

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 (Practice Standards – Worker Screening) Rules 2018

Purpose

The *National Disability Insurance Scheme (Practice Standards – Worker Screening) Rules 2018* (instrument) is made under section 209 of the *National Disability Insurance Scheme Act 2013* (the Act) for the purposes of sections 73Q and 73T of the Act.

As part of the framework to support the safe delivery of services and supports to people with disability under the National Disability Insurance Scheme (NDIS), this instrument establishes key elements of the system of screening people who work for a registered NDIS provider.

The NDIS worker screening system is a national system given effect by the cooperative efforts of the Commonwealth, States and Territories. The arrangement between the Commonwealth and the jurisdictions is recorded in the Intergovernmental Agreement on Nationally Consistent Worker Screening for the Disability Insurance Scheme (the Agreement). A copy of the Agreement is available at ndiscommission.gov.au.

Background

Section 209 of the Act provides that the Minister may, by legislative instrument, make rules (NDIS rules) prescribing 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 the Act.

Section 73Q of the Act provides that a registered NDIS provider must keep records of the kind, for the period and in the form prescribed by the NDIS rules.

Section 73T of the Act provides that the NDIS rules may set out requirements for or in relation to standards concerning the quality of supports or services to be provided by registered NDIS providers.

Paragraph 73T(3)(d) of the Act specifically provides for the NDIS rules to set out requirements for matters relating to the screening of workers employed or otherwise engaged by registered NDIS providers, but does not restrict the scope of the power to prescribe matters in relation to standards.

This instrument is part of a broader suite of NDIS Practice Standards, which apply to registered NDIS providers, and persons or entities seeking to be so registered – see

the National Disability Insurance Scheme (Provider Registration and Practice Standards) Rules 2018.

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 2003* 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.

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

This instrument is a legislative instrument for the purposes of the *Legislation Act 2003* and an NDIS rule for the purposes of the Act.

Commencement

This instrument commences on 1 July 2018 (immediately after the instrument of appointment of the Commissioner and the delegation by the Minister to the Commissioner of powers and functions under the Act).

Consultation

Section 209 of the Act prescribes that NDIS rules fall into four categories. Subsection 209(8) of the Act prescribes certain categories of NDIS rules to be 'Category B' rules. To the extent that this instrument makes NDIS Practice Standards that deal with the screening of workers involved in the provision of supports or services to people with disability under the NDIS, these are 'Category B' NDIS 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 NDIS rules. In compliance with this requirement, prior to making this instrument the Commissioner (as the Minister's delegate) obtained agreement from South Australia and New South Wales.

To the extent that this instrument deals with record keeping within the meaning of section 73Q of the Act, these NDIS rules are 'Category D' rules. Subsection 209(7) requires each host jurisdiction to have been consulted with in relation to the making of all category D NDIS rules, before making those rules.

In compliance with this requirement, the Commonwealth has undertaken significant consultation with all States and Territories in relation to the design and content of the instrument. This is in addition to the extensive consultation which culminated in the Commonwealth and States and Territories setting out the framework for how worker screening will operate nationally in the Agreement. The consultation on this instrument was ongoing throughout the development and drafting process and included opportunities to provide written feedback and submissions, as well as direct face to face consultations. Consultation was also undertaken with the National Disability Insurance Agency.

The Commonwealth has also undertaken a targeted consultation process 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. The peak bodies were provided with an opportunity to consider a detailed consultation paper and provide submissions to the Department. The feedback was considered and where appropriate incorporated into the Agreement, and the instrument has been developed against the framework set out in the Agreement.

This consultation was in addition to the consultation conducted on worker screening as part of the broader Regulation Impact Statement (RIS) process which supported the enabling legislation for the instrument, the *National Disability Insurance Scheme Amendment (Quality and Safeguards Commission and Other Measures) Act 2017*.

RIS

Implementing a worker screening system was subject to the RIS for the enabling legislation (OBPR ID 16842), and no separate RIS is required for this instrument.

Explanation of the provisions

Preamble

The preamble provides some context to the instrument by outlining the purpose of the National Disability Insurance Scheme (NDIS) and how the instrument is intended to fit into that context and purpose. The Preamble sets out the overall policy objectives underlying the instrument. The content of the preamble is based in part on 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>.

The preamble also restates the relevant function and power of the Commissioner of the NDIS Quality and Safeguards Commission in relation to the screening of workers of registered NDIS providers.

Part 1 - Preliminary

Section 1 - Name

Section 1 provides that the instrument is titled the *National Disability Insurance Scheme (Practice Standards – Worker Screening) Rules 2018*.

Section 2 – Commencement

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

Section 3 – Authority

Section 3 provides that this instrument is made under the *National Disability Insurance Scheme Act 2013*.

Section 4 – Application

Subsection 4(1) provides that the instrument only applies in a host jurisdiction if it is also a participating jurisdiction, and subject to the transitional arrangements set out in Part 4. ‘Host jurisdiction’ and ‘participating jurisdiction’ are expressions defined in the Act.

This section reflects that there will be a staged implementation of NDIS worker screening, with States and Territories moving to full implementation on a basis which ensures that safety of people with disability and a smooth transition for NDIS providers and their workers. This transition will also take into account the operational capacity of the NDIS worker screening unit in the relevant jurisdiction.

Subsection 4(2) sets out that the instrument applies to all registered NDIS providers, and any person or entity who is applying to be one. A person or entity who is applying to become a registered NDIS provider is an **applicant** as defined in section 5, consistent with section 18A of the *Acts Interpretation Act 1901*.

Section 5 – Definitions

Section 5 provides the definitions for expressions used in the instrument.

The legislative note provides a signpost to some of the expressions used in the instrument which have the same meaning as when used in the Act. These terms are:

- “host jurisdiction”;
- “key personnel”;
- “NDIS Practice Standards”;
- “participant”;
- “participating jurisdiction”; and
- “registered NDIS provider”.

Section 5 also provides that in the instrument the following terms have the following meanings:

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

Agreement means the Intergovernmental Agreement on Nationally Consistent Worker Screening for the National Disability Insurance Scheme made by the Commonwealth, States and Territories which commences from 1 July 2018, in accordance with its clause 9. At the time of making of this instrument, the Agreement had been signed by the Commonwealth, Queensland, New South Wales and Tasmania. The text of the Agreement can be found on the Commission's website.

applicant means a person or entity who has made an application for registration under section 73C of the Act. This term has the same definition in section 4 of the *National Disability Insurance Scheme (Provider Registration and Practice Standards) Rules 2018*.

appropriate contract means a legally binding arrangement (including a contract) between an NDIS provider and a **subcontractor**, when the arrangement meets the requirements set out in subsection 13(4) of the instrument. Subsection 13(4) sets out what a registered NDIS provider must include in a legally binding arrangement with a subcontractor.

certification has the same meaning as the meaning given to that term in section 5 of the *National Disability Insurance Scheme (Provider Registration and Practice Standards) Rules 2018*. Section 5 of that rule provides:

5 Meaning of certification

- (1) Certification is an assessment by an approved quality auditor of an applicant, or of a registered NDIS provider, against an applicable standard by conducting:
 - (a) a desk audit of the applicant or provider, including reviewing the applicant's or provider's relevant documentation, in relation to the standard; and
 - (b) an inspection of the sites, facilities, equipment and services used, or proposed to be used, in the delivery of supports or services by the applicant or provider in relation to the standard; and
 - (c) interviews with relevant persons, including key personnel of the applicant or provider and persons receiving, or to receive, supports or services from the applicant or provider in relation to the standard.
- (2) The assessment may be conducted by sampling that is appropriate for the size of the provider or applicant and for the classes of supports or services provided or to be provided.
- (3) Despite subsection (1), the Commissioner may, in writing, authorise an approved quality auditor to assess an applicant or a registered NDIS provider against an applicable standard by conducting a review of the outcomes and evidence from a

comparable quality audit process undertaken in relation to the applicant or provider, if the Commissioner considers it is appropriate to do so.

