

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) Amendment Rules 2021

Purpose

The *National Disability Insurance Scheme (Protection and Disclosure of Information—Commissioner) Amendment Rules 2021* (the Instrument) are made under section 209 of the *National Disability Insurance Scheme Act 2013* (the Act) for the purposes of section 67F of the Act.

The Instrument amends the *National Disability Insurance Scheme (Protection and Disclosure of Information—Commissioner) Rules 2018* (the Rules).

The Rules 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 (the Commissioner).

The Instrument makes amendments for the purpose of creating an additional exception to the requirement in section 11 of the Rules to consult a person whose personal information is proposed to be disclosed under section 67E of the Act. The additional exception concerns the disclosure of information to certain agencies that have specific functions related to national worker screening, which is a feature of the NDIS Quality and Safeguarding Framework.

The Intergovernmental Agreement on Nationally Consistent Worker Screening for the National Disability Insurance Scheme (the Agreement) records the national worker screening policy as agreed by the Commonwealth, States and Territories. The Commonwealth agreed to take on certain responsibilities relating to information sharing with States and Territories for their functions related to worker screening. The Instrument assists the Commonwealth to fulfil the following responsibilities, which it agreed to as part of the Agreement:

- Introduce or amend Commonwealth legislation to facilitate effective information sharing with participating NDIS worker screening units;
- Through the NDIS Quality and Safeguards Commission (the Commission), provide relevant disciplinary and misconduct information in relation to a worker to participating NDIS worker screening units; and
- Support and facilitate the local implementation of the national policy for NDIS worker screening, consistent with the transitional quality and safeguards working arrangements that have been agreed, or are being agreed, with each state and territory.

Background

The Instrument is made under section 209 of the Act construed in accordance with subsection 33(3) of the *Acts Interpretation Act 1901*.

Section 209 of the Act provides that the Minister may, by legislative instrument, make National Disability Insurance Scheme rules (NDIS rules) prescribing matters required or permitted by the Act to be prescribed by the NDIS rules or which are necessary or convenient to be prescribed in order to carry out or give effect to the Act.

Section 67F of the Act provides that the NDIS rules may make provision for and in relation to the exercise of the powers of the Commissioner to disclose information for the purposes of paragraph 67E(1)(a) or subparagraph 67E(1)(b)(i), (iii) or (iv).

The Instrument is made under section 209 for the purposes of section 67F.

Subsection 33(3) of the *Acts Interpretation Act 1901* states:

Where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by-laws) the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.

The Instrument is a legislative instrument for the purposes of the *Legislation Act 2003*.

Section 67E of the Act came 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*. The amendments established the Commission, including the office of the Commissioner.

Division 2 of Part 2 of Chapter 4 of the Act establishes a regime for the protection of information held by the Commission and the limited disclosure of information by the Commission. 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 recording, use or disclosure of, soliciting disclosure of, and offering to supply protected Commission information, respectively.

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

Paragraph 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.

Paragraph 67E(1)(b) provides that the Commissioner may disclose such information to particular persons or entities, namely, Secretaries, Chief Executives and other heads of a Commonwealth, State or Territory Department of State or other authority for the purposes of the Department or authority, or to a State or Territory Department of State or other 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 also 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 NDIS rules made for the purposes of section 67F (that is, the Rules).

The Rules prescribe requirements relating to the disclosure of information under section 67E of the Act, which the Rules refer to as 'NDIS information'. The requirements include that the Commissioner identify any personal information in the NDIS information that is proposed to be disclosed, and then, in certain circumstances, de-identify that personal information unless any of the exceptions in section 10 of the Rules apply. The Instrument does not propose to make any amendments to that requirement.

In certain circumstances the Commissioner is also required to undertake the consultation process described at subsection 11(1) of the Rules prior to making a disclosure of NDIS information. As part of this process, the Commissioner is required to notify any individual whose personal information is in the NDIS information (referred to as the 'affected individual'), seek the consent of that individual to the proposed disclosure and provide them with a reasonable opportunity to comment on the proposed disclosure.

