

## **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 2020*

### **Purpose**

The *National Disability Insurance Scheme (Practice Standards – Worker Screening) Amendment Rules 2020* (the Instrument) are made under section 209 of the *National Disability Insurance Scheme Act 2013* (the Act) for the purposes of section 73T of the Act.

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

The Rules form part of the framework to support the safe delivery of services and supports to people with disability under the National Disability Insurance Scheme (NDIS).

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

The Instrument amends the transitional arrangements that apply to States and Territories under Part 4 of the Rules to provide for 1 February 2021 to be the new commencement date of national worker screening.

The Instrument also broadens the circumstances in which a worker can work in a risk assessed role in Queensland during its transition to national worker screening to reflect changes to relevant policy in that jurisdiction. The Instrument also redefines an acceptable SA check for the purposes of the transitional arrangements that apply to South Australia, to reflect changes to legislation and policy in that jurisdiction.

Finally, the Instrument amends some of the definitions in the Rules in order to align the definitions with those used in the Act.

### **Background**

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 this Act to be prescribed or which are necessary or convenient to be prescribed in order to carry out or give effect to the Act.

Section 73T(1) of the Act provides that the NDIS rules may set out requirements for or in relation to standards concerning the quality of supports or services to be provided by registered NDIS providers.

The Instrument amends the Rules which form part of a broader suite of NDIS Practice Standards that apply to registered NDIS providers, and persons or entities seeking to be so registered – see the *National Disability Insurance Scheme (Provider Registration and Practice Standards) Rules 2018*.

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**

The Instrument commences on 30 June 2020.

## **Consultation**

Section 209 of the Act prescribes that NDIS rules fall into four categories. Subsection 209(8) of the Act prescribes certain categories of NDIS rules to be 'Category B' rules. Category B rules include rules made for the purposes of subsection 73T(1), to the extent that the NDIS Practice Standards deal with the screening of workers involved in the provision of supports or services to people with disability under the NDIS.

Under subsection 209(5), Category B rules relating to an area, law or program of a host jurisdiction, cannot be made under section 209(1) unless the host jurisdiction has agreed to the making of those rules. In compliance with this requirement, prior to making the Instrument the Commissioner (as the Minister's delegate) obtained agreement from New South Wales, South Australia, Victoria, Queensland, Tasmania, Australian Capital Territory and Northern Territory.

## **Regulatory Impact Statement (RIS)**

Implementing a national 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**

### Section 1 - Name

Section 1 provides that the instrument is titled the *National Disability Insurance Scheme (Practice Standards – Worker Screening) Amendment Rules 2020*.

### Section 2 – Commencement

Section 2 provides that the whole of the Instrument commences on 30 June 2020.

### Section 3 – Authority

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

### Section 4 – Schedules

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

### Schedule 1 – Amendments

#### **Item 1 Section 5 (note to heading)**

This amendment replaces references to sections 9, 10, 10A, 11 and 11A of the Act from the Note at the beginning of section 5 with a reference to section 9 only. Section 9 is the definition section of the Act. The reference to the other sections is unnecessary.

#### **Item 2 Section 5 (after paragraph (c) of the note to the heading)**

This amendment inserts the terms ‘NDIS worker screening check’ and ‘NDIS worker screening law’ into the note as they are also expressions used in the Rules that are defined in the Act.

#### **Item 3 Section 5 (definition of *NDIS worker screening check*)**

This amendment repeals the definition of ‘NDIS worker screening check’ in the Rules because the expression is defined in the Act. This ensures that the definition of ‘NDIS worker screening check’ in the Act applies to this expression where it is used in the Rules.

#### **Item 4 Section 5 (definition of *NDIS worker screening legislation*)**

This amendment repeals the definition of ‘NDIS worker screening legislation’ in the Rules because the expression ‘NDIS worker screening law’ is the relevant expression to use and is defined in the Act. Item 24 substitutes all uses of ‘NDIS worker screening legislation’ in the Rules with ‘NDIS worker screening law’ to ensure that the expression and definition used in the Rules are the same as in the Act.

### **Item 5 Section 14A (heading)**

This amendment repeals the heading “14A Disapplication of exception for jurisdictions with a ‘no card, no start’ policy” and substitutes “14A Disapplication of exception for ‘no card, no start’ jurisdictions” to more accurately reflect the content of the section.

### **Item 6 Paragraph 14A(2)(b)**

This amendment replaces a reference to ‘subsection 24(6)’ with ‘subsection 24(6), (6A) or (6B)’ as a consequence of amendments to section 24.

