

NDIS Participants in Residential Aged Care

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Introduction and Outline

- When will RAC providers need to be a registered NDIS provider
- What can dual Aged Care / NDIS registered providers expect from NDIS compliance and audit
- What steps are required to remove NDIS registration
- Managing security of tenure

When will RAC
providers need to be a
registered NDIS
provider?

Registration, renewal or removal flowchart

Were you a residential aged care provider supporting an NDIS participant on 1 December 2020?

YES

If you were new to the NDIS Commission, you are a Transitioned NDIS Provider

NO

Have you started supporting an NDIS participant after 1 December 2020?

YES

NO

Do you meet any 1 of the following 4 criteria?

1. the services delivered by you are **managed by the NDIA under the participant's plan**
2. the NDIS participant is in **SDA** provided by you
3. there is or likely to be an ongoing need to **use an RRP** in relation to the NDIS participant OR
4. you must develop a **Behaviour Support Plan** for the NDIS participant

YES

You must **register or renew** your NDIS registration

You do not need to register with the NDIS Commission

NO

You can either **remove your NDIS registration or not register**

What can dual
registered providers
expect from NDIS
compliance and audit?

NDIS Compliance Registration / renewal requirements

To register or renew NDIS registration, you must comply with the following:

- satisfy the Commissioner that your entity is **suitable to provide supports or services** to people with disability
- satisfy the Commissioner your **key personnel are suitable** to be involved in the provision of supports or services
- meet the NDIS **Practice Standards** in an **audit**

Suitability to provide supports or services to people with disability

The Commissioner will consider whether:

- you have **previously** been **registered** as a registered NDIS provider or a registered provider of supports
- a **banning order** has ever been in force in relation to you
- you have been **convicted of an indictable offence** against a law of the Commonwealth or of a State or Territory;
- you are or have been an **insolvent under administration** or a **Chapter 5 body corporate** (within the meaning of the *Corporations Act 2001*)
- you have been the subject of **adverse findings or enforcement action** by the Commonwealth, or a State or Territory Department, authority or other body established for a public purpose, including one with responsibilities relating to the **quality or regulation of services provided to people with disability, older people or children**

Suitability to provide supports or services to people with disability

The Commissioner will consider whether:

- you have been the subject of **adverse findings or enforcement action** by any of the following:
 - ASIC
 - ACNC
 - ACCC
 - APRA
 - the Australian Crime Commission
 - AUSTRAC
 - a State or Territory body equivalent to any of above
 - a work health and safety authority of a State or Territory
- you have been the subject of any **fraud, misrepresentation or dishonesty findings or judgment** in any administrative civil or criminal proceedings, or are currently party to any proceedings that may result you being the subject of such findings or judgment
- you have ever been disqualified from managing corporations under Part 2D.6 of the *Corporations Act 2001*

Registration / renewal requirements

To register or renew NDIS registration, you must comply with the following:

- satisfy the Commissioner that your entity is **suitable to provide supports or services** to people with disability
- satisfy the Commissioner your **key personnel are suitable to be involved in the provision of supports or services**
- meet the NDIS **Practice Standards** in an **audit**

Definition of key personnel

AGED CARE

- if the entity is **not a State or Territory** – a member of a group of persons who is **responsible for the executive decisions** of the entity at that time, which includes:
 - if the entity is a **body corporate** that is incorporated, or taken to be incorporated, under the *Corporations Act 2001* – a **director** of the body corporate for the purposes of that Act and
 - in **any other case** – a **member of the entity's governing body**
- if the entity is **not a State or Territory** – any other person who has **authority or responsibility for, or significant influence over, planning, directing, or controlling the activities** of the entity at that time

NDIS

- a member of the group of persons who is **responsible for the executive decisions** of the person or entity, which includes:
 - if the entity is a **body corporate** that is incorporated, or taken to be incorporated, under the *Corporations Act 2001* – a **director** of the body corporate for the purposes of that Act and
 - in **any other case** – a **member of the person's or entity's governing body**
- any other person who has **authority or responsibility for (or significant influence over) planning, directing or controlling the activities** of the person or entity