- (4) If the Commissioner gives an authorisation under subsection (3), the applicant or provider is taken, for the purposes of this instrument, to be assessed using certification.

clearance means a decision (however described) under the NDIS worker screening legislation of a State or Territory, in response to an application for an NDIS worker screening check, that clears the applicant to work with people with disability in a risk assessed role, when that decision is current and operative. This means that if the operation of the decision is suspended, or the decision is revoked, there is no longer a clearance because there is no longer an operative decision.

closed, in relation to an NDIS worker screening check, means closed to further consideration by an NDIS worker screening unit, for example, as a result of the worker or other personnel failing to progress his or her application. This can include by failing to provide information requested by the NDIS worker screening unit in a timely manner. It is different from withdrawal, which is instigated by the person who applied for the NDIS worker screening check (see definition of **withdrawn**).

exclusion means a decision (however described) under the NDIS worker screening legislation of a jurisdiction, in response to an application for an NDIS worker screening check, which has the effect that the applicant is excluded from working in a risk assessed role with people with disability. This means that, even if a person is subject to an exclusion, they are not excluded from working with people with disability in roles *other than* risk assessed roles with a registered NDIS provider.

An exclusion is different from a revocation, although they both have the same practical effect (the worker being excluded from working in a risk assessed role). A revocation is the overturning or cancelling of a clearance, after it has been issued.

An exclusion might be described in the NDIS worker screening legislation of a jurisdiction, for example, as a negative assessment or a refusal to grant a clearance, rather than using the term 'exclusion'.

interim bar is an interim decision made under the NDIS worker screening legislation of a jurisdiction to bar a person from working with people with a disability, while the person's application for an NDIS worker screening check is being processed. The two legislative notes draw attention to the clause in the Agreement, which sets out how an interim bar is intended to work in practice. Specifically, an interim bar is to be used where records are identified which indicate that a person who has applied for an NDIS worker screening check may pose a risk to people with disability. It is used to prevent that person from working with disability until a final decision is made. The interim bar will stay in place until the NDIS worker screening unit removes it, or the application is finalised (for example, by the issuing of a clearance or an exclusion). The Agreement indicates an intention that there will be a right of internal review of an interim bar decision (in the NDIS worker screening legislation of States and Territories), where it is not resolved in a set timeframe.

more than incidental contact has the meaning given by section 6 of this instrument.

national policy for NDIS worker screening means the policy contained in the Agreement, as amended from time to time. The note to this definition identifies that the text of the Agreement can be found on the Commission's website.

NDIS worker screening check means the assessment of whether a person who works, or seeks to work, with a person with disability poses a risk to such a person.

NDIS worker screening legislation of a State or Territory means the legislation of that jurisdiction, once it becomes a participating jurisdiction, which it has made to give effect to subclause 20(a) of the Agreement. Subclause 20(a) of the Agreement provides that each State and Territory Government will seek to introduce or amend legislation establishing a scheme for the screening of NDIS workers consistent with the national policy for NDIS worker screening in the Agreement.

NDIS worker screening unit means the person or body operated by a State or Territory, which is responsible for conducting NDIS worker screening checks for that jurisdiction. An NDIS worker screening unit might be, for example, part of a State or Territory government department or agency, including part of an existing screening unit.

other personnel (or 'member of other personnel') means a natural person who is not employed or otherwise engaged by a registered NDIS provider – that is, he or she is not a **worker** (see below) – but performs work at the premises of, or otherwise as part of the provision of supports or services to any person with disability by, the registered NDIS provider.

Other personnel would generally be expected to provide this work as part of a commercial arrangement between the NDIS provider and (for example) a service provider, subcontractor or labour hire organisation. It is intended that all personnel having contact with people with disability as part of the registered NDIS provider's ordinary business are subject to appropriate screening requirements, irrespective of how that business is structured in terms of the sourcing and deploying labour.

The example under this definition is based on a registered NDIS provider engaging a company to provide cleaning services at the specialist accommodation premises for people with disability run by the provider. Because the people who will do the cleaning are engaged by the company (and not by the provider) they are not workers of the provider. They do, however, work at the premises of the provider, performing duties which are integral to the provision of specialist accommodation to people with disability. There is no separate or distinct relationship between the cleaning company and the people with disability – its workers have access to the people with disability because of the services and supports they assist the registered provider to deliver to those people with disability.

As a result, those people doing the cleaning work at the premises of the registered NDIS provider are **other personnel** of that provider.

rappport means a relationship or understanding, being more than merely polite and functional. Rapport is a function of getting to know someone as a person, rather than just bare courtesy. This is a key concept in determining whether a role involves more than incidental contact with a person with disability, as part of its normal duties.

risk assessed role means a role with a registered NDIS provider that falls into one of three categories.

The first category covers any role which is a key personnel role. “Key personnel” is a term defined in the Act, and includes those people employed or otherwise engaged by a registered NDIS provider who (together or individually) are responsible for executive decisions of the provider.

The second category covers any role with duties which involve the direct delivery of particular kinds of services or supports to a person with disability. Those services (**specified services**) and supports (**specified supports**) are published in a list by the Commissioner pursuant to section 7, and updated from time to time.

The third category covers any role for which the normal duties are likely to require more than incidental contact with a person with disability. The note to the definition directs the reader to clause 6 of the instrument, which deals with what constitutes “more than incidental contact”.

The definition of **risk assessed role** reflects the national policy for NDIS worker screening, particularly as set out in clause 23 of the Agreement.

specified service and **specified support** means a service or support, respectively, included in the relevant list (as in force and existing from time to time) published by the Commissioner pursuant to section 7. Clause 25 of the Agreement identifies how the list is determined and will be maintained.

The note under the definition of each of these terms draws attention to subsection 209(2) of the Act, which expressly provides that an instrument of this kind may make provision for or in relation to a matter by applying, adopting or incorporating any matter contained in an instrument or other writing as in force or existing from time to time. That is, the prohibition in section 14 of the *Legislation Act 2003* (on prescribing matters by reference to an instrument or other document as existing from time to time) does not apply to this instrument.

subcontractor, in relation to a registered NDIS provider, means a person or entity that makes the services of other personnel available to the provider.

suspension means a decision to suspend the operation of a clearance. It is a decision made under the NDIS worker screening legislation of a jurisdiction. During the period of a suspension there is no clearance for the purposes of this instrument, because the decision to approve an application for an NDIS worker screening check is not operative at that time. The Agreement indicates an intention that there will be a right of internal review for suspension decisions (in the NDIS worker screening legislation of States and Territories) – see clauses 80 and 82.

transitional arrangements in relation to a jurisdiction means the interim risk management measures which apply in that jurisdiction while the jurisdiction transitions to the worker screening scheme. The transfer arrangements and timing are those negotiated between the States, Territories and the Commonwealth in accordance with clause 121 of the Agreement.