### **Item 7 Part 4 (heading)**

This amendment repeals the heading ‘Part 4 – Special arrangements during the transition period’ and substitutes ‘Part 4 – Transitional and special arrangements’. This is to reflect the fact that in certain circumstances some of the special arrangements in Part 4 continue to have some operation beyond the transition period under those arrangements.

### **Item 8 Paragraphs 23(9)(a) and (b)**

This amendment relates to the special arrangements that apply to New South Wales under Part 4 of the Rules. It replaces references to ‘1 July 2020’ with ‘1 February 2021’ to reflect the new commencement date of national worker screening.

### **Item 9 Subsection 23(12) (subparagraph (b)(i) of the definition of *transition period*)**

This amendment replaces a reference to ‘30 June 2020’ with ‘31 January 2021’ to reflect the new commencement date of national worker screening.

### **Item 10 Subsections 24(5) and (6)**

This amendment repeals subsections 24(5) and (6) and creates a new definition of an acceptable SA check.

The new subsection 24(6) describes a person as having an acceptable SA check if:

- (a) the risk assessed role does not involve the person engaging in child-related work; and
- (b) before or during the transition period, or within 2 months after the end of the transition period:
  - (i) the person has been subject to an assessment (within the meaning of section 5B of the *Disability Services Act 1993* (SA) as in force from time to time); and
  - (ii) an authorised screening unit has made a finding, in relation to that assessment, to the effect that the person is cleared for disability services employment; and

- (c) an authorised screening unit has not subsequently made a contrary finding in relation another assessment the person has been subject to under that Act; and
- (d) it is not more than 3 years since the finding referred to in subparagraph (b)(ii).

The new subsection 24(6A) describes a person as having an acceptable SA check if:

- (a) before or during the transition period:
  - (i) the person has been subject to an assessment (within the meaning of section 8B of the *Children's Protection Act 1993* (SA) as in force immediately before it was repealed or section 8 of the *Children's Protection Law Reform (Transitional Arrangements and Related Amendments) Act 2017* (SA) as in force from time to time); and
  - (ii) an authorised screening unit has made a finding, in relation to that assessment, to the effect that the person is cleared for child-related employment; and
- (b) an authorised screening unit has not:
  - (i) made a finding under an Act mentioned in subparagraph (b)(i) to the effect that the person is not cleared for child-related employment; or
  - (ii) made a finding under the *Disability Services Act 1993* (SA), as in force from time to time, to the effect that the person is not cleared for disability services employment; and
- (c) the person is not a prohibited person; and
- (d) it is not more than 3 years since the finding referred to in subparagraph (a)(ii).

The *Children's Protection Act 1993* (SA) has been repealed, but prior to the commencement of relevant provisions of the *Child Safety (Prohibited Persons) Act 2016* (SA), it was the legislation used for findings made to the effect that a person was cleared for child-related employment.

The new subsection 24(6B) describes a person as having an acceptable SA check if:

- (a) during the transition period:
  - (i) the person has been subject to a working with children check conducted by the central assessment unit in accordance with the *Child Safety (Prohibited Persons) Act 2016* (SA) as in force from time to time; and
  - (ii) the central assessment unit has determined under that Act that the person is not prohibited from working with children; and
- (b) an authorised screening unit has not made a finding under the *Disability Services Act 1993* (SA), as in force from time to time, to the effect that the person is not cleared for disability services employment; and
- (c) the person is not a prohibited person; and

- (d) it is not more than 5 years since the determination referred to in subparagraph (a)(ii).

**Item 11 Paragraphs 24(7)(a) and (b)**

This replaces references to '1 July 2020' with '1 February 2021' to reflect the new commencement date of national worker screening.

**Item 12 Subsection 24(8)**

As a consequence of the amendment in item 10, this amendment replaces 'paragraph (6)(c)' with 'the requirements of paragraph (6)(d), (6A)(d) and (6B)(d)' to define the day on which an acceptable SA check expires.

**Item 13 Subsection 24(10)(heading)**

This amendment repeals the heading and substitutes '*Definitions*'.

**Item 14 Subsection 24(10)**

This amendment defines the terms '*acceptable SA check*', '*child-related work*' and '*prohibited person*' which are used throughout section 24.

**Item 15 Subsection 24(10) (subparagraph (b)(i) of the definition of *transition period*)**

This amendment replaces a reference to '30 June 2020' with '31 January 2021' to reflect the new commencement date of national worker screening.

**Item 16 Subsection 25(8) (subparagraph (b)(i) of the definition of *transition period*)**

This amendment relates to the special arrangements that apply to Victoria under Part 4 of the Rules. It replaces a reference to '30 June 2020' with '31 January 2021' to reflect the new commencement date of national worker screening.

