may require restrictions placed on access to food in their home due to behaviours arising from their medical condition that could cause harm, such as overeating or eating foods that have not been prepared properly and may cause food poisoning. This is an environmental restriction that could be a longer-term intervention to address these behaviours, while positive behaviour support interventions, such as behavioural therapy, are being implemented.

The primary purpose of the use of restrictive practices must be to respond to a person with disability's behaviour of concern to protect that person or others from harm.

The Commonwealth and State and Territory Governments commitment to reducing and eliminating the use of restrictive practices is consistent with the United Nations *Convention on the Rights of Persons with Disabilities* (CRPD) and its intent to protect the rights, freedoms and inherent dignity of people with disability. Australia has ratified and agreed to be bound by the terms of the CRPD under international law.

This instrument together with the National Disability Insurance Scheme (Provider Registration and Practice Standards) Rules 2018 (Registration Rules) and National Disability Insurance Scheme (Incident Management and Reportable Incidents) Rules 2018 (Incident Rules), gives effect to the Commissioner's regulatory function of providing national oversight and policy setting in relation to behaviour support; and monitoring the use of restrictive practices within the NDIS, with the aim of reducing and eliminating such practices. This instrument sets out the additional conditions that attach to the registration of all registered NDIS providers in relation to the use of behaviour support and regulated restrictive practices.

This instrument together with the Registration and Incident Rules provide important safeguards to ensure that all registered NDIS providers using regulated restrictive practices and delivering behaviour support services, meet the quality and standards required to deliver those supports. The Commissioner will monitor registered NDIS provider compliance with the conditions of registration and will collect, analyse and disseminate data relating to the use of behaviour supports and restrictive practices by registered NDIS providers in each State and Territory. The collection of data will support the functions of the Commissioner under section 181H of the Act in working towards the reduction and elimination of the use of restrictive practices. The Commissioner also has the power to intervene and require a registered NDIS provider to take certain action where appropriate.

The Commissioner, in making this instrument, has had regard to the financial sustainability of the NDIS as required by subsection 209(3) of the 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**

This 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**

Subsection 209(8) of the Act prescribes certain categories of rules to be ‘category B’ rules. Relevantly, subsection 209(5) limits the rule making power under section 209(1) so that where a ‘category B’ rule relates to an area, law or program of a host jurisdiction, the category B rule cannot be made unless the host jurisdiction has agreed to the making of the rules. In compliance with this requirement, prior to making this instrument the Commissioner (as the Minister’s delegate) has obtained agreement from all jurisdictions, except Western Australia.

The Commonwealth has undertaken extensive consultation with all States and Territories in relation to the design and content of this instrument. This consultation was ongoing throughout the development and drafting process and included numerous opportunities to provide written feedback and submissions, as well as direct face-to-face consultations.

The Commonwealth has also undertaken a targeted consultation process within the Commonwealth and with 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. The representative bodies were provided with an opportunity to review an advanced draft of this instrument and provide submissions to the Department. All feedback received during consultations was considered and where appropriate incorporated into this instrument and/or associated guidance material.

## **Regulation Impact Statement (RIS)**

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

## **Explanation of the provisions**

### Preamble

The preamble provides some context to the instrument by outlining the purpose of the NDIS and how the instrument is intended to fit into that context and purpose. The preamble also restates the relevant function and power of the NDIS Quality and Safeguards Commission (Commission) in relation to behaviour support and the reduction and elimination of the use of regulated restrictive practices by NDIS providers.

### Part 1 – Preliminary

#### Section 1 – Name

Section 1 provides that the instrument is titled the *National Disability Insurance Scheme (Restrictive Practices and Behaviour Support) Rules 2018*

#### Section 2 – Commencement

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

#### Section 3 – Authority

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

#### Section 4 – Application

Section 4 provides that the instrument applies:

- in a host jurisdiction that is a participating jurisdiction; and
- subject to transitional arrangements as set out in Part 4 of the instrument.

The note in this section provides a cross-reference to section 207 of the *National Disability Insurance Scheme Act 2013* (the Act). This note clarifies that obligations in this instrument, as made under the Act, do not affect any obligation a person has under the law of a State or Territory to the extent that such a law is capable of operating concurrently with the obligations created under the Act.

In particular, for the purposes of this instrument where a person or entity has an obligation to obtain authorisation for the use of a restrictive practice, including a regulated restrictive practice nothing in this instrument overrides that obligation. In addition, nothing in this instrument overrides or prevents any person or entity from reporting, for example, to the police or other body where a State or Territory obligation to report exists.

A legislative note at section 4 provides that obligations in the instrument do not affect any obligation a person has under a law of a State or Territory, to the extent that law is capable of operating concurrently with the obligations created under the Act. This note is consistent with section 207 of the Act.

#### Section 5 – Definitions

Section 5 provides definitions for terms used in the instrument.

A legislative note provides a signpost definition for:

- “Commission”
- “Commissioner”;
- “NDIS provider”;
- NDIS Practice Standards”;
- “participant”;
- “registered NDIS provider”; and
- “reportable incident”.

Section 5 also provides that in the instrument, a reference to the following terms, have the following meanings:

**Act** means the *National Disability Insurance Scheme Act 2013*.

**behaviour support plan** means:

- (a) a comprehensive behaviour support plan; or
- (b) an interim behaviour support plan.

**NDIS behaviour support practitioner** means 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.

A behaviour support competency framework is being developed in consultation with the States and Territories for the Commissioner to use when assessing whether a person is suitable to undertake behaviour support assessments.

**functional behavioural assessment** means the process for determining and understanding the function or purpose behind a person's behaviour, and may involve the collection of data, observations, and information to develop an understanding of the relationship of events and circumstances that trigger and maintain the behaviour.

**regulated restrictive practice**: has the meaning given by section 6 of the instrument.

**specialist behaviour support provider** means a registered NDIS provider whose registration includes the provision of specialist behaviour support services.

## Section 6

This instrument provides that regulated restrictive practices are only to be used as a last resort and in response to a person with disability's behaviour to protect the person or others from harm.

Section 6 provides that the instrument applies to certain types of restrictive practices: seclusion; chemical restraint; mechanical restraint; physical restraint; and environmental restraint. Environmental restraint includes the use of containment and access to objects. These practices are "regulated restrictive practices" for the purposes of the instrument. Regulated restrictive practices are defined generally. That is, this definition sets out the main features or elements of the types of regulated restrictive practices. This definition does not describe in detail all of the forms of restrictive practice or activities that may be included in a general definition.

A legislative note to this section provides that the term **restrictive practice** is defined in section 9 of the Act.

## Part 2 – Conditions of registration and regulated restrictive practices

### Division 1 – Introduction

#### Section 7A – Simplified outline of this part

This section provides an outline of this Part of the instrument. The outline generally provides that the conditions in Part 2 apply to all registered NDIS providers of supports or services to a person with disability using restrictive practices in delivering those supports and services. The conditions are summarised as follows, restrictive practices must:

- not occur where the relevant State and Territory prohibits such use;
- be undertaken in accordance with State and Territory authorisation processes and a behaviour support plan;

- be recorded by the provider and reported to the Commissioner so that the Commissioner can effectively monitor the use of regulated restrictive practices in the NDIS.

