

EXPLANATORY STATEMENT

Issued by the authority of the Commissioner of the NDIS Quality and Safeguards Commission

National Disability Insurance Scheme Act 2013

National Disability Insurance Scheme (Protection and Disclosure of Information—Commissioner) Rules 2018

Purpose

The *National Disability Insurance Scheme (Protection and Disclosure of Information—Commissioner) Rules 2018* (the instrument) are made for the purposes of section 67F of the *National Disability Insurance Scheme Act 2013* (Act). They make provision for and in relation to the exercise of disclosure of information powers for the purposes of paragraph 67E(1)(a) and subparagraphs 67E(1)(b)(i), (iii) and (iv) of the Act by the Commissioner of the NDIS Quality and Safeguards Commission.

Background

Section 67E of the Act comes into effect on 1 July 2018 as part of a package of amendments in the *National Disability Insurance Scheme (Quality and Safeguards Commission and Other Measures) Act 2017* (Amendment Act). The Amendment Act amends the Act to establish the NDIS Quality and Safeguards Commission (the Commission), including the office of the Commissioner of the NDIS Quality and Safeguards Commission (the Commissioner).

Division 2 of Part 2 of Chapter 4 of the Act (as amended) establishes a regime for the protection of information held by the Commission and the limited disclosure of information by the Commissioner. Section 67A is a general provision setting out the limited circumstances in which a person may record, disclose or otherwise use “protected Commission information” (as defined at section 9 of the Act), while sections 67B, 67C and 67D establish offences for unauthorised use or disclosure of, soliciting disclosure of, and offering to supply protected Commission information, respectively. Further, section 67G (in Division 3 of Part 2 of Chapter 4) protects certain documents and other information from production to a court, tribunal, authority or person with power to require the production of such information, unless the production or disclosure is for the purposes of the Act.

Section 67E gives the Commissioner power to disclose certain information despite sections 67B, 67D and 67G.

Subsection 67E(1)(a) provides that the Commissioner may, if satisfied on reasonable grounds that it is in the public interest to do so in a particular case or class of cases, disclose information acquired by a person in the performance of his or her functions or duties or in the exercise of his or her powers under the Act, to such persons and for such purposes as the Commissioner determines.

Subsection 67E(1)(b) provides that the Commissioner may disclose such information to particular persons or entities, namely, Secretaries, Chief Executives and other

heads of Commonwealth, State or Territory authorities for the purposes of the Department or authority, or to a State or Territory Department or authority that has responsibility for matters relating to people with disability, including the provision of supports or services to people with disability: see subparagraphs 67E(1)(b)(i), (iii) and (iv). Subparagraph 67E(1)(b)(ii) provides that the Commissioner may disclose such information to a person who has express or implied consent of the persons to whom the information relates to collect it.

In disclosing information for the purposes of paragraph 67E(1)(a) or subparagraph 67E(1)(b)(i), (iii) or (iv), subsection 67E(2) provides that the Commissioner must act in accordance with the National Disability Insurance Scheme rules made for the purposes of section 67F.

Section 67F of the Act provides that the National Disability Insurance Scheme rules may make provision for and in relation to the exercise of the Commissioner's power to disclose information for the purposes of paragraph 67E(1)(a) and subparagraphs 67E(1)(b)(i), (iii) and (iv) of the Act. Subsection 209(1) of the Act enables the Minister to make the National Disability Insurance Scheme rules prescribing matters:

- (a) required or permitted to be prescribed by the Act to be prescribed by the National Disability Insurance Scheme rules; or
- (b) necessary or convenient to be prescribed in order to carry out or give effect to the Act.

This instrument is made under section 209 for the purposes of section 67F.

As the delegate of the Minister for Social Services, in making this instrument, the Commissioner of the NDIS Quality and Safeguards Commission has had regard to the need to ensure the financial sustainability of the NDIS as required by subsection 209(3) of the Act.

Section 4 of the *Acts Interpretation Act 1901* (AI Act) concerns the exercise of power between the passing and commencement of an Act. It applies if, at a time (the start time), an Act will confer a power to make an appointment or to make an instrument of legislative or administrative character, and either (a) the Act will commence at the start time, or (b) the Act will be amended by another Act that commences at the start time: subsection 4(1). Subsection 4(2) of the AI Act permits, in limited circumstances, the power to be exercised before the commencement of the Act. These circumstances include, bringing the appointment or instrument into effect, bringing the Act concerned into operation, making the Act concerned or the other Act as amended fully effective at or after the start time of the Act concerned. Subsection 4(3) of the AI Act authorises anything to be done before the start time for the purpose of enabling the exercise of the power, or of bringing the appointment or instrument into effect, as if the relevant commencement had occurred. Paragraph 13(1)(a) of the *Legislation Act 2013* provides that the AI Act applies to any instrument so made as if it were an Act and as if each provision of the instrument were a section of an Act. The instrument of appointment of the Commissioner of the NDIS Quality and Safeguards Commission and the Minister's delegation instrument operate subject to section 4 of the AI Act.

