

**Standing Committee on Community Affairs  
Legislation Committee**

Public Hearing – 2 August 2021  
ANSWER TO QUESTION ON NOTICE

Social Services Portfolio

**Topic:** Inquiry into the National Disability Insurance Scheme Amendment (Improving Supports for At Risk Participants) Bill 2021

**Question reference number:** IQ21-000064

**Senator:** Jordon Steele-John

**Type of Question:** Written. **Hansard Page/s:**

**Date set by the Committee for the return of answer:** 4 August 2021

**Question:**

*Privacy and Information*

Item 7 - amends paragraph 60(2)(e) to enable a person to record, disclose or use protected Agency information where the person reasonably believes that it is for the purpose of, or in relation to, preventing or lessening a threat (whether current or future) to an individual's life, health or safety. This amendment responds to recommendations 1, 7 and 9 of the Robertson Review enabling information sharing across government and government agencies and is intended to enable better identification and protection of vulnerable NDIS participants. The Robertson Review found the current threshold of a 'serious' threat to an individual's life, health or safety to be too high and recommended the removal of the threshold requirement of a 'serious' threat.

This amendment removes the qualifier 'serious' as a reasonable and proportionate means of better protecting vulnerable participants. This amendment will enable the Agency and the Commission to provide a proactive individualised approach to identifying a participant that may be at risk of harm so that appropriate actions can be taken to reduce and better protect the participant.

1. Which people get to record, disclose or use protected Agency information in this way?
2. What constitutes a 'reasonable belief'?
3. What requirements are there to engage with participants/families/carers before determining that their information can be recorded and used in this way?
4. Does this, in practice, mean that staff of the Commission can make a subjective determination of 'vulnerability' and remove privacy thresholds for participant information without their consent?
5. What is the tangible distinction between a threat and a serious threat?
6. What is the threshold for what a threat is and how it is to be determined?
7. Does the Commission have guidelines for what a threat need be in order to allow for the use of a participants information in the proposed way?

**Answer:**

1. This item does not change who in the Agency or the NDIS Commission can record, disclose or use protected information, where a person reasonably believes sharing that information is required to prevent or lessen a serious threat to an individual's life, health or safety.

The Agency and NDIS Commission have in place comprehensive information sharing protocols, which set out the circumstances in which information can be shared between the Agency and NDIS Commission, and who is responsible for sharing that information. These protocols would remain in place.

In the Agency, the Agency Participant Incidents Team is responsible for reporting critical and reportable incidents to the NDIS Commission.

2. In privacy law, to hold a 'reasonable belief' an individual must have a reasonable basis for the belief, and not merely a genuine or subjective belief. A reasonable basis requires the existence of facts which are sufficient to persuade a reasonable person.

The concept of reasonable belief exists in current paragraph 60(2)(e) and is not altered by the Bill.

3. The only change is to the threshold for the exception to usual privacy requirements to consult with the participant before sharing information. The exception already exists where a serious threat to an individual's life, health or safety. As recommended in the Robertson Review this changes the threshold from a serious threat to a threat. Mr Robertson considered any real threat to a person with a disability should be a sufficient to activate this exception.

4. This means that staff who have the delegation to make such information disclosures must have a reasonable belief (as defined above) that an individual faces a threat to life, health or safety. In these circumstances, the delegate can release information relevant to preventing this threat without the need to consult the individual, if necessary. Where it was possible to consult with the individual without compromising a response to the threat, normal consultation and consent provisions would apply.

Removing the serious qualifier makes the threshold more objective.

The proposed amendments mean only the existence of a threat would need to be identified. Previously the level of the threat would also need to have been assessed to determine whether the threat was a serious threat.

5. There is currently no definition of a serious threat in the legislation. A delegate considering sharing information under the current provision would need to determine themselves whether a threat reached the threshold of a serious threat. This potentially could lead to immediate action not being taken to share information and address threats that could result in harm.

The Robertson Review found that any threat to an individual's life, health and safety was a more appropriate threshold and did not rely on the judgement of the delegate to determine its level of seriousness. While Mr Robertson did not provide tangible examples of the difference between a serious threat and threat, it was assumed that a serious threat was a higher threshold to reach than a threat. The proposed amendment would thus provide a greater level of protection to people with disability than the current provisions.

6. The word 'threat' would be given its ordinary meaning, applied consistently with the objects of the NDIS Act. The Macquarie Dictionary defines 'threat' as including 'a declaration of an intention or determination to inflict punishment, pain or loss on someone in retaliation for, or conditionally upon, some action or course; menace... an indication of probable evil to come ... something that gives indication of causing evil or harm'. Mr Robertson in his review, suggested that the 'serious' should not be used in reference to a threat to an individual's life, health or safety, because the threat in and of itself should be enough to raise sufficient concern about the impact on a person with disability.
  
7. As threat is given its ordinary meaning, the NDIS Commission does not have guidelines further defining what constitutes a 'threat' to a person with disability. This could limit the many and varied situations which come to the attention of the NDIS Commission where there is a harm, real or threatened, to a person with disability. For example, matters may come to the attention of the NDIS Commission as potential breaches of the NDIS Code of Conduct. The NDIS Code of Conduct provides for a range of things that providers and workers must do, including:
  - promptly taking steps to raise and act on concerns about matters that may impact on the quality and safety of supports, and
  - taking all reasonable steps to prevent and respond to all forms of violence against, and exploitation, neglect and abuse of people with disability.

It follows that the NDIS Commission could be alerted to matters that were threats in this context, and where the nature of the threat, even if not 'serious', could prompt a need to disclose information to avoid the threat eventuating.

The information to which this provision relates can be in respect to a participant, but most commonly would be about a person (a provider or a worker) who comes to the attention of the Commission as potentially posing a threat, or alleged to have caused harm to, a person with disability.

The Agency and the NDIS Commission have well-established agreed protocols relating to the sharing of information to help ensure that the sharing is appropriate where it relates to an NDIS participant.