

EXPLANATORY STATEMENT

Issued by the authority of the Minister for Senior Australians, Aged Care Services

Aged Care Act 1997
Aged Care Quality and Safety Commission Act 2018

Aged Care Legislation Amendment
(Requirements for Staff Members and Volunteers) Instrument 2021

Purpose

The *Aged Care Legislation Amendment (Requirements for Staff Members and Volunteers) Instrument 2021* (Amending Instrument) is to amend the *Accountability Principles 2014* (Accountability Principles); the *Grant Principles 2014* (Grant Principles); the *Records Principles 2014* (Records Principles); *Sanctions Principles 2014* (Sanctions Principles), and *Classification Principles 2014* (Classification Principles) under the *Aged Care Act 1997* (Aged Care Act) and the *Aged Care Quality and Safety Commission Rules 2018* (Commission Rules) under the *Aged Care Quality and Safety Commission Act 2018* (Commission Act). The purpose of these amendments is to allow approved providers in the aged care sector, as part of their responsibilities in relation to staff, to accept a clearance obtained from the National Disability Insurance Scheme (NDIS) Worker Screening Check process as an alternative to the police certificate requirements in the aged care legislation, in certain circumstances.

This alternative pathway only relates to aged care workers who have undergone an NDIS Worker Screening Check and obtained a clearance (NDIS worker screening clearance), primarily for the purpose of a risk assessed role within an aged care service.

These amendments will enable an aged care worker to hold an NDIS worker screening clearance, or a police certificate, in order for their approved provider to satisfy the requirements relating to aged care workers under the Aged Care Act.

The Amending Instrument also remove references to CrimTrac, which was abolished in 2016, and allows reports prepared by the Australian Criminal Intelligence Commission (ACIC) and its accredited agencies to be accepted for the purposes of the Aged Care Act and the Commission Act.

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

Background

Amendments relating to NDIS worker screening clearances

There are a number of NDIS participants who are living in residential aged care facilities. Previously approved providers of permanent residential aged care supporting NDIS participants were exempt from the NDIS Quality and Safeguards Commission's (NDIS Commission) mandatory registration requirements.

On 1 December 2020, permanent residential aged care providers delivering services to NDIS participants in their facilities automatically became registered NDIS providers. This means that as of 1 December 2020, aged care providers supporting NDIS participants have operated under a dual regulatory framework (the Aged Care Act and the *National Disability Insurance Scheme Act 2013* (NDIS Act)).

Aged care sector stakeholders have raised concerns about the dual regulation requiring providers to comply with the police certificate requirements in the aged care legislation as well as the requirements for an NDIS worker screening clearance under the *National Disability Insurance Scheme (Practice Standards—Worker Screening) Rules 2018* (Worker Screening Rules).

Since 1 December 2020, transitional arrangements under the Worker Screening Rules allowed aged care workers supporting NDIS participants in residential aged care (and in a risk assessed role) to continue to use their existing valid police certificate issued prior to 1 February 2021. Under these arrangements, upon expiry of the police certificate, workers in risk assessed roles must obtain an NDIS worker screening clearance in addition to the police certificate required under the Aged Care Act.

NDIS Worker Screening Checks are undertaken by the NDIS Worker Screening Units (WSUs), operated by the state and territory government who issue an NDIS worker screening clearance. The WSUs are ACIC accredited agencies who consider an applicant's criminal history information alongside misconduct and other available information to assess the risk of harm posed by an applicant. The WSUs make the decision about whether a person is cleared or excluded from working in a risk assessed role.

Given both checks are designed to offer protection to consumers, regulatory requirements could be simplified for aged care providers through recognition of the NDIS worker screening clearance. Recognition of both clearances within aged care legislation would mean NDIS participants have continued certainty that protection is not lessened through this change.

Amendments to update references to CrimTrac

On 1 July 2016, the *Australian Crime Commission Amendment (National Policing Information) Act 2016* amended the *Australian Crime Commission Act 2002* to provide a legislative basis for CrimTrac's functions to be exercised by the ACIC, including the provision of systems and services relating to national policing information and nationally coordinated criminal history checks. CrimTrac was

abolished as an Executive Agency with effect from 1 September 2016. The Amending Instrument will reflect this change.

The ACIC works with Australian police agencies to deliver the National Police Checking Service (NPCS). The ACIC does not accept applications or submit checks on behalf of individuals. Instead, the ACIC has accredited a number of organisations that assist clients to apply for and submit a Nationally Coordinated Criminal History Check. These organisations are entrusted with direct access to the National Police Checking Service. The Amending Instrument will recognise these organisations in the definition of police certificate.

