

## **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 Amendment (Provider Registration –  
Extension of Exemption) Rules 2020*

### **Purpose**

This amending instrument extends the National Disability Insurance Scheme ('NDIS') registration exemption available to residential aged care providers under subsection 7(4) of the *National Disability Insurance Scheme (Provider Registration and Practice Standards) Rules 2018* ('Practice Standards Rules'). It extends the exemption from 30 June 2020 until 30 November 2020.

### **Background**

Subsections 7(1) to (3) of the Practice Standards Rules require a person to be registered under section 73E of the *National Disability Insurance Scheme Act 2013* ('NDIS Act') in order to provide support services in participating jurisdictions including:

- a) specialist disability accommodation;
- b) supports involving, or likely to involve, the use of a regulated restrictive practice;
- c) specialist behaviour support services, if this will entail a behavioural support assessment or development of a behaviour support plan.

Subsection 7(4) of the Practice Standards Rules grants providers a registration exemption from subsections 7(1) to (3) to provide the supports mentioned at 7(1) to (3), despite not being registered under section 73E of the NDIS Act, if they are an approved provider within the meaning of the *Aged Care Act 1997* and if the participant is also approved as a recipient of residential care under Part 2.3 of that Act.

This exemption would otherwise lapse at the end of 30 June 2020 (subsection 7(5)); however, this instrument will extend the registration exemption until 30 November 2020.

Aged care providers are currently focused on managing the health risks to residents of aged care facilities from novel coronavirus COVID-19. In the view of stakeholders (participant and industry) and relevant government departments and agencies, aged care providers are not in a position to engage with changes to their registration obligations at this time. The Younger People in Residential Aged Care (YPIRAC) Stakeholder Reference Group, established to oversee the implementation of the Government's initiatives to reduce the number of younger people in residential aged care, recommended the exemption from registration be extended owing to the

impacts of the COVID-19 pandemic. The Minister for the NDIS, Stuart Robert, following consultation with the Minister for Aged Care and Senior Australians, Richard Colbeck, requested the NDIS Commissioner make the amendment to extend the registration exemption. The Minister has power under subsection 201A(2) of the NDIS Act to direct the Commissioner when the Commissioner is exercising powers under a delegation from the Minister, and the Commissioner must comply with any such direction.

There are currently a number of aged care providers who are supporting participants whose residential care is included in their NDIS plan. This support may include a restrictive practice or behaviour support. Numerous providers therefore are exempt under subsection 7(4) and have never been registered as registered NDIS providers. These providers are regulated by the Aged Care Quality and Safety Commission under the *Aged Care Quality and Safety Commission Act 2018*. They are also subject to the NDIS Code of Conduct and NDIS Quality and Safeguards Commission complaints mechanisms.

All relevant aged care providers will need to be registered with the NDIS Quality and Safeguards Commission by 1 December 2020 in a way that avoids the administrative burdens and time pressures that an application under section 73C of the NDIS Act would impose. Transitional arrangements, including amendment of relevant rules as required, will be developed for the timely transition of relevant residential aged care providers to NDIS registration. Should the exemption outlined above lapse without appropriate transitional registration arrangements in place, there is a risk that some residential aged care providers would be in breach of their NDIS registration obligations or may cease supporting residents who are NDIS participants, thereby placing acute pressure on alternative sources of accommodation.

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

### **Commencement**

The instrument commences on the day after it is registered.

Under subsection 33(3) of the *Acts Interpretation Act 1901* 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 condition (if any) to repeal, rescind, revoke, amend or vary any such instrument.

### **Consultation**

This instrument is a Category D rule for the purposes of section 209 of the NDIS Act. Accordingly, as required under subsection 209(7) of the Act, the Commonwealth has consulted each host jurisdiction in relation to the making of this instrument. Each host jurisdiction has had the opportunity to review this instrument and provide comments and feedback.

Consultation has also been undertaken with the Department of Health, the Aged Care Quality and Safety Commission, and the National Disability Insurance Agency.

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

A RIS is not required for this instrument (OBPR ID 26358).

### **Explanation of the provisions**

#### Section 1 – Name

Section 1 states the name of the instrument.

#### Section 2 – Commencement

Section 2 states the commencement date of the instrument.

#### Section 3 – Authority

Section 3 states the authority under which the instrument is made.

#### Section 4 – Schedules

Section 4 provides that each instrument that is specified in a Schedule is amended or repealed as set out in that Schedule, and any other item in a Schedule to the instrument has effect according to its terms.

#### Schedule 1 – Amendments

This Schedule amends the Practice Standards Rules.

**Item 1** omits the date 30 June 2020 from subsection 7(5) and substitutes the date 30 November 2020. This continues the exemption from NDIS registration requirements of affected residential aged care providers to 30 November 2020.