This instrument is a legislative instrument for the purposes of the *Legislation Act 2003* and is an NDIS rule for the purposes of section 209 of the Act.

Commencement

The instrument commences on 1 July 2018 (immediately after the instrument of appointment of the Commissioner of the NDIS Quality and Safeguards Commission and the delegation instrument to the Commissioner commence).

Consultation

Instruments made for the purposes of section 67F are Category D NDIS rules under section 209 of the Act: see table item 4 of subsection 209(8) of the Act. Subsection 209(7) of the Act provides that the Minister must not make Category D rules unless each host jurisdiction has been consulted in relation to the making of the rules.

The Commissioner of the NDIS Quality and Safeguards Commission, as the delegate of the Minister for Social Services and the rule-maker for the instrument, consulted all host jurisdictions in relation to the making of the instrument.

The Commonwealth has also undertaken a targeted consultation process with a range of peak bodies representing people with disability and carers, providers of services for people with disability and workers providing supports or services to people with disability. The peak bodies were given an opportunity to review an advanced draft of the instrument and provide submissions to the Department. The feedback was considered and where appropriate incorporated into the instrument.

The Commonwealth also consulted the Office of the Australian Information Commissioner on the instrument.

Regulation Impact Statement (RIS)

A RIS is not required for this instrument (OBPR ID 16842).

Explanation of the provisions

Preamble

The Preamble sets the overall policy objectives for the instrument.

Part 1 – Preliminary

Section 1 provides how the proposed instrument is to be cited, that is, as the *National Disability Insurance Scheme (Protection and Disclosure of Information—Commissioner) Rules 2018* (the instrument).

Section 2 provides that the instrument commences on 1 July 2018.

Section 3 provides that the authority for the instrument is the *National Disability Insurance Scheme Act 2013* (Act).

Section 4 provides definitions for expressions used in the instrument and identifies expressions that are used in the instrument but defined in the Act.

Key expressions that are defined in section 4 for the purposes of the instrument include:

- “affected individual”, which is defined to mean an individual whose person information is contained in NDIS information that is, or is proposed to be, disclosed;
- “consent”, which is defined as informed consent (a legislative note directs the reader to subsection 4(9) and section 7 of the Act, which are relevant to the Commission’s interactions with people with disability); and
- “NDIS information”, which is defined as information obtained by a person in the performance of the person’s functions or duties or in the exercise of the person’s powers under the Act. This definition is adopted from section 67E of the Act, which governs the disclosure of information by the Commissioner on public interest grounds paragraph 67E(1)(a)) and to specified persons (paragraph 67E(1)(b)).

The definitions of the expressions “de-identified” and “personal information” have the same meaning as in the *Privacy Act 1988*.

Section 5 clarifies how the instrument operates with regard to children and with regard to participants with a nominee under Part 5 of Chapter 4 of the Act.

Subsection 5(1) provides that Part 4 of Chapter 4 of the Act applies to things required or permitted to be done by or in relation to a child, as if it were required or permitted to be done by the Act. The main effect of this subsection is that things required or permitted to be done in relation to a child, under the instrument, must be done by or in relation to a person or persons who have parental responsibility in relation to the child, or a person determined in writing by the Chief Executive Officer (CEO) of the National Disability Insurance Scheme Launch Transition Agency (Agency).

Subsection 5(2) provides that subsections 5(3) and 5(4) apply in relation to a person if the person is a participant and has a nominee.

Subsection 5(3) provides that sections 79 and 80 of the Act apply to any act that may be done by the person under or for the purposes of the instrument, as if that thing were an act that may be done under or for the purposes of the Act. The main effect of this subsection is that an act that may be done in relation to a participant who has a nominee, under the instrument, may be done by the participant’s correspondence nominee, as if the act may be done under the Act (see section 79 of the Act). Further, a nominee’s duties to the participant under section 80 of the Act (and other provisions pertaining to those duties) extend to acts that may be done under the instrument.

Subsection 5(4) provides similarly in relation to notices that the Commissioner is authorised or required by the instrument to give to the person. It provides that sections 81 and 82 apply to any notice the Commissioner is authorised or required by the instrument to give to the person as if references to the CEO in those sections

were references to the Commissioner, and as if the Commissioner was authorised or required to give the notice under the Act. The main effect of this subsection is that notices authorised or required to be given to a person under the instrument, where the person is a participant with a nominee, must be given to the participant's correspondence nominee (see section 81 of the Act). Further, a notice issued by the Commissioner under the instrument will be taken to have been complied with if the nominee complies with the notice (see section 82 of the Act).