Who should seek an NDIS Worker screening clearance?

An NDIS worker screening clearance should only be sought if the aged care worker is in a risk assessed role supporting NDIS participants.

One of the responsibilities detailed in Part 6 of the Accountability Principles provides that approved providers must ensure that their staff have been issued with a police certificate and that this police certificate does not record that the person has been convicted of certain offences. The police certificate requirements under the Aged Care Act were implemented in 2007 and strengthened in 2009 as part of the Australian Government's ongoing commitment to protect the health, safety and wellbeing of vulnerable aged care recipients.

The Amending Instrument affords no lesser protections to aged care or NDIS consumers. The primary role of the Amending Instrument is to reduce regulatory burden by accepting the NDIS worker screening clearance an alternative to the police certificate requirements, in certain circumstances.

Authority

Section 96-1 of the Aged Care Act provides that the Minister has the power to make instruments providing for matters required or permitted, or necessary or convenient, in order to give effect to the relevant Part or section of the Aged Care Act.

Section 77 of the Commission Act provides that the Minister has the power to make instruments providing for matters required or permitted, or necessary, or convenient in order to give effect to the Act.

Reliance on subsection 33(3) of the *Acts Interpretation Act 1901*

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 conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.

Commencement

The Amending Instrument commences the day after it is registered on the Federal Register of Legislation.

Consultation

The Amending Instrument are made in response to aged care stakeholder (peak bodies and providers) feedback. Aged care stakeholders discussed worker screening duplication with the Department of Health (Department) and requested streamlining across aged care and the NDIS. Stakeholder feedback was taken into account when drafting the Amending Instrument. Further consultation was undertaken with the Aged Care Quality and Safety Commission (ACQSC), the Department of Social Services and the NDIS Commission on the practical implications of the Amending Instrument.

As part of a targeted stakeholder consultation, an Exposure Draft of the Amending Instrument was provided to key aged care stakeholders. The Department met with representatives from aged care peak bodies and approved providers to outline the Amending Instrument and seek feedback on whether the amendments would effectively reduce legislative duplication across worker screening in aged care and the NDIS.

Aged care stakeholders were generally supportive of the Amending Instrument and agree it would reduce regulatory burden. The ACQSC and NDIS Commission provided comments on the Amending Instrument and are also supportive.

Regulation Impact Statement (RIS)

The Office of Best Practice Regulation (OBPR) was consulted during development of the Amending Instrument. OBPR advised that a RIS is not required (OBPR ID 44027)

Details of the Aged Care Legislation Amendment (Requirement for Staff Members and Volunteers) Instrument 2021

Section 1 states that the name of the Amending Instrument is the *Aged Care Legislation Amendment (Requirement for Staff Members and Volunteers) Instrument 2021*.

Section 2 states that the Amending Instrument commences on the day after it is registered.

Section 3 states that the instrument is made under the Aged Care Act and the Commission Act.

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

Schedule 1 amends the Accountability Principles, Grant Principles, Records Principles, and the Sanctions Principles.

Part 1 Amendments relating to NDIS worker screening clearances

Accountability Principles 2014

Item 1

Item 1 inserts three new defined terms into section 4 of the Accountability Principles. The new terms define an NDIS worker screening clearance, the NDIS worker screening rules and the process of obtaining an NDIS worker screening clearance.

These definitions allow the Accountability Principles to adopt the processes for obtaining an NDIS clearance set out in the NDIS legislation.

Item 2

Item 2 repeals the paragraph 47(a) and substitutes a new paragraph 47(a). Currently paragraph 47(a) requires that an approved provider must ensure that all staff and volunteers have been issued with a police certificate and, if necessary, a relevant statutory declaration.

The new paragraph 47(a) requires that an approved provider must ensure that each person who is a staff member or volunteer have either a police certificate or an NDIS worker screening clearance, to ensure that a staff member or volunteer does not have a criminal conviction that would preclude them from providing aged care.

Item 3

Item 3 repeals sections 48 and 49 and inserts new sections 48 and 49.

Section 48 of the Accountability Principles sets out the requirements in relation to new staff members and volunteers.

New section 48 requires that an approved provider must not allow a person to become a staff member or volunteer unless they are satisfied of the requirements in subsection 48(2) and 48(3).

New subsection 48(2) sets out the requirements for people who are seeking a police certificate, which is consistent with the current section 48. It provides that an approved provider must not allow a person to become a staff member or volunteer unless they are satisfied that:

- subject to section 49, there is a police certificate that is not more than three years old and does not record that the person has been convicted of the relevant offences, and
- if the person has been a citizen or permanent resident of a country other than Australia the person has made a statutory declaration stating that they have not been convicted of the relevant offences.