## Section 7 – Purpose of this Part

Section 7 provides that Part 2 of the instrument is made for the purposes of section 73H of the Act. Part 2 of the instrument sets out the conditions relating to the use of regulated restrictive practices that apply to all registered NDIS providers.

Legislative note 1 provides a cross reference to section 73J of the Act, which provides that a registered NDIS provider may be liable to civil penalty if the provider breaches a condition to which the provider's registration is subject.

Legislative note 2 provides that the conditions in Part 2 are in addition to those set out in the Act at subsection 73F(2) of the Act, those imposed by the Commissioner under subsection 73G(1) of the Act and those imposed under the *National Disability Insurances Scheme (Provider Registration and Practice Standards) Rules 2018*.

Legislative note 3 provides that Part 4 of the instrument contains special rules that apply instead of, or as well as, some of the rules in Part 2 in the circumstances set out in Part 4.

Legislative note 4 provides a cross reference to subsection 73ZK(4) of the Act and the *National Disability Insurance Scheme (Incident Management and Reportable Incidents) Rules 2018*, which in some circumstances make the using a regulated restrictive practice in the circumstances covered by Part 2 of this instrument a reportable incident.

## Division 2 – Conditions of registration

### Section 8 – Use of a restrictive practice in a State or Territory prohibited

Section 8 addresses the conditions of registration applicable where the practice is to be used in a State or Territory that prohibits the use of that restrictive practice. Subsection (1) sets out when this section applies, and subsection (2) sets out conditions of registration.

Subsection 8(1) sets out two circumstances that must apply for section 8 to apply. The first circumstance is that a State or Territory prohibits the use of a restrictive practice. The second circumstance is that a registered NDIS provider provides supports or services to a person with disability in the State or Territory (where the restrictive practice is prohibited).

If the circumstances in subsection (1) are met, the registration of the registered NDIS provider is subject to the conditions set out in subsection (2).

Subsection 8(2) sets out the condition of registration that applies where section 8 applies. The condition is that the provider must not use the restrictive practice in relation to the person with disability.

The condition clarifies that this instrument does not authorise a registered NDIS provider to use a restrictive practice, including a regulated restrictive practice, if its use has been prohibited by a State or Territory in which the registered NDIS provider is providing a support or service.

States and Territories may prohibit types of restrictive practices including regulated restrictive practices. The role of the Commission is not to authorise or prohibit the use of a restrictive practice that responsibility remains with each individual State or Territory. The prohibition of restrictive practices is inconsistent between jurisdictions. It can be the case that a registered NDIS provider providing supports or services in a number of jurisdictions may be able to use a restrictive practice in one State or Territory and the same restrictive practice is prohibited in another jurisdiction in which they provide supports or services. The Commission will assist the States and Territories to develop a regulatory framework, including nationally consistent minimum standards, in relation to restrictive practices.

### Section 9 – Use of a regulated restrictive practice in a State or Territory with an authorisation process

Section 9 addresses the conditions of registration applicable where the use of regulated restrictive practice is subject to an authorisation process in a State or Territory. Subsection (1) sets out when this section applies, and subsection (2) sets out conditions of registration.

Subsection 9(1) sets out two circumstances that must apply for section 9 to apply. The first circumstance is that a State or Territory has an authorisation process (however described) in relation to the use of a regulated restrictive practice. The second circumstance is that a registered NDIS provider provides supports or services to a person with disability in the State or Territory (where authorisation process (however described) applies).

The legislative note in this section provides examples of what an authorisation process may include. This note is not intended to limit the types of processes in a State or Territory that may be considered by that State or Territory as an authorisation process. For example, some States have a 'short-term' approval process; this process is considered an authorisation process for the purpose of this instrument.

If the circumstances in subsection (1) are met, the registration of the registered NDIS provider is subject to the conditions set out in subsection (2). This section does not apply where a State or Territory does not have an authorisation process in relation to the use of a regulated restrictive practice.

Subsection 9(2) sets out the conditions of registration that apply to the registered NDIS provider where section 9 applies. The conditions are:

- the use (other than a single emergency use) of the regulated restrictive practice in relation to the person with disability must be authorised in accordance with the State or Territory authorisation process; and
- The registered NDIS provider must lodge with the Commissioner evidence that the use is authorised as soon as reasonably practicable after the use of the practice in relation to the person.



For the avoidance of doubt, where a registered NDIS provider will use a regulated restrictive practice in relation to a person with disability in more than one State or Territory the use must be in accordance with the authorisation process (however described) of each State or Territory.

A single emergency use is 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. 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 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. This would constitute an emergency use of a restrictive practice, rather than an ongoing use of a restrictive practice as described in section 11.

It is the role of the Commission to oversee the use of restrictive practices. States and Territories retain the responsibility for authorisation processes in relation to restrictive practices. Consistent with this position a registered NDIS provider must not use a regulated restrictive practice, unless it has been authorised in accordance with an authorisation process where one exists.

The conditions clarify that this instrument does not:

- authorise a registered NDIS provider to use a restrictive practice, including a regulated restrictive practice; and
- override a State or Territory authorisation process (if such a process exists) or create a separate authorisation to use a regulated restrictive practice.

#### Section 10 – Use of a regulated restrictive practice in accordance with a behaviour support plan

Section 10 addresses the conditions of registration applicable where the use of regulated restrictive practice is in accordance with a behaviour support plan. Subsection (1) sets out when this section applies, and subsection (2) sets out conditions of registration.

Subsection 10(1) sets out two circumstances that must apply for section 10 to apply. The first circumstance is that a registered NDIS provider provides supports or services to a person with disability in accordance with a behaviour support plan. The second circumstance is that the behaviour support plan (mentioned in paragraph 10(1)(a)) includes the use of a regulated restrictive practice.

If the circumstances in subsection (1) are met, the registration of the registered NDIS provider is subject to the conditions set out in subsection (2).

Subsection (2) set out that the registration of the registered NDIS provider is subject to the conditions:

- the regulated restrictive practice must be used in accordance with the behaviour support plan that includes the use of that regulated restrictive practice; and
- the registered NDIS provider is to notify a specialist behaviour support provider if there has been a change in circumstances that requires the behaviour support plan to be reviewed.

Subsection (3) provides that it is also a condition of registration on the registered NDIS provider that they agree to demonstrate compliance with the conditions set out in subsection (2) if required to do so by the Commissioner.

The legislative note in this section provides a cross reference to Part 7.4 of the *Criminal Code*, which provides offences in relation to false or misleading statements, information and documents.

#### Section 11 – Use of a regulated restrictive practice in accordance with State or Territory authorisation but not a behaviour support plan.

Section 11 addresses the conditions of registration applicable where the first use of a regulated restrictive practice is not in accordance with a behaviour support plan (as required by section 10 of the instrument), but is in accordance with a State or Territory authorisation process (as required by section 9 of the instrument) this would include obtaining a short term approval, where applicable. Subsection (1) sets out when this section applies, and subsections (2) and (3) set out conditions of registration.

Subsection 11(1) sets out five circumstance that must apply for section 11 to apply. The five circumstances are:

- a registered NDIS provider uses a regulated restrictive practice in relation to a person with disability (the **first use**); and
- an authorisation (however described) is required by the State or Territory in which the use occurs; and
- the use of the regulated restrictive practice is authorised in accordance with the State or Territory authorisation process; and
- the use is not in accordance with a behaviour support plan for the person with disability; and
- the use (the **ongoing use**) of the regulated restrictive practice in relation to the person with disability will, or is likely to, continue.