Part 2 – State and Territory laws that may affect a requirement by the Commissioner to give information or produce documents

Section 6 provides a simplified outline of Part 2 of the instrument.

Section 7 provides that for the purposes of paragraph 58(2)(b) of the Act, the laws listed in Schedule 1 to the instrument are prescribed.

Subsection 58(1) of the Act relevantly provides that nothing in a law of a State or Territory prevents a person from giving information, producing a document, or giving evidence that the person is required to give or produce to the Commissioner or a Commission officer under the Act, unless subsection 58(2) applies. Under subsection 58(2)(b), the National Disability Insurance Scheme rules may prescribe a law of a State or Territory that can take precedence over the requirement under the Act to give information or evidence or produce a document to the Commissioner or a Commission officer.

The relevant State and Territory laws for the purposes of paragraph 58(2)(b), in relation to a requirement to give information or evidence or produce a document to the Commissioner or a Commission officer, are listed at Schedule 1 to the instrument. Thus, a person who would otherwise be required to give information or evidence or produce a document to the Commissioner or a Commission officer under the Act may rely on a provision listed in Schedule 1 in order to resist providing that information.

Part 3 – The Commissioner's information disclosure powers

Section 8 provides a simplified outline of Part 3 of the instrument.

Section 9 is an application provision. It provides that Part 3 of the instrument applies to a disclosure of information that contains protected Commission information or personal information. The expression "protected Commission information" is defined at section 9 of the Act. The expression "personal information" is defined at section 4 of the instrument, and has the same meaning as in the *Privacy Act 1988*.

Division 1 – Rules about the Commissioner disclosing information

Section 10 sets out rules with regard to de-identification of information that apply where the Commissioner proposes to disclose NDIS information.

Subsection 10(1) provides that before disclosing NDIS information under section 67E of the Act (other than under subparagraph 67E(1)(b)(ii)) the Commissioner must, so far as is reasonably practicable:

- (a) identify any personal information included in the NDIS information; and
- (b) consider if the purpose of the proposed disclosure would be adversely affected if the personal information was de-identified; and
- (c) if the purpose would not be adversely affected, de-identify the personal information.

Subsection 10(2) provides an exception to the requirement at subsection 10(1) if the affected individual whose personal information is included in the NDIS information has consented to the proposed disclosure.

Subsection 10(3) provides further exceptions to the requirement at subsection 10(1) if the Commissioner is satisfied of any of the following:

- (a) the disclosure is necessary to prevent or lessen a serious threat to an individual's life, health or safety;
- (b) complying with subsection 10(1) would result in an unreasonable delay in the disclosure;
- (c) complying with subsection 10(1) would frustrate the purpose of the disclosure.

The exceptions at subsection 10(3) provide a balance between the interests of the proposed recipient of the NDIS information, and the interests of the affected individual. These exceptions recognise that there may be instances in which the Commissioner will need to disclose information to, for example, a law enforcement agency, in circumstances of urgency or to prevent imminent harm. The Commissioner will need to be satisfied that one of the circumstances in subsection 10(3) is met; that is, the Commissioner will be required to turn their mind to these issues and exercise discretion in invoking the exception – it is not an automatic exception.

Section 11 sets out rules with regard to consultation that apply where the Commissioner proposes to disclose NDIS information.

Subsection 11(1) provides that before disclosing NDIS information under section 67E of the Act (other than under subparagraph 67E(1)(b)(ii)) the Commissioner must, so far as is reasonably practicable:

- (a) notify any affected individual about the proposed disclosure; and
- (b) seek the affected individual's consent to the proposed disclosure; and
- (c) provide a reasonable opportunity for the affected individual to comment on the proposed disclosure.

The Commissioner must specify a date by which the individual must respond, when notifying the individual for the purposes of paragraph 11(1)(a): subsection 11(2). In practice, the Commissioner will allow a reasonable time for affected individuals to respond to such a notice, taking into consideration the urgency of the proposed disclosure and the nature of the information in question (for example, if the information is voluminous, it might be reasonable to allow longer to respond).

Subsection 11(3) provides that when deciding whether to disclose the information, the Commissioner must consider any express statement that the affected individual does not consent to the proposed disclosure, and any other comments or views

provided by the affected individual. However, the Commissioner is not required to consider these matters if the response from the affected individual is received after the date specified in the notice: subsection 11(4).