Definition of key personnel (continued)

AGED CARE

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- if, at the time, the entity conducts an aged care service:
 - any person who is or is likely to be **responsible for the nursing services** provided by the service and who holds a recognised qualification in nursing and
 - any person who is or is likely to be **responsible for the day-to-day operation** of the service
- **No equivalent**

whether or not the person is employed by the entity

Suitability of key personnel

AGED CARE

- the **individual's experience** in providing, at any time, aged care or relevant forms of care
- whether a NDIS **banning order** against the individual is, or has at any time been, in force
- whether the individual has at any time been **convicted of an indictable offence**
- whether a **civil penalty order** against the individual has been made at any time
- whether the individual is, or has at any time been, an **insolvent under administration**

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- whether a **banning order** has ever been in force in relation to the member
- whether the member has been **convicted of an indictable offence** against a law of the Commonwealth or of a State or Territory
- whether the member is or has been an **insolvent under administration**

Suitability of key personnel

AGED CARE

- whether the individual is or has at any time been the subject of adverse findings or enforcement action by any of the following:
 - **Commonwealth, State or Territory Department**
 - another **body established for a public purpose** under a law of the Commonwealth

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- whether the member has been the subject of **adverse findings or enforcement action** by the **Commonwealth, a State or Territory Department, authority or other body established for a public purpose**, including one with responsibilities relating to the quality or regulation of services provided to people with disability, older people or children

Suitability of key personnel

AGED CARE

- whether the individual is or has at any time been the subject of **adverse findings or enforcement action** by any of the following:
 - Australian Securities & Investments Commission
 - Australian Charities & Not-for-profits Commission
 - Australian Competition & Consumer Commission
 - Australian Prudential Regulation Authority
 - Australian Crime Commission
 - AUSTRAC
 - State or Territory authority (including, but not limited to, a body that is equivalent to a body mentioned above)
 - [local government authority](#)

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- whether the member has been the subject of **adverse findings or enforcement action** by any of the following:
 - Australian Securities & Investments Commission
 - Australian Charities & Not-for-profits Commission
 - Australian Competition & Consumer Commission
 - the Australian Prudential Regulation Authority
 - the Australian Crime Commission
 - AUSTRAC
 - State or Territory body equivalent to a body mentioned in any of the above
 - State or Territory work health and safety authority

Suitability of key personnel

AGED CARE

- whether the individual:
 - is, or has at any time been, the subject of any **fraud, misrepresentation or dishonesty findings or judgment** in any administrative, civil or criminal proceedings or
 - is **currently party to any proceedings** that **may result** in the individual being the subject of **such findings or judgment**
- whether the individual is, or has at any time been, **disqualified from managing corporations** under Part 2D.6 of the Corporations Act 2001
- **any other matter** specified in the rules

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- whether the member:
 - has been the subject of any **fraud, misrepresentation or dishonesty findings or judgment** in any administrative, civil or criminal proceedings, or
 - is **currently party to any proceedings** that **may result** in the member being the subject of **such findings or judgment**
- whether the member has ever been **disqualified from managing corporations** under Part 2D.6 of the Corporations Act 2001;
- **any other matter** the Commissioner considers relevant.

