

**CRIMES AMENDMENT (NATIONAL DISABILITY INSURANCE SCHEME—  
WORKER SCREENING) REGULATIONS 2019**

**EXPLANATORY STATEMENT**

Issued by authority of the Attorney-General

in compliance with section 15J of the *Legislation Act 2003*

**Purpose**

The purpose of the *Crimes Amendment (National Disability Insurance Scheme—Worker Screening) Regulations 2019* (the Amendment Regulations) is to prescribe State and Territory persons and bodies and the relevant laws under which they are authorised for the purposes of sections 85ZZGI, 85ZZGJ and 85ZZGK of the *Crimes Act 1914* (the Crimes Act).

**Background**

The Crimes Act contains mechanisms to protect persons with disability from sexual, physical and emotional harm by permitting criminal history information to be disclosed and taken into account in assessing the suitability of persons to work with persons with disability. Divisions 2 and 3 of Part VIIC of the Crimes Act contain restrictions to the disclosure of information related to pardons, quashed convictions and spent convictions. The *Crimes Amendment (National Disability Insurance Scheme – Worker Screening) Act 2018* amended Part VIIC of the Crimes Act by inserting Subdivision AA into Division 6 of Part VIIC, creating an exclusion for disclosure of information about a pardoned, quashed or spent conviction of persons who work, or seek to work, with persons with disability in the National Disability Insurance Scheme (NDIS). The exclusion replicated the arrangements for the working with children checks regime in Subdivision A of Division 6 of Part VIIC.

The Amendment Regulations form an important part of the broader NDIS Quality and Safeguarding Framework (the Framework), which is designed to support the rights of people with disability by ensuring they have access to quality and safe services under the NDIS. The Amendment Regulations will allow Commonwealth, State and Territory agencies to deliver a nationally consistent approach to worker screening, which is a core element of the Framework aimed at mitigating the risk of harm to persons with disability.

**Issues**

Section 91 of the Crimes Act provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act. The Attorney-General relevantly has administrative responsibility for the Crimes Act. The Attorney-General has approved the Amendment Regulations.

Section 85ZZGL of the Crimes Act requires that before the Governor-General makes a regulation prescribing a person or body to which information may be disclosed or by which information may be taken into account or disclosed for the purposes of sections 85ZZGI, 85ZZGJ or 85ZZGK of the Crimes Act, the Minister must be satisfied that the person or body:

- (i) is required or permitted by or under a Commonwealth law, a State law or a Territory law to obtain and deal with information about persons who work, or seek to work, with a person with disability; and
- (ii) complies with applicable Commonwealth law, State law or Territory law relating to privacy, human rights and records management; and
- (iii) complies with the principles of natural justice; and
- (iv) has risk assessment frameworks and appropriately skilled staff to assess risks to the safety of a person with disability.

Sections 85ZZGI, 85ZZGJ or 85ZZGK of the Crimes Act deal with information in relation to persons who work, or seek to work, with persons with disability. Section 20A of the Amendment Regulations prescribes persons or bodies for the purposes of these sections of the Crimes Act. As the Minister responsible for section 85ZZGL of the Crimes Act, the Attorney-General is satisfied that the above criteria have been met in relation to the persons and bodies prescribed by the Amendment Regulations.

In accordance with subsection 85ZZ(1) of the Crimes Act, the Information Commissioner has advised the Attorney-General that an exclusion to the application of Divisions 2 and 3 of Part VIIC should be granted, and that no restrictions on the circumstances in which an exclusion would apply are required.

The *National Disability Insurance Scheme Amendment (Worker Screening Database) Act 2019* provides for the establishment, operation and maintenance of a worker screening database to record decisions made in relation to persons who have made an application for an assessment of whether they, in working or seeking to work, with persons with disability, pose a risk to such persons.

Further details of the proposed Regulations are set out in [Attachment A](#).

A Statement of Compatibility with Human Rights has been completed in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011* and is set out at [Attachment B](#).

The Amendment Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*.

