I certify that the Applicant's submissions are suitable for publication in accordance with paragraph 27 of Practice Note SC CA 01.

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on behalf of Karen Smith, Crown Solicitor, solicitor for the Applicant

ATTORNEY GENERAL FOR NSW v MM (A PSEUDONYM) BY HIS TUTOR BARBARA RAMJAN

APPLICANT'S SUMMARY OF ARGUMENT

PART A: INTRODUCTION AND SUMMARY

1. The Attorney General (**the Attorney**) seeks leave to appeal from a decision of Weinstein J delivered on 19 September 2025: *Attorney General for NSW v MM (a pseudonym) by his tutor Barbara Ramjan* [2025] NSWSC 1074**.** His Honour held that s 67G of the *National Disability Insurance Scheme Act* 2013 (Cth) (**NDIS Act**), which renders identified documents immune from compulsion subject to narrow exceptions, applies to documents produced by registered NDIS providers in the course of providing supports and services to NDIS participants.

2. The Attorney seeks leave to appeal on the ground set out in the draft Notice of Appeal.[1] On its proper construction, s 67G captures only documents which are held because of the exercise or performance of a power, function or duty the carrying out of which is enabled (or enabled and mandated) by the NDIS Act.

A.1 Background

3. This question has arisen in proceedings under s 123 of the *Mental Health and Cognitive Impairment Forensic Provisions Act* 2020 (NSW) (**MHCIFP Act**).[2] Orders were made under s 138 of the MHCIFP Act requiring the defendant's NDIS service provider, Little Blue Wren Services Pty Ltd (**LBW**) to produce documents relating to the behaviour, or physical or mental condition, of the defendant (**LBW records**).[3]

4. The defendant contends that the documents were obtained in contravention of s 67G of the *National Disability Insurance Scheme Act* 2013 (Cth) (**NDIS Act**), and sought relief in the Court below on that basis.[4] There was and is no dispute between the parties that there is a potential "operational inconsistency" between s 67G of the NDIS Act and s 138 of the MHCIFP Act.

[1] White Folder, Tab 2.
[2] The proceedings were commenced on 16 May 2025. On 29 July 2025, an additional hearing day was allocated for the determination the admissibility of documents obtained from Little Blue Wren Services Pty Ltd pursuant to s 138 of the MHCIFP Act. The hearing took place on 1 and 4 September 2025.
[3] White Folder, Tab 14. The order is contained within Tab O of Exhibit CH-1 to the Affidavit of Callum Hair.
[4] There is presently an agreed interim regime in place concerning the documents.

The controversy concerned whether the documents produced pursuant to the s 138 orders fell within the scope of s 67G.

A.2 Leave to appeal

5. The principles concerning leave to appeal are well-known.[5] The present proceedings concern an issue of principle and a matter of general public importance. As is set out at [19] below, the findings of the primary judge have the effect that a large number of documents will be shielded from the ordinary processes of State criminal investigation, law enforcement and civil procedure. The decision below is attended by sufficient doubt to warrant reconsideration.

6. The LBW records are relevant to the application under s 123. The relevance is not merely peripheral or as background – one of the court-appointed experts (without the benefit of the NDIS records) opines that MM poses a risk of causing serious harm to others if he ceases to be a forensic patient, but that continued NDIS support is a means of managing MM's risk, and that the least restrictive means of managing MM's risk is continued NDIS support alone[6]. That opinion is not shared by the other court-appointed expert and will be the subject of debate at final hearing, but it highlights why the LBW records may have greater significance than being mere background or contextual evidence in the proceedings below.

PART B: THE NDIS ACT AND SECTION 67G

B.1 The NDIS Act

7. The NDIS Act was introduced in 2013. It came into effect in a context where persons and entities were already providing support and services to people with disability.[7] The NDIS Act relevantly established a national regulatory framework. One of the mechanisms was a framework for the registration of "registered NDIS providers" (under s 73E), and a corresponding prohibition on unregistered NDIS providers providing specified types of supports and services (specifically, those where funding is managed through the NDIS Agency (**the Agency**)).[8] Unregistered NDIS providers are not otherwise precluded from providing supports or services. The framework was the subject of amendment in 2017, the significance of which is discussed at [12]–[17] below.

