



## Senate Community Affairs Committee

### NDIS Amendment Bill 2021 Inquiry

#### Answer to Question on Notice

Reference: SQ21-000104

## NDIS Bill Inquiry QON: Staff training - disclosure of information

Hearing: 2 August 2021

Hansard Page: 31

### Question:

**Senator STEELE-JOHN:** Ms Taylor, is it possible for you to, on notice, provide to the committee a copy of the training that you provide to your staff and that you'll seek to amend should this legislation pass? As this is my last question, I will ask a different one. If somebody is deemed at risk or vulnerable under the proposed legislation—whatever wording we end up using for it—and are not informed when the information is disclosed, is there a process for them objecting to their classification in that way and, if so, what is that process?

**Ms Taylor:** For objecting to our disclosure of their information for purposes in the context of the bill?

**Senator STEELE-JOHN:** Yes.

**Ms Taylor:** All I can do, I think, is go back to the examples I gave earlier about the circumstances in which we might use these provisions. As I said before, they are not obligatory powers. I'll just take a step back. At present, if we were seeking to ban a person from operating in the NDIS because we'd substantiated a contravention—we'd identified they'd caused serious harm to someone—maybe we would be required under the act to advise them of an intent to ban, for example, and then to go about a banning process. If, in that period, we were aware that there were other people who might be exposed to that person, we couldn't tell anybody because of the way in which the act operates currently. It's protected information as we go through the process of banning. We're not able to lawfully reveal the fact that we are actually concerned. These provisions allowing us to advise the agency that there might be other participants who might be affected are highly unlikely to result in a person saying, 'You shouldn't have told the agency.' These are areas where we are, with reasonable belief, deeply concerned about the safety of a participant. Having disclosed information that a person might be at risk where they may not have been aware they might be at risk, if a person wants to complain that we gave information that wasn't appropriate we would deal with that in the usual way as a complaint and seek to remedy that complaint with that person

### Answer:

Training provided to NDIS Quality and Safeguards Commission staff is at Attachment A. This would be updated following passage of the Bill.



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# NDIS Quality and Safeguards Commission

**Secrecy Provisions, Information Disclosure and Protection**

# Why are you here? Top takeaways.



By the end of the presentation you will hopefully better understand:

- your obligations with respect to information protection and disclosure when working in an Australian Public Service agency.
- what can happen when these obligations are not met.
- the privacy provisions within the NDIS Act and those that create offences.
- what is ‘protected NDIS Commission information’?
- what factors to consider when determining how to disclose information.
- how do decisions about information disclosure get made.
- where to go for help if you are not sure what to do.

# Your obligations as Commonwealth officers



- The *Public Service Act 1999* (the PS Act) provides the broad legislative framework for the Australian Public Service (APS).
- Section 13 of the PS Act sets out the APS Code of Conduct, which requires, among other things, APS employees:
  - To comply with all applicable Australian laws, when acting in the course of APS employment;
  - To not improperly use inside information or the employee's duties, status, power or authority to cause, or seek to cause, detriment to the employee's Agency, the Commonwealth or any other person.
- While the PS Act and Regulations cover APS employees, we understand NDIS Commission contractors are generally obligated, under the terms of their contract, to act in accordance with the APS Code of Conduct. If they don't, they should!

# Secrecy provisions in Commonwealth legislation (excluding the NDIS Act)



- Commonwealth legislation contains a large number of secrecy provisions that impose duties on public servants not to disclose information that comes to them by virtue of their employment.
- The federal parliament has, in recent times, enacted laws that strengthen and increase the scope of offences related to unauthorised disclosures of information.
- Division 122 of the *Criminal Code* deals with the secrecy of information. It includes a number of criminal offences for improper handling of information, including, most relevantly for the Commission:
  - section 122.4, which deals with the unauthorised disclosure of information by current and former Commonwealth officers, where a person communicates information that the person made or obtained through them being a Commonwealth officer and the person is under a duty, under a law of the Commonwealth, not to disclose the information.

# Secrecy provisions within the NDIS Act



- The secrecy provisions that relate to the NDIS Commission are set out at sections 67A to 67H of the NDIS Act and specific offence provisions for unauthorised disclosures of information are at sections 67B, 67C and 67D.
- The reasoning behind the inclusion of secrecy provisions in the NDIS Act in part related to the large amount of personal information that will be collected by the NDIS Commission.
- The protection of that information and a person's right to privacy are considered paramount.
- The offence provisions are linked to the meaning of ***protected NDIS Commission information*** as defined in section 9 of the NDIS Act.