This allows the approved provider to be satisfied that, according to Australian records, a person has not been convicted of the relevant offences that would preclude a person from providing care.

New subsection 48(3) inserts a new requirement that an approved provider must not allow a person to become a staff member or volunteer unless the person has an NDIS worker screening clearance that was not issued more than 5 years ago and is not suspended.

New subsection 48(3)(b) also inserts a requirement that if a person who is seeking an NDIS worker screening clearance, has been at any time after turning 16 a citizen or permanent resident of a country other than Australia, the person must make a statutory declaration declaring that they have never been convicted of the relevant offences. The offences covered by this subsection are the offences set out in the aged care legislation that preclude a person from providing care.

This item allows approved providers to be satisfied that a potential staff member or volunteer does not have a criminal conviction in Australia that would preclude them from providing care through recognising the NDIS worker screening clearance. It also maintains the current requirement for aged care staff to make a relevant statutory declaration if they have been a citizen or permanent residence outside Australia that they have not been convicted of the relevant offences.

Section 49 provides the arrangements for new staff members or volunteers who do not yet have a police certificate.

New subsection 49(1) maintains the current requirements for staff who are seeking a police certificate; specifically that:

- the police certificate has not yet been issued,
- the care to be provided is essential,
- an application for the police certificate has been made, and

- until the police certificate has been issued the person will be subject to appropriate supervision during the time the person has access to care recipients.

The person is also required to make a statutory declaration stating that they have never been convicted of the relevant offences.

New subsection 49(2) inserts similar requirements for those people who are seeking an NDIS clearance, specifically requiring that:

- the person must be in the process of obtaining an NDIS working screening clearance,
- the care is essential,
- the person will be subject to appropriate supervision, and
- they make a statutory declaration stating that they have never been convicted of the relevant offences.

This subsection applies the requirements currently set out in the aged care legislation, including the relevant supervision requirements, to staff who are seeking an NDIS worker screening clearance.

Item 4

Section 50 of the Accountability Principles sets out the continuing and ongoing responsibilities of approved providers.

Item 4 repeals subsection 50(1) which sets out the continuing responsibilities of approved providers in relation to staff who are seeking police certificates.

Item 4 substitutes a new subsection 50(1) that provides that an approved provider must ensure that each staff member or volunteer has either:

- a police certificate that is not more than three years old and that does not record that they have been convicted of the relevant offences, or
- the person has an NDIS worker screening clearance that is not more than five years old and is not suspended.

Item 4 at subsection 50(1A) also clarifies that this subsection does not apply in relation to a period during which a person does not have a police certificate or NDIS worker screening clearance as permitted by section 49.

Item 5

Subsection 50(2) provides that the approved provider must ensure that each person who is a staff member or volunteer for the approved provider, is not allowed to continue unless the approved provider is satisfied that the conditions of the police certificate issued for the person have not changed, a police certificate has not expired, **or** a statutory declaration made by the person is correct.

Item 5 makes a correction to subsection 50(2) that provides that **neither** a police certificate **nor** statutory declaration records that a staff member or volunteer have been convicted of the relevant offences. This ensures that information provided on statutory declarations are continued to be considered alongside a police certificate,

and providers are continuing to consider the currency of statutory declaration provisions in employment considerations.

Item 6

Item 6 repeals paragraph 53B(2)(a) and substitutes a new paragraph 53B(2)(a). This new paragraph requires the approved provider to obtain a police certificate for all proposed key personnel, unless the provider is satisfied that the person has an NDIS worker screening clearance, before engaging them, or as soon as practicable.

Grant Principles 2014

Item 7

Section 17(2) of the Grant Principles prohibits approved providers from engaging a person to be a community visitor in specific circumstances.

Item 7 repeals paragraph 17(2)(a), which contained the requirements about police certificates, and inserts a new requirement that requires approved providers to comply with the new subsection 2A, which is discussed in Item 8.

Item 8

Item 8 inserts a new 17(2A) that requires potential community visitors to have either a police certificate that does not record a conviction for a relevant offence or NDIS worker screening clearance. This allows NDIS worker screening clearances to be accepted under the Community Visitors Scheme. This will reduce the regulatory burden for volunteers who are providing a benefit to the community across multiple government programs.

Records Principles 2014

Item 9

Item 9 inserts three new defined terms into section 4 of the Records Principles. The new terms define an NDIS working screening clearance, the NDIS worker screening rules and the process of obtaining an NDIS worker screening clearance.