The note to the definition points to the content of clause 121 of the Agreement, which explains that the safety of people with disability, a smooth transition for workers and providers, and the operational capacity of NDIS worker screening units are key considerations in the negotiation of transitional arrangements.

verification is a reference to a method of assessment for a registered NDIS provider (or a person who is applying to become one). It means an assessment by an approved quality auditor of that person, against an applicable standard, by conducting a desk audit of the person. A desk audit is generally an audit conducted of documents offsite.

withdrawn, in relation to an application for an NDIS worker screening check, means that it has been withdrawn by the person who made the application, in accordance with any requirements for withdrawal imposed by the jurisdiction to which the application was made. The withdrawal of an application is different from the application being closed. The former is at the instigation of the applicant, and the latter is at the instigation of the NDIS worker screening unit.

The legislative note to this definition refers the reader to the Agreement, where it is foreshadowed in clause 55 that withdrawal of an application will not be allowed after an interim bar or an intention to exclude notice is issued by the relevant jurisdiction.

work has the same meaning as in section 85ZZGM of the *Crimes Act 1914*. Section 85ZZGM was inserted into the *Crimes Act 1914* by the *Crimes Amendment (National Disability Insurance Scheme – Worker Screening) Act 2018* to support the sharing of information for screening of people working with people with disability as part of the delivery of NDIS services or supports.

worker means a natural person who is employed or otherwise engaged by a registered NDIS provider. It is a broad term which covers a wide range of people who perform work as part of the business of a registered NDIS provider, and includes employees, contractors, consultants and volunteers. Where a registered NDIS provider is a sole trader, that provider is also a worker. People who perform work as part of the business of a registered NDIS provider, but who are not workers, are covered by the definition of **other personnel**.

Section 6 – Definitions relating to more than incidental contact

Subsection 6(1) of the instrument defines the concept of **contact**. The term **contact** includes physical contact (such as touch), face-to-face contact, oral communication, written communication and electronic communication. These are all ways of interacting with a person with disability.

Subsection 6(2) provides a non-exclusive list of when the normal duties of a worker or other personnel involve **more than incidental contact**. It sets out some of the

kinds of roles which definitely involve more than incidental contact, but does not cover the field. This means that even if a role does not fall into one of the categories listed in subsection 6(2), that role may still involve more than incidental contact, and be a risk assessed role as a result.

Paragraph 6(2)(a) explains that the normal duties of a role involve more than incidental contact if they include physically touching (contacting) a person with disability. Touching someone may include, but does not require, skin to skin or body to body contact. For example, a worker has physical contact with a person with disability if they touch a clothed part of a person with disability, with a clothed (e.g. gloved) part of their own body. Similarly, physical touch would also include touching a person with disability with an object (for example, a stethoscope or a hairbrush).

Paragraph 6(2)(b) explains that the normal duties of a role involve more than incidental contact if they include building a level of rapport with a person with disability as an integral and ordinary part of the performance of those duties. Two examples are included under the provision to illustrate how the paragraph applies in practice.

- The first example under the provision works through an instance when a person would meet this threshold, being a person whose role involves the delivery of mobility equipment to the homes with people with disability. As part of the usual delivery arrangements, the worker is expected to provide training about how to use the equipment, and make any necessary adjustments to customise the equipment to the person with disability.
- The second example looks at a role which does not involve more than incidental contact with people with disability. The role is the role of an accountant who performs only 'back office' functions for a specialist custom prosthetics business. The accountant comes across people with disability many work days, when moving through public areas of the business, at which time the accountant nods and says hello. In this case, the role does not involve more than incidental contact, because the duties of the accountant's role do not require more than polite functional contact with people with disability. The accountant would not be expected to get to know the customers as individuals, as part of the normal performance of the duties of the role.

Paragraph 6(2)(c) explains that the normal duties of a role involve more than incidental contact, if they include contact with multiple people with disability as part of directly delivering a specialist disability support or service, or in a specialist disability accommodation setting.

The ordinary duties of a role will meet this threshold, for example, if they include having contact with people with disability as part of providing services which are targeted to people with disability. This reflects that the person is likely to have significantly higher frequency and intensity contact with people with disability, than someone providing the same services to the world at large. People whose duties could be expected to fall into this category would include, for example:

- a music teacher who teaches classes specifically tailored for people with intellectual disability; and

- a builder who specialises in disability support home modifications.

These examples show that whether contact is more than incidental is often linked to the level of opportunity a role would ordinarily provide to workers or other personnel to harm – including groom – a person with disability. The likelihood that contact is more than incidental increases with the intimacy, frequency, and regularity of the contact with a person with disability.

Section 7 – Commissioner must publish lists

Section 7 explains that the Commissioner must publish the list of specified supports and services, as soon as practicable after that list is made or amended. This list will be freely available to any interested person on the website of the Commission at www.ndiscommission.gov.au.

The instrument incorporates the list of specified supports and services, as existing from time to time. Subsection 209(2) of the Act expressly allows an instrument made under section 209 (like this one) to incorporate an instrument in writing as existing from time to time, despite section 14 of the *Legislation Act 2003*.

The list of specified supports and services assists a registered NDIS provider to determine whether a role is a risk assessed role. If a service or support is included in the list, then a role which involves the direct delivery of that service or support to a person with disability is a risk assessed role (see paragraph (b) of the definition of **risk assessed role**).

At the time this instrument is made, the list of specified supports and services includes 27 specified supports and services, which are identified by reference to the classes of supports against which a provider is registered under the NDIS Act. Of the 27 supports and services, 26 are specified in whole, while one (assistance with travel/transport arrangements) has been specified in part. The full list of the classes of support for which an NDIS provider can be registered can be found in the table at subsection 20(3) of the *National Disability Insurance Scheme (Provider Registration and Practice Standards) Rules 2018*.

Part 2 – Practice Standards relating to screening of workers and other personnel

Division 1 – Introduction

Section 8 – Purpose of this Part

Subsection 8(1) identifies that the Part is made for the purposes of subsection 73T(1) of the Act. The note to this subsection points out that paragraph 73T(3)(d) expressly enables the NDIS rules to set practice standards for matters relating to worker screening, and that other practice standards can be found in the *National Disability Insurance Scheme (Provider Registration and Practice Standards) Rules 2018*.

Subsection 8(2) explains that the Part specifies standards concerning the screening of workers and other personnel of registered NDIS providers. There are three notes to this provision.

The first note sets out that a person applying for registration must be assessed as meeting applicable practice standards in order to be registered as a registered NDIS provider (see paragraph 73E(1)(c) of the Act). That assessment is conducted by an approved quality auditor appointed by the Commissioner under section 73U of the Act.

The second note sets out that non-compliance with a relevant practice standard by a registered NDIS provider constitutes a breach of a condition of its registration (see paragraph 73F(2)(c) and section 73J of the Act).

The third note draws attention to Part 4 of the instrument, which contains special rules that apply instead of – or as well as – some of the rules in Part 2 in some circumstances.

Practice standards set the benchmarks which a registered NDIS provider needs to meet in the way they deliver services and supports to people with disability. A provider is measured against these standards at specific points during the registration cycle, as well as on an *ad hoc* basis if issues are identified (for example) through a complaint or reportable incident.

During the registration cycle, a registered NDIS provider is subject to at least one audit by an approved quality auditor appointed under section 73U of the Act. Generally speaking, the auditor examines the performance of the provider through its records (where the applicable assessment methodology is verification) and also with site visits and interviews with people with disability receiving services and supports from the provider (where the assessment methodology is certification).

The practice standards in this Part work with the record keeping obligations in Part 3 to provide a worker screening regime which can be monitored through these audit arrangements, to mitigate the risk of harm to people with disability from those who work closely with them.

