

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 (Provider Registration and Practice Standards) Amendment (2021 Measures No.1) Rules 2021

Purpose

The *National Disability Insurance Scheme (Provider Registration and Practice Standards) Amendment (2021 Measures No.1) Rules 2021* (the Instrument) amends the *National Disability Insurance Scheme (Provider Registration and Practice Standards) Rules 2018* (the Rules) to create additional NDIS Practice Standards (practice standards) that relate to emergency and disaster management, mealtime management and severe dysphagia management.

These practice standards are supported by appropriate quality indicators under the *National Disability Insurance Scheme (Quality Indicators for NDIS Practice Standards) Guidelines 2018*¹ (the Guidelines) that explicitly address the quality and safety of supports and services expected of a registered NDIS provider or a person or entity who is applying to become a registered NDIS provider.

Background

The Instrument is made under section 209 of the Act construed in accordance with subsection 33(3) of the *Acts Interpretation Act 1901*.

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*.

The functions of the Commissioner of the NDIS Quality and Safeguards Commission (NDIS Commissioner) include functions relating to the quality and safety of services and supports provided to NDIS participants, and registering NDIS providers and

¹ Previously referred to in the Rules as the *National Disability Insurance Scheme (Quality Indicators) Guidelines 2018*.

monitoring their compliance with registration conditions. The NDIS Commissioner manages the quality assurance and registration of NDIS providers under a nationally rigorous framework that includes the NDIS Practice Standards in the Rules and the Guidelines, which are to be taken into account when assessing compliance with those standards.

The Instrument deals with some of the practice standards that NDIS providers must meet to become and remain registered NDIS providers.

In 2019, the NDIS Quality and Safeguards Commission (NDIS Commission) commissioned an independent synopsis of contemporary reviews of deaths of people with disability who had been in receipt of specialist disability supports and services. The review found strong and consistent themes indicating service delivery contributors to the deaths of people with disability. These included issues relating to mealtime management and associated dysphagia supports by specialist disability providers.

The report of the review recommended the NDIS Commissioner's regulatory powers be used to require registered NDIS providers to undertake certain activities to ensure quality and safety in mealtime management with the aim of reducing the numbers of preventable deaths among NDIS participants.

The Instrument responds to the recommendations in the report by imposing additional requirements under the Rules, supported by appropriate quality indicators in the Guidelines that reinforce the importance of the prevention of deaths among people with disability.

In addition to the insertion of the mealtime management and severe dysphagia management practice standards, the Instrument also inserts an emergency and disaster management practice standard which covers health emergencies which may affect the delivery of supports and services during an event of scale, complexity and sustained disruption, such as (but not limited to) the COVID-19 pandemic.

While the Rules cover broad risk management obligations of registered NDIS providers, the new emergency and disaster management practice standard under the Instrument specifically addresses what registered NDIS providers must have in place to prepare, prevent, manage and respond to emergency and disaster situations, whilst mitigating risks to and ensuring continuity of supports that are critical to the health, safety and wellbeing of NDIS participants.

Commencement

The Instrument commences on 15 November 2021.

In relation to existing registered NDIS providers, section 16A (emergency and disaster management) as inserted by the Instrument, applies on and after 24

January 2022. Section 26A (mealtime management), as inserted by the Instrument, applies to existing registered NDIS providers on and after 13 December 2021.

There are transitional provisions concerning the application of the amendments made by the Instrument to applications for registration made under section 73C of the NDIS Act and mid-term audits under section 13B of the Rules.

Consultation

The Instrument is a Category D rule for the purposes of section 209 of the *National Disability Insurance Scheme Act 2013* (NDIS Act). Accordingly, as required under subsection 209(7) of the NDIS Act, the Commonwealth has consulted each host jurisdiction in relation to the making of the Instrument. Each host jurisdiction has had the opportunity to review this Instrument and provide comments and feedback.

There was also consultation with the NDIS Commission Consultative Committees, namely, the Disability Sector Consultative Committee and the Industry Consultative Committee.

Regulation Impact Statement (RIS)

A RIS is not required for this Instrument (OBPR ID 44195).

Explanation of the provisions

Section 1 – Name

Section 1 provides that the name of the Instrument is the *National Disability Insurance Scheme (Provider Registration and Practice Standards) Amendment (2021 Measures No.1) Rules 2021*.