# NDIS Act offences for unauthorised information handling



- A person commits an offence if:
  - They use or disclose protected NDIS Commission information where they are not authorised to do so (section 67B)
  - They solicit someone else to disclose protected NDIS Commission information even if the information is not actually disclosed (section 67C)
  - They offer to supply protected NDIS Commission information (section 67D(1))
  - They hold themselves out as being able to supply protected NDIS Commission information (section 67D(2))
- **The penalty for these offences is imprisonment for 2 years or 120 penalty units or both**

# Breaches of secrecy provisions can result in serious consequences



- A range of criminal and administrative processes can result from the unauthorised disclosure of information including:
  - being investigated by the Australian Federal Police
  - criminal prosecution
  - termination of employment
  - reduction in classification, re-assignment of duties, reduction in salary
- Employees or staff from the ATO, the Australian Customs Service and the Defence Intelligence Organisation have all been sentenced to terms of imprisonment for unauthorised disclosures of information.

# Other considerations to be aware of



- The *Privacy Act 1988* (the Privacy Act) applies to all APS agencies, including the NDIS Commission. The Privacy Act includes the Australian Privacy Principles, which set out standards, rights and obligations for the collection, use, disclosure and storage of personal information, including sensitive information.
- Information disclosures happen routinely in the course of duties.
- Defences will be available to you if you have disclosed information properly as part of you carrying out the requirements of your position.
- Public officials (disclosers) who suspect wrongdoing within the Commonwealth public sector can raise their concerns under the *Public Interest Disclosure Act 2013* (PID Act).

# The PID Act – how you can raise concerns



- If you have information that you reasonably believe shows wrongful conduct by someone as a public official in the NDIS Commission (or any other Commonwealth agency) you may be hesitant to disclose this information – perhaps fearing negative consequences for yourself or others.
- But if the conduct is what the PID Act calls ‘disclosable conduct’ AND you make the disclosure to someone whom the Act authorises to receive a disclosure you will get a number of protections under the Act.
- ‘Disclosable conduct’ includes conduct that contravenes a law, corruption maladministration or abuse of public trust, or conduct that results in wastage of public money or property.

# PID Act – continued



- Under the PID Act you can make a disclosure relating to the NDIS Commission to:
  - Your supervisor or manager; or
  - An ‘authorised officer’ in the NDIS Commission; or
  - An ‘authorised officer’ in the Commonwealth Ombudsman’s office.
- There are only rare exceptions when you can make a disclosure to someone not listed above (for example to get legal advice from a lawyer)
- It is important to be aware that the protections under the PID Act are NOT available if you make a disclosure outside the avenues provided by the Act.
- For information about the NDIS Commission’s procedures for facilitating and dealing with disclosures relating to the NDIS Commission go to:  
<https://www.ndiscommission.gov.au/about/public-interest-disclosures>.

# Common misconceptions with respect to the secrecy provisions within the NDIS Act



- Your view that a proposed disclosure will be ‘good for participants’ wellbeing’ or ‘safeguarding in the sector’ will enable the disclosure of protected NDIS Commission information to external parties.
- NDIS Commission officers are required to give information if asked by police, coroners or judicial bodies.
- You are protected from repercussions if you are merely following instructions from supervisors to disclose information – it is everybody’s responsibility.
- The information sharing schedules being exchanged between the NDIS Commissioner and other State and Commonwealth Departments and agencies mean you can automatically disclose the types of information listed in the schedules.
- Office of General Counsel advises on the content of the information to be disclosed.
- You cannot disclose personal information to others in the NDIS Commission (subject to APS Code of Conduct and common sense)

# What is 'protected Commission information'?



## ***Protected Commission information is defined in section 9 of the Act :***

- information about a person that is or was held in the NDIS Commission's records or
- information to the effect that there is no information about a person in the NDIS Commission's records.

Examples of protected NDIS Commission information which may be in the NDIS Commission's records include:

- the name, gender and date of birth of persons with disability or of their relatives and friends
- disability and health information about persons with disability or their relatives and friends
- the personal details about the key personnel, employees and contractors of NDIS providers including their work history and criminal
- the personal details about health professionals who have no connection to an NDIS provider, such as a GP, nurse or allied health worker.

# WHEN will information disclosure issues arise?



- Staff may need to consider whether to disclose protected NDIS Commission information when:
  - a person or agency external to the NDIS Commission has requested information, either verbally or in writing; or
  - the staff member considers that the information is the type of information which should be disclosed in the circumstances, although no request has been received.
- Each disclosure must be considered on a case by case basis and must apply the information disclosure law under the NDIS Act according to the particular situation.

