

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 (Nominees) 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 (Nominees) Rules 2013* (the Nominees Rules) are made pursuant to sections 80, 88 and 93 of the Act. The Nominees Rules are about nominees, and deal with whether a nominee should be appointed, who should be appointed as a nominee, the duties of nominees, and the cancellation and suspension of nominees.

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

The Nominees 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 Nominees 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 National Disability Insurance Scheme (the scheme), and for the National Disability Insurance Scheme Transition Agency (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 Nominees Rules is one of a number of instruments that comprise these rules.

Commencement

The Nominees Rules commence on 1 July 2013.

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

Explanation of provisions

The Nominees Rules has seven Parts:

- **Part 1** explains what the Nominees Rules are about.
- **Part 2** provides an outline of the Nominees Rules.
- **Part 3** deals with determining whether it is necessary for a nominee to be appointed.
- **Part 4** deals with who should be appointed as a nominee and the term of the appointment.
- **Part 5** deals with how nominees are expected to act and prescribes additional duties of nominees.
- **Part 6** deals with suspension and cancellation of appointments of nominees.
- **Part 7** deals with other matters, including interpretation of the Nominees Rules.

Part 1 – What these Rules are about

Paragraphs 1.1 to 1.2 are explanatory and contextual.

Part 2 – Outline of these Rules

Paragraphs 2.1 to 2.5 are explanatory and contextual.

Part 3 – Whether it is necessary to appoint nominee

This Part deals with the issue of whether it is necessary for a nominee to be appointed for a participant.

Paragraphs 3.1 to 3.10 summarise the operation of sections 78 and 79, and subsection 86(4) of the Act. These sections contain additional details relating to actions of nominees.

Paragraph 3.11 summarises subsections 86(2) and 87(2) of the Act. The Act contains further provisions relating to the appointment of a nominee, which have not been summarised in the Nominees Rules.

Appointment at request of participant

Paragraphs 3.12 and 3.13 concern the situation where a participant has requested a nominee to be appointed. Paragraph 3.13 lists the criteria and matters to which the CEO is to have regard when the participant has requested that a particular person be appointed as nominee.

Appointment without a request from the participant

Paragraphs 3.14 and 3.15 apply to the situation where a participant has not requested a nominee to be appointed. Paragraph 3.14 lists the criteria and matters to which the CEO is to have regard when deciding whether to appoint a nominee when the participant has not made a request. Paragraph 3.15 gives an example of when a nominee might be appointed without the request of a participant.

Part 4 – Who should be appointed as nominee?

This Part deals with the issue of who should be appointed as a nominee.

Paragraphs 4.1 to 4.3 explain the operation of the Act.

Paragraph 4.4 identifies persons who must not be appointed as a nominee.

Matters to take into account when deciding who to appoint as nominee

Paragraphs 4.5 to 4.8 concern the criteria and matters the CEO is required to take into account when deciding whether to appoint a particular person as a nominee. Paragraphs 4.6(a) and 4.6(c)(i) (to the extent that that it relates to a person who has guardianship of the participant) summarise the requirements of paragraph 88(2)(b) and subsection 88(4) of the Act. However, paragraphs 4.6(b), 4.6(c)(i) (other than to the extent that that it relates to a person who has guardianship of the participant) and 4.6(c)(ii) prescribe further matters to which the CEO is to have regard when appointing a nominee. Paragraph 4.7, so far as it relates to paragraph 4.7(b), summarises the requirement of subsection 88(3) of the Act. The other parts of the paragraphs impose rules in relation to the matters to be taken into account.

Term of appointment of nominee

Paragraph 4.9 summarises the operation of subsections 86(4) and (5) of the Act.

Paragraph 4.10 gives examples of when the CEO might decide that an appointment for a specified term is appropriate.

Paragraph 4.11 specifies the views to be taken into account when deciding whether the appointment should be for a specified term and what that term should be.

Requirements with which the CEO is to comply when appointing nominee

Paragraph 4.12 specifies that the CEO is to consult with any court-appointed decision-maker or participant-appointed decision-maker in relation to any appointment.