Section 2 – Commencement

Section 2 provides that the Instrument commences on 15 November 2021.

Section 3 – Authority

Section 3 provides that the Instrument is made under the NDIS Act.

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 applicable items in the Schedule concerned, and any other item in a Schedule to the Instrument has effect according to its terms.

Schedule 1 – Amendments

This Schedule amends the Rules.

Item 1 – Section 4

This amendment provides a definition of mealtime management, which is a term used in the Instrument.

Item 2 – Section 4

This amendment repeals the definition of *National Disability Insurance Scheme (Quality Indicators) Guidelines* and is consequential on the amendment to section 24 of the Rules (Item 8 – Section 24 refers), which changes the name of the Guidelines.

Item 3 – Part 4

This amendment repeals and substitutes the heading of Part 4 of the Rules to address the fact that the existing heading does not accurately reflect the purpose of that Part, as set out in subsection 12(2).

Item 4 – Subsection 13B(4)

This amendment repeals and substitutes subsection 13B(4) to specify that mid-term audits of registered NDIS providers must commence no later than either 18 months after the beginning of the period for which the provider's registration is in force or such longer period after the beginning of that period as the Commissioner allows.

Item 5 – At the end of Part 4

This amendment inserts a new section 13C into the Rules to specify that a registered NDIS provider that is registered to provide high intensity daily personal activities is subject to the condition that the provider must not provide a support mentioned in Schedule 2 to the Rules (which relates to high intensity daily personal activities) if the support is not set out in the provider's certificate of registration.

For example, a provider that is registered to provide high intensity daily personal activities but does not have complex bowel care (clause 3 in Schedule 2) set out in their certificate of registration must not provide complex bowel care.

Item 6 – Paragraph 20(1)(a)

This amendment repeals and substitutes the paragraph concerned to clarify that to be registered to provide a class of supports specified in column 1 of an item in the table in subsection 20(3) of the Rules, an applicant must be assessed by an approved quality auditor, using the method specified in column 3 of that item, as meeting each standard that:

- is specified in a Schedule mentioned in column 2 of that item; and
- applies to the provider.

The insertion of subparagraph 20(1)(a)(ii) clarifies that those seeking to be registered to provide high intensity daily personal activities need only be assessed as meeting each applicable standard in Schedule 2 that applies to the provider (i.e. each standard that corresponds with each specific support in Schedule 2 that the provider seeks to provide as a registered NDIS provider).

Item 7 – Subsection 20(3) (table items 32 to 37)

This amendment repeals items 32 to 37 of the table in subsection 20(3) and substitutes them with items 31A to 36 for the purpose of aligning the item numbers to correspond with the registration group references used for those classes of supports in the NDIS Commission Operating System.

Item 8 – Section 24

This amendment repeals and substitutes section 24 with a provision that sets out when the quality indicators in the *National Disability Insurance Scheme (Quality Indicators for NDIS Practice Standards) Guidelines 2018* (previously referred to in the Rules as the *National Disability Insurance Scheme (Quality Indicators) Guidelines*) must be taken into account.

Item 9 – At the end of Part 3 of Schedule 1

This amendment inserts clause 16A, the new practice standard for emergency and disaster management. Clause 16A is intended to address the planning required by providers to prepare, prevent, manage and respond to emergency and disaster situations whilst mitigating risks to and ensuring continuity of supports that are critical to the health, safety and wellbeing of NDIS participants.

Item 10 – After clause 26 of Schedule 1

This amendment inserts clause 26A, the new practice standard for mealtime management. This standard applies to a provider that is responsible for providing supports to participants who require mealtime management (such as those with mild dysphagia) and is intended to help ensure quality and safety in the provision of mealtime management. It deals with the nutritional value and texture of meals, and with their planning, preparation and delivery.

Item 11 – Schedule 2 (note)

This amendment repeals and substitutes the note under the heading to Schedule 2 to include a reference to section 13C of the Rules, and is consequential on the insertion of section 13C (see above, Item 5 – At the end of Part 4).

Item 12 – Subclause 1(1) of Schedule 2

This amendment repeals and substitutes the subclause concerned to clarify how the practice standards in Schedule 2 (clauses 3 to 9) of the Rules apply to both a

provider that is registered to provide high intensity daily personal activities and to a person or entity who is applying to become registered to provide high intensity daily personal activities.