Subsection 11(5) provides that subsection 11(1) does not apply – that is, the Commissioner does not need to consult the affected individual – if the Commissioner is satisfied that:

- (a) the affected individual is aware that the Commissioner may be disclosing the NDIS information; and
- (b) the affected individual has indicated, expressly or by implication, that they consent to the proposed disclosure, and
- (c) the affected individual has had an opportunity to express their views about the proposed disclosure.

Subsection 11(6) provides that section 11 does not apply in relation to an affected individual if the Commissioner is satisfied that giving notice to the affected individual would frustrate the purpose of the disclosure, or if the Commissioner has been unable to contact the affected individual after making reasonable attempts. These exceptions are included to cover situations in which it is impractical to notify the affected individual or where notice would adversely impact upon investigation, compliance or enforcement activity in relation to an NDIS provider.

Subsection 11(7) provides that section 11 does not apply to a proposed disclosure if the Commissioner is satisfied of any of the following:

- (a) the disclosure is necessary to prevent or lessen a serious threat to an individual's life, health or safety;
- (b) complying with subsections 11(1) and (3) would result in an unreasonable delay in the disclosure;
- (c) complying with subsections 11(1) and (3) would frustrate the purpose of the disclosure.

The exceptions at subsection 11(7) provide a balance between the interests of the proposed recipient of the NDIS information, and the interests of the affected individual. These exceptions recognise that there may be instances in which the Commissioner will need to disclose information to, for example, a law enforcement agency, in circumstances of urgency or to prevent imminent harm. The Commissioner will need to be satisfied that one of the circumstances in subsection 11(7) is met; that is, the Commissioner will be required to turn their mind to these issues and exercise discretion in invoking the exception – it is not an automatic exception.

Section 11 requires consultation with affected individuals before disclosing NDIS information. The Commissioner will keep records of the consultations undertaken and any responses received, which will be considered in deciding whether to proceed with a proposed disclosure. Affected individuals will be given a reasonable opportunity to express their views on proposed disclosures. This consultation puts those individuals on notice that their personal information is included in NDIS information that the Commissioner is considering whether to disclose. If the Commissioner then decides to disclose the NDIS information (either with or without

the affected individual's personal information included), or decides not to disclose the NDIS information, the instrument does not require the Commissioner to notify the affected individual of the outcome.

Section 12 requires the Commissioner, when disclosing NDIS information under section 67E of the Act (other than under subparagraph 67E(1)(b)(ii)), to give the recipient a notice that explains the purpose of the disclosure, any limitations on how the person may use, record or disclose the information, and a statement that the information is only to be used in accordance with the purpose of the disclosure.

Legislative note 1 at section 12 draws the reader's attention to subparagraph 67A(1)(d)(ii) of the Act, which allows a person to use, record and disclose protected Commission information (as defined at section 9 of the Act) for the purpose for which the information was disclosed to the person under section 67E. Section 12 of the instrument supports this requirement, as it is likely that NDIS information will also be protected Commission information in many instances. Legislative note 2 provides that the notice under section 12 of the instrument must comply with the notice requirements at section 7 of the Act.

Section 13 requires the Commissioner to make a record of disclosures of NDIS information made under section 67E of the Act (other than under subparagraph 67E(1)(b)(ii)). Subsection 13(1) is the requirement to make a record of the disclosure, while subsection 13(2) sets out what the record must include, as follows:

- (a) a description or summary of the information disclosed; and
- (b) the recipient of the disclosure; and
- (c) the purpose of the disclosure; and
- (d) details of the request that prompted the disclosure (if there was such a request); and
- (e) if the Commissioner decided that an exception under subsections 10(3), 11(6) or 11(7) applied – a summary of that decision.

Subsection 13(3) provides that the description or summary for the purposes of paragraph 13(2)(a) may take the form of a list of document numbers, or record numbers, which would enable retrieval of the information from the Commission's record management system.

Subsection 13(4) provides for the length of time that a record made for the purposes of subsection 13(1) must be kept. This will generally be 7 years, unless otherwise provided by the National Archives of Australia under paragraph 24(2)(b) of the *Archives Act 1983*.

Division 2 – Disclosures by the Commissioner in the public interest

Section 14 sets out the matters that the Commissioner must consider in deciding whether the Commissioner is satisfied, on reasonable grounds, that it is in the public interest to disclose NDIS information under paragraph 67E(1)(a) of the Act. These matters, listed at subsection 14(1), are:

- (a) where the information concerns an affected individual's life, health or safety – whether the affected individual would be likely to be in a position to seek assistance themselves or give notice of their circumstances to the proposed recipient of the information; and
- (b) the purpose for which the information was collected, including any information provided to the affected individual at the time it was collected about how the information would, or would not, be used or disclosed; and
- (c) whether the affected individual would reasonably expect the Commissioner to disclose the information, for the proposed purpose and to the proposed recipient of the information; and
- (d) whether the disclosure would be contrary to a request by a complainant under subsection 15(3) of the *National Disability Insurance Scheme (Complaints Management and Resolution) Rules 2018*; and
- (e) whether the proposed recipient has sufficient interest in the information; and
- (f) if the proposed recipient requested the information – whether that person could reasonably obtain the information from another source;
- (g) whether section 15, 16, 17, 18 or 19 of the instrument applies to the disclosure.