8. Registration is subject to a variety of standard conditions set out in s 73F, and additional conditions may be imposed under s 73G. Section 73H allows further conditions to be imposed

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[5] See, e.g., *Kassam v Hazzard* (2021) 106 NSWLR 520 at [25] (Bell P, with whom Meagher and Leeming JJA agreed), referring to *Secretary, Department of Family and Community Services v Smith* (2017) 95 NSWLR 597 at [28].
[6] White Folder, Tab 23 (Expert Report of Dr Gordon Elliott filed 2 September 2025).
[7] This is recognised in s 3(2).
[8] Section 33(6). Section 9 of the Act defines ***NDIS provider***, ***registered*** and ***registered NDIS provider***.

through the NDIS Rules. Section 73J provides that a person will breach s 73J if the person is a registered NDIS provider, and breaches a condition to which the registration is subject.

9. Sections 73N and 73P provide for the suspension and revocation of the registration of a NDIS provider if, relevantly, the Commissioner of the NDIS Quality and Safeguards Commission (**the Commissioner**) reasonably believes that a person has contravened, is contravening, or is proposing to contravene, the NDIS Act. Registered NDIS providers are subject to record-keeping obligations under s 73Q. Non-registered NDIS providers may also be subject to record-keeping obligations, of different scope, under s 46(3).

10. Unregistered NDIS providers are also subject to obligations imposed by the NDIS Act: see, e.g., s 73V (compliance with the Code of Conduct where applicable). The obligations imposed on NDIS providers (registered or unregistered) are in the nature of regulation of private entities. The expectation that these NDIS providers will be private entities, often operating for profit, can be seen in the text of the NDIS Act, e.g., in s 4(15), recognising that "[i]n exercising their right to choice and control, people with disability require access to a diverse and sustainable market for disability supports".

11. This regulation of the activities of NDIS providers is qualitatively different from the public duties, functions or powers conferred on officers and other persons performing what may be described as a public function under the Act, such as the CEO of the Agency (ss 158-159), the Commissioner (ss 181A-181B), staff of the Agency (s 169) or the NDIS Quality and Safeguards Commission (**the Commission**) (s 181U), persons engaged to assist the Agency (s 170) or the Commissioner (s 181W), consultants to the Agency (s 171) or the Commissioner (s 181V),[9] members of the Board of the Agency (Ch 6, Pt 2) or of the Independent Advisory Council (Ch 6, Pt 3), inspectors or investigators (s 73ZR), the scheme actuary (s 180A) or the reviewing actuary (s 180D). The Attorney accepts that it is not always easy to draw a bright line between (a) the exercise of public or administrative functions under an Act, and (b) the provision of public funding to persons engaging in private activities, with those activities being regulated in part for the benefit of the public. The Attorney's contention is that an appropriate way to reflect the qualitative difference between the former and the latter categories of activity, grounded in the words chosen by Parliament, is to hold that the former category involves duties, powers or functions which are enabled, or enabled and mandated, under the NDIS Act. Where that is the case, possession of the documents may itself be seen to "derive from the

[9] Under s 9, an ***Agency officer*** is a member of staff under s 169 or a person assisting under s 170; a ***Commission officer*** is similarly a member of staff under s 181U or a person assisting under s 181W. Consultants under s 171 or s 181U are outside the definition.

enactment".[10] Section 67G is engaged by a duty, power or function which enables the person to do something which they could not otherwise do, which causes them to possess the protected document or acquire the protected information.

