

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 (Provider Registration and Practice Standards) Amendment (2019 Measures No. 1) Rules 2019

Purpose

The *National Disability Insurance Scheme (Provider Registration and Practice Standards) Amendment (2019 Measures No. 1) Rules 2019* (the Instrument) are made pursuant to paragraphs 73E(1)(d) and (e), section 73H and subsection 73T(1) of the *National Disability Insurance Scheme Act 2013* (the Act).

The Instrument amends the *National Disability Insurance Scheme (Provider Registration and Practice Standards) Rules 2018* (the Rules).

The amendments to the Rules contained in the Instrument concern the quality audit process to be used for persons applying to the NDIS Quality and Safeguards Commission (the NDIS Commission) to be a registered NDIS provider and to assess ongoing compliance of registered NDIS providers with applicable quality standards.

The Rules specify, for each class of supports for which a provider has applied to be registered to provide, the applicable quality standards to be assessed by an approved quality auditor and the method of assessment. The assessment method is either certification (applying to higher-risk services and supports) or verification (applying to lower-risk services and supports).

The Instrument reduces regulatory burden by removing particular audit requirements that apply to applicants or registered NDIS providers that are bodies corporate, irrespective of the classes of supports and services being provided. This amendment enables such providers that are delivering lower-risk and less complex supports and services to consistently attract a verification assessment method and be assessed against relevant quality standards. It addresses the risk of those providers choosing not to register or leaving the National Disability Insurance Scheme (NDIS) market entirely. The loss of small to medium sized businesses and sole providers that operate as bodies corporate from the NDIS market due to disproportionate regulatory burden would have the effect of limiting the choice and control of NDIS participants.

The Instrument also clarifies the proportionate nature of the assessment to be carried out by approved quality auditors.

These amendments concern the method of assessment and applicable standards relevant to a provider that has applied for registration as a registered NDIS provider. The amendments

to the Rules contained in the Instrument do not change the obligations of registered NDIS providers to comply with the NDIS Code of Conduct, to identify and manage risks to participants, and to uphold obligations around incident reporting and complaints management.

A new provision inserted in the Rules by this Instrument requires registered NDIS providers to undergo a mid-term audit against certain quality standards during their period of registration if they deliver higher-risk and more complex supports which must be assessed using the certification method.

The Instrument also makes changes to the list of events about which registered NDIS providers need to notify the Commissioner of the NDIS Commission (the Commissioner) during the period of registration. This is to provide clarity as to the circumstances in which registered NDIS providers are required to give notice of changes that might indicate risks to service delivery to NDIS participants, such as the occurrence of events relevant to suitability to remain registered, and to help ensure the currency of information held about the provider by the NDIS Commission.

The amendments also make minor changes to the list of matters to which the Commissioner must have regard when determining the suitability of persons who have applied for registration, and the suitability of their key personnel, in determining whether to grant registration applications.

The amendments also include a definition of 'transitioned provider' to ensure this term is used consistently with the definition of this term in the *National Disability Insurance Scheme (Quality and Safeguards Commission and Other Measures) Transitional Rules 2018* (the NDIS Transitional Rules).

The amendments also change the definition of the term 'worker' to ensure the NDIS Practice Standards apply to sole traders or partners of partnerships who are directly involved in service delivery to NDIS participants.

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 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 for Social Services has delegated to the Commissioner the making of rules for the purposes of paragraphs 73E(1)(d) and (e), section 73H and 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*.

Background

The Act provides for the establishment of an independent Commissioner and NDIS Commission to protect and prevent people with disability from experiencing harm arising from poor quality or unsafe supports or services under the NDIS.

The Rules give effect to the Commissioner's core function under the Act to develop a nationally consistent approach to managing quality and safeguards for people with disability receiving supports or services, including those received under the NDIS.

The Commissioner manages the quality assurance and registration of registered NDIS providers under a national framework including the NDIS Practice Standards and the NDIS Code of Conduct.

The Commissioner is obliged to determine the suitability of persons who have applied for registration, and the suitability of their key personnel, in determining whether to grant registration applications. Requiring the Commissioner to determine suitability supports the objective of ensuring that only persons who are likely to provide safe and quality supports and services should be able to become registered NDIS providers.

