

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) Amendment Rules 2019

Purpose

The *National Disability Insurance Scheme (Practice Standards – Worker Screening) Amendment Rules 2019* (the Instrument) are made for the purposes of subsection 73T(1) of the Act. Subsection 73T(1) enables rules to be made to establish NDIS Practice Standards relating to the screening of workers employed or otherwise engaged by registered NDIS providers under the *National Disability Insurance Scheme Act 2013* (the Act).

The Instrument amends the *National Disability Insurance Scheme (Practice Standards – Worker Screening) Rules 2018* (the Rules).

The amendments establish special arrangements for screening of workers in States and Territories that apply from when they become participating jurisdictions under the Act on 1 July 2019 until they have moved to full implementation of the national NDIS worker screening system described below. The jurisdictions concerned are the Australian Capital Territory (ACT), the Northern Territory (NT), Queensland, Tasmania and Victoria.

The amendments make minor changes to the special arrangements that already exist in the Rules for the screening of workers in States that became participating jurisdictions on 1 July 2018 until those jurisdictions have moved to full implementation of the NDIS worker screening system. The jurisdictions concerned are New South Wales (NSW) and South Australia (SA).

The amendments also make other changes to the Rules to take account of the fact some participating jurisdictions are what are sometimes referred to as ‘no card, no start’ jurisdictions. The amendments ensure that provisions that enable a person who has applied for a clearance under the NDIS worker screening system to be engaged in certain roles pending the outcome of that application do not apply if the person has applied for the clearance in a ‘no card, no start’ jurisdiction.

Authority for making the Instrument

The Instrument is made under section 209 of the Act construed in accordance with subsection 33(3) of the *Acts Interpretation Act 1901*.

Section 209 of the Act provides that the Minister (the Minister for Social Services) may, by legislative instrument, make rules (NDIS rules) prescribing matters required or permitted by the Act to be prescribed or which are necessary or convenient to be prescribed in order to carry out or give effect to the Act. As enabled by section 201A of the Act, the Minister has delegated to the Commissioner of the NDIS Quality and Safeguards Commission (the Commissioner) the making of rules for the purposes of subsection 73T(1) of the Act.

Subsection 33(3) of the *Acts Interpretation Act 1901* states:

Where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by-laws) the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.

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

Commencement

This Instrument commences on 1 July 2019.

Background

The NDIS worker screening system is a national system being implemented through the cooperative efforts of the Commonwealth, States and Territories in accordance with 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.

The national system includes 'NDIS worker screening units' being established in each State and Territory under the legislation of that State or Territory. These units will be responsible for conducting 'NDIS worker screening checks' – assessments of whether a person who works, or seeks to work, in certain roles with a person with disability poses a risk to such a person. If the person is assessed as not posing an unacceptable risk the outcome will be a clearance. If the person is assessed as posing an unacceptable risk the outcome will be an exclusion.

A clearance issued under the NDIS worker screening legislation of one jurisdiction will be portable across participating jurisdictions. In other words, they will be able to be relied on in other participating jurisdictions.

In this Explanatory Statement all references to a 'clearance' are to a clearance under the NDIS worker screening legislation of a jurisdiction.

NDIS Practice Standards relating to the screening of workers employed or otherwise engaged by registered NDIS providers are part of the NDIS worker screening system. The Rules establish those standards. They are some of the NDIS Practice Standards with which registered NDIS providers must comply as a condition of registration (see paragraph 73F(2)(c) of the Act). Applicants for registration as a registered NDIS provider must be assessed as meeting applicable NDIS Practice Standards in order to be registered (see paragraph 73E(1)(c) of the Act). (Other NDIS Practice Standards are prescribed in the *National Disability Insurance Scheme (Provider Registration and Practice Standards) Rules 2018*.)

The Rules commenced on 1 July 2018 and apply only to participating jurisdictions under the Act. During the period from 1 July 2018 to 30 June 2019 only NSW and SA were participating jurisdictions. On 1 July 2019 the ACT, the NT, Queensland, Tasmania and Victoria also become participating jurisdictions. (It is intended that Western Australia become a participating jurisdiction on 1 July 2020.)

The standards in the Rules relate, in particular, to screening of people to engage in what the Rules refer to as a 'risk assessed role' in a participating jurisdiction. A 'risk assessed role' is:

- a 'key personnel role' of a person or an entity (as defined by section 11A of the Act);
- a role for which the normal duties include the direct delivery of 'specified supports' or 'specified services' (as defined by sections 5 and 7 of the Rules) to a person with disability; or
- a role for which the normal duties are likely to require more than incidental contact (as defined by section 6 of the Rules) with a person with disability.

