

## EXPLANATORY STATEMENT

Issued by the Authority of the Assistant Minister for Social Services

*National Disability Insurance Scheme Act 2013*

*National Disability Insurance Scheme (Protection and Disclosure of Information) Amendment (No. 2) Rules 2014*

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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 that Act to be prescribed or which are necessary or convenient to be prescribed in order to carry out or give effect to the Act.

Subsection 58(1) of the Act contains a general rule that a requirement under the Act to give information or evidence or produce documents to the National Disability Insurance Scheme Launch Transition Agency (the Agency) is not affected by State and Territory laws. However, subsection 58(2) of the Act provides that despite subsection 58(1), a person is not required to give information, produce a document or give evidence to the Agency or an officer for the purposes of the Act if the person would be prevented from doing so under a law of a State or Territory and the relevant law is prescribed by the National Disability Insurance Scheme Rules for the purpose of paragraph 58(2)(b). Part 3 of the *National Disability Insurance Scheme (Protection and Disclosure of Information) Rules 2013* (the Information Rules) provides a list of State and Territory laws that are exceptions to the general rule in subsection 58(1) of the Act for the purpose of paragraph 58(2)(b).

The *National Disability Insurance Scheme (Protection and Disclosure of Information) Amendment (No. 2) Rules 2014* (the Amendment Rules) are made for the purposes of section 58 of the Act and amend the Information Rules to update references to Victorian legislation to reflect Victoria's new emergency management governance arrangements.

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

The Amendment Rules are Category B rules. Subsection 209(5) of the Act provides that the Minister must not make Category B rules unless the host jurisdiction has agreed to the making of the rules. Victoria (the host jurisdiction) has agreed to the making of these rules as required under subsection 209(5) of the Act.

The Amendment Rules are a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

## **Commencement**

The Amendment Rules commence the day after registration.

## **Consultation**

The Commonwealth has consulted with the Victorian Government in making the Amendment Rules.

## **Regulation Impact Statement (RIS)**

It has been determined, following consultation with the Office of Best Practice Regulation (OBPR), that a RIS is not required. OBPR ID 17924.

## **Explanation of provisions**

**Section 1** states the name of the Amendment Rules.

**Section 2** provides that the Amendment Rules commence on the day after they are registered.

**Section 3** provides that Schedule 1 to the Amendment Rules amends the Information Rules.

**Schedule 1** sets out amendments to paragraph 3.3(b) of the Information Rules.

**Item 1** deletes the references in paragraph 3.3(b) to the *Emergency Management Act 1986*, subsection 21G(2) and the *Police Regulation Act 1958*, sections 86ZG, 86ZH and inserts references to the *Emergency Management Act 2013*, subsection 73(2) and the *Victoria Police Act 2013*, sections 184, 185. The amendments reflect changes made to Victorian legislation.

The list of laws in paragraph 3.3(b) is an exception to the general rule in subsection 58(1) that a requirement under the Act to give information or evidence or produce documents to the Agency is not affected by State and Territory laws. A person is not required to give information, produce a document or give evidence to the Agency for the purposes of the Act if the person would be prevented from doing so under one of the State or Territory laws listed in paragraph 3.3(b) of the Information Rules.

## **Statement of Compatibility with Human Rights**

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

### ***National Disability Insurance Scheme (Protection and Disclosure of Information) Amendment (No. 2) Rules 2014***

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 of the Legislative Instrument**

The purpose of this legislative instrument is to deal with the circumstance in which a State or Territory law may prevent the disclosure of information or a document by a person under the *National Disability Insurance Scheme Act 2013* (the Act).

Subsection 58(1) of the Act contains a general rule that a requirement under the Act to give information or evidence or produce documents to National Disability Insurance Scheme Launch Transition Agency (the Agency) is not affected by State and Territory laws. However, subsection 58(2) of the Act provides that despite subsection 58(1), a person is not required to give information, produce a document or give evidence to the Agency or an officer for the purposes of the Act if the person would be prevented from doing so under a law of a State or Territory and the relevant law is prescribed by the National Disability Insurance Scheme Rules for the purpose of paragraph 58(2)(b). Part 3 of the *National Disability Insurance Scheme (Protection and Disclosure of Information) Rules 2013* (the Information Rules) provides a list of State and Territory laws that are exceptions to the general rule in subsection 58(1) of the Act for the purpose of paragraph 58(2)(b).

The *National Disability Insurance Scheme (Protection and Disclosure of Information) Amendment (No. 2) Rules 2014* (the Amendment Rules) are made for the purposes of section 58 of the Act and amend the Information Rules to update references to Victorian legislation to reflect Victoria's new emergency management governance arrangements.

#### **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 (CRC), especially Article 7 and 16;
- Articles 14 and 17 of the International Covenant on Civil and Political Rights (ICCPR).

### *General principles underpinning the CRPD*

The CRPD recognises 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 National Disability Insurance Scheme (NDIS) 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 records of the National Disability Insurance Agency 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.

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 the Agency 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 the Agency if these State or Territory laws apply to that person. This instrument amends this list of State and Territory laws. This is a positive engagement of the right to privacy by providing a precise exception to the requirement to provide information, give a document or give evidence.

### **Conclusion**

This instrument is compatible with human rights because it advances the protection of privacy rights of persons with disabilities in Australia, consistent with the ICCPR, 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 NDIS.

**Senator the Hon Mitch Fifield, Assistant Minister for Social Services**