If the circumstances in subsection (1) are met, the registration of the registered NDIS provider is subject to the conditions set out in subsection (2). Those conditions are that the provider must take all reasonable steps to:

- facilitate the development of an interim behaviour support plan for the person with disability by a specialist behaviour support provider that covers the use of the practice within 1 month after the first use of the regulated restrictive practice; and
- facilitate the development of a comprehensive behaviour support plan for the person with disability by a specialist behaviour support provider that covers

the use of the practice within 6 months after the first use of the regulated restrictive practice.

Subsection (3) provides that it is also a condition of registration of the registered NDIS provider that they agree to demonstrate compliance with the conditions set out in subsection (2) if required to do so by the Commissioner.

The legislative note in this section provides a cross reference to Part 7.4 of the *Criminal Code*, which provides offences in relation to false or misleading statements, information and documents.

### Section 12 – Use of a regulated restrictive practice other than in accordance with behaviour support plan or State or Territory authorisation

Section 12 addresses the condition of registration that apply to a registered NDIS provider where the first use of a regulated restrictive practice is not in accordance with a behaviour support plan (as required by section 10 of the instrument) and is not in accordance with a State or Territory authorisation process (as required by section 9 of the instrument) this would include obtaining a short term approval, where applicable. Subsection (1) sets out when this section applies, and subsections (2) and (3) set out conditions of registration.

Generally speaking, section 12 applies when a restrictive practice has been used but not authorised, and it is likely that the use of the restrictive practice will be ongoing. Specifically, subsection 12(1) sets this out as five circumstances that must apply for section 12 to apply. The five circumstances are:

- a registered NDIS provider uses a regulated restrictive practice in relation to a person with disability (the **first use**); and
- the use is not in accordance with a behaviour support plan for the person with disability; and
- an authorisation (however described) is required by the State or Territory in which the use occurs; and
- the use of the restrictive practice is not authorised in accordance with the authorisation process; and
- the use (the **ongoing use**) of the regulated restrictive practice in relation to the person with disability will, or is likely to, continue.

If the circumstances in subsection (1) are met, the registration of the registered NDIS provider is subject to the conditions set out in subsection (2). Those conditions are that the provider must:

- obtain authorisation (however described) for the ongoing use of the regulated restrictive practice from the relevant State or Territory as soon as reasonably practicable. This would include obtaining a short term approval, where applicable; and
- lodge evidence of that authorisation with the Commissioner as soon as reasonably practicable after it is received; and
- take all reasonable steps to facilitate the development of an interim behaviour support plan for the person with disability by a specialist behaviour support

provider that covers the use of the practice within 1 month after the first use of the regulated restrictive practice; and

- take all reasonable steps to facilitate the development of a comprehensive behaviour support plan for the person with disability by a specialist behaviour support provider that covers the use of the practice within 6 months after the first use of the regulated restrictive practice.

Subsection (3) provides that it is also a condition of registration of the registered NDIS provider that they agree to demonstrate compliance with the conditions set out in subsection (2) if required to do so by the Commissioner.

The legislative note in this section provides a cross reference to Part 7.4 of the Criminal Code, which provides offences in relation to false or misleading statements, information and documents.

### Section 13 – Use of a regulated restrictive practice when not covered by a behaviour support plan and State and Territory authorisation not required

Section 13 sets out the conditions that apply to a registered NDIS provider where the first use of a regulated restrictive practice is not in accordance with a behaviour support plan (as required by section 10 of the instrument) and there is no relevant State or Territory authorisation process for the regulated restrictive practice required. Subsection (1) sets out when this section applies, and subsections (2) and (3) set out conditions of registration.

Subsection 13(1) sets out four circumstances that must apply for section 13 to apply. The four circumstances are:

- a registered NDIS provider uses a regulated restrictive practice in relation to a person with disability (the **first use**); and
- the use is not in accordance with a behaviour support plan for the person with disability; and
- an authorisation (however described) is not required by the State or Territory in which the use occurs; and
- the use of the regulated restrictive practice in relation to the person with disability will, or is likely to, continue.

If the circumstances in subsection (1) are met, the registration of the registered NDIS provider is subject to the conditions set out in subsection (2).

Those conditions are that the provider must take all reasonable steps to:

- facilitate the development of an interim behaviour support plan for the person with disability by a specialist behaviour support provider that covers the use of the practice within 1 month after the first use of the regulated restrictive practice; and
- facilitate the development of a comprehensive behaviour support plan for the person with disability by a specialist behaviour support provider that covers the use of the practice within 6 months after the first use of the regulated restrictive practice.

Subsection (3) provides that it is also a condition of registration of the registered NDIS provider that they agree to demonstrate compliance with the conditions set out in subsection (2) if required to do so by the Commissioner.

The legislative note in this section provides a cross reference to Part 7.4 of the Criminal Code, which provides offences in relation to false or misleading statements, information and documents.

#### Section 14 – Reporting requirements

Section 14 addresses reporting requirements by way of conditions of registration on registered NDIS providers in relation to the use of regulated restrictive practices.

Paragraph 14(1)(a) provides that a registered NDIS provider must give monthly reports to the Commissioner regarding the use of regulated restrictive practices by the provider, subject to paragraph (b).

Paragraph 14(1)(b) provides that if a registered NDIS provider obtains a short term approval from a State or Territory for the use of a regulated restrictive practice, the provider must report to the Commissioner on the use of the regulated restrictive practice (under that short term approval) every 2 weeks while the approval is in force.

Subsection (2) provides that a report under section 14 must:

- be in the form approved by the Commissioner under subsection (3); and
- include any information, and be accompanied by any documents, required by the Commissioner.

Subsection (3) provides that the Commissioner must approve a form for the purposes of section 14.

The legislative note in section 14 provides a cross-reference to the additional reporting requirements on registered NDIS providers. Some uses of regulated restrictive practices will also be a reportable incident, and therefore reportable in accordance with Part 3 of the *National Disability Insurance Scheme (Incident Management and Reportable Incidents) Rules 2018*. The reporting requirements in this note are in addition to the reporting requirements set out in section 14 of this instrument.

A registered NDIS provider may use regulated restrictive practices in relation to a number of people with disability and more than one type of regulated restrictive practice may be used in relation to the same person with disability. The registered NDIS provider is required to report in each of these circumstances; however, the reporting mechanism may be different. These reporting requirements are not duplicative and relate to different circumstances. A provider will unlikely need to report through more than one mechanism in relation to the use of a regulated restrictive practice in relation to a person with disability.

#### Section 15 – Record keeping

Section 15 sets out a condition of registration imposed on a registered NDIS provider that is a broad record keeping requirement.

Subsection (1) provides that the registration of a registered NDIS provider is subject to the condition that the provider must keep written information relating to the use by the provider of regulated restrictive practices in relation to persons with disability.