The 'specified supports' and 'specified services' are the supports and services in a list published by the Commissioner for the purposes of these provisions. The list is published on www.ndiscommission.gov.au.

Part 2 of the Rules:

- Requires registered NDIS providers to assess all roles in which their workers and other personnel will engage and identify each one that is a risk assessed role (section 11 of the Rules).
- Requires registered NDIS providers to develop and maintain a risk management plan for protecting people with disability while a worker or other personnel is in the process of obtaining a clearance (section 12 of the Rules).
- Precludes a registered NDIS provider allowing a worker to engage in a risk assessed role unless the worker has a clearance (section 13 of the Rules).
- Precludes a registered NDIS provider allowing a member of other personnel to engage in a risk assessed role unless the provider has, among other steps:
 - taken reasonable steps to be satisfied that the member has a clearance and
 - entered into a contract with the person or entity that made the services of the other personnel available, being a contract that imposes particular obligations concerning clearances (section 13 of the Rules).
- Authorises a registered NDIS provider, in certain circumstances, to allow a person to engage in a risk assessed role even though the person does not have a clearance (section 14 of the Rules).

Most significantly, in the context of the Instrument, these circumstances include where the provider is subject to 'transitional arrangements' and is complying with them. The transitional arrangements give effect to the staged implementation of the national policy for NDIS worker screening, described in Part 12 – Transfer of the Agreement.

Part 4 of the Rules specifies transitional arrangements that apply to the delivery of supports or services to NDIS participants in NSW (section 23) and SA (section 24). These transitional arrangements recognise the protections in place for people with disability residing in NSW and SA prior to the commencement of the Rules and are based on continuity of those protections as worker screening standards in those States until their full implementation of the national policy for NDIS worker screening.

Part 3 of the Rules requires a registered NDIS provider to keep, for 7 years, certain records about:

- the roles with the provider that are risk assessed roles
- the workers who engage in those roles, and
- any contract that the provider has (as required by section 13 of the Rules) with a person or entity that made the services of the other personnel available.

Consultation

The Instrument is an NDIS rule for the purposes of the Act. Section 209 of the Act divides NDIS rules into four categories. Subsection 209(8) of the Act prescribes certain categories of NDIS rules to be 'Category B' rules. The provisions in the Instrument are Category B rules because they make 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.

A Category B rule that relates to an area, law or program of a host jurisdiction cannot be made unless the host jurisdiction has agreed to the making of the rule (see subsection 209(5) of the Act and the definition of 'host jurisdiction' in section 9 of the Act). In compliance with this requirement, prior to making this Instrument the Commissioner (as the Minister's delegate) obtained agreement to the Instrument from the ACT, NSW, the NT, Queensland, SA, Tasmania and Victoria.

Regulatory Impact Statement (RIS)

Implementation of a national NDIS 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 in the Instrument

Section 1 - Name

Section 1 provides that the Instrument is titled the *National Disability Insurance Scheme (Practice Standards – Worker Screening) Amendment Rules 2019*.

Section 2 – Commencement

Section 2 provides that the Instrument commences on 1 July 2019.

Section 3 – Authority

Section 3 provides that the Instrument is made under the Act.

Section 4 – Schedules

Section 4 has the effect of amending the Rules as set out in Schedule 1 to the Instrument.

Schedule 1 – Amendments

Item 1*

This amendment inserts section 14A into the Rules. Section 14A relates to section 14 of the Rules, which provides exceptions to the prohibition in section 13 of a registered NDIS provider allowing a worker or other personnel without a clearance to engage in a risk assessed role.

Section 14A relates in particular to the exception in paragraph 14(a), which applies where the person (i.e. the worker or other personnel):

*References in this Explanatory Statement to an 'item' are references to an item in Schedule 1 to the Instrument.

- (i) is in the process of obtaining a clearance (as defined by section 5); and
- (ii) is appropriately supervised by a person with a clearance; and
- (iii) the provider is implementing a risk management plan in accordance with Division 3 of Part 2 of the Rules; and
- (iv) the law of the participating jurisdiction in which the person provides services to a participant allows the person to engage in a risk assessed role while that person is in the process of obtaining a clearance.

