

Disability Services and Other Legislation (NDIS) Amendment Regulation 2019

Explanatory notes for SL 2019 No.125

made under the

Disability Services Act 2006

Police Service Administration Act 1990

Working with Children (Risk Management and Screening) Act 2000

General Outline

Short title

Disability Services and Other Legislation (NDIS) Amendment Regulation 2019

Authorising law

Section 12, 16A, 46, 140, 199 and 239 of the *Disability Services Act 2016*

Section 10.2S and 10.28 of the *Police Service Administration Act 1990*

Section 401 and Schedule 1, Part 1, section 6 of the *Working with Children (Risk Management and Screening) Act 2000*

Policy objectives and the reasons for them

The objectives of the amendments in the Disability Services and Other Legislation (NDIS) Amendment Regulation 2019 (Amendment Regulation) are to:

1. expand the scope of who is required to obtain a yellow card or blue card under the *Disability Services Act 2006* (DSA) and the *Working with Children (Risk Management and Screening) Act 2000* (WWC Act) in line with the requirements that registered providers are required to implement to meet their obligations under the National Disability Insurance Scheme (NDIS);
2. provide a four month transition period for new NDIS non-government service providers and persons engaged or employed by the providers to become compliant with the screening requirements of the DSA and WWC Act;
3. ensure where service providers are regulated under the *Aged Care Act 1997* (Cwlth) (Aged Care Act) in relation to the provision of disability services to an adult with an intellectual or cognitive disability, they are not required to comply with Part 6 of the DSA;

4. ensure NDIS providers who use restrictive practices in the course of providing a class of supports under an NDIS participant's plan are only required to report about the use of restrictive practices to the NDIS Commission and not also report to the chief executive of the Department of Communities, Disability Services and Seniors (DCDSS); and
5. update legislative references to ensure the Queensland Police Service (QPS) can continue to exchange criminal history information with South Australia for child-related employment purposes. On commencement Part 3 of the *Disability Services and Other Legislation (Worker Screening) Amendment Act 2018* this will also have the effect of enabling information to be shared for disability-related screening.

Worker screening

Under the NDIS, registered providers will be required to meet a broader range of screening requirements than is currently captured under the DSA and WWC Act in order to comply with the conditions of their registration. This will require a broader range of people to be screened.

Amendments to the Disability Service Regulation 2017 (DSR) and the Working with Children (Risk Management and Screening) Regulation 2011 (WWC Regulation) will support Queensland NDIS service providers to meet their provider registration obligations under the NDIS using existing state based screening systems – the blue card system (for people working with children with disability) and the yellow card system (for people working with adults with disability) until the NDIS worker screening system commences operation in Queensland.

Expanding the scope of screening under the DSA and WWC Act ensures there is no significant increase in the complexity of the regulatory environment for service providers, and ensures an established, rigorous process applies to additional providers and workers.

Amending the Police Service Administration Regulation 2016 (PSAR) ensures Queensland's commitment to the exchange of an expanded range of criminal history information for the purposes of worker screening is upheld. Amending the reference to the relevant South Australian legislation will ensure that information can continue to be shared with all Australian States and Territories as appropriate.

Behaviour support and restrictive practices

Restrictive Practices in Aged Care

Under the NDIS (Provider Registration and Practice Standards) Rules 2018 (Cwlth) (NDIS Registration Rules), NDIS providers who are regulated under the Aged Care Act are not required to be registered in relation to the provision of behaviour supports and restrictive practices. This reflects that NDIS providers have responsibilities under the Aged Care Act relating to the quality of care they provide and the rights of people to whom care is provided.

As a result, these NDIS providers are also not required to comply with the NDIS (Restrictive Practice and Behaviour Support) Rules 2018 (Cwlth) (NDIS RP and BS Rules), which set out the conditions that apply to all registered NDIS providers who use restrictive practices in the course of delivering NDIS supports. Amendments to the DSR are necessary to ensure that where NDIS providers are regulated under the Aged Care Act they are not required to comply with Part 6 (Positive behaviour support and restrictive practices) of the DSA. This ensures a consistent approach with that adopted under the NDIS framework.

Reporting in relation to the use of restrictive practices

From 1 July 2019, the NDIS Commission will be responsible for compliance and enforcement of all registered NDIS providers. A registered NDIS provider who uses restrictive practices in the course of providing NDIS supports, must report to the NDIS Commissioner on the use of restrictive practices by the provider.

The amendments to the DSR are required to avoid duplicative reporting requirements to the chief executive in circumstances where providers will be required to report to the NDIS Commissioner. It is intended that the chief executive only receive reports about the use of restrictive practices that are outside the jurisdiction of the NDIS Commission.

Achievement of policy objectives

Worker screening

To achieve its objectives, the Amendment Regulation will amend the DSR and WWC Regulation to reflect requirements under the NDIS in relation to worker screening.

