

EXPLANATORY STATEMENT

Issued by the Authority of the Minister for Families, Community Services and
Indigenous Affairs and Minister for Disability Reform

National Disability Insurance Scheme Act 2013

*National Disability Insurance Scheme (Protection and Disclosure of Information)
Rules 2013*

Section 209 of the *National Disability Insurance Scheme Act 2013* (the Act) provides that the Minister may, by legislative instrument, prescribe matters required or permitted by this Act to be prescribed or which are necessary or convenient to be prescribed in order to carry out or give effect to this Act.

The *National Disability Insurance Scheme (Protection and Disclosure of Information) Rules 2013* (the Information Rules) are made pursuant to sections 58 and 67 of the Act.

The Information Rules are about safeguarding the privacy of people whose information is held by the National Disability Scheme Launch Transition Agency (DisabilityCare Australia). They deal with the circumstances in which a State or Territory law may prevent the disclosure of information or a document by a person to DisabilityCare Australia, and the ability of the CEO to disclose information in the public interest or to a Commonwealth, State or Territory Department or authority.

The Minister in making the Information Rules has had regard to financial sustainability of the National Disability Insurance Scheme (the scheme) as required under subsection 209(3).

The Information Rules include Category A rules for the purposes of section 209 of the Act. Accordingly the Commonwealth and each host jurisdiction have agreed to the making of the Information Rules.

Background

In 2011, the Productivity Commission report, *Disability Care and Support* (Report No. 54), found that 'current disability support arrangements are inequitable, underfunded, fragmented and inefficient, and give people with a disability little choice' (Overview, p. 5), and recommended the establishment of a National Disability Insurance Scheme. People who are participants in the scheme will be assisted to develop a personal, goal-based plan about how they will be provided with general supports and reasonable and necessary supports.

The Act was enacted in March 2013 giving effect to the commitment by the Commonwealth, State and Territory Governments to establish such a scheme, and for its progressive implementation from July 2013. The Act sets out the statutory

framework for the scheme, and for DisabilityCare Australia to administer the scheme. The Act is to be supplemented by National Disability Insurance Scheme rules, which address the more detailed operational aspects of the scheme. The Information Rules is one of a number of instruments that comprise these rules.

Commencement

The Information Rules commence on the day they are registered.

Consultation

The design of the scheme has been a collaborative exercise, relying heavily on substantial contributions from stakeholders, including:

- the COAG Select Council on Disability Reform;
- joint Commonwealth/State/Territory Government working groups at official levels;
- extensive consultation with people with disabilities, their advocates, carers and families;
- the NDIS Advisory Group, comprising people, some of whom live with disability, who have expertise in social insurance principles, disability policy, service provision, performance monitoring, training and curriculum development, academia and research, psychological and intellectual disability, Indigenous disability services, young people and children with disability;
- four Expert Groups, comprising persons with disabilities, their carers, advocates, service providers and other sector experts, focused on:
 - a national approach to control and choice;
 - eligibility and assessment;
 - quality, safeguards and standards; and
 - disability workforce and sector capacity; and
 - the National Disability and Carer Alliance, which undertook public engagements around the country.

The Information Rules is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

Explanation of provisions

The Information Rules has six Parts:

- **Part 1** explains what these Rules are about.
- **Part 2** provides an outline of these Rules.
- **Part 3** lists State and Territory laws that are prescribed for the purposes of paragraph 58(2)(b) of the Act. A person is not required to give information, produce a document, or give evidence, to DisabilityCare Australia if the person would be prevented from doing so by one of these State or Territory laws.
- **Part 4** deals with the power of the CEO to disclose information collected under the Act if it is necessary to do so in the public interest.
- **Part 5** deals with the circumstances in which the CEO may disclose information to the heads of other Commonwealth, State or Territory Departments or authorities.
- **Part 6** deals with other matters, including interpretation of these Rules.

Part 1 – What these Rules are about

Paragraphs 1.1 to 1.3 are explanatory and contextual.

Part 2 – Outline of these Rules

Paragraphs 2.1 to 2.4 are explanatory and contextual.

Part 3 – Effect of State and Territory laws on a requirement to give information or evidence or produce documents

This Part relates to the circumstances in which a person may be required to give information, produce a document, or give evidence to DisabilityCare Australia for the purposes of the Act. It deals with the circumstances in which a State or Territory law can effect whether or not a person is required to give this information or evidence, or produce a document.