Notification requirements regarding key personnel

- **Both** require notification in relation to:
 - a **change in circumstances** that **relates to a suitability matter** concerning a member of KP or
 - where an **individual becomes** one of the **KP**
- **Aged care** additionally requires notification when an individual **ceases being** one of the **KP**
- **Non-compliance with notification requirements** may lead to similar consequences:
 - refusal, suspension or revocation of NDIS registration or approved provider status
 - civil penalties

Notification requirements regarding key personnel

- **Timing of notification:**
 - Aged Care: 14 days
 - NDIS: 'as soon as practicable'
- Unlike Aged Care, under NDIS, the **notification requirement** does not include additionally considering whether, and being satisfied that:
 - all new KP
 - existing KP with a change of circumstance concerning suitability are suitable to work in the sector

This means dual registered RAC providers are subject to similar but less onerous notification requirements than providers solely registered under the AC regime

Commissioner's power to deem key personnel unsuitable

- **Under both schemes**, the respective Commissioner can deem KP unsuitable based on consideration of similar suitability criteria

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- A provider's approval is subject to the AP being suitable to provide Aged Care services, which may take into account KP suitability
- Non-compliance with the Commission's determination would engage the Commission's power to impose sanctions, which include suspension and revocation of a provider's approval
- **Non-compliance:**
 - is also an **offence**, which carries a **penalty** and
 - entitles the Secretary to **apply for a court order to remedy non-compliance**

NDIS

- NDIS registration is subject to the suitability of KP
- Non-compliance with the Commissioner's determination would enliven the Commissioner's powers to refuse, suspend or revoke registration
- Notification may give rise to exercise of the Commissioner's power to deem KP unsuitable

NDIS Worker Screening requirement

- All workers that are in risk-assessed roles (incl KP) are additionally required to have an NDIS Worker Screening clearance **except** if after 31 Jan 2021, the RAC provider has:
 - an acceptable AC provider check in accordance with the requirements of the Accountability Principles 2014; or
 - an acceptable check in accordance with state and territory transitional arrangements
- In Vic, you don't need an NDIS Worker Screening clearance if:
 - The RACP complies with the Safety Screening Policy for registered NDIS providers operating in Victoria
 - any person engaged in a risk assessed role has a safety screening that is compliant with the Safety Screening Policy AND
 - the person has a current Working with Children Check that was issued in Victoria before 31 January 2021 OR has made an application for an NDIS Worker Screening Check

Registration / renewal requirements

To register or renew NDIS registration, you must comply with the following:

- satisfy the Commissioner that your entity is **suitable to provide supports or services** to people with disability
- satisfy the Commissioner your **key personnel are suitable** to be involved in the provision of supports or services
- meet the **NDIS Practice Standards** in an **audit**

What is an NDIS Audit?

- A “test” mandated by the NDIS Commission
 - all NDIS providers are required to undertake
 - conducted by private auditors
- Ensures all providers meet basic quality standards in line with the nationwide commitment proposed by the NDIA



What are providers being audited against?

- The first and most important step in the process is to understand the policies and procedures behind the NDIS and why you need them in the first place!
- The **NDIS Practice Standards and Quality Indicators**:
 - lay the foundations for the audit process
 - are a set of policies that all providers must implement in your operations



Practice Standards for Audit

The **core module** covers:

- rights of participants and responsibilities of providers
- governance and operational management
- the delivery of supports, and
- the environment in which supports are delivered

The **supplementary modules** cover:

- High intensity daily personal activities
- Specialist behaviour support, including implementing behaviour support plans
- Early childhood supports
- Specialised support co-ordination, and
- Specialist disability accommodation

