

# Disability Services Amendment Regulation 2023

Explanatory notes for SL 2023 No.120

made under the

*Disability Services Act 2006*

## General Outline

### Short title

Disability Services Amendment Regulation 2023

### Authorising law

Sections 140, 199 and 215 of the *Disability Services Act 2006*

### Policy objectives and the reasons for them

The policy objective of the *Disability Services Amendment Regulation 2023* (the Amendment Regulation) is to amend the *Disability Services Regulation 2017* (the Regulation) to:

- exempt approved providers under the *Aged Care Quality and Safety Commission Act 2018* (Cth) from the requirement to comply with part 6 of the *Disability Services Act 2006* (the Act) in the provision of services which include National Disability Insurance Scheme (NDIS) supports or services to an adult in residential aged care (RAC); and
- update several provisions that were inadvertently not updated following amendments to defined terms made by the *Disability Services and Other Legislation (Worker Screening) Amendment Act 2020* (WS Amendment Act).

In accordance with the roles and responsibilities set out in the NDIS Quality and Safeguarding Framework (QSF), states and territories are responsible for the legislative and policy frameworks that authorise the use of regulated restrictive practices in the NDIS. The NDIS Quality and Safeguards Commission (NDIS Commission) is responsible for overseeing the use of behaviour support and restrictive practices, including by monitoring registered NDIS provider compliance with the conditions of registration relating to behaviour support plans (which correspond to positive behaviour support plans under the Act) and restrictive practices use.

Queensland's current authorisation framework for the use of restrictive practices with adults with an intellectual or cognitive disability who receive disability services or NDIS supports or services is created under the Act and Chapter 5B of the *Guardianship and Administration Act 2000* (GAA).

Under the framework, responsibility for the authorisation of restrictive practices is distributed across multiple bodies and persons, with the decision-maker depending on the type of restrictive practice, length of time, and service setting as follows:

- The Queensland Civil and Administrative Tribunal (QCAT) has exclusive jurisdiction (under Chapter 5B of the GAA) to appoint guardians for a restrictive practice matter (those guardians have authority to consent to the use of restrictive practices with an adult with an intellectual or cognitive disability (except for containment or seclusion);
- QCAT has exclusive jurisdiction to consent to the use of containment or seclusion with an adult with an intellectual or cognitive disability;
- the Office of the Public Guardian (OPG) has authority to approve the short-term use of containment or seclusion with an adult with an intellectual or cognitive disability in an emergency in certain circumstances; and
- the chief executive of disability services has the authority to approve short-term use of all other restrictive practices.

Most restrictive practices are approved by guardians specifically appointed to consent to the use of restrictive practices by QCAT and, in the case of containment and seclusion, by QCAT itself.

On commencement of the NDIS QSF in Queensland on 1 July 2019, residential aged care (RAC) providers were exempt from Commonwealth registration requirements, noting that the aged care system is subject to an alternative quality and safeguarding framework. Queensland put in place a corresponding exemption, under section 12 of the Regulation, exempting RAC providers from the requirement to comply with part 6 of the Act.

On 1 December 2020, the Commonwealth exemption lapsed, and from 1 March 2021, RAC providers were required to obtain state or territory authorisation (where available) to use regulated restrictive practices with NDIS participants in aged care facilities. Queensland temporarily retained its exemption, noting the uncertain impacts on providers and the intention to consider the inclusion of RAC providers in a reformed Queensland authorisation framework pursuant to the Positive Behaviour Support and Restrictive Practices (PBSRP) Review. The PBSRP Review is considering potential reforms to move towards greater national consistency in authorisation processes for the use of restrictive practices in the provision of NDIS supports or services.

RAC providers are now subject to the same registration requirements under the *National Disability Insurance Scheme Act 2013* (Cth) and *National Disability Insurance Scheme (Restrictive Practices and Behaviour Support) Rules 2018* (Cth) as other registered NDIS providers. These include that restrictive practices use only occur pursuant to a behaviour support plan developed by a specialist behaviour support practitioner and lodged with the NDIS Commission, and that all authorised and unauthorised use be reported to the NDIS Commissioner.

On 1 February 2021, the definition of 'disability services' under s 12 of the Act was amended by section 6 of the WS Amendment Act to exclude NDIS supports or services from 'disability services'. These amendments were necessary to facilitate the

implementation of a nationally consistent approach to the screening of workers providing NDIS services.

An unintended consequence of the amendments to the definition of 'disability services' from 1 February 2021 is that Queensland's exemption no longer applies to an approved provider under the *Aged Care Quality and Safety Commission Act 2018* (Cth) in the provision of services which include NDIS supports or services to an adult in RAC. While not the intent of the amendments, an effect is that RAC providers are technically required to comply with Queensland's authorisation framework in order to use restrictive practices with NDIS participants.