Subsection 14A(1) disapplies the exception in paragraph 14(a) where:

- (a) the person has submitted an application for a clearance to an NDIS worker screening unit; and
- (b) the law of the jurisdiction in which the application was submitted prohibits a person from engaging in a risk assessed role while in the process of obtaining a clearance; and
- (c) the person does not have an 'acceptable check that applies in that jurisdiction'; and
- (d) a decision has not been made on the application.

A person has an acceptable check that applies in the jurisdiction if, in summary, the transitional arrangements that apply in that jurisdiction authorise the registered NDIS provider to allow the person to engage in a risk assessed role despite the person not having a clearance (subsection 14A(2)). The transitional arrangements for NSW and SA are set out in sections 23 and 24, respectively, of the Rules. The Instrument makes minor changes to those arrangements and adds transitional arrangements for the ACT, the NT, Queensland, Tasmania and Victoria. The transitional arrangements are described below.

Items 2 and 3

These amendments relate to the references in paragraph 14(a) of the Rules to a person being in the process of obtaining a clearance.

Subsection 15(1) of the Rules states that 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(3) lists what needs to have occurred for a person's application for a clearance to be a complete application for the purposes of the Rules. The amendments:

- add to that list that a registered NDIS provider has confirmed to the NDIS worker screening unit concerned that the person is, or intends to be, a worker of that provider; and
- add subsection 15(4), which requires the confirmation to be given in accordance with any applicable requirements of the NDIS worker screening legislation of the jurisdiction in which the application has been submitted.

Items 4 – 7: arrangements for NSW

These amendments concern the transitional arrangements in section 23 of the Rules. The arrangements apply to a person or entity that has applied to be, or is, registered as a registered NDIS provider to deliver any class of support or service to a participant residing in NSW.

A registered NDIS provider who is complying with these arrangements in relation to a person whom they want to engage in a risk assessed role will come within the exception in paragraph 14(b) of the Rules. The exception has the effect of enabling the provider to allow the person to engage in that role even though the person does not have a clearance.

The NSW transitional arrangements specify two sets of circumstances in which 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. The two sets of circumstances are specified in, respectively, subsections 23(3) and (4) of the Rules.

The Instrument does not amend subsection 23(4), which concerns a secondary school student on a formal work experience placement with a registered NDIS provider. The Instrument does, however, affect subsection 23(3).

The circumstances specified in subsection 23(3) are that:

- (a) the person has ‘an acceptable NSW check’; and
- (b) it is before the ‘transition time’ for the person (as defined by subsection 23(9)); and
- (c) if a notice has been issued to the provider by the Commissioner under subsection 23(11) – that notice has not yet come into effect.

The notice under subsection 23(11) informs the provider that paragraph 14(b) of the Rules no longer applies to the provider from the day specified in the notice, which must be at least 14 days after the notice is given.

Item 6 of the Instrument amends paragraphs 23(9)(a) and (b) of the Rules, which defines the ‘transition time’ for a person – a concept used in paragraph 23(3)(b). The amendments change the year referred to in those paragraphs from 2019 to 2020. The effect is to provide the potential for a registered NDIS provider to rely on an ‘acceptable NSW check’ of a person to satisfy the criterion in paragraph 23(3)(a) for one year longer than the provider could have relied on this prior to the amendments.

Subsections 23(6), (7) and (8) of the Rules each set out different circumstances in which a person would have ‘an acceptable NSW check’.

One of the criteria to be met in order for a person to have an acceptable NSW check under subsection 23(7) is that the person had a criminal record check done at a time that was within the last two years and ‘between 1 July 2018 and 30 June 2019’ (paragraph 23(7)(b)).

One of the criteria to be met in order for a person to have an acceptable NSW check under subsection 23(8) is that ‘prior to 1 July 2019’ the person was issued with a working with children check clearance or a clearance within the meaning of the *Child Protection (Working With Children) Act 2012* (NSW) (paragraph 23(8)(b)).

The amendments made by items 4 and 5 of the Instrument, respectively, replace:

- 'between 1 July 2018 and 30 June 2019' in paragraph 23(7)(b) and
- 'prior to 1 July 2019' in paragraph 23(8)(b)

with, respectively, 'during the transition period' and 'before or during the transition period'.

The amendment made by item 7 of the Instrument is the insertion of a new provision – subsection 23(12) – which defines 'transition period' as the period:

- (a) starting on 1 July 2018; and
- (b) ending on the earlier of the following two days: (i) 30 June 2020 and (ii) the day that the Minister gives notice under section 30 that the NDIS worker screening unit is operational in NSW.