The list of factors that the Commissioner must consider is exhaustive, and once the Commissioner has considered them, it is open to the Commissioner to decide whether to be satisfied, on reasonable grounds, that it is in the public interest to disclose the NDIS information. None of the factors at paragraphs 14(1)(a) to (g) automatically leads to an obligation to disclose, or not to disclose, the NDIS information. These factors are relevant considerations in the exercise of the Commissioner's discretion under paragraph 67E(1)(a) of the Act, but section 14 of the instrument does not fetter or displace the Commissioner's discretion. The list of factors is exhaustive, to limit the risk that irrelevant information would be taken into account in considering whether to exercise the discretion to disclose NDIS information on public interest grounds.

Paragraph 14(1)(a) encompasses situations in which the information concerns, for example, the quality or safety of supports or services being provided to a person with disability. In deciding whether to disclose the information, the Commissioner must consider whether the person with disability would be likely to be able to seek assistance with regard to the supports or services themselves, or notify the proposed recipient of the information, for the purposes of seeking assistance or prompting an investigation.

The reference to subsection 15(3) of the *National Disability Insurance Scheme (Complaints Management and Resolution) Rules 2018* at paragraph 14(1)(d) refers to a provision under which a complainant may, in making a complaint to the Commissioner, ask the Commissioner to keep certain information confidential. The information that the complainant may ask the Commissioner to keep confidential is the identity of the complainant, the identity of a person identified in the complaint, or any other details included in the complaint.

Subsection 14(2) defines the expression "sufficient interest" for the purposes of paragraph 14(1)(e). A proposed recipient has sufficient interest in the NDIS information if:

- (a) the Commissioner is satisfied that, in relation to the purpose of the disclosure, the recipient has a genuine and legitimate interest in the information; or
- (b) the recipient is a Commonwealth, State or Territory Minister.

Paragraph 14(2)(b) presumes that a Commonwealth, State or Territory Minister would have sufficient interest in certain NDIS information by virtue of the position that they hold, as a representative of the Australian Government or a State or Territory Government. It is important to note that, while such persons are taken to have sufficient interest in the information, it will remain open to the Commissioner to decide to disclose, or not to disclose, the information after considering all of the factors listed at subsection 14(1).

Sections 15 to 19 of the instrument set out specific circumstances that may be relevant to the Commissioner's decision to disclose NDIS information under paragraph 67E(1)(a) of the Act. However, while these matters must be taken into account, none of them leads to an obligation to disclose – they must be considered in the context of the other factors listed at subsection 14(1), and disclosure will be at the Commissioner's discretion.

Section 15 applies in relation to a disclosure of NDIS information for the purposes of enforcing laws and in related circumstances. Paragraph 15(a) provides that section 15 applies to a proposed disclosure where the Commissioner is satisfied that the disclosure is necessary:

- (a) for the enforcement of a criminal law of the Commonwealth, a State, a Territory or a foreign country, that relates to an indictable offence punishable by imprisonment of 2 years or more; or
- (b) for the enforcement of a law imposing a pecuniary penalty equivalent to 40 penalty units or more (a penalty unit is \$210 as at 1 July 2017: subsection 4AA(1), *Crimes Act 1914*); or
- (c) to prevent an act that may have a significant adverse impact on the affected individual; or
- (d) to prevent an act that may have a significant adverse impact on the public revenue.

Section 15 also applies to a proposed disclosure where the disclosure relates to an offence or a threatened offence: against an officer of the Commonwealth, or of a State or Territory; against Commonwealth, State or Territory property; or in premises occupied by the Commission.

Section 16 applies to a proposed disclosure if the Commissioner is satisfied that the disclosure is necessary to brief the Minister for any of the following purposes:

- (a) to enable the Minister to consider and respond to complaints, incidents or issues raised with the Minister; or
- (b) about an error or delay on the part of the Commission; or
- (c) about an instance of an anomalous or unusual operation of the Act, regulations made under the Act or the National Disability Insurance Scheme rules.