Subsection (2) sets out a non-exhaustive list of the types of information that must be kept by a registered NDIS provider under subsection (1). The minimum information that must be kept for the purposes of subsection (1) is:

- a description of the use of the regulated restrictive practice, including:
  - the impact on to the person with disability or another person;
  - any injury to the person with disability or another person;
  - whether the use of the restrictive practice was a reportable incident;
  - and
  - why the regulated restrictive practice was used;
- a description of the behaviour of the person with disability that lead to the use of the regulated restrictive practice;
- the time, date and place at which the use of the regulated restrictive practice started and ended;
- the names and contact details of the persons involved in the use of the regulated restrictive practice;
- the names and contact details of any witnesses to the use of the regulated restrictive practice;
- the actions taken in response to the use of the regulated restrictive practice;
- what other less restrictive options were considered or used before using the regulated restrictive practice;
- the actions taken leading up to the use of the regulated restrictive practice, including any strategies used to prevent the need for the use of the practice.

This list of information does not limit the effect of subsection (1) but provides a list of the minimum information that must be kept by a provider.

Subsection (3) provides that a record made for the purposes of section 15 must be kept for seven years from the day the record is made.

How a provider chooses to keep records is up to the registered NDIS provider, so long as the records created and kept meet the requirements set out in section 15. A record created for another purpose, for example a behaviour support plan, depending on the information contained in that plan, may be sufficient to comply completely (or partially) with the record keeping requirements under the instrument. If a record created complies with the record keeping requirements, a new record does not need to be created specifically to meet this requirement. The seven year period under subsection (3) runs from the date the record is created even where the record serves two purposes – the 1<sup>st</sup> being for some other purpose and the 2<sup>nd</sup> being for the purposes of section 15 of this instrument.

### Part 3- Conditions of registration relating to the provision of specialist behaviour support services

## Section 16A – Simplified outline of this Part

Section 16A provides an outline of Part 3 of the instrument.

The conditions in this Part apply to all NDIS registered providers who provide specialist behaviour support services.

## Division 1 – Introduction

### Section 16 – Purpose of this Part

Section 16 provides that Part 3 of the instrument is made for the purposes of section 73H of the Act. Part 3 of the Rules set out the conditions that apply to all NDIS registered providers who provide specialist behaviour support services.

The legislative note 1 provides a cross reference to section 73J of the Act, which section provides that a registered NDIS provider may be liable to civil penalty if the provider breaches a condition to which the provider's registration is subject.

The legislative note 2 provides clarity that the conditions in this Part are in addition to those set out in the Act at subsection 73F(2) of the Act, those imposed by the Commissioner under subsection 73G(1) of the Act and those imposed under the *National Disability Insurances Scheme (Provider Registration and Practice Standards) Rules 2018*.

The legislative note 3 provides that Part 4 of the instrument contains special rules that apply instead of, or as well as, some of the rules in Part 3 in the circumstances set out Part 4.

## Division 2 – Conditions of registration

### Section 17 – Requirement to use an NDIS behaviour support practitioner

Section 17 sets out a condition of registration on NDIS providers registered to provide specialist behaviour support services. These providers are called specialist behaviour support providers.

It is a condition of registration that specialist behaviour support services must be provided by an NDIS behaviour support practitioner.

This condition applies regardless of whether the person or entity is a registered NDIS provider providing a number of categories of supports or services as well as self-employed providers who are NDIS behaviour support practitioners. In either circumstance, an NDIS behaviour support practitioner must provide the specialist behaviour support service, either as an employee or contractor of the registered NDIS provider, or as the registered NDIS provider themselves where they are an NDIS behaviour support practitioner.

### Section 18 – Who can develop behaviour support plans containing a regulated restrictive practice

Section 18 sets out a condition of registration applicable to the registration of specialist behaviour support providers that relates to the development of behaviour support plans containing a regulated restrictive practice.

The condition is that a behaviour support plan for a person with disability that contains a regulated restrictive practice must be developed by:

- an NDIS behaviour support practitioner engaged by the provider; or
- if the provider is an NDIS behaviour support practitioner – that provider itself.

This section clarifies that it is a condition on the registration of a registered NDIS provider who provides specialist behaviour support services that behaviour support plans that contain regulated restrictive practices may only be developed by an NDIS behaviour support practitioner. NDIS behaviour support practitioner is defined in section 5 of this instrument.

#### Section 19 – Period within which a behaviour support plan containing a regulated restrictive practice must be developed

Section 19 addresses the period in which behaviour support plans containing a restrictive practice must be developed. Subsection (1) sets out when this section applies, and subsection (2) sets out conditions of registration.

Subsection 19(1) sets out two circumstances that must apply for subsection (2) to apply. The two circumstances are:

- a regulated restrictive practice is used in relation to a person with disability; and
- as a result of the use of a regulated restrictive practice, a specialist behaviour support provider is engaged to develop a behaviour support plan for the person with disability.

If the circumstances in subsection (1) are met, the registration of the registered NDIS provider is subject to the conditions set out in subsection (2).

Subsection (2) sets out that the registration of the specialist behaviour support provider is subject to the conditions, that provider must:

- Within 1 month after the first use of the regulated restrictive practice (as referred to in paragraph (1)), develop an interim behaviour support plan (in relation to the person with disability) that includes provision for the use of that regulated restrictive practice; and
- Within 6 months after the first use of the regulated restrictive practice, develop a comprehensive behaviour support plan (in relation to the person with disability) that includes provision for the use of that regulated restrictive practice.

#### Section 20 – How behaviour support plans containing a regulated restrictive practice must be developed

Section 20 addresses conditions of registration related to how behaviour support plans containing a regulated restrictive practice must be developed.



Subsection (1) sets out that the registration of a specialist behaviour support provider is subject to the conditions in section 20 in relation to behaviour support plans developed by the provider.

Subsection (2) sets out that a behaviour support plan for a person with disability that contains a regulated restrictive practice must be developed in accordance with any authorisation process (however described) in the State or Territory in which the regulated restrictive practice is, or is proposed to be, used.

Subsection (2) ensures that the behaviour support plan is consistent with the authorisation process (however described) of a State or Territory. This condition aligns with the conditions under sections 9 and 10 of this instrument. Where a regulated restrictive practice is used in accordance with the behaviour support plan it should also be in accordance with any State or Territory authorisation (however described).

Subsection (3) sets out that in developing and reviewing a behaviour support plan for a person with disability, the specialist behaviour support provider (under subsection 20(1)) must take all reasonable steps to:

- reduce and eliminate the need for the use of regulated restrictive practices in relation to the person with disability; and
- take into account any previous behaviour support assessments and other assessments; and
- make changes within the environment of the person with disability that may reduce or remove the need for the use of regulated restrictive practices; and
- consult with the person with disability; and
- consult with the person with disability's family, carers, guardian or other relevant person; and
- consult with the registered NDIS provider who may use the regulated restrictive practice and other relevant specialists.

Subsection (4) sets out that when consulting in accordance with paragraph 3(d) or (e), the specialist behaviour support provider must provide details of the intention to include a regulated restrictive practice in the behaviour support plan, in an appropriately accessible format, to:

- the person with disability subject to the plan; and
- the person with disability's family, carers, guardian or other relevant person.

Subsection (5) sets out that in developing a comprehensive behaviour support plan for a person with disability, the specialist behaviour support provider must undertake a behaviour support assessment, including a functional behavioural assessment of, the person with disability. This condition is in addition to the conditions set out in subsection (3) for the development of a comprehensive behaviour support plan.

### Section 21 – Contents of behaviour support plan containing a regulated restrictive practice

Section 21 addresses the contents of a behaviour support plan containing a regulated restrictive practice.

