

# ***Disability Services and Other Legislation (Worker Screening) Amendment Regulation 2021***

Explanatory notes for SL 2021 No. 2

made under the

*Disability Services Act 2006*

*Police Service Administration Act 1990*

*Transport Planning and Coordination Act 1994*

*Working with Children (Risk Management and Screening) Act 2000*

## **General Outline**

### **Short title**

*Disability Services and Other Legislation (Worker Screening) Amendment Regulation 2021*

### **Authorising law**

This Amendment Regulation is made under the:

- *Disability Services Act 2006*, sections 12(1)(g), 65, 66(c), 104(3), 138R(5), 239, Schedule 8
- *Police Service Administration Act 1990*, sections 10.2S, 10.28
- *Transport Planning and Coordination Act 1994*, sections 28EA, 38
- *Working with Children (Risk Management and Screening) Act 2000*, section 401

### **Policy objectives and the reasons for them**

The objective of the *Disability Services and Other Legislation (Worker Screening) Amendment Regulation 2021* (Amendment Regulation) is to support the commencement and operation of the *Disability Services and Other Legislation (Worker Screening) Amendment Act 2020* (Amendment Act).

The Amendment Act was passed by Queensland Parliament on 4 December 2020 and assented to on 11 December 2020. The Amendment Act will commence from 1 February 2021 and amend the *Disability Services Act 2006* (the DSA) to deliver on Queensland's commitment to implement nationally consistent worker screening under the National Disability Insurance Scheme (NDIS) and continue a state screening system for disability services outside the jurisdiction of the NDIS Quality and Safeguards Commission (NDIS Commission).

On 3 May 2018, the Premier for Queensland signed the *Intergovernmental Agreement on Nationally Consistent Worker Screening for the National Disability Insurance Scheme* (IGA), committing Queensland to implement nationally consistent NDIS worker screening to enhance regulatory

safeguards and protect people with disability who receive NDIS supports or services from risk of harm.

All states and territories have agreed to commence nationally consistent NDIS worker screening by 1 February 2021 under the *NDIS (Practice Standards—Worker Screening) Rules 2018* (WS Rules).

Collectively, the Amendment Act and Amendment Regulation effectively implement nationally consistent NDIS worker screening in Queensland and will continue state disability screening for services outside the jurisdiction of the NDIS Commission.

## **Achievement of policy objectives**

To achieve its objective, the Amendment Regulation will amend the *Disability Services Regulation 2017*, the *Police Service Administration Regulation 2016*, the *Transport Planning and Coordination Regulation 2017* and the *Working with Children (Risk Management and Screening) Regulation 2020*.

Specifically, the Amendment Regulation will:

- clarify that a service related to providing care and support, or protection to a forensic disability client at the forensic disability service (FDS) under the *Forensic Disability Act 2011* (FDA) is a disability service (under section 12) for the purposes of Part 5 of the DSA;
- consistent with the agreed position under the IGA, prescribe entities under section 65(a)(ii) of the Amendment Act to enable worker screening applications to be made by persons engaged by the National Disability Insurance Agency, the NDIS Quality and Safeguards Commission, service providers providing certain Commonwealth programs related to the NDIS and NDIS service providers providing Commonwealth continuity of support services;
- prescribe under section 65(b) of the Amendment Act, criteria that must be satisfied for a worker screening application to be made, namely that a person must live or work in Queensland;
- prescribe under section 66(c) of the Amendment Act the department as an entity administering Part 5 of the DSA to enable departmental worker screening staff to apply for State disability worker screening;
- prescribe under section 104 of the Amendment Act, matters about which a clearance holder must advise the chief executive;
- prescribe under section 138R of the Amendment Act, entities that the chief executive may request information from to inform an assessment of whether an applicant poses a risk of harm to people with disability; and
- prescribe for Schedule 8 of the Amendment Act:
  - the Commonwealth offences that form part of the definition of disqualifying offences and serious offences; and
  - the matters that form part of the definition of a risk assessment matter.