**Item 17 Subparagraph 26(3)(b)(i)**

This amendment relates to the special arrangements that apply to Queensland under Part 4 of the Rules. It omits the reference to 'Part 5' of the *Disability Services Act 2006* (Qld) to accommodate the potential for amendments to that Act to make the reference to Part 5 inappropriate.

**Item 18 Paragraph 26(4)(b)**

This amendment extends subsection 26(4) to also allow an individual who has made an application to seek to meet a requirement mentioned in existing subparagraph (3)(b)(i) or (ii), but whose application has not yet been decided, to work in a risk assessed role in Queensland although the person does not yet have a clearance under an NDIS worker screening check.

### **Item 19 Subsection 26(5)**

This amendment repeals the existing subsection 26(5) that defines the expression 'transition time', which is used in paragraph 26(4)(c), and replaces it with a new subsection 26(5) with a new definition of the expression. The new definition identifies the end of a transition time for a person as being the later of the following:

- If the person meets subparagraph (4)(b)(i) – the day the relevant notice or certificate that the person held immediately before the end of the transition period expires;
- If the person meets subparagraph (4)(b)(ii) – the earlier of the following:
  - If the person is granted a notice in relation to the valid application mentioned in that subparagraph – the day that notice expires;
  - If the person is not granted a notice in relation to that valid application – the day the person was notified of the decision not to grant the notice.

The purposes of this amendment are to:

- create an end date for the period that a person can seek to rely on a notice or certificate that has been issued after being assessed as meeting the requirements under subparagraph 26(3)(b)(i) or (ii), and
- create an end date for the period that a person can rely on an application as described in subparagraph 26(4)(b)(ii) if a decision is made that the person will not be granted a notice.

### **Item 20 Subsection 26(8) (subparagraph (b)(i) of the definition of *transition period*)**

This amendment replaces a reference to '30 June 2020' with '31 January 2021' to reflect the new commencement date of national worker screening.

### **Item 21 Subsection 27(9) (subparagraph (b)(i) of the definition of *transition period*)**

This amendment relates to the special arrangements that apply to Tasmania under Part 4 of the Rules. It replaces a reference to '30 June 2020' with '31 January 2021' to reflect the new commencement date of national worker screening.

### **Item 22 Subsection 28(9) (subparagraph (b)(i) of the definition of *transition period*)**

This amendment relates to the special arrangements that apply to the Australian Capital Territory under Part 4 of the Rules. It replaces a reference to '30 June 2020' with '31 January 2021' to reflect the new commencement date of national worker screening.

**Item 23 Subsection 29(9) (subparagraph (b)(i) of the definition of *transition period*)**

This amendment relates to the special arrangements that apply to the Northern Territory under Part 4 of the Rules. It replaces a reference to ‘30 June 2020’ with ‘31 January 2021’ to reflect the new commencement date of national worker screening.

**Item 24 Amendments of listed provisions—NDIS worker screening law**

This amendment omits the references to ‘NDIS worker screening legislation’ in the Rules and substitutes ‘NDIS worker screening law’ to ensure that the expressions and definitions in the Rules and Act are aligned.



## 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 2020**

The *National Disability Insurance Scheme (Practice Standards – Worker Screening) Amendment Rules 2020* (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 and form part of the framework to support the delivery of services and supports to people with disability under the National Disability Insurance Scheme (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.

The NDIS worker screening system is a national system given effect by the cooperative efforts of the Commonwealth, States and Territories. The arrangement between the Commonwealth and the jurisdictions is recorded in the Intergovernmental Agreement on Nationally Consistent Worker Screening for the Disability Insurance Scheme (the Agreement). Under 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 the extension of special arrangements for screening of workers in order to provide for 1 February 2021 to be the new commencement date of national worker screening.

The Instrument also broadens the circumstances in which a worker can work in a risk assessed role in Queensland during its transition to national worker screening to reflect changes to relevant policy in that jurisdiction. It also redefines an acceptable SA check for the purposes of the transitional arrangements that apply to South Australia, to reflect changes to legislation and policy in that jurisdiction.

The Instrument amends some of the definitions in the Rules in order to align the definitions with those used in the *National Disability Insurance Scheme Act 2013* (the Act).

### 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 transitional arrangements provide for types of clearances that will be acceptable in each state and territory during the transition to national worker screening clearances.

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).

The Instrument amends the Rules to ensure that the promotion of these rights is ongoing during the transition period that applies to each of the States and Territories.

#### *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 2020* 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**