Paragraph 4.13 concerns considerations for the CEO when deciding whether to appoint as a nominee a person that is a body corporate.

Part 5 – How nominees are expected to act

Paragraph 5.1 and 5.2 summarised the guidance as to how nominees are to act under the scheme. This guidance applies both to nominees appointed at the request of a participant and nominees appointed on the initiative of the CEO.

Duty to ascertain wishes, and promote personal and social wellbeing, of participant

Paragraph 5.3 and 5.4 describe the duty as set out in subsections 80(1), (2) and (3) of the Act.

Plan nominee to act only if participant not capable

Paragraph 5.5 specifies that a plan nominee appointed on the initiative of the CEO is able to do an act on behalf of the participant only if the nominee considers that the participant is not capable of doing the act. (The paragraph summarises subsection 78(5) of the Act but this is not described as a duty under the Act.)

Paragraph 5.6 specifies that a plan nominee appointed at the request of the participant has a duty to refrain from doing an act unless satisfied of certain matters.

Paragraph 5.7 deals with the concurrent operation of State and Territory laws.

Duty to consult

Paragraph 5.8 and 5.9 specifies duties on a nominee to consult in relation to doing acts under, or for the purposes of, the Act.

Duty to develop capacity of participant

Paragraph 5.10 specifies a duty on a nominee to apply their best endeavours to developing the capacity of the participant.

Paragraph 5.11 states that there is an expectation that DisabilityCare Australia will assist nominees in fulfilling this duty.

Duty to avoid or manage conflicts of interest

Paragraph 5.12 and 5.13 specifies that a nominee has a duty to the participant to avoid a conflict of interest.

Duty for corporate nominee to inform CEO if person closely involved in performance of nominee functions changes

Paragraph 5.14 specifies a duty for corporate nominee to inform the CEO if the person closely involved in performance of nominee functions changes.

Part 6 – Suspension and cancellation of appointment of nominee

Paragraphs 6.1 to 6.4 summarise sections 89, 90 and 91 of the Act. The provisions in the Act contain further details of the grounds of suspension and cancellation. The Act specifies a number of detailed procedural and other requirements that must be followed for these grounds of cancellation or suspension to be relied on. Paragraph 6.1 states that under the Act there are several situations in which the CEO is able, or is required, to suspend or cancel the appointment of a nominee.

Paragraph 6.5 imposes rules for the CEO when cancelling or suspending the appointment of a nominee in the situations described in paragraph 6.3 or paragraph 6.4.

Part 7 – Other matters

Citation

Paragraph 7.1 specifies the citation for the Nominees Rules.

Interpretation

Paragraphs 7.2 to 7.4 give guidance on interpretation and definitions for certain terms used in the Nominees 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 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview

The purpose of this legislative instrument is to deal with whether a nominee should be appointed, who should be appointed as a nominee, duties of nominees, and the cancellation and suspension of nominees.

Human rights implications

The Nominees Rules engage the following human rights:

- The rights of persons with disabilities in the Convention on the Rights of Persons with Disabilities (CRPD), Articles 3 and 12.

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 Nominees Rules in paragraph 1.2 align closely with the CRPD principles. The key objective of the Act that is reflected in the Nominees Rules are:

- The Act should enable people with disability to exercise choice and control in the pursuit of their goals and planning and delivery of their supports.

This is reinforced by the following general principles contained in the Act and engaged in the Nominees Rules:

- People with disability should be supported to exercise choice, including in relation to taking reasonable risks, in the pursuit of their goals and the planning and delivery of their supports.
- People with disability have the same right as other members of Australian society to be able to determine their own best interests, including the right to exercise choice and control, and to engage as equal partners in decisions that will affect their lives, to the full extent of their capacity.
- People with disability should be supported in all their dealings and communications with DisabilityCare Australia so that their capacity to exercise choice and control is maximised in a way that is appropriate to their circumstances and cultural needs.
- The role of families, carers and other significant persons in the lives of people with disability is to be acknowledged and respected.
- Where acts or things are done on behalf of persons with disability:
 - (i) they should be involved in decision-making that affects them, including making decisions for themselves, to the extent possible; and
 - (ii) they should be encouraged to engage in the life of the community; and
 - (iii) the judgements and decisions they would have made for themselves should be taken into account; and
 - (iv) their cultural and linguistic circumstances, and gender, should be taken into account; and
 - (v) their supportive relationships, friendships and connections with others should be recognised.