## Statement of Compatibility with Human Rights

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

### **National Disability Insurance Scheme Amendment (Provider Registration – Extension of Exemption) Rules 2020**

The *National Disability Insurance Scheme Amendment (Provider Registration – Extension of Exemption) Rules 2020* (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 legislative instrument**

This amending instrument extends the National Disability Insurance Scheme ('NDIS') registration exemption available to residential aged-care providers under subsection 7(4) of the National Disability Insurance Scheme (Provider Registration and Practice Standards) Rules 2018 ('Practice Standards Rules'). It extends the exemption from 30 June 2020 until 30 November 2020.

#### **Background**

Subsections 7(1) to (3) of the Practice Standards Rules require a person to be registered under section 73E of the National Disability Insurance Scheme Act 2013 ('NDIS Act') in order to provide support services in participating jurisdictions including:

- a) specialist disability accommodation;
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Aged care providers are focused on managing the health risks to residents of aged care facilities from novel coronavirus COVID-19. In the view of participant and industry stakeholders, and relevant government departments and agencies, aged care providers are not in a position to engage with changes to their registration obligations at this time.

There are currently a number of aged care providers who are supporting participants whose residential care is included in their NDIS plan. This support may include a restrictive practice or behaviour support. Numerous providers therefore are exempt

under subsection 7(4) and have never been registered as registered NDIS providers. These providers are regulated by the Aged Care Quality and Safety Commission under the Aged Care Quality and Safety Commission Act 2018. They are also subject to the NDIS Code of Conduct and NDIS Quality and Safeguards Commission complaints mechanisms.

All relevant aged care providers will need to be registered with the NDIS Quality and Safeguards Commission by 1 December 2020. Appropriate transitional registration arrangements will need to be implemented to take effect from that date. Should the registration exemption not be extended, there is a risk that many residential aged care providers would be in breach of their NDIS registration obligations or may cease supporting residents who are NDIS participants, thereby placing acute pressure on alternative sources of accommodation.

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

### **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, as covered in the Convention on the Rights of Persons with Disabilities (CRPD) and;
- the right to an adequate standard of living and accessibility to health and other supports and services, covered in both the CRPD and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

### ***Freedom from exploitation, violence and abuse***

NDIS participants in residential aged care are protected from exploitation, violence and abuse by both the aged care regulatory framework (Aged Care Act, Aged Care Quality and Safety Commission Act, and associated regulation) and the NDIS regulatory framework (NDIS Act and associated regulation).

The amendment to the Rules contained in the Instrument changes only the date of expiry of the exemption from mandatory NDIS registration for residential aged care providers supporting NDIS participants who are approved recipients of aged care; it does not alter the application of the aged care regulatory framework.

The extent of applicable protections under the NDIS regulatory framework depends upon whether the provider of supports to an NDIS participant is a registered or unregistered NDIS provider. The NDIS Code of Conduct applies to all providers, regardless of whether they are registered, and is used to prevent exploitation, violence and abuse by NDIS providers and workers. More comprehensive obligations apply to registered NDIS providers.

The exemption from mandatory registration recognises that residential aged care providers are regulated under the aged care regulatory framework, consistent with relevant rights under international human rights law, and that a transitional period for these providers to register with the NDIS Quality and Safeguards Commission is in the interests of NDIS participants.

The impacts of the coronavirus COVID-19 pandemic have required aged care providers to focus on managing the health risks to residents including NDIS participants. In the view of participant and industry representatives, and relevant government departments and agencies, aged care providers have therefore not been in a position to engage with changes to their registration obligations. It is in the interests of NDIS participants, and consistent with their human rights, to extend the exemption from mandatory registration for residential aged care providers. The extended period will allow an appropriate period of transition to NDIS registration, including educating providers of their NDIS registration obligations.

***Right to adequate standard of living and accessibility to health and other supports and services***

A central aspect of the NDIS is that people with disability can access adequate supports and exercise choice and control over their supports.

Extension of the registration exemption recognises that some NDIS participants are in residential aged care and that, given the impacts of COVID-19, an extended period of time is required for aged care providers to become registered to continue to offer supports to these participants. The exemption does not alter the right of NDIS participants to access, and be supported to access, alternative forms of accommodation as they choose.

NDIS participants residing in residential aged care facilities also have the right to access personal assistance necessary (Article 19 of the CRPD), and an adequate standard of living and social protection (Article 28 of the CRPD).

**Conclusion**

This instrument is compatible with human rights as it promotes appropriate protections and access to supports for NDIS participants as part of an overall legislative scheme designed to deliver improved quality and safeguards for them.

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