

EXPLANATORY STATEMENT

Issued by the authority of the Minister for the National Disability Insurance Scheme

National Disability Insurance Scheme Act 2013

*National Disability Insurance Scheme (NDIS Worker Screening Law) Amendment
Determination 2024*

Purpose

The *National Disability Insurance Scheme (NDIS Worker Screening Law) Determination 2020* (**2020 Determination**) specifies State and Territory laws that are NDIS worker screening laws for the purposes of section 10B of the *National Disability Insurance Scheme Act 2013* (**the Act**).

The *National Disability Insurance Scheme (NDIS Worker Screening Law) Amendment Determination 2024* (**2024 Determination**) amends the 2020 Determination, to correct a drafting error in the 2020 Determination which relates to the legislation that is prescribed as being the NDIS worker screening law for Queensland.

Under subsection 33(3) of the *Acts Interpretation Act 1901*, where an Act confers a power to make, grant or issue any an 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 like conditions (if any) to repeal, rescind, revoke, amend or vary any such instrument.

Background

Section 10B of the Act provides that the Minister may, by legislative instrument, determine a law of a State or Territory to be an 'NDIS worker screening law', with the agreement of that State or Territory. Before determining a law of a State or Territory, the Minister must be satisfied that the law establishes a scheme for the screening of workers for purposes including the NDIS.

States and Territories are responsible for conducting NDIS worker screening checks, including the application process and risk assessment. A centralised database is hosted and administered by the NDIS Quality and Safeguards Commissioner to provide and maintain current and accurate information relating to these checks. The database is accessible to persons or bodies for the purposes of the NDIS.

The 2024 Determination is a legislative instrument for the purposes of the *Legislation Act 2003*, but is not subject to disallowance, as a result of subsection 44(1) of that Act. This is because the enabling legislation enables the establishment and operation of an intergovernmental worker screening scheme involving the Commonwealth and the States and Territories.

Consultation

The Queensland government has been consulted and has agreed to the amendment.

The Office of Impact Assessment have advised that the 2024 Determination is unlikely to have more than a minor regulatory impact (OIA23-06139).

Explanation of provisions

Section 1 – Name

Section 1 provides that the name of the Determination is the *National Disability Insurance Scheme (NDIS Worker Screening Law) Amendment Determination 2024*.

Section 2 – Commencement

The Determination commences on the day after registration.

Section 3 – Authority

Section 3 provides that the Determination is made under the Act. Section 10B of the Act provides that the Minister may, by legislative instrument, determine a law of a State or Territory to be a ‘NDIS worker screening law’ with the agreement of that State or Territory.

Section 4 – Schedule 1 – Amendments

Section 4 provides that the *National Disability Insurance Scheme (NDIS Worker Screening Law) Determination 2020* is amended as set out in the Schedule.

Schedule 1 - Amendments

Subsection 5(6) of the 2020 Determination incorrectly identifies the *Disability Services and Other Legislation (Worker Screening) Act 2020* (QLD) as the relevant NDIS worker screening law for Queensland. The 2024 Determination amends the 2020 Determination, to correctly list the *Disability Services Act 2006* (QLD) as the NDIS worker screening law for Queensland.

Statement of Compatibility with Human Rights

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

National Disability Insurance Scheme (NDIS Worker Screening Law) Amendment Determination 2024

The *National Disability Insurance Scheme (NDIS Worker Screening Law) Amendment Determination 2024* (the **2024 Determination**) 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 Determination

The Instrument amends the *National Disability Insurance Scheme (NDIS Worker Screening Law) Determination 2020* which specifies state and territory laws that are NDIS worker screening laws for the purposes of section 10B of the *National Disability Insurance Scheme Act 2013* (**the Act**).

Nationally consistent worker screening was agreed with states and territories in the Intergovernmental Agreement on Nationally Consistent Worker Screening for the NDIS (**Intergovernmental Agreement**). Under the Intergovernmental Agreement, states and territories remain responsible for conducting NDIS worker screening checks (**NDIS Checks**), including the application process and risk assessment.

It is intended that laws establishing a scheme for the screening of workers in connection with the NDIS be specified as NDIS worker screening laws as they are made or amended by each state and territory. The NDIS Checks performed under those laws support employers to determine if a person is suitable to deliver supports and services to NDIS participants, thereby minimising the risk people with disability will be subject to violence, abuse, neglect and exploitation. As such, the Determination plays a role in upholding the human rights of persons with a disability by helping to protect them from experiencing harm from persons working closely with them.