The end of the 'transition period' is defined in the same way as it is defined for the other participating jurisdictions whose arrangements are being added to the Rules by the Instrument.

Section 30 is a new provision inserted into the Rules by item 11 of the Instrument. It enables the Minister, by notifiable instrument, to give notice that the NDIS worker screening unit for a State or Territory is operational in that State or Territory, with the agreement of that State or Territory.

The combined effect of the amendments is to provide the potential for reliance on:

- a criminal record check done as late as 30 June 2020 to satisfy the criterion in paragraph 23(7)(b) and
- a working with children check clearance or a clearance within the meaning of the *Child Protection (Working With Children) Act 2012* (NSW) issued as late as 30 June 2020 to satisfy the criterion in paragraph 23(8)(b).

This is one year longer than under section 23 of the Rules as in force prior to amendment by the Instrument.

Items 8 – 10: arrangements for SA

These amendments concern the transitional arrangements in section 24 of the Rules. The arrangements apply to a person or entity that has applied to be, or is, registered as a registered NDIS provider to deliver any class of support or service to a participant residing in SA.

A registered NDIS provider who is complying with these arrangements in relation to a person whom they want to engage in a risk assessed role will come within the exception in paragraph 14(b) of the Rules. The exception has the effect of enabling the provider to allow the person to engage in that role even though the person does not have a clearance.

The transitional arrangements for SA specify two sets of circumstances in which 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. The two sets of circumstances are specified in, respectively, subsections 24(3) and (4) of the Rules.

The Instrument does not amend subsection 24(4), which concerns a secondary school student on a formal work experience placement with a registered NDIS provider. The Instrument does, however, affect subsection 24(3).

The circumstances specified in subsection 24(3) are that:

- (a) the person has ‘an acceptable SA check’; and
- (b) it is before the ‘transition time’ for the person (as defined by subsection 24(7)); and
- (c) if a notice has been issued to the provider by the Commissioner under subsection 24(9) – that notice has not yet come into effect.

The notice under subsection 24(9) informs the provider that paragraph 14(b) of the Rules no longer applies to the provider from the day specified in the notice, which must be at least 14 days after the notice is given.

Item 9 of the Instrument amends paragraphs 24(7)(a) and (b) of the Rules, which define the ‘transition time’ for a person – a concept used in paragraph 24(3)(b). The amendments change the year referred to in those paragraphs from 2019 to 2020. The effect is to provide the potential for a registered NDIS provider to rely on an ‘acceptable SA check’ of a person to satisfy the criterion in paragraph 24(3)(a) for one year longer than the provider could have relied on this prior to the amendments.

Subsection 24(6) of the Rules sets out the circumstances in which a person would have ‘an acceptable SA check’.

The criteria to be met in order for a person to have an acceptable SA check include those in paragraph 24(6)(a), namely that the person has been subject to an assessment:

- (i) within the meaning of section 5B of the *Disability Services Act 1993* (SA), at which time the authorised screening unit made a finding to the effect that the person was cleared for disability services employment, or
- (ii) within the meaning of section 8B of the *Children’s Protection Act 1993* (SA), at which time the authorised screening unit made a finding to the effect that the person was cleared for child-related employment.

(‘Authorised screening unit’ and ‘child-related employment screening’ are terms defined under the *Children’s Protection Act 1993* (SA).)

Items 8 and 10 of the Instrument, respectively:

- amend paragraph 24(6)(a) so that the person has to have been subject to the assessment referred to in that paragraph ‘before or during the transition period’ and
- insert a new provision – subsection 24(10) – which defines ‘transition period’ as the period:
 - (a) starting on 1 July 2018; and

- (b) ending on the earlier of the following two days: (i) 30 June 2020 and (ii) the day that the Minister gives notice under section 30 that the NDIS worker screening unit is operational in SA.

As noted above:

- the end of 'transition period' is defined in the same way as it is defined for the other participating jurisdictions whose arrangements are being added to the Rules by the Instrument and
- section 30 is inserted into the Rules by item 11 of the Instrument.

The combined effect of the amendments are:

- to make it clear that an assessment described in subparagraph 24(6)(a)(i) or (ii) that was done before 1 July 2018 can be relied on in establishing that a person has an acceptable SA check but
- to preclude reliance on such an assessment if it is done after the earlier of 30 June 2020 and the day notice is given by the Minister under section 30.