It has also been identified that several provisions of the Regulation were inadvertently not updated following amendments to defined terms made by the WS Amendment Act, in particular the omission of the definition of '*funded non-government service provider*' and its replacement with '*funded service provider*'.

## **Achievement of policy objectives**

The Amendment Regulation will:

- amend section 12(a) by inserting 'or NDIS supports or services' after 'disability services', ensuring RAC providers providing both types of services are exempted from the requirement to comply with part 6 of the Act;
- amend section 13(2)(c) by inserting 'and NDIS supports or services' after 'disability services', ensuring both types of services are captured; and
- amend section 16 heading, and 16(1), by omitting 'non-government', ensuring the correct reference to the defined term '*funded service provider*'.

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

The Amendment Regulation is consistent with the policy objectives of the Act, as it supports the operation of the NDIS in Queensland.

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

The Amendment Regulation is consistent with the policy objectives of other legislation.

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

There is no alternative way of achieving the policy objectives.

## **Benefits and costs of implementation**

The Amendment Regulation will clarify the position for affected providers, the majority of whom are currently operating on the basis they continue to be excluded from Queensland's authorisation framework for the use of restrictive practices with NDIS participants. The Amendment Regulation will mitigate the significant and potentially adverse operational impacts on RAC providers from having to immediately comply with a second authorisation framework without a transitional period, noting that providers must already comply with the consent-based restrictive practices framework

under Commonwealth aged care legislation. Providers' transition to the NDIS authorisation framework may then occur in an orderly and planned way, pursuant to the PBSRP Review.

A range of other relevant safeguards for NDIS participants with whom restrictive practice are used in aged care will continue to apply under the NDIS QSF and the aged care regulatory framework. Of note, these include the requirement under aged care legislation that consent to the use of restrictive practices be obtained from the person or, where the person lacks capacity, a substitute decision-maker.

There are no implementation costs associated with the Amendment Regulation.

## **Consistency with fundamental legislative principles**

The Amendment Regulation is consistent with fundamental legislative principles (FLPs).

## **Consultation**

The Amendment Regulation has been assessed as meeting agency-assessed exclusion category (f)—*Regulatory proposals that correct technical errors or amend legislation to take account of current Queensland drafting practice*—under the *Queensland Government Guide to Better Regulation*. Accordingly, no further regulatory impact assessment or consultation with the Office of Best Practice Regulation is required.

The Amendment Regulation has not been subject to community consultation, noting reinstatement of the exemption as originally intended reflects most affected operators' current understanding of the legislation and current practice.

## Notes on provisions

### Short Title

Clause 1 states that the short title is the *Disability Services Amendment Regulation 2023*.

### Regulation amended

Clause 2 states that this regulation amends the *Disability Services Regulation 2017*.

### **Amendment of s 12 (Service providers to which pt 6 of the Act does not apply—Act, s 140)**

Clause 3 amends section 12(a) by inserting ‘or NDIS supports or services’ after ‘disability services.’

It has been identified that section 12(a) was not consequentially updated following amendments to section 12 of the *Disability Services Act 2006* (the Act) by section 6 of the *Disability Services and Other Legislation (Worker Screening) Amendment Act 2020* (WS Amendment Act), which inserted section 12(2) to exclude NDIS supports or services from the scope of ‘disability services’ as defined. The purpose of this amendment is to correct this oversight and ensure approved providers under the *Aged Care Quality and Safety Commission Act 2018* (Cth) are exempted from the requirement to comply with part 6 of the Act in the provision of services which include NDIS supports or services to an adult in residential aged care. The amendment will apply prospectively.

### **Amendment of s 13 (Information about restrictive practice approvals—Act, s 199)**

Clause 4 amends section 13(2)(c) by inserting ‘or NDIS supports or services’ after ‘disability services’ and section 13(5) by omitting ‘non-government’ from paragraph (b) of the definition of *provider number*.

It has been identified that section 13 was not updated after the amendments to:

- section 12 of the Act by section 6 of the WS Amendment Act, which inserted section 12(2) (‘however, *disability services* do not include NDIS supports or services’); and
- section 16A of the Act by section 9 of the WS Amendment Act, which omitted the term ‘NDIS non-government service provider’ and inserted the term ‘NDIS service provider’.

The purpose of the amendments is to correct these oversights and ensure the correct use of defined terms, so all relevant information can be obtained by service providers who have received approval to use restrictive practices in the provision of NDIS supports or services.

**Amendment of s 16 (Records funded non-government service provider must make and keep—Act, s 215)**

Clause 5 amends section 16, heading, and section 16(1) by omitting 'non-government'.

It has been identified that section 16 was not updated after the amendments to section 215 of the Act by schedule 1, section 17 of the WS Amendment Act, which omitted 'non-government' in 'funded non-government service provider'. The purpose of this amendment is to correct this oversight and ensure the correct use of defined terms.