

## **EXPLANATORY STATEMENT**

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

*National Disability Insurance Scheme Act 2013*

Direction to the NDIS Quality and Safeguards Commissioner under section 181K of the *National Disability Insurance Scheme Act 2013* – No. 1/2023

### **Purpose**

The *Direction to the NDIS Quality and Safeguards Commissioner under section 181K of the National Disability Insurance Scheme Act 2013 – No. 1/2023* (Direction) is made under subsection 181K(1) of the *National Disability Insurance Scheme Act 2013* (Act). It provides directions to the NDIS Quality and Safeguards Commissioner (Commissioner) about the performance of their functions and the exercise of their powers to ensure those functions are being performed, and powers are being exercised, in a manner that is aligned with the Government's commitment to upholding the rights of, and promoting the health, safety and wellbeing, of persons with disability.

### **Background**

The Government is committed to ensuring persons with disability in Australia receive supports and services that promote their health and wellbeing without compromising on quality. The safety and welfare of persons with disability is of the utmost importance and needs to be prioritised now, and into the future.

A key part of achieving these commitments is a stronger focus on regulating providers of supports and services, including through nationally consistent and responsive regulation, policy development, advice and education.

The NDIS Quality and Safeguards Commission (Commission) was established in 2018 to oversee and regulate providers of disability supports and services by registered providers in the NDIS. The Government expects the Commission to fully and effectively perform all the functions conferred on the Commissioner under the Act, including taking appropriate corrective action to address the use of a restrictive practice in relation to a person with disability where the use is prohibited by the relevant State or Territory, or where the use is not in accordance with an authorisation (however described) issued under a State or Territory process.

The Final Report from the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (the Royal Commission) states that reform is needed to improve the processes for authorising, reviewing and overseeing restrictive practices. The Royal Commission recommended that the Commission increase the use of its enforcement powers and monitoring tools in relation to NDIS providers that:

- have a history of non-compliance or repeatedly fail to meet their obligations to provide safe, quality supports and services;
- have demonstrated a disregard for the safety of people with disability; and

- have caused serious harm to a person or people with disability.

This direction is consistent with the recommendations of the Royal Commission to continue to act to reduce and eliminate the use of restrictive practices.

The Act bestows certain functions, and powers, on the Commissioner. Under section 181K of the Act, the Minister may give directions to the Commissioner about the performance of their functions and exercise of their powers.

This Direction is the first one made under that section. It is intended to ensure the Commissioner is focused on achieving the Government's overarching commitments to the safety, welfare, and overall wellbeing of people with disability in Australia.

## **Commencement**

The Direction commences on the day after it is registered on the Federal Register of Legislation.

## **Disallowance and sunseting**

A note to subsection 181K(1) of the Act, under which this instrument is made, provides that section 42 (disallowance) and Part 4 of Chapter 3 (sunseting) of the *Legislation Act 2003* (Legislation Act) do not apply (with reference to the regulations made for the purpose of paragraphs 44(2)(b) and 54(2)(b) of that Act).

The *Legislation (Exemptions and Other Matters) Regulation 2015* (Regulation) is made for the purpose of paragraphs 44(2)(b) and 54(2)(b) of the Legislation Act. It relevantly specifies classes of instruments that are exempt from disallowance and sunseting.

The Regulation provides that instruments that are a direction by a Minister to any person or body are exempt from both disallowance (see item 2 of the table 2 to section 9) and sunseting (see item 3 of the table to section 11). This exemption was justified in the explanatory statement to the Regulation in the following terms:

This exemption [from disallowance] recognises that executive control is intended in these instances.

...

Sunseting is not appropriate for such directions which are intended to remain in place until revoked by the relevant Minister.

This instrument falls within the class identified by the Regulation as being exempt from disallowance and sunseting.

The exemption from disallowance is appropriate, given the nature of the instrument is procedural and it relates to the specific performance of the Commissioner's role and the day-to-day operation of the Commission more broadly. It does not adversely affect rights, liberties, duties and obligations of the Australian public nor does it create or amend any substantive law. Rather, the direction provides specific action items to ensure the Commissioner's focus aligns with the focus of the Minister, and

the Government, in the way that functions are performed and powers are exercised under the Act. In that sense, the instrument is intended to be an exercise of executive control (albeit in the form of a legislative instrument) that compliments the overarching legislative objects and purpose underpinning the NDIS and the Commission.