Specifically, the Amendment Regulation will:

- during transition to the NDIS worker screening check, require a person to obtain a yellow card or yellow card exemption (to work with adults with disability) or a blue card (to work with children with a disability) if they are engaged in a risk assessed role, which includes:
 - key personnel roles of an entity providing supports or services to people with disability;
 - roles for which the normal duties include the direct delivery of specified supports or specified services to a person with disability; and
 - roles for which the normal duties are likely to require more than incidental contact with a person with disability;
- provide an appropriate transition period (four months) for individuals impacted by the new screening requirements. Specifically, the Amendment Regulation:
 - delays the application of provisions that prohibit individuals from working while their application for a yellow card or yellow card exemption is being processed, ensuring a new engaged person can work while their application is being processed up until 1 July 2020;
 - delays the application of provisions that prohibit people working with children with disability while their application for a blue card is being processed, ensuring that these new business operators and employees can work while their application is being processed up until 1 July 2020;
 - provides that if the chief executive becomes aware that a person who has made an application within the four month transition period has a conviction for a serious offence, the transition period will end and they will no longer be able to continue regulated activities until they have been issued with a relevant positive notice. Relevant existing offences under the DSA and WWC Act will then apply.
- amend the PSAR to make a minor technical amendment required due to a legislation change in South Australia, from 1 July 2019. From this date a new screening unit, named the central assessment unit, will be established under the *Child Safety (Prohibited Persons) Act 2016 (SA)*. This amendment reflects the change to the name and establishing legislation for the South Australian screening unit and will enable the existing exchange of an expanded range of criminal history information to continue.

Behaviour support and restrictive practices

The Amendment Regulation will also amend the DSR to:

- exempt a service provider from the operation of Part 6 of the DSA (Positive behaviour support and restrictive practices) in circumstances where the service provider is:
 - an approved provider under the Aged Care Act; and
 - providing disability services to an adult with an intellectual or cognitive disability approved to receive residential care under the Aged Care Act.
- ensure NDIS providers who use restrictive practices in the course of providing a class of supports to a participant under an NDIS plan are not required to report about the use of restrictive practices to the chief executive.

Consistency with policy objective of authorising law

The Amendment Regulation is consistent with the main objects of the amended DSA to ensure that from 1 July 2019, Queensland's disability legislation operates effectively in conjunction with the NDIS regulatory framework.

Inconsistency with policy objectives of other legislation

The Amendment Regulation is consistent with the policy objectives of other legislation. It provides for the quality and safety of services for Queenslanders, consistent with the DSA and the *Community Services Act 2007*.

Alternative ways of achieving policy objectives

There is no alternative way of achieving the policy objectives. The Amendment Regulation generates the greatest net benefits for the community in that it seeks to remove any potential duplicate regulation between Queensland and the Commonwealth. It will also support Queensland NDIS service providers to meet their obligations under the NDIS until the nationally consistent NDIS worker screening system is implemented in Queensland.

Benefits and costs of implementation

The 2019-20 Queensland State Budget includes additional funding of \$19.5 million over four years for ongoing State disability functions, including authorising the use of restrictive practices, worker screening and NDIS performance monitoring. The costs of implementing the changes to the Amendment Regulation will be met within this budget allocation.

Consistency with fundamental legislative principles

The amendments in the Amendment Regulation are generally consistent with fundamental legislative principles (FLPs). Potential breaches of FLPs are addressed below.

Section 4(2)(a) *Legislative Standards Act 1992* – Whether subordinate legislation has sufficient regard to the rights and liberties of individuals

Clauses 5,6 and 15 of the Amendment Regulation expand the scope of screening required under the DSA and WWC Act to meet that required of registered providers under the NDIS.

The Amendment Regulation may be considered a breach of the fundamental legislative principles that legislation has sufficient regard to the rights and liberties of individuals in that these provisions could operate to preclude someone from working in an area they currently work in due to a conviction for a past offence. However, the expanded scope of screening is considered justified to enable Queensland NDIS service providers to meet their obligations under the NDIS.

Section 4(2)(b) *Legislative Standards Act 1992* – Whether subordinate legislation has sufficient regard to the institution of Parliament

The Amendment Regulation may be considered a breach of fundamental legislative principles that legislation has sufficient regard to the institution of Parliament. However, the amendments to the DSR, WWC Regulation and the PSAR are necessary to avoid potential duplicative regulatory and reporting requirements, to reflect the scope of screening required under the NDIS, and to ensure Queensland's commitment to share an expanded range of criminal history information is maintained.

The making of the Amendment Regulation will be subject to scrutiny by the Legislative Assembly. In addition, the making of the Amendment Regulation has been developed within the operation of the provisions which prescribe the objects of the DSA and the definition provisions that prescribe the extent of the disability services to which the DSA applies.

Consultation

The Queensland Productivity Commission has assessed the proposed changes in relation to worker screening and restrictive practices and determined that no further regulatory impact assessment is required under the Queensland Government Guide to Better Regulation.

In accordance with the Queensland Government Guide to Better Regulation, the Office of Best Practice Regulation was not consulted in relation to the proposed amendments to the PSAR. The QPS applied a self-assessable exclusion from undertaking further regulatory impact analysis (Category (j) – Regulatory proposals relating to police powers and administration, general criminal laws, the administration of courts and tribunals and corrective services).

The Commonwealth Government undertook extensive consultation between 16 February 2015 to 30 April 2015 to assess regulatory impacts on participants, suppliers and specific stakeholder groups of the NDIS Quality and Safeguarding Framework (NDIS QSF). The Department of Social Services prepared a Decision Regulation Impact Statement (RIS) that was provided to COAG Disability Reform Council for their decision. As the Amendment Regulation effectively implements the NDIS QSF in Queensland, further extensive consultation has not been undertaken at this time.