The new terms relate to acceptance of NDIS worker screening clearances under the Aged Care Act and the manner in which they must be kept.

Item 10

Section 9 of the Records Principles relates to records about staff members and volunteers, including police certificates.

Item 10 repeals section 9 of the Records Principles and substitutes it with a new section 9. New section 9 will now relate to police certificates and NDIS worker screening clearances. New subsection 9(a) provides that an approved provider must keep records that enable the approved provider to demonstrate for each staff member or volunteer there is:

- a police certificate that is not more than three years old, or
- an NDIS worker screening clearance that is not more than five years old and is not suspended.

New subsection 9(b) provides that approved providers must keep records that can demonstrate that where a staff member or volunteer is allowed, in accordance with Part 6 of the Accountability Principles, to be without a police certificate or NDIS worker screening clearance they have made an application for a police certificate or are in the process of obtaining an NDIS worker screening clearance.

New subsection 9(c) also continues to require that any statutory declaration required to be made under Part 6 of the Accountability Principles has in fact been made.

Item 11

Item 11 repeals section 10 that provided the requirements for keeping information about police certificates in accordance with the *Privacy Act 1988*.

Item 11 inserts a new section 10 that requires the approved provider who has kept a police certificate or a copy of the police certificate or a copy or other evidence of an NDIS worker screening clearance, to keep these records in accordance with the *Privacy Act 1988*.

This item protects the personal information collected from a staff member or volunteer by an approved provider through the storing of, or keeping information taken from, a police certificate or an NDIS clearance.

Sanctions Principles 2014

Items 12

Item 12 makes technical amendments to section 6 to include a new subsection number. This means that section 6 will have the previous requirements for police certificates set out in subsection 6(1) and the requirements relating to NDIS worker screening clearances in subsection 6(2).

Item 13

Item 13 repeals previous subparagraph 6(b)(i) of the Sanctions Principles and substitutes with a new paragraph. The previous subparagraph required that an approved provider obtain a police certificate.

The new subparagraph 6(b)(i) requires that an approved provider obtain a police certificate unless the approved provider is satisfied that the person meets the requirements in new subsection 6(2), discussed at Item 14.

Item 14

Item 14 inserts a new paragraph 6(2) to allow a person to meet the requirements in subsection 6 if the person has an NDIS worker screening clearance. This provides an alternative in place of a police certificate.

Part 2 Amendments relating to police certificates

Items 15 and 24

Items 15 and 24 repeal the definition of CrimTrac in the Accountability Principles and Grant Principles.

This definition has been repealed as CrimTrac was abolished as an Executive Agency with effect from 1 September 2016. CrimTrac was defined because it was included in the definition of police certificate, another defined term. As CrimTrac no longer provides the systems and services relating to national policing information and nationally coordinated criminal history checks it is no longer needed as part of the definition of police certificate.

Items 16, 25, 26 and 27

Items 16, 25, 26 and 27 insert a new definition of police certificate into section 4 of the Accountability Principles, section 4 of the Grant Principles, section 4 of the Records Principles and section 4 of the Sanctions Principles respectively.

The previous definition of police certificate was a report prepared by the Australian Federal Police, CrimTrac or the police force or police service of a State or Territory.

The new definition removes the reference to CrimTrac and now includes a report about the person's criminal conviction prepared by the Australian Federal Police; the Australian Criminal Intelligence Commission (ACIC); an agency accredited by the Australian Criminal Intelligence Commission; or the police force or police service of a State or Territory.

The definition now includes the ACIC because the ACIC exercises the functions relating to nationally coordinated criminal history checks that were previously CrimTrac functions.

The definition also includes ACIC accredited bodies because the ACIC does not accept applications directly from individuals or organisations. Applicants can access checks through accredited bodies or police services. Including accredited body in the definition of police check makes it clear that approved providers can now access the online national police checks offered by accredited organisation. This removes a previous regulatory burden that prevented approved providers from accessing these services.

Items 17, 18, 19 and 20

Item 17 inserts a new definition of police certificate into section 4 of the Commission Rules.

Item 18 repeals the previous definition of a police report - a report prepared by the Australian Federal Police, or the police force or police service of a State or Territory.

The new definition includes a report about the person's criminal conviction prepared by the Australian Federal Police; the Australian Criminal Intelligence Commission (ACIC); an agency accredited by the Australian Criminal Intelligence Commission; or the police force or police service of a State or Territory.

Section 90 of the Commission Rules outlines registration requirements of quality assessors, and the decisions required by the Commissioner to register a quality assessor. A police check is part of this decision making.

Item 19 amends subparagraph 90(1)(c) to change reference its reference from requiring a police report for an applicant to requiring a police certificate.