Section 17 applies in relation to a disclosure of NDIS information for purposes related to missing or deceased persons. Subsection 17(1) provides that section 17 applies to a proposed disclosure of NDIS information if all of the following criteria are met:

- (a) the information relates to a person who is, or has been reported to be, missing or deceased; and
- (b) the Commissioner is satisfied that there are no reasonable grounds to believe that the person would not want the information disclosed; and
- (c) the Commissioner is satisfied that the disclosure is necessary to:
 - (i) locate the person, or a relative or beneficiary of the person; or
 - (ii) assist a court, coronial inquiry, royal commission or commission of inquiry (however described), a Department or other authority of a State or Territory, or an authority responsible for administering a disability support scheme in another country, with an inquiry related to the missing or deceased person; or
 - (iii) assist a person in relation to the administration of the estate of the person (where the person is deceased).

Subsection 17(2) further provides that section 17 may apply to the disclosure of NDIS information that is about a person other than the person referred to in paragraph (a). A legislative note at subsection 17(2) directs the reader to section 10 of the instrument, which may require de-identification of the information.

If the Commissioner decides to disclose NDIS information based on the application of section 17, the Commissioner will disclose the information in a manner that is mindful of Indigenous Australian customs surrounding naming deceased persons.

Section 18 applies in relation to a disclosure of NDIS information that would assist a child welfare agency. Subsection 18(1) provides that section 18 applies to a proposed disclosure if the Commissioner is satisfied that the disclosure is necessary to assist a child welfare agency:

- (a) to contact a parent, guardian or relative in relation to a child; or
- (b) to carry out its responsibilities relating to the safety, welfare or wellbeing of a child.

“Child welfare agency” is defined at subsection 18(2) for the purposes of section 18. A legislative note at subsection 18(2) provides examples of child welfare agencies.

Section 19 applies in relation to a disclosure of NDIS information for the purposes of assisting professional bodies in relation to their members, where those members are employed or otherwise engaged by an NDIS provider. Subsection 19(1) provides that section 19 applies to a proposed disclosure if the Commissioner is satisfied that:

- (a) the Commissioner holds information about a person employed or otherwise engaged by an NDIS provider; and
- (b) the disclosure is necessary to assist a professional body to consider whether the person’s conduct meets the standards required to attain or maintain membership of the professional body.

“Professional body” is defined at subsection 19(2) for the purposes of section 19.

Division 3 – Disclosures by the Commissioner to Secretaries, Chief Executives and other heads of authorities

Section 20 sets out when the Commissioner may disclose NDIS information under subparagraphs 67E(1)(b)(i), (iii) or (iv) of the Act – that is, to Secretaries, Chief Executives and other heads of authorities. Section 20 provides that the Commissioner may disclose NDIS information to a person, Department or authority under those subparagraphs following a request from the person, Department or authority or of the Commissioner’s own initiative.

Section 20 clarifies that the Commissioner need not have received a request in order to disclose NDIS information under subparagraphs 67E(1)(b)(i), (iii) or (iv), but may do so independently. Disclosure under those subparagraphs is not subject to public interest considerations, in contrast to disclosures of NDIS information under paragraph 67E(1)(a).

Section 21 sets out the matters that the Commissioner may have regard to, in considering:

- (a) what the purpose of a Department or authority of the Commonwealth, a State or a Territory is for the purposes of subparagraph 67E(1)(b)(i) or (iv) of the Act; or
- (b) what the responsibilities of a Department or authority of a State or Territory are for the purposes of subparagraph 67E(1)(b)(iii) of the Act.

In considering the relevant purposes or responsibilities, the Commissioner may have regard to:

- (c) legislation within the Department or authority’s portfolio, including the purposes or objects of that legislation; and
- (d) functions, powers or responsibilities bestowed on a Commonwealth Department or authority by legislation or by the Commonwealth Administrative Arrangements Order (as amended from time to time); and
- (e) functions, powers or responsibilities bestowed on a State or Territory Department or authority by legislation or by administrative arrangements (as amended from time to time) in those jurisdictions.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

National Disability Insurance Scheme (Protection and Disclosure of Information—Commissioner) Rules 2018

This instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the legislative instrument

The *National Disability Insurance Scheme (Protection and Disclosure of Information—Commissioner) Rules 2018* (the instrument) are made for the purposes of section 67F of the *National Disability Insurance Scheme Act 2013* (Act). The instrument makes provision for and in relation to the exercise of disclosure of information powers for the purposes of paragraph 67E(1)(a) and subparagraphs 67E(1)(b)(i), (iii) and (iv) of the Act by the Commissioner of the NDIS Quality and Safeguards Commission.

Human rights implications

The instrument engages the following rights:

- the rights of people with disabilities in the Convention on the Rights of Persons with Disabilities (CRPD), especially Articles 3 and 22;
- the rights of children in the Convention on the Rights of the Child (CRC), especially Article 7 and 16;
- Articles 14 and 17 of the International Covenant on Civil and Political Rights (ICCPR).

