



Western Australia

# **National Disability Insurance Scheme (Worker Screening) Act 2020**

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# National Disability Insurance Scheme (Worker Screening) Act 2020

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### Defined terms





Western Australia

## **National Disability Insurance Scheme (Worker Screening) Act 2020**

**An Act to provide for the screening of workers in connection with the operation of the National Disability Insurance Scheme and to amend certain other Acts as a consequence of this Act.**

## **Part 1 — Preliminary**

### **1. Short title**

This is the *National Disability Insurance Scheme (Worker Screening) Act 2020*.

### **2. Commencement**

(1) This Act comes into operation as follows —

- (a) Part 1 — on the day on which this Act receives the Royal Assent (*assent day*);
- (b) the rest of the Act — on a day fixed by proclamation, and different days may be fixed for different provisions.

(2) However —

- (a) if no day is fixed under subsection (1)(b) before the end of the period of 10 years beginning on assent day, this Act is repealed on the day after that period ends; or
- (b) if paragraph (a) does not apply, and a provision of this Act does not come into operation before the end of the period of 10 years beginning on assent day, that provision is repealed on the day after that period ends.

### **3. Act binds Crown**

This Act binds the Crown in right of Western Australia and, so far as the legislative power of the Parliament permits, the Crown in all its other capacities.

### **4. Paramount consideration**

In performing a function under this Act, the CEO or the State Administrative Tribunal must regard the safety and wellbeing of people with disability and, in particular, their right to live free from abuse, violence, neglect and exploitation, as the paramount consideration.

## 5. Terms used

(1) In this Act —

**Aboriginal child** means a child who is a descendant of the Aboriginal people of Australia;

**adult** means a person who has reached 18 years of age;

**another jurisdiction** means a jurisdiction other than this State (including jurisdictions outside Australia);

**approved** means approved by the CEO;

**authorised officer** means an officer designated under section 53 for the purposes of this Act or for the purposes of the provision in which the term is used;

**authorised person** means —

- (a) a person or body exercising functions in the operation or administration of a relevant law; or
- (b) the NDIS Commission; or
- (c) a law enforcement agency of this State or another jurisdiction; or
- (d) a person or body prescribed by the regulations for the purposes of this definition;

**CEO** means the chief executive officer of the Department;

**CEO (Justice)** means the chief executive officer of the department of the Public Service principally assisting in the administration of the *Sentence Administration Act 2003* Part 8;

**charge** means a non-conviction charge or a pending charge;

**child** means a person who is under 18 years of age;

**Class 1 offence** — see section 6(1);

**Class 2 offence** — see section 6(2);

**Class 3 offence** means an offence (including an offence under a law of another jurisdiction) that is not a Class 1 offence or a Class 2 offence;

**Commissioner of Police** means the person holding or acting in the office of Commissioner of Police under the *Police Act 1892*;

**contact** includes any form of face-to-face or physical contact, and communication, whether oral, written or electronic;

**conviction** — see section 7;

**corresponding law** means a law of another State or a Territory that —

- (a) contains provisions that substantially correspond with the provisions of this Act; and
- (b) is prescribed by the regulations as a corresponding law for the purposes of this Act;

**court** means a court constituted in this State or another jurisdiction;

**criminal record**, in relation to a person, means —

- (a) every conviction of the person for an offence in this State or another jurisdiction; and
- (b) every charge made against the person for an offence in this State or another jurisdiction;

**criminal record check** means the procedures set out in section 33 to enable the CEO to determine whether a person has a criminal record and, if so, to obtain related information about the person;

**criminal records agency** means —

- (a) the Commissioner of Police; or
- (b) the Commissioner of the Australian Federal Police; or
- (c) the Commissioner (however designated) of the police force of another jurisdiction; or
- (d) a person or body that is —
  - (i) established or constituted under the law of another jurisdiction; and
  - (ii) prescribed by the regulations for the purposes of this definition;

**Department** means the department of the Public Service principally assisting the Minister in the administration of this Act;

**designated person** means a person who has —

- (a) applied for a clearance under this Act or a corresponding law; or
- (b) a clearance under this Act or a corresponding law; or
- (c) applied to cancel an NDIS worker check exclusion certificate under this Act or a corresponding law; or
- (d) applied for an internal review or external review under this Act or a corresponding law;