The exemption from sunseting is appropriate for the same reasons. It will ensure that the instrument can remain in force until it is no longer appropriate or required. At that time, which may be earlier or later than the sunseting regime would repeal the instrument, it can be repealed by the Minister. This is consistent with the nature of the instrument.

## **Consultation**

The Commissioner and the Chief Executive Officer of the National Disability Insurance Agency were advised of the intention to make this direction. This consultation is considered appropriate given that the primary impact is on the work of the Commissioner and the Commission.

## **Impact analysis**

The Office of Impact Analysis has advised a detailed Impact Analysis is not required for this instrument (OIA23-05815).

## **Explanation of the provisions**

**Section 1** provides that the name of the Direction is the *Direction to the NDIS Quality and Safeguards Commissioner under section 181K of the National Disability Insurance Scheme Act 2013 –No. 1/2023*.

**Section 2** provides that the Direction commences on the day after it is registered on the Federal Register of Legislation.

**Section 3** provides that the Direction is made under subsection 181K(1) of the Act. Subsection 181K(1) of the Act provides that the Minister may give directions to the Commissioner about the performance of their functions and exercise of their powers.

**Section 4** defines terms used in the Direction. These definitions also appear in the Act, but have been reproduced in the Direction for the reader's convenience.

**Section 5** provides that directions given to the Commissioner are set out in Schedule 1 to the Direction.

## **Schedule 1**

Schedule 1 contains the directions given to the Commissioner about the performance of their functions and the exercise of their powers.

**Section 1** provides that the Commissioner must review and/or develop certain policies and procedures. Specifically, under subsection 1(1), the Commissioner is directed to ensure the Commission has policies and procedures in place that require its staff to take timely, firm and appropriate compliance and enforcement action against NDIS providers who fail to comply with applicable requirements under the Act concerning the use of restrictive practices in relation to a person with disability.

Subsection 1(2) provides that the Commissioner may comply with subsection (1) by doing one or both of the following:

- (a) reviewing, updating and implementing existing policies and procedures;
- (b) developing and implementing new policies and procedures.

This means that the Commissioner is not required to develop new policies and procedures where those policies and procedures already exist, but ensures those policies will be reviewed and updated to align with the objectives of this Direction. It also requires the Commissioner to ensure there are no gaps in the existing policies and procedures by requiring new policies and procedures to be developed if they do not already exist.

**Section 2** describes the content of policies and procedures for the purpose of the direction. Specifically, it provides that the policies and procedures mentioned in section 1 must include:

- (a) procedures that require staff of the Commission to:
  - (i) make timely, appropriate and reasonable use of all available powers under the Act, including, but not limited to, making banning orders, suspending and revoking registration of providers and pursuing civil penalties, and referring appropriate matters to the police for investigation of potential breaches of criminal law;
  - (ii) swiftly responding to complaints and notifications of reportable incidents concerning the use of restrictive practices and conducting timely and appropriate investigations into the issues raised;
  - (iii) work collaboratively with the Agency to ensure the safety of people with a disability by sharing information (as permitted by law); and
  - (iv) actively monitor registered NDIS providers' compliance with the conditions of registration relating to behaviour support plans and restrictive practices;

- (b) service standards setting out timeframes within which the Commission aims to respond to complaints and notifications of reportable incidents;
- (c) a procedure to support the timely and efficient collection, analysis, and dissemination of information relating to the use of behaviour supports and restrictive practices by NDIS providers, to the extent that the law permits such information to be collected, analysed and disseminated.

**Section 3** directs the Commissioner to ensure that all policies and procedures in place under section 1 are published on the Commission's website as soon as practicable after coming into effect. This is to provide maximum transparency in relation to the Commission's operations.

**Section 4** applies if the Minister issues a Statement of Expectations to the Commissioner. It directs the Commissioner to respond within 28 days of the date of that statement by providing to the Minister a Statement of Intent detailing how the Commissioner intends to meet the Minister's expectations.

Ministerial Statements of Expectations are issued by the responsible Minister to a regulator to provide greater clarity about government policies and objectives relevant to the regulator in line with its statutory objectives, and the priorities the Minister expects it to observe in conducting its operations.