*Clarifying that certain departmental functions are disability services for the purposes of the DSA*

This amendment puts it beyond doubt that a service related to the provision of care and support, or protection to a forensic disability client at the FDS under the FDA is a ‘disability service’ for the purposes of Part 5 of the DSA.

The FDS is declared as the place shown under Schedule 1 of the *Forensic Disability Regulation 2011*.

The effect of this amendment is to ensure a worker engaged by the department to work at the FDS must be screened under the State worker screening system under Part 5 of the DSA. This includes administrative staff located at the FDS who are supporting staff delivering services directly to clients. Offences and penalties will apply as these workers will be captured under the scope of persons who are providing State disability work for the department.

*Expand the scope of who can apply for NDIS screening*

A person engaged by any of the following entities will be enabled, but not required, to make an NDIS worker screening application:

- employees engaged by the National Disability Insurance Agency (NDIA) or the NDIS Commission;
- organisations funded by the Commonwealth Government to deliver: Local Area Co-ordination services; Early Childhood Early Intervention services; and services as part of the Information Linkages and Capacity Building Program in connection with the NDIS; and
- an NDIS service provider delivering continuity of support services, on behalf of the Commonwealth, for a person with disability aged over 65 years old, or 50 years old for an Aboriginal or Torres Strait Islander person, and is ineligible for the NDIS.

This amendment allows persons engaged by these entities to make an application for an NDIS clearance. This implements clauses 32 – 34 of the IGA.

*Enabling certain departmental staff to apply for State disability worker screening*

This amendment enables persons engaged by the department to administer worker screening functions under Part 5 of the DSA to apply for State disability worker screening.

*Nexus to Queensland required*

In conjunction with any criteria listed in section 65(c) of the Amendment Act, this amendment requires a person to live or work, or propose to live or work, in Queensland to be eligible to make an NDIS worker screening application.

The intention of the nexus requirement is that Queensland will only accept NDIS worker screening applications by people who are either already living or working in Queensland, or are proposing to live or work in Queensland, once a clearance is issued. While the Queensland worker screening unit will not accept applications from a person who is working or living in another state, this does not prevent portability of NDIS clearances across jurisdictions and roles within the NDIS, once a person has been issued with an NDIS clearance or exclusion.

*Clearance holder to notify change in engagement status*

Section 104 of the Amendment Act provides that a clearance holder must notify the chief executive if their police information or a risk assessment matter has changed, as well as administrative information, such as a change in the person's name or contact details. Section 104(3)(c) provides that other types of administrative information may be prescribed by regulation under section 104.

The Amendment Regulation provides a clearance holder must also notify the chief executive if their engagement status changes. A change in engagement status means a change to the clearance holder's working relationship with a service provider, or as a sole trader, and is not mutually exclusive. For example, this may include a worker:

- commencing an engagement with a new service provider (regardless of whether the person is ending an engagement with another service provider);
- ending an engagement with a service provider (regardless of whether the person is not continuing with another engagement);
- starts to carry out disability work as an NDIS or State sole trader;
- stops carrying out disability work as an NDIS or State sole trader.

*Ensuring relevant information can be requested from other prescribed entities*

Section 138R of the Amendment Act sets out entities that the chief executive may request certain types of information from in order to consider that information as part of the risk assessment of a person. For example, under section 138R, the chief executive may request child safety information about a person from the chief executive responsible for child safety. Section 138R(5) provides that other entities may be prescribed by regulation under this section.

The Amendment Regulation prescribes the chief executive responsible for administering the *Animal Care and Protection Act 2001* as an entity for the purposes of section 138R.

Similar to those entities prescribed in the Amendment Act, the chief executive may request animal cruelty offence information about a person from the chief executive responsible for holding this information. Once obtained, the chief executive may use this information as part of a risk assessment of a person.