General principles underpinning the CRPD

The CRPD recognises the barriers that persons with disabilities may face in realising their rights. While the rights under all human rights treaties apply to everyone, including persons with disabilities, the CRPD applies human rights specifically to the context of persons with disabilities.

The establishment of the NDIS Quality and Safeguards Commission promotes the rights of people with disabilities in Australia by providing access to nationally consistent regulatory and complaints management arrangements for supports and services provided by NDIS providers.

The preamble of the CRPD, and the general principles set out in Article 3 reflect the need for the respect for the inherent dignity, individual autonomy (including the freedom to make one's own choices and the independence of the person), the need for persons with disabilities to be able to participate fully and effectively and be included in society, the need for respect for difference and acceptance of persons

with disabilities as part of human diversity and providing persons with disabilities the opportunity to be involved actively in decision-making processes about policies and programmes, including those directly concerning them.

Respect for privacy

Article 22 of the CRPD provides that no person with disability, regardless of place of residence or living arrangements, shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence or other types of communication, or to unlawful attacks on his or her honour and reputation. It also provides that the privacy of personal, health and rehabilitation information of persons with disabilities should be protected on an equal basis with others. This right contains similar protections to those in Article 17 of the ICCPR and Article 16 of the CRC.

Information about a person that is or was stored in the Commission records is 'protected Commission information' under the Act. Where this information was acquired by a person in the performance of their functions or duties or the exercise of their powers under the Act, the circumstances in which the information can be disclosed are set out in this instrument. This is a positive engagement with Article 22 of the CRPD as the provisions are specific and require certain criteria to be met before the Commissioner's discretion to disclose the information can be exercised. This satisfies the requirement for any interference with privacy to be both lawful and non-arbitrary.

Under section 58 of the Act there are circumstances in which a person may resist giving information, producing a document, or giving evidence to the Commissioner for the purposes of the Act where State or Territory laws prohibiting such disclosure are prescribed for the purposes of that section. Section 7 of the instrument prescribes a list of State and Territory laws that prohibit the release of certain information, and thereby allow a person to resist a request for information from the Commissioner by relying on that State or Territory law. This is a positive engagement of the right to privacy in that it provides a precise exception to the requirement to provide information, give a document or give evidence where a prescribed State or Territory law takes precedence over the request for information.

Part 3 of the instrument outlines the rules about the Commissioner disclosing information including the requirements to de-identify any protected information and consult with an affected individual about a proposed disclosure. There is an exception to the consultation requirement at section 11 where:

- the affected individual is aware that the Commissioner may be disclosing the NDIS information;
- the affected individual has indicated, expressly or by implication, that they consent to the proposed disclosure;
- the affected individual has had an opportunity to express their views about the proposed disclosure;

There is also an exception to the consultation requirement where:

- the Commissioner is satisfied that giving notice would frustrate the purpose of the disclosure;
- reasonable attempts have been made to contact an affected individual.

These exceptions are included to cover situations in which it is impractical to notify the affected individual or where notice would adversely impact upon investigation, compliance or enforcement activity in relation to an NDIS provider.

In addition, de-identification and consultation requirements do not apply if the Commissioner is satisfied that:

- the disclosure is necessary to prevent or lessen a serious threat to an individual's life, health or safety;
- de-identification or consultation would result in an unreasonable delay in the disclosure;
- de-identification or consultation would frustrate the purpose of the disclosure.

The Commissioner might receive information from a variety of sources about potential abuse, neglect or exploitation of people with disability. That information may reveal abuse which is happening outside the context of NDIS supports and services and require co-ordination with the family or carers of people with disability or relevant State and Territory bodies.

Three inquiries into abuse in the disability sector were undertaken in 2014-15: the Senate Standing Committee on Community Affairs' (2015) *Report on the inquiry into the abuse and neglect against people with disability in institutional and residential settings, including the gender and age related dimensions, and the particular situation of Aboriginal and Torres Strait Islander people with disability, and culturally and linguistically diverse people with disability*; the Victorian Ombudsman's (2015) *Reporting and Investigation of Allegations of Abuse in the Disability Sector: Phase 1 – The Effectiveness of Statutory Oversight*; and the Victorian Parliament's (2015) *Interim Report on the Inquiry into Abuse in Disability Services*. These inquiries emphasised that system-level oversight is required to ensure serious incidents are thoroughly investigated, responses are co-ordinated, and systemic issues are identified and addressed. The Commission will need to work with mainstream systems within States and Territories including child protection and professional bodies when it receives information about abuse, neglect or exploitation.