Paragraph 3.1 is explanatory and contextual.

Paragraphs 3.2 and 3.3(a) summarise the operation of subsection 58(1) and paragraph 58(2)(a) of the Act, which relate to the circumstances in which a person may be required to give information, produce a document, or give evidence to DisabilityCare Australia.

Paragraph 3.3(b) lists State and Territory laws that are prescribed for the purposes of paragraph 58(2)(b). A person is not required to give information, produce a document, or give evidence, to DisabilityCare Australia if the person would be prevented from doing so by one of these State or Territory laws.

Paragraph 3.4 summarises section 59 of the Act.

Part 4 – Disclosure of information by the CEO in the public interest

This Part deals with the power of the CEO to disclose information collected under the Act if it is necessary to do so in the public interest.

Paragraph 4.1 explains the operation of sections 62 and 65 and paragraph 66(1)(a) of the Act.

Paragraph 4.2 is contextual and explains that Part 4 sets out guidance for the CEO in the exercise of his or her power to certify that disclosure of information is necessary in the public interest. The Information Rules are not intended to limit the circumstances in which the CEO may give a public interest certificate under paragraph 66(1)(a) of the Act.

General considerations

Paragraph 4.3 explains that in cases to which Part 4 applies (which are identified in paragraphs 4.6 to 4.11) the CEO may give a public interest certificate if:

- the information cannot reasonably be obtained from a source other than DisabilityCare Australia; and
- the person to whom the information will be disclosed has a sufficient interest in the information.

Paragraph 4.4 provides a definition of sufficient interest. A person has a sufficient interest if the CEO is satisfied that, in relation to the purpose of the disclosure, the person has a genuine and legitimate interest in the information, or if the person is a Commonwealth, State or Territory Minister.

Paragraph 4.5 provides that in considering whether to give a public interest certificate under paragraph 4.3 to disclose information about a particular person, the CEO should have regard to whether the person would be likely to be in a position to seek assistance themselves or give notice of their circumstances. This is intended to ensure that, as far as possible, the CEO takes into account the interests of the person – for example, in cases where the CEO is considering giving a public interest certificate on the grounds that it is necessary to do so under paragraph 4.9 to locate the person.

Enforcement of laws

Paragraph 4.6 deals with cases where disclosure is necessary in connection with the enforcement of laws. This makes clear that it will be possible to disclose information, for example, to the police, where the information relates to an offence against a relevant law. An example of the type of information that may be disclosed

in these cases is information about the whereabouts of a person suspected of committing an offence or breaching a relevant law.

Mistake of fact

Paragraph 4.7 allows for disclosure of information to correct a mistake of fact in relation to the administration of the scheme, where either the integrity of the scheme will be at risk if the mistake is not corrected, or the mistake relates to a matter that was, or will be, published. An example of the type of information that may be disclosed in these cases is a description of how DisabilityCare Australia has developed a person's plan under the scheme.

Ministerial briefing

Paragraph 4.8 permits the disclosure of information if the disclosure is necessary to brief a Commonwealth, State or Territory Minister:

- to enable the Minister to be advised of complaints or issues raised by, or on behalf of a person, and if necessary respond to that person;
- on issues raised or proposed to be raised publicly so that the Minister can respond by correcting a mistake of fact, a misleading perception or impression, a misleading statement;
- about an error or delay on the part of DisabilityCare Australia; or
- about an instance of an anomalous or unusual operation of the Act, regulations made under the Act or the Rules.

An example of the type of information that may be disclosed in these cases is a description of how DisabilityCare Australia has developed a person's plan under the scheme.

Missing and deceased persons

Paragraph 4.9 allows for the disclosure of information in cases where:

- the information is about a person who is, or has been reported to be, missing or dead; and
- there is no reasonable ground to believe that the person would not want the information to be disclosed; and
- the disclosure is necessary:
 - to locate a person;
 - to assist certain bodies in relation to inquiries about the person;
 - in relation to a dead person – to assist a person responsible for the administration of the estate of the dead person in relation to such administration.

Examples of the types of information that may be disclosed in these cases are information about the whereabouts of a missing person and information regarding whether a person is dead or alive.

Agencies responsible for children

Paragraph 4.10 allows for disclosure in cases where it is necessary to assist a child welfare agency to contact a parent or relative in relation to a child, or carry out its responsibilities relating to the safety, welfare or wellbeing of a child. Examples of the types of information that may be disclosed in these cases are information about a child's welfare and information about a relevant person's whereabouts.