Choice and control — appointing a nominee

At the heart of the scheme is the principle of choice and control. The Nominees Rules recognise that, in certain circumstances, persons with disabilities may not be able to manage their own affairs. In these cases, the scheme allows for the appointment of nominees, to manage either a person's plan (the plan nominee) or their correspondence (correspondence nominee). In both cases, appointment may be at the request of the person, or at the instigation of the CEO of DisabilityCare Australia (the CEO).

The Nominees Rules positively engage with the principles recognised in Article 3 of the CRPD for persons with disabilities which recognise respect for inherent dignity, individual autonomy including the freedom to make one's own choices and independence of persons. More specifically the Nominees Rules make a positive engagement with a number of facets of Article 12 of the CRPD which recognises the right for people with disability to exercise legal capacity in all aspects of their lives and receive appropriate support to do this if required.

There a number of safeguards that are prescribed in the Nominees Rules which are a positive engagement with Article 12 (4) of the CRPD which provides that all

measures that relate to the exercise of legal capacity must provide for appropriate and effective safeguards to prevent abuse. This envisages that measures relating to the exercise of legal capacity include the following features:

- respect the rights, will and preferences of the person with disabilities;
- be free of conflict of interest and undue influence;
- are proportional and tailored to the person's circumstances;
- apply for the shortest time possible;
- are subject to regular review by a competent, independent and impartial authority; and
- the safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.

Paragraph 3.12 in the Nominees Rules requires that where the participant has requested a person to be appointed a nominee the CEO is to have regard to the principle that a nominee should be appointed where the participant request one. The CEO also needs to have regard to the following considerations:

- any evidence that indicates that the person might have unduly or improperly induced or influenced the participant to request the appointment and
- any conflicts of interest.

Paragraph 3.14 provides that the CEO has the discretion to appoint a nominee without a request from the participant. In this scenario it is envisaged that the participant wasn't able to communicate this request and the request came from the carer or a family member of the participant. In this situation the CEO is required to consult with the participant and take into account the considerations set out in sub-paragraph 3.14 (b) including:

- whether the participant would be able to participate effectively in the scheme without having a nominee appointed;
- the principle that a nominee should be appointed only when necessary, as a last resort, and subject to appropriate safeguards;
- whether the participant has supportive relationships, friendships or connections with others that could be relied on or strengthened to assist the participant to make their own decisions; or improved by appointment of an appropriate person as a nominee; and
- any relevant views of the participant, any person (including a carer) who assists the participant to manage their day-to-day activities and make decisions; and any court-appointed decision-maker or participant-appointed decision-maker.

In both of these cases this is a positive engagement with Article 12 of the CRPD which recognises the right for people with disability to exercise legal capacity in all aspects of their lives and receive appropriate support to do this if required. Although this measure of appointing a nominee to undertake the decision-making function may seem to place a limitation on the right of persons with disabilities to make their own choices, it is tempered with appropriate safeguards such as the CEO to look for

evidence of undue influence and conflict of interest before making that decision in accordance with Article 12 (4). It should also be borne in mind that these provisions have at their heart that the appointment of a nominee is a last resort and where possible a temporary measure.

The Nominees Rules also include safeguards in line with Article 12 (4) of the CRPD to the effect that the following three categories of persons cannot be appointed:

- a person under the age of 18 years of age;
- a person who is an employee of DisabilityCare Australia;
- any person associated with DisabilityCare Australia other than in a personal capacity such as a contractor.