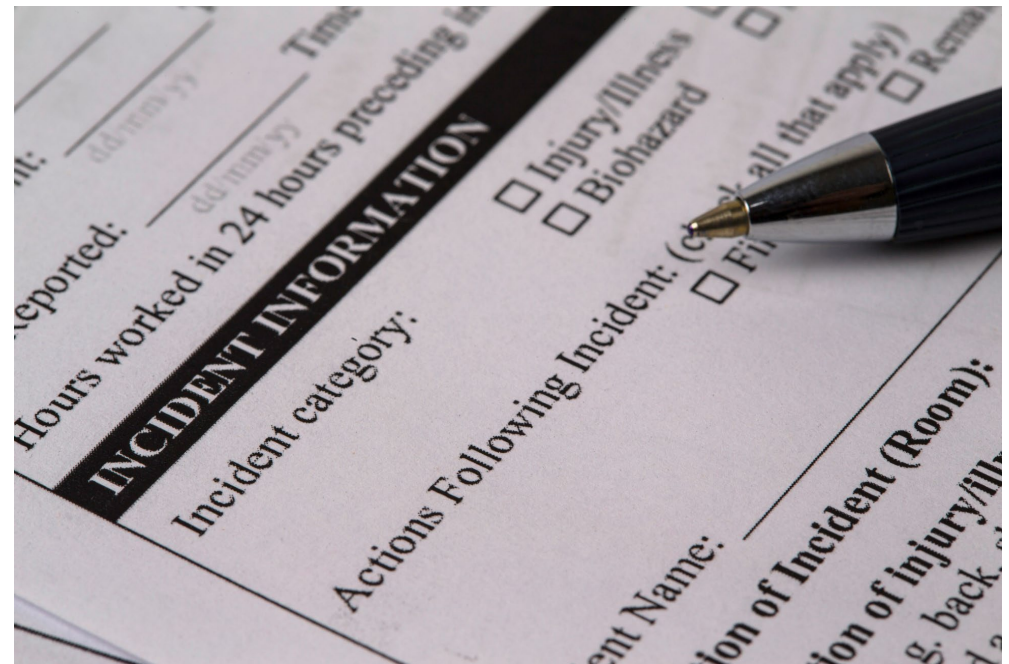
Similarities between the standards

- Individual Values and Beliefs
- Privacy and Dignity
- Violence, Abuse, Neglect, Exploitation and Discrimination
- Information Management
- Continuity of Supports
- Access to Supports
- Support Planning



Gaps between the standards

- Incident reporting
- Restrictive practices and behaviour support plans
- Worker Code of Conduct
- Worker orientation
- Worker screening



Gaps analysis examples

- Restrictive practices and behaviour support plans
- Code of Conduct
- Worker orientation
- High intensity daily personal activities
- Whistleblower protections



Reportable incident management

- Notification timeframes
- Meaning of “in connection with”
- Categories of reportable incidents

NDIS

Unlawful sexual or physical contact with, or assault of, an NDIS participant

Sexual misconduct committed against, or in the presence of, an NDIS participant including grooming of the NDIS participant for sexual activity

Abuse or neglect of an NDIS participant

The **death** of an NDIS participant

The unauthorised use of restrictive practice in relation to a NDIS participant

Serious injury of an NDIS participant

SIRS

Unlawful sexual contact or inappropriate sexual conduct

Psychological or emotional abuse

Neglect

Unexpected death

use of a restrictive practice in relation to the residential care recipient (other than in circumstances set out in the Quality of Care Principles)

NO EQUIVALENT

What will the audit process look like?

You need to find and appoint an **approved independent auditor**, who will review your organisational policies to determine whether they are implemented in accordance with these Practice Standards

Two types of audits:

1. **Verification** audit (low-risk supports) and
 2. **Certification** audit (higher risk supports)
- A **verification audit** is required for sole proprietors or smaller organisations delivering low-risk supports to NDIS participants
 - As the types of services and supports typically provided at a RAC facility are **high risk** you will most likely be required to undertake a **certification** audit

Classes of support

- As a RAC facility, you are likely to provide the following **classes of support**:
 - high intensity daily personal activities
 - assistance with daily personal activities
 - specialist positive behaviour support
 - assistance with daily life tasks in a group or shared living arrangement
 - specialist disability accommodation only
- All of the above require a **certification** audit!
- As each class of support also corresponds to a set of applicable Practice Standards, by identifying the classes of support, you also determine which NDIS Practice Standards apply to you – these are standards you will be audited against!