Division 2 – NDIS Practice Standards – worker screening

Section 9 – Worker screening – class of supports, applicable standards and assessment process

Section 9 sets out what assessment method applies to the practice standards set out in this instrument.

Subsection 9(1) provides that, to provide any class of support, an applicant for registration under section 73C must be assessed by an approved quality auditor as meeting the standards specified in this Part, using the verification method.

This means that all applicants for registration must be assessed as meeting the worker screening practice standards in this instrument, in order to be registered.

The verification method is one of two assessment methods, and is set out in more detail in the *National Disability Insurance Scheme (Provider Registration and Practice Standards) Rules 2018*. Of the two methods, the verification method is the less stringent.

Subsection 9(2) makes it explicit that a registered NDIS provider must continue to comply with the standards in Part 2, in order to remain registered to provide any class of support. Compliance with practice standards is a condition on the registration of every provider (see paragraph 73F(2)(c)).

Section 10 – Assessment by certification meets requirement to be assessed by verification

Section 10 clarifies that for the purposes of Part 2 of this instrument, if compliance with an applicable standard must be assessed using verification, the requirement is met if compliance with the standard is assessed using certification. That is, the assessment method used must be at least the verification method (being the least stringent), but can be certification (being a more stringent method).

Division 3 – NDIS Practice Standards – screening of workers and other personnel

Section 11 – Assessment of risk assessed roles

Under section 11, a registered NDIS provider must assess all the roles which their workers and other personnel engage in, and identify each one that is a risk assessed role. Subsection 11(2) makes it clear that the provider must assess the roles with the organisation, whether it is performed by a worker or other personnel.

The effect of this provision is to require a registered NDIS provider to look at each part of its business, and identify those roles which attract worker screening obligations. That is, it is a fundamental preliminary step which a provider needs to take to be able to effectively ensure that risk assessed roles are only performed by appropriate workers or other personnel.

This applies irrespective of the size or structure of the registered NDIS provider's business, ranging from the sole trader to the large corporation.

In considering compliance with this provision by a registered NDIS provider – including in the initial transitional period when these obligations are new – the Commissioner will have regard to whether a provider is taking genuine, conscientious steps to building and then maintaining its compliance. Relevant assessment of roles which a provider has already done to ensure compliance with State or Territory regulation can also be taken into account when assessing compliance under this scheme. The Commissioner is looking for substantive compliance pursued in a timely way, including by maximising the benefit of work already undertaken for other regulators.

Section 12 – Risk management plan to be maintained and given effect

Subsection 12(1) of the instrument requires a registered NDIS provider to develop and maintain a satisfactory risk management plan for protecting people with disability while a worker or any other personnel is in the process of obtaining a clearance. The plan must be in writing. A plan is satisfactory by reference to the accurate identification of risk, and the inclusion of relevant and responsive measures to address it.

In examining compliance with this provision by a registered NDIS provider – particularly in the initial transitional period when these obligations are new – the Commissioner will have regard to whether a provider is genuinely working towards a proper plan which is responsive to the risk posed by the kinds of contact its staff have with people with disability. The initial risk management plan needs to be prepared in a reasonable timeframe, and may build on existing work a provider has already completed as part of its internal governance, or through its engagement with State or Territory regulators.

Subsection 12(2) identifies circumstances in which a registered NDIS provider must review its risk management plan. Without limiting the obligation to have and maintain a satisfactory plan, a provider must review its plan if the Commissioner requests it to do so or there is a reportable incident within the meaning of subsections 73Z(4) and (5) of the Act which involves a worker or other personnel of the provider. That is, the provider must conduct a review in those circumstances, in addition to any other time that it is appropriate to do so to ensure that its risk management plan is satisfactory.

It may be, for example, that a provider conducts reviews on a regular basis as part of maintaining the relevance and responsiveness of its plan to the risks associated with the kinds of supports or services it provides to NDIS participants. A risk management plan is satisfactory by reference to its identification and mitigation of risks.

Subsection 12(3) makes it clear that a registered NDIS provider must implement its risk management plan. While the Commissioner may agree to excuse a provider from this obligation, such agreement is likely to be short term only, and to reflect special circumstances. For example, the Commissioner may use this power to manage the phase-in of worker screening to recognise that a registered NDIS provider may need a transitional period to meet its obligations under this provision, where the provider has mapped out a clear pathway to compliance.

Practically speaking, it is in the interests of a registered NDIS provider to minimise the time for which it is excused from implementing its risk management plan. This is because it does not get the benefit of its workers being able to engage in risk assessed roles which they are obtaining a clearance, at any time the risk management plan is not being implemented (see section 15(2)(g)).

Division 4 – Worker screening – workers and other personnel of a registered NDIS provider

Section 13 – Certain roles restricted to workers or other personnel with a clearance

Section 13 establishes standards about when roles may only be engaged in by a worker or other personnel with a clearance.

As set out in the national policy for NDIS worker screening, worker screening will be phased in over a period time, with States or Territories joining the national system progressively. To address this, subsection 13(1) provides that the standards set out in section 13 only apply if a State or Territory is a participating jurisdiction, and the

registered NDIS provider provides supports or services to a person with a disability in that State or Territory.

Upon commencement of this instrument, for example, the only two participating jurisdictions will be New South Wales and South Australia. The intended program for other States to become participating jurisdictions is set out in clause 119 of the Agreement.

Subsection 13(2) establishes the standard that, subject to the exceptions in Division 4 of Part 2, a registered NDIS provider must only allow a worker to engage in a risk assessed role if the worker has a clearance.

This standard is a key element of the worker screening regime. It requires a registered NDIS provider to put in place – and use – systems and processes to support the safe delivery of supports and services by taking appropriate steps to regulate who performs what roles in its business.

Subsection 13(3) sets out the equivalent standard in relation to other personnel. It provides that, subject to the exceptions in Division 4 of Part 2, a registered NDIS provider must only allow a member of other personnel to engage in a risk assessed role, if that provider has:

- identified to the person (***the subcontractor***) who makes the services of other personnel available to the registered NDIS provider each risk assessed role that those other personnel engage in;
- entered into an appropriate contract with the subcontractor; and
- taken reasonable steps to satisfy itself that the member of other personnel has a clearance.

The requirement in relation to other personnel is different to that in relation to workers because the registered NDIS provider is unlikely to have the same control over, and access to information about, other personnel. While these people may regularly be part of the provider's delivery of supports to people with disability, they have their payment or other human resources relationship with another organisation (referred to in the provision as the subcontractor). It is the subcontractor that has the control and access to information.

As a result, the NDIS provider is required to set up and maintain its relationship with the subcontractor, in a way that means they work together to ensure other personnel are appropriately screened if they are going to engage in a risk assessed role with the NDIS provider. This is intended to make sure that that all personnel having contact with people with disability as part of the registered NDIS provider's business are subject to appropriate screening requirements, irrespective of how that business is structured in terms of the sourcing and deploying labour.