Paragraph 4.11 gives a definition of child welfare agency.

Part 5 – Disclosure of information by the CEO to Secretaries, chief executives and heads of authorities

This Part sets out matters relating to the way in which the CEO may exercise the power to disclose information to the heads of government bodies.

Paragraph 5.1 summarises subparagraphs 66(1)(b)(i) and (v) of the Act, which give the CEO the power to disclose information to the heads of certain government bodies.

Paragraphs 5.2 to 5.5 set out matters relating to the exercise of the CEO's power including that the power may be exercised on request or on the CEO's own initiative, and that the CEO must keep records in relation to any instances of disclosure.

Part 6 – Other matters

Citation

Paragraph 6.1 specifies the citation for the Information Rules.

Interpretation

Paragraphs 6.2 to 6.4 give guidance on interpretation and definitions for certain terms used in the Information Rules.

Statement of Compatibility

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

This legislative instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview

The purpose of this legislative instrument is to deal with the circumstances in which a State or Territory law may prevent the disclosure of information or a document by a person to DisabilityCare Australia, and the ability of the CEO to disclose information in the public interest or to a Commonwealth, State or Territory Department or authority

Human rights implications

The Information Rules engage the following rights:

- the rights of people with disabilities in the Convention on the Rights of Persons with Disabilities (CRPD), especially Articles 3 and 22;
- the rights of children in the Convention on the Rights of the Child, especially Article 7 and 16;
- Articles 14 and 17 of the International Covenant on Civil and Political Rights.

General principles underpinning the CRPD

The CRPD recognised the barriers that persons with disabilities may face in realising their rights. While the rights under all human rights treaties apply to everyone, including persons with disabilities, the CRPD applies human rights specifically to the context of persons with disabilities.

The establishment of the scheme promotes the rights of people with disabilities in Australia by providing access to nationally consistent funding and support to help them realise their aspirations, and to participate in the social and economic life of the community.

The preamble of the CRPD, and the General Principles set out in Article 3 reflect the need for the respect for the inherent dignity, individual autonomy (including the freedom to make one's own choices and the independence of the person), the need for persons with disabilities to be able to participate fully and effectively and be included in society, the need for respect for difference and acceptance of persons with disabilities as part of human diversity and providing persons with disabilities the opportunity to be involved actively in decision-making processes about policies and programmes, including those directly concerning them.

The general principles in the Act that have been applied in the Information Rules in paragraph 1.3 align closely with the CRPD principles. The two key principles of the Act that is reflected in the Information Rules:

- People with disability have the same right as other members of Australian society to respect for their worth and dignity and to live free from abuse, neglect and exploitation
- People with disability should have their privacy and dignity respected

Respect for privacy

Article 22 of the CRPD provides that no person with disability, regardless of place of residence or living arrangements, shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence or other types of communication, or to unlawful attacks on his or her honour and reputation. It also provides that the privacy of personal, health and rehabilitation information of persons with disabilities should be protected on an equal basis with others. This right contains similar protections to those in Article 17 of the ICCPR and Article 16 of the CRC in relation to children.

Information collected under the Act and stored in DisabilityCare Australia records is considered to be 'protected information'. The Act provides limited circumstances in which 'protected information' can be disclosed. The details in which these limited circumstances would arise are set out in more detail in the Information Rules. This is a positive engagement with Article 22 of the CPRD as the provisions are specific and require certain criteria to be met before the discretion of a decision maker can be exercised. This satisfies the requirement for any interference with privacy to be both lawful and non-arbitrary.

For example under subsection 58(1) and paragraph 58(2)(a) of the Act there are circumstances in which a person may be required to give information, produce a document, or give evidence to DisabilityCare Australia for the purposes of the Act. Paragraph 3.3 (b) of the Information Rules limits the ambit of the operation of this provision by prescribing a list of State and Territory laws that apply where a person is not required to give information, produce a document, or give evidence, to DisabilityCare Australia if these State or Territory laws apply to that person. This is a positive engagement of the right to privacy by in providing a precise exception to the requirement for provision of information, give a document or give evidence.

