

## **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 (Complaints Management and Resolution) Rules 2018*

### **Purpose**

The *National Disability Insurance Scheme (Complaints Management and Resolution) Rules 2018* (instrument) are made under sections 73W, 73X and 209 of the *National Disability Insurance Scheme Act 2013* (the Act). This instrument prescribes the arrangements in relation to the management and resolution of complaints by registered NDIS providers and by the Commissioner of the NDIS Quality and Safeguards Commission (the Commissioner).

This instrument is about the Commissioner's role in supporting the resolution of complaints between registered NDIS providers and people with disability, where possible. Registered NDIS providers are required by this instrument to have complaints management arrangements in place and to support people with disability in making complaints. This instrument also explains how complaints can be made to, managed and resolved by, the Commissioner.

Section 209 of the Act provides that the Minister may, by legislative instrument, prescribe matters required or permitted by this Act to be prescribed or which are necessary or convenient to be prescribed in order to carry out or give effect to this Act.

Section 73W(1) of the Act provides that a registered NDIS provider must implement and maintain a complaints management and resolution system that complies with the requirements prescribed in the National Disability Insurance Scheme (NDIS) rules.

Section 73X of the Act provides that the NDIS rules may prescribe arrangements relating to the management and resolution of complaints arising out of, or in connection with, the provision of supports or services by NDIS providers.

### **Background**

The NDIS is designed to provide people with disability with the reasonable and necessary supports that they need to live their lives and have choice and control in the services they receive. Safe and high quality supports and services under the NDIS are important to the everyday quality of life of people with disability.

This instrument is informed by the NDIS Quality and Safeguarding Framework (the Framework). The Framework identified that an effective complaints system is needed to:

- help people with disability understand their rights and what they should expect of providers;
- give people with disability the confidence to complain, when needed, by addressing power imbalances that people with disability can face when raising issues;
- be accessible and easy to navigate;
- enable other stakeholders (such as advocates and workers) to make complaints and ensure issues can be addressed when people with disability are unable or unwilling to make a complaint;
- support the resolution of complaints between providers and people with disability, when possible, provide an escalation pathway when needed;
- ensure that quality and safety issues are appropriately managed;
- enable the identification of systemic issues and drive improvement actions, including through provider reporting on complaints.

This will support development of an effective and competitive NDIS market and ensure people with disability have access to effective, quality and safe supports.

Complaints management systems ensure providers are responsive to the needs of people with disability and focussed on the timely resolution of issues and ensure that when things go wrong, something is done about it. Receptive and proactive providers can use the feedback to drive change and improvements across the system.

People with disability may face multiple barriers to making complaints about their supports or services under the NDIS. These include lack of experience asserting their rights as consumers, fear of retribution, negative experiences with complaints systems (including not being believed) and difficulty communicating what happened without support. Additionally, in the case of violence, neglect and abuse, people can face substantial barriers to making a complaint.

Under Chapter 6A of the Act (as amended), the Commissioner has responsibility for a complaints function (paragraph 181D(1)(c) and section 181G). This function includes the functions conferred on the Commissioner by Division 2 of Part 3A of Chapter 4 of the Act, about registered NDIS providers.

This instrument supports the establishment of a strong regulatory system that will help ensure that registered NDIS providers respond appropriately to complaints and that corrective action can be taken when necessary. It will also ensure regular analysis of complaints data to identify systemic issues and drive system improvements. This is particularly important in the context of the developing NDIS market.

Complaints create opportunities to address harm, conflict and misunderstandings and improve the quality of supports. Expectations and obligations of all parties to a complaint can be clarified, and a good complaints process can support improving the relationship between the person with disability and their provider. Complaints and

disputes need to be resolved fairly, effectively and promptly. People with disability need to feel safe and supported to make a complaint or provide negative feedback without fear of adverse consequences or loss of service.

An NDIS provider is often best placed to resolve a complaint and restore confidence in people with disability, their families and carers about the quality of supports and services. A critical element of quality supports and services is the establishment and maintenance of a workplace culture that values and is inclusive of people with disability. Such a culture can be promoted through leadership, respectful communication and an effective complaints management system.

The NDIS Quality and Safeguards Commission (the Commission) will uphold the rights of people with disability, work with people with disability, their carers, families and other significant people to increase their confidence to raise issues. The Commission will also work with NDIS providers to build their capacity to appropriately respond to complaints.

If a serious risk to participants, such as corrupt or unethical conduct is identified, corrective action will be initiated. Systemic issues may be identified and addressed at both the individual provider and NDIS market levels.

The Commissioner's complaints functions at new section 181G includes capacity building for NDIS providers and people with disability in making and resolving complaints. Underpinning the way in which the Commissioner will manage and seek to resolve complaints is supporting people with disability to attempt to resolve complaints directly with a provider wherever possible.

Complaints about the National Disability Insurance Agency (the Agency) or its staff will generally be handled through existing complaints management arrangements within the Agency or by the Commonwealth Ombudsman. The Commissioner will operate on the basis of a no wrong door approach and if necessary will support the referral of complaints to other bodies as appropriate.

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 NDIS 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**

Subsection 209(8) of the Act prescribes certain NDIS rules to be 'category D' rules. Subsection 209(7) requires the Minister to consult with each host jurisdiction in relation to the making of all category D rules. In compliance with this requirement, the Commonwealth has undertaken extensive consultation in relation to the design and content of the instrument with the States and Territories, including the relevant government departments and agencies such as State Ombudsman's offices. The first round of consultation occurred before drafting of the rules started, giving the states and territories the opportunity to have direct input into the policy before it was settled and drafting commenced. This consultation was ongoing throughout the development and drafting process and included numerous opportunities to provide written feedback and submissions, as well as direct face to face consultations.

Close consultation was also undertaken with the National Disability Insurance Agency.

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 provided with 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 rules and/or associated guidance. The need for an effective complaints system was a strong theme in the consultation on the NDIS Quality and Safeguards Framework.

Many people with disability and advocates noted the significant barriers people with disability face in making complaints and having them addressed. In particular, this includes not being believed by authorities when reporting an incident. Stakeholders emphasised the need for effective supports to enable people to complain and have their issues resolved. They also stressed the need for there to be serious consequences for providers that behave unethically, are grossly incompetent, or that put the safety and wellbeing of participants at serious risk. In addition, the need to strike an appropriate balance between regulatory burden, procedural fairness and protecting people with disability were raised by a number of stakeholders. All of

these concerns have been taken into consideration in the preparation of this instrument.

## **Regulation Impact Statement (RIS)**

The Office of Best Practice Regulation (OBPR) has been consulted and has advised that a RIS is not required (OBPR ID 16842).

## **Explanation of the provisions**

### Preamble

The Preamble sets out the overall policy objectives underlying the instrument. The content of the preamble is based in part on the Framework, available on the Department of Social Services website at <https://www.dss.gov.au/disability-and-carers/programs-services/for-people-with-disability/ndis-quality-and-safeguarding-framework>.

### Part 1 – Preliminary

#### Section 1 – Name

Section 1 provides how this instrument is to be cited, that is, as the *National Disability Insurance Scheme (Complaints Management and Resolution) Rules 2018*.

#### Section 2 – Commencement

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

#### Section 3 – Authority

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

#### Section 4 – Definitions

Section 4 provides that in this instrument, a reference to ‘Act’ means the *National Disability Insurance Scheme Act 2013*. A number of expressions used in this instrument are defined in section 9 of the Act.

Section 4 also provides a definition for ‘complainant’.

### Part 2 – Complaints management and resolution system for registered NDIS providers

#### Section 5 – Simplified outline of this Part

Section provides a simplified outlines of Part 2 of the instrument.

#### Section 6 – Purpose of this Part

Section 6 provides that Part 2 of this instrument is made for the purposes of paragraph 73W(b) of the Act. It sets out what must be included in the complaints management and resolution systems of registered NDIS providers.

A failure by a registered NDIS provider to implement a complaints management and resolution system that complies with Part 2 of the instrument is a breach of a condition of registration and may lead to compliance and enforcement action under Division 8 of Part 3A of the Act.

