

EXPLANATORY STATEMENT

Issued by the authority of the Acting Commissioner of the NDIS Quality and Safeguards Commission

National Disability Insurance Scheme Act 2013

National Disability Insurance Scheme (Practice Standards—Worker Screening) Amendment (Transitional and Special Arrangements—Victoria) Rules 2021

Purpose

The *National Disability Insurance Scheme (Practice Standards – Worker Screening) Amendment (Transitional and Special Arrangements—Victoria) Rules 2021* (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 that regulates 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 nationally consistent 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.

The Instrument amends the transitional arrangements that apply to Victoria under Part 4 of the Rules to allow additional time for the recognition of transitional and special arrangements in Victoria.

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 the day after it is registered.

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 Victoria.

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 (Transitional and Special Arrangements—Victoria) Rules 2021*.

Section 2 – Commencement

Section 2 provides that the whole of the Instrument commences on the day after it is registered.

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 Subparagraphs 25(5)(d)(ii) and (iii)

This amendment substitutes “6 months” with “12 months” in both of these subparagraphs. This will enable registered NDIS providers in Victoria to allow a person to work in a risk assessed role if the person does not have an NDIS worker screening clearance when one of the following applies:

- less than 12 months have elapsed since the end of the transition period. The provider must also be meeting the requirements in paragraphs 25(5)(a) to (c); or
- 12 months or more have elapsed since the end of the transition period and the person is in the process of obtaining a clearance, within the meaning of section 15 of the Rules. The provider must also be meeting the requirements in paragraphs 25(5)(a) to (c).

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 (TRANSITIONAL AND SPECIAL ARRANGEMENTS—VICTORIA) RULES 2021

The *National Disability Insurance Scheme (Practice Standards—Worker Screening) Amendment (Transitional and Special Arrangements—Victoria) Rules 2021* (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 for the screening of workers in the National Disability Insurance Scheme (NDIS). The Rules set out the requirements for registered NDIS providers in relation to the screening of their workers to minimise the risk of harm to people with disability.

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).

Consistent with the Agreement, the Rules establish transitional and special arrangements for the screening of workers in participating jurisdictions until they have moved to full implementation of NDIS worker screening.

The Instrument amends the Rules to establish an additional period of time during which a registered NDIS provider can allow a person who does not have a clearance to work in a risk assessed role in Victoria.

The amendment extends the timeframe that registered NDIS providers can engage certain individuals in risk assessed roles without an NDIS worker screening clearance. This is to ensure that the workforce providing supports and services to

people with disability is not impacted by factors identified by Victoria as impacting the uptake and implementation of the NDIS worker screening check.

Background

There is a risk that these factors will impact people with disability by reducing the number of workers available to provide them with supports and services. The Instrument addresses this risk by extending the period of time that registered NDIS providers can engage a person without a clearance in a risk assessed role, where the provider was also meeting the requirements in paragraphs 25(5)(a) to (c). This mitigates the risk of harm to people with disability by minimising the risk of impact on the current disability workforce.

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 only change to the Rules through this amendment is the extension of the period during which a registered NDIS provider in Victoria can engage a person without a clearance in a risk assessed role. This promotes the rights of people with disability by ensuring that there are sufficient workers available to enable people with disability to have choice and control over their own supports and services and who is providing those supports and services.

The extension is limited to registered NDIS providers that are also complying with paragraphs 25(5)(a) to (c). As part of these requirements, if a registered NDIS provider is allowing a person to work in a risk assessed role without a clearance (whether or not the person is in the process of obtaining a clearance), the registered NDIS provider must, before the end of the transition period, comply with the safety screening requirements in relation to the person in accordance with the safety

screening policy issued by the Victorian Department of Health and Human Services as in force from time to time. Further, the person's safety screening must be current in accordance with those requirements.

This ensures that if a person is working in a risk assessed role without a clearance, or while they are in the process of obtaining a clearance, the risk to people with disability is minimised because the person's safety screening meets the safety screening policy requirements. This supports the paramount consideration of NDIS worker screening being 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 Instrument ensures that those who work in risk assessed roles for registered NDIS providers are not disadvantaged by circumstances outside of their control such as delays in processing NDIS worker screening checks.

The requirement that the worker meet the safety screening policy requirements is an existing requirement and should not impact the ability of a person who is already engaged in a risk assessed role to continue in that role. The person should already be meeting those screening requirements.

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 maintain the existing protections in the transitional and special arrangements that apply in Victoria.

Conclusion

The Instrument advances 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. It also promotes the human rights of workers by ensuring that they are not unduly impacted by administrative delays, which in turn maintains an effective disability workforce to provide supports and services under the NDIS.

Samantha Taylor, Acting Commissioner of the NDIS Quality and Safeguards Commission