The Amendment Regulation also prescribes the Health Ombudsman (OHO) under the *Health Ombudsman Act 2013* and the chief executive officer of the Australian Health Practitioner Regulation Agency (AHPRA) established under the *Health Practitioner Regulation National Law (Queensland)*. This will enable the chief executive to request disciplinary and misconduct information regarding health practitioners held by either OHO or AHPRA. This is relevant as health practitioners will require disability worker screening to provide certain disability services or NDIS supports or services to people with disability.

*Prescribe types of information that applicants and clearance holders are required to self-disclose*

Schedule 8 of the Amendment Act provides that a **risk assessment matter** refers to matters prescribed by regulation. This term is intended to include matters, other than police information, that the chief executive must consider when risk assessing a person.

This amendment prescribes risk assessment matters that reflect clause 45 of the IGA. Clause 45 of the IGA requires applicants to self-disclose information regarding:

- previous refusal of an NDIS worker screening check or other working with vulnerable persons screening processes (such as a disability checks, working with children check or a working with vulnerable persons check);
- domestic violence orders;
- child protection orders and/or information; and
- any relevant workplace misconduct findings, including disciplinary information.

Requiring applicants and clearance holders to disclose changes in certain information ensures the chief executive is aware when there is a change in information relevant to conducting a risk assessment. This enables the chief executive to conduct a reassessment of a clearance holder if required using the most current and comprehensive information available to determine whether a person poses an unacceptable risk of harm to people with disability.

The Amendment Regulation prescribes information that is not already captured by the Amendment Act. For example, the Amendment Act requires applicants and cardholders to notify the chief executive of changes to their police information, which includes breaches of domestic violence orders and international criminal history. Therefore, it is not necessary for this information to be prescribed as a risk assessment matter in the Amendment Regulation.

#### *Prescribing Commonwealth serious and disqualifying offences*

States and territories have agreed to nationally consistent categorisation of serious and disqualifying offences as part of the strengthened risk assessment framework for NDIS worker screening. The Amendment Act provides that:

- a person with a conviction for a disqualifying offence will be automatically excluded; and
- a person with a pending charge for a serious or a disqualifying offence or a conviction for a serious offence will be risk assessed, with a presumption of an exclusion unless there are exceptional circumstances.

The Amendment Regulation prescribes the Commonwealth serious and disqualifying offences that form part of this disqualifying framework.

Prescribing the Commonwealth serious and disqualifying offences by regulation enables Queensland to respond contemporaneously to changes in offence categorisation at a national level that fall outside Queensland's jurisdiction. Ultimately, this is intended to avoid risk of harm to people with disability where possible.

#### *Amendments to the Police Service Administration Regulation 2016*

The Amendment Regulation amends the *Police Service Administration Regulation 2016* to prescribe remaining NDIS worker screening units in other jurisdictions, as 'interstate screening units' under authorising NDIS worker screening legislation. This includes Victoria, Northern Territory and Western Australia. This will allow the Queensland Police Service to exchange an expanded range of criminal history information with these agencies. This ensures Queensland's commitment to share this information for the purposes of worker screening is upheld.

The Amendment Regulation also makes a minor amendment to the term Chief Executive Officer under Western Australia's working with children screening unit to ensure drafting consistency. It also makes a minor amendment to the term Commissioner under the Australian Capital Territory's working with vulnerable people background checking legislation.

#### *Amendments to the Transport Planning and Coordination Regulation 2017*

The intent of this amendment is to enable reproduction of a person's digital photo and digitised signature under the *Transport Planning and Coordination Act 1994* (TPCA), for the purposes of identity verification and the issuing of clearance cards for state disability and NDIS worker screening under Part 5 of the DSA.