National worker screening

In the context of national worker screening, subject to the operation of the existing exceptions in section 11 of the Rules, the Commissioner would be required, so far as is reasonably practicable, to carry out this consultation process for each proposed disclosure of disciplinary and misconduct information about a worker to an NDIS worker screening unit, or to a State or Territory Department or authority that has responsibility for the implementation of the transitional and special arrangements contained in Part 4 of the *National Disability Insurance Scheme (Practice standards—Worker Screening) Rules 2018* (the Worker Screening Rules). These are referred to in this explanatory statement as, respectively, worker screening units and acceptable check authorities.

The Commission's 2019-2020 Annual Report records that there were 17, 253 registered NDIS providers registered with the Commission as at 30 June 2020. Under the Worker Screening Rules, registered NDIS providers must ensure that workers and other personnel (referred to jointly in this explanatory statement as workers) are engaged in 'risk assessed roles' only if they have an NDIS Worker Screening Check clearance or an 'acceptable check' under the transitional and special arrangements in Part 4 of the Worker Screening Rules. Part 4 outlines the

types of acceptable check required in each state or territory if a person who does not have an NDIS Worker Screening Check clearance is to be engaged in a risk assessed role.

National worker screening plays a significant role in assisting the Commissioner to fulfil the Commissioner's core function in paragraph 181E(a) of the Act, namely to uphold the rights of, and promote the health, safety and wellbeing of, people with disability receiving supports or services, including those received under the NDIS. It also supports fulfilment of the object in paragraph 3(1)(ga) of the Act, namely to protect and prevent people with disability from experiencing harm arising from poor quality or unsafe supports or services provided under the NDIS.

In the Agreement, the Commonwealth committed to facilitate effective information sharing with worker screening units. The Commonwealth also committed to support and facilitate local implementation of the national policy for NDIS worker screening consistent with transitional working arrangements and to provide relevant disciplinary and misconduct information to worker screening units.

In their application to the disclosure of relevant information to worker screening units and acceptable check authorities, the consultation requirements in section 11 are not well-adapted to the Commonwealth's commitment in the Agreement concerning information sharing or to supporting fulfilment of the Commissioner's core function in paragraph 181E(a) of the Act or the object in paragraph 3(1)(ga) of the Act. The Instrument therefore creates an additional exception to the requirements that is intended to provide a more streamlined process for the sharing of information by the Commission with worker screening units and acceptable check authorities.

While the Rules do not prescribe a particular period for the consultation required by subsection 11(1), the consultation should provide a person with a reasonable opportunity to comment on the proposed disclosure. The period required in order to give a person reasonable opportunity to comment will differ depending on the circumstances of each proposed disclosure. This is in addition to the time involved in determining whether the Commission has (or is able to obtain) the contact details of the affected individual, considering the grounds for disclosure and considering any comments made by the affected individual about the proposed disclosure. Any objection to the disclosure or comments about it by the affected individual must be taken into account in determining whether or not to disclose the information. However, they do not preclude the disclosure.

Maintaining protections for workers

The purpose of national worker screening is to identify individuals who pose an unacceptable risk of harm to people with disability through the risk assessments conducted by worker screening units. Under transitional and special arrangements that apply in a state or territory, the acceptable check authorities share this responsibility until acceptable checks cease to be recognised under those arrangements. The decision to disclose information about a person relevant to these assessments will be determined on a case by case basis.

There exists the potential that, because of information about them that has been disclosed to a worker screening unit or acceptable check authority, a worker will lose

their clearance or acceptable check, resulting in an impact on the range of roles in which the worker can be engaged in the disability sector. However, ensuring that workers are not in roles in which they pose a risk to the safety of persons with disability is an intended consequence of the national worker screening scheme. Moreover, procedural fairness obligations are built into the process of assessing an NDIS worker screening check application. There are review mechanisms available to workers affected by adverse screening decisions. Individuals will be able to seek an internal review of a decision by a worker screening unit and, if not satisfied following the internal review, may also choose to seek an external review by a tribunal or authority within the relevant jurisdiction.

Importantly, the amendments in the Instrument leave unaffected the strict limitations in sections 67A and 67B of the Act on how any protected Commission information disclosed by the Commission can be recorded, used or further disclosed.