A key part of setting up this relationship between the registered NDIS provider and the subcontractor is the making and administration of an ***appropriate contract***. An ***appropriate contract*** must require the subcontractor to:

- only allow a member of other personnel to work in a risk assessed role with the provider if that member of other personnel has a clearance, or is subject to an exception from the requirement for a clearance;
- only allow a member of other personnel to work in a risk assessed role with the provider, if the subcontractor is allowed to share information with the provider about any matter relating to whether that person may engage in a risk assessed role. This would include information about whether the member of other personnel has made an application for a clearance, and other decisions made under NDIS worker screening legislation. This means that the subcontractor has to set up its relationship with its staff or other workers in a way which supports the sharing of this information, whether by consent or otherwise, if it wants to put them forward to perform a risk assessed role with the provider;
- cooperate with any reasonable request from the registered NDIS provider for information about the clearance status of a member of other personnel;
- cooperate with any reasonable request for assistance to investigate any complaint made to the NDIS provider about the conduct of, or any reportable incident involving, any member of other personnel engaged in a risk assessed role;
- cooperate with any reasonable request for information from the NDIS provider for information relating to whether and how the subcontractor is complying with the obligations in the appropriate contract; and
- impose these obligations on anyone else that it enters into an arrangement with, if the arrangement involves or allows for the provision of services by other personnel to the NDIS provider.

The Commissioner may require a registered NDIS provider to provide the Commissioner with information or records provided by the subcontractor (including the appropriate contract) for the purposes of administering the Act (see conditions of registration, particularly paragraph 73F(2)(i) of the Act).

Section 14 – Exceptions to the restriction of certain roles to cleared workers and other personnel

Section 14 sets out the limited circumstances in which a registered NDIS provider may allow a person to engage in a risk assessed role, even though they do not have a clearance.

Paragraph 14(a) explains that a registered NDIS provider may allow a person to engage in a risk assessed role if certain conditions are met. The conditions are:

- the person is in the process of obtaining a clearance (subparagraph 14(a)(i)), is appropriately supervised by a person with a clearance (subparagraph 14(a)(ii)), the provider is implementing its risk management plan in accordance with Division 4 of this instrument (subparagraph 14(a)(iii)), and the law of the participating jurisdiction in which the person provides services to a person with disability allows the person to engage in a risk assessed role, while the person is in the process of obtaining a clearance (subparagraph 14(a)(iv)); or

- the registered NDIS provider is subject to transitional arrangements (subparagraph 14(b)(i)) and is complying with the transitional arrangements (subparagraph 14(b)(ii)); or
- the person is a secondary school student on a formal work experience placement with the registered NDIS provider (subparagraph 14(c)(i)) and is directly supervised by another worker of the provider who has a clearance (subparagraph 14(c)(ii)).

Section 15 sets out when a person is in the process of obtaining a clearance.

Supervision of a worker or other personnel (by someone who already has a clearance) must be part of protecting people with disability, while an application for a worker screening check is being assessed. Supervision will be “appropriate” when it is part of a risk management strategy which provides a sound level of protection overall to people with disability. A registered NDIS provider has some flexibility to find a supervision method and level which fits the size and complexity of its business, as a central part of managing and mitigating risk.

Subparagraph 14(a)(iv) recognises that States and Territories may also regulate the disability sector, as part of providing safeguards to people with a disability. The exception in this subsection does not override or in anyway derogate from those safeguards. That is, a person may only engage in a risk assessed role while in the process of obtaining a clearance, if they meet the requirements in subparagraphs 14(a)(ii) to (iv), including any relevant State or Territory requirements, and are not subject to a State or Territory prohibition or exclusion.

Paragraph 14(b) provides that a registered NDIS provider may allow a person to engage in a risk assessed role when the person does not have a clearance, in circumstances where a participating jurisdiction is transitioning to full implementation of the national worker screening scheme. A person may engage in a risk assessed role with a provider without a clearance, if that person is compliant with all the requirements specified in the transitional arrangements for a jurisdiction. Transitional arrangements only apply during the transitional period for a participating jurisdiction (see Part 4).

Paragraph 14(c) provides that a registered NDIS provider may allow a person to engage in a risk assessed role when the person does not have a clearance, if that person is a secondary school student on a formal work experience placement with the registered NDIS provider, and the student is being directly supervised by another worker of the provider who has a clearance. At any time a work experience student is not being directly supervised by a worker of the NDIS provider with a clearance, they may not be allowed to engage in a risk assessed role (see paragraph 15(2)(g)).

Section 15 – When a person is in the process of obtaining a clearance

Subsection 15(1) explains that, subject to certain exceptions, a person is in the process of obtaining a clearance during the period starting on the day on which the person submits a complete application for a clearance to the relevant NDIS worker screening unit, and ending on the day on which a clearance or exclusion is made.

Subsection 15(2) sets out the exceptions. A person is not in the process of obtaining a clearance, despite subsection 15(1), if:

- the person has applied for an NDIS worker screening check on at least one prior occasion, and on the most recent prior occasion the person was subject to an exclusion (paragraph 15(2)(a));
- if the person has had a clearance on at least one prior occasion, and on the most recent prior occasion the clearance was revoked (paragraph 15(2)(b));
- on any day after the application for an NDIS worker screening check is withdrawn by the person (paragraph 15(2)(c));
- on any day after the application for an NDIS worker screening check is closed (paragraph 15(2)(d));
- on any day when an interim bar is in force in relation to the person (paragraph 15(2)(e));
- at any time the worker is not being supervised by a person in accordance with the requirements of section 14 of this instrument (paragraph 15(2)(f)); or
- at any time a risk management plan required under this instrument is not being implemented (paragraph 15(2)(g)), even if the Commissioner has excused the provider from implementing the plan under section 12(3).

In relation to a previous exclusion, or revocation of a clearance, the exception reflects that a previous finding of this kind is treated as an indication that the risk posed by the worker (or other personnel) means it is not appropriate for them to have the benefit of special arrangements while their application for a clearance is being processed. This is not the case, however, if they have had a successful application for clearance between the latest exclusion or revocation and the current application, and an NDIS worker screening unit has issued a clearance.

The term and mechanism used for revocation of a clearance may vary between jurisdictions. Revocation might be an express decision set out in the jurisdiction's NDIS worker screening legislation, for example, or it might be a decision made under the NDIS worker screening legislation, in reliance on generally applicable statutory interpretation legislation for the jurisdiction. It may also be called an exclusion (as discussed in the legislative note). Irrespective of mechanism or term used, if a clearance is subject to a decision to render it inoperative permanently, it will be taken to have been revoked for the purposes of this section.

A person is also not in the process of obtaining a clearance after their application is withdrawn or closed. As per the definition of **closed**, an application is closed if an NDIS worker screening unit chooses to close it to further consideration, generally for administrative reasons. These might include if the person applying for the application fails to provide further information requested. This is different from an application being withdrawn. In the case of withdrawal, it is the person making the application who decides to bring the application process to a close. The national policy on NDIS worker screening indicates that States or Territories may restrict the ability of a person to withdraw an application, if it has reached a point where the NDIS worker screening unit has identified concerns about the risk posed by the person to people with disability (see clause 55 of the Agreement). In those circumstances, the worker screening unit would proceed to make a final decision on

the application so the individual cannot avoid a full assessment by unilaterally withdrawing it.

This subsection also provides that the period in which a person is obtaining a clearance is suspended during any time when the necessary risk management measures to protect people with disability are not in place. It might be, for example, that a new worker has applied for an NDIS worker screening check and is being supervised during a work placement. If there is no one available to supervise the new worker one day – because the worker with a clearance who usually does this is sick and no other appropriate supervision arrangements can be put in place for the day – then the worker does not get the benefit of the special arrangements in section 14 on that day. That is, they may not engage in a risk assessed role and would need to be allocated other duties until appropriate supervision becomes available again.