The existing *National Disability Insurance Scheme (NDIS Worker Screening Law) Determination 2020* incorrectly references the NDIS worker screening law for Queensland as the *Disability Services and Other Legislation (Worker Screening) Amendment Act 2020* (Worker Screening Amendment Act).

This instrument corrects the error, specifying the *Disability Services Act 2006* (QLD) as the correct NDIS worker screening law for the purposes of the Act.

Human rights implications

The 2024 Determination engages the following rights under international human rights law:

- Rights of persons with disabilities to live free from exploitation, violence and abuse - Article 16 of the *Convention of the Rights of Persons with Disabilities (CRPD)*
- Right to work - Article 6 of the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*; and
- Right to privacy – Article 22 of the CRPD and Article 17 of the International Covenant on Civil and Political Rights (**ICCPR**).

Rights of persons with disability – Article 16 of the CRPD

Article 16 of the CRPD states that all parties to the CRPD shall take all appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities from all forms of exploitation, violence and abuse. The purpose of the CRPD is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.

The 2024 Determination supports the implementation of the NDIS Checks. A nationally consistent approach to worker screening seeks to minimise the risk of harm to persons with disability, caused by people who work closely with them. A nationally consistent and recognised worker screening regime promotes the rights of persons with disability by:

- sending a strong signal to the community about the priority placed on the rights of persons with disabilities to be safe and protected;
- reducing the potential for providers to employ workers who pose a high risk of harm to persons with disabilities; and
- prohibiting persons who pose a high risk, or who are proven to have harmed vulnerable people, from working in particular roles in the NDIS sector.

Persons with disability have the right to be protected from exploitation, violence and abuse from those who work closely with them. The rights of people with disability are of paramount consideration in the conduct of the NDIS Checks. The 2024 Determination ensures that appropriate worker screening checks are in place to protect and promote the rights of NDIS participants, some of whom are the most vulnerable persons in the community.

Right to work – Article 6 of the ICESCR

Article 6 of 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'. This right also applies to workers who work with people with

disability, including NDIS participants.

The 2024 Determination engages the right to work by recognising existing or newly established state and territory worker screening laws as national worker screening checks for the NDIS. The effect of this is that a worker screening decision made under a designated worker screening law will be applicable nationally as an NDIS Check.

The *National Disability Insurance Scheme (Practice Standards - Worker Screening) Rules 2018* require workers in 'risk assessed roles' within registered NDIS providers to hold a current Check clearance. Persons may be excluded from holding a Check clearance if a risk assessment conducted by a state or territory worker screening unit determines they pose an unacceptable risk of harm to persons with disability. Risk assessed roles are those involving more than incidental contact with a person with disability, key personnel, or roles involving the delivery of supports or services specified by the NDIS Quality and Safeguards Commissioner.

This requirement reflects a proportionate approach whereby only workers whose role involves an opportunity to cause harm to persons with disability must undertake screening. This requirement does not prevent persons from working with unregistered providers in the NDIS, nor does it prevent persons from working in roles involving only incidental contact with persons with disability.

To the extent that the 2024 Determination engages the right to work, any restriction is proportionate and necessary in achieving the protection of persons with disability and confidence in the safety of the NDIS market.

Right to privacy – Article 22 of the CRPD and Article 17 of the ICCPR

Article 22 of the CRPD and Article 17 of the ICCPR provides that no one shall be subjected to arbitrary or unlawful interference with their privacy. The Determination engages the right to privacy by recognising state and territory laws, including provisions for the collection, use and disclosure of personal information contained in those laws, for the purposes of the NDIS Checks.

The Queensland law being prescribed by the 2024 Determination contains measures to protect individuals' privacy. Further, applicants for a NDIS Check will be asked for their informed consent, which provides permission to the prescribed worker screening units to collect, use and disclose applicant's personal information for the purposes of the NDIS Checks.

The 2024 Determination is compatible with human rights because, to the extent that it may limit a person's right to privacy, the limitations are reasonable and necessary to achieving the protection of persons with disability and confidence in the safety of the NDIS market. Further, Queensland must ensure that it has appropriate processes in place to protect the privacy of a person who is applying for the NDIS Check.

Conclusion

The 2024 Determination advances the protection of the rights of persons with disability in Australia consistent with the CRPD, particularly in relation to preventing exploitation, violence and abuse in the NDIS sector. The 2024 Determination is compatible with human rights because, to the extent that it may limit the right to work and right to privacy, the limitation is reasonable, necessary and proportionate to achieving the protection of persons with disability and confidence in the safety of the NDIS market.

[Circulated by the authority of the Minister for the National Disability Insurance Scheme, the Hon Bill Shorten MP]