B.2 The 2017 Amendments

12. The predecessor section to s 67G was s 65, which was contained in Part 2 of Ch 4 of the NDIS Act as made. It was in almost identical terms, but did not include a carve-out referring to the *Royal Commissions Act 1902*. In the Explanatory Memorandum concerning the NDIS Act, it was explained that s 60 was being enacted because "[a] large amount of personal information will likely be acquired by the Agency through the operation of the scheme, and the protection of that information and a person's right to privacy is considered paramount."[11] Further, s 65:[12]

> …provides that an officer must not, except for the purposes of this Act, be required to produce any document in their possession or disclose any matter or thing they had or knew because of their performance, exercise of their duties, functions or powers under the Act to a court, tribunal, authority or person who has the power to require the production of documents or the answering of questions.

13. The word "officer" is used in this explanation, although the word "person" was used in s 65.[13]

14. In 2017, the NDIS Act was amended by the *National Disability Insurance Scheme Amendment (Quality and Safeguards Commission and Other Measures) Act* 2017 (NSW) (**Amending Act**). The amendments came about substantially in response to an independent review conducted pursuant to s 208 of the NDIS Act as made.[14] In the Outline at the commencement of the Explanatory Memorandum, it was explained that (emphasis added):[15]

> Disability services delivered through other systems, such as health, education and justice, will continue be covered by the quality and safeguarding arrangements for those systems. **Universal complaints and redress mechanisms, including police, fair trading bodies, professional and industry bodies, consumer protection laws and other regulatory and complaints systems will continue to be available to both NDIS participants and people with disability outside the NDIS**.

15. The Amending Act established the Commission and the Commissioner. The Amending Act also effected a restructure of Part 2 of Chapter 4. The provisions contained in Part 2 of the

[10] See, by analogy, the approach to the expression, "decision of an administrative character made … under an enactment" in *Griffith University v Tang* (2005) 221 CLR 99 at [89]; *Fuller v Lawrence* (2024) 99 ALJR 103 at [13], [16].
[11] House of Representatives, Explanatory Memorandum, *National Disability Insurance Scheme Bill* (2010-2011-2012) (**2013 Ex-Mem**), p 26.
[12] 2013 Ex-Mem, p 27.
[13] The explanation using the word "officer" was not referred to or altered in the revised Explanatory Memorandum, or either of the Supplementary Explanatory Memoranda.
[14] House of Representatives, Explanatory Memorandum, *National Disability Insurance Scheme Amendment (Quality and Safeguards Commission and Other Measures) Bill 2017* (**2017 Ex-Mem**), Outline, p ii.
[15] 2017 Ex-Mem, Outline, p iv.

NDIS Act as made (ss 60-67) were the subject of technical amendments to clarify that they applied only to the Agency.[16] They were also amended to align with new provisions for the protection of information provided to the newly-established Commission.[17] Section 65 was repealed and re-enacted as s 67G, sitting within the newly-established Division 3 of Part 2of Ch 4. The explanatory memorandum said of proposed s 67G:[18]

> This is an important protection and discretion which enables people to provide information to the Commission without fear of it being used against them in proceedings which do not relate to the purposes of the Act. The new section does not prevent a subpoena being issued to any person who provided the information to the Commission.

16. The reference to "protection and discretion" is significant. Unlike ss 66 and 67E, s 67G does not in terms confer a discretion. However, that is because s 67G is not framed as a secrecy provision that prevents disclosure (cf the offence provisions in ss 62 and 67B). Rather, it preserves a discretion in the sense that s 67G provides an immunity from being "required" to produce or disclose. Such an immunity – untethered to a secrecy provision and therefore preserving a "discretion" to disclose – is readily understandable in relation to Commonwealth officers and other persons performing public functions under the NDIS Act (the persons in the first category in [11] above) but difficult to understand in relation to private service-providers who are regulated under the Act.

17. The Amending Act also substantially amended the system of registration for providers. Prior to 2017, the registration of providers was dealt with in Part 3 of Ch 4 (ss 69-73). At that time, the only section concerning the obligations of registered providers was s 73, which allowed the NDIS Scheme rules to make provision in relation to a range of matters, including compliance with prescribed safeguards, and the consequences of a failure to comply with the NDIS Act. Part 3A moved the registration function from the Agency to the newly-established Commission, and introduced new processes for registration and quality assurance.[19]

PART C: THE INTERPRETATION OF SECTION 67G

18. The words in s 67G(a) are capable of varying semantic scopes. The primary judge held at [62] that "[t]he better view is that registered NDIS providers are performing functions and duties under the NDIS in providing the services and supports for which they are registered. Accordingly, documents created or possessed by a person in the course of providing such services and supports are therefore protected from production under s 67G of the NDIS Act."