Subsection 21(1) sets out the circumstances that must apply for section 21 to apply. The circumstances are that a specialist behaviour support provider develops or reviews a behaviour support plan for a person with disability that contains the use of a regulated restrictive practice.

Subsection (2) applies in the circumstance set out in subsection (1). Subsection (2) provides that the registration of the specialist behaviour support provider is subject to the condition that the plan must include strategies that are evidence based, person-centred and proactive and that address the person with disability's needs and the functions of behaviour.

Evidenced based, person-centred and proactive strategies will be person specific, the purpose of which should be to help meet the person's needs and improve their quality of life.

Subsection (3) applies in the circumstance set out in subsection (1). Subsection (3) provides that the registration of the specialist behaviour support provider is also subject to the condition that the regulated restrictive practice (contained in the behaviour support plan referred to subsection (1)) must:

- be clearly identified in the behaviour support plan; and
- if the State or Territory in which the regulated restrictive practice is to be used has an authorisation process (however described) in relation to that practice—be authorised in accordance with that process; and
- 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 or 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

Subsection (4) sets out a further condition of registration that applies to specialist behaviour support providers. That condition is that the person with disability to whom the behaviour support plan applies must be given opportunities to participate in community activities and develop new skills that have the potential to reduce or eliminate the need for regulated restrictive practices (to be used them) in the future.

### Section 22 – Review of comprehensive behaviour support plans containing a regulated restrictive practice

Section 22 addresses the review of comprehensive behaviour support plans containing a regulated restrictive practice.

This section provides that the registration of a specialist behaviour support provider is subject to the condition that a comprehensive behaviour support plan developed by the provider, that contains a regulated restrictive practice, must be reviewed by an NDIS behaviour support practitioner:

- if there is a change in circumstances which requires the plan to be amended—as soon as practicable after the change occurs; or

- in any event—at least every 12 months while the plan is in force.

A change in circumstances may be raised by any person including; the registered NDIS provider, the specialist behaviour support provider, behaviour support practitioner, the person with disability, and their family, carers, guardians or an advocate.

#### Section 23 – Form of behaviour support plan containing a regulated restrictive practice

Section 23 addresses the conditions that apply to the registration of a specialist behaviour support provider in relation to the form of a behaviour support plan containing a regulated restrictive practice.

Subsection (1) sets out that the registration of a specialist behaviour support provider is subject to the condition that any behaviour support plan prepared by or on behalf of the provider that contains a regulated restrictive practice must:

- be in a form approved by the Commissioner; and
- include any information, and be accompanied by any documents, required by the Commissioner.

Subsection (2) provides that the Commissioner must approve a form for the purposes of this section.

#### Section 24 – Behaviour support plan containing a regulated restrictive practice must be lodged with the Commissioner

Section 24 sets out the conditions that apply to the registration of a specialist behaviour support provider in relation to the lodgement of a behaviour support plan containing a regulated restrictive practice with the Commission.

Subsection (1) sets out that the registration of a specialist behaviour support provider is subject to the condition that a behaviour support plan for a person with disability that contains a regulated restrictive practice, including a reviewed plan, must be lodged with the Commission as soon as practicable after it is developed.

The legislative note under subsection (1) provides a cross reference to section 19, (the conditions that apply in relation to the period within which a behaviour support plan must be developed) and section 22 (the conditions in relation to when a plan must be reviewed). This is to make clear the alignment between obligation under sections 19, 22 and 24.

Subsection (2) sets out that a behaviour support plan that contains a regulated restrictive practice must be lodged with the Commissioner, regardless of whether State or Territory authorisation (however described) is required to be obtained, or has been obtained, for the use of the practice in the relevant State or Territory. This would be the case despite subsection (2) but is included for the avoidance of any doubt.

Subsection (3) sets out that a behaviour support plan that is required to be lodged under subsection (1) must be lodged in the manner required by the Commissioner.

## Part 4 – Special arrangements

Part 4 of the instrument sets out the special arrangements for approved registered providers of supports that are “transitioned providers” under the *National Disability Insurance Scheme (Quality and Safeguards Commission and Other Measures) Transitional Rules 2018*, and therefore registered NDIS providers.

### Section 25A – Simplified outline of this Part

Section 25A provides a simplified outline of Part 4 of the instrument.

### Section 25 – Purpose of this Part

Section 25 provides that Part 4 of the instrument is made for the purposes of section 73H of the Act.

### Section 26 – Special arrangements – use regulated restrictive practice with a behaviour support plan and in accordance with an authorisation process

Section 26 addresses the special arrangements that apply to all registered NDIS providers who at the time of transition are using a regulated restrictive practice in relation to a person with disability in accordance with a behaviour support plan and a State or Territory authorisation process (however described).

Subsection 26(1) sets out the circumstances that must apply for section 26 to apply. The circumstances are:

- There is a person or entity, who at the transition time:
  - is a registered NDIS provider for a participant; and
  - the supports are provided under a behaviour support plan (the existing plan) that contains a regulated restrictive practice; and
  - the behaviour support plan controls the use of the regulated restrictive practice and contains alternative behaviour support strategies; and
  - the host jurisdiction in which the supports are provided has an authorisation process (however described) in relation to the use of the regulated restrictive practice; and
  - the use of the regulated restrictive practice is authorised in accordance with the authorisation process; and
  - the host jurisdiction in which the participant lives, becomes a participating jurisdiction.

A behaviour support plan as referred to in subsection (1) that is defined to be the “existing plan” for the purposes of section 26, must meet the minimum standards as set out in subsection 26(1) to be relied on for this transition arrangement to apply.

Subsection (1) also defines the “transition time” for the purposes of section 26 as the time at which the host jurisdiction in which the supports will be provided becomes a participating jurisdiction.

The legislative note 1 provides a cross-reference to the Act where the terms **host jurisdiction** and **participating jurisdiction** are defined at sections 10 and 10A.

The legislative note 2 provides a cross-reference to the *National Disability Insurance Scheme (Quality and Safeguards Commission and Other Measures) Transitional Rules 2018*. This transitional legislative instrument provides for the automatic transition of an approved registered provider of supports to be a registered NDIS provider, the class of provider to whom section 26 applies.

If the circumstances in subsection (1) are met, subsection (2) applies. Subsection (2) addresses the grace period allowed for an approved registered provider of supports that is a “transitioned provider” under the *National Disability Insurance Scheme (Quality and Safeguards Commission and Other Measures) Transitional Rules 2018* to comply with sections 9 – 15 of this instrument. Under subsection (2) the person or entity that meets the description in subsection (1) does not need to comply with sections 9 to 15 of this instrument in relation to the person with disability and the use of the regulated restrictive practice for a period of time. That period is, from:

- the start of the transition time to the ending at the earliest of the following:
  - if the provider does not comply with subsection (3) within the period required by paragraph (4)(b)—the end of that period;
  - if the existing plan is reviewed for any reason, including as directed by the Commissioner—the day the review of the plan is completed;
  - if the Commissioner gives a written notice to the provider that this subsection no longer applies to the provider—the day specified in the notice (which must be at least 14 days after the notice is given);
  - the end of 12 months after the transition time.

Subsection (3) sets out that a person or entity that meets the circumstances described in subsection (1) must notify the Commissioner of the existence of the behaviour support plan, the regulated restrictive practice (or practices) that plan contains and the expiry date of the plan.