Paragraphs 73E(1)(d) and (e) of the Act provide that the Commissioner may register a person as a registered NDIS provider if (among other things):

- (d) the Commissioner is satisfied that the applicant is suitable to provide supports or services to people with disability, having regard to any matters prescribed by the NDIS rules for the purposes of this paragraph; and
- (e) the Commissioner is satisfied that the applicant's key personnel (if any) are suitable to be involved in the provision of supports or services for which the applicant will be registered to provide, having regard to any matters prescribed by the NDIS rules for the purposes of this paragraph.

Section 9 of the Rules sets out the matters to which the Commissioner must have regard in determining the suitability of an applicant to become a registered NDIS provider. These include matters such as whether the applicant has been convicted of an indictable offence and whether the applicant has been the subject of adverse findings or enforcement action by other Commonwealth, State or Territory regulators or other bodies.

Section 10 of the Rules sets out the matters to which the Commissioner must have regard in determining the suitability of a member of an applicant's key personnel to be involved in the provision of supports or services for which the applicant will be registered to provide. These include matters such as whether the member of the key personnel has been the subject of

adverse findings or enforcement action by an authority, whether a banning order under the Act has ever been in force in relation to the member, and whether the member has ever been disqualified from managing corporations under Part 2D.6 of the *Corporations Act 2001*.

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

Section 13 of the Rules requires registered NDIS providers to notify the Commissioner of a change of circumstances that materially affects the provider's ability or the ability of any of the provider's key personnel, to provide the supports or services the provider is registered to provide.

Section 73T(1) of the Act provides that the NDIS rules may make provision for or in relation to standards concerning the quality of supports or services to be provided by registered NDIS providers. Rules made for this purpose are known as the NDIS Practice Standards.

Part 6 of the Rules specifies the standards concerning the quality of supports and services to be provided by registered NDIS providers.

Paragraph 73E(1)(c) of the Act provides that the Commissioner may register a person as a registered NDIS provider if (among other things):

- (c) the applicant has been assessed by an approved quality auditor as meeting the applicable standards and other requirements prescribed by the NDIS Practice Standards.

Part 6 of the Rules specifies that an NDIS provider applying to the NDIS Commission to become a registered NDIS provider is required to be assessed by an approved quality auditor using either a verification or a certification assessment method. The verification assessment method applies to lower-risk, less-complex supports and services. The certification assessment method applies to higher-risk, more complex supports and services. Section 20 of the Rules identifies the applicable standards and the assessment method relevant to be registered to provide each class of supports.

Section 21 of the Rules requires all applicants for registration that are bodies corporate to be assessed as meeting the standards specified in Schedule 1 to the Rules, using the certification method, irrespective of the class of supports to be provided, and in addition to the assessment of the standards that apply under section 20 of the Rules.

These requirements must also be complied with by registered NDIS providers that are bodies corporate in order for them to remain registered.

The Joint Standing Committee on the National Disability Insurance Scheme (the Joint Standing Committee) inquiry into *General issues around the implementation and performance of the NDIS* heard from provider bodies that the quality audit processes applying to providers seeking registration were placing a significant financial burden on small

providers and acting as a disincentive to their participation in the NDIS market¹. The Joint Standing Committee recommended that the NDIS Commission “urgently review the impact of its regulatory requirements on sole providers and small to medium sized businesses providing disability services”².

Disproportionate regulatory impact on providers can lead to providers choosing not to register or leaving the NDIS market entirely. This reduces accessibility of people with disability to appropriate and affordable services, responsive to their needs. The amendments contained in this Instrument support a proportionate approach to the quality audit process, without reducing the safeguarding effects of the regulatory arrangements. The majority of the registered NDIS providers that will benefit from the amendments to the Rules contained in the Instrument are small to medium sized businesses and sole providers which operate as bodies corporate.

Documents incorporated by reference

Item³ 1 of the Instrument incorporates by reference a provision of the *National Disability Insurance Scheme (Quality and Safeguards Commission and Other Measures) Transitional Rules 2018* (the NDIS Transitional Rules), as in force from time to time. The NDIS Transitional Rules are freely available on the Federal Register of Legislation (<https://www.legislation.gov.au/Details/F2018L00630>).

Item 2 of the Instrument incorporates by reference provisions of the *National Disability Insurance Scheme (Practice Standards – Worker Screening) Rules 2018* (the Worker Screening Rules), as in force from time to time. The Worker Screening Rules are freely available on the Federal Register of Legislation (<https://www.legislation.gov.au/Details/F2019C00574>).

