

NORTHERN TERRITORY OF AUSTRALIA

NATIONAL DISABILITY INSURANCE SCHEME (WORKER CLEARANCE)  
ACT 2020

As in force at 1 July 2020

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# NORTHERN TERRITORY OF AUSTRALIA

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As in force at 1 July 2020

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## NATIONAL DISABILITY INSURANCE SCHEME (WORKER CLEARANCE) ACT 2020

**An Act to provide for clearance for people providing support and services to participants in the National Disability Insurance Scheme and for related purposes**

### **Part 1                      Preliminary matters**

#### **1                      Short title**

This Act may be cited as the *National Disability Insurance Scheme (Worker Clearance) Act 2020*.

#### **2                      Commencement**

This Act commences on the day fixed by the Administrator by *Gazette* notice.

#### **3                      Objects of Act**

The objects of this Act are to provide for screening checks intended to protect participants from harm arising from poor quality or unsafe supports or services under the NDIS by:

- (a) demonstrating that the rights of participants to be safe and protected are a high community priority; and
- (b) reducing the potential for providers of NDIS funded supports and services to engage individuals who pose an unacceptable risk of harm to participants; and
- (c) prohibiting individuals who have a history of harm against participants from having more than incidental contact with participants when working for a provider of NDIS funded supports and services; and
- (d) deterring individuals who pose an unacceptable risk of harm to participants from seeking NDIS work.

#### **4 Principles guiding screening checks**

Screening checks are to be guided by the following principles:

- (a) human rights – the paramount consideration is the right of participants to live their lives free from abuse, violence, neglect and exploitation, consistent with the United Nations Convention on the Rights of Persons with Disabilities;
- (b) duty of care – providers of NDIS funded supports and services have the primary responsibility for ensuring that they do not engage unsuitable people and that their employees are not acting or behaving in any way that puts participants at risk of harm;
- (c) screening is risk-based – decisions are made based on the potential risk an individual poses to participants after assessing the details of a range of relevant information;
- (d) proportionality – only employees whose role provides a significant opportunity for harm to participants are required to undergo screening;
- (e) consistency – ensuring the screening check delivers the same outcome, regardless of the jurisdiction in which the assessment was conducted;
- (f) privacy and appropriate use of information – information about an individual, obtained in the course of conducting screening checks, is not used for an improper purpose and is protected from inappropriate disclosure;
- (g) natural justice – procedural fairness and transparency, ensuring screening check processes are independent and fair;
- (h) efficiency and effectiveness – streamlined screening processes for employees of providers of NDIS funded supports and services who operate across jurisdictions, with a single screening process for all employees.

#### **5 Act binds Crown**

This Act binds the Crown in right of the Territory and, to the extent the legislative power of the Legislative Assembly permits, the Crown in all its other capacities.

## 6 Application of Act

This Act applies to and in relation to a person who, under Part 2 of the *National Disability Insurance Scheme (Practice Standards – Worker Screening) Rules 2018* (Cth), is required to have an NDIS worker clearance.

*Note for section 6*

*Rule 14(c) of the National Disability Insurance Scheme (Practice Standards – Worker Screening) Rules 2018 (Cth) provides that a person is not required to have a clearance if the person is:*

- (a) a secondary school student on a formal work experience placement with a registered NDIS provider; and
- (b) directly supervised by a worker of the provider who has a clearance.

## 7 Interpretation

(1) In this Act:

**adult** means a person who is 18 years of age or older.

**affected person**, see section 42(2).

**applicant** means an applicant for a screening check under this Act.

**approved form** means a form approved under section 57.

**authorised person** means the following:

- (a) the Screening Agency;
- (b) an organisation or body performing screening checks in a State or another Territory;
- (c) a person performing functions or exercising powers under this Act or a corresponding law;
- (d) the NDIS Commission;
- (e) a law enforcement agency of the Territory or another jurisdiction, including outside of Australia;
- (f) any other person, organisation or body prescribed by regulation.

**authorised purpose**, see section 45.

**CEO** means the Chief Executive Officer of the Agency administering this Act.

**child** means a person who is under 18 years of age.

**clearance** means an NDIS worker clearance granted by the Screening Agency for a person to engage in NDIS work for a registered NDIS provider or an NDIS provider.

**clearance holder** means a person who holds a clearance under this Act or a corresponding law to engage in NDIS work.

**corresponding law** is a law of a State or another Territory that corresponds with this Act and includes a law that is prescribed by regulation as a corresponding law.

**criminal intelligence**, see section 6 of the *Serious Crime Control Act 2009*.

**decision notice**, for a decision, means a written notice setting out:

- (a) the decision and the reasons for it; and
- (b) any right the person to whom the notice is to be given has, under this Act or another Act, to apply for a review of, or to appeal, the decision.

*Note for definition decision notice*

*The Northern Territory Civil and Administrative Tribunal Act 2014 sets out the requirements of a decision maker after the decision maker has made an NTCAT reviewable decision under this Act.*

**disqualified person** means a person who, as an adult, committed a disqualifying offence.

**disqualifying offence** means an offence prescribed by regulation as a disqualifying offence.

**engage**, in relation to a person, means in any of the following capacities:

- (a) as a paid or unpaid employee;
- (b) as a self-employed person or a contractor or subcontractor;
- (c) as a volunteer.

**excluded**, in relation to a person, see section 29.

**interim bar**, see rule 5 of the *National Disability Insurance Scheme (Practice Standards – Worker Screening) Rules 2018* (Cth).

**more than incidental contact**, see section 8.

**NDIS Act** means the *National Disability Insurance Act 2013* (Cth) and includes the rules under that Act.



**NDIS Code of Conduct** means the *National Disability Insurance Scheme (Code of Conduct) Rules 2018* made under the NDIS Act.