Registered NDIS providers have additional obligations in relation to incident management systems and reportable incidents if a complaint raises an issue that is also an incident or a reportable incident. Obligations in relation to incident management and reportable incidents are set out in the *National Disability Insurance Scheme (Incident Management and Reportable Incidents) Rules 2018*, which are made for the purposes of sections 73Y and 73Z of the Act.

### Section 7 – Complaints management and resolution system must comply with this Part

Section 7 requires a registered NDIS provider to implement and maintain a complaints management and resolution system that complies with the requirements set out in Part 2 of this instrument.

It is a requirement of the Act that the complaints management and resolution system must also be appropriate to the size of the provider and for the classes of supports or services provided by the provider (paragraph 73W(a) of the Act). This means that, while all registered NDIS providers have the same *minimum* obligations, the nature of the system will differ between providers. Quality auditors will assess whether a complaints management and resolution system is appropriate and proportionate as part of the general audit process prescribed in the *National Disability Insurance Scheme (Provider Registration and Practice Standards) Rules 2018* made for the purpose of 73T of the Act providing for the NDIS Practice Standards.

It is also a requirement of the act that the complaints management and resolution system acknowledges the role of advocates and other representatives of people with disability and provides for the cooperation and involvement of such people in the resolution and management of complaints.

### Section 8 – Complaints management and resolution system requirements

Section 8 sets out the minimum requirements for a registered NDIS provider's complaints management and resolution system. A registered NDIS provider may have additional requirements or procedures in place if appropriate to the type and size of the provider. The procedures for managing and resolving complaints should be transparent and affected people with disability should have a central role in the process of managing and resolving a complaint, while acknowledging the role of advocates and other representatives and facilitating their participation in the process.

*Subsection 1* provides that the complaints management and resolution system of a registered NDIS provider must comply with a number of requirements.

*Paragraph (2)(a)* provides that a complaints management and resolution system must enable any person to make a complaint (including an anonymous complaint) to the registered NDIS provider about the supports or services provided by the provider. This supports the 'no wrong-door' approach to managing complaints.

*Paragraph (2)(b)* provides that a complaints management and resolution system must provide for an easy and accessible process for the making and resolving of complaints. This may include facilitating communication in languages other than English, braille or via audio recording and taping.

*Paragraph (2)(c)* provides that a complaints management and resolution system must ensure appropriate support and assistance is provided to any person who wishes to make, or has made, a complaint. This may include facilitating the participating of an advocate or other representative or support person of an affected person with disability.

*Subsection 2* provides that the processes provided for in the system may vary depending on the nature of the complaint. For example, the processes for managing a complaint relating to a minor issues may be more streamlined than the process for dealing with a more serious complaint, such as one relating to the failure to provide supports or services as required.

*Subsection 3* provides that the system must require that:

- complaints are acknowledged, assessed and resolved in a fair, efficient and timely manner; and
- appropriate action is taken in relation to issues raised in complaints; and
- reasonable steps are taken to ensure that any person who makes a complaint to the provider, and each person with disability affected by an issue raised in such a complaint, is advised how that complaint or issue may be raised with the Commissioner; and
- appropriate support and assistance in contacting the Commissioner in relation to a complaint is provided to any person who makes a complaint and each person with disability affected by an issue raised in a complaint.

Although complaints should generally be raised first with providers, it is crucial that complainants, and affected people with disability, are aware that they have further avenues of complaint to the Commissioner, and that they are given assistance to use those avenues where necessary.

Reasonable steps to ensure that a person is advised how a complaint may be raised with the Commissioner may include providing information about making complaints to the Commissioner in the manner that the person is most likely to understand. Appropriate support and assistance in contacting the Commissioner may include ensuring that a person has access to an independent advocate and/or other support persons.

*Subsection 4* provides that the system must also require that reasonable steps are taken to ensure that:

- a person who makes a complaint, or a person with disability affected by an issue raised in a complaint, is not adversely affected as a result of the making of the complaint; and
- information provided in a complaint is kept confidential and only disclosed if required by law or if the disclosure is otherwise appropriate in the circumstances.

An NDIS provider is obliged to adhere to privacy laws and other applicable laws which protect the privacy and confidentiality of information. Section 207 of the Act provides that the Act does not exclude laws of a State or Territory and, to the extent possible, should operate concurrently with those laws. Some information provided in a complaint may reveal more systemic issues about the provision of supports or services that require wider consultation and information gathering in order to understand and appropriately respond. If that is the case, it may be appropriate to disclose the substance of the complaint without revealing the identity of the complainant unless they consent as required by applicable information and privacy laws. In other circumstances, a complaint may be made on behalf of one or more people with disability who need to be consulted with about the substance of a complaint. Again, this does not mean that a provider can, without complying with applicable laws, disclose any personal information about the complaint beyond what is appropriately necessary to understand and respond to the complaint.

It is a crucial to the effective operation of a complaints management and resolution system that a person who makes a complaint, or an affected person with disability, is protected from any adverse consequences that could arise as a result of making a complaint such as retribution or the withdrawal of services.

Reasonable steps may include ensuring that information relating to a complaint is only accessible to people that require access in order for the complaint to be appropriately managed and resolved.

Division 7 of Part 3A of the Act also provides protections for certain people that disclose information to the Commissioner, including protections against detriment or threats. People qualifying for protection include officers, employees and contractors of NDIS providers, as well as people with disability receiving supports and services, or nominees, family members, carers, independent advocates or significant others of that person.

Section 73ZB of the Act provides that if a person makes a disclosure that qualifies for protection they are not subject to any civil or criminal liability for making the disclosure and contractual or other remedies cannot be enforced against the person on the basis of the disclosure. A contract can also not be terminated on the basis that a disclosure constitutes a breach of contract.

Section 73ZC of the Act provides that victimisation, including causing detriment and threatening to cause detriment are also prohibited and subject to civil penalties.

*Subsection 5* provides that the system must provide that persons making a complaint:

- are appropriately involved in the resolution of the complaint; and



- are kept informed of the progress of the complaint, including any action taken, the reasons for any decisions made and options for review of decisions in relation to the complaint.

This ensures that persons making a complaint are involved in the process of managing and resolving the complaint which will help lead to more satisfactory outcomes for the person who has made a complaint.

*Subsection 6* provides that the system must provide that, unless it is inappropriate to do so, a person with disability affected by an issue raised in a complaint:

- is kept informed of the progress of the complaint, including any action taken, the reasons for any decisions made and options for review of decisions; and
- is kept appropriately involved in the resolution of the complaint.

It is important that the complainant and any affected people with disability play a central role in the resolution and management of a complaint so that an outcome can be reached that satisfies those affected by issues raised in the complaint and improves supports and services for them and for others. However, there may be circumstances where it is not appropriate for a person with disability to be directly involved in the resolution of a complaint, for example where that person is a child.

*Subsection 7* provides that the system must provide for the following details to be readily available and accessible to the public:

- how a complaint about the registered NDIS provider can be made to the provider;
- how a complaint about the registered NDIS provider can be made to the Commissioner.

Any person can make a complaint to a registered NDIS provider, or to the Commissioner about a registered NDIS provider. As such, it is crucial that this information is readily available to any person who may wish to make a complaint. For example, a member of the community may wish to make a complaint as a result of information that they have received, or issues that they are aware of. Alternatively, another provider may become aware of an issue while they are providing supports or services to an affected person with disability.

*Subsection 8* provides that the system must provide for the periodic review of the system to ensure its effectiveness.

This requirement will ensure that the complaints management and resolution system remains fit for purpose as the provider, and broader NDIS market, develop and evolve and will enable the provider to respond to emerging risks.

### Section 9 – System must afford procedural fairness

Procedural fairness is a common expectation that people have when decisions that may affect them are being made by government, employers and other organisations. In essence, people expect that a decision will be based on relevant facts and circumstances; that they will have an opportunity to contribute to the decision and to

contest any adverse material; the decision-maker will be impartial and even-handed; and an adverse decision will be explained.