Item 11: arrangements for Victoria, Queensland, Tasmania, ACT and NT

Item 11 of the Instrument inserts sections 25 to 30 into the Rules. Sections 25 to 29 set out the arrangements that apply to a person or entity that has applied to be, or is, registered as a registered NDIS provider to deliver any class of support or service to a participant residing in the States and Territories that will become participating jurisdictions under the NDIS on 1 July 2019.

A registered NDIS provider who, with respect to a person whom they want to engage in a risk assessed role in one of these jurisdictions, is complying with the arrangements that apply in that jurisdiction will come within the exception in paragraph 14(b) of the Rules. The exception has the effect of enabling the provider to allow the person to engage in that role even though the person does not have a clearance.

New section 25 sets out the arrangements for Victoria.

Section 25 specifies:

- in subsections 25(3) and (4) two sets of circumstances in which a registered NDIS provider may *during* the 'transition period' allow a person to engage in a risk assessed role in Victoria at a time when the person does not have a clearance, and
- in subsections 25(5) and (6) two sets of circumstances in which a registered NDIS provider may do this *after* the 'transition period'.

The 'transition period' is defined by subsection 25(8) as the period:

- (a) starting on 1 July 2019; and
- (b) ending on the earlier of the following two days: (i) 30 June 2020 and (ii) the day that the Minister gives notice under section 30 that the NDIS worker screening unit is operational in Victoria.

The arrangements that the Instrument adds to the Rules for other participating jurisdictions also include the concept of a 'transition period' and define it in the same way (except that

they refer to the jurisdiction to which the particular arrangements relate rather than to Victoria).

As noted above, section 30 is inserted into the Rules by item 11 of the Instrument.

The circumstances under subsection 25(3) are that:

- (a) it is during the transition period; and
- (b) the provider is compliant (in relation to the person concerned) with the safety screening requirements in accordance with the safety screening policy issued by the Victorian Department of Health and Human Services and as in force from time to time; and
- (c) the person's safety screening is current in accordance with the requirements; and
- (d) a notice (if any) issued to the provider by the Commissioner pursuant to subsection 25(7) has not come into effect.

The safety screening policy issued by the Victorian Department of Health and Human Services as in force at the commencement of the Instrument is entitled *Victorian Safety Screening Policy – For registered NDIS providers operating in Victoria, July 2019* and is proposed to be published on the website of that Department.

The notice under subsection 25(7) informs the provider that paragraph 14(b) of the Rules no longer applies to the provider from the day specified in the notice, which must be at least 14 days after the notice is given.

The circumstances under subsection 25(4) are that:

- (a) it is during the transition period; and
- (b) the person is a secondary school student on a formal work experience placement with the provider; and
- (c) the person is directly supervised by a person who meets the requirements of paragraphs 25(3)(b) and (c); and
- (d) a notice (if any) issued to the provider by the Commissioner pursuant to subsection 25(7) has not come into effect.

The circumstances under subsection 25(5) are that:

- (a) it is after the transition period; and
- (b) before the end of the transition period, the provider was compliant (in relation to the person concerned) with the safety screening requirements in accordance with the safety screening policy issued by the Victorian Department of Health and Human Services and as in force from time to time; and

- (c) the person's safety screening is current in accordance with the requirements; and
- (d) any of the following apply:
 - (i) the person has a current working with children check (within the meaning of the *Working with Children Act 2005* (Vic)) that was issued to the person before the end of the transition period;
 - (ii) less than 6 months have elapsed since the end of the transition period;
 - (iii) 6 months or more have elapsed since the end of the transition period and the person is in the process of obtaining a clearance (within the meaning of section 15); and
 - (iv) a notice (if any) issued to the provider by the Commissioner pursuant to subsection 25(7) has not come into effect.

The circumstances under subsection 25(6) are that:

- (a) it is after the transition period; and
- (b) the person is a secondary school student on a formal work experience placement with the provider; and
- (c) the person is directly supervised by a person who meets the requirements of paragraphs 25(5)(b), (c) and (d); and
- (d) a notice (if any) issued to the provider by the Commissioner pursuant to subsection 25(7) has not come into effect.

New section 26 sets out the arrangements for Queensland.

Section 26 specifies:

- in subsection 26(3) one set of circumstances in which a registered NDIS provider may *during* the 'transition period' allow a person to engage in a risk assessed role in Queensland at a time when the person does not have a clearance, and
- in subsections 26(4) and (6) two sets of circumstances in which a registered NDIS provider may do this *after* the 'transition period'.