# WHAT is the law about disclosing ‘protected Commission information’



- Sections 67A to 67H of the NDIS Act tells us the law about disclosing protected Commission information.
- The main sections are section 67A and section 67E.
- The NDIS (Protection and Disclosure of Information – Commissioner) Rules 2018 set out the process which the Commissioner must follow before making a decision under section 67E.

## Section 67E(3) – nominees – a special case



- The NDIS Commissioner may disclose protected NDIS Commission information about an NDIS participant to their correspondence nominee or plan nominee.
- The NDIS Commissioner does **not have to comply with any** of the information disclosure sections of the NDIS Act or Rules when doing this (section 67E(3)).
- However, **only** the NDIS Commissioner (or delegate) can make this disclosure decision.

# Approach to information disclosure issues



- Is the information protected NDIS Commission information?
  - START with section 67A
- Can the information be disclosed under that section?
  - If the answer is YES, decide whether to disclose the information.
  - If the answer is NO...
  - THEN consider section 67E
- Can the information be disclosed under section 67E?
  - If the answer is YES, decide whether to disclose the information.
  - If the answer is NO, do not disclose the information.

# Discretion



- There is a discretion to decide disclose protected NDIS Commission information – ‘**may**’ disclose.
- Section 67A and section 67E give the NDIS Commission the discretion to decide if it discloses protected NDIS Commission information.
- The NDIS Commission is not **required** to disclose just because someone asks for information.
- The NDIS Commission decides what is appropriate to disclose.
- Not required to disclose even if those sections would allow disclosure.

# Disclosures under s67A



A person may disclose protected NDIS Commission information in four alternative situations:

1. for the purposes of the NDIS Act; or
2. with the express or implied consent of the person to whom the information relates; or
3. if the person dealing with the information reasonably believes that the disclosure of the information by them is necessary to prevent or lessen a serious threat to an individual's life, health or safety; or
4. for the purpose for which the information was disclosed to the person under section 67E of the NDIS Act (if it was disclosed to them under that section).

# Who can decide to make section 67A disclosures?



- Any NDIS Commission staff member can decide to disclose protected Commission information under section 67A.
- There is no legal requirement in the NDIS Act that this decision must be made by the Commissioner.
- This is in contrast to section 67E, which permits only the Commissioner to make decisions about disclosures under that section.
- Your team may have a policy or practice about whether certain section 67A disclosures should be approved by a manager

# Section 67A disclosures

## What does 'for the purposes of the NDIS Act' mean?



### Exercising the NDIS Commissioner's functions

- **This is the most important and most common situation where staff will be disclosing protected NDIS Commission information.**
- The NDIS Commissioner's performance of his functions is 'for the purposes of the NDIS Act' because those functions are conferred on the NDIS Commissioner by the NDIS Act.
- A person does not need consent to disclose information where the disclosure is needed so the NDIS Commissioner can effectively performing his functions
- **ASK:** Is the information disclosure necessary to effectively carry out the functions of the Commissioner?

# Core and specific functions



- The NDIS Commissioner has the functions set out in the NDIS Act and the Rules
- There are core functions and specific functions.
- **CORE:** The NDIS Commissioner has very broad overarching core functions under section 181E.
  - Example – section 181E (h) to engage in, promote and coordinate the sharing of information to achieve the objects of this Act.
- **SPECIFIC:** These are in both the Act and the Rules.
- Consider **first** if the proposed disclosure would support the exercise of a specific function (e.g. the complaints function).
- Generally, avoid relying **ONLY** on the core function for information disclosure under s67A

# Section 67A - disclosures to the NDIA



- The NDIA is established by the NDIS Act.
- It carries out the functions conferred on it by the NDIS Act.
- Disclosures of protected NDIS Commission information can be made to the NDIA if they are necessary to enable the NDIA to carry out its functions under the Act.
- These disclosures will be ‘for the purposes’ of the NDIS Act.
- Information sharing protocols exist between the NDIS Commission and the NDIA which deal with how and when information will be disclosed between the two agencies.
- NDIS Commission staff should refer to these when disclosing information to the NDIA and discuss with their manager any concerns they may have.

# Section 67A disclosures - research and policy



Section 67A(2) tells us

- disclosures of protected NDIS Commission information are ‘for the purposes of the NDIS Act’ if the Commissioner reasonably believes they are necessary for:
  - research into matters relevant to the NDIS; or
  - policy development.