Section 9 provides that complaints management and resolution system of a registered NDIS provider must require that people are afforded procedural fairness when a complaint is dealt with by the provider. For this purpose, the Commissioner may, by notifiable instrument, make guidelines relating to procedural fairness.

Guidelines made for this purpose will be known as the *National Disability Insurance Scheme (Procedural Fairness) Guidelines 2018*. These guidelines will assist providers to ensure that their complaints management and resolution system accords people procedural fairness. The guidelines will explain the nature of procedural fairness and will set out steps that providers may take in dealing with complaints in order to ensure that people are afforded procedural fairness.

### Section 10 – Documentation and record keeping

Section 10 sets out how a complaints management and resolution system must be documented and how records of complaints must be kept.

*Subsection 1* provides that a registered NDIS provider must:

- document the complaints management and resolution system; and
- provide copies of the documented system, and the information required by subsection 8(7), in a form that is accessible to the following persons
  - persons with disability receiving supports or services from the registered NDIS provider, and their families, carers and advocates;
  - each person employed or otherwise engaged by the registered NDIS provider; and
- assist persons referred to above to understand how the documented system operates.

The requirement to document the complaints management and resolution system relates to a requirement to put into writing (or other appropriate format) how the provider will meet all of the requirements of Part 2 of this instrument. This is likely to include putting in place certain practices and procedures that will ensure that the requirements are met. Further guidance will be provided by the Commissioner on how a complaints management and resolution system can be documented. The guidance will be available on the Commission's website at [www.ndiscommission.gov.au](http://www.ndiscommission.gov.au).

This requirement is fundamental to the proper functioning of a complaints management and resolution system as it ensures that persons with disability and their families and carers are aware of their rights and can advocate for their needs and safety where appropriate.

It is also crucial that each person employed or otherwise engaged by the registered NDIS provider understands and is able to utilise the complaints management and resolution system. This ensures that such people know how to make a complaint if they become aware of issues or have concerns with the provider.

Providing the documented system in a manner that is accessible may include providing the system in languages other than English, in braille or via an audio recording.

The requirement to document the system relates only to the system itself, as information provided in individual complaints must generally be kept confidential, as required by paragraph 8(4)(b) of this instrument.

*Subsection 2* provides that the system must also provide that appropriate records of complaints received by the registered NDIS provider are kept by the provider, including the following, where appropriate:

- information about the complaints;
- any action taken to resolve complaints;
- the outcome of any action taken.

It is necessary for NDIS providers to keep accurate records to enable them to identify any systemic issues and to be able to provide those records to the Commissioner or quality auditor if necessary.

*Subsection 3* provides that records made for the purposes of subsection 2 must be kept for 7 years from the day that the record is made.

An NDIS provider may also record any further information that it deems necessary or appropriate.

Registered NDIS providers are required to provide records of complaints to the Commissioner upon request. It is therefore expected that all records are kept in an organised, accessible and legible manner.

In addition to this requirement, a registered NDIS provider may be required to comply with other Commonwealth, State or Territory laws in relation to the retention of records, for example, laws relating to the maintenance of medical records.

*Subsection 4* provides that the system must provide for the collection of statistical and other information relating to complaints made to the provider to enable the provider to:

- review issues raised in complaints; and
- identify and address systemic issues raised through the complaints management and resolution process; and
- report information relating to complaints to the Commissioner, if requested to do so by the Commissioner.

This will assist the provider to identify any systemic issues that may exist within their organisation, including those relating to supports or services that they provide, workforce, or organisational practices or procedures. The identification of systemic issues means that they can be addressed in a timely manner to ensure that supports and services are consistently provided in a safe manner.

## Section 11 – Roles, responsibilities, compliance and training of workers

In order for a complaints management and resolution system to operate effectively people employed or otherwise engaged by a registered NDIS provider play a crucial role in implementing the system. Section 11 sets out how workers play a role in implementing a complaints management and resolution system.

*Subsection 1* provides that the complaints management and resolution system must set out the roles and responsibilities of persons employed or otherwise engaged by the registered NDIS provider in relation to the receipt, management and resolution of complaints made to the provider.

The development and supervision of staff should include the promotion and execution of a positive complaints culture. Large organisations should demonstrate clear decision making frameworks for responding quickly and ensuring appropriate management attention to the feedback received.

*Subsection 2* provides that the system must provide that each person employed or otherwise engaged by the registered NDIS provider must comply with the system.

*Subsection 3* provides that the system must include requirements relating to the provision of training to persons employed or otherwise engaged by the registered NDIS provider in the use of, and compliance with, the system.

The form, method and extent of training should be appropriate to the size of the provider and the class of supports or services provided. For example, a large provider who provides supports or services in several jurisdictions or locations, may be expected to have a formal training program. Alternatively, providers that provide supports or services to people with disability that may have difficulties in communicating should have specific training in how to assist them to make a complaint.

## Section 12 – Referring complaints

Section 12 provides that the complaints management and resolution system must require a complaint to be referred or notified to any other bodies in accordance with any requirements under relevant Commonwealth, State or Territory laws.

Such bodies may include:

- child protection agencies;
- work health and safety agencies;
- consumer protection agencies; and
- medical or professional accreditation or monitoring bodies.

This reflects the ‘no wrong-door’ approach to managing complaints.

## Part 3 – Complaints to, and inquiries by, the Commissioner

### Division 1 – Introduction

#### Section 13 – Simplified outline of this Part

Section 13 provides a simplified outline of Part 3 of the instrument.

## Section 14 – Purposes of this Part

Section 14 provides that part 3 of the instrument is made for the purposes of subsection 73X(1) of the Act. It prescribes arrangements relating to the management and resolution of complaints to the Commissioner arising out of, or in connection with, the provision of supports or services provided by NDIS providers.

Failure by a registered NDIS provider to comply with the requirements of this Part constitutes a breach of condition of registration (see paragraph 73F(2)(f) of the Act), and may lead to compliance and enforcement action under Division 8 of Part 3A of the Act.

## Division 2 – Complaints to the Commissioner

### Subdivision A – Complaints

#### Section 15 – Making a complaint to the Commissioner

Section 15 sets out how a person may make a complaint to the Commissioner. It is important that the complainant and person with disability are placed at the centre of this process and the process of making complaints should be as easy as possible. There is a ‘no wrong-door’ approach taken to dealing with complaints. This means that complaints may be made to the Commissioner by any person, even if they may ultimately be better dealt with by another body or agency.

*Subsection 1* provides that a person may make a complaint to the Commissioner in relation to an issue arising out of, or in connection with, the provision of supports or services provided by an NDIS provider

The phrase “arising out of, or in connection with” is broad and includes issues that may have arisen during the course of supports or services being provided or the alteration or withdrawal of supports or services. An issue may not have occurred during the provision of supports, but is connected because it arose out of the provision of supports or services.

*Subsection 2* provides that a complaint may be made orally, in writing or by any other means which is appropriate in the circumstances. It may also be made anonymously. An anonymous complaint is one where a complainant does not disclose their details to the Commissioner, or if they do, request that their details not be recorded. If a complainant requests to be anonymous they will not be provided with feedback on the complaints handling and resolution process. This is different to a confidential complaint, where a complainant will provide their details to the Commissioner, but will ask that their details not be provided to any other person, as provided for in subsection (3).

*Subsection 3* provides that a complainant may ask the Commissioner to keep certain information confidential, including the identity of the complainant, the identity of a person identified in the complaint, or any other details included in the complaint. Section 19 of the instrument sets out how the Commissioner will deal with information that a complainant has requested be kept confidential.

*Subsection 4* requires the Commissioner to take reasonable steps to ensure that:

- appropriate support and assistance is provided to any person who wishes to make a complaint; and
- a person making a complaint, and persons with disability affected by a complaint, are provided with information about accessing an independent advocate.

Appropriate support and assistance may include assisting a person to make a complaint in the manner that they are most likely to understand, for example by securing the assistance of an interpreter.

### Section 16 – Dealing with a complaint

Section 16 sets out how the Commissioner may deal with a complaint. One complaint may raise more than one issue. Each of those issues must be dealt with by the Commissioner, either collectively or individually, and may each be dealt with in a different manner.