As noted above, the 'transition period' is defined by subsection 26(8) in the same way that it is defined for the other participating jurisdictions whose arrangements are being added to the Rules by the Instrument. It is the period:

- (a) starting on 1 July 2019; and
- (b) ending on the earlier of the following two days: (i) 30 June 2020 and (ii) the day that the Minister gives notice under section 30 that the NDIS worker screening unit is operational in Queensland.

As noted above, section 30 is inserted into the Rules by item 11 of the Instrument.

The circumstances under subsection 26(3) are that:

- (a) it is during the transition period; and
- (b) any of the following apply:
 - (i) the person concerned meets the requirements specified in Part 5 of the *Disability Services Act 2006* (Qld) in relation to screening of persons engaged to provide services to people with disability;
 - (ii) the person meets the requirements specified in the *Working with Children (Risk Management and Screening) Act 2000* (Qld) in relation to screening for regulated employment or regulated businesses;
 - (iii) the person engages in the risk assessed role in the person's capacity as a registered health practitioner (within the meaning of the *Health Practitioner Regulation National Law 2009* (Qld)) and the person has a certificate of registration (within the meaning of that Act); and
- (c) a notice (if any) issued to the provider by the Commissioner pursuant to subsection 26(7) has not come into effect

The notice under subsection 26(7) informs the provider that paragraph 14(b) of the Rules no longer applies to the provider from the day specified in the notice, which must be at least 14 days after the notice is given.

The circumstances under subsection 26(4) are that:

- (a) it is after the transition period; and
- (b) immediately before the end of the transition period, the person satisfied subparagraph 26(3)(b); and
- (c) it is before the transition time for the person; and
- (d) a notice (if any) issued to the provider by the Commissioner pursuant to subsection 26(7) has not yet come into effect.

Subsection 26(5) defines a person's 'transition time' as the expiry of the relevant notice or certificate that the person held immediately before the end of the transition period.

The circumstances under subsection 26(6) are that:

- (a) it is after the transition period; and
- (b) the person is a secondary school student on a formal work experience placement with the provider; and
- (c) the person is directly supervised by a person who meets the requirements of paragraphs 26(4)(b) and (c); and
- (d) a notice (if any) issued to the provider by the Commissioner pursuant to subsection 26(7) has not come into effect.

New section 27 sets out the arrangements for Tasmania.

Section 27 specifies:

- in subsections 27(3) and (4) two sets of circumstances in which a registered NDIS provider may *during* the 'transition period' allow a person to engage in a risk assessed role in Tasmania at a time when the person does not have a clearance, and
- in subsections 27(5) and (7) two sets of circumstances in which a registered NDIS provider may do this *after* the 'transition period'.

The 'transition period' is defined by subsection 27(9) in the same way that it is defined for the other participating jurisdictions whose arrangements are being added to the Rules by the Instrument. It is the period:

- (a) starting on 1 July 2019; and
- (b) ending on the earlier of the following two days: (i) 30 June 2020 and (ii) the day that the Minister gives notice under section 30 that the NDIS worker screening unit is operational in Tasmania.

As noted above, section 30 is inserted into the Rules by item 11 of the Instrument.

The circumstances under subsection 27(3) are that:

- (a) it is during the transition period; and
- (b) the person concerned is registered to engage in a regulated activity under the *Registration to Work with Vulnerable People Act 2013* (Tas.); and
- (c) the registration is in terms that allow the person to engage in the role concerned; and
- (d) a notice (if any) issued to the provider by the Commissioner pursuant to subsection 27(8) has not yet come into effect.

The notice under subsection 27(8) informs the provider that paragraph 14(b) of the Rules no longer applies to the provider from the day specified in the notice, which must be at least 14 days after the notice is given.

The circumstances under subsection 27(4) are that:

- (a) it is during the transition period; and
- (b) the person is a secondary school student on a formal work experience placement with the provider; and
- (c) the person is directly supervised by a person who meets the requirements of paragraphs 27(3)(b) and (c); and
- (d) a notice (if any) issued to the provider by the Commissioner pursuant to subsection 27(8) has not yet come into effect.

The circumstances under subsection 27(5) are that:

- (a) it is after the transition period; and
- (b) immediately before the end of the transition period, the person met the requirements of paragraphs 27(3)(b) and (c); and
- (c) it is before the 'transition time' for the person (as defined by subsection 27(6)); and
- (d) a notice (if any) issued to the provider by the Commissioner pursuant to subsection 27(8) has not yet come into effect.