**disqualified person** — see section 8(1);

**DPP** means the Director of Public Prosecutions appointed under the *Director of Public Prosecutions Act 1991* section 5 or a person or body exercising functions that substantially correspond to the functions of the Director of Public Prosecutions under the law of another jurisdiction;

**engage** includes to engage or act in any of the following capacities —

- (a) as a paid or unpaid employee;
- (b) as a self-employed person or as a contractor or subcontractor;
- (c) as a volunteer;

**exclusion** means a decision on which an NDIS worker check exclusion certificate is issued;

**family member**, in relation to a child, means —

- (a) a parent, grandparent, brother, sister, uncle, aunt or cousin of the child, whether the relationship is established by, or traced through, consanguinity, marriage, a de facto relationship, a written law or a natural relationship; or

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- (b) for an Aboriginal child — a person regarded under the customary law or tradition of the child’s community as the equivalent of a person mentioned in paragraph (a); or
- (c) for a Torres Strait Islander child — a person regarded under the customary law or tradition of the Torres Strait Islands as the equivalent of a person mentioned in paragraph (a); or
- (d) a person determined by the CEO to be in a relationship with the child that is similar to a relationship mentioned in paragraph (a);

**government agency** means —

- (a) a department of the Public Service; or
- (b) a government department established or constituted under a law of another jurisdiction; or
- (c) a body, whether incorporated or not, that is established, constituted or continued for a public purpose under a written law of this State or another jurisdiction and that, under the authority of a written law of this State or another jurisdiction, performs a statutory function on behalf of this State or a government of another jurisdiction;

**harm** includes but is not limited to any detrimental effect on a person’s physical, sexual, psychological, emotional or financial wellbeing;

**health professional** means a person who is —

- (a) a health practitioner registered under the *Health Practitioner Regulation National Law (Western Australia)*; or
- (b) in a class of persons prescribed for the purposes of this definition;

**interstate screening agency** means a person or body exercising functions in the operation or administration of a corresponding

law that substantially correspond to the functions of the CEO under this Act;

**key personnel** has the meaning given in the NDIS Act section 11A;

**National Disability Insurance Scheme** has the meaning given in the NDIS Act section 9;

**NDIS Act** means the *National Disability Insurance Scheme Act 2013* (Commonwealth) and includes any regulations or rules under that Act;

**NDIS Commission** means the NDIS Quality and Safeguards Commission established under the NDIS Act section 181A;

**NDIS employer** means a person who engages a person to do NDIS work;

**NDIS purpose** —

- (a) means any purpose that is for, or connected with, the operation or administration of, or compliance with, a relevant law (insofar as may be relevant to the National Disability Insurance Scheme); and
- (b) includes any of the following purposes —
  - (i) verifying the identity of a person who is, or who has at any time been, an applicant for, or the holder of, a clearance under this Act or a corresponding law;
  - (ii) considering and deciding a person's application for a clearance under this Act or a corresponding law;
  - (iii) assessing and determining under this Act or a corresponding law whether a person poses a relevant risk of harm;
  - (iv) assessing and determining whether a risk assessment of a person is required under this Act or a corresponding law;

- (v) ongoing monitoring of a person who holds a clearance under this Act or a corresponding law for the purpose of determining whether the person requires a risk assessment or poses a relevant risk of harm;
- (vi) considering and deciding a person's application for the cancellation of an NDIS worker check exclusion certificate under this Act or a corresponding law;
- (vii) conducting an internal review or external review under this Act or a corresponding law;

**NDIS work** —

- (a) means work comprising, or connected with, the provision of supports or services to people with disability under the National Disability Insurance Scheme; and
- (b) includes work that —
  - (i) is the subject of requirements under the NDIS Act for a person to have a clearance under this Act or a corresponding law in order to be allowed by a registered NDIS provider to engage in that work; or
  - (ii) is undertaken in the exercise or performance by a person of a power or duty delegated to the person by the CEO under this Act; or
  - (iii) the CEO is satisfied is work in respect of which it is otherwise necessary or convenient for a person to have a clearance to facilitate the person's engagement in particular work;

but

- (c) does not include, if the regulations so provide, work that is carried out in circumstances, or by a person, prescribed by the regulations for the purposes of this definition;