Item 4 of the Instrument incorporates by reference a provision of the *Corporations Act 2001*, as in force from time to time. The *Corporations Act 2001* is freely available on the Federal Register of Legislation (<https://www.legislation.gov.au/Details/C2019C00216>).

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 D’ rules. The provisions of the Instrument are Category D rules. Subsection 209(7) of the Act requires the Minister to consult with each host jurisdiction in relation to the making of all Category D rules. In compliance with this requirement, prior to making this Instrument the Commissioner (as the Minister’s delegate) consulted with all States and Territories in relation to the content of the proposed instrument. The consultation included an opportunity to provide written feedback and submissions on a draft of the instrument.

¹ Joint Standing Committee on the National Disability Insurance Scheme, *General issues around the implementation and performance of the NDIS*, Progress Report 2019, paragraphs 3.18-3.33, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/National_Disability_Insurance_Scheme/General_NDIS/Report/c03

² Ibid, paragraph 3.34.

³ References in this Explanatory Statement to an ‘item’ are references to an item in Schedule 1 to the Instrument.

The Commissioner also undertook a targeted consultation process with a range of bodies representing people with a disability and carers, providers of NDIS services for people with disability, approved quality auditors, and workers providing supports or services to people with disability. These bodies were provided with an opportunity to review a draft of the instrument and provide submissions. The feedback was considered and, where appropriate, incorporated into the rules and/or will be incorporated into future associated guidance.

Regulatory Impact Statement (RIS)

The enabling legislation was subject to a RIS (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 (Provider Registration and Practice Standards) Amendment (2019 Measures No. 1) Rules 2019*.

Section 2 – Commencement

Section 2 provides that the Instrument commences on 1 January 2020.

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 a definition of ‘transitioned provider’ into the Rules. It provides that the term ‘transitioned provider’ has the same meaning as in the NDIS Transitional Rules.

Subsection 7(4) of the NDIS Transitional Rules provides that a transitioned provider is a person or entity who is a registered NDIS provider under the Act because of paragraph 7(2)(b) of the NDIS Transitional Rules. In this way, a provider will be a ‘transitioned provider’ for a limited period when they transition from being a registered provider of supports under Part 3 of Chapter 4 of the Act to being a registered NDIS provider under Part 3A of Chapter 4 of the Act. The NDIS Transitional Rules provide that such providers are deemed to be registered NDIS providers when the host jurisdiction in which the provider is providing supports or services to a participant becomes a participating jurisdiction in the NDIS. Transitioned providers are registered NDIS providers, but are not subject to all the same conditions of registration and requirements as other registered NDIS providers.

The NDIS Transitional Rules provide that a person or entity ceases to be a transitioned provider if:

- (a) the person or entity makes an application to be a registered NDIS provider under section 73C of the Act and the Commissioner makes a decision under section 73E of the Act to register, or not to register, the person or entity as a registered NDIS provider; or
- (b) the registration of the provider is revoked under section 73P of the Act; or
- (c) unless section 73K of the Act applies – the period specified for the purposes of paragraph 73E(5)(e) of the Act expires.

Accordingly, a registered NDIS provider will cease to be a transitioned provider at the point that the Commissioner has made a decision on that provider's application for registration as a registered NDIS provider.

Item 2

This amendment repeals and replaces the definition of 'worker' in the Rules.

This amendment provides that the term 'worker' means any of the following:

- (a) a person employed or otherwise engaged by a registered NDIS provider;
- (b) a partner (of a partnership that is a registered NDIS provider) whose role is of the kind mentioned in paragraph (b) or (c) of the definition of *risk assessed role* in the *National Disability Insurance Scheme (Practice Standards – Worker Screening) Rules 2018*;
- (c) an individual (who is a registered NDIS provider) whose role is of the kind mentioned in paragraph (b) or (c) of the definition of *risk assessed role* in the *National Disability Insurance Scheme (Practice Standards – Worker Screening) Rules 2018*.

The term 'otherwise engaged' is defined in section 9 of the Act as including 'engaged on a voluntary basis'.

'Risk assessed role' is defined in section 5 of the Worker Screening Rules at paragraphs (b) and (c) as follows:

- (b) a role for which the normal duties include the direct delivery of specified supports or specified services to a person with disability;
- (c) a role for which the normal duties are likely to require more than incidental contact with a person with disability.