Subsection (4) sets out that a notification under subsection (3) must be given:

- in the form approved by the Commissioner; and
- within 3 months after the start of the transition time, or such longer period as the Commissioner allows.

Subsection (5) sets out that the registration of the person or entity as a registered NDIS provider is subject to the conditions that:

- the provider must comply with subsection (3); and
- if requested by the Commissioner – the person or entity must provide a copy of the behaviour support plan to the Commissioner within the period requested by the Commissioner.

The special arrangements under section 26 only relate to a regulated restrictive practice that has already been implemented and used at the start of the transition time. These special arrangements do not apply in relation to any new use of a regulated restrictive practice.

Section 27 – Special arrangements – use regulated restrictive practice in accordance with an authorisation process but not a behaviour support plan

Section 27 addresses the special arrangements that apply to all registered NDIS providers who at the time of transition are using a regulated restrictive practice in relation to a person with disability, in accordance with a State or Territory authorisation process (however described), but not in accordance with a behaviour support plan.

Subsection 27(1) sets out the circumstances that must apply for section 27 to apply. The circumstances are:

- There is a person or entity, at the transition time:
- That is a registered NDIS provider for a participant; and
- That provides supports involving the use of a regulated restrictive practice; and
- the use is not in accordance with a behaviour support plan for the person with disability; and
- the host jurisdiction in which the supports are provided has an authorisation process (however described) in relation to the use of the regulated restrictive practice; and
- the use of the regulated restrictive practice is authorised in accordance with the authorisation process; and
- at the transition time, the host jurisdiction in which the participant lives becomes a participating jurisdiction.

Subsection (1) also defines the “transition time” for the purposes of section 27 as the time at which the host jurisdiction in which the supports will be provided becomes a participating jurisdiction.

The legislative note 1 provides a cross-reference to the Act where the terms **host jurisdiction** and **participating jurisdiction** are defined at sections 10 and 10A.

The legislative note 2 provides a cross-reference to the *National Disability Insurance Scheme (Quality and Safeguards Commission and Other Measures) Transitional Rules 2018* which provides for the automatic transition of an approved registered provider of supports to be a registered NDIS provider, the class of provider to whom section 27 applies.

If the circumstances in subsection (1) are met, subsection (2) applies. Subsection (2) addresses the grace period allowed for an approved registered provider of supports that is a “transitioned provider” under the *National Disability Insurance Scheme (Quality and Safeguards Commission and Other Measures) Transitional Rules 2018* to comply with sections 9 – 15 of this instrument. Under subsection (2) the person or entity that meets the description in subsection (1) does not need to comply with sections 9 to 15 of this instrument in relation to the person with disability and the use of the regulated restrictive practice for a period of time. That period is, from:

- the start of the transition time to the ending at the earliest of the following:
  - if the provider does not comply with subsection (3) within the period required by that subsection – the end of that period;
  - if the Commissioner gives a written notice to the provider that this subsection no longer applies to the provider—the day specified in the notice (which must be at least 14 days after the notice is given);
  - the end of 12 months after the transition time.

Subsection (3) sets out that the person or entity (that meets the description in subsection (1)) must facilitate the development of a behaviour support plan for the person with disability that contains the use of the regulated restrictive practice and that meets the requirements of Division 2 of Part 3 of this instrument:

- within 6 months after the start of the transition time; or
- such longer period as directed by the Commissioner.

Subsection (4) sets out that the registration of the person or entity as a registered NDIS provider is subject to the conditions that:

- the provider must comply with subsection (3); and
- if requested by the Commissioner – the person or entity must provide a copy of the behaviour support plan developed in accordance with subsection (3) to the Commissioner within the period requested by the Commissioner.

The special arrangements under section 27 only relate to a regulated restrictive practice that has already been implemented and used at the start of the transition time. These special arrangements do not apply in relation to any new use of a regulated restrictive practice.

#### Section 28 – Special arrangements – use regulated restrictive practice where no authorisation process or behaviour support plan

Section 28 addresses the special arrangements that apply to all registered NDIS providers who at the time of transition are using a regulated restrictive practice in relation to a person with disability, where there is no State or Territory authorisation process (however described) or behaviour support plan.

Subsection 28(1) sets out the circumstances that must apply for section 28 to apply. The circumstances are:

- There is a person or entity, at the transition time:
- the person or entity is a registered NDIS provider for a participant; and
- the provision of supports involves the use of a regulated restrictive practice; and
- the use is not in accordance with a behaviour support plan for the person with disability; and
- the host jurisdiction in which the support are provided does not have an authorisation process (however described) in relation to the use of the regulated restrictive practice; and
- the host jurisdiction in which the participant lives becomes a participating jurisdiction.

The legislative note 1 provides a cross-reference to the Act where the terms **host jurisdiction** and **participating jurisdiction** are defined at sections 10 and 10A.

The legislative note 2 provides a cross-reference to the *National Disability Insurance Scheme (Quality and Safeguards Commission and Other Measures) Transitional Rules 2018* which provides for the automatic transition of an approved registered provider of supports to be a registered NDIS provider, the class of provider to whom this section relates.

Subsection (1) also defines the “transition time” for the purposes of section 28 as the time at which the host jurisdiction in which the supports will be provided becomes a participating jurisdiction.

Subsection (2) provides that a person or entity that meets the description in subsection (1) does not need to comply with sections 9 to 15 of this instrument in relation to the person with disability and the use of the regulated restrictive practice.

Subsection (3) provides that the person or entity that meets the description in subsection (1) must notify the Commissioner of the regulated restrictive practice used by the person or entity:

- in the form approved by the Commissioner; and
- within 1 month after the start of the transition time, or such longer period as the Commissioner allows.

Subsection (4) sets out that the registration of the person or entity as a registered NDIS provider is subject to the conditions that:

- the provider must comply with subsection (3); and
- within 3 months after the transition time – the person or entity must take all reasonable steps to facilitate the development of an interim behaviour support plan for the person with disability that meets the requirements of Division 2 of Part 3; and
- within 6 months after the transition time – the person or entity must take all reasonable steps to facilitate the development of a comprehensive behaviour support plan for the person with disability that meets the requirements of Division 2 or Part 3.

Subsection (5) sets out that the registration of the registered NDIS provider is also subject to the condition that the provider agrees to demonstrate compliance with paragraph (4)(b) or (c) if required to do so by the Commissioner.

The legislative note 3 in this section provides a cross reference to Part 7.4 of the *Criminal Code*, which provides offences in relation to false or misleading statements, information and documents.

The special arrangements under section 28 only relate to a regulated restrictive practice that has already been implemented and used at the start of the transition time. These special arrangements do not apply in relation to any new use of a regulated restrictive practice.

### Section 29 – Special arrangements – specialist behaviour support service providers

Section 29 addresses the special arrangements that apply to persons or entities approved (by the CEO of the Agency) to deliver specialist behaviour support services to a person with disability as at the start of the transition time.

Subsection 29(1) sets out the circumstances that must apply for section 29 to apply. The circumstances are:

- There is a person or entity, at the transition time;
- That person or entity is approved to deliver specialist behaviour support services to a person with disability in a host jurisdiction; and



- the host jurisdiction in which the participant (that is the person with disability under paragraph 29(1)(a)) lives becomes a participating jurisdiction.