**NDIS worker check clearance** or **clearance** means a clearance granted under section 15(1) or 28(7) or under a corresponding provision under a corresponding law (however a clearance may be described under the corresponding law);

**NDIS worker check clearance certificate** means a certificate issued on the granting of a clearance;

**NDIS worker check exclusion certificate** means a certificate issued under section 15(4) or 25(11) or (14) or under a corresponding provision under a corresponding law (however such a certificate may be described under the corresponding law);

**non-conviction charge** means a charge for an offence that has been disposed of by a court otherwise than by way of a conviction, and has a meaning affected by subsection (5);

**notifiable person**, in relation to an applicant for a clearance or the holder of an NDIS worker check clearance certificate under this Act, means —

- (a) any person who proposes to engage, or who engages, the applicant or holder in NDIS work, as has been made known to the CEO under, or for the purposes of, this Act; or
- (b) any other person prescribed by the regulations for the purposes of this definition;

**officer** means a person employed in, or engaged by, the Department whether as a public service officer under the *Public Sector Management Act 1994*, under a contract for services, or otherwise;

**pending charge** means a charge for an offence that has not yet been disposed of by a court;

**presumptively disqualified person** — see section 8(2);

**public authority** means —

- (a) a department of the Public Service; or

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- (b) a body, whether incorporated or not, that is established, constituted or continued for a public purpose under a written law and that, under the authority of a written law, performs a statutory function on behalf of this State; or
- (c) an entity established by or under the *Health Practitioner Regulation National Law (Western Australia)*; or
- (d) any other entity prescribed by the regulations for the purposes of this definition;

**relevant information**, in relation to a person, means —

- (a) information relevant to verifying the identity of the person; or
- (b) information about the person disclosed in an application for a clearance, or for the cancellation of an NDIS worker check exclusion certificate, under this Act or a corresponding law; or
- (c) information relating to the person's criminal record, and any other information relating to the person that is connected with, or otherwise related to, a conviction or charge mentioned in a criminal record; or
- (d) information about workplace misconduct by the person in this or another jurisdiction, being misconduct that concerns persons to whom a relevant risk of harm relates; or
- (e) information about any order imposed on the person by a court or tribunal relating to child protection, apprehended violence or domestic or family violence in this or another jurisdiction; or
- (f) information relevant to determining whether the person requires a risk assessment under this Act or a corresponding law; or
- (g) information about the person's clearance history; or

- (h) information about any current or past engagement of the person by an NDIS employer in this State or another State or a Territory; or
  - (i) other information relevant to determining whether the person poses a relevant risk of harm; or
  - (j) information about —
    - (i) the status of any application under this Act; or
    - (ii) any process or step that is being taken, or has been taken, under a relevant law; or
    - (iii) any certificate held, suspended or cancelled under this Act or a corresponding law; or
    - (iv) any interim bar imposed under this Act or a corresponding law;
- or
- (k) any other information prescribed by the regulations for the purposes of this definition;

**relevant law** means —

- (a) this Act; or
- (b) a corresponding law; or
- (c) the NDIS Act;

**relevant risk of harm** means risk of harm to people with whose protection a relevant law is concerned;

**risk assessed role** means —

- (a) a key personnel role of a person or an entity; or
- (b) a role for which the normal duties include the direct delivery of specified supports or specified services to a person with disability; or
- (c) a role for which the normal duties are likely to require more than incidental contact with a person with disability;

**risk assessment** has the meaning given in section 17(1);

**Torres Strait Islander child** means a child who is a descendant of the indigenous inhabitants of the Torres Strait Islands;

**unacceptable risk** means the risk described in section 17;

**vulnerable person** means an adult who is, or may be, unable to care for themselves, or unable to protect themselves from harm or exploitation, due to age, illness or disability.