*Subsections 1 and 2* provide that if the Commissioner receives a complaint under section 15, the Commissioner must acknowledge receipt of the complaint. However, the Commissioner is not required to acknowledge receipt of the complaint if the complaint was received anonymously or the contact details of the complainant were not provided.

*Subsection 3* provides that the Commissioner must, in relation to each issue raised in the complaint, decide to do one of three things.

*Paragraph 3(a)* provides that the Commissioner may decide to take no further action, or defer taking action, on the issue on the basis of one of the factors set out in subsections 17(1) and 17(3) (if no further action is to be taken) or subsections 17(4) and 17(5) (if the Commissioner decides to defer taking action).

*Paragraph 3(b)* provides that the Commissioner may decide to give assistance and advice to the complainant, a person with disability affected by the issue and the NDIS provider to which the issue relates. The purpose of doing this is to assist the complainant, affected person with disability and NDIS provider to resolve the complaint without the further involvement of the Commissioner.

The Commissioner will seek to resolve complaints in a way that will achieve the most timely, proportionate and appropriate outcome for complainants and affected people. This may be achieved by the Commissioner supporting complainants to resolve their complaints directly with NDIS providers without the Commissioner's ongoing formal involvement.

*Paragraph 3(c)* provides that the Commissioner may decide to undertake a resolution process in accordance with sections 20 to 22 of this instrument.

*Subsection 4* provides that before making a decision under subsection (3), the Commissioner may do one or more of the following:

- review documents provided to the Commissioner;
- visit the location at which the supports or services are provided by the NDIS provider, or the offices of the NDIS provider;
- discuss the issues raised in the complaint with the complainant, a person with disability affected by an issue raised in the complaint, the NDIS provider or any other person;
- work with the complainant, a person with disability affected by an issue raised in the complaint, the NDIS provider or a person employed or otherwise engaged by the NDIS provider to:
  - provide advice and assistance; and
  - where possible and appropriate, assist the persons involved in the complaint to come to a mutually agreed resolution;
- request information relating to the issues raised in the complaint from any person;
- take any other action that the Commissioner considers is appropriate in the circumstances.

The Commissioner has the power under section 55A of the Act to require a person (other than prospective participant or a person with disability receiving supports or services) to produce documentation or information that is in their custody or control. Failure to comply with such a request is an offence under section 57 of the Act. It is also a condition of registration that a registered NDIS provider must give information to the Commissioner upon the Commissioner's request (see paragraph 73F(2)(i) of the Act).

The Commissioner may also decide to request information from a person with disability receiving supports or services, but may not require them to produce that information under this section.

*Subsection 5* provides that in dealing with the complaint, the Commissioner must:

- consider the views of any person with disability affected by the complaint, if the Commissioner considers it is reasonable and appropriate to do so; and
- take action under this Division with due regard to procedural fairness, including by allowing a person employed or otherwise engaged by an NDIS provider reasonable opportunity to comment on any proposed adverse finding in relation to the person; and
- seek to resolve the complaint as quickly, and with as little formality, as a proper consideration of the issues raised in the complaint allows.

As noted at section 30 of this instrument, the Commissioner may make guidelines under section 181D of the Act setting out how the rules of procedural fairness may be complied with.

#### Section 17 – No further action, or deferring action, in relation to a complaint

Section 17 provides that the Commissioner may decide to take no further action in relation to an issue raised in a complaint if the Commissioner is satisfied that one or more specified circumstances apply.

The Commissioner may also decide to defer taking any action if certain circumstances apply. By deferring action the Commissioner is able to obtain further information, or allow other processes to take place, before deciding whether it is appropriate to take further action.

*Subsection 1* provides that the Commissioner may decide to take no further action in relation to a complaint, or an issue raised in a complaint, if the Commissioner is satisfied that one or more circumstances apply.

*Paragraph (1)(a)* allows the Commissioner to take no further action if the complaint or issue was not raised in good faith. For example where a complaint is vexatious or without merit.

*Paragraph (1)(b)* allows the Commissioner to take no further action if the complaint or issue has been, or is being, dealt with under this instrument. For example where the complaint raises an issue that has already been dealt with through a resolution process.

*Paragraph (1)(c)* allows the Commissioner to take no further action if the complaint has been withdrawn under section 18, which sets out the process for the withdrawal of a complaint.

*Paragraph (1)(d)* allows the Commissioner to take no further action if a person with disability affected by an issue raised in the complaint does not wish the issue to be considered by the Commissioner. For example, if an issue raised in a complaint has been resolved to the satisfaction of an affected person with disability, that person may ask that the complaint not be considered further. The Commissioner may also decide to take no further action, if taking further action could cause harm to an affected person with disability. If the Commissioner decides to take no further action on this basis, the Commissioner must also consider the matters raised in subsection (2) explained below.

*Paragraph (1)(e)* allows the Commissioner to take no further action if the complaint or issue is better dealt with by another person or body. For example, if the issue relates to goods or services that may be better dealt with by a consumer protection body.

*Paragraph (1)(f)* allows the Commissioner to take no further action if there is insufficient information about the complaint, about an issue or about the complainant to take any further action. Section 28 of this instrument allows the Commissioner to subsequently reconsider a decision to take no further action on his or her own volition if further information is received after the decision is made. This will generally be following reasonable inquiries and information gathering.

*Paragraph (1)(g)* allows the Commissioner to take no further action if, having regard to all the circumstances, further action in relation to the complaint or issue is not appropriate or warranted. This gives the Commissioner appropriate discretion in dealing with a complaint.



*Subsection 2* provides that in deciding whether to take no further action on the basis that an affected person with disability does not wish the issue to be dealt with any further, the Commissioner must consider:

- whether the health, safety or welfare of any person with disability affected by an issue raised in the complaint will be negatively impacted by a decision to take no further action; and
- whether the person with disability has been subject to victimisation, coercion or duress in deciding that the person does not wish the issue to be considered.

It is a crucial safeguard that the Commissioner considers these matters. In circumstances where a failure to deal with an issue raised in a complaint could lead to a risk of harm, or further harm, to an affected person with disability, the Commissioner must consider whether it is more appropriate to continue to take further action, despite the expressed desire of an affected person with disability.

Given their position of particular vulnerability, the Commissioner must also ensure that if a person with disability requests that no further action be taken on a complaint, that request is not due to fear of reprisal or pressure.

*Subsection 3* provides that the Commissioner may decide to take no further action in relation to a complaint, or an issue raised in a complaint, if the complaint or issue:

- is, or has been, the subject of a legal proceeding; or
- is, or has been, the subject of a coronial inquiry.

and the Commissioner is satisfied that that complaint or issue is being, or has been, adequately dealt with.

*Subsection 4* provides that the Commissioner may also decide to defer taking action in relation to a complaint or an issue raised in a complaint if the complaint or issue is the subject of a legal proceeding or a coronial inquiry.

This may be appropriate in circumstances where the Commissioner may require further information to deal with a complaint, where dealing with a complaint may interfere with legal proceedings or a coronial inquiry, or where the Commissioner does not yet know whether a coronial inquiry or legal proceeding will adequately deal with a complaint.

*Subsection 5* provides that the Commissioner may decide to defer taking action in relation to a complaint or an issue raised in a complaint to enable the complainant or a person with disability affected by the complaint or issue to deal directly with the NDIS provider in relation to the complaint or issue.

Deferring action in such circumstances recognises that wherever possible, complaints should be dealt with directly with the NDIS provider. The Commissioner may provide advice and assistance to the complainant, the person with disability or any other person to assist them in dealing directly with the NDIS provider.

## Section 18 – Withdrawal of complaint

Section 18 sets out the process for a complainant to withdraw their complaint.

*Subsections 1 and 2* provide that a complaint may be withdrawn at any time by notifying the Commissioner by any means appropriate under the circumstances. The Commissioner must acknowledge the withdrawal of the complaint in writing.