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[16] 2017 Ex-Mem, p 9 [39].
[17] 2017 Ex-Mem, p 9 [40].
[18] 2017 Ex Mem, p 9 [65].
[19] Second Reading Speech, Australia, House of Representatives 2017, *Debates*, 31 May 2017, p 5741.

19. The outcome is that the records of a registered provider to which s 67G applies would be immune from subpoena in State court proceedings or in disciplinary proceedings before a Tribunal in respect of that provider, unless one of the narrow exceptions in that section applies. Police could not execute a warrant for these documents while investigating suspected criminal activity. State-based regulatory bodies (for example, SafeWork NSW or professional regulators such as the Health Care Complaints Commission) could not obtain such documents through exercise of any statutory investigative powers. Registered NDIS providers – who are typically private businesses, often run for profit – would be immune from many of the investigative processes of State-based litigation and law enforcement in relation to such documents.

20. The observations of the primary judge at [73]-[74] do not provide an answer to those concerns. Those observations refer to a mechanism through which a State authority may *request* documents from the NDIS Commissioner, who might then obtain them from the provider. There is no ability to compel production by the Commissioner, and this process can be expected to take time (noting that pursuant to s 73J(2)(i) a request for information from the registered NDIS provider must specify a period for compliance of no less than 14 days). This runs counter to the statement in the Explanatory Memorandum to the 2017 Amending Act that universal complaints and redress mechanisms would remain available. The scope of protective laws enacted by the States (enforceable through the police, professional regulators, SafeworkNSW and other equivalents), are impaired in respect of NDIS participants.

21. Section 67G provides an immunity from requirements to produce but no obligation of secrecy, and has no explicit carve-out referable to the consent of the disabled person. Consistent with the stated purpose in the explanatory memorandum, s 67G is not primarily concerned with protecting individuals' privacy (something which is preserved in other legislation and by Part 2 as a whole), but is rather concerned with ensuring that, if information or documents are provided to persons exercising public or administrative functions under the Act, then courts, tribunals or other authorities cannot force their disclosure for unrelated purposes.

<u>C.1 The Attorney's position</u>

C.1.1 Textual considerations

22. The words "power", "function" and "duty" are words of potentially broad import, but they are also words capable of different interpretations in different statutory contexts.[20] The NDIS does not confer statutory powers on registered providers. Rather, the NDIS Act regulates or

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[20] *Canadian Pacific Tobacco Company Ltd v Stapleton* (1952) 86 CLR 1 at 6 (Dixon CJ); *Jordan v Second Commissioner of Taxation* [2019] FCA 1602 at [56] ff (White J);

conditions the provision of particular services. It is apparent from s 73F that the conditions of registration for registered providers are likely to govern many, if not all, facets of the provider's activities concerning disability services. If "duties" … under" the NDIS Act is construed, for example, to encompass conditions imposed pursuant to s 73G and 73F, then much of what a registered provider does in providing disability services will involve performing "duties" imposed under the NDIS Act. The same would be true if compliance with rules made pursuant to s 209 involved performing a "duty" under the NDIS Act.

23. The language of "power" and "function" under the NDIS Act is not apt to refer to an activity that a person can do independently of the NDIS Act. In this sense, it reflects the distinction that an entity created by statute, or the functions of an office created by statute, can only be exercised in the manner contemplated by that statute or by some other statute. Private individuals do not derive their powers to act from the NDIS Act. Similarly, corporations do not derive their powers to act from the NDIS Act, but from the Corporations Act.[21]

24. "Power", "function" and "duty" should not be broken down and considered in isolation – the provision uses a composite expression. If "duty" is understood in the same way as "power" and "function" (ie, as referring to something that depends on the legislation to enable it to be done or to have effect), then it would not mean any obligation imposed by the NDIS Act, but only acts both enabled and mandated by the operation of the NDIS Act. Something would not be a "duty, power or function" under the NDIS Act if the Act merely regulates or imposes conditions on an activity that a private person or entity could otherwise engage in.