- (2) For the purposes of this Act —
- (a) a self-employed person who does NDIS work will be taken to be an NDIS employer who engages themselves to do that work; and
  - (b) a person may do NDIS work as a volunteer in their own right and, in this case, the person is taken to be self-employed as a volunteer.
- (3) For the purposes of the definition of **relevant information** in subsection (1), a person's **clearance history** is the history of action taken under a relevant law in respect of —
- (a) an application for a clearance by the person, or a clearance granted to the person under this Act or a corresponding law, including any risk assessment, determination, imposition of an interim bar, refusal of an application, or suspension or cancellation of an NDIS worker check clearance certificate under this Act or a corresponding law; or
  - (b) an application for the cancellation of an NDIS worker check exclusion certificate under this Act or a corresponding law.
- (4) For the purposes of the definition of **risk assessed role** in subsection (1), and without limiting what may constitute more than incidental contact, the normal duties of a role are likely to require more than incidental contact with a person with disability if those duties include —
- (a) physically touching a person with disability; or

- (b) building a rapport with a person with disability as an integral and ordinary part of the performance of those duties; or
  - (c) having contact with multiple people with disability —
    - (i) as part of the direct delivery of a specialist disability support or service; or
    - (ii) in a specialist disability accommodation setting.
- (5) A reference in this Act to a non-conviction charge includes a reference to an expunged conviction as defined in the *Historical Homosexual Convictions Expungement Act 2018* section 3(1).
- (6) Subsection (5) applies despite anything in the *Historical Homosexual Convictions Expungement Act 2018*.
- (7) Except where the contrary intention appears, a term used in this Act that is defined in the NDIS Act has the same meaning in this Act as it has in that Act.

## 6. Class 1 offence and Class 2 offence

- (1) A *Class 1 offence* is —
- (a) an offence against a provision listed in Schedule 1 (if the offence complies with any condition specified in that Schedule or prescribed by the regulations); or
  - (b) an offence under a law of another jurisdiction the elements of which, if they had occurred in this State, would have constituted an offence of a kind referred to in this subsection; or
  - (c) an offence under a law of this State or another jurisdiction that is prescribed by the regulations to be a Class 1 offence; or
  - (d) an offence that, at the time it was committed or alleged to have been committed —
    - (i) was a Class 1 offence for the purposes of this Act; or

- (ii) in the case of an offence committed, or alleged to have been committed, before the commencement of this section — was an offence of a kind referred to in this subsection;
  - or
  - (e) an offence of attempting, or of conspiracy or incitement, to commit an offence of a kind referred to in paragraphs (a) to (d).
- (2) A **Class 2 offence** is —
- (a) an offence against a provision listed in Schedule 2 (if the offence complies with any condition specified in that Schedule or prescribed by the regulations); or
  - (b) an offence under a law of another jurisdiction the elements of which, if they had occurred in this State, would have constituted an offence of a kind referred to in this subsection; or
  - (c) an offence under a law of this State or another jurisdiction that is prescribed by the regulations to be a Class 2 offence; or
  - (d) an offence that, at the time it was committed or alleged to have been committed —
    - (i) was a Class 2 offence for the purposes of this Act; or
    - (ii) in the case of an offence committed, or alleged to have been committed, before the commencement of this section — was an offence of a kind referred to in this subsection;
- or
- (e) an offence of attempting, or of conspiracy or incitement, to commit an offence of a kind referred to in paragraphs (a) to (d).
- (3) An offence ceases to be classified as a Class 1 offence or a Class 2 offence if a pardon is granted in relation to the offence.

- (4) For the purposes of Schedule 1 or 2, an offence falls within the ambit of this subsection if —
- (a) the victim of the offence is a child who has reached 14 years of age; and
  - (b) the age difference between the victim and the offender does not exceed 5 years.

## 7. Conviction

- (1) For the purposes of this Act, a reference to a **conviction**, in relation to an offence committed by a person, is a reference to any of the following —
- (a) a court making a formal finding of guilt in relation to the offence;
  - (b) a court convicting the person of the offence, if there has been no formal finding of guilt before conviction;
  - (c) a court accepting a plea of guilty from the person in relation to the offence;
  - (d) a court acquitting the person following a finding under *The Criminal Code* section 27 that the person is not guilty of the offence on account of unsoundness of mind or an acquittal following an equivalent finding under a law of another jurisdiction.
- (2) For the purposes of this Act, a reference to a **conviction** includes a reference to a conviction that is a spent conviction.
- (3) For the purposes of subsection (2), an offence becomes spent if, under a law of this State or another jurisdiction, the person concerned is permitted not to disclose the fact that the person was convicted or found guilty of the offence.
- (4) For the purposes of this Act, a reference to a **conviction** does not include a reference to a conviction that is subsequently quashed or set aside by a court.