The legislative note 1 provides a cross-reference to the Act where the terms **host jurisdiction** and **participating jurisdiction** are defined at sections 10 and 10A.

The legislative note 2 provides a cross-reference to the *National Disability Insurance Scheme (Quality and Safeguards Commission and Other Measures) Transitional Rules 2018* which provides for the automatic transition of approved registered providers to be registered NDIS providers, the class of provider to whom this section relates.

Subsection (1) also defines the “transition time” for the purposes of section 29 as the time at which the host jurisdiction in which the supports will be provided becomes a participating jurisdiction.

Subsection (2) sets out that the registration of the person or entity, as a specialist behaviour support provider, is subject to the condition that the person or entity must notify the Commissioner of:

- the names and details of the behaviour support practitioners that, at the transition time, the person or entity employs or otherwise engages to undertake behaviour assessments (including functional behavioural assessments) and to develop behaviour support plans.

Subsection (3) sets out that a notification under subsection (2) must be given:

- in the form approved by the Commissioner; and
- within 1 month after the start of the transition time, or such longer period as the Commissioner allows.

## Statement of Compatibility with Human Rights

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

### National Disability Insurance Scheme (Restrictive Practices and Behaviour Support) Rules 2018

These rules are 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 *National Disability Insurance Scheme (Restrictive Practice and Behaviour Support) Rules 2018* (the instrument) is made under sections 73H and section 209 of the *National Disability Insurance Scheme Act 2013* (the Act).

This instrument sets out the additional conditions that attach to the registration of all registered NDIS providers in relation to the use of behaviour support and restrictive practices.

#### Background

The *National Disability Insurance Scheme Amendment (Quality and Safeguards Commission and Other Measures) Act 2017* (Amendment Act) contains a package of amendments to the Act, implementing much of the NDIS Quality and Safeguards Framework (Framework), which was published by the Disability Reform Council on 9 December 2016.

The Commissioner's behaviour support function in section 181H of the Amendment Act includes overseeing the use of behaviour support and restrictive practices, including by:

- Monitoring registered NDIS provider compliance with the conditions of registration relating to behaviour support plans; and
- Collecting, analysing and disseminating data and other information relating to the use of behaviour supports and restrictive practices by NDIS providers.

'Restrictive practice' means any practice or intervention that has the effect of restricting the rights or freedom of movement of a person with disability (section 9 of the Act). This instrument only applies to specified kinds of restrictive practices, defined as *regulated restrictive practices* under section 6 of the instrument.

In the past, restrictive practices were often used as a first line of response for people with behaviours of concern. It is now recognised that restrictive practices can represent serious human rights infringements. The United Nations Committee on the Rights of People with Disabilities (UNCRPD) has expressed concern about the unregulated use of restrictive practices and recommended that State parties take immediate steps to end such practices.

Positive behaviour support is currently recognised as a best practice approach to behaviour support that takes a person-centred approach to addressing underlying unmet needs behind a person with disability's behaviours of concern, which may lead to the use of restrictive practices. The National Framework for the Reduction and Elimination of Restrictive Practices, agreed by all Australian governments in 2014, defines positive behaviour support as 'the integration of the contemporary ideology of disability service provision with the clinical framework of applied behaviour analysis. Positive behaviour support is supported by evidence encompassing strategies and methods that aim to increase the person's quality of life and reduce challenging behaviour.'

The approach taken in this instrument works to reduce and eliminate the use of restrictive practices in line with the CPRD by promoting behaviour support strategies including positive behaviour support and imposing significant oversight requirements where restrictive practices are used as a last resort. This strategy engages people with disability, their families and supporters, as well as disability support workers and service providers. It engages a variety of regulatory mechanisms to develop a holistic system for the safeguarding of the human rights of people with disability.

In some limited circumstances restrictive practices may be used to ensure the safety of the person or others. As agreed in the Framework, States and Territories retain responsibility for the legislative and/or policy arrangements around authorisation and consent to the use of a restrictive practice. State and Territory legislation can also prohibit the use of particular restrictive practices.

It is important to note that these rules do not authorise a registered NDIS provider to use a restrictive practice. This includes a regulated restrictive practice, or where its use has been prohibited by a State or Territory in which the registered NDIS provider is providing a support or service.

The Commission will assist the States and Territories to develop a regulatory framework including nationally consistent minimum standards in relation to restrictive practices (section 181H(f) of the Act).

#### *The Commissioner's behaviour support function*

The Commissioner's behaviour support function is set out in section 181H of the NDIS Act. There are two aspects to the Commissioner's role in overseeing the use of behaviour support and restrictive practices and supporting the reduction and elimination of these practices by NDIS providers. These are:

- (i) monitoring registered NDIS provider compliance with the conditions of registration relating to behaviour support plans; and
- (ii) collecting, analysing and disseminating data and other information relating to the use of behaviour support and restrictive practices by NDIS providers.

The first role addresses the required approach for the development of behaviour support plans and the registration conditions on NDIS providers when a restrictive practice is being used by those providers; these conditions emphasise the importance of a human rights-based, person-centred and an evidence-informed approach. The second role is the collection of information related to actual restrictive practice use, so that the principles of workforce development and the judicious use

of data to inform practice can contribute to the overall reduction and elimination of practices.

This instrument creates certain conditions on the registration of providers using regulated restrictive practices and imposes a number of limitations when a restrictive practice is being used. For example, when a restrictive practice is being used it must:

- be part of a behaviour support plan developed by a behaviour support practitioner;
- be the least restrictive response possible in the circumstances;
- reduce the risk of harm to the person or others;
- be used for the shortest possible time to ensure the safety of the person or others; and
- if the State or Territory requires authorisation for the use of that practice, such authorisation must be obtained.

The Act and this instrument, in line with the second aspect of the Commissioner's role, imposes obligations on NDIS providers using regulated restrictive practices to report the use of those practices to the NDIS Commission each month. This will allow the NDIS Commission to have oversight on the use of these practices across NDIS services and 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.

### **Human rights implications**

The UNCRPD has expressed concern about the unregulated use of restrictive practices; the implementation of the Commission's behaviour support function through this instrument will assist Australia in meeting the obligations to take immediate steps. In the context of the NDIS, the reduction and elimination of restrictive practices will be supported through nationally consistent registration arrangements for NDIS providers engaged in developing and implementing behaviour support plans that contain provision for the use of a restrictive practice.

This instrument engages the following rights under the *Convention on the Rights of Persons with Disabilities* (CRPD):

- the right to equal recognition before the law and to exercise legal capacity in article 12 of the CRPD;
- the right of persons with disabilities to physical and mental integrity on an equal basis with others in Article 17 of the CRPD;
- the right to liberty and security of the person in Article 9 of the ICCPR, Article 5 of the Convention on the Elimination of Racial Discrimination (CERD), Article 37 of the CROC, noting Australia has a reservation to Article 37(c), and Article 14 of the CRPD (noting Australia has a reservation);
- the right to freedom from exploitation, violence and abuse in Article 16 of the CRPD;
- the right to freedom of expression and opinion and access to information in Article 21 of the CRPD, and;

- the protection against cruel, inhuman or degrading treatment or punishment in Article 7 of the ICCPR, Article 37 of the CROC and Article 15 of the CPRD.