## **Consultation**

The Department of Social Services (the Department) has consulted on the Amendment Regulations with the Attorney-General's Department and the Information Commissioner. The Attorney-General has agreed to the Amendment Regulations and will be the sponsoring Minister. The Amendment Regulations were also informed by consultation with affected States and Territories regarding corresponding State and Territory legislation.

## Regulation Impact Statement

Following consultation with the Office of Best Practice Regulation (OBPR), no additional Regulation Impact Statement (RIS) is required for this measure. OBPR has confirmed that this measure is covered by the *NDIS Quality and Safeguarding RIS* (OBPR ID 16842).

## Commencement

The Amendment Regulations are to commence the later of the day after they are registered on the Federal Register of Legislation and the commencement of the *National Disability Insurance Scheme Amendment (Worker Screening Database) Act 2019*. They do not commence at all if the *National Disability Insurance Scheme Amendment (Worker Screening Database) Act 2019* does not commence.

## Prescribed Laws

Copies of the relevant State and Territory Acts as prescribed are freely available online, and can be found at relevant State and Territory government websites set out below:

*National Disability Insurance Scheme (Worker Checks) Act 2018* (NSW)  
<https://legislation.nsw.gov.au/#/view/act/2018/82>

*Disability Inclusion Act 2018* (SA)  
<https://www.legislation.sa.gov.au/LZ/C/A/DISABILITY%20INCLUSION%20ACT%202018.aspx>

*Registration to Work with Vulnerable Persons Act 2013* (Tas)  
<https://www.legislation.tas.gov.au/view/html/inforce/current/act-2013-065>

*Working with Vulnerable Persons (Background Checking) Act 2011* (ACT)  
<https://www.legislation.act.gov.au/a/2011-44/>

Authority: Section 91 of the *Crimes Act 1914*

## **Explanation of the provisions**

### **Section 1 – Name**

This section provides that the instrument is named the *Crimes Amendment (National Disability Insurance Scheme – Worker Screening) Regulations 2019* (the Amendment Regulations).

### **Section 2 – Commencement**

This section inserts a table that specifies the commencement date of the Amendment Regulations.

The Amendment Regulations commence on the later of the day after they are registered on the Federal Register of Legislation and the commencement of the *National Disability Insurance Scheme Amendment (Worker Screening Database) Act 2019*. The Amendment Regulations do not commence at all if the *National Disability Insurance Scheme Amendment (Worker Screening Database) Act 2019* does not commence.

### **Section 3 – Authority**

This section provides that the Amendment Regulations are made under the *Crimes Act 1914* (the Crimes Act).

### **Section 4 – Schedule(s)**

This is a formal clause that identifies that the Amendment Regulations amend the *Crimes Regulations 2019* (the Crimes Regulations), which is the instrument specified in Schedule 1.

### **Schedule 1 – Amendments**

This schedule contains amendments to the Crimes Regulations.

#### **Item 1 – Section 20**

This item amends the heading to section 20 of the Crimes Regulations to add “–exclusions relating to work with children”.

The purpose of this amendment is to clarify that the exclusion provided by Subdivision A of Division 6 of Part VIIC of the Crimes Act is limited to assessing the suitability of persons for work with children.

#### **Item 2 – Section 20**

This item amends section 20 of the Crimes Regulations after the words “are prescribed” to add the words “to the extent that those laws relate to persons working, or seeking to work, with children”, within the meaning of section 85ZZGF of the Crimes Act.

The purpose of this amendment is to clarify that the prescription of laws for the purposes of Subdivision A of Division 6 of Part VIIC of the Crimes Act is limited to those laws to the

extent that they relate to persons working or seeking to work with children. ‘Work’ and ‘child’ have the meaning set out in section 85ZZGF.

The amendment replicates the words and intent of the amendment at paragraph 20A(b) (see Item 3, below).

### **Item 3 – After section 20**

This item inserts, after section 20 of the Crimes Regulations, a new section 20A “Exclusions from Division 2 and 3 of Part VIIC of the Act – exclusions relation to work with persons with disability”.

This section lists prescribed persons and bodies and the State or Territory law under which they are required or permitted to be exempt from Divisions 2 and 3 of Part VIIC of the Crimes Act.