*Subsection 3* provides that, despite the withdrawal of a complaint, the Commissioner may deal, or continue to deal, with the complaint. Although complaints may be withdrawn for any number of valid reasons, for example the issues are resolved with the provider directly, or the complainant no longer wishes to participate in the process, it is crucial that the Commissioner has the ability to continue to deal with a complaint. For example, if the complaint raises an issue that carries a risk of harm to other people with disability, the Commissioner may decide that it is appropriate to continue to deal with the complaint to protect the health, safety and wellbeing of those people.

Alternatively, a complainant may wish to withdraw a complaint while an affected person with disability wishes the complaint to be dealt with. Rather than requiring a person with disability to make a new complaint, the Commissioner could decide to continue to deal with the complaint that has already been made.

*Subsection 4* provides that in deciding whether to deal, or continue to deal, with the complaint, the Commissioner may consider the following matters:

- the wishes of the person or persons with disability affected by an issue raised in the complaint;
- the health, safety or welfare of any person with disability affected by an issue raised in the complaint;
- whether the complaint may have been withdrawn on the basis of victimisation, coercion or duress.

The Commissioner is not required to consider all of the above matters in each circumstance. For example, where a complaint is withdrawn on the basis that it has already been satisfactorily resolved it may not be necessary to consider the above matters.

If the Commissioner decides to continue to deal with a complaint that has been withdrawn, the Commissioner is not required to give the complainant a notice relating to the outcome of a complaints process, although the Commissioner is not prohibited from doing so. A complainant who has withdrawn their complaint will not have the right to apply for reconsideration of the Commissioner's decision in relation to a complaint.

## Section 19 – Confidentiality

Section 19 prescribes how the Commissioner will deal with information that the complainant has requested be kept confidential. Subsection 15(3) provides that a complainant may ask the Commissioner to keep certain information confidential.

*Subsection 1* provides that the Commissioner is required to take reasonable steps to ensure that a request for confidentiality under subsection 15(3) is complied with.

*Subsection 2* provides that, despite subsection 1, the Commissioner may decide not to comply with the confidentiality request if the Commissioner considers that doing so will, or is likely to, place the safety, health or wellbeing of the complainant, a person with disability affected by an issue raised in the complaint or any other person at risk. It is important that the Commissioner has the ability to provide certain information to other people or bodies if necessary. For example, if the Commissioner refers an issue raised in a complaint to another body or agency (including a law enforcement agency), or to notify a guardian of a person with disability who has been the victim of an alleged assault.

If a complaint relates to an issue that is also a reportable incident, information must be recorded and dealt with in accordance with the requirements in the *National Disability Insurance Scheme (Incident Management and Reportable Incidents) Rules 2018* made for the purposes of section 73Z of the Act, regardless of any request for confidentiality.

*Subsection 3* provides that the Commissioner must take all reasonable steps to notify the complainant before deciding not to keep information confidential that the complainant has requested be kept confidential under subsection 15(3) and could include reasons why the information could not be kept confidential.

Division 7 of part 3A of the Act also provides protections for people who disclose information, including to the Commissioner as part of a complaint. These protect people from being subject to threats or detriment and apply to employees, contractors, people with disability, their nominees, family members, carers, advocates or significant others.

## Subdivision B – Resolution process

### Section 20 – Resolution process

Section 20 sets out the process for the Commissioner to resolve a complaint. In taking action to resolve a complaint, an affected person with disability and the complainant must remain at the centre of the process.

*Subsection 1* provides that if the Commissioner decides to undertake a resolution process in relation to an issue, the Commissioner may adopt one or more approaches to resolve the issue.

*Paragraph (1)(a)* provides that the Commissioner may require the NDIS provider to which the issue relates to examine and attempt to resolve the issue and report back to the Commissioner.

*Paragraph (1)(b)* provides that the Commissioner may request the complainant, the NDIS provider and any other person to participate in a conciliation process. The purpose of conciliation is to help people to reach an agreement on how the issues raised as part of a complaint can be resolved. Participants do not have to prove or disprove the complaint. Instead, the conciliation conference allows the person who made the complaint and the service provider to state their point of view, discuss the issues in dispute and reach a resolution together if possible. Most conciliations will involve a conciliation conference, which is a facilitated meeting of people who are

involved in the complaint. The conciliation facilitator works with all parties to ensure their issues are understood and any power imbalance is managed. If the conciliation process is successful, the Commissioner may end the resolution process. If the conciliation is not successful, the Commissioner may take other actions to seek to resolve the issue.

*Paragraph (1)(c)* provides that the Commissioner may provide advice to the NDIS provider in relation to the issue. For example, the Commissioner may decide to provide information or guidance to the NDIS provider on how to work with a complainant to resolve a complaint, or how to avoid future complaints on similar issues.

*Paragraph (1)(d)* provides that the Commissioner may require the NDIS provider to undertake remedial action in relation to the issue and report back to the Commissioner. For example, the Commissioner may require an NDIS provider to implement new systems to prevent future issues similar to those raised by a complaint. The Commissioner may also require an NDIS provider to take certain steps to assist an affected person with disability.

*Paragraph (1)(e)* provides that the Commissioner may take any other action the Commissioner considers appropriate in the circumstances to seek to resolve the issue. This could include the Commissioner utilising the compliance and enforcement powers set out in Division 8 of Part 3A of the Act.

*Subsection 2* provides that in adopting any of the approaches in subsection (1), the Commissioner may do one or more of the following:

- review documents;
- visit the location at which the supports or services are provided by the NDIS provider;
- visit the offices of the NDIS provider;
- discuss the issue with the complainant, the person with disability affected by an issue raised in the complaint, the NDIS provider or any other person, in person or by other means;
- request information from any person.

The Commissioner is not able to enter the premises of an NDIS provider without consent, or require relevant people to speak to Commission officers, unless a warrant has been obtained under Division 8 of Part 3A of the Act.

Pursuant to section 55A of the Act, if the Commissioner reasonably believes that a person (other than a prospective participant or person receiving supports or services from an NDIS provider) has information or documentation that may be relevant to the investigation, management, conciliation or resolution of a complaint, the Commissioner may require that person to provide that information or documentation. Failure to comply with such a request is an offence under section 57 of the Act. It is also a condition of registration that a registered NDIS provider must give information to the Commissioner upon the Commissioner's request (see paragraph 73F(2)(i) of the Act).

*Subsection 3* provides that evidence of anything said or done by a person in the course of the conciliation of a complaint under this section is not admissible in any legal proceedings relating to the complaint.

*Subsection 4* provides that subsection (3) does not apply in relation to any proceedings commenced under, or in connection with, the Act. This means that evidence arising out of a conciliation conference may be used in proceedings commenced under the Act that are not proceedings related to the complaint, such as compliance and enforcement action that is unrelated to the complaint.

#### Section 21 – Notifying NDIS provider

Section 21 provides that if the Commissioner decides to undertake a resolution process in relation to a complaint, the Commissioner must notify the NDIS provider to which the complaint relates about the issue as soon as practicable, unless the Commissioner considers that the notification will, or is likely to:

- impede the resolution of the issue; or
- place the safety, health or wellbeing of the complainant, a person with disability or any other person at risk; or
- place the complainant or a person with disability at risk of victimisation, intimidation or harassment.

For example, if the Commissioner considers that informing an NDIS provider is likely to prejudice information gathering in relation to an issue, the Commissioner is not necessarily required to inform the NDIS provider that he or she is going to undertake a resolution process. Similarly, if the Commissioner considers that informing an NDIS provider that a complaint has been made is likely to lead to retaliation against a person with disability, the Commissioner may decide not to notify the NDIS provider.

#### Section 22 – Ending resolution process

Section 22 sets out how the Commissioner may end a resolution process commenced under section 20 of this instrument.

*Subsection 1* provides that the Commissioner may decide to end a resolution process in relation to a complaint, or an issue raised in a complaint, if one or more prescribed circumstances.

*Paragraph (1)(a)* provides that the Commissioner may end a resolution process if the complaint or issue has been resolved because the complainant, and the NDIS provider to which the complaint or issue relates, have agreed on an outcome. For example, the NDIS provider has apologised and taken steps to rectify any issues that were the subject of the complaint.