A Regulator Statement of Intent responds to the expectations set out in a Ministerial Statement of Expectations. It outlines how the regulator intends to meet those expectations including how it will demonstrate progress. The Statement of Intent can be broader in scope than the expectations set out in the Statement of Expectations, and offers an avenue to highlight any emerging risks or operational issues relevant to the delivery of the regulator's functions. Statements of Intent generally should:

- in responding to the Statement of Expectations, provide the regulator's perspective on its purpose, strategic direction and delivery of statutory objectives
- articulate how the regulator intends to deliver against the Minister's expectations set out in the Statement of Expectations in practical terms, including possible internal initiatives or structures, changes in systems or governance, efforts to build staff capacity and foster an organisational culture that supports regulator best practice
- outline how the regulator intends to engage with regulated entities, other regulators and other stakeholders
- outline how the regulator intends to engage with policy departments and the Minister at a high level, how progress against meeting the Minister's expectations will be measured and reported on by the regulator

The Minister's Statement of Expectations and Commissioner's Statement of Intent can be found on the Commission's website:

<https://www.ndiscommission.gov.au/about/corporate-documents>.

**Section 5** directs the Commissioner to comply with certain reporting requirements.

Subsection 5(1) directs the Commissioner to provide a report to the Minister by 31 October 2023 and every three months thereafter, outlining the steps they have taken to implement the direction. Each due date for a report is referred to as 'the reporting date'.

Subsection 5(2) provides that a report given under subsection 1 must contain information about implementation and compliance with the policies and procedures mentioned in section 1. This ensures transparency and accountability in how the Commission undertakes its functions.

Subsection 5(3) provides that a report given under subsection 1 must contain a summary of all compliance and enforcement action taken during the three-month period ending one month prior to the reporting date. This timeframe will allow the Commissioner to collate all relevant information into an appropriate format to provide to the Minister.

Specifically, a report given under subsection 5(1) must contain information about the following:

- (a) the number and kinds of compliance and enforcement actions taken
- (b) in relation to actions in response or related to a complaint received by the Commission, the average time between the receipt of a complaint and any compliance or enforcement action
- (c) in relation to actions in response or related to a reportable incident notified to the Commission, the average time between the notification of a reportable incident and any compliance or enforcement action.

Compliance and enforcement action includes all infringement notices, compliance notices, enforceable undertakings, civil penalties, revoking or suspending registration and banning orders. The Commission can also exercise powers under the *Commonwealth Regulatory Powers (Standard Provisions) Act 2014* including entering premises, securing evidence and compelling the production of information.

Subsection 5(4) applies if the Commissioner has provided a Statement of Intent to the Minister, whether under section 4 of this Direction or otherwise. If a Statement of Intent has been provided, the Commission is directed to provide a report to the Minister addressing their progress against the intended actions on the reporting date (that is on 31 October 2023 and ever three months thereafter).

This direction ensures ongoing accountability and transparency in how the Commissioner is achieving their stated objectives.

The report addressing progress against the Statement of Intent does not need to be provided in the same document as the report required by subsection 5(1).

## Statement of Compatibility with Human Rights

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

### **Direction to the NDIS Quality and Safeguards Commissioner under section 181K of the *National Disability Insurance Scheme Act 2013 –No. 1/2023***

This direction 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 *Direction to the NDIS Quality and Safeguards Commissioner under section 181K of the National Disability Insurance Scheme Act 2013 –No. 1/2023* sets out directions to the NDIS Quality and Safeguards Commissioner (the Commissioner) about the performance of their functions and the exercise of their powers.

The instrument directs the Commissioner to have policies and procedures in place that require staff of the NDIS Quality and Safeguard Commission (the Commission) to:

- take timely, firm and appropriate compliance and enforcement action against NDIS providers who fail to comply with applicable requirements under the *NDIS Act 2013* (the Act) concerning the use of restrictive practices in relation to a person with disability
- swiftly respond to complaints and notifications of reportable incidents concerning the use of restrictive practices
- work collaboratively by sharing information with the National Disability Insurance Agency and
- activity monitor registered NDIS providers' compliance with the conditions of registration relating to behaviour support plans and restrictive practices.

The policies and procedures must also include service standards setting out timeframes for the Commission to respond to complaints and notifications of reportable incidents, and a procedure to support the timely and efficient collection, analysis, and dissemination of accurate information relating to the use of behaviour supports and restrictive practices by NDIS providers.

The updated and/or new policies and procedures must be published on the Commission's website.