**NDIS Commission** means the NDIS Quality and Safeguards Commission established under the NDIS Act.

**NDIS provider** means a provider of NDIS funded supports and services under the NDIS Act.

**NDIS work**, see section 9.

**non-conviction charge** means proceedings that have been commenced against a person as an adult or a child in relation to a charge, but were not finally determined because the proceedings were discontinued.

*Examples for definition non-conviction charge*

*Examples for a non-conviction charge include the following proceedings:*

- (a) a proceeding that was withdrawn;
- (b) a proceeding that was the subject of a *nolle prosequi*, a *no true bill* or a submission of no evidence to offer;
- (c) a proceeding that led to a conviction that was quashed on appeal or on which a person was acquitted or disposed of by a court otherwise than by way of conviction.

**NTCAT reviewable decision**, see section 43(1).

**ongoing monitoring**, see section 27.

**participant**, see section 9 of the NDIS Act.

**pending charge** means a current charge for a criminal offence that has not yet been determined, whether the person is being dealt with as an adult or a child.

**presumed disqualifying offence** means an offence prescribed by regulation as a presumed disqualifying offence.

**presumed disqualified person**, see section 10.

**registered NDIS provider** means a provider of NDIS funded supports and services registered under the NDIS Act.

**reviewable decision**, see section 42(1).

**risk assessed role**, see section 11.

**risk assessment**, see section 34.

**Screening Agency** means the entity declared by the Minister under section 13.

**screening check** means an NDIS worker screening check undertaken by the Screening Agency to assess whether an applicant is eligible to hold a clearance.

**spent conviction** means a conviction which, in accordance with the *Criminal Records (Spent Convictions) Act 1992*, no longer forms part of a person's criminal history.

**Tribunal affected person**, see section 43(2).

**volunteer**, see section 12.

*Note for subsection (1)*

*The Interpretation Act 1978 contains definitions and other provisions that may be relevant to this Act.*

- (2) A term defined in the NDIS Act has the same meaning in this Act unless separately defined for this Act.

## 8 **Meaning of *more than incidental contact***

- (1) Without limiting what may constitute ***more than incidental contact***, the normal duties of a role are likely to require more than incidental contact with a participant if those duties include:
- (a) physically touching a participant; or
  - (b) building a rapport with a participant as an integral and ordinary part of the performance of those duties; or
  - (c) having contact with multiple participants:
    - (i) as part of the direct delivery of a specialist disability support or service; or
    - (ii) in a specialist disability accommodation setting.

*Examples for subsection (1)*

- 1 *The role of an employee involves the delivery of mobility equipment to the homes of participants. As a standard part of that role, the employee provides training and instructions to the participant about how to use the equipment safely and makes adjustments to the equipment to make it suitable for the participant. This role is likely to require more than incidental contact. This is because there is "contact" with the participant. The ordinary content of that contact (testing the participant's needs and preferences with them, talking about and responding to the nature of their disability) means that there is a level of openness and trust required on the part of the participant which would routinely involve the employee building a level of rapport with them.*

2 *An accountant works for a business that supplies custom prosthetics to participants, and performs only "back office" duties. The accountant has coincidental contact with participants many work days, when moving through public areas of the business, at which time the accountant nods and says hello to the customers. The accountant's role does not involve more than incidental contact with participants. This is because the duties of the role do not require the accountant to have more than polite, functional contact with participants, or get to know them in any way.*

(2) In this section:

**contact** includes physical contact, face-to-face contact, oral communication, written communication and electronic communication.

## 9 **Meaning of *NDIS work***

(1) ***NDIS work*** means work comprising, or in connection with, the provision of supports or services by registered NDIS providers or NDIS providers to participants.

(2) In this section:

**work** means work:

- (a) that is the subject of requirements under the NDIS Act for a person to hold a clearance under this Act or a corresponding law in order to be allowed by a registered NDIS provider or NDIS provider to engage in that work; or
- (b) that the Screening Agency is satisfied is work in respect of which it is otherwise necessary or convenient for a person to hold a clearance to facilitate the person's engagement in that work.

## 10 **Meaning of *presumed disqualified person***

(1) A person who, as an adult, committed a presumed disqualifying offence is a ***presumed disqualified person***.

(2) A person who is the subject of pending criminal proceedings for a disqualifying offence or a presumed disqualifying offence, allegedly committed as an adult, is also a ***presumed disqualified person***.

(3) A presumed disqualified person must be refused a clearance unless there are exceptional circumstances.

## 11 **Meaning of *risk assessed role***

(1) A ***risk assessed role*** is:

- (a) a key personnel role of a person or an entity; or

- (b) a role for which the normal duties include the direct delivery of specified supports or specified services to a participant; or
  - (c) a role for which the normal duties are likely to require more than incidental contact with a participant.
- (2) A registered NDIS provider must:
- (a) assess all roles in which the provider's employees and other personnel will engage; and
  - (b) identify each one that is a risk assessed role.
- (3) An NDIS provider may:
- (a) assess all roles in which the provider's employees and other personnel will engage; and
  - (b) identify each one that is a risk assessed role.
- (4) A role is a role with a particular registered NDIS provider or NDIS provider, whether the duties of the role are performed by an employee or other personnel.

## 12 **Meaning of *volunteer***

- (1) A person is a ***volunteer*** if the person:
- (a) may be engaged by another person to do NDIS work as a volunteer; or
  - (b) may do NDIS work as a volunteer on the person's own account.
- (2) A person mentioned in subsection (1)(b) is taken to be a self-employed person who engages themselves as a volunteer.

## 13 **Screening Agency**

The Minister may, by *Gazette* notice, declare an entity to be the Screening Agency.

## **14 Application of Criminal Code**

Part IIAA of the Criminal Code applies to an offence against this Act.