A practice standard in Schedule 2 will only apply to:

- a provider who is registered to provide high intensity daily personal activities if the particular support mentioned in the standard is set out in the provider's certificate of registration; and
- a person or entity who is applying to be registered to provide high intensity daily personal activities and has requested in the application for registration that the particular support mentioned in the standard be set out in the person's or entity's certificate of registration.

Item 13 – Subclause 3(1) of Schedule 2

This amendment repeals and substitutes subclause 3(1) relating to the practice standard for complex bowel care.

The purpose of this amendment is to clarify that this practice standard only applies to a provider that is registered to provide high intensity daily personal activities and has complex bowel care set out in the provider's certificate of registration.

Item 14 – Subclause 4(1) of Schedule 2

This amendment repeals and substitutes subclause 4(1) relating to the practice standard for enteral (nasogastric tube-jejunum or duodenum) feeding and management.

The purpose of this amendment is to clarify that this practice standard only applies to a provider that is registered to provide high intensity daily personal activities and has enteral (nasogastric tube-jejunum or duodenum) feeding and management set out in the provider's certificate of registration.

Item 15 – After clause 4 of Schedule 2

This amendment inserts clause 4A, the new practice standard for severe dysphagia management. This standard applies to a provider that is registered to provide high intensity daily personal activities and has severe dysphagia management set out in the provider's certificate of registration.

This standard requires those providers to ensure that each participant requiring severe dysphagia management receives appropriate support that is relevant and proportionate to their individual needs and preferences.

Item 16 – Subclause 5(1) of Schedule 2

This amendment repeals and substitutes subclause 5(1) relating to the practice standard for tracheostomy management.

The purpose of this amendment is to clarify that this practice standard only applies to a provider that is registered to provide high intensity daily personal activities and has tracheostomy management set out in the provider's certificate of registration.

Item 17 – Subclause 6(1) of Schedule 2

This amendment repeals and substitutes subclause 6(1) relating to the practice standard for urinary catheter management (in-dwelling urinary catheter, in-out catheter, and suprapubic catheter).

The purpose of this amendment is to clarify that this practice standard only applies to a provider that is registered to provide high intensity daily personal activities and has urinary catheter management (in-dwelling urinary catheter, in-out catheter, and suprapubic catheter) set out in the provider's certificate of registration.

Item 18 – Subclause 7(1) of Schedule 2

This amendment repeals and substitutes subclause 7(1) relating to the practice standard for ventilator management.

The purpose of this amendment is to clarify that this practice standard only applies to a provider that is registered to provide high intensity daily personal activities and has ventilator management set out in the provider's certificate of registration.

Item 19 – Subclause 8(1) of Schedule 2

This amendment repeals and substitutes subclause 8(1) relating to the practice standard for subcutaneous injections.

The purpose of this amendment is to clarify that this practice standard only applies to a provider that is registered to provide high intensity daily personal activities and has subcutaneous injections set out in the provider's certificate of registration.

Item 20 – Subclause 9(1) of Schedule 2

This amendment repeals and substitutes subclause 9(1) relating to the practice standard for complex wound management.

The purpose of this amendment is to clarify that this practice standard only applies to a provider that is registered to provide high intensity daily personal activities and has complex wound management set out in the provider's certificate of registration.

Item 21 – Clause 2 of Schedule 4

This amendment omits "use of regulated restrictive practices" from clause 2 and substitutes it with "implementation of behaviour support plans" for the purpose of addressing the fact that the existing practice standards in Schedule 4 primarily relate to the implementation of behaviour support plans as opposed to the use of regulated restrictive practices.

Item 22 – At the end of Part 7

Part 7 of the Rules contains application, saving and transitional provisions. This amendment inserts section 31 into Part 7 to deal with the application of the amendments made by the Instrument.

Subsection 31(1) defines some expressions used in section 31. It defines ‘existing registered NDIS provider’ to mean a person or entity who was a registered NDIS provider immediately before 15 November 2021.

Subsections 31(2) and (3) have the effect that:

- new clause 16A (emergency and disaster management practice standard) applies to an existing registered NDIS provider from 24 January 2022; and
- new clause 26A (mealtime management practice standard) applies to an existing registered NDIS provider from 13 December 2021.