Subsection 27(6) defines a person's 'transition time' as the earlier of:

- (a) 3 years after the person was registered to engage in a regulated activity under the *Registration to Work with Vulnerable People Act 2013* (Tas.); and
- (b) the expiry of the registration that the person held immediately before the end of the transition period.

The circumstances under subsection 27(7) are that:

- (a) it is after the transition period; and
- (b) the person is a secondary school student on a formal work experience placement with the provider; and
- (c) the person is directly supervised by a person who meets the requirements of paragraphs 27(5)(b) and (c); and
- (d) a notice (if any) issued to the provider by the Commissioner pursuant to subsection 27(8) has not yet come into effect.

New section 28 sets out the arrangements for the ACT.

Section 28 specifies:

- in subsections 28(3) and (4) two sets of circumstances in which a registered NDIS provider may *during* the 'transition period' allow a person to engage in a risk assessed role in the ACT at a time when the person does not have a clearance, and
- in subsections 28(5) and (7) two sets of circumstances in which a registered NDIS provider may do this *after* the 'transition period'.

The 'transition period' is defined by subsection 28(9) in the same way that it is defined for the other participating jurisdictions whose arrangements are being added to the Rules by the Instrument. It is the period:

- (a) starting on 1 July 2019; and
- (b) ending on the earlier of the following two days: (i) 30 June 2020 and (ii) the day that the Minister gives notice under section 30 that the NDIS worker screening unit is operational in the ACT.

As noted above, section 30 is inserted into the Rules by item 11 of the Instrument.

The circumstances under subsection 28(3) are that:

- (a) it is during the transition period; and
- (b) the person concerned is registered to engage in a regulated activity under the *Working with Vulnerable People (Background Checking) Act 2011* (ACT); and
- (c) the registration is in terms that allow the person to engage in the role concerned; and
- (d) a notice (if any) issued to the provider by the Commissioner pursuant to subsection 28(8) has not yet come into effect.

The notice under subsection 28(8) informs the provider that paragraph 14(b) of the Rules no longer applies to the provider from the day specified in the notice, which must be at least 14 days after the notice is given.

The circumstances under subsection 28(4) are that:

- (a) it is during the transition period; and
- (b) the person is a secondary school student on a formal work experience placement with the provider; and
- (c) the person is directly supervised by a person who meets the requirements of paragraphs 28(3)(b) and (c); and
- (d) a notice (if any) issued to the provider by the Commissioner pursuant to subsection 28(8) has not yet come into effect.

The circumstances under subsection 28(5) are that:

- (a) it is after the transition period; and
- (b) immediately before the end of the transition period, the person met the requirements of paragraphs 28(3)(b) and (c); and
- (c) it is before the 'transition time' for the person (as defined by subsection 28(6)); and
- (d) a notice (if any) issued to the provider by the Commissioner pursuant to subsection 28(8) has not yet come into effect.

Subsection 28(6) defines a person's 'transition time' as the earlier of:

- (a) 3 years after the person is registered under the *Working with Vulnerable People (Background Checking) Act 2011* (ACT); and
- (b) the expiry of the registration that the person held immediately before the end of the transition period.

The circumstances under subsection 28(7) are that:

- (a) it is after the transition period; and
- (b) the person is a secondary school student on a formal work experience placement with the provider; and
- (c) the person is directly supervised by a person who meets the requirements of paragraphs 28(5)(b) and (c); and
- (d) a notice (if any) issued to the provider by the Commissioner pursuant to subsection 28(8) has not yet come into effect.

New section 29 sets out the arrangements for the NT.

Section 29 specifies:

- in subsections 29(3) and (4) two sets of circumstances in which a registered NDIS provider may *during* the 'transition period' allow a person to engage in a risk assessed role in the NT at a time when the person does not have a clearance, and
- in subsections 29(5) and (7) two sets of circumstances in which a registered NDIS provider may do this *after* the 'transition period'.

The 'transition period' is defined by subsection 29(9) in the same way that it is defined for the other participating jurisdictions whose arrangements are being added to the Rules by the Instrument. It is the period:

- (a) starting on 1 July 2019; and
- (b) ending on the earlier of the following two days: (i) 30 June 2020 and (ii) the day that the Minister gives notice under section 30 that the NDIS worker screening unit is operational in the NT.

