

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 (Code of Conduct) Amendment (2023 Measures No. 1) Rules 2023

Purpose

The *National Disability Insurance Scheme (Code of Conduct) Amendment (2023 Measures No. 1) Rules 2023* (the Instrument) amends the *National Disability Insurance Scheme (Code of Conduct) Rules 2018* (the NDIS Code of Conduct Rules).

The Instrument is made under section 209 of the *National Disability Insurance Scheme Act 2013* (the Act) for the purposes of subsection 73V(1) of the Act.

The Instrument amends the NDIS Code of Conduct Rules to specify that NDIS providers, their workers and members of their key personnel must not represent or charge a price for the supply of the same or substantially the same goods for NDIS participants which is higher than the price for those who are not NDIS participants. This prohibition applies unless there is reasonable justification for this conduct.

The Instrument amends the NDIS Code of Conduct Rules to specify that members of the key personnel of NDIS providers are Code-covered persons who must comply with the NDIS Code of Conduct. This clarifies that key personnel of NDIS providers are bound by the NDIS Code of Conduct and held to the same standard as NDIS providers and workers.

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.

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*.

Subsection 201A(1) of the Act provides that the Minister may delegate to the Commissioner of the NDIS Quality and Safeguards Commission (the Commissioner) their powers under section 209 of the Act to make NDIS Rules, including NDIS Rules made for the purposes of subsection 73V(1) of the Act. The Minister has delegated this power to the Commissioner.

Subsection 73V(1) of the Act provides that the National Disability Insurance Scheme rules may make provision for or in relation to a code of conduct that applies to either or both NDIS providers and persons employed or otherwise engaged by NDIS providers, or members of the key personnel of NDIS providers.

Where a person is subject to a requirement under the NDIS Code of Conduct, failure to comply with the requirement amounts to a civil penalty under subsection 73V(3) of the Act. The penalty is 250 penalty units.

The NDIS Code of Conduct Rules form part of the NDIS Quality and Safeguards Framework to support the safe delivery of services and supports to people with disability under the National Disability Insurance Scheme (NDIS). The NDIS Code of Conduct sets expectations for Code-covered persons, shapes their behaviour and workplace culture, and empowers NDIS participants in relation to their rights.

The NDIS Code of Conduct explicitly states the standards and obligations that people with disability and the Australian community can expect of NDIS providers, their key personnel, and workers delivering NDIS supports and services. It has a preventative effect, by setting out expectations of providers, key personnel and workers, and a corrective effect through sanctions provided in section 73V of the Act.

The Instrument deals with pricing conduct by NDIS providers and other Code-covered persons where they represent or charge a higher price for goods for NDIS participants than for those who are not participants. This conduct has been described as 'price differentiation' and has been reported in the NDIS, particularly for equipment and therapy supports.

The Instrument reflects the expectation that Code-covered persons must not engage in this type of conduct in order to comply with their obligations under the NDIS Code of Conduct.

In making this Instrument, the Commissioner has had regard to the objects and principles of the Act and the need to ensure the financial sustainability of the NDIS, as required by subsection 209(3) of the Act.

Commencement

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

Consultation

Section 209 of the Act provides that NDIS rules fall into four categories. Subsection 209(8) of the Act provides that certain categories of NDIS rules are ‘Category D’ rules. Category D rules include rules made for the purposes of subsection 73V(1) of the Act.

Under subsection 209(7) of the Act, Category D rules cannot be made under subsection 209(1) unless each host jurisdiction has been consulted in relation to the making of those rules. In compliance with this requirement, prior to making the Instrument the Commissioner (as the Minister’s delegate) consulted all host jurisdictions in relation to the making of this instrument. Each host jurisdiction has had the opportunity to review this instrument and provide comments and feedback.

In making the Instrument, the Commissioner has also consulted with the NDIS Commission Consultative Committee (which includes participants, providers and other stakeholders), the Department of Social Services, the National Disability Insurance Scheme Agency and the Australian Competition and Consumer Commission.