**8. Disqualified person and presumptively disqualified person**

- (1) For the purposes of this Act, a person is a *disqualified person* if the person has a conviction for a Class 1 offence committed by the person when an adult.
- (2) For the purposes of this Act, a person is a *presumptively disqualified person* if —
  - (a) there is a pending charge against the person for an offence that is a Class 1 offence or a Class 2 offence alleged to have been committed by the person when an adult; or
  - (b) the person has a conviction for a Class 2 offence committed by the person when an adult; or
  - (c) the person —
    - (i) has a conviction for a Class 3 offence committed by the person when an adult; and
    - (ii) the offence was committed against, towards, or in the presence of, a child or vulnerable person; and
    - (iii) the CEO reasonably believes that in the course of committing the offence the person performed an indecent act.

**9. Conduct, circumstances and criminal matters before commencement of Act**

- (1) This Act extends to conduct and circumstances occurring before the commencement of this section.
- (2) References in this Act to convictions and charges extend to —
  - (a) convictions and charges that relate to events that occurred when a person was a child; and
  - (b) convictions and charges that occurred or were laid before the commencement of this section.

*[Parts 2-7 have not come into operation.]*

*[Schedules 1 and 2 have not come into operation.]*

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## Notes

This is a compilation of the *National Disability Insurance Scheme (Worker Screening) Act 2020*. For provisions that have come into operation see the compilation table. For provisions that have not yet come into operation see the uncommenced provisions table.

### Compilation table

<b>Short title</b>	<b>Number and year</b>	<b>Assent</b>	<b>Commencement</b>
<i>National Disability Insurance Scheme (Worker Screening) Act 2020 Pt. 1</i>	48 of 2020	9 Dec 2020	9 Dec 2020 (see s. 2(1)(a))

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### Uncommenced provisions table

To view the text of the uncommenced provisions see *Acts as passed* on the WA Legislation website.

<b>Short title</b>	<b>Number and year</b>	<b>Assent</b>	<b>Commencement</b>
<i>National Disability Insurance Scheme (Worker Screening) Act 2020 (other than Pt. 1)</i>	48 of 2020	9 Dec 2020	To be proclaimed (see s. 2(1)(b))

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## Defined terms

*[This is a list of terms defined and the provisions where they are defined.*

*The list is not part of the law.]*

<b>Defined term</b>	<b>Provision(s)</b>
Aboriginal child .....	5(1)
adult .....	5(1)
another jurisdiction .....	5(1)
approved .....	5(1)
assent day .....	2(1)
authorised officer .....	5(1)
authorised person .....	5(1)
CEO .....	5(1)
CEO (Justice) .....	5(1)
charge .....	5(1)
child .....	5(1)
Class 1 offence .....	5(1), 6(1)
Class 2 offence .....	5(1), 6(2)
Class 3 offence .....	5(1)
clearance .....	5(1)
clearance history .....	5(3)
Commissioner of Police .....	5(1)
contact .....	5(1)
conviction .....	5(1), 7(1), (2) and (4)
corresponding law .....	5(1)
court .....	5(1)
criminal record .....	5(1)
criminal record check .....	5(1)
criminal records agency .....	5(1)
Department .....	5(1)
designated person .....	5(1)
disqualified person .....	5(1), 8(1)
DPP .....	5(1)
engage .....	5(1)
exclusion .....	5(1)
family member .....	5(1)
government agency .....	5(1)
harm .....	5(1)
health professional .....	5(1)
interstate screening agency .....	5(1)
key personnel .....	5(1)
National Disability Insurance Scheme .....	5(1)
NDIS Act .....	5(1)
NDIS Commission .....	5(1)
NDIS employer .....	5(1)

Defined terms

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NDIS purpose .....	5(1)
NDIS work.....	5(1)
NDIS worker check clearance.....	5(1)
NDIS worker check clearance certificate.....	5(1)
NDIS worker check exclusion certificate .....	5(1)
non-conviction charge.....	5(1)
notifiable person .....	5(1)
officer.....	5(1)
pending charge.....	5(1)
presumptively disqualified person .....	5(1), 8(2)
public authority .....	5(1)
relevant information.....	5(1)
relevant law.....	5(1)
relevant risk of harm .....	5(1)
risk assessed role.....	5(1)
risk assessment.....	5(1)
Torres Strait Islander child.....	5(1)
unacceptable risk.....	5(1)
vulnerable person .....	5(1)