Certification audit (higher risk supports)

- **Document review:** Auditors review your documentation by conducting a desktop review of your documents
- **Onsite assessment:** NDIS providers offering high-risk supports must undertake an on-site assessment where the auditors will:
 - examine the environment of service delivery and potential policy failures
 - interview team members and clients to get a full, unbiased picture of how the provider performs
 - you should **engage your leadership team** in the audit visit to:
 - demonstrate commitment to the standards and the audit process
 - build an organisational-relationship with the audit team

How are providers assessed?

- a rating of **0 (major non-conformities)**: unable to demonstrate appropriate preparation, quality assurance, or implementation of policies and procedures and is, therefore, precluded a recommendation for either verification or certification
- a rating of **1 (minor non-conformities)**: the provider has evidence of correct policy and procedure implementation without the appropriate documentation to back them up. This usually requires non-urgent but still important corrective action
- a rating of **2 (conformity)**: the provider can clearly provide evidence of proper policy implementation and documentation based on the factors previously discussed, allowing for recommendation to either verification or certification
- a rating of **3 (conformity with elements of best practice)**: the provider is going above and beyond by not only providing the minimum requirements but also implementing innovations for swift, appropriate service delivery

Consequences of non-compliance

An audit may be relied on by the Commissioner in making decisions under the Act:

- whether to register as a registered NDIS provider (s 73E(1)(c) NDIS Act)
- imposing conditions of registration (s 73G)
- varying registration unilaterally (s 73L)
- suspending registration (s 73N)
- revoking registration (s 73P)

The Commission may use approved quality auditor surveillance activities for:

- complaints investigation processes (s 73X)
- compliance notices (s 73ZM)
- banning orders (section 73ZN of the Act)
- enforceable undertakings (s 73ZP) and/or
- injunctions (s 73ZQ)

In summation

- The ultimate goal of an NDIS audit is to help providers offer a quality experience for participants on a consistent basis
- All NDIS providers can provide services that are at the cutting edge of best practices, enabling you to have a competitive edge
- You will need to complete a **Gap Analysis** against the standards: Practice Standards & Quality Indicators
- Address your non-conformities thoroughly and promptly
- Log evidence of your corrective actions, present evidence against Practice Standards and Quality Indicators and use the right NDIS language
- Remember, the three things you need to get there are **policies**, **procedures**, and a **commitment to continuous improvement**

What steps are
required to remove
NDIS registration?

What steps are required to remove NDIS registration?

- Expiry of Registration
- Withdraw application for registration
- Request revocation of registration
- Notification of changes or events
- 'A decision of the provider to cease accepting, on a permanent basis, any new participants for supports or services that the provider is registered to provide'

Managing security of tenure

Managing security of tenure

- Confirm that you have a valid resident agreement that contains the right to terminate the agreement
- Confirm that the ground you rely upon is in the resident agreement and is consistent with the User Rights Principles
- Obtain two assessments of long-term needs
- Provide assistance to obtain alternative accommodation in accordance with the resident agreement
- Confirm that there is suitable alternative affordable and available accommodation that meets the assessed long-term needs of the resident
- Decide to ask the resident to leave the service and
- Serve the written notice in compliance with the security of tenure provisions

Key Messages

- Consider whether you must be a registered NDIS provider and whether you want to remain one
- If you are required to register or renew, you will need to complete a Gap Analysis against the Practice Standards and begin addressing any gaps well in advance of the audit visit
- Consider all the suitability matters in relation to your organisation and your KP
- Remember, as this is your first audit, you are unlikely to be fully compliant
- Document all your corrective actions against the Practice Standards and Quality Indicators
- The process to revoke registration is complex
- Participants must be supported to exercise choice and control over their lives during this process

There will be time for questions at the end. Raise your hand or use the Q&A function.

Questions



Disclaimer & Russell Kennedy Contacts

Today's presentation is intended as **general commentary only** and should not be regarded as legal advice.

If you require specific advice on the topics discussed, please contact the presenters directly:



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