*Paragraph (1)(b)* provides that the Commissioner may end a resolution process if the NDIS provider has addressed the complaint or issue to the satisfaction of the Commissioner. For example, the NDIS provider has taken steps of its own accord to resolve the issues that were the subject of a complaint.

*Paragraph (1)(c)* provides that the Commissioner may end a resolution process if the Commissioner has required the NDIS provider to undertake remedial action within a specified period in relation to the complaint or issue. For example, the issue that was the subject of the complaint has been rectified, and new systems have been put in place to prevent further similar issues arising.

*Paragraph (1)(d)* provides that the Commissioner may end a resolution process if the Commissioner has initiated compliance or enforcement action under Division 8 of Part 3A of the Act which relates to the complaint or issue.

*Paragraph (1)(e)* provides that the Commissioner may end a resolution process if the complaint has been withdrawn under section 18 of this instrument.

*Paragraph (1)(f)* provides that the Commissioner may end a resolution process if the complaint or issue is better dealt with by another person or body. For example, if the issue relates to goods or services that may be better dealt with by a consumer protection body.

*Paragraph (1)(g)* provides that the Commissioner may end a resolution process if continuation of the resolution process is not appropriate or warranted because the Commissioner is satisfied that:

- despite reasonable inquiry by the Commissioner, the circumstances giving rise to the complaint or issue cannot be determined, noting that section 28 of this instrument allows the Commissioner to reconsider a decision to end a resolution process on his or her own volition if further information is received; or
- information given by the complainant was not given in good faith; or
- the complaint or issue is already being dealt with under this instrument, for example an issue is being dealt with through a separate resolution process; or
- a person with disability affected by an issue raised in the complaint does not wish the resolution process to continue;

*Paragraph (1)(h)* provides that the Commissioner may end a resolution process if, having regard to all the circumstances, continuation of the resolution process is not appropriate or warranted.

*Subsection 2* provides that in deciding whether to end a resolution process on the basis that an affected person with disability does not wish the issue to be dealt with any further, the Commissioner must consider:

- whether the health, safety or welfare of any person with disability affected by an issue raised in the complaint will be negatively impacted by the decision; and
- whether the complaint may have been withdrawn on the basis of victimisation, coercion or duress.

If ending a resolution process will mean that an issue is not adequately dealt with, which in turn could give rise to a risk of harm, or further harm, to an affected person with disability, the Commissioner must consider whether it is more appropriate to continue to deal with the complaint.

The Commissioner must also ensure that if a person with disability requests an end to a resolution process, that request is made freely and is not due to fear of reprisal.

The Commissioner is required to provide a notice relating to a decision to end a resolution process in accordance with Subdivision 2, Division 2 of Part 3 of this instrument.

### Subdivision C – Notices relating to outcome of complaints processes

#### Section 23 – Notice of decision to take no further action

Section 23 provides that if the Commissioner decides to take no further action in relation to a complaint, the Commissioner must provide notice to relevant people.

*Subsection 1* provides that if the Commissioner decides to take no further action in relation to a complaint or an issue arising out of a complaint under paragraph 16(3)(a), the Commissioner must, as soon as practicable, give the complainant:

- the reasons for the Commissioner’s decision to take no further action and any appropriate feedback for the complainant in relation to that decision; and
- information about how the complainant may apply for reconsideration of the decision by the Commissioner.

This requirement is in accordance with principles of procedural fairness and will assist the complainant to understand why no further action is taken. This will also assist the complainant if they decide to apply for reconsideration of the decision by the Commissioner.

*Subsection 2* provides that the Commissioner is not required to provide information if the complaint was made anonymously, or the complaint was withdrawn. If the complaint was made anonymously, the Commissioner would have no way of notifying the complainant. If the complaint is withdrawn, the complainant has indicated that they no longer wish to be involved in the process. Section 23 does not prohibit the Commissioner from providing information to a complainant who has withdrawn their complaint.

*Subsection 3* provides that, in complying with subsection (1), the Commissioner may, on request from a person with disability affected by an issue raised in the complaint, exclude information. For example, a person with disability may request that certain personal or sensitive information is not provided to the complainant. The Commissioner is not required to seek the feedback or consent of a person with disability before complying with subsection (1).

*Subsection 4* provides that the Commissioner may exclude information under subsection (3) only if the Commissioner is satisfied that such an exclusion will not materially affect the complainant’s ability to seek reconsideration of the decision or be afforded procedural fairness.

#### Section 24 – Notice of outcome of resolution process

Section 24 applies if the Commissioner decides to end a resolution process in relation to a complaint, or an issue raised in a complaint, under section 22 of this instrument, the Commissioner must provide notice to certain people.

*Subsection 2* provides that the Commissioner must, as soon as practicable, give the complainant, each person with disability affected by an issue raised in the complaint, the relevant NDIS provider and any person employed or otherwise engaged by the provider who may have adverse findings made against the person, the following information, in writing:

- notice of the outcome of the resolution process including:
  - any key findings or outcomes of the resolution process; and
  - any actions agreed to be taken by an NDIS provider or complainant in relation to the issue; and
  - any remedial action in relation to the complaint or issue that the Commissioner requires the NDIS provider to undertake within a specified period; and
  - the Commissioner's decision to end the resolution process and the reasons for that decision;
- information about how the complainant or the NDIS provider may apply for reconsideration of the Commissioner's decision; and
- any other appropriate information.

Providing this information to any affected person with disability will ensure that an affected person with disability is kept involved in every aspect of the complaints resolution process, and that they will be aware of what action has been taken to address the issues raised in a complaint.

Providing this information to the relevant NDIS provider and any person employed or otherwise engaged by the provider who may have adverse findings made against the person ensures that procedural fairness is accorded.

*Subsection 3* provides that, despite the above, the Commissioner is not required to provide the information required in subsection (2) if the complaint was made anonymously, or the complaint was withdrawn.

Section 24 does not prohibit the Commissioner from providing information to a complainant who has withdrawn their complaint.

*Subsection 4* provides that, in complying with subsection (2), the Commissioner may, on request from a person with disability affected by an issue raised in the complaint, exclude information. For example, a person with disability may request that certain personal or sensitive information is not provided to the complainant. The Commissioner is not required to seek the feedback or consent of a person with disability before providing a notice in accordance with subsection (2).

*Subsection 5* provides that the Commissioner may exclude information under subsection (4) only if the Commissioner is satisfied that such an exclusion will not materially affect the complainant's ability to seek reconsideration of the decision. For example, certain pieces of information may be excluded, but the Commissioner must still provide reasons and adequate feedback and information for a person seeking



reconsideration to understand the action that has been taken and the justification for it.

*Subsection 6* provides that the Commissioner may include different information in a notice given under this section to the complainant, each person with disability affected by an issue raised in the complaint, the relevant NDIS provider and any person employed or otherwise engaged by the provider. For example, it may not be appropriate to provide certain information to the complainant if that information may breach the privacy of a worker. Similarly, it may not be appropriate to provide certain information to a provider where that information may impact on the privacy, health, safety or wellbeing of a person with disability, or the complainant.

### Section 25 – Provision of information to other persons

Section 25 provides that the Commissioner may give information, including about action taken in relation to an issue raised in a complaint, to any person or body that the Commissioner considers has a sufficient interest in the matter. A person may have sufficient interest in the matter if the Commissioner is satisfied that, in relation to the purpose of the disclosure, the proposed recipient has a genuine and legitimate interest in the information.

Other persons or bodies that may have a sufficient interest in the matter may include:

- with the consent of a person with disability affected by an issue raised in a complaint, independent advocates or representatives;
- with the consent of a person with disability affected by an issue raised in a complaint, their family members, carers or other significant people.

In providing information, the Commissioner must comply with his or her obligations under the *Privacy Act 1988*, and should consider whether providing the information is appropriate or necessary for the proper handling of the complaint.

### Subdivision D – Reconsideration of decisions

#### Section 26 – Application for reconsideration by Commissioner

Section 26 provides that applications for reconsideration by the Commissioner can be made in relation to the following decisions:

- a decision under paragraph 16(3)(b) to take no further action on an issue raised in a complaint by a complainant; and
- a decision under section 22 to end a resolution process.