Subsection 15(3) identifies when a complete application for a clearance has been submitted to an NDIS worker screening unit by a person. If the person is other personnel, then the only requirement for a complete application to have been submitted, being that the relevant NDIS worker screening unit has issued a notice in writing to the person, confirming that the application has been made (paragraph 15(3)(a)).

The note to paragraph 15(3)(a) draws attention to the fact that the notification from an NDIS worker screening unit that an application has been made may take a wide range of forms, and use a range of technology. These might include, for example, an SMS sent to the mobile phone number identified by the person in their application for an NDIS worker screening check. It could also be a status update published to the person's electronic profile in the database maintained by the NDIS worker screening unit, where the person sets up access to their profile in the database, as part of making the application.

If the person is a worker, then there are two further requirements which must also be met in order for them to be taken to have submitted a complete application. The complete application for a worker is not taken to have been submitted until the registered NDIS provider has also seen the notice issued by the NDIS worker screening unit and made a record of the worker screening application number included in the notice.

Part 3 – Record keeping requirements for worker screening

Section 16 – Purpose of this Part

Section 16 explains that Part 3 is made for the purposes of section 73Q of the Act. The note to this section identifies that section 73Q of the Act provides for the making of NDIS rules about record keeping by registered NDIS providers.

Section 17 – Kinds of records which must be kept – records about risk assessed roles

Subsection 17(1) explains that a registered NDIS provider must have a written list of all roles within the provider which are risk assessed roles. The note to this

subsection makes it clear that this obligation extends to each risk assessed role with the provider, irrespective of how the provider arranges for a person to fill that role.

Subsection 17(2) sets out the requirements for keeping the list of risk assessed roles current and up to date. A registered NDIS provider must update the written list of roles that are risk assessed roles if a new risk assessed role is identified, or an existing role is reclassified as a risk assessed role on review. The update must be made within 20 business days of the new role being identified, or the existing role being reclassified.

Subsection 17(3) identifies the kinds of information which must be included in the list created or maintained for the purposes of this section. The list must include the organisation identifier for the role (such as its title or position number, for example), which paragraph or paragraphs of the definition of “risk assessed role” apply to the role, a description of the role, the date on which the role was assessed as being a risk assessed role, and the name and title of the person who assessed the role as being a risk assessed role. The list must also include information about which paragraph or paragraphs of the definition of **risk assessed role** applies to the role; that is, the list needs to indicate whether the role is a key personnel role, involves the direct delivery of specified services or supports, or involves more than incidental contact with people with disability as part of its normal duties.

The information maintained in this list both helps a registered NDIS provider to manage and mitigate the risk of harm to people with disability, and allows an auditor to determine whether the provider is complying with its obligations under this instrument.

Section 18 – Kinds of records which must be kept – records about workers

Subsection 18(1) requires a registered NDIS provider to keep a written list of all workers who engage in risk assessed roles. That list must be kept up to date (subsection 18(2)).

Subsection 18(3) sets out the kinds of information which must be included in a list created or maintained for the purposes of this section. That list must include:

- the full name, date of birth and address of the person;
- the risk assessed role or roles (from the list maintained under section 17) in which the person engages;
- if the person does not have to have a clearance to perform the duties of a risk assessed role – the basis in section 14 on which they may do so, the start and end dates for the exemption from this requirement, and the name of the person supervising the worker during this period (if any);
- the worker’s NDIS worker screening check application number. This is a number generated by the NDIS worker screening unit in response to the worker making an application;
- the worker’s NDIS worker screening check number. This is a number which is generated by the Commission in response to a notification from the relevant NDIS worker screening unit that a complete worker screening check application has been made and that the person who made the application does not already have an NDIS worker screening check number;

- the worker's NDIS worker screening check outcome expiry date. This could be, for example, the date on which a clearance or exclusion expires;
- whether the worker's clearance is subject to any decision which has the effect that the registered NDIS provider may not allow the worker to engage in a risk assessed role, and what kind of decision that is. As indicated in the note to this provision, the kinds of decisions which may affect a clearance include a decision to suspend or revoke it. If a clearance is suspended or revoked, for example, the registered NDIS provider would not be able to rely on its expiry date to work out whether a worker may engage in a risk assessed role.

The information maintained in this list both helps a registered NDIS provider to manage and mitigate the risk of harm to people with disability, and allows an auditor to determine whether the provider is complying with its obligations under this instrument.

In addition to the list, a registered NDIS provider is required by subsection 18(4) to keep a range of records which relate to the ability of a worker to engage in a risk assessed roles. The registered NDIS provider must keep a copy of any record relating to an interim bar, a suspension, an exclusion, or action taken in relation to any of these things, in relation to any worker of the provider.

Subsection 18(5) requires a registered NDIS provider to also keep a copy of any record relating to allegations against any worker with a clearance of any misconduct by them, and the action taken (including any investigation) in response to that allegation.

Section 19 – Kinds of records which must be kept – other personnel

Section 19 sets out the kinds of records which a registered NDIS provider must keep, in relation to its other personnel.

Under paragraph 19(1)(a), the registered NDIS provider must keep a copy of any appropriate contract it enters into with a person who makes the services of the other personnel available to the provider. This includes any variations to that contract over time.

Paragraphs 19(1)(b) and (c) require that the provider also keep particular kinds of records relating to an appropriate contract. These include any record relating to the administration of the contract, particularly in relation to those obligations in it (in accordance with subsection 13(4)) which support the registered NDIS provider to meet its obligations in relation to other personnel working in risk assessed roles. The provider must also keep a record of information provided to it about a member of other personnel, in accordance with an appropriate contract.

Under paragraphs 19(1)(d) and (e), the NDIS provider must keep any record relating to how it meets its obligations to take reasonable steps to satisfy itself that a member of other personnel has a clearance, or may engage in a risk assessed role without one (because he or she is in the process of obtaining a clearance).

A provider must also keep any record about an allegation against any member of other personnel with a clearance about any work related misconduct by them. That

is, this provision is intended to cover the kind of misconduct about which a provider would be expected to become aware, as part of the relationship it has with the member of other personnel.

Section 20 – The form in which records must be kept

Section 20 sets out the form in which the list required by subsection 18(1) must be kept. It is expressed in terms of the outcome that form must have, to allow a registered NDIS provider flexibility to use a form which is proportionate to the size and complexity of its business.

Each list must be kept in a form which would allow an auditor to determine which worker was performing the duties of any risk assessed role with the provider, on any day in the 7 years prior to the audit. That is, it needs to be in a form which allows an auditor to determine whether the registered NDIS provider has been meeting its obligations under Parts 2 and 3 of this instrument.

Section 21 – The period for which records must be kept

Section 21 provides that a record which is subject to this Part must be kept for 7 years from the date the record is made. In relation to a list made under section 17 or 18, for example, this would mean that each version of the list would need to be kept for 7 years from the date of the creation or updating of the list.

The period of 7 years for record keeping in this instrument is consistent with the record keeping requirements for other records under NDIS rules – see, for example, subsection 15(3) of the *National Disability Insurance Scheme (Restrictive Practices and Behaviour Support) Rules 2018*.

Part 4 – Special arrangements during the transition period

Section 22 – Purpose of this Part

Section 22 explains that this Part is made for the purpose of section 73T of the Act. It gives effect to the staged implementation of the national policy for NDIS worker screening, as described in Part 12 – Transfer of the Agreement.

This Part provides for the recognition of risk mitigation measures put in place by States and Territories, in the period from when the State or Territory becomes a participating jurisdiction, until it has moved to full implementation of the national policy for NDIS worker screening.