The amendments also leave unaffected section 12 of the Rules. Section 12 requires that where protected Commission information is disclosed under subparagraph 67E(1)(b)(i), (iii) or (iv), the recipient of that information must be provided with a notice outlining the purpose of the disclosure of that information to them, any limitations on how they may use, make a record of or disclose the information and a statement that the information is only to be used in accordance with the purpose of the disclosure.

Section 67A of the Act specifies the circumstances in which a person may make a record of protected Commission information, disclose such information or otherwise use such information (separate from the discretionary disclosure power provided to the Commissioner in section 67E of the Act).

Section 67A will not authorise staff of a worker screening unit or acceptable check authority to use the information provided to them about a worker for any purpose other than the purpose specified in the notice under section 12 of the Rules, unless (relevantly):

- they do so for a purpose of the Act (subparagraph 67A(1)(d)(i) of the Act) or
- they do so with the express or implied consent of the person to whom the information relates (subparagraph 67A(1)(d)(iii) of the Act) or
- they reasonably believe that the making of the record, or the disclosure or use of the information, is necessary to prevent or lessen a serious threat to an individual's life, health or safety (paragraph 67A(1)(e) of the Act).

Section 67B of the Act makes it an offence for a person to make a record of, disclose or use protected Commission information in any way that is not authorised by the Act.

Further, the Instrument leaves unaffected the requirement in section 13 of the Rules to make a record of a disclosure under section 67E of the Act. The record must include:

- a description or summary of the information disclosed; and
- the recipient of the disclosure; and
- the purpose of the disclosure; and

- if the disclosure was made following a request for the information—details of the request; and
- if there was a decision that an exception under subsections 10(3), 11(6) or 11(7) applied in relation to the disclosure—a summary of that decision.

Consent

As noted above, under subparagraph 67A(1)(d)(iii) of the Act, a person may make a record of, disclose or otherwise use protected Commission information with the consent of the person to whom the information relates. The Agreement states that an application for an NDIS Worker Screening Check must be in a form approved by a worker screening unit. Relevantly, and in addition to other requirements, the approved form must include consent from the applicant to:

- the worker screening unit obtaining from the Commission any information relevant to determining the applicant's eligibility for an NDIS Worker Screening Check clearance and
- the Commission sharing any such information for the purposes of the screening process and
- their NDIS Worker Screening Check outcome being included in the National Clearance Database and to the disclosure of their NDIS Worker Screening Check outcome to current and prospective employees, the Commission, worker screening units and third-party government screening entities and
- ongoing monitoring of their eligibility to maintain NDIS Worker Screening Check clearance for the duration of their clearance.

However, in some instances, it may not be clear that the consent given by an applicant covers certain information held by the Commission that is proposed to be disclosed to the worker screening unit because of its relevance to the applicant's NDIS Worker Screening Check clearance. This could also be the case where a person has made an application for an acceptable check to the relevant authority and provided their consent for the authority to obtain information about them from the Commission or other bodies.

The additional exception that the Instrument adds to the requirement to consult will help to ensure that an appropriate disclosure of information, which is relevant to the checks, is not unduly impeded and the checking process unnecessarily delayed as a result.

Australian Privacy Principles

The Australian Privacy Principles (APPs) are in Schedule 1 of the *Privacy Act 1988*. APP 6 requires that if an APP entity, which includes the Commission, holds personal information about an individual that was collected for a particular purpose, the entity must not disclose that information for another purpose unless one of a number of specified exceptions applies.

One of these exceptions is that the disclosure is required or authorised by or under an Australian law (APP 6.2(b)).

Disclosures of personal information under section 67E of the Act enliven this exception. The Office of the Information Commissioner previously commented that authorisations by law engaging the exception under APP 6.2(b) should be reasonably necessary and proportionate to achieve the relevant public policy goals.¹ Similarly, the Human Rights Committee has noted that the right to privacy may be limited where the measure pursues a legitimate objective and is effective to achieve and proportionate to that objective.²

The Rules operate to protect the right to privacy by limiting and narrowing the authorisation of disclosures under section 67E by adding the additional requirements relating to those disclosures. This Explanatory Statement and the accompanying Statement of Compatibility with Human Rights explain how the amendments to the Rules in the Instrument are reasonable, necessary and proportionate to achieving the public policy objective of implementing national worker screening and, through its implementation, providing additional safeguards and protections for people with disability who receive supports and services under the National Disability Insurance Scheme (NDIS).