Two of the key tenets of the safeguards for a measure under Article 12 (4) are respect for the rights, will and preferences of the person with disabilities and that a measure is proportional and tailored to the person's circumstances.

Paragraphs 4.6 to 4.8 of the Nominees Rules positively engages with these two key tenets in prescribing a list of matters that the CEO must take into account when deciding whether to appoint a particular person to be a nominee. These matters are additional to those set in section 88 of the Act and include:

- taking into consideration any wishes of the participant regarding the making of the appointment and having regard to those wishes, however they are expressed;
- having regard to whether the proposed nominee is both willing and able to comply with the duties of the nominee set in section 80 of the Act;
- having regard to the presumption that, if the participant has a court-appointed decision-maker or a participant-appointed decision-maker and the powers and responsibilities of that person are comparable with those of a nominee, that person should be appointed as nominee;
- the degree to which the proposed nominee would involve the participant in decision-making processes;
- the degree to which the proposed nominee assists the participant to make decisions for himself or herself;
- the degree to which the proposed decision-maker ascertains what judgements and decisions the participant would have made for themselves;
- the desirability of preserving family relationships and informal support networks of the participant; and
- any conflict of interest in relation to the proposed nominee and the participant.

One of the requirements of Article 12 (4) of the CRPD is that a measure is proportional and tailored to the person's circumstances and applies for the shortest time possible. This is positively engaged in paragraph 4.9 which provides that a nominee can be appointed indefinitely or for a specified period. Paragraph 4.10 sets out examples as to when the appointment of a nominee for a specified period is

appropriate. This is further dealt with in paragraph 4.11 which sets out what the CEO must take into account when determining the length of the appointment.

Duties of nominees

Part 5 of the Nominees Rules dealt with the additional duties of plan nominees and correspondence nominees to participants that specified in the Act. This positively engages with Article 12 (4) of the CRPD which provides that all measures that relate to the exercise of legal capacity must provide for appropriate and effective safeguards to prevent abuse. Three of the safeguards for measures that are engaged with are the measure must respect the rights, will and preferences of the person with disabilities, that it be free from conflict of interest and undue influence and be proportionate to the degree to which the measures affect the person's rights and interest.

For example paragraph 5.6 provides that a plan nominee appointed at the request of the participant must refrain from doing an act unless the participant cannot do or be supported to do or does not want to do the act themselves. Similarly paragraph 5.12 provides that the nominee has a duty to the participant to avoid or manage any conflict of interests in respect of the nominee and the participant. This includes a further obligation to inform the CEO of where there is such a conflict of interest. For example a conflict would arise if the nominee is, in a professional or administrative capacity, directly or indirectly responsible for, or involved in, the provision of any services for fee or reward to the participant

Paragraph 5.10 provides that the nominee has the duty to apply their best endeavours to developing the capacity of the participant to make their decisions to where a nominee is no longer required. This engages with the stipulation that a measure under Article 12 (4) of the CRPD should be for the shortest time possible.

Cancellation or suspension appointment of nominees

Part 6 of the Nominees Rules sets out the criteria that the CEO must have regard to where they are considering cancelling or suspending the appointment of a nominee. This positively engages with Article 12 (4) of the CRPD which provides that all measures that relate to the exercise of legal capacity must provide for appropriate and effective safeguards to prevent abuse. Three of the safeguards for measures that are engaged with are that:

- the measure must respect the rights, will and preferences of the person with disabilities;
- the measure be free from conflict of interest and undue influence; and
- the measure be proportionate to the degree to which the measures affect the person's rights and interest.

For example the CEO must consider:

- (a) any breach of a duty of the nominee to the participant under the Act or the Nominees Rules the views of the participant, and of any person who cares for or supports the participant;
- (b) the impact on the participant of any cancellation or suspension of appointment;
- (c) whether the participant still needs a nominee.

Conclusion

This instrument is compatible with human rights because it advances the protection of the rights of persons with disabilities in Australia in making decisions, consistent with the CRPD. It creates additional opportunities for persons with disabilities to exercise those rights by providing support through nominees 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.