The extent to which the laws are prescribed is limited to the extent that the laws are NDIS worker screening laws (within the meaning of the *National Disability Insurance Scheme Act 2013*); and relate to persons working, or seeking to work, with people with disability (within the meaning of section 85ZZGM of the Crimes Act). ‘NDIS worker screening laws’ will be determined, by legislative instrument, under section 10B of the *National Disability Insurance Scheme Act 2013*, which was inserted by the *National Disability Insurance Scheme Amendment (Worker Screening Database) Act 2019*. NDIS worker screening laws are be State or Territory laws, identified with the agreement of the State or Territory, that the relevant Minister is satisfied establish a scheme for the screening of workers for purposes including the NDIS. Determination of NDIS worker screening laws will be necessary before worker screening for the purposes of the NDIS worker screening database may commence.

This section prescribes persons or bodies and laws as in force from time to time. Section 10A of the *Acts Interpretation Act 1901* (as applied by paragraph 13(1)(a) of the *Legislation Act 2003*) has the effect that references to State and Territory acts can also be taken to be references to those Acts as in force from time to time. To the extent that the persons are prescribed by reference to the occupier of an office, for example, Registrar, the reference identifies the persons who for the time being hold or occupy the office, or perform the duties of the office (section 20 of the *Acts Interpretation Act 1901*). The Commonwealth and States and Territories are working closely together to implement worker screening, and any changes to State and Territory laws or prescribed persons or bodies will be known to the Commonwealth, such that the need for any changes to the prescriptions may be considered.

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

The *Crimes Amendment (National Disability Insurance Scheme – Worker Screening) Regulations 2019* (Amendment Regulations) are 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 Amendment Regulations**

The Amendment Regulations will amend the *Crimes Regulations 2019* (Crimes Regulations) to prescribe a person or body in New South Wales, South Australia, Tasmania and the Australian Capital Territory to be authorised to receive, use and disclose spent, pardoned and quashed convictions. The Amendment Regulations will also prescribe the authorising legislation.

This will assist State and Territory worker screening units in determining whether an applicant for an NDIS Worker Screening Check (NDIS Check) poses an unacceptable risk of harm to persons with disability under the National Disability Insurance Scheme (NDIS). The Amendment Regulations aim to uphold the human rights of persons with disability by helping protect them from experiencing harm from the persons working closely with them.

The protection of persons with disability from violence, abuse and neglect is a key priority for all Australian governments. In December 2016, the Council of Australian Governments (COAG) agreed to the NDIS Quality and Safeguarding Framework (the Framework). Nationally consistent NDIS worker screening is a key element of the Framework that will minimise the risk of harm to persons with disability from the persons who work closely with them.

Nationally consistent worker screening has been agreed with States and Territories through the Intergovernmental Agreement on Nationally Consistent Worker Screening for NDIS (Intergovernmental Agreement). The Intergovernmental Agreement sets out the national policy for worker screening and includes the development of a national worker screening database (database) hosted and administered by the Commissioner of the NDIS Quality and Safeguards Commission (Commission). The Amendment Regulations are an important step towards implementing nationally consistent NDIS worker screening and giving effect to the Commonwealth Government's regulatory responsibilities under the Framework.

The Amendment Regulations will enable the use and disclosure of spent, quashed and pardoned conviction information to State and Territory worker screening units for the purposes of NDIS worker screening. It is well documented that reports of abuse and neglect perpetrated against persons with disability may not be pursued for a variety of reasons. This includes difficulties experienced in securing a conviction where the victim is a person with disability, and the challenges faced by persons with disability who are victims of crime. Including this kind of additional information can provide a better indication of risk than criminal convictions alone and will assist worker screening units make a more accurate and informed assessment of the risk that a person may pose to persons with disability in the NDIS.

The Amendment Regulations seek to replicate the arrangements that have been in place for the purposes of the Working With Children Checks regime.