Other considerations

As the delegate of the Minister for Social Services, in making this instrument, the Commissioner has had regard to the need to ensure the financial sustainability of the NDIS as required by subsection 209(3) of the 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 the day after it is registered.

Consultation

Instruments made for the purposes of section 67F of the Act are Category D NDIS rules under section 209 of the Act: see item 4 of the table in 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, 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 Commissioner also consulted the Information Law Unit of the Attorney-General's Department and the Department of Social Services at officer level in relation to the making of the Instrument.

¹ Office of the Australian Information Commissioner, Submission No. 39 to the Senate Standing Committee on Community Affairs, *Inquiry into the National Disability Insurance Scheme Amendment (Quality and Safeguards Commission and Other Measures) Bill 2017* (3 August 2017) 2.

² Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Human rights scrutiny report* (Report 7 of 2017, 8 August 2017) [1.112].

When developing the Rules the Commonwealth undertook 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 Rules prior to their making and to provide submissions. The feedback was considered and where appropriate incorporated into the Rules.

Regulation Impact Statement (RIS)

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

Explanation of the provisions.

Section 1 – Name

Section 1 provides that the Instrument is titled the *National Disability Insurance Scheme (Protection and Disclosure of Information—Commissioner) Amendment Rules 2021*.

Section 2 – Commencement

Section 2 provides that the whole of the Instrument commences the day after it is registered.

Section 3 – Authority

Section 3 provides that the Instrument is made under the *National Disability Insurance Scheme Act 2013*.

Section 4 – Schedules

Section 4 provides that each instrument specified in a Schedule to the Instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to the Instrument has effect according to its terms.

Schedule 1 – Amendments

Item 1 – Section 1

This amendment repeals and substitutes section 1 with a provision to rectify the fact that the existing name of the Rules in section 1 does not include the year that the Rules were made.

Item 2 – After section 8

This amendment inserts a new section 8A into the Rules to specify that Part 3 of the Rules is made for the purposes of section 67F of the Act. It also specifies that Part 3 provides for matters in relation to the exercise of the Commissioner's power to disclose information for the purposes of any of the following provisions of the Act:

- Paragraph 67E(1)(a);

- Subparagraph 67E(1)(b)(i), (iii) or (iv).

Item 3 – At the end of section 11

This amendment adds subsection (8) to section 11 to create a new exception to the requirement to consult with an affected person on a proposed disclosure of their personal information. The exception relates to the person or body to whom the disclosure is made, the responsibilities of that person or body and the purpose of the disclosure. The exception applies when:

- (a) The disclosure is made to:
 - (i) a person (including the chief executive (however described) of a Department of State of a State or Territory of the head of an authority of a State or Territory); or
 - (ii) a Department of a State of a State or Territory; or
 - (iii) an authority of a State of Territory;
 that has responsibility for:
 - (iv) conducting an NDIS worker screening check under an NDIS worker screening law; or
 - (v) conducting an assessment (however described) or making a decision that related to whether a person meets a requirement mentioned in Part 4 of the Worker Screening Rules in a participating jurisdiction; and
- (b) The disclosure is made for the purposes of sharing information to assist the person, Department or authority to effectively conduct those checks or assessments or make those decisions.

The information recipients identified in paragraph (a) of new subsection (8) are those referred to in paragraph 67E(1)(a) and subparagraphs 67E(1)(b)(iii) and (iv) of the Act.

Under section paragraph 67E(1)(a), the Commissioner may disclose certain 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 as the Commissioner determines if the Commissioner is satisfied that the disclosure is in the public interest. This requires a consideration of the factors in section 14 of the Rules.

Subparagraph 67E(1)(b)(i) of the NDIS Act provides that the Commissioner may disclose such information to the Secretary of a Department of State of the Commonwealth, or to the head of an authority of the Commonwealth for the purposes of that Department or authority. The new exception will not apply to disclosure to those persons because they do not have the responsibility for the conducting of NDIS worker screening checks or the other types of checks that are acceptable under the transitional arrangements in Part 4 of the Worker Screening rules. These checks and assessments are only conducted by a Department or an authority of a State or Territory.