The amendments to the *Transport Planning and Coordination Regulation 2017* provide that the DSA is a prescribed authorisation Act and an NDIS clearance, State clearance or corresponding clearance card under the DSA is a prescribed authority, under the TPCA. This authorises the chief executive to use digitised photos or digitised signatures, held by the chief executive of the Department of Transport and Main Roads, as part of identity verification as well as to display a person's photo on their clearance card. This strengthens the identity check process and reduces the risk of fraudulent use of another person's clearance card.

#### *Amendments to the Working with Children (Risk Management and Screening) Regulation 2020*

The Amendment Regulation omits section 6 of the *Working with Children (Risk Management and Screening) Regulation 2020* (WWC Regulation). This is an unnecessary provision as the scope of blue card screening for persons who perform disability work will be set under the *Working with Children (Risk Management) and Screening Act 2000* (refer Schedule 1, section 6A).

### **Consistency with policy objective of authorising law**

The Amendment Regulation is consistent with the main objectives of the DSA to:

1. support nationally consistent worker screening for the NDIS and the IGA;
2. enable Queensland to operate a state disability worker screening system for certain disability services that it continues to fund, or deliver, outside of the jurisdiction of the NDIS Commission;
3. streamline and strengthen the legislative framework for disability worker screening in Queensland; and
4. ensure the blue card system operates effectively and efficiently alongside the disability worker screening system and the strongest possible safeguards are maintained in relation to persons working with children with disability.

### **Inconsistency with policy objectives of other legislation**

The Amendment Regulation is consistent with the policy objectives of other legislation. It creates provisions to ensure the proper and effective implementation of the worker screening framework under the DSA.

### **Alternative ways of achieving policy objectives**

There are no alternative ways of achieving the policy objective. The Amendment Regulation implements critical provisions to support the proper and effective implementation of the worker screening framework under the DSA.

### **Benefits and costs of implementation**

The implementation of NDIS worker screening is expected to increase application volumes resulting in increased operating costs compared to the current yellow card screening system. In addition, there are costs associated with implementation, including the development of an ICT system to effectively interface with the national worker screening database.

The Queensland Government has provided funding as part of both the 2018-19 and 2019-20 budget processes to meet the costs of continuing to operate a disability worker screening system as well as prepare for implementation of NDIS worker screening.

The Queensland Government will invest further funding over the next two years to ensure the costs of operating the NDIS check and implementing a joint application process with the blue card system are met. The new online application portal will streamline the application process and assist in reducing wait times for applicants.

The implementation of nationally consistent NDIS worker screening will enhance regulatory safeguards and minimise the risk of people with disability from receiving unsafe NDIS supports or services. This will also be replicated for State disability worker screening.

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

#### *Scope of screening*

Amending the scope of NDIS and State disability screening by regulation may be considered a breach of the FLP that legislation has sufficient regard to the institution of Parliament. The scope is proposed to be expanded by enabling people engaged by other organisations to apply for a NDIS worker screening application under section 65(a)(iii) of the Amendment Act. A similar amendment is proposed under section 66(c), to enable departmental staff undertaking worker screening functions under Part 5 of the DSA to apply for a State disability clearance.

Additionally, amendments will be made to put beyond doubt that a service related to the provision of care and support, or protection of forensic disability clients, at the FDS, under the FDA is a ‘disability service’ as defined under section 12 of the DSA. The effect of this is that the workers engaged by the FDS must be screened under the State disability screening system.

This potential breach is justified given that expanding the scope of who may apply for an NDIS worker screening check is required to implement clauses 32-34 of the IGA and give effect to changes that occur at the national level contemporaneously. The amendments made to the state worker screening scope are also justified given they are clarifying the scope of departmental functions that constitute a disability service, as well as those that enable a person to make a State disability worker screening application. The provisions prescribed by regulation are also authorised within the boundaries of the Amendment Act.

#### *Nexus to Queensland required*

Prescribing that a person must live or work, or propose to live or work in Queensland, in order to make an NDIS worker screening application by regulation rather than primary legislation, may be a breach of the FLP that legislation has sufficient regard to the institution of Parliament.