Section 92 of the Commission Rules outlines ongoing registration requirements of quality assessors, where the Commissioner makes a decision to register for a further period of a year.

Item 20 repeals subparagraph 92(1)(d) and substitutes a new subparagraph, to change its reference from requiring a police report, to requiring a police certificate.

Items 21, 22 and 23

Item 21 inserts a new definition of police certificate into section 4 of the Classification Principles.

Item 22 repeals the previous definition of a police report – which links this definition to the Commission Rules.

The new definition includes a report about the person's criminal conviction prepared by the Australian Federal Police; the Australian Criminal Intelligence Commission (ACIC); an agency accredited by the Australian Criminal Intelligence Commission; or the police force or police service of a State or Territory.

Section 45 of the Classification Principles outlines registration requirements of an Aged Care Financial Instrument (ACFI) assessor, and the decisions required by the Department to register an ACFI assessor. A police check is part of this decision making.

Item 23 amends paragraph 45(c) to change its reference from requiring a police report for an applicant to requiring a police certificate.

Statement of Compatibility with Human Rights

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

Aged Care Legislation Amendment (Requirement for Staff Members and Volunteers) Instrument 2021

The *Aged Care Legislation Amendment (Requirement for Staff Members and Volunteers) Instrument 2021* 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) Act 2011*.

Overview of the legislative instrument

The *Aged Care Legislation Amendment (Requirement for Staff Members and Volunteers) Instrument 2021* (Amending Instrument) amends the *Accountability Principles 2014* (Accountability Principles), *Grant Principles 2014* (Grant Principles) *Records Principles 2014* (Records Principles), *Sanctions Principles 2014* (Sanctions Principles) and *Classification Principles 2014* (Classification Principles) under the *Aged Care Act 1997* (Aged Care Act) and the *Aged Care Quality and Safety Commission Rules 2018* (Commission Rules) under the *Aged Care Quality and Safety Commission Act 2018* (Commission Act).

The purpose of these amendments is to allow a clearance under the National Disability Insurance Scheme (NDIS) Worker Screening Checks (NDIS workers screening clearance) to satisfy the requirements for aged care staff and volunteers (aged care workers) under the *Aged Care Act 1997*, where an aged care provider is caring for a participant under the *National Disability Insurance Scheme Act 2013* (NDIS Act), and undertake changes to the Commission Rules to align definitions of police certificate across aged care legislation.

The Amending Instrument also allow for police certificates from the Australian Criminal Intelligence Commission (ACIC) and its accredited agencies to be accepted by all aged care providers.

The Amending Instrument amends the Accountability Principles to set out legislative provisions that allow aged care providers to be satisfied of requirements relating to new aged care workers who have an NDIS worker screening clearance. The Amending Instrument also allow for police certificates from the ACIC and its accredited agencies to be accepted by all aged care providers.

The Amending Instrument amends the Records Principles to set out provisions that include keeping a record of an NDIS worker screening clearance to satisfy record keeping requirements for aged care providers, and ensure a current police certificate is maintained for all staff, no matter which worker screening pathway is used.

The Amending Instrument amends the Grant Principles to allow aged care providers to be satisfied of requirements relating to volunteers who have an NDIS worker screening clearance for the purposes of the Community Visitors Scheme.

The Amending Instrument amends the Sanctions Principles to include an NDIS worker screening clearance as a requirement for key personnel where an aged care provider, who is also a registered NDIS provider, has NDIS participants.

The Amending Instrument will not affect the level of care provided to care recipients, but will enable both aged care providers and aged care workers to, where appropriate, seek only a single worker screening clearance when supporting both NDIS participants and aged care residents.

Human rights implications

The Amending Instrument engages the following human rights as contained in articles 11, 16, and 25 of the *Convention of the Rights of Persons with Disabilities* (CRPD) and article 11(1) of *International Covenant on Economic, Social and Cultural Rights* (ICESCR),:

- The right to protection from situations of risk.
- The right to protection within their home from all forms of exploitation, violence and abuse through the appropriate legislative protections and independent monitoring being put in place.
- The right to enjoy the highest attainable standard of health without discrimination on the basis of disability, including standard of living.
- The right to an adequate standard of living.

The Amending Instrument upholds these rights by ensuring appropriate worker screening checks are in place and that there is appropriate record keeping and monitoring of those checks.

Conclusion

The Amending Instrument is compatible with human rights as it promotes the human right to protection from situations of risk, exploitation, violence and abuse for aged care residents and NDIS participants within aged care.

Senator the Hon Richard Colbeck
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