Section 5 of the Worker Screening Rules defines 'specified service' to mean a service that is included in the list (as in force or existing from time to time) published by the Commissioner pursuant to section 7 of the Worker Screening Rules. Section 5 of the Worker Screening Rules also defines 'specified support' to mean a support that is included in the list (as in force or existing from time to time) published by the Commissioner pursuant to section 7 of

the Worker Screening Rules. The list of specified supports and services for the purposes of section 7 of the Worker Screening Rules can be found on the NDIS Commission website (www.ndiscommission.gov.au).

Section 6 of the Worker Screening Rules sets out what constitutes 'more than incidental contact'.

This amendment recognises that some registered NDIS providers are small businesses that employ or engage few or no workers and where the providers themselves (the sole trader or partner of a partnership) have a role:

- for which the normal duties include the direct delivery of specified supports or specified services to a person with disability; or
- for which the normal duties are likely to require more than incidental contact with a person with disability.

A number of the NDIS Practice Standards refer to 'workers' (for example, clause 6 of Schedule 8 to the Rules provides that 'Each participant's support needs are met by workers who are competent in relation to their role, hold relevant qualifications and have relevant expertise and experience to provide person-centred support'). This amendment ensures that the NDIS Practice Standards which relate to workers will extend to sole traders or partners of a partnership who have a direct role in delivering supports and services to people with disability.

Item 3

This item inserts a new provision – subsection 5(1A) – which concerns the certification assessment method referred to in the Rules.

Subsection 5(1A) provides that the assessment must be proportionate to:

- (a) the size of the provider or applicant; and
- (b) the scale of the provider or applicant, having regard to:
 - (i) the geographical area or areas in which the provider or applicant provides, or is to provide, supports or services; and
 - (ii) the number of locations at or from which the provider or applicant provides, or is to provide, supports or services; and
- (c) the scope and complexity of the supports or services provided or to be provided.

This amendment confirms the factors which must be considered to ensure a certification assessment is conducted in a proportionate manner and emphasises the importance of taking into account the specific circumstances and characteristics of an applicant or provider. In this way, a certification assessment will reflect the varied configuration of service provision across the NDIS, and the diverse support arrangements for individual participants. Certification assessments which are conducted in a proportionate way will continue to consider whether applicants or providers meet relevant NDIS Practice Standards so the

Commissioner has all the information necessary to determine an application or assess the ongoing registration of NDIS providers.

This item also repeals and replaces subsection 5(2), which relates to the basis for an approved quality auditor to use sampling as part of the certification method of assessment. This amendment simply provides that the assessment may be conducted by an appropriate sampling method. The *National Disability Insurance Scheme (Approved Quality Auditors Scheme) Guidelines 2018* (the Approved Quality Auditors Scheme Guidelines) contain guidance for auditors about appropriate sampling methods.

Item 4

This amendment concerns section 9 of the Rules, which relates to the matters to which the Commissioner must have regard in determining whether he or she is satisfied that the applicant for registration as a registered NDIS provider is suitable to provide supports or services to people with disability.

Paragraph 9(2)(d) requires the Commissioner to have regard to whether the applicant is or has been an 'insolvent under administration' (which is defined in the *Corporations Act 2001*).

This amendment will also require the Commissioner to have regard to whether the applicant is or has been a 'Chapter 5 body corporate', as that term is defined in the *Corporations Act 2001*. This amendment will ensure that the Commissioner is to have regard to an existing or previous corporate insolvency event of an applicant.

Items 5 and 7

These amendments correct the name of the Australian Securities and Investments Commission in subparagraphs 9(2)(f)(i) and 10(2)(e)(i) of the Rules.

Item 6

This amendment is to section 10 of the Rules, which relates to the matters to which the Commissioner must have regard in determining whether the Commissioner is satisfied that a member of an applicant's key personnel is suitable to be involved in the provision of supports or services for which an applicant will be registered to provide.

This amendment deletes the words "following an investigation" from paragraph 10(2)(e). This amendment ensures that the matter to which the Commissioner is to have regard is not limited only to where the bodies listed in that paragraph have carried out an investigation prior to making adverse findings or taking enforcement action with respect to the member of an applicant's key personnel.