*Subsections 1 and 2* provide that a complainant, or a person with disability affected by an issue raised by the complaint, may apply for a reconsideration of a decision by the Commissioner to take no further action on an issue raised in a complaint made by the complainant. This supports the guiding principle of the NDIS that a person with disability has the same right to pursue any grievance as any other member of society. However an application cannot be made if the complaint has been withdrawn.

*Subsection 3* provides that if the Commissioner makes a decision under section 22 to end a resolution process in relation to a complaint or an issue, any of the following persons may apply to the Commissioner for reconsideration of the decision:

- the complainant;
- a person with disability affected by the issue;
- the NDIS provider to which the issue relates;
- a person employed or otherwise engaged by the NDIS provider who may have an adverse finding made against the person.

If a provider seeks a review of a direction by the Commissioner to undertake certain remedial action under paragraph 22(1)(c), the provider must take the specified action required while awaiting that review.

*Subsection 4* provides that an application cannot be made under subsection (3) if:

- the Commissioner decided to end a resolution process because the issue is better dealt with by another person or body; or
- the Commissioner decided to end a resolution process under section 22, if that resolution process was conducted as a result of a previous application for reconsideration.

This means that a person cannot request a reconsideration of a decision to end a resolution process that was itself the result of a reconsideration.

Although reconsideration cannot be sought in the above circumstances, a person may make a complaint to the Commonwealth Ombudsman. Although the Commonwealth Ombudsman is not able to overturn a decision of the Commissioner, it will look at the administrative processes involved in making the decision and can make recommendations.

*Subsection 5* provides that a person making an application under subsection (1) or (3) for reconsideration of a decision must:

- state the reasons why reconsideration is sought; and
- unless subsection (6) applies—make the application within 42 days of the person being notified of the decision.

*Subsection 6* provides that the Commissioner may extend the period to make an application for reconsideration if the Commissioner is satisfied it is appropriate to do so. For example, if the person seeking reconsideration is unwell and is not able to make the application within 42 days, the Commissioner may be satisfied that it is appropriate to extend the time period to make an application.

*Subsection 7* provides that an application under subsection (1) or (3) may be made orally, in writing or by any other means which is appropriate in the circumstances.

*Subsection 8* provides that if satisfied it is reasonable in all the circumstances to do so, the Commissioner may:

- notify any other person of an application made under subsection (1) or (3); and
- provide any other person with a copy of the application; and
- provide an opportunity for any other person to provide comments on the application within the period specified by the Commissioner.

For example, the Commissioner may provide a copy of the application to an independent advocate.

### Section 27 – Reconsideration by Commissioner on application

Section 27 sets out how the Commissioner will deal with reconsiderations when an application is received under section 26. Throughout the reconsideration process, the Commissioner must have regard to procedural fairness.

*Subsection 1* provides that within 28 days of receiving an application under section 26 to reconsider a decision, the Commissioner must either confirm the decision in relation to which reconsideration has been sought, or decide to undertake a new resolution process.

If the Commissioner confirms the original decision, a person may make a complaint to the Commonwealth Ombudsman. Although the Commonwealth Ombudsman is not able to overturn a decision of the Commissioner, it will look at the administrative processes involved in making the decision and can make recommendations. The Commonwealth Ombudsman could review the decision making process for both the original decision, and the decision to confirm that.

*Subsection 2* provides that if the Commissioner is satisfied that the application for reconsideration raises an issue that was not part of, or not related to, the original complaint, the Commissioner may treat the application as a fresh complaint.

*Subsection 3* provides that if the Commissioner confirms the original decision, the Commissioner must notify the following, in writing, of the Commissioner's decision:

- the applicant; and
- a person with disability affected by an issue raised in a complaint.

*Subsection 4* provides that if the Commissioner decides to undertake a new resolution process in relation to a complaint or an issue under subsection (1):

- the Commissioner must notify the following, in writing, of the Commissioner's decision:
  - the complainant;
  - unless the Commissioner is satisfied it would be inappropriate to do so—a person with disability affected by the issue;
  - the NDIS provider to which the complaint or issue relates;
  - a person employed or otherwise engaged by the NDIS provider who may have an adverse finding made against the person

The new resolution process must be conducted in accordance with Subdivisions B and C of Division 2 of Part 3 this instrument.

The Commissioner must complete the new resolution process within 90 days of receiving the application to reconsider the decision. This timeframe may be extended by a further 14 days if the Commissioner notifies the following of the decision to extend the timeframe, including the reasons for the decision:

- the complainant;
- a person with disability affected by an issue raised in the complaint;
- the NDIS provider to which the issue relates;
- any person employed or otherwise engaged by the NDIS provider who may have an adverse finding made against the person.

### Section 28 – Reconsideration by the Commissioner on own motion

Section 28 allows the Commissioner to consider a decision that the Commissioner has made on his or her own motion in certain circumstances.

*Subsection 1* provides that the Commissioner may reconsider a decision (the original decision) made by the Commissioner in relation to a complaint if the Commissioner becomes aware of new information that, had the Commissioner been aware of it at the time the original decision was made, may have affected the original decision.

For example, if the Commissioner decided to take no further action on an issue raised in a complaint on the basis that it had been resolved to the satisfaction of an affected person with disability and that person provides further information which indicates that the complaint has not been resolved

*Subsection 2* provides that in exercising the power under subsection (1), the Commissioner must have regard to prescribed matters.

*Paragraph (2)(a)* provides that the Commissioner must have regard to the time period that has elapsed since the original decision was made. The Commissioner would generally not re-consider a decision after a significant lapse of time.

*Paragraph (2)(b)* provides that the Commissioner must have regard to the effect a reconsideration of the original decision would have on any relevant party, including the complainant, a person with disability affected by an issue raised in the complaint, the NDIS provider or a person employed or otherwise engaged by the NDIS provider. For example, a complainant or an affected person with disability may not want to re-visit a difficult time.

*Paragraph (2)(c)* provides that the Commissioner must have regard to any other matter the Commissioner considers relevant. For example, if the new information relates to an issue that may indicate that there is an ongoing risk of harm to one or more people with disability, the Commissioner would be more likely to re-consider a decision to take no further action. The Commissioner may also consider the reasons that a decision was made, for example where a decision to take no further action was made at the request of a person with disability as opposed to in circumstances where the Commissioner did not have sufficient information to proceed.

*Subsection 3* provides that if the Commissioner decides to reconsider the original decision, the Commissioner:

- must give written notice of the decision to each person who was provided with notice in relation to the original decision; and
- must undertake a new resolution process in accordance with sections 20 to 22.

### Division 3 – Inquiries by the Commissioner

#### Section 29 – Inquiries by the Commissioner in relation to complaints

Section 29 prescribes how and when the Commissioner may undertake an inquiry in relation to complaints.

The inquiry process is intended to determine or define potential matters including any systemic issues which may be connected with supports or services provided under the NDIS. Where the Commissioner determines or defines an issue but has no direct ability to further consider or resolve the matter, the Commissioner may provide a report and recommendations to assist in the resolution of issues and further the Commissioner's functions in relation to promoting and protecting the rights, health, safety and wellbeing of people with disability. An inquiry may also lead to the Commissioner engaging monitoring or investigation powers in relation to NDIS provider compliance with the Act.

Inquiries also assists the Commissioner to carry out his or her complaints function under paragraph 181G(e) which provides that one of the Commissioner's functions is to collect, correlate, analyse and disseminate information relating to complaints arising out of, or in connection with, the provision of supports or services by NDIS providers.

*Subsection 1* provides that the Commissioner may authorise an inquiry on his or her own initiative in relation to an issue arising out of, or connected with, a complaint about the provision of supports or services by an NDIS provider.

*Subsection 2* provides that the Commissioner may authorise an inquiry in relation to a series of complaints that have occurred in connection with the provision of supports or services by one or more NDIS providers. This allows the Commissioner to inquire into emerging risks or areas of concern across the NDIS market, and not just in relation to a specific provider.