Section 31(4) has the effect that the amendments made by the Instrument apply in relation to:

- an application under section 73C of the NDIS Act to become a registered NDIS provider made on or after 15 November 2021; and
- an application under section 73C of the NDIS Act to become a registered NDIS provider made but not decided before 15 November 2021, if the assessment under paragraph 73E(1)(c) of the NDIS Act has not been made before that day.

Section 31(5) has the effect that the amendments made by the Instrument apply in relation to a mid-term audit under section 13B of the Rules that is carried out on or after 15 November 2021.

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 (2021 Measures No.1) Rules 2021 (the Instrument)

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

National Disability Insurance Scheme (Provider Registration and Practice Standards) Rules 2018 (the Rules), together with the *National Disability Insurance Scheme (Practice Standards—Worker Screening) Rules 2018* and the NDIS Code of Conduct, set out the standards expected of registered NDIS providers.

The Instrument amends to the Rules to deal with the following matters:

- Some of the conditions of registration with which registered NDIS providers must comply, namely, a condition concerning mid-term audits for certain providers, and a condition relating to restrictions on registered NDIS providers who are registered to provide high intensity daily personal activities; and
- NDIS Practice Standards for registered NDIS providers concerning emergency and disaster management, mealtime management and severe dysphagia management.

Background

The *National Disability Insurance Scheme Act 2013* (the Act) establishes an independent national Commission and Commissioner, to protect and prevent people with disability from experiencing harm arising from poor quality or unsafe supports or services under the National Disability Insurance Scheme (NDIS).

The Commissioner is responsible for compliance, complaints and risk management arrangements for the registration and regulation of NDIS providers, including practice standards, a code of conduct and mechanisms for complaints and reportable incidents. The Commissioner is also be responsible for national oversight and policy setting in relation to workers screening, behaviour support and monitoring the use of regulated restrictive practices within the NDIS with the aim of reducing and eliminating such practices.

The functions of the Commissioner of the NDIS Quality and Safeguards Commission include functions relating to the quality and safety of services and supports in the NDIS to people with disability including registering NDIS providers and monitoring

their compliance with registration conditions. The Commissioner manages the quality assurance and registration of NDIS providers under a nationally rigorous framework including the NDIS Practice Standards and the NDIS Code of Conduct.

Registration requirements include a risk-based proportionate assessment of an application to deliver classes of supports and services against the applicable NDIS Practice Standards. All applicants for registration as a registered NDIS provider are required to be assessed against the applicable standards with the assessment comprising a verification or certification audit process.

Human rights implications

The Convention on the Rights of Persons with Disabilities (CRPD) contains several human rights (including personal mobility, health, habilitation and rehabilitation), that are engaged, either directly or indirectly by the Instrument, including:

- The right to health – encompassing the right to the enjoyment of the highest attainable standard of physical and mental health – which is contained in article 12(1) of the International Covenant on Economic and Social and Cultural Rights (ICESCR). The UN Committee on Economic Social and Cultural rights has stated that health is a fundamental human right indispensable for the exercise of other human rights; and
- The right to an adequate standard of living is specified in Article 11 of the ICESCR, Article 28 of the CRPD and Article 27 of the CRC, which require governments to take appropriate steps to realise this right. The CRPD provides that one step is to ensure access by people with disabilities to appropriate and affordable services, devices and other assistance for disability related needs.

The additional NDIS Practices Standards introduced by the Instrument also support Articles 11, 25 and 28 of the CRPD, in relation to the requirements placed on providers to:

- Undertake planning to ensure that risks to the health, safety and wellbeing of participants that may arise in an emergency or disaster are considered and mitigated (including in relation to continuity of supports);
- Undertake appropriate planning and preparation to ensure meals are nutritious and of a texture that is appropriate to a participant's individual needs and preferences and are delivered in a way that ensure those meals are enjoyable; and
- Ensure that participants requiring severe dysphagia management receive appropriate support that is relevant and proportionate to their needs and preferences.

The Instrument helps to promote the right to health and the right to an adequate standard of living through establishing appropriate standards that an NDIS provider

must achieve and adhere to in order to become and remain a registered NDIS provider. This will help people with disability to access quality supports and services that support them to enjoy the highest attainable standard of physical and mental health and to enjoy an adequate standard of living.

Conclusion

This instrument is compatible with human rights as it forms part of an overall legislative scheme designed to deliver improved quality and safeguards for people with disability receiving supports or services from registered NDIS providers.

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