Item 8

This item repeals and replaces section 13 of the Rules and inserts a new section 13A. These amendments concern the requirement for registered NDIS providers to notify the Commissioner of certain changes and events during the period of registration. The amendments enhance the provisions that were originally contained in section 13 and provide greater clarity for providers on what must be notified.

Section 13, as amended, imposes a condition of registration on registered NDIS providers to give the Commissioner notice of certain changes, being changes to contact details and changes in scale of the provider. This amendment will help to ensure the currency of information held by the NDIS Commission about registered NDIS providers. Notice must be given, in the form approved by the Commissioner, as soon as practicable after the earlier of the following times:

- (i) when the provider becomes aware that the change will occur;
- (ii) when the change occurs.

Section 13A imposes a condition of registration on registered NDIS providers to give the Commissioner notice of certain events, including the occurrence of events relevant to suitability to be registered (such as the provider becoming insolvent, or becoming the subject of adverse findings or enforcement action by relevant authorities). Notice must be given as soon as practicable after the event occurs, in the form approved by the Commissioner.

The combined effect of these amendments is that they will:

- help to ensure that the NDIS Commission is kept informed of current contact details for registered NDIS providers, which is critical to the Commissioner's ability to communicate effectively with providers, liaise with them about any complaints made to the Commissioner, and undertake compliance and enforcement activities if necessary; and
- enhance the Commissioner's ability to be pro-actively informed in a timely manner about changed circumstances affecting registered NDIS providers which may indicate potential risk to NDIS participants, rather than being informed reactively through complaints and reported incidents.

The requirement to give notice of certain changes and events helps to ensure that the Commissioner is given an opportunity to consider if he or she remains satisfied that the provider and the provider's key personnel are suitable to be, respectively, a registered NDIS provider and involved in the provision of the supports or services concerned. The occurrence of particular events may indicate that there is a risk that NDIS participants may be harmed by adverse changes.

These provisions also support the Commissioner's market oversight function under section 181E(i) of the Act, specifically enabling the Commissioner to monitor changes in the NDIS market that may indicate emerging risk.

This item also inserts section 13B, which requires certain registered NDIS providers to undergo an audit against applicable practice standards at a mid-point during the period of registration.

The Rules do not currently require a registered NDIS provider to undergo any quality audit activity outside of the assessment required as part of the application for registration. However, there is provision in the Approved Quality Auditors Scheme Guidelines for certain providers to undergo annual 'surveillance (monitoring) audits' during the period of registration.

This amendment imposes a condition of registration on providers registered to provide a class of supports for which, under the table in subsection 20(3) of the Rules, the assessment method for the applicable standards is certification. These providers are required to undergo an audit which:

- must be carried out by an approved quality auditor using the certification method; and
- must commence no later than 18 months after the beginning of the period for which the provider's registration is in force.

Subsection 13B(5) provides that the mid-term audit must assess, for each of the class of supports mentioned in subsection 13B(1), whether the provider has met, and is meeting, the following applicable standards for the class of supports:

- (a) the standards in Part 3 of Schedule 1 (those relating to provider governance and operational management);
- (b) any standard for which a previous assessment by an approved quality auditor identified a need for the provider to implement a corrective action plan;
- (c) any standard specified in relation to the audit, for the purposes of this paragraph, by the Commissioner in a written notice given to the provider.

Given that determinations of specified standards under paragraph 13B(5)(c) are to be made in relation to particular audits of particular providers, this paragraph is intended to confer an administrative, and not a legislative, power on the Commissioner. The specification of standards under paragraph 13B(5)(c) enables a mid-term audit to include the assessment of standards relevant to how the provider continues to manage operational and governance risk since the Commissioner's decision to register the provider.

Subsection 13B(7) provides that the requirement for the mid-term audit does not apply to:

- a provider that is an individual or partnership and early intervention supports for early childhood is the only class of supports mentioned in subsection 13B(1) that the provider is registered to provide; or
- a provider who is only registered to provide specialist disability accommodation; or
- a provider that is a transitioned provider.

Subsection 13B(6) provides that a report of the audit must be given to the Commissioner as soon as practicable after the audit is completed.

Section 13B will help to ensure that the Commissioner becomes aware, during the registration cycle, of whether a provider of higher-risk supports and services is meeting applicable quality standards.