*Note for section 14*

*Part IIAA of the Criminal Code states the general principles of criminal responsibility, establishes general defences, and deals with burden of proof. It also defines, or elaborates on, certain concepts commonly used in the creation of offences.*

## **Part 2 NDIS worker clearance**

### **Division 1 Acceptance of applications**

#### **15 Acceptance date for application for screening check**

- (1) An application for a screening check may be made at any time after the commencement of this section.
- (2) However, an application that is made before the application acceptance date (the **acceptance date**) is taken to have been made on the acceptance date.
- (3) The CEO must, by *Gazette* notice, give notice of the acceptance date.

#### **16 Persons ineligible to apply for screening check**

- (1) A person cannot apply for a screening check if:
  - (a) the person has had a clearance refused or cancelled under this Act or a corresponding law because the person is a disqualified person; or
  - (b) the person has made an application for a screening check under this Act or a corresponding law and that application is pending (whether or not the application is subject to an interim bar); or
  - (c) the person currently holds a clearance under this Act or a corresponding law, unless the application is made no more than 3 months before the expiry of the current clearance; or
  - (d) the person is subject to a prohibition for 5 years from applying for a screening check following refusal or cancellation of a clearance.

*Note for subsection (1)(d)*

*Division 5 applies in relation to a prohibition.*

- (2) An application made in contravention of subsection (1) is not a valid application and must be rejected.

## **Division 2            Requirements for application**

### **17            Application for screening check**

- (1) An application for a screening check must be made to the Screening Agency in the approved form.
- (2) The application must:
- (a) include the prescribed information; and
  - (b) include the prescribed proof of identity; and
  - (c) be accompanied by the prescribed fee.
- (3) The Screening Agency may, by written notice, request from an applicant further information relevant to the determination of the application.
- (4) If the applicant fails to provide information requested under subsection (3) within the time prescribed by regulation, the application is taken to be discontinued.

### **18            Applicant to give consent**

- (1) An applicant for a screening check must consent:
- (a) to the Screening Agency seeking information from law enforcement agencies, the NDIS Commission and other prescribed organisations; and
  - (b) for those bodies to provide information relevant to the determination of the application to the Screening Agency.
- (2) The applicant must also consent to:
- (a) the result of the screening check in relation to the applicant being disclosed to the applicant's current and prospective employers, the NDIS Commission and screening authorities of other States or another Territory; and
  - (b) relevant information (including the result of the screening check in relation to the applicant) being entered in a database for clearances for the NDIS; and

- (c) if a clearance is granted – ongoing monitoring for the duration of the clearance of the applicant's eligibility to maintain the clearance; and
  - (d) the sharing of information relating to the applicant between law enforcement agencies and the NDIS Commission for screening processes for working with vulnerable people.
- (3) The applicant may consent to a secondary use of de-identified information for research purposes or compilation of statistics for use in workforce development, service improvement and quality and safety improvements.

*Note for subsection (3)*

*See IPP2 in the Information Act 2002.*

## **19            Disclosures**

An application for clearance must disclose each of the following that applies to or in relation to the applicant:

- (a) whether the applicant has been refused a clearance or has been unsuccessful in other working with vulnerable persons screening in Australia or internationally;
- (b) any international criminal history;
- (c) information about domestic violence orders or child protection orders;
- (d) any workplace misconduct findings;
- (e) any other matter the applicant considers relevant to the application.

## **20            Employer verification**

- (1) A screening check is required to be performed in relation to a person who is engaged by, or to be engaged by, a registered NDIS provider.
- (2) However, a screening check may also be performed in relation to a person who is:
  - (a) engaged by, or to be engaged by, an NDIS provider; or
  - (b) a self-employed person who engages in NDIS work.

- (3) For an application for a screening check to be processed, a registered NDIS provider or an NDIS provider must verify that the applicant is, or will be, engaged in NDIS work.
- (4) If an applicant's nominated registered NDIS provider or NDIS provider does not, within the timeframe required by the Screening Agency, verify that the applicant is engaged by, or to be engaged by, the registered NDIS provider or NDIS provider in NDIS work, the application is discontinued.

### **Division 3 Assessment of application**

#### **21 Eligibility to work while application assessed**

- (1) Subject to subsections (2) and (3), an applicant may engage in NDIS work once the applicant has submitted an application for a screening check.
- (2) For an applicant to begin NDIS work while the applicant's application is pending, the following conditions must have been met:
  - (a) the application must be complete in accordance with the requirements of this Act;
  - (b) the application must not have been discontinued or been withdrawn;
  - (c) the applicant must not have previously been refused a clearance under a screening check or had the applicant's clearance cancelled;
  - (d) the applicant must not be the subject of an interim bar;
  - (e) the applicant's employer must have agreed the applicant can work while the applicant's application is being assessed;
  - (f) the applicant's employer must have put in place risk management strategies;
  - (g) the applicant's employer must have arranged for the applicant to be supervised by another person who has a clearance.

*Note for subsection (2)(d)*

*See section 31 in relation to an interim bar.*

- (3) An applicant must not begin NDIS work under subsection (1) if the applicant's application for a screening check was made in a jurisdiction that does not allow an applicant to engage in NDIS work while the applicant's application is being determined.



## **22 Assessment of application**

- (1) The Screening Agency must assess an application for a screening check received under section 17.
- (2) In making an assessment for an application under subsection (1), the Screening Agency must:
  - (a) conduct a criminal history information check in relation to the applicant; and
  - (b) assess any disciplinary and misconduct information about the applicant supplied by the NDIS Commission to the Screening Agency, including:
    - (i) any adverse and substantiated findings of a formal investigation; and
    - (ii) any adverse actions by the NDIS Commission; and
  - (c) assess the outcomes of previous screening checks in relation to the applicant.