25. There are textual factors that support this interpretation. The language of "supports and services provided <u>under the arrangements</u> set out in Chapter 2", including in the definition of "NDIS provider" in s 9, is apt to capture the overlay of the obligations under the NDIS Act to the pre-existing sphere of activity of a registered provider (i.e., the provider's business), in contrast to that provider exercising or performing powers, duties or functions under the NDIS Act. The former involves providing supports and services "under the arrangements" set out in two Chapters of the NDIS Act; the latter involves performing duties, powers or functions "under the NDIS Act". It reflects the general scheme in the Act that providers are engaged by or on behalf of the participant to provide supports or services that form part of the providers' ordinary business. The NDIS Act provides for funding of those services and regulates in

[21] In ***SG*** *v New South Wales Crime Commission* [2016] NSWSC 1615 at [38]-[42] and ***SG*** v *New South Wales Crime Commission* ***(No 4)*** [2021] NSWSC 92 at [75]-[76], Rothman J considered the performance of "functions" for or with the Australian Crime Commission. His Honour distinguished between the "special functions" of the Commission and its corporate functions.

certain respects the activities of those providers in connection with that funding, but the scheme assumes that it is the general law that enables those providers to conduct their businesses providing those supports and services. It is relevant in this regard that the statute draws a distinction between the ***National Disability Insurance Scheme***, which is defined as the arrangements set out in Chapters 2 and 3, and the NDIS Act. Supports or services are provided, and amounts are paid, under the *Scheme* (see, eg, ss 3(1)(ga), 8, 24, 35, 45, 45A).

26. This interpretation may be assisted by the words in s 67G, "performance or exercise", which suggest that the "powers", "functions" and "duties" in s 67G refer to positive actions enabled (or enabled and compelled) by the NDIS Act, rather than obligations that require compliance when exercising a power or capacity which is non-statutory or which is conferred otherwise than by the NDIS Act. This may be contrasted with the language of s 203, which refers to an "obligation … imposed" or "a thing the entity would be permitted to do", and s 6, which refers to "meeting obligations under, or for the purposes of" the NDIS Act. This difference in language supports a conclusion that the word "duties" (as part of the composite expression "duties, functions or powers") in s 67G does not pick up *any* obligation imposed by the Act and, particularly, does not pick up obligations or activities that are merely regulated by the Act.

27. The obligations imposed on registered NDIS providers go well beyond the circumstances covered by subparagraph (c) in order 1 below. They would extend to complaints management/resolution systems (s 73W) and incident management and reporting (ss 73Y-73Z). If consideration is given to obligations that arise under the rules, they would include the *National Disability Insurance Scheme (Practice Standards – Worker Screening) Rules 2018*. If these obligations are covered by s 67G, then its scope is even more surprisingly broad (and impairs a greater range of State regulatory and law enforcement activities). If these matters are not covered, then it follows that "duties" should not simply be equated with "obligations", but should rather be read in a narrower sense to produce a more coherent result. Once it is accepted that "duties" should be read in a narrower sense, there is every reason to prefer a narrower sense of the kind proposed by the Attorney.

C.1.2 Purpose and context

28. The objects of the NDIS Act are set out in s 3. The NDIS Act seeks to balance a number of different objectives. They include, at s 3(1)(ga), protecting and preventing people with disability from experiencing harm arising from poor quality or unsafe supports or services provided under the NDIS. Similarly, s 4 establishes that a range of different principles are to guide action

taken under the NDIS Act, including that people with disability have the same right as other members of society to live free from abuse neglect and exploitation (s 4(6)), the same right to pursue any grievance (s 4(7)), and have their privacy and dignity respected (s 4(10)). They also include a recognition that the NDIS Act does not exclusively cover any field of regulation, but is rather intended to supplement existing legislative regimes and supports, and operates concurrently with other Commonwealth and State regimes (see, eg, ss 3(3)(c)-(d), 4(14)-(15)). This reflects the purpose that emerges from the explanatory memorandum that "universal complaints and redress mechanisms" should continue to be available.