Unless the Commissioner determines otherwise, an NDIS provider will generally be registered for a period of three years. With the insertion of section 13B, certain registered NDIS providers will be required to undergo the following three quality audits during a three-year period:

- the assessment required to inform the Commissioner's decision to register (year one);

- the mid-term audit provided for by the insertion of section 13B (year two); and
- the assessment required as part of an application under section 73C of the Act to be registered for a further period, which the Commissioner will generally require to be completed before the expiry of the current period of registration (year three).

In this way, section 13B facilitates the approach envisaged in the NDIS Quality and Safeguarding Framework for annual audits to support 'recertification'⁴.

Furthermore, the audit cycle interacts with the NDIS Commission's ongoing monitoring of registered NDIS providers. The Commission has a range of compliance and enforcement tools in the Act which can be deployed should matters become apparent regarding a registered NDIS provider's compliance with registration conditions, for example through the NDIS Commission's complaints and reportable incidents functions. Additionally, the other amendments in Item 8 (reporting of changes and events) support the NDIS Commission's continued oversight of registered NDIS providers.

The Approved Quality Auditors Scheme Guidelines will be amended to reflect and complement the amendments to the Rules contained in the Instrument. The provision for annual surveillance (monitoring) audits will be removed to reflect the new requirements for a mid-term audit.

Items 9, 11, 13 and 14

Item 9 repeals section 21 of the Rules, which required all applicants for registration that are bodies corporate to be assessed as meeting the standards specified in Schedule 1 using certification in order to be registered, and to comply with the standards specified in Schedule 1 to remain registered. The requirements of section 21 applied in addition to the requirements of section 20 and regardless of the class of supports being or to be provided.

The removal of section 21 reduces regulatory burden on providers that are bodies corporate and delivering lower-risk supports and services. It directly addresses the observations of the Joint Standing Committee in regard to the NDIS Commission considering any disproportionate regulation of small to medium sized businesses and sole providers.

The combined effect of the amendment is that:

- providers that are bodies corporate and delivering lower-risk supports and services will be assessed against the standards specified in Schedule 8 to the Rules using verification (in accordance with section 20), which is consistent with the assessment of providers (except government providers) with other business structures (such as sole traders or partnerships) delivering lower-risk supports and services; and
- providers that are bodies corporate and delivering higher-risk supports and services will be assessed against the applicable standards for the class of supports being provided, using certification, in accordance with section 20.

⁴ NDIS Quality and Safeguarding Framework, 9 December 2016, Figure 4, page 88.
https://www.dss.gov.au/sites/default/files/documents/04_2017/ndis_quality_and_safeguarding_framework_final.pdf

This amendment follows on from amendments that the Commissioner made to the Approved Quality Auditors Scheme Guidelines in April 2019 to support a more proportionate quality audit process without diminishing protections for participants, including amendments to:

- reduce minimum assessment times when using the certification method and clarify that assessment duration is to be calculated in accordance with proportionality;
- reduce the minimum number of auditors required to conduct certain assessments; and
- enable assessments using the certification method to be conducted remotely in certain circumstances, including where the provider operates in remote or regional areas or from a virtual site, or where the supports involve limited interaction with participants.

Items 11, 13 and 14 are consequential changes following the repeal of section 21 of the Rules.

Item 10

This amendment simplifies subsection 25(2) of the Rules by removing the words after 'in relation to' (and the note) and substituting the term 'transitioned providers' (see item 1 for an explanation of this term).

Item 12

These amendments provide information about the application of the amendments to the Rules contained in the Instrument.

Subsection 30(1) provides that the amendments of sections 4 and 5 made by the Instrument apply in relation to an assessment commenced on or after 1 January 2020.

Subsection 30(2) provides that the amendments of sections 9 and 10 made by the Instrument apply in relation to an application under section 73C of the Act made on or after 1 January 2020.

Subsection 30(3) provides that sections 13, 13A and 13B, as inserted by the Instrument, apply on and after 1 January 2020 in relation to a registered NDIS provider, whether registered before, on or after that day.

Subsection 30(4) provides that, despite the repeal of section 21 by the Instrument, that section continues to apply, in relation to an assessment commenced before 1 January 2020, as if that repeal had not happened.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

NATIONAL DISABILITY INSURANCE SCHEME (PROVIDER REGISTRATION AND PRACTICE STANDARDS) AMENDMENT (2019 MEASURES NO. 1) RULES 2019

The *National Disability Insurance Scheme (Provider Registration and Practice Standards) Amendment (2019 Measures No. 1) Rules 2019* (the Instrument) are compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Instrument

The Instrument is made pursuant to paragraphs 73E(1)(d) and (e), section 73H and subsection 73T(1) of the *National Disability Insurance Scheme Act 2013* (the Act).