Impact Analysis Statement

The Office of Impact Assessment has advised that the proposed amendments do not require detailed Impact Analysis (OIA ID: OIA23-05580).

Explanation of the provisions

Section 1 - Name

Section 1 provides that the Instrument is titled the *National Disability Insurance Scheme (Code of Conduct) Amendment (2023 Measures No. 1) Rules 2023*.

Section 2 – Commencement

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

Section 3 – Authority

Section 3 provides that the 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 – National Disability Insurance Scheme (Code of Conduct) Rules 2018

This Schedule amends the NDIS Code of Conduct Rules.

Item 1 Section 4 (paragraphs (a) to (c) of the note)

This amendment replaces reference to a list of definitions provided in the Act from the Note at the beginning of section 4 with reference to an expanded list of definitions provided in the Act. The amendment provides a reference to definitions for terms that are defined in the Act and newly included in the Rules.

Item 2 Subsection 5(2)

This amendment repeals the definition of ‘Code-covered persons’ in the NDIS Code of Conduct Rules, and substitutes it with a new definition that includes members of the key personnel of NDIS providers in addition to NDIS providers and persons employed or engaged by NDIS providers. The amendment incorporates all persons to whom rules for or in relation to a code of conduct made under subsection 73V(1) may apply.

The purpose of this amendment is to ensure that the NDIS Code of Conduct applies to members of the key personnel of NDIS providers. The term ‘key personnel’ is defined in section 11 of the Act and includes persons who are responsible for the executive decisions of an NDIS provider or have authority, responsibility or significant influence over planning, directing or controlling the activities of an NDIS provider. Key personnel also includes directors of a body corporate and members of an NDIS provider’s governing body.

This amendment reflects amendments to subsection 73V(1) of the Act by the *National Disability Insurance Scheme Amendment (Improving Supports for At Risk Participants) Act 2021*. The amendment enabled the NDIS Code of Conduct Rules to make provision for a code of conduct that applies to members of the key personnel of NDIS providers in addition to NDIS providers and persons employed or otherwise engaged by them.

Item 3 Section 6

This amendment adds a subsection to section 6 of the NDIS Code of Conduct Rules. Existing paragraphs 6(a)-(g) of the NDIS Code of Conduct Rules are now under new subsection 6(1) of the NDIS Code of Conduct Rules. This change does not affect the content of existing obligations under the NDIS Code of Conduct Rules.

Item 4 At the end of section 6

This amendment creates new subsection 6(2) of the NDIS Code of Conduct Rules. New paragraph 6(2)(a) prohibits a Code-covered person from representing a higher price for the supply of goods (or substantially the same goods) for a participant than for a person who is not a participant.

Similarly, new subsection 6(2)(b) prohibits a Code-covered person from charging a higher price for the supply of goods (or substantially the same goods) for a participant than charged by the Code-covered person for a person who is not a participant.

The purpose of this amendment is to address concerns about pricing conduct by NDIS providers and other Code-covered persons where prices for the same goods are different for NDIS participants than for other people who are not NDIS

participants. An example of this conduct is where an NDIS provider advertises that the price for a shower chair for NDIS participants is \$200 but also advertises the price for the same shower chair for non-NDIS participants is only \$100, where there is no reasonable justification for the price difference.

The amendment addresses pricing conduct where the goods involved are 'substantially the same'. This clarifies that Code-covered persons must not represent or charge higher prices for goods for NDIS participants than for others where the goods involved, although not identical, are substantially the same. An example of where the goods involved are substantially the same is where the colour of the goods is different but they are otherwise identical. If there is significant customisation of the goods concerned then they will not be substantially the same.

The prohibition applies to price differentiation conduct by the Code-covered person where the Code-covered person does not have a reasonable justification for the difference in pricing. Whether a Code-covered person has a reasonable justification for price differences will depend on the circumstances of the pricing conduct. A reasonable justification for differences in pricing may include:

- Fluctuations in the market price for the goods over time
- Different warranties or services attached to the goods
- Different volumes of the goods being supplied.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

NATIONAL DISABILITY INSURANCE SCHEME (CODE OF CONDUCT) AMENDMENT (2023 MEASURES NO. 1) RULES 2023

The *National Disability Insurance Scheme (Code of Conduct) Amendment (2023 Measures No. 1) Rules 2023* (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 (Code of Conduct) Rules 2018* (the NDIS Code of Conduct Rules).