29. As noted above, a consequence of the primary judge's reasoning is that registered NDIS providers would be immune from many of the ordinary investigative processes of State-based litigation and law enforcement. This materially impairs the protections offered by a range of State-based regulatory bodies, including in relation to criminal activity, occupational health and safety, professional regulation and fair trading. Further, the primary judge's reasoning would have the surprising consequence that NDIS *participants* would be precluded from requiring that they be given access to documents concerning them (for instance, under privacy law) unless they persuade the Commissioner to obtain the documents and disclose them under s 67E.[22] This would not advance the objects described above.

30. Similarly, while the interpretation adopted by the primary judge would protect the *privacy* of people with disability, the *dignity* of people with disability would be better served through State law enforcement bodies having the same access to documents and information held by a registered provider (by, for example, police, or other similar entities) as those bodies have in respect of any other provider of social or medical services. The dignity of people with disability would also plainly be better served if they could, when otherwise empowered to do so, compel the production to them of their own documents. The legislature's desire to balance the competing interests between participant privacy and other factors is recognised in ss 67E(1)(a), (1)(b)(i), (iii) and (iv) and in s 67F.

31. In addition, despite the focus of the defendant and the primary judge on individual privacy, the breadth of the interpretation preferred by the primary judge has the effect that documents that do not contain any private information of participants will fall within s 67G. Section 67G is not confined to documents containing the private information of a participant; it is defined

[22] In argument before the primary judge, the respondent submitted that s 67G should be read down so as not to apply to requirements imposed by NDIS participants: transcript, 4 September 2025 (Part 1) page 46:7 (White Folder, Tab 11). The Attorney agrees, but submits that the more coherent and textual pathway to that outcome is to construe the words "duties, functions or powers" so as not to encompass every activity carried out by a registered NDIS provider.

by reference to the performance of duties, functions or powers under the NDIS Act. For instance, an occupational health and safety investigation seeking documents concerning the processes and protocols utilised by a registered provider may be impaired or stymied on the basis that those documents were created because of the performance or exercise of duties, functions or powers under the NDIS Act.

PART D: OTHER MATTERS REQUIRED BY UCPR RULE 51.12

32. The Attorney seeks a concurrent oral hearing of leave and any appeal. Having regard to the urgency of the application, and the fact that it involves a single question of statutory interpretation, a concurrent hearing would be the most efficient use of the Court's resources. The Attorney estimates a concurrent hearing would take half a day to 1 day. If an urgent concurrent hearing is ordered, the Attorney will rely on this summary of argument as his written submissions.

33. If the application is refused, there is no reason why an order for costs should not be made in favour of the respondent.

PART E: LIST OF AUTHORITIES AND LEGISLATION

1. Legislation
    a. *Mental Health and Cognitive Impairment Forensic Provisions Act* (2020) (NSW) Part 6 Div 1-3, ss 123, 138, 139.
    b. *National Disability Scheme Insurance Act* 2013 (Cth) (as made), Ch 4, Parts 2 and 3,.
    c. *National Disability Scheme Insurance Act* 2013 (Cth) Ch 4, Parts 1 to 3A; Ch 6, Parts 2 to 4; Ch 6A; ss 3, 4, 6, 8, 9, 24, 33, 35, 45, 45A, 46, 180A, 180D, 203, 207, 209.
2. Extrinsic materials
    a. Explanatory Memorandum to the *NDIS Amendment (Quality and Safeguards Commission and Other Measures) Bill 2017*.
    b. Explanatory Memorandum to the *National Disability Insurance Scheme Bill 2013*.

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