The Instrument amends the *National Disability Insurance Scheme (Provider Registration and Practice Standards) Rules 2018* (the Rules).

The amendments to the Rules contained in the Instrument concern the quality audit process to be used for persons applying to the NDIS Quality and Safeguards Commission (the NDIS Commission) to be a registered NDIS provider and for assessing ongoing compliance of registered NDIS providers with applicable quality standards.

The Rules specify, for each class of supports for which a provider has applied to be registered to provide, the applicable quality standards to be assessed by an approved quality auditor and the method of assessment. The assessment method is either certification (applying to higher-risk services and supports) or verification (applying to lower-risk services and supports).

The Instrument reduces regulatory burden by removing particular audit requirements that apply to applicants or registered NDIS providers that are bodies corporate, irrespective of the classes of supports and services being provided. This amendment enables such providers that are delivering lower-risk and less complex supports and services to consistently attract a verification assessment method and be assessed against relevant quality standards. It addresses the risk of those providers choosing not to register or leaving the National Disability Insurance Scheme (NDIS) market entirely. The loss of small to medium sized businesses and sole providers that operate as bodies corporate from the NDIS market due to disproportionate regulatory burden would have the effect of limiting the choice and control of NDIS participants.

The Instrument also clarifies the proportionate nature of the assessment to be carried out by approved quality auditors.

These amendments concern the method of assessment and applicable standards relevant to a provider that has applied for registration as a registered NDIS provider. The amendments to the Rules contained in the Instrument do not change the obligations of registered NDIS providers to comply with the NDIS Code of Conduct, to identify and manage risks to participants, and to uphold obligations around incident reporting and complaints management.

A new provision inserted in the Rules by the Instrument requires registered NDIS providers to undergo a mid-term audit against certain quality standards during their period of registration if they deliver higher-risk and more complex supports which must be assessed using the certification method.

The Instrument also makes changes to the list of events about which registered NDIS providers need to notify the Commissioner of the NDIS Commission (the Commissioner) during the period of registration. This is to provide clarity as to the circumstances in which registered NDIS providers are required to give notice of changes that might indicate risks to service delivery to NDIS participants, such as the occurrence of events relevant to suitability to remain registered, and to help ensure the currency of information held about the provider by the NDIS Commission.

The amendments also make minor changes to the list of matters to which the Commissioner must have regard when determining the suitability of persons who have applied for registration, and the suitability of their key personnel, in determining whether to grant registration applications.

The amendments also include a definition of 'transitioned provider' to ensure this term is used consistently with the definition of this term in the *National Disability Insurance Scheme (Quality and Safeguards Commission and Other Measures) Transitional Rules 2018* (the NDIS Transitional Rules).

The amendments also change the definition of the term 'worker' to ensure the Practice Standards apply to sole traders or partners of partnerships who are directly involved in service delivery to NDIS participants.

Background

The Act provides for the establishment of an independent Commissioner and NDIS Quality and Safeguards Commission to protect and prevent people with disability from experiencing harm arising from poor quality or unsafe supports or services under the NDIS.

The Rules give effect to the Commissioner's core function under the Act to develop a nationally consistent approach to managing quality and safeguards for people with disability receiving supports or services, including those received under the NDIS.

The Commissioner manages the quality assurance and registration of NDIS providers under a national framework including the NDIS Practice Standards and the NDIS Code of Conduct.

The Rules specify NDIS Practice Standards, thereby enabling people with disability participating in the NDIS to be aware of the applicable standards expected of registered NDIS providers.

The Rules specify the independent assessment process against applicable quality standards that must occur for providers applying to become registered.

The Rules also specify those matters to which the Commissioner must have regard when determining the suitability of an applicant for registration as a registered NDIS provider and the suitability of the applicant's key personnel to be involved in the provision of supports or services that the applicant would be registered to provide.

Further, under the Rules, registered NDIS providers are obliged to notify the Commissioner of changes of circumstances. This gives the Commissioner the opportunity to consider if he or she remains satisfied of the suitability of the provider and of the provider's key personnel.