*Example for subsection (2)(b)(i)*

*A reportable incident notification, complaint or breach of the NDIS Code of Conduct.*

*Example for subsection (2)(b)(ii)*

*Banning orders.*

- (3) In making an assessment for an application under subsection (1), the Screening Agency may take into account the following:
  - (a) additional information held by law enforcement agencies about the circumstances of an offence or alleged offence if available;
  - (b) any other information relevant to determining an applicant's eligibility for a clearance, including information obtained through self-disclosure.
- (4) Information mentioned in subsection (3)(b) includes, but is not limited to, the following:
  - (a) international criminal history;
  - (b) domestic violence and child protection orders relating to the applicant;

- (c) information about any previous working with children checks, working with vulnerable persons checks or other worker screening processes the applicant has undergone;
- (d) information from any reportable or notifiable conduct schemes, such as from the Ombudsman or any professional complaints bodies or associations;
- (e) employer or other professional records or information about the applicant, including professional references;
- (f) courts and tribunals records.

### **23 Determination of application**

- (1) Unless an application is discontinued or is withdrawn, the Screening Agency must decide:
  - (a) to grant clearance to an applicant; or
  - (b) to refuse clearance to an applicant; or
  - (c) to impose an interim bar on the applicant.
- (2) The Screening Agency must refuse clearance to an applicant:
  - (a) if the applicant is a disqualified person; or
  - (b) if, after the assessment of the application under section 22, the Screening Agency determines that the applicant poses an unacceptable risk of harm to participants.
- (3) The Screening Agency may refuse clearance if the Screening Agency is not satisfied that the applicant is or will be engaged to do NDIS work.

*Note for subsections (2) and (3)*

*Division 5 applies if an applicant's clearance is refused.*

- (4) The Screening Agency must:
  - (a) notify an applicant, in writing, if the Screening Agency refuses clearance to the applicant; and
  - (b) notify the NDIS Commission if a clearance is refused to an applicant.

## **Division 4            Clearance granted**

### **24            Clearance granted**

- (1) The Screening Agency may grant clearance to an applicant:
- (a) who has not previously been refused clearance; and
  - (b) does not have a relevant criminal history or disciplinary or misconduct record; and
  - (c) if no issues arise through self-disclosure or any relevant and assessable records.

*Note for subsection (1)*

*A clearance may also be granted after a risk assessment of the applicant under section 37(1)(a)(i).*

- (2) A clearance, once granted, is portable across roles and employers within the NDIS.
- (3) The Screening Agency must:
- (a) notify an applicant, in writing, if the Screening Agency grants the applicant a clearance; and
  - (b) notify the NDIS Commission if a clearance is granted to an applicant.

### **25            Duration of clearance**

A clearance remains in force for 5 years from the date of the clearance unless earlier surrendered, suspended or cancelled.

### **26            Cancellation of clearance**

- (1) The Screening Agency may, without proceeding to a risk assessment, cancel a person's clearance if:
- (a) the clearance was granted as a result of an invalid application; or
  - (b) the clearance was granted by mistake and should not have been granted; or
  - (c) the Screening Agency is no longer satisfied that the person is or will be engaged to do NDIS work.

- (2) The Screening Agency must:
- (a) notify a person, in writing, if the Screening Agency cancels the person's clearance; and
  - (b) notify the NDIS Commission if a person's clearance is cancelled.

*Note for section 26*

*Division 5 applies if a person's clearance has been cancelled.*

## **27 Ongoing monitoring**

- (1) A clearance holder is subject to **ongoing monitoring** by the Screening Agency of the following:
- (a) relevant criminal charges brought against the clearance holder;
  - (b) NDIS Commission records;
  - (c) other information the Screening Agency considers relevant.
- (2) The Screening Agency may, as a result of monitoring as mentioned in subsection (1):
- (a) suspend a person's clearance; or
  - (b) cancel a person's clearance.
- (3) The Screening Agency must cancel a person's clearance if the person is a disqualified person.
- (4) The Screening Agency must notify the NDIS Commission if a person's clearance is suspended or cancelled.

*Notes for section 27*

*1 Division 5 applies if a person's clearance is cancelled.*

*2 Division 6 applies if a person's clearance is suspended.*

## **Division 5 Clearance refused or cancelled**

### **28 Application of Division**

This Division applies if the Screening Agency, in relation to a person:

- (a) decides to refuse clearance to an applicant under section 23(1)(b); or

- (b) decides to cancel the person's clearance under section 26(1); or
- (c) decides to cancel the person's clearance under section 27(2)(b); or
- (d) decides to refuse clearance to an applicant after conducting a risk assessment under section 39(1)(a); or
- (e) decides to cancel the person's clearance after conducting a risk assessment under section 39(1)(b); or
- (f) is advised that the person has had clearance refused or cancelled under a corresponding law.

## 29        **Excluded persons**

- (1) A person mentioned in section 28 is **excluded** from NDIS work.
- (2) Excluded persons are prohibited from engaging in NDIS work and delivering non-specified supports and services entailing more than incidental contact with a participant, as a registered NDIS provider or an NDIS provider or as a person employed by a registered NDIS provider or an NDIS provider.

*Note for subsection (2)*

*Excluded persons are also required under the NDIS Code of Conduct to disclose the outcome of the person's screening check to any person or provider to whom they are providing supports or services under the NDIS.*

- (3) An excluded person (except a person mentioned in section 26(1)(c)) may not reapply for a screening check for a period of 5 years after the date of the decision.

*Note for subsection (3)*

*If the reason the person's clearance was refused or cancelled is because the person is a disqualified person, the person will not be subject to the prohibition. A disqualified person is permanently disqualified from reapplying for a clearance under section 16(1)(a).*

- (4) The effect of the prohibition is that the person is prohibited for 5 years from the date of the refusal or cancellation from reapplying for a screening check, unless:
  - (a) there has been a relevant change of circumstances in relation to the reason for the prohibition; or
  - (b) there are other exceptional circumstances that the Screening Agency considers would allow for reconsideration of the prohibition.