Section 23 – Application – special arrangements NSW

Section 23 sets out the transitional arrangements which will apply in New South Wales (NSW). These recognise protections currently in place for people with disability residing in NSW prior to the commencement of this instrument, until NSW transitions to the full national policy for NDIS worker screening. The transitional arrangements are based on continuity of current worker screening standards in NSW for providers in the immediate term.

Subsection 23(1) explains that the section only applies to a person or entity who is, or has applied to become, a registered NDIS provider, to deliver any class of supports or services to a participant residing in NSW. It does not apply to any other person or entity.

Subsection 23(2) makes it clear that a registered NDIS provider is complying with the transitional arrangements when delivering services or supports in NSW, if that provider complies with section 23. Complying with transitional arrangements is relevant to whether a registered NDIS provider is subject to an exception to the practice standard prescribed by section 13 of the instrument – see paragraph 14(b). A registered NDIS provider, for example, would be able to allow a staff member to work in a risk assessed role in the period before NSW is set up to issue clearances under NDIS worker screening legislation if it meets the transitional arrangements.

The transitional arrangements are stated in subsections 23(3) and (4).

Subsection 23(3) provides that a registered NDIS provider may allow a person to engage in a risk assessed role at a time when the person does not have a clearance if the person has an acceptable NSW check, it is before the transition time for the person, and – if a notice has been issued to the provider by the Commissioner under subsection 23(11) – that notice has not yet come into effect.

Subsection 23(4) provides a framework for a secondary student on a formal work experience placement to be able to engage in a risk assessed role without a clearance, during the transitional period in NSW. Under subsection 23(4) a registered NDIS provider may allow a secondary student to do this, but only with appropriate supervision, and while the transitional arrangements are operative for the provider. The appropriate level of supervision is direct supervision by a person who has an acceptable NSW check, if the person has not reached the time when they are required to transition to a clearance under NDIS worker screening legislation (the *transition time*).

Subsection 23(5) deals with what constitutes an acceptable NSW check. An acceptable NSW check is a check described at 23(6), (7) or (8).

Subsection 23(6) allows for the recognition of existing criminal record or police checks, including those previously obtained for the purpose of section 32 of the *Disability Inclusion Act 2014 (NSW)*. A person has an acceptable NSW check if they do not meet the requirements of paragraph 23(8)(a), the person had a criminal check within the last four years and before 1 July 2018, and the police check showed that the person had no conviction for a ‘prescribed criminal offence’ within the meaning of the *Disability Inclusion Act 2014 (NSW)*.

A criminal record check does not have to have been obtained for the purposes of the *Disability Inclusion Act 2014 (NSW)* for it to be an acceptable NSW check. A criminal record or police check does, however, have to meet the minimum requirements for a check under that legislation, for it to meet the requirements of subsection 23(6).

Subsection 23(7) provides for those circumstances where a person does not have a relevant check in place when this instrument commences, or their existing check

expires before 1 July 2019 but after commencement. A person has an acceptable NSW check if the person does not meet the requirements of subsection 23(8)(a), the person had a criminal check within the last two years and between 1 July 2018 and 30 June 2019, and the police check showed that the person had no conviction for a 'prescribed criminal offence' within the meaning of the *Disability Inclusion Act 2014* (NSW).

Subsection 23(8) provides for the recognition of working with children check clearances issued under NSW law. A person has an acceptable NSW check if the risk assessed role the person undertakes means that they engage in child related work within the meaning of the *Child Protection (Working With Children) Act 2012* (NSW), they have been issued with a working with children check under that legislation, and the working with children check is current and operative. This means that if a person would ordinarily be required to obtain a working with children check, that can be recognised as part of the transitional arrangements. If a person is not required to have a working with children check as a result of the duties of their risk assessed role, then a working with children check is not an acceptable NSW check for them. They may, however, hold or be able to obtain an acceptable NSW check within the meaning of subsection 23(6) or (7).

Subsection 23(9) sets out when the transitional arrangements end with respect to a worker or member of other personnel. The transition time for a person is the later of 1 July 2019, or the expiry of an acceptable NSW check which applied to that person on 1 July 2019. After the transition time, a registered NDIS provider may no longer rely on the exception in paragraph 14(b) of this instrument in respect of this worker.

The effect of managing transition by reference to each worker's transition date means that the worker screening impact – for providers and the NDIS worker screening unit – will be distributed over time, to better avoid peaks where a disproportionately large number of workers or other personnel need to be screened at once.

Subsection 23(10) explains when an acceptable NSW check expires. An acceptable NSW check expires at the end of the last day that it meets the requirement of paragraph (6)(b), (7)(b) or (8)(c).

Subsection 23(11) provides the Commissioner with the discretion to make an administrative decision and give a written notice to a particular registered NDIS provider that paragraph 14(b) of this instrument of this instrument no longer applies to that provider from the day specified in the notice. The day specified in the notice must be at least 14 days after the notice is given.

Section 24 – Application – special arrangements SA

Section 24 sets out the transitional arrangements which will apply in South Australia (SA). These recognise protections currently in place for people with disability residing in SA prior to the commencement of this instrument, until SA transitions to the full national policy for NDIS worker screening. The transitional arrangements are based on continuity of current worker screening standards in SA for providers in the immediate term.

Subsection 24(1) explains that the section only applies to a person or entity who is, or has applied to become, a registered NDIS provider, to deliver any class of supports or services to a participant residing in South Australia. It does not apply to any other person or entity.

Subsection 24(2) makes it clear that a registered NDIS provider is complying with the transitional arrangements when delivering services or supports in SA, if that provider complies with this section 24. Complying with transitional arrangements is relevant to whether a registered NDIS provider is subject to an exception to the practice standard prescribed by section 13 of this instrument – see paragraph 14(b). A registered NDIS provider, for example, would be able to allow a staff member to work in a risk assessed role in the period before SA is set up to issue clearances under NDIS worker screening legislation, if it meets the transitional arrangements.

The requirements for complying with the transitional arrangements are stated in subsections 24(3) and (4).

Subsection 24(3) provides that a registered NDIS provider may allow a person to engage in a risk assessed role at a time when the person does not have a clearance if the person has an acceptable SA check, it is before the transition time for the person, and – if a notice has been issued to the provider by the Commissioner under subsection 24(9) – that notice has not yet come into effect.

Subsection 24(4) provides a framework for a secondary student on a formal work experience placement to be able to engage in a risk assessed role without a clearance, during the transitional period in NSW. Under subsection 23(4) a registered NDIS provider may allow a secondary student to do this, but only with appropriate supervision, and while the transitional arrangements are operative for the provider. The appropriate level of supervision is direct supervision by a person who has an acceptable NSW check, if the person has not reached the time when they are required to transition to a clearance under NDIS worker screening legislation (the *transition time*).

Subsection 24(5) deals with what constitutes an acceptable SA check. An acceptable NSW check is a check described at 24(6).

Under subsection 24(6), the instrument recognises two kinds of checks currently conducted under SA law as acceptable SA checks. These are positive assessments made under *the Disability Services Act 1993 (SA)*, or the *Children's Protection Act 1993 (SA)*, at a time when the assessment is current and operative. In the normal course, these assessments are issued for a period of 3 years by the relevant SA government screening unit.

This instrument recognises as acceptable SA checks only actual assessments (checks) conducted by an authorised screening unit under the relevant SA law. It does not recognise as an acceptable SA check, for example, assessments conducted under regulation 6(1)(a) of the *Children's Protection Regulations 2010 (SA)* which are not conducted by an authorised screening unit.