The *Crimes Amendment (National Disability Insurance Scheme – Worker Screening) Act 2018* (the Amending Act) amended the *Crimes Act 1914* (the Act) to permit, in certain circumstances, the spent, pardoned and quashed convictions of persons who work, or seek to work, with persons with disability in the NDIS to be disclosed to, and taken into account by, State and Territory worker screening units in determining whether a person is suitable to work with persons with disability in the NDIS.

To the extent that the Amendment Regulations engage human rights, there are safeguards built in to the Amending Act, as well as the Framework, to ensure that spent, pardoned and quashed conviction information is shared only with prescribed persons or bodies and only for the purposes of the NDIS Check. Further, before a State or Territory worker screening units can be prescribed by the Amendment Regulations to receive and use spent, pardoned and quashed convictions, the Minister needs to be satisfied that the State and Territory worker screening unit:

- is required or permitted by or under a Commonwealth law, a State law or a Territory law to obtain and deal with information about persons who work, or seek to work, with a person with disability;
- complies with applicable Commonwealth law, State law or Territory law relating to privacy, human rights and records management;
- complies with the principle of natural justice; and
- has risk assessment frameworks and appropriately skilled staff to assess risks to the safety of a person with disability.

### **Human rights implications**

Of the human rights and freedoms recognised in the international instruments listed in the definition of human rights at section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*, the Amendment Regulations engage the following rights under international human rights law:

- Rights of persons with disabilities to live free from exploitation, violence and abuse – Article 16 of the *Convention of the Rights of Persons with Disabilities* (CRPD) done at New York, 30 March 2007;
- Right to work – Article 6 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) done at New York, 16 December 1966;
- Presumption of innocence – Article 14(2) of the *International Covenant on Civil and Political Rights* (ICCPR) done at New York, 16 December 1966;
- Right to privacy – Article 17 of the ICCPR; and
- Right to equality and non-discrimination – Articles 2(1) and 26 of the ICCPR.

## Rights of persons with disability – Article 16 of the CRPD

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

A nationally consistent approach to worker screening seeks to minimise the risk of harm caused to persons with disabilities by persons who work closely with them. A nationally consistent and recognised worker screening regime promotes the rights of persons with disability by:

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

The Amendment Regulations support the implementation of nationally consistent worker screening arrangements by prescribing State and Territory worker screening units to be authorised to receive and use spent, pardoned and quashed Commonwealth convictions for the purposes of the NDIS Check. This is consistent with recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse *Working with Children Checks* report (the Report), which aimed to strengthen the protection children receive through the Working with Children Checks regime. The Report indicated an applicant's complete and unabridged criminal history should be available for review by State and Territory worker screening units to enable a thorough risk-based worker screening assessment.

The Amendment Regulations promote the rights of persons with disability consistent with Australia's obligations, by ensuring that a suitable workforce delivers the supports and services provided through the NDIS.

## Right to work – Article 6 of the ICESCR

Article 6 of the ICESCR recognises the right to work and 'includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts'. This right also applies to workers who work with persons with disability, including NDIS participants.

To the extent that the Amendment Regulations engage the right to work they will prescribe worker screening units able to access information about spent, pardoned and quashed convictions, which may be used to inform NDIS providers and prescribed agencies about a person's suitability to hold a NDIS Check clearance. The National Disability Insurance Scheme (Practice Standards – Worker Screening) Rules 2018 require workers in 'risk assessed roles' within registered NDIS providers to hold a current NDIS Check clearance.



Persons may be excluded from holding a NDIS Check clearance if their criminal history information is determined to pose an unacceptable risk of harm to persons with disability. Risk assessed roles are those involving more than incidental contact with a person with disability, key personnel, or roles involving the delivery of supports or services specified by the NDIS Quality and Safeguards Commission.

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

The paramount objective of the Amendment Regulations is to protect persons with disability from experiencing harm arising from unsafe supports or services under the NDIS. Persons with disability have the right to be protected from exploitation, violence and abuse from those who work closely with them and some NDIS participants are amongst the most vulnerable persons in the community.