*Subsection 3* provides that an inquiry may be carried out whether or not a complaint has been received under section 15. This allows the Commissioner to authorise an inquiry where a complaint has been received by a provider, but has not been referred to the Commissioner. Such information may come to the Commissioner's attention when a quality audit is conducted, or if the Commissioner requests information from a provider for another purpose.

*Subsection 4* provides that an inquiry may be carried out as the Commissioner thinks fit and the Commissioner is not bound by any rules of evidence. Although the Commissioner is not bound by the rules of evidence, he or she must comply with the principles of natural justice and broader administrative law. The Commissioner will also comply with principles of procedural fairness where relevant.

*Subsection 5* sets out some of the actions that the Commissioner may take in conducting an inquiry and provides that the Commissioner may:

- consult with other persons, bodies and governments on matters relating to the inquiry; or
- request information that is relevant to the inquiry from any person; or
- provide opportunities for people with disability to participate in the inquiry.

This subsection does not limit the actions that the Commissioner may take in carrying out an inquiry. In requesting information, the Commissioner is able to use the information gathering power in section 55A of the Act to require a person (other than a person with disability receiving supports or services or a prospective participant) to provide information or documents within their custody or control if the Commissioner considers that that information may be relevant to the Commissioner's complaints function, which encompasses inquires in relation to complaints.

*Subsection 6* provides that the Commissioner may prepare and publish a report setting out his or her findings in relation to the inquiry. The content and form of the report are at the discretion of the Commissioner. For example, the Commissioner may decide not to publish certain findings where those findings may compromise the privacy, or the health, safety and wellbeing of a person with disability.

#### Division 4 – Other matters

##### Section 30 – Commissioner must comply with procedural fairness rules

Section 30 provides that in dealing with a complaint, the Commissioner must have due regard to the rules of procedural fairness. The Commissioner may make guidelines for the purposes of dealing with complaints, including in relation to matters of procedural fairness under subsection 181D(2) of the Act.

Procedural fairness is a common expectation that people have when decisions that may affect them are being made by government, employers and other organisations. In essence, people expect that a decision will be based on relevant facts and circumstances; that they will have an opportunity to contribute to the decision and to contest any adverse material; the decision-maker will be impartial and even-handed; and an adverse decision will be explained.

##### Section 31 – Referral to other organisations

Subsection 1 provides that nothing in this instrument prevents the Commissioner from referring an issue raised in a complaint to the Minister, the Agency, or another person or body.

The Commissioner may refer a complaint to the Minister where (examples). The Commissioner may refer a complaint to the Agency, for example, where the complaint relates to pricing. Other persons or bodies may include:

- Consumer protection agencies
- Work health and safety agencies

- Law enforcement agencies
- Medical or professional accreditation or monitoring bodies

Subsection 2 provides that the Commissioner may continue to deal with an issue raised in a complaint even if the Commissioner has referred the issue under subsection (1).

#### Section 32 – Commissioner may take action under the Act

Section 32 provides that nothing in this instrument prevents the Commissioner from taking action under Division 8 of Part 3A of the Act in relation to an issue raised in a complaint or an issue raised in information received by the Commissioner.

Division 8 of Part 3A of the Act sets out the compliance and enforcement framework for monitoring compliance with the Act and taking action to enforce compliance. Section 32 makes it clear that the Commissioner is able to take compliance and/or enforcement action regardless of any other action taken (or not taken) under this instrument.

## **Statement of Compatibility with Human Rights**

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

### **National Disability Insurance Scheme (Complaints Management and Resolution) Rules 2018**

The *National Disability Insurance Scheme (Complaints Management and Resolution) Rules 2018* (the 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 instrument describes a scheme for the management and resolution of complaints and other concerns about supports or services provided by NDIS providers.

Registered NDIS providers are required by this instrument to have complaints management and resolution systems in place and to support people with disability in making complaints.

Anybody can make a complaint about supports or services provided by an NDIS provider and this instrument also explains how complaints can be made to, managed and resolved by, the Commissioner of the NDIS Quality and Safeguards Commission (the Commissioner).

Complaints management and resolution systems ensure providers are responsive to the needs of people with disability and focussed on the timely resolution of issues and that, when things go wrong, something is done about it.

People with disability may face multiple barriers to making complaints about their supports or services. These include lack of experience asserting their rights as consumers, fear of retribution, negative experiences with complaints systems (including not being believed) and difficulty communicating what happened without support. Additionally, in the case of violence, neglect and abuse, people can face substantial barriers to making a complaint.

This instrument supports the establishment of a strong regulatory system that will help ensure that NDIS providers respond appropriately to complaints and that corrective action can be taken when necessary. It will also ensure regular analysis of complaints data to identify systemic issues and drive system improvements. This is particularly important in the context of the developing NDIS market.

#### **Human Rights Implications**

This 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, 4, 5, 7, 12, 13, 16, 17, 21, 22, 25, 28 and 31;



- The rights of children in the *Convention on the Rights of the Child (CRC)*, especially Articles 12, 13, 16, 19, 23 and 34
- Articles 7(b), 11 and 12 of the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*; and
- Article 17 of the *International Covenant on Civil and Political Rights*.

#### *Equality before the law and equal access to justice*

By ensuring that people with disability are supported and enabled to make complaints, and kept appropriately involved in the management and resolution of complaints, the instrument engages the right of people with disability to equal recognition before the law and effective access to justice, in accordance with articles 12 and 13 of the CRPD.

#### *Standards of living and health*

The instrument engages the right to an adequate standard of living and the right to the enjoyment of the highest attainable standard of physical and mental health, as contained in articles 11 and 12 of the ICESCR and articles 25 and 28 of the CRPD.

It outlines the minimum requirements that a registered NDIS provider is required to have in place to receive and respond to complaints and sets out how complaints can be made to, managed and resolved by, the Commissioner. This will enhance the handling of complaints about NDIS supports and services and further enforce the rights of people with disability to an adequate standard of living and to enjoy the highest attainable standard of physical and mental health.

#### *Protection from exploitation, violence and abuse*

This instrument engages with article 16 of the CRPD and article 19 of the CRC by taking legislative and other measures to protect persons with disabilities from all forms of exploitation, violence and abuse and to ensure that instances of exploitation, violence and abuse against persons with disability are identified, investigated and where appropriate prosecuted.

In particular, the instrument will enable Australians with disability and their families and carers to make complaints about supports and services provided under the NDIS to an independent complaints handling body. The instrument also enables the identification of instances of exploitation, violence and abuse through internal complaints management and resolution systems of registered NDIS providers.

#### *Protection against arbitrary interference with privacy*

The instrument engages article 17 of the ICCPR and article 22 of the ICRPD, which provide that no one shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, and that everyone has the right to the protection of the law against such interference or attacks.

The Commissioner is required to ensure that a request by a complainant for confidentiality is complied with unless the Commissioner considers that doing so will, or is likely to, place the safety, health or well-being of the complainant, a person with

disability affected by an issue raised in a complaint or any other person. Before deciding not to keep information confidential, the Commissioner must take all reasonable steps to notify the complainant.

Any personal information which the Commissioner collects as part of the performance of his or her functions is 'protected Commission information' under the *National Disability Insurance Scheme Act 2013* (the Act). As such, it will be handled in accordance with the limitations placed on the use and disclosure of protected Commission information under the Act, the *National Disability Insurance Scheme (Protection and Disclosure of Information – Commissioner) Rules 2018*, the *Privacy Act 1988*, and any other applicable Commonwealth, State or Territory legislation. Information will only be dealt with where reasonably necessary for the fulfilment of the Commissioner's lawful and legitimate functions.

### **Conclusion**

The instrument is compatible with human rights as it promotes the human rights to an adequate standard of living, the highest attainable standard of physical and mental health, protection from exploitation, violence and abuse and equality before the law and equal access to justice. To the extent that it may limit the protection against arbitrary interference with privacy, those limitations are reasonable and proportionate and this approach is compatible with human rights principles.

**Graeme Head, Commissioner of the NDIS Quality and Safeguards Commission**