Human rights implications

The Rules as amended by the Instrument engage the following rights under international human rights law:

- protection from and prevention of exploitation, violence and abuse, especially Articles 11 and 16 of the Convention on the Rights of Persons with Disabilities (CRPD) and Articles 34 and 36 of the Convention on the Rights of the Child (CROC);
- accessibility to health care and other services and supports responsive to the needs of people with a disability, and the right to health, to an adequate standard of living, and to participation in the community, especially Articles 19, 25 and 28 of the CRPD, Articles 23 and 27 of the CROC and Article 12 of the International Covenant on Economic, Social and Cultural Rights.

Freedom from exploitation, violence and abuse

The registration function of the Commissioner is an important mechanism for providing protections for vulnerable people from the risk of violence, abuse, neglect and exploitation and other harms in the course of NDIS support provision.

The Rules as amended by the Instrument that concern suitability requirements for a person or entity to become registered as a NDIS provider enable the Commissioner to assess whether the person or entity can provide safe and quality supports and services.

The provisions in the Instrument that impose a condition of registration on registered NDIS providers to notify the Commissioner of certain events give the Commissioner an opportunity to consider if he or she remains satisfied that the provider and their key personnel are suitable and if there is a risk that participants may be harmed by those events.

CPRD Article 16(3) obliges State Parties to ensure that, in order to prevent the occurrence of all forms of exploitation, violence and abuse, all facilities and programs designed to serve persons with disability are effectively monitored by independent authorities.

The quality assurance process facilitated by third-party approved quality auditors provides a framework for monitoring whether providers meet quality expectations for the provision of supports and services in the NDIS, including compliance with obligations relating to the rights of people with disability.

The inclusion in the Instrument of a requirement for providers delivering higher-risk supports and services to undergo a mid-term quality audit during the period of registration provides a further opportunity for assessing providers' compliance with quality standards and safeguarding the recipients of NDIS supports and services.

Right to health, adequate standard of living and accessibility of services and supports

A central aspect of the NDIS is that people with disability can exercise choice and control over their supports and the providers that provide them. It is therefore essential that there is a strong and viable market for disability supports and services that supports genuine choice and control. In particular, this includes ensuring that there are enough providers available to meet the support needs of people with disability in geographic regions.

The Commissioner has been monitoring the regulatory impact of the quality audit process that applies to providers applying for registration and the potential effects on the NDIS market. The Joint Standing Committee on the National Disability Insurance Scheme inquiry into *General issues around the implementation and performance of the NDIS* heard from provider bodies that the quality audit processes applying to providers seeking registration were placing a significant financial burden on small providers and acting as a disincentive to their participation in the NDIS market¹.

The amendments to the Rules contained in the Instrument recognise that disproportionate regulatory impact on providers can lead to providers choosing not to register or leaving the NDIS market entirely. This reduces accessibility of persons with disability to appropriate and affordable services, responsive to their needs. The amendments to the Rules support a proportionate approach to the quality audit process, without reducing the safeguarding effects of the regulatory arrangements.

The Instrument's removal of mandatory certification audits for providers that are bodies corporate addresses disproportionate regulatory burden on providers delivering lower-risk and less complex supports, without limiting the regulatory action that the NDIS Commission can take. This amendment to the Rules supports and helps to sustain a robust, vibrant and innovative NDIS market where participants can exercise choice and control. The continued participation of smaller providers delivering lower-risk supports enables people with disability to select from a range of providers under the NDIS that meet quality and safety standards, including smaller providers that operate in the participant's local community.

Conclusion

¹ Joint Standing Committee on the National Disability Insurance Scheme, *General issues around the implementation and performance of the NDIS*, Progress Report 2019, paragraphs 3.18-3.33, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/National_Disability_Insurance_Scheme/General_NDIS/Report/c03

The Instrument forms part of an overall legislative scheme that upholds and respects the rights of people with disability. The registration and regulatory functions of the NDIS Commission are designed to protect and prevent people with disability from experiencing harm arising from poor quality or unsafe supports or services under the NDIS. The amendments to the Rules contained in the Instrument support a regulatory environment that protects people with disability from harm and promotes independent and informed choice of people with disability.

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*.

Graeme Head, Commissioner of the NDIS Quality and Safeguards Commission