(5) In this section:

**relevant change of circumstances** means one or more of the following:

- (a) proceedings for an offence on which the refusal or cancellation was based are withdrawn or dealt with without the person being found guilty of the offence;
- (b) a finding of guilt for an offence on which the refusal or cancellation was based is quashed or set aside;
- (c) if the refusal or cancellation was based on a risk assessment – a finding that was the subject of the risk assessment is quashed or set aside or otherwise expressly or impliedly ceases to have effect;
- (d) any other change of circumstances that the Screening Agency considers should result in the person being permitted to make an application.

## **Division 6 Interim bar or suspension**

### **30 Application of Division**

This Division applies if the Screening Agency:

- (a) imposes an interim bar on an applicant under section 23(1)(c);  
or
- (b) suspends the clearance of a person under section 27(2)(a).

### **31 Interim bar**

- (1) An interim bar prevents an applicant from engaging in NDIS work while the applicant's application is pending.
- (2) The Screening Agency must impose an interim bar in relation to an applicant:
  - (a) if the applicant is subject to a pending charge for a disqualifying offence – until the charge is resolved or the Screening Agency determines the application; or
  - (b) if the applicant is subject to a banning order by the NDIS Commission – until the NDIS Commission varies or revokes the banning order, or the Screening Agency determines the application; or

- (c) if the Screening Agency is satisfied there is a reasonable likelihood that a risk assessment of the applicant will determine that the applicant poses an unacceptable risk of harm to participants.
- (3) An interim bar remains in place until the Screening Agency determines the application relating to the applicant on whom the interim bar is imposed.
- (4) If the Screening Agency decides to impose an interim bar on an applicant, the Screening Agency must give the applicant a decision notice for that decision.
- (5) The Screening Agency must:
  - (a) notify an applicant, in writing, when an interim bar relating to the applicant ceases to be in effect; and
  - (b) notify the NDIS Commission if an interim bar is imposed on an applicant, and also if an interim bar ceases to be in effect.

## **32 Suspension**

- (1) A suspension of a person's clearance prevents the person from engaging in NDIS work until the Screening Agency decides whether to lift the suspension or cancel the clearance.
- (2) The Screening Agency must suspend a clearance in relation to a person:
  - (a) if the person is subject to a pending charge for a disqualifying offence – until the charge is resolved or the Screening Agency completes a risk assessment; or
  - (b) if the person is subject to a banning order by the NDIS Commission – until the NDIS Commission varies or revokes the banning order, or the Screening Agency completes a risk assessment; or
  - (c) if the Screening Agency is satisfied that there is a reasonable likelihood that a risk assessment of the person will determine that the person poses an unacceptable risk of harm to participants.
- (3) If the Screening Agency decides to suspend a person's clearance, the Screening Agency must give the person a decision notice for that decision.

- (4) The Screening Agency must:
- (a) notify a person, in writing, when a suspension of the person's clearance is lifted; and
  - (b) notify the NDIS Commission if a person's clearance is suspended, and also if the suspension is lifted.

### **33 Internal review of interim bar or suspension**

- (1) Subject to subsection (3), the following decisions are reviewable:
- (a) a decision to impose an interim bar on an applicant;
  - (b) a decision to suspend a person's clearance.
- (2) The applicant or the person may seek an internal review of the decision if the interim bar or suspension has been imposed or in place for 6 months or longer.
- (3) A person whose clearance has been suspended is not entitled to apply for a review if the person is a disqualified person, except on the grounds that the person is a disqualified person only because of mistaken identity.

*Note for section 33*

*If a person is unsuccessful on an internal review, the person may seek review of the decision by NTCAT – see section 43.*

## **Division 7 Risk assessment**

### **34 Requirement for risk assessment**

The Screening Agency may conduct a **risk assessment** of a person if:

- (a) the person is an applicant on whom an interim bar has been imposed under section 23(1)(c); or
- (b) the person's clearance is suspended under section 27(2)(a).

### **35 Matters to be considered when determining whether there is unacceptable risk of harm to participant**

- (1) In determining if a person poses an unacceptable risk of harm to a participant, the Screening Agency does not need to be satisfied that it is likely the person will cause harm to a participant in the future.



- (2) In determining whether a person poses an unacceptable risk of harm to a participant, the Screening Agency must consider the following factors:
  - (a) the nature, gravity and circumstances of any offence committed, or alleged to have been committed, or misconduct by the person or other relevant information and how this is relevant to disability-related work;
  - (b) the length of time that has passed since the event occurred;
  - (c) the vulnerability of the victim at the time of the event and the person's relationship to the victim or position of authority over the victim at the time of the event;
  - (d) the person's criminal, misconduct or disciplinary or other relevant history, including whether there is a pattern of concerning behaviour;
  - (e) the person's conduct since the event;
  - (f) all other relevant circumstances in respect of the person's offending, misconduct and disciplinary or other relevant history and the impact on the person's eligibility to be engaged in NDIS work.
- (3) To determine the relevant weight given to information in a risk assessment, the Screening Agency must take into account the context and characteristics of the information, including reliability, how it was obtained and the nature, extent and outcome of investigations.
- (4) The rights of a person to work with a participant are not relevant in determining whether or not a person poses an unacceptable risk of harm.
- (5) If a person has multiple criminal offences of varying severity, the Screening Agency must consider disqualifying offences and presumed disqualifying offences before considering other offences.

### **36 Staff to be appropriately skilled**

- (1) A risk assessment of a person must only be undertaken by appropriately skilled staff.
- (2) In this section:

***appropriately skilled*** includes having appropriate qualifications, experience or standing to make the assessment, as determined by the Screening Agency.