The potential breach is justified given this amendment gives effect to the status quo for how laws normally apply in Queensland (Section 35(1)(b), *Acts Interpretation Act 1954* – i.e. only to people in Queensland for example). The proposed approach puts it beyond doubt that this is the intended operation of NDIS worker screening in Queensland.

The potential breach is also justified given that this Amendment Regulation will be subject to parliamentary committee scrutiny and to disallowance by Parliament.

*Prescribing Commonwealth serious and disqualifying offences*

Prescribing Commonwealth offences by regulation, rather than by principal legislation, raises the FLP that legislation has sufficient regard to the institution of Parliament. This is authorised under the Bill and justified given that prescribing Commonwealth offences by regulation provides the necessary flexibility to properly administer a nationally consistent screening system. It also ensures Queensland can be responsive in maintaining the highest level of safeguards where Commonwealth offences are introduced or changed and requires consistency in screening to manage risk of harm.

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

*Amendments to the Transport Planning and Coordination Act 1994*

The amendments to the *Transport Planning and Coordination Regulation 2017*, in prescribing a clearance card issued under the DSA as a prescribed authority, may constitute a breach of the FLP that sufficient regard be given to the rights and liberties of individuals, specifically the right to an individual's information (in the form of photo identification and a signature) being kept private and confidential. This is justified as it provides a robust method of identity verification for those working with people with disability which, in turn, maintains safeguards for these individuals. There are also strict requirements under the Amendment Act to maintain the confidentiality of this information.

*Collection of information from clearance holders and prescribed entities*

The Amendment Regulation provides that a person must update the chief executive of a change in engagement by an NDIS or funded service provider, or as a sole trader, as well as a change in risk assessment information about the person. This may be considered a breach of the FLP that an individual's information should be kept private and confidential.

Separately, the Amendment Regulation also prescribes the ability to obtain animal welfare offence information, from the department that administers the *Animal Care and Protection Act* and the ability to obtain disciplinary and misconduct information about health practitioners from OHO and AHPRA. This may be considered a potential breach of the FLP that legislation must have sufficient regard to the rights and liberties of a person, specifically the right for an individual's information to be kept private and confidential. Under the Amendment Act, the chief executive may disclose confidential information to other entities in limited, specified circumstances.

These proposed amendments in relation to obtaining and using information about a person are considered appropriate and justified given they ensure the most relevant and reliable information is considered when risk assessing a person. The ability to undertake an informed risk assessment strengthens the information sharing framework that underpins a national screening system. Importantly, it also increases safeguards for people with disability in Queensland.

The DSA and Amendment Act also provide strong safeguards to prevent confidential information being shared, used or disclosed in an unauthorised way, with offences and penalties for breaches.

## **Consultation**



In November 2020, the Queensland Productivity Commission assessed the proposed changes and determined that no further regulatory impact assessment is required under the Queensland Government Guide to Better Regulation.

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 QSF. The Commonwealth Government also undertook extensive targeted consultation during development of the WS Rules and IGA from 2017. The Department of Social Services prepared a Decision Regulation Impact Statement (RIS) that was provided to COAG Disability Reform Council.

During the period from October to November 2018, the then Department of Communities, Disability Services and Seniors (the former Department) conducted a public consultation process which canvassed community views in relation to proposed legislative reforms for NDIS worker screening. Views were sought regarding the screening of unregistered NDIS providers, ‘no card, no start’ and whether screening systems should interact with each other. Results of consultation informed the development of policy positions for NDIS worker screening.

In February 2020, the former Department undertook further targeted consultation that informed key stakeholders about the proposed legislative amendments related to NDIS worker screening and sought stakeholders’ perspectives on operational implementation. This included Queensland Advocacy Incorporated, Queenslanders with Disability Network, other non-government organisations and peak bodies within the disability services and community sector and people with disability. Results of consultation informed the implementation of policy issues on which Queensland has discretion, including technical and operational impacts.