Subparagraph 67E(1)(b)(ii) of the NDIS Act provides that the Commissioner may disclose to a person who has the express or implied consent of the person to whom the information relates to collect it. The new exception will also not apply to disclosure under this provision because the consultation requirement does not apply to a disclosure under this provision.

The new subparagraph (8)(b) provides that for this exception to the requirement to consult to be enlivened, the purpose for the proposed disclosure of the information must be to assist the information recipient to conduct an NDIS Worker Screening Check or acceptable check. Under section 12 of the Rules, which (as noted above) remains unchanged by the Instrument, a recipient of NDIS information must be provided with a notice that includes the purpose of the disclosure, any limitations on how the person may use, make a record of, or disclose the information and a statement that the information is only to be used in accordance with the purpose of the disclosure. As stated in the Note after section 12, which also remains unchanged, subparagraph 67A(1)(d)(ii) authorises a person to make a record of, disclose and otherwise use protected Commission information if the person is using the information or making the record or disclosure for the purpose for which the information was disclosed to the person under section 67E.

As also noted above, it is an offence under section 67B of the Act for a person to make a record of, disclose or otherwise make use of protected Commission information if the person is not authorised or required under the Act to make the record, disclose or otherwise use that information.

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) Amendment Rules 2021

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) Amendment Rules 2021* (the Instrument) are made for the purposes of section 67F of the *National Disability Insurance Scheme Act 2013* (the Act). The Instrument creates a new exception to the requirement to consult with an individual on the disclosure of their personal information under section 67E of the Act. The exception applies when the disclosure is for purposes relating to national NDIS worker screening and is made to State or Territory authorities with responsibility for conducting NDIS worker screening checks (worker screening units) or to other authorities responsible for checks that are acceptable under associated prescribed transitional arrangements (acceptable check authorities).

Human rights implications

The Instrument engages the following rights:

- the rights of people with disability in the Convention on the Rights of Persons with Disabilities (CRPD), especially Articles 3, 16 and 22;
- the right to equality and non-discrimination (Article 2) and the right to work (Article 6) of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR)
- the right to equality and an impartial trial (Article 14) and the right to privacy (Article 17) of the *International Covenant on Civil and Political Rights* (ICCPR).

Rights of people with disability

Article 3 of the CRPD outlines its general principles. While the rights under all human rights treaties apply to everyone, including people with disability, the CRPD applies human rights specifically to the context of people with disability.

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 people with disability 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 people with disability the

opportunity to be involved actively in decision-making processes about policies and programmes, including those directly concerning them.

Article 16 of the CRPD provides that parties shall take all appropriate legislative administrative, social, educational and other measures to protect persons with disabilities, both within and outside the home, from all forms of violence and abuse, including their gender-based aspects.

This is particularly significant in the context of national worker screening which provides a mechanism by which workers will be screened and assessed based on the level of risk they pose to people with disability. The Instrument amends the Rules to allow the worker screening units and acceptable check authorities responsible for conducting those assessments to have all relevant information available to them so that their decisions are based on complete information about a worker. The Rules as amended by the Instrument promote the rights of persons with disability and specifically ensure that a paramount consideration of national worker screening is the right of people with disability to live free from abuse, violence, neglect and exploitation.

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.

The purpose of the Instrument is to make amendments for the purpose of the appropriate sharing of information about workers to facilitate screening of the workers. Where personal information of a person with disability (or any other person) is intertwined or included in the information to be shared about a worker, the general requirement to de-identify that personal information remains, subject to the existing exceptions to that requirement. It is anticipated that in most instances, given the purpose of the disclosure will ordinarily be the assessment of the worker, it will not be relevant to also include the personal information of people with disability.

Rights to equality and non-discrimination, and to work

Article 2 of the ICESCR provides that the rights in the ICESCR will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 6 of the ICESCR recognises the right to work and ‘includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts.’