Full criminal history information is an important and relevant consideration when assessing whether an applicant poses an unacceptable risk of harm to persons with disability. The State and Territory worker screening units to be prescribed in the Amendment Regulations are required to have appropriately skilled staff to assess risks to persons with disability, comply with the principles of natural justice and comply with a nationally consistent risk assessment and decision-making framework, including considerations of the circumstances surrounding any offence. These safeguards will ensure that the outcome of a worker screening assessment has achieved an appropriate balance between a person's right to work and the right persons with disability of protection from experiencing harm.

The Amendment Regulations support a proportionate approach that does not unduly prevent a person from choosing to work in the NDIS market and maintains the rights of persons with disability risk by excluding workers whose behavioural history indicates they pose an unacceptable risk of harm. The Amendment Regulations are compatible with human rights because, to the extent that they may limit a person's right to work, the limitations are reasonable and necessary to achieving the protection of persons with disability and confidence in the safety of the NDIS market.

#### Presumption of innocence – Article 14(2) of the ICCPR

Article 14(2) of the ICCPR provides that a person charged with a criminal offence has the right to be presumed innocent until proven guilty. The Amendment Regulations allow a State and Territory worker screening unit to consider pardoned, quashed or spent convictions in determining whether an applicant poses a risk to persons with disability, and does not override the presumption of innocence. The worker screening unit's only consideration is whether the convictions provided by the Amendment Regulations, along with the rest of a person's criminal history, shows a history of behaviour that results in an unacceptable risk of harm to persons with disability.

### Right to privacy– Article 17 of the ICCPR

Article 17 of the ICCPR provides that no one shall be subjected to arbitrary or unlawful interference with their privacy. The Amendment Regulations engage the right to privacy as they provide access to an applicant’s detailed criminal history information to prescribed State and Territory worker screening units.

The limit on applicants’ right to privacy is legitimately authorised by Subdivision AA of Division 6 of Part VIIC of the Act, which provides for spent, pardoned and quashed conviction information to be disclosed and taken into account in assessing whether a person who works, or seeks to work, with a person with disability, poses a risk to such a person. The State and Territory worker screening units being prescribed by the Amendment Regulations are required to take measures to ensure the appropriate protection and use of the information to be received, and these measures are contained in the prescribed legislation of each jurisdiction. In addition, each worker screening unit being prescribed has its own State or Territory privacy legislation that it must comply with in respect of the collection, use and storage of personal information. Further, applicants for a NDIS Check will be asked for their informed consent, which provides permission to the prescribed worker screening units to access such information as a part of the application process.

The Amendment Regulations are compatible with human rights because, to the extent that they may limit a person’s right to privacy, the limitations are reasonable and necessary to achieving the protection of persons with disability and confidence in the safety of the NDIS market. Further, each worker screening unit must ensure that they have appropriate processes in place to protect the privacy of a person who is applying for the NDIS Check.

### Right to equality and non-discrimination under Article 2(1) and 26 of the ICCPR

Article 2(1) provides that an individual’s rights are respected and recognised in the ICCPR, without distinction of any kind such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Article 26 provides that all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground.

Differential treatment, including the differential effect of a measure that is neutral on its face, will not constitute unlawful discrimination if the differential treatment is rationally connected to the legitimate objective of that measure. Any differential treatment envisaged by the Amendment Regulations is reasonable and proportionate. This is because the legitimate objective of the Amendment Regulations is to protect persons with disability from harm.

Further, there is sufficient research and objective evidence that support the relevance of criminal records as a basis for determining an individual’s risk to vulnerable persons. This, along with the criteria outlined in section 85ZZGL of the Act that must be satisfied before a State and Territory worker screening unit can be prescribed by the Amendment Regulations and key safeguards that are in place ensures that any differential treatment will not constitute unlawful discrimination.

## **Conclusion**

The Amendment Regulations advance the protection of the rights of persons with disability in Australia consistent with the CRPD, particularly in relation to preventing exploitation, violence and abuse in the NDIS sector.

The Amendment Regulations are compatible with human rights because, to the extent that it may limit human rights the limitations are reasonable, necessary and proportionate to achieving the protection of persons with disability and confidence in the safety of the NDIS market.

**The Hon. Christian Porter**

**Attorney-General**