# WHEN do you need to consider section 67E information disclosures?



If an NDIS Commission staff member considers protected NDIS Commission information should be disclosed but the disclosure cannot be made under section 67A because it is:

- Not for the purposes of the NDIS Act
- Not consented to by the person whose information is concerned
- Not reasonably necessary to prevent/lessen a serious threat to life/health/safety

THEN the staff member **may only disclose the information if the NDIS Commissioner (or their delegate) makes a decision under section 67E** to disclose that information.

# Disclosures under s67E



The NDIS Commissioner (or delegate) may decide to disclose information if:

1. He is satisfied there are reasonable grounds that disclosure would be in the public interest; or
2. There is express or implied consent to the disclosure from the person the information is about; or
3. The disclosure is to a Commonwealth or State/Territory departmental or agency head for the purpose of that Department or agency; or
4. The disclosure is to a Commonwealth or State/Territory department or agency with responsibility for matters relating to people with disability.

# WHO can decide section 67E disclosures?



- Only the NDIS Commissioner (or his delegate) have the authority to make section 67E decisions.
- The current delegations are located on the NQSC intranet under the 'Governance' tab
- Staff need to send a written recommendation to the NDIS Commissioner or delegate that they make a section 67E disclosure.
- There needs to be a written record of the decision of the NDIS Commissioner (or delegate) about the recommended section 67E disclosure.



## To the head of a Commonwealth or State/Territory department or agency

- Most common ground of section 67E disclosure
- Many government agencies have a shared interest in our information
- May request information or we may decide they would be interested in particular information
- Must be to the head of the agency/department not to any officer in it
- The disclosure must be for the purpose of the agency/department
- You may need to ask the agency/department to clarify what they are going to use the information for (the purpose) and how this relates to their functions
- The legislation which establishes an agency can help to clarify their functions

# Section 67E disclosures



**To a Commonwealth or State/Territory department or agency with responsibility for matters relating to people with disability.**

- You need to check the department/agency has this responsibility.
- Check their legislation.
- Ask them to tell you how or why the disclosure would help them perform their functions.

# Disclosures in the public interest under s67E



- The NDIS Commissioner must be satisfied on ‘reasonable grounds’ that a disclosure of information is in the public interest (s67E(1)(a)).
- In deciding if the disclosure is in the public interest, the NDIS Commissioner must consider all the factors set out in s14 of the Information Protection and Disclosure Rules:
  - if information concerns the life, health or safety of a person whose information is to be disclosed- whether that person is in a position to seek assistance themselves or give the recipient the information themselves
  - the purpose for which the information was collected
  - the expectations of a person in relation to the use of information
  - whether disclosure would be contrary to the request of a complainant under the NDIS (Complaints Management and Resolution) Rules
  - whether the proposed recipient has a sufficient interest
  - whether the proposed recipient could obtain information elsewhere

# Disclosures in the public interest under s67E (cont.d)



- In deciding if the disclosure is in the public interest , the NDIS Commissioner must also consider these factors under section 14:
- whether sections 15, 16, 17, 18 or 19 of the Rules apply to the disclosure
- ✓ Enforcement of laws and related circumstances (s15)
- ✓ Briefing the Minister (s16)
- ✓ Missing or deceased persons (s17)
- ✓ Assisting child welfare agencies (s18)
- ✓ Assisting professional bodies (s19)

# Mandatory process for s67E disclosures



- If the affected person has not consent to disclosure then a disclosure under section 67E can only be made after the Commissioner follows the process set out in the Rules.
- **This process must be followed for any disclosure under section 67E, not just those made on public interest grounds.**
- The process involves:
  - CONSULTATION** *Before final decision is made* - consultation with affected person (s11) (unless exception applies)
  - DE-IDENTIFICATION** *Before final decision is made* - consider de-identification (s10) (unless exception applies)
  - DISCLOSURE NOTICE** *If decision to disclose* - sending a notice to the information recipient about what they can use the information for and if there are limits on this (s12)

# Other steps after s67E decision to disclose



- The NDIS Commission must keep a record or log of all disclosures under section 67E (s13 of Information Protection and Disclosure Rules)
- The log must include
  - 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) if the disclosure was made following a request for the information—details of the request; and
  - e) a summary of any decision that there was an exception to the requirements to de-identify/consult before deciding to disclose under section 67E

# WHERE to find further information and resources



- Guidance on the section 67E disclosure log on ARC- EF19/5761
- Ask your manager
- May need advice from the Office of General Counsel

# Thank you and Questions?



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