Article 14 of the ICCPR recognises the rights of all persons to be equal before courts and tribunals, and that everyone charged with a criminal offence will have the right to be presumed innocent until proven guilty according to law.

A key objective of the Rules as amended by the Instrument is to protect people with disability from experiencing harm arising from unsafe supports or services under the

NDIS by ensuring that relevant information is made available for the purpose of assessments related to the screening of workers who work with, or intend to work with, people with disability.

Worker screening is required for roles with registered NDIS providers that the *National Disability Insurance Scheme (Practice Standards—Worker Screening) Rules 2018* (Worker Screening Rules) refer to as ‘risk assessed roles’. These types of roles will ordinarily require a higher level of interaction with, or control over, decisions that affect people with disability. For this reason, it is in the interests of preventing harm to people with disability to ensure that workers in those roles have been assessed as not posing an unacceptable risk to people with disability.

The sharing of information by the NDIS Quality and Safeguards Commission with worker screening units and acceptable check authorities may, in some cases, prevent certain individuals from being permitted to work in risk assessed roles.

The national worker screening policy, as contained in the Intergovernmental Agreement on Nationally Consistent Worker Screening for the National Disability Insurance Scheme (the Agreement), contains a nationally consistent, risk-based decision-making framework for considering a person’s criminal history and patterns of behaviour over time to guard against the unreasonable exclusion of people who have committed an offence or misconduct from working in the disability sector, where this is not relevant to their potential future risk to people with disability.

States and Territory worker screening units will provide certain review and appeal rights to individual workers who have applied for an NDIS Worker Screening Check and may be subject to an adverse decision. Individuals will be able to seek a review from a worker screening unit of an adverse decision, consistent with the principles of natural justice and procedural fairness. Where there is an intention to make an adverse decision, States and Territories will disclose the reason why the adverse decision is proposed, except where the worker screening unit is required under Commonwealth, State or Territory law to refuse to disclose the information the worker screening unit will also allow the individual a reasonable opportunity to be heard and consider the individual’s response before finalising the decision.

The Instrument supports a proportionate approach to safeguards that does not unduly prevent a person from choosing to work in the NDIS market, but ensures the risk of harm to people with disability is minimised by excluding workers whose behavioural history indicates they pose a risk if working in risk assessed roles.

The right to privacy

Article 17 of the ICCPR provides that no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation, and that everyone has the right to the protection of the law against such interference or attacks.

As part of national worker screening and as agreed by the Commonwealth and all States and Territories in the Agreement, worker screening units and acceptable check authorities will be provided relevant disciplinary and misconduct information to be used in the assessment of whether or not a person should obtain a clearance.

The assessing body will conduct an assessment of the information that is available in order to make a decision determining the outcome of an application for an NDIS Worker Screening Check or other assessment under Part 4 of the Worker Screening Rules.

Worker screening units and acceptable check authorities are government authorities and are required to ensure that any disclosure of information is lawful. This helps to ensure the maintenance and the protection of the privacy of individuals from unlawful interference. Protected Commission information disclosed under section 67E of the Act can only be used by the information recipient for the purpose for which it was disclosed (unless other circumstances in paragraph 67A(1)(d) or (e) apply). Section 67B of the Act makes it an offence to make a record of, disclose or otherwise use protected Commission information in a way that is not authorised by the Act. The requirement to make a record of, disclose or otherwise use information only as authorised by the Act is an obligation that extends to any recipient of protected Commission information, including government authorities.

The Instrument amends the Rules to create an additional exception to the requirement that would, subject to existing exceptions, necessitate the Commissioner consulting, so far as is reasonably practicable, with an individual before providing information about the individual that is relevant to the assessment of whether or not the individual poses an unacceptable risk of harm to people with disability, to the person or body responsible for that assessment. This assessment is for the purpose of ensuring that individuals who pose an unacceptable risk of harm to people with disability are prevented from working in certain roles in the disability services sector and ultimately helps to preserve and protect the rights of people with disability.

The exception will apply only where the information is disclosed to specific persons or bodies with specific responsibility and for a particular purpose, with the ultimate objective of protecting the rights of people with disability and preventing and minimising the risk of harm to them.

Conclusion

The 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