Subsection 24(7) sets out when the transitional arrangements end with respect to a worker or member of other personnel. The transition time for a person is the later of

1 July 2019, or the expiry of an acceptable SA check which applied to that person on 1 July 2019. After the transition time, a registered NDIS provider may no longer rely on the exception in paragraph 14(b) of this instrument in respect of this worker.

The effect of managing transition by reference to each worker's transition date means that the worker screening impact – for providers and the NDIS worker screening unit – will be distributed over time, to better avoid peaks where a disproportionately large number of workers or other personnel need to be screened at once.

Subsection 24(8) makes it clear that an acceptable SA check expires at the end of the last day on which it is current and operative.

Subsection 24(9) provides the Commissioner with the discretion to make an administrative decision and give a written notice to a particular registered NDIS provider that paragraph 14(b) of this instrument no longer applies to that provider from the day specified in the notice. The day specified in the notice must be at least 14 days after the notice is given.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

NATIONAL DISABILITY INSURANCE SCHEME (PRACTICE STANDARDS – WORKER SCREENING) RULES 2018

This 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 this Instrument

This instrument, together with the *National Disability Insurance Scheme (Provider Registration and Practice Standards) Rules 2018*, gives effect to the Commissioner's core function to develop and oversee the broad policy design for a nationally consistent framework to the screening of workers in the NDIS.

This instrument sets out the requirements on all registered NDIS providers in relation to the screening of workers, with the aim of minimising the risk of harm to people with disability from the people working closely with them.

Background

While the primary responsibility for recruiting and providing a safe environment for people with disability rests with employers (including sole traders and self-employed), a worker screening outcome is one source of information that can support employers in fulfilling this responsibility.

The national policy for NDIS worker screening is outlined in an intergovernmental agreement (IGA) and brought into effect through relevant Commonwealth and state and territory legislation and policy guidelines. The Commissioner is responsible for working with all Australian Governments to develop and oversee the broad policy design for a nationally consistent approach to screening of workers delivering supports and services to people with disability (section 181E(f) of the Act).

Under the national policy for NDIS worker screening, people who provide NDIS supports and services through a registered NDIS provider and have more than incidental contact with a person with disability, are involved in the direct delivery of specified services or supports, or are a member of the key personnel of an organisation, will be required to undergo NDIS worker screening.

Human rights implications

The instrument engages the following rights under international human rights law:

- the rights of people with disabilities, especially Article 16 of the *Convention on the Rights of Persons with Disabilities* (CRPD)
- the right to equality and non-discrimination (Article 2) and the right to work (Article 6) of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR).

Rights of people with disability – Article 16 of the CRPD

The instrument promotes the rights of persons with disability consistent with Australia's obligations by ensuring that the supports and services provided through the NDIS are delivered by a suitable workforce.

The instrument supports a nationally consistent approach to worker screening which is an important element of the design of the NDIS and the NDIS Quality and Safeguarding Framework that minimises the risk of harm to people with disability from the people who work closely with them. A nationally consistent and recognised worker screening regime promotes the rights of people with disability by:

- sending a strong signal to the community as a whole about the priority placed on the rights of people with disability to be safe and protected
- reducing the potential for providers to employ workers who pose a high risk of harm to people with disability
- prohibiting those persons, that pose a high risk or are proven to have harmed vulnerable people, from working in the sector
- deterring individuals who pose a high risk of harm from seeking work in the sector.

The instrument sets out Practice Standards that apply to all registered NDIS providers for screening of workers and other personnel, including the requirement to:

- assess all roles and identify risk assessed roles, regardless of whether the duties of the role are performed by a worker or a member of other personnel (such as those engaged through a subcontractor)
- have and maintain a satisfactory written risk management plan for protecting people with disability while a worker or any other personnel is in the process of obtaining a NDIS worker screening clearance
- only allow workers to engage in a risk assessed role if they hold an NDIS worker screening clearance or are subject to limited exceptions set out in the instrument
- only allow a member of other personnel to engage in a risk assessed role if there is an appropriate contract in place with the subcontractor, and the provider has taken reasonable steps to satisfy itself that the member of other personnel has a clearance

- keep records relating to risk assessed roles, records of workers who engage in risk assessed roles, and records relating to the engagement of other personnel.

The instrument promotes the rights of persons with disability consistent with Australia's obligations by ensuring that the paramount consideration of NDIS worker screening is the right of people with disability to live lives free from abuse, violence, neglect and exploitation.

Rights to equality and non-discrimination, and work – Articles 2 and 6 of the ICESCR

Article 2 of the ICESCR provides that rights enunciated within it will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 6 of the ICESCR recognises the right to work and 'includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts'. This right also applies to workers who work with people with disability, including NDIS participants.

The paramount objective of this instrument is to protect people with disability from experiencing harm arising from unsafe supports or services under the NDIS.

Consistent with this objective, worker screening is being introduced for roles with registered NDIS providers that have been identified as requiring particular mitigation of the risk of harm to people with disability. Those roles are called risk assessed roles. Worker screening obligations are not imposed in relation to other roles. This reflects a targeted, measured approach to the risk.

Risk assessed roles fall into three categories. Those categories are roles for which the normal duties involve direct delivery of particular, identified classes of supports or services, delivery of other NDIS supports or services that entails more than incidental contact with a person with disability; or performance of a key executive, management and operational position. A registered NDIS provider will be required to ensure that its workers and other personnel have successfully undergone the necessary screening processes, before allowing them to engage in these kinds of roles. This is a condition of registration as a registered NDIS provider.

This recognises that some NDIS participants are amongst the most vulnerable people in the community and that people with disability have the right to be protected from exploitation, violence and abuse.

Criminal history checks and other forms of pre-employment screening are conducted as a matter of routine for a range of occupations to allow employers to make recruitment decisions which support a safe and secure workplace for workers and people with disability.

However, governments recognise that some individuals, by virtue of their history, have valuable lived experiences to share with people with disability accessing NDIS supports and services. It is recognised that people with lived experience who have committed an offence or misconduct in the past can make significant changes in their lives.

The NDIS Commission will work with all governments to put in place a nationally consistent, risk-based decision-making framework for considering a person's criminal history and patterns of behaviour over time to guard against the unreasonable exclusion of people who have committed an offence or misconduct from working in the disability sector, where this is not relevant to their potential future risk to people with disability.

Under the national policy for NDIS worker screening, states and territories will provide certain review and appeal rights to individual workers who may be subject to an adverse decision. Individuals can seek a review of an adverse decision, consistent with the principles of natural justice and procedural fairness. Where there is an intention to make an adverse decisions, states and territories will disclose the reason the adverse decision is proposed, except where the NDIS worker screening units is required under Commonwealth, State or Territory law to refuse to disclose the information; allow the individual a reasonable opportunity to be heard; and consider the individual's response before finalising the decision.

The instrument supports a proportionate approach to safeguards that does not unduly prevent a person from choosing to work in the NDIS market, but ensures the risk of harm to people with disability is minimised, by excluding workers whose behavioural history indicates they pose a risk to certain services and supports.

Conclusion

The *National Disability Insurance Scheme (Practice Standards – Worker Screening) Rules 2018* 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. To the extent the Instrument impinges on the human rights of workers, the impositions are reasonable, necessary and proportionate to achieving the protection of people with disability and confidence in the safety of the NDIS market, thereby ensuring the long-term integrity and sustainability of the NDIS.

Graeme Head, Commissioner of the NDIS Quality and Safeguards Commission