The direction also specifies that the Commissioner must report to the Minister on a quarterly basis on steps taken to implement this direction.

#### **Background**

The Commissioner's behaviour support function in section 181H of the Act is to provide leadership in relation to behaviour support, and in the reduction and elimination of the use of restrictive practices, by NDIS providers, including by:

- developing policy and guidance materials in relation to behaviour supports and the reduction and elimination of the use of restrictive practices by NDIS providers; and

- overseeing the use of behaviour support and restrictive practices by:
  - monitoring registered NDIS provider compliance with the conditions of registration relating to behaviour support plans; and
  - collecting, analysing and disseminating data and other information relating to the use of behaviour supports and restrictive practices by NDIS providers.

‘Restrictive practice’ means any practice or intervention that has the effect of restricting the rights or freedom of movement of a person with disability (section 9 of the Act). The Act and this direction only applies to specified kinds of restrictive practices, defined as regulated restrictive practices under section 6 of the *National Disability Insurance Scheme (Restrictive Practices and Behaviour Support) Rules 2018*.

Reducing and eliminating the use of restrictive practices is consistent with the *Convention on the Rights of Persons with Disabilities* (CRPD).

The Final Report from the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (the Royal Commission) states that reform is needed to improve the processes for authorising, reviewing and overseeing restrictive practices. The Royal Commission recommended that state and territory governments ensure appropriate legal frameworks are in place, including in disability settings that provide that a person with disability should not be subjected to restrictive practices, except in accordance with procedures for authorisation, review and oversight established by law.

The Royal Commission recommended that the Commission increase the use of its enforcement powers and monitoring tools in relation to NDIS providers that:

- have a history of non-compliance or repeatedly fail to meet their obligations to provide safe, quality supports and services;
- have demonstrated a disregard for the safety of people with disability; and
- have caused serious harm to a person or people with disability.

This direction is consistent with the recommendations of the Royal Commission to continue to act to reduce and eliminate the use of restrictive practices.

### **Human rights implications**

This legislative instrument engages with the following human rights:

- the right to freedom from exploitation, violence and abuse – Article 16 of the CRPD
- the right to liberty and security of the person – Article 14 of the CRPD
- the right to privacy – Article 22 of the CRPD

#### **Right to freedom from exploitation, violence and abuse**

Article 16 of the CRPD provides that all States Parties shall take all appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities from all forms of exploitation, violence and abuse. In order to prevent the occurrence of all forms of exploitation, violence and abuse, States Parties are required to ensure that all facilities and programmes designed to serve persons with disabilities are effectively monitored by independent authorities.



This instrument furthers this right by helping to reduce the risk of harm to persons with disability through directions to the Commissioner, requiring them to make timely, appropriate and reasonable use of all available powers under the Act, including, but not limited to, making banning orders, suspending and revoking registration of providers and pursuing civil penalties, and referring appropriate matters to the police for investigation of potential breaches of criminal law.

Further, the instrument directs the Commissioner to provide regular reports to the Minister on enforcement and compliance action taking, which will enhance accountability in ensuring that the Commissioner is taking appropriate and timely action regulatory action.

### Right to liberty and security of the person

Article 14 of the CRPD provides that States Parties must ensure that people with disability, on an equal basis with others, are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty.

This instrument directs the Commissioner to put in place procedures requiring staff of the Commission to swiftly respond to complaints and notifications of reportable incidents concerning the use of restrictive practices and conduct timely and appropriate investigations into the issues raised. Procedures must also require staff to actively monitor registered NDIS providers' compliance with the conditions of registration relating to behaviour support plans and restrictive practices.

These directions further the right of people with disability to liberty and the security of the person by enhancing monitoring and enforcement of the use of restrictive practices, to the extent permitted by law. The directions to the Commissioner take into account the fact that States and Territories are primarily responsible for regulating the use of restrictive practices.

### Right to privacy

Article 22 of the CRPD provides that no person with disability shall be subjected to arbitrary or unlawful interference with his or her privacy.

This instrument takes account of this right by noting that the collection, analysis, dissemination and sharing of information must only be done in accordance with the law, including the *Privacy Act 1986* and the secrecy provisions contained in the Act.

### **Conclusion**

This legislative instrument is compatible with human rights because it advances the protection of the rights of persons with disability in Australia consistent with the CRPD.