The NDIS Code of Conduct Rules promote the health, safety and wellbeing of persons with disability, by setting out acceptable, appropriate and ethical conduct for NDIS providers, members of their key personnel and persons employed or otherwise engaged by them, delivering supports or services in the NDIS market.

The NDIS Code of Conduct Rules are important to:

- empower people with disability in relation to their rights;
- outline expectations for providers, key personnel and individual workers;
- shape the behaviour and culture of organisations; and
- provide a mechanism to enforce consequences if Code-covered persons do not meet expectations.

The NDIS Code of Conduct Rules work alongside other elements of the quality and safeguarding arrangements to promote a safe and skilled workforce within the National Disability Insurance Scheme (NDIS).

Consistent with this approach, the Instrument amends the NDIS Code of Conduct Rules to protect the consumer rights of NDIS participants, by prohibiting Code-covered persons from representing or charging a higher price for the same or substantially the same goods for NDIS participants compared with persons who are not participants, without reasonable justification.

The Instrument amends the definition of Code-covered person in the NDIS Code of Conduct Rules in order to clarify that members of the key personnel of NDIS providers are bound by the NDIS Code of Conduct.

Human rights implications

The obligations in the NDIS Code of Conduct Rules are fundamental to the rights of people with disability set out in the *United Nations Convention on the Rights of Persons with Disabilities* (CRPD).

The NDIS Code of Conduct Rules as amended by the Instrument engage the right of people with disability to equality and non-discrimination (Article 5) and enhance promotion of the range of rights enabled by the NDIS Code of Conduct Rules by addressing the effects of discrimination on other rights and expanding who is subject to the NDIS Code of Conduct.

The NDIS Code of Conduct Rules as amended by the Instrument support equality and non-discrimination in the consumer rights of NDIS participants. When a Code-covered person represents or charges a higher price for goods for NDIS participants than for a person who is not a participant without reasonable justification, this conduct discriminates on the basis of participation by the person with disability in the NDIS.

The conduct of charging a higher price to NDIS participants without reasonable justification also potentially reduces the funds available in a participant's plan to purchase reasonable and necessary supports. This impedes the human rights of people with disability promoted by the NDIS, including personal mobility (Article 20 of the CRPD) and adequate standards of living and social protection, particularly access to appropriate and affordable services, devices and other assistance for disability-related needs (Article 28(2)(a)).

By specifying the application of the NDIS Code of Conduct Rules to key personnel of NDIS providers, the Instrument also extends the human rights promoted by the NDIS Code of Conduct Rules generally in relation to the provision of services. These include: the rights of people with disability to choose their living arrangements and be included in the community (Article 19), to personal mobility (Article 20), to enjoy the highest attainable standard of health (Article 25), to habilitation and rehabilitation (Article 26) and to an adequate standard of living for themselves and their families (Article 28).

Article 4 obliges State Parties to undertake to adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognised in the CRPD. The NDIS Code of Conduct Rules, as amended by the Instrument, and the compliance and enforcement provisions under the *National Disability Insurance Scheme Act 2013*, will be used to uphold the rights of people with disability.

Conclusion

The *National Disability Insurance Scheme (Code of Conduct) Amendment (2023 Measures No. 1) Rules 2023* advance the protection of the rights of people with disability in Australia consistent with the CRPD, particularly in relation to ensuring equality and non-discrimination for NDIS participants purchasing goods in the NDIS market. The Instrument confirms that members of the key personnel of NDIS providers are required to comply with obligations in the NDIS Code of Conduct

Rules, further promoting the full array of human rights advanced by the NDIS Code of Conduct Rules.

Tracy Mackey, Commissioner of the NDIS Quality and Safeguards Commission