**37            Determination or intention of Screening Agency after risk assessment**

- (1) At the completion of a risk assessment the Screening Agency may:
  - (a) for an applicant to whom an interim bar has been imposed:
    - (i) grant the clearance; or
    - (ii) if the risk assessment indicates that the applicant poses an unacceptable risk of harm to a participant – indicate an intention to refuse the clearance; or
  - (b) for a person subject to a suspension:
    - (i) lift the suspension; or
    - (ii) if the risk assessment indicates that the person poses an unacceptable risk of harm to a participant – indicate an intention to cancel the clearance.
- (2) The Screening Agency must notify the person, in writing, of the Screening Agency's determination or intention under subsection (1).
- (3) The notice must give reasons for the intention to refuse or cancel the clearance and advise the person of the process for requesting an internal review of the proposed decision.

**38            Internal review of intention**

- (1) Subject to subsection (3), an intention to refuse clearance to an applicant or cancel a person's clearance is reviewable.
- (2) The applicant or the person may seek an internal review of the intention within the time specified in the notice given under section 37(2).
- (3) An applicant whose clearance has been refused or a person whose clearance has been suspended is not entitled to apply for a review if the applicant or the person is a disqualified person, except on the grounds that the applicant or the person is a disqualified person only because of mistaken identity.

*Note for section 38*

*If a person is unsuccessful on an internal review, the person may seek review of the decision by NTCAT – see section 43.*

### **39 Determination of Screening Agency after intention notified**

- (1) If no application for internal review is received within the specified time in the notice given under section 37(2), the Screening Agency must:
  - (a) if the Screening Agency is proceeding under section 37(1)(a)(ii) – refuse the clearance; or
  - (b) if the Screening Agency is proceeding under section 37(1)(b)(ii) – cancel the clearance.
- (2) The Screening Agency must notify the person, in writing, of the Screening Agency's decision under subsection (1).
- (3) The Screening Agency must notify the NDIS Commission of:
  - (a) the outcome of an application for a screening check; or
  - (b) the cancellation of a person's clearance.

*Note for section 39*

*Division 5 applies if an applicant is refused clearance or a person's clearance has been cancelled.*

## **Division 8 Miscellaneous matters**

### **40 Withdrawing application**

- (1) An applicant may withdraw the applicant's application for a screening check at any time before the Screening Agency has determined the application, unless an interim bar has been imposed on the applicant.
- (2) An application cannot be withdrawn if:
  - (a) the Screening Agency refused clearance as a result of the applicant's most recent previous application for a screening check; or
  - (b) the clearance most recently held by the applicant was cancelled, other than:
    - (i) at the request of the applicant; or
    - (ii) because the applicant was no longer doing NDIS work.
- (3) A request to withdraw an application must be in the approved form.
- (4) The Screening Agency must consent to the withdrawal.

- (5) The Screening Agency must:
- (a) notify an applicant, in writing, if the Screening Agency consents to the withdrawal; and
  - (b) notify the NDIS Commission if an applicant's application is withdrawn.

#### **41 Surrender of clearance**

- (1) A clearance holder may, at any time, request cancellation of the clearance by written notice to the Screening Agency.
- (2) The Screening Agency must, as soon as practicable after receiving the request, cancel the clearance.
- (3) However, the Screening Agency must not accede to the request for cancellation if:
- (a) the clearance (including a clearance held under a corresponding law) is suspended; or
  - (b) the Screening Agency is undertaking, or proposing to undertake, a risk assessment of the clearance holder.
- (4) The Screening Agency must:
- (a) notify a person, in writing, if the Screening Agency cancels the person's clearance; and
  - (b) notify the NDIS Commission if a person's clearance is cancelled.

### **Part 3 Review of decision**

#### **42 Internal review**

- (1) A **reviewable decision** is a decision made by the Screening Agency that is designated as reviewable by this Act.

*Note for subsection (1)*

*The following decisions are designated as reviewable:*

- (a) a decision to impose an interim bar on an applicant or suspend a person's clearance after 6 months has elapsed under section 33;
- (b) an intention to refuse clearance to an applicant or cancel a person's clearance under section 38.

- (2) An **affected person**, for a reviewable decision, is the applicant or the person whose clearance has been suspended or whose clearance is intended to be cancelled.
- (3) An affected person for a reviewable decision may apply to the CEO for an internal review of the decision.
- (4) The CEO may appoint a public sector employee (the **internal reviewer**) to conduct an internal review of a reviewable decision.
- (5) The CEO must be satisfied that the employee has the qualifications, experience and personal qualities necessary to review the reviewable decision.
- (6) In reviewing the decision, the internal reviewer must:
  - (a) follow the procedures (if any) for review prescribed by regulation; and
  - (b) comply with the rules of natural justice.
- (7) An internal reviewer who reviews a decision may:
  - (a) affirm the decision; or
  - (b) vary the decision; or
  - (c) set the decision aside and substitute a new decision.
- (8) The decision of an internal reviewer in relation to the review of an intention to refuse a clearance under section 37(1)(a)(ii) or an intention to cancel a clearance under section 37(1)(b)(ii) takes effect as a final decision for the application or clearance.

*Note for subsection (8)*

*If a person is unsuccessful on an internal review, the person may seek review of the decision by NTCAT – see section 43.*

### **43 Review by NTCAT**

- (1) NTCAT has jurisdiction to review the following decisions (an **NTCAT reviewable decision**):
  - (a) a decision of the internal reviewer under section 42 in relation to an interim bar or suspension;
  - (b) a decision of the internal reviewer under section 42 in relation to an intention to refuse clearance to an applicant or cancel a person's clearance.

- (2) A **Tribunal affected person** for the decision is the applicant or the person whose clearance has been suspended or cancelled.
- (3) A Tribunal affected person for an NTCAT reviewable decision may apply to NTCAT for a review of the decision.
- (4) The right to apply for review of the decision mentioned in subsection (1) arises only:
  - (a) after the Tribunal affected person has requested an internal review of the decision; and
  - (b) if the result of that review remained adverse to the Tribunal affected person.