Division 2 of Part 3 of the instrument outlines the matters the Commissioner must have regard to in determining whether there are reasonable grounds on which it is in the public interest to disclose NDIS information. The criteria in section 14 limit the scope of the exercise of the decision-making power by requiring that the Commissioner must consider, amongst other things, whether the information cannot be reasonably obtained from another source and that the person making the request has 'sufficient interest'.

The scope is further limited by defining a proposed recipient of information has 'sufficient interest' if the person has a 'genuine and legitimate interest' for the purpose of the disclosure or the person is a State, Territory or Commonwealth Minister. There is also an obligation under section 14 that, in deciding whether to disclose information about a particular person that concerns the person's life, health

or safety, the Commissioner should consider whether that person would be likely to be in a position to seek assistance themselves or give notice of their circumstances to the proposed recipient of the information. This is intended to ensure that, as far as possible, the Commissioner takes into account the interests of the person concerned, and it is a further protection against arbitrary interference with the privacy of a person under Article 17 of the ICCPR and a person with a disability under Article 22 of the CRPD.

Section 15 provides for the circumstances where the Commissioner is satisfied that disclosure is necessary for the enforcement of laws, to prevent an act that may have a significant adverse impact on an individual, or to protect public revenue. This is justifiable on the basis that it allows for law enforcement authorities or regulators to properly undertake their functions where there is information indicating the contravention or imminent contravention of a relevant law.

Section 16 provides for the circumstance where the Commissioner is satisfied that disclosure is necessary to brief a Commonwealth, State or Territory Minister to enable the Minister to be advised of complaints or issues raised by, or on behalf of a person, and if necessary respond to that person. It also applies where the Commissioner is satisfied that disclosure is necessary for purposes related to the Commission's functions and the operation of the Act. The disclosure is limited to a Minister being briefed for the purposes set out in the paragraph and it is a reasonable limitation on the right to privacy as it enables matters to be escalated and managed appropriately.

Section 17 provides for the circumstances where the Commissioner is satisfied that disclosure is about a person who is, or is reported to be, missing or deceased. The disclosure is of a limited nature by requiring the Commissioner to be satisfied that there are reasonable grounds to believe that the person would not want that information disclosed, and that the disclosure is necessary to locate the missing person, assist certain bodies in relation to enquiries about the person or assist in the administration of a deceased estate. The disclosure is not an arbitrary interference with privacy in that it is limited to prescribed purposes, and the Commissioner must have regard to whether the person would not want the information disclosed.

Section 18 provides for the circumstances where the Commissioner is satisfied that disclosure is necessary to assist a child welfare agency to contact a parent or relative in relation to a child, or to carry out its responsibilities relating to the safety, welfare or wellbeing of a child. Disclosing information in these circumstances engages with Article 19 of the CRC which requires nations to take all steps to protect a child from abuse, neglect or maltreatment. This also engages with Article 3 of CRC and Article 7 of the CRPD which relate to the requirement for States to make decisions related to children with the best interests of the child the paramount consideration. Article 7 of the CRPD in particular requires the taking of all necessary measures to ensure the full enjoyment by children with disabilities of all human rights and fundamental freedoms on an equal basis with other children. It also requires that in all actions concerning children with disabilities, the best interests of the child shall be a primary consideration.

Section 19 applies where the Commissioner is satisfied that disclosure is necessary to assist professional bodies in relation to their members, where those members are

employed or otherwise engaged by an NDIS provider. This disclosure is not an arbitrary interference with privacy in that it is limited to circumstances where the Commissioner is satisfied that the disclosure is necessary to assist a professional body to consider whether the person's conduct meets the standards required to attain or maintain membership of the professional body. Their membership of the relevant professional body will be generally be relevant to their employment or engagement by the NDIS provider, so the disclosure would be likely to assist in determining whether such employment or engagement should continue.

Division 3 of Part 3 provides limitations on the power under the Act for the Commissioner to disclose information to the heads of certain government bodies if they request information for one or more purposes of the department or authority. The Commissioner may also disclose NDIS information to the heads of certain government bodies on the Commissioner's own initiative. The disclosure is limited to only the heads of those government bodies described in section 67E of the Act and there is a requirement for the Commissioner to record the particulars of the disclosure including the reason for the disclosure at section 13 of the instrument. This discretion is reasonable as it is for the purpose of Commonwealth-State relations to further enhance the effectiveness of the Commission.

Conclusion

This instrument is compatible with human rights as it forms part of an overall legislative scheme designed to deliver improved quality and safeguards for people with disability receiving supports or services from registered NDIS providers. To the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate to enable the appropriate information gathering and disclosure powers to protect and prevent people with disability from harm as a result of unsafe or poor quality supports or services under the NDIS.

Graeme Head, Commissioner of the NDIS Quality and Safeguards Commission