Part 4 of the Information Rules provide guidance as to the type of circumstances in which the CEO may exercise a discretionary power to disclose 'protected information' in the public interest by issuing a public interest certificate. The criteria in paragraphs 4.3 and 4.4 of the Information Rules limit the scope of the exercise of the decision-making power by requiring that the decision-maker must be satisfied that the information cannot be reasonably obtained from another source and that the person making the request has 'sufficient interest'.

The scope is further limited in defining that a 'sufficient interest' in paragraph 4.4 as either being a person having a 'genuine and legitimate interest' for the purpose of the disclosure or the person is a State, Territory or Commonwealth Minister. There is also the further obligation under paragraph 4.5 that the decision-maker in deciding whether to disclose information about a particular person, should have regard to whether that person would be likely to be in a position to seek assistance themselves or give notice of their circumstances. This is intended to ensure that, as far as possible, the decision-maker takes into account the interests of that person and it is a further protection against arbitrary interference with the privacy of a person under Article 17 of the ICCPR and a person with a disability under Article 22 of the CRPD.

Paragraph 4.6 provides for the circumstances where disclosure is necessary in connection with the enforcement of laws where the information is relevant to an offence against a relevant law. This is justifiable on the basis that it allows for law enforcement authorities to properly undertake their functions where there is information indicating the commission of the offence.

Paragraph 4.7 provides for the circumstances where disclosure of information is to correct a mistake of fact in relation to the administration of the scheme, where either the integrity of the scheme will be at risk if the mistake is not corrected, or the mistake relates to a matter that was, or will be, published. The disclosure is limited to the specific purpose of correcting a mistake of fact relating to how the scheme has been administered in the case of a particular individual.

Paragraph 4.8 provides for the circumstance where the disclosure of information is necessary to brief a Commonwealth, State or Territory Minister to enable the Minister to be advised of complaints or issues raised by, or on behalf of a person, and if necessary respond to that person. Alternatively it may be on issues raised or proposed to be raised publicly so that the Minister can respond by correcting a mistake of fact, a misleading perception or impression, a misleading statement. The disclosure is limited to a Minister being briefed for the purposes set out in the paragraph and it is a reasonable limitation on the right to privacy.

Paragraph 4.9 provides for the circumstances where the disclosure of information is about a person who is missing or for the administration of the estate of a deceased person. The disclosure is of a limited nature by requiring consideration as to whether there are reasonable grounds that the person would not want that information disclosed and it must be necessary to locate the missing person, assist certain bodies in relation to enquiries about the person or assist in the administration of a deceased estate. The disclosure is not arbitrary in that it is related to prescribed circumstance with the scope of the decision-making power limited to the two considerations of reasonable grounds for non-disclosure in these circumstances and necessity.

Paragraph 4.10 provides for the circumstances where disclosure of information is necessary to assist a child welfare agency to contact a parent or relative in relation to a child or carry out its responsibilities relating to the safety, welfare or wellbeing of a child. The disclosure in this circumstance engages with Article 19 of the CRC

which requires nations to take all steps to protect a child from abuse, neglect or maltreatment. This also engages with Article 3 of CRC and Article 7 of the CRPD which relates to the requirement for states to make decisions related to children with the best interests of the child the paramount consideration. Article 7 of the CRPD in particular requires the taking of all necessary measures to ensure the full enjoyment by children with disabilities of all human rights and fundamental freedoms on an equal basis with other children. It also requires that in all actions concerning children with disabilities, the best interests of the child shall be a primary consideration.

Part 5 of the Information Rules provides a limited power for the CEO to disclose information to the heads of government bodies if they request for information to be disclosed to them for one or more purposes of the department or authority described in a written request. The CEO may also disclose information acquired by a person in the performance of their function or duties under the Act to the head of government bodies on their own initiative. The disclosure of information is limited to only the heads of government bodies and there is a requirement for CEO to record the particulars of the disclosure including the reason for the disclosure. This discretion is reasonable as it is for the purpose of Commonwealth-State relations to further enhance the effectiveness of the scheme.

Conclusion

The Information Rules are compatible with human rights because it advances the protection of privacy rights of persons with disabilities in Australia, consistent with the ICCPR, ICESR, CRC and CRPD. It creates additional opportunities for persons with disabilities to exercise those rights by providing support to enable participation in the social, economic and cultural life of the community. To the extent that it limits human rights in some circumstances, those limitations are reasonable, necessary and proportionate to ensure the long-term integrity and sustainability of the scheme.