*Note for section 43*

*The Northern Territory Civil and Administrative Tribunal Act 2014 sets out the procedure for applying to NTCAT for review and other relevant matters in relation to reviews.*

#### **44 Confidentiality of classified information**

- (1) In exercising its jurisdiction to review an NTCAT reviewable decision under this Part, NTCAT must take steps to maintain the confidentiality of classified information provided to it by the Commissioner of Police.
- (2) If NTCAT considers the classified information is criminal intelligence, the steps taken under subsection (1) include steps to receive evidence and hear argument about the information in private in the absence of the parties to the proceedings, their representatives and the public.
- (3) If NTCAT considers classified information is not criminal intelligence, NTCAT must allow the Commissioner of Police to withdraw the classified information from consideration.
- (4) This section applies to an appeal to the Supreme Court under section 141 of the *Northern Territory Civil and Administrative Tribunal Act 2014* brought by a party in relation to a decision of NTCAT made in the exercise of its review jurisdiction under this Part.
- (5) In this section:

**classified information** means information the Commissioner of Police classifies as criminal intelligence under the *Serious Crime Control Act 2009*.

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## **Part 4                      Collection, use, storage and disclosure of information**

### **45                      Authorised purpose**

- (1) An **authorised purpose** is any purpose connected with assessing a person's suitability to work with participants in accordance with this Act or any other law, including the following:
- (a) verifying the person's identity;
  - (b) determining whether the person poses an unacceptable risk of harm to a participant;
  - (c) determining whether a risk assessment is required in relation to the person;
  - (d) ongoing monitoring of a clearance holder;
  - (e) conducting a review of a decision made under this Act;
  - (f) for research or statistical purposes;
  - (g) for any other purpose prescribed by regulation.
- (2) In addition to the matters specified in subsection (1), the following are also authorised purposes:
- (a) providing the information to an organisation or body performing screening checks in a State or another Territory;
  - (b) sharing relevant information for entry in a database for clearances for the NDIS;
  - (c) sharing information with an authorised person on request, or when the Screening Agency considers it appropriate.

### **46                      Information only to be used for authorised purpose**

Information obtained under this Act must only be used by the Screening Agency for an authorised purpose.

### **47                      Sharing and disclosing information**

- (1) The Screening Agency must ensure that information made available to other persons, bodies or organisations is:
- (a) appropriate and relevant for the purposes of conducting a screening check; and
  - (b) made available only to authorised persons; and

- (c) collected through lawful and fair means; and
  - (d) accurate, up-to-date, complete and not misleading; and
  - (e) made available in a timely manner.
- (2) The Screening Agency must:
- (a) take the steps that are reasonable in the circumstances to protect personal information from misuse, interference, loss, unauthorised access, modification and disclosure; and
  - (b) put in place formal information sharing processes and mechanisms that are reliable, robust and transparent.

#### **48 Screening Agency may disclose**

- (1) The Screening Agency is authorised to:
- (a) inform any authorised persons of the outcome of an applicant's screening check; and
  - (b) inform any authorised persons if an interim bar has been imposed on an applicant or a person has had the person's clearance suspended or cancelled.
- (2) The Screening Agency is also authorised to provide to an authorised person relevant information about an applicant or a clearance holder:
- (a) for the purpose of:
    - (i) verifying the identity of the applicant or clearance holder or verifying the applicant's or clearance holder's clearance status; or
    - (ii) conducting a risk assessment in relation to the applicant or clearance holder; or
  - (b) for any other reason prescribed by regulation.
- (3) The Screening Agency may also provide to an authorised person information about relevant offences that has been obtained for the purposes of assessing a person's suitability to work with a participant.



**49 Authorised person may disclose**

An authorised person may disclose to any other authorised person any information obtained in accordance with this Act if:

- (a) there are reasonable grounds to suspect that there is a risk of significant harm to a person with disability, a child or vulnerable person; and
- (b) the disclosure is necessary to prevent that harm.

**50 Power to require relevant information from other persons**

- (1) The Screening Agency may, by written notice, require a person to provide information that is relevant to assessing the risk of harm posed by an applicant or a clearance holder.
- (2) The person to whom the notice is given is authorised to provide the information.

**51 Criminal history information to be exchanged**

- (1) The Screening Agency may, on request, provide criminal history information relating to a person to the NDIS Commission or screening authority of a State or another Territory, and may request criminal history information relating to an applicant or a clearance holder from any of the following:
  - (a) a law enforcement agency of the Territory;
  - (b) the screening authority of a State or another Territory;
  - (c) the NDIS Commission;
  - (d) the Australian Criminal Intelligence Commission;
  - (e) a law enforcement agency of the Commonwealth or a State or another Territory.
- (2) Criminal history information includes the following in relation to a person:
  - (a) the person's criminal history;
  - (b) spent convictions;
  - (c) pending charges;
  - (d) non-conviction charges;

- (e) if available, information held by law enforcement agencies about the circumstances of an offence or alleged offence, such as the following:
- (i) when the offence was committed, or alleged to have been committed;
  - (ii) the age of the offender or alleged offender;
  - (iii) the age of the victim;
  - (iv) whether the offence or alleged offence involved or was intended to involve a vulnerable person, including a person with disability;
  - (v) the relationship, if any, between the offender or alleged offender and any vulnerable person or person with disability involved in the offence;
  - (vi) the circumstances and nature of the behaviours constituting or involved with the offence or alleged offence;
  - (vii) other factors relevant to a decision about whether a person poses a risk of harm to people with disability.

## **52 Information sharing – miscellaneous**

Notice of any decision under this Act must not disclose the existence or content of any criminal intelligence disclosed to the Screening Agency.