As noted above, section 30 is inserted into the Rules by item 11 of the Instrument.

The circumstances under subsection 29(3) are that:

- (a) it is during the transition period; and
- (b) the person concerned has a clearance notice granted under the *Care and Protection of Children Act 2007* (NT) that is in force; and
- (c) the clearance notice is in terms that allow the person to engage in the role concerned; and
- (d) a notice (if any) issued to the provider by the Commissioner pursuant to subsection 29(8) has not yet come into effect.

The notice under subsection 29(8) informs the provider that paragraph 14(b) of the Rules no longer applies to the provider from the day specified in the notice, which must be at least 14 days after the notice is given.

The circumstances under subsection 29(4) are that:

- (a) it is during the transition period; and
- (b) the person is a secondary school student on a formal work experience placement with the provider; and
- (c) the person is directly supervised by a person who meets the requirements of paragraphs 29(3)(b) and (c); and
- (d) a notice (if any) issued to the provider by the Commissioner pursuant to subsection 29(8) has not yet come into effect.

The circumstances under subsection 29(5) are that:

- (a) it is after the transition period; and
- (b) immediately before the end of the transition period, the person met the requirements of paragraphs 29(3)(b) and (c); and
- (c) it is before the 'transition time' for the person (as defined by subsection 29(6)); and
- (d) a notice (if any) issued to the provider by the Commissioner pursuant to subsection 29(8) has not yet come into effect.

Subsection 29(6) defines a person's 'transition time' as the earlier of:

- (a) 2 years after the person was given a clearance notice under the *Care and Protection of Children Act 2007* (NT); and
- (b) the expiry of the clearance notice that the person held immediately before the end of the transition period.

The circumstances under subsection 29(7) are that:

- (a) it is after the transition period; and
- (b) the person is a secondary school student on a formal work experience placement with the provider; and
- (c) the person is directly supervised by a person who meets the requirements of paragraphs 29(5)(b) and (c); and
- (d) a notice (if any) issued to the provider by the Commissioner pursuant to subsection 29(8) has not yet come into effect.

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) AMENDMENT RULES 2019

The *National Disability Insurance Scheme (Practice Standards – Worker Screening) Amendment Rules 2019* (the Instrument) is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Instrument

The Instrument amends the *National Disability Insurance Scheme (Practice Standards – Worker Screening) Rules 2018* (the Rules).

The Rules give effect to the NDIS 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.

The Rules set out the requirements for 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.

Under the *Intergovernmental Agreement on Nationally Consistent Worker Screening for the Disability Insurance Scheme* (the Agreement) the parties recognised that the national NDIS worker screening scheme is to be implemented incrementally over time. To support this approach, the Rules establish special arrangements for screening of workers in participating jurisdictions until they have moved to full implementation of NDIS worker screening. They do so on a basis designed to ensure the safety of people with disability and a smooth transition for workers and providers under the NDIS.

Consistent with this approach, the Instrument amends the Rules to establish special arrangements for screening of workers in States and Territories that apply from when they become participating jurisdictions under the Act on 1 July 2019 until they have moved to full implementation of the national NDIS worker screening system. It also makes minor changes to the special arrangements that already apply for the screening of workers in States that became participating jurisdictions on 1 July 2018 until those jurisdictions have moved to full implementation of the NDIS worker screening system.

The Instrument also make other changes to the Rules to take account of the fact some participating jurisdictions are what are sometimes referred to as 'no card, no start' jurisdictions. The amendments ensure that provisions that would enable an applicant for a clearance under the NDIS worker screening system to be engaged in certain roles pending the outcome of that application do not apply in certain circumstances.

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 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 (paragraph 181E(f) of the Act).

Human rights implications

The Rules as amended by the Instrument engage 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 Rules as amended by the Instrument promote 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 Rules as amended by the Instrument support 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, and
- deterring individuals who pose a high risk of harm from seeking work in the sector.

The Rules as amended by the Instrument set out NDIS 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
- 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

- only allow a member of other personnel to engage in a risk assessed role if there is an appropriate contract in place with the person who has made the services of those personnel available to the provider, and the provider has taken reasonable steps to satisfy itself that the member of other personnel has a clearance, and
- 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 Rules as amended by the Instrument promote 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 the Rules as amended by the 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 required 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 is 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 works 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 will be able to 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 decision, States and Territories will disclose the reason why 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) Amendment Rules 2019 advance 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 they impinge 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