Article 14(1) of the CRPD provides that State Parties shall ensure that persons with disabilities, on an equal basis with others, enjoy the right to liberty and security of person and 'are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty'. Article 14 of the CRPD has similarities to aspects of article 9 of the International Covenant on Civil and Political Rights (ICCPR).

### Obligations for NDIS providers

The requirement that all regulated restrictive practices when used must be in the context of an NDIS behaviour support plan places important regulation and oversight on the use of restrictive practices. These obligations set out minimum requirements for behaviour support plans and requires providers to review and prepare plans, and then lodge behaviour support plans that contain a regulated restrictive practice with the Commissioner, to enable monitoring of the use of such practices in the NDIS.

- Only behaviour support practitioners who are assessed by the Commissioner as being suitable in terms of their skills, experience and/or qualifications will be able to develop behaviour support plans<sup>1</sup>. An understanding of human rights, person-centred and evidence-based approaches to people with disability who have behaviours of concern will form part of the suitability assessment<sup>2</sup>.
- The requirements around the content of a behaviour support plan are designed to ensure a restrictive practice is used as safely and with as little negative impact upon the person as possible<sup>3</sup>. This instrument requires that restrictive practices:
  - be authorised where the state or territory requires authorisation of the restrictive practice<sup>4</sup>;
  - 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<sup>5</sup>;
  - be the least restrictive response possible in the circumstances to ensure the safety of the person or others<sup>6</sup>;
  - reduce the risk of harm to the person with disability or others<sup>7</sup>;
  - be in proportion to the potential negative consequence or risk of harm<sup>8</sup>; and
  - be used for the shortest possible time to ensure the safety of the person with disability or others<sup>9</sup>.

<sup>1</sup> Section 18, Who can develop behaviour support plans containing a restrictive practice

<sup>2</sup> Section 5, definition of *NDIS behaviour support practitioner*

<sup>3</sup> Section 20, How behaviour support plans containing a regulated restrictive practice must be developed

<sup>4</sup> Section 20 (2)

<sup>5</sup> Section 21 (c)

<sup>6</sup> Section 21 (d)

<sup>7</sup> Section 21 (e)

<sup>8</sup> Section 21 (f)

- Behaviour support plans must contain strategies that aim to reduce and eliminate the use of restrictive practices, both in the long-term and in the short-term<sup>10</sup> including by:
  - reducing and eliminating the need for the use of regulated restrictive practices in relation to the person with disability<sup>11</sup>;
  - taking into account any previous behaviour support assessments and other assessments<sup>12</sup>;
  - making changes within the environment of the person with disability that may reduce or remove the need for the use of regulated restrictive practices<sup>13</sup>;
  - consulting with the registered NDIS provider who may use the regulated restrictive practice and other relevant specialists<sup>14</sup>.
- In developing a behaviour support plan, the practitioner must consult with the person with disability and their supporters<sup>15</sup>, and must inform them of the content of the behaviour support plan and any intention to use restrictive practices in a way that is accessible to them<sup>16</sup>. The person with disability's opinion must be taken into account when developing a behaviour support plan, and this engages their right to freedom of opinion and access to information.
- The registration of a specialist behaviour support provider is also subject to the condition that the person with disability to whom the behaviour support plan applies must be given opportunities to participate in community activities and develop new skills that have the potential to reduce or eliminate the need for regulated restrictive practices in the future<sup>17</sup>.
- Oversight of behaviour support plans:
  - Any behaviour support plan that contains a regulated restrictive practice must be lodged with the Commissioner as soon as practicable after it is developed<sup>18</sup>.
  - Behaviour support plans must be reviewed every 12 months, and earlier than that where there is a change of circumstances requiring a review of the plan. For example, a change of provider would be a circumstance requiring a review of the person's behaviour support plan<sup>19</sup>.
  - Any information indicating provider non-compliance with the law and associated registration requirements regarding behaviour support and the use of restrictive practices may invoke a regulatory response

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<sup>9</sup> Section 21 (g)

<sup>10</sup> Section 20 (3)

<sup>11</sup> Section 20 (3) (a)

<sup>12</sup> Section 20 (3) (b)

<sup>13</sup> Section 20 (3) (c)

<sup>14</sup> Section 20 (f)

<sup>15</sup> Section 20 (d) and Section 20 (e)

<sup>16</sup> Section 20 (4)

<sup>17</sup> Section 21 (4)

<sup>18</sup> Section 24 (1)

<sup>19</sup> Section 22

including investigation, referral to police and sanctions such as suspension or revocation of registration.

The obligations on behaviour support providers act as a safeguard against inhumane treatment and positively engage the person with disability's right to physical and mental integrity on an equal basis with others, liberty and security of the person, and freedom from exploitation, violence and abuse.

### Oversight of behaviour support and use of restrictive practices

The Commission will provide leadership in behaviour support through guidance, education and advice to the sector, the National Disability Insurance Agency, NDIS participants and their families and carers, with a view to building capability in behaviour support and reducing and eliminating the use of restrictive practices.

To inform and implement this function the Commission will collect information and data from relevant persons and bodies, analyse this information to identify patterns, trends and anomalies in the use of behaviour supports and restrictive practices and report on the use of restrictive practices to the Ministerial Council, including policy issues and recommendations.

The role of the Commission is not to authorise the use of a restrictive practice, that responsibility remains with each State or Territory. This instrument requires providers implementing restrictive practices to only be undertaken in accordance with a behaviour support plan and be recorded by the provider and reported to the Commissioner, so that the Commissioner can effectively monitor the use of regulated restrictive practices in the NDIS.

Providers who use regulated restrictive practices will be required to give monthly reports to the Commissioner regarding the use of regulated restrictive practices<sup>20</sup>, in a form prescribed by the Commissioner<sup>21</sup>. They are also obligated to report any use of a regulated restrictive practice not in accordance with a behaviour support plan as a reportable incident<sup>22</sup>.

- There is an obligation on providers to take all reasonable steps to facilitate the development of a NDIS behaviour support plan where it becomes apparent that an NDIS participant they work with has behaviour support needs, or where it becomes apparent that a regulated restrictive practice may be required to prevent harm<sup>23</sup>. They must:
  - facilitate the development of an interim behaviour support plan for the person with disability by a specialist behaviour support provider that covers the use of the practice within 1 month after the first use of the regulated restrictive practice<sup>24</sup>;
  - facilitate the development of a comprehensive behaviour support plan for the person with disability by a specialist behaviour support provider that covers the use of the practice within 6 months after the first use of the regulated restrictive practice<sup>25</sup>.

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<sup>20</sup> Section 14 (1)

<sup>21</sup> Section 14 (2)

<sup>22</sup> *Reportable Incident Rule*

<sup>23</sup> Section 13 (2)

<sup>24</sup> Section 13 (2) (a)

<sup>25</sup> Section 13 (2) (b)

## **Conclusion**

The instrument is compatible with human rights because it advances the protection of human rights. The Commissioner's role in the reduction and elimination of restrictive practices advances the protection of the rights of people with disability in Australia consistent with the CRPD, particularly in relation to preventing exploitation, violence and abuse in the disability sector.

In addition to the NDIS Commission addressing complaints and reportable incidents, there are a number of other bodies who act as an independent voice promoting the rights of people with disability and resolving complaints about disability services. The Commission will be working closely with the range of these organisations to collectively address quality and safety issues in the NDIS.

**Graeme Head, Commissioner of the NDIS Quality and Safeguards Commission**