## **Part 5 Offences**

### **53 Unauthorised collection or use of information**

- (1) A person commits an offence if the person:
- (a) intentionally collects or uses information under this Act; and
  - (b) the collection or use is not authorised by this Act or another law in force in the Territory.

Maximum penalty: 200 penalty units or imprisonment for 2 years.

- (2) Strict liability applies to subsection (1)(b).

**54 Offence to disclose certain information**

- (1) A person commits an offence if:
- (a) the person obtains information in the course of performing a function connected with the administration of this Act or exercising a power under this Act; and
  - (b) the information is confidential and the person is reckless in relation to that circumstance; and
  - (c) the person intentionally engages in conduct; and
  - (d) the conduct results in the disclosure of the information and the disclosure is not:
    - (i) for a purpose connected with the administration of this Act, including a legal proceeding arising out of the operation of this Act; or
    - (ii) to a person who is otherwise entitled to the information; and
  - (e) the person is reckless in relation to the result and circumstance referred to in paragraph (d).

Maximum penalty: 200 penalty units or imprisonment for 2 years.

- (2) Strict liability applies to subsection (1)(a).
- (3) If the information referred to in subsection (1) relates to a person, it is a defence to a charge for an offence against that subsection if the person has consented to the disclosure of the information.

*Note for subsection (3)*

*In addition to the circumstances mentioned in this section, a person who discloses information mentioned in this section will not be criminally responsible for an offence if the disclosure is justified or excused by or under a law (see section 43BE of the Criminal Code).*

**55 Misleading information**

- (1) A person commits an offence if:
- (a) the person intentionally gives information to another person; and
  - (b) the other person is an authorised person; and

- (c) the information is misleading and the person has knowledge of that circumstance; and
- (d) the authorised person is acting in an official capacity and the person has knowledge of that circumstance.

Maximum penalty: 200 penalty units or imprisonment for 2 years.

(2) A person commits an offence if:

- (a) the person intentionally gives a document to another person; and
- (b) the other person is an authorised person; and
- (c) the document contains misleading information and the person has knowledge of that circumstance; and
- (d) the authorised person is acting in an official capacity and the person has knowledge of that circumstance.

Maximum penalty: 200 penalty units or imprisonment for 2 years.

(3) Strict liability applies to subsections (1)(b) and (2)(b).

(4) It is a defence to a prosecution for an offence against subsection (2) if the person, when giving the document:

- (a) draws the misleading aspect of the document to the authorised person's attention; and
- (b) to the extent to which the person can reasonably do so – gives the authorised person the information necessary to remedy the misleading aspect of the document.

(5) In this section:

***acting in an official capacity***, in relation to an authorised person, means the person is exercising powers or performing functions under, or otherwise related to the administration of, this Act.

***misleading information*** means information that is misleading in a material particular or because of the omission of a material particular.

**56 Fail to comply with request for information**

- (1) A person who is given a notice under section 50 must comply with the notice.

Maximum penalty: 50 penalty units.

- (2) An offence against subsection (1) is an offence of strict liability.

**Part 6 Administrative matters****57 Approved forms**

The CEO may approve forms for this Act.

**58 Fees**

- (1) The regulations may prescribe fees payable under this Act.
- (2) The Screening Agency may do any of the following if the Screening Agency considers it appropriate:
- (a) exempt payment of a fee;
  - (b) waive (wholly or partly) a fee;
  - (c) refund (wholly or partly) a fee.

**59 Evidentiary certificates**

- (1) The Screening Agency may issue a certificate that states that, on a specified date or during a specified period:
- (a) a specified person was or was not the holder of a clearance;  
or
  - (b) a specified person had or had not made an application for a clearance; or
  - (c) a clearance held by a specified person was or was not suspended; or
  - (d) a specified person was or was not subject to an interim bar; or
  - (e) a clearance held by a specified person was cancelled.
- (2) A certificate under this section is admissible in legal proceedings as evidence of the matters stated in the certificate.

**60 Protection from liability**

- (1) A person is not civilly or criminally liable for an act done or omitted to be done by the person in good faith in the exercise of a power or performance of a function under this Act.
- (2) Subsection (1) does not affect any liability the Territory would, apart from that subsection, have for the act or omission.
- (3) In this section:

**exercise**, of a power, includes the purported exercise of the power.

**performance**, of a function, includes the purported performance of the function.

**61 Failure to give notice of decision**

Failure to give notice of a decision under this Act does not affect the validity of the decision.

**62 Regulations**

The Administrator may make regulations under this Act.

*Note for section 62*

*See section 65 of the Interpretation Act 1978.*

**Part 7 Amendment of Criminal Records (Spent Convictions) Act 1992****63 Act amended**

This Part amends the *Criminal Records (Spent Convictions) Act 1992*.

**64 Section 15A amended (Exclusion in relation to spent records)**

After section 15A(1)

*insert*

- (1AA) In addition, sections 11 and 13 do not apply in respect of a spent record in relation to an application for a screening check to obtain a clearance to provide services or supports to participants in the National Disability Insurance Scheme.

**65 Repeal of Part**

This Part is repealed on the day after it commences.

## ENDNOTES

### 1

### KEY

Key to abbreviations

amd = amended

app = appendix

bl = by-law

ch = Chapter

cl = clause

div = Division

exp = expires/expired

f = forms

*Gaz* = *Gazette*

hdg = heading

ins = inserted

lt = long title

nc = not commenced

od = order

om = omitted

pt = Part

r = regulation/rule

rem = remainder

renum = renumbered

rep = repealed

s = section

sch = Schedule

sdiv = Subdivision

SL = Subordinate Legislation

sub = substituted

### 2

### LIST OF LEGISLATION

***National Disability Insurance Scheme (Worker Clearance) Act 2020 (Act No. 7, 2020)***

Assent date            9 March 2020

Commenced            1 July 2020 (*Gaz* G17, 29 April 2020, p 2)