

## **EXPLANATORY STATEMENT**

Issued by the authority of the Minister for Social Services

*Disability Services and Inclusion Act 2003*

*Disability Services and Inclusion (Code of Conduct) Rules 2023*

### **Purpose**

The *Disability Services and Inclusion (Code of Conduct) Rules 2023* (the instrument) establishes the general code of conduct (Code) made under section 20 of the *Disability Services and Inclusion Act 2003* (the Act) and the transitional code of conduct (Transitional Code) made under the *Disability Services and Inclusion Act (Consequential Amendments and Transitional Provisions) Act 2023* (the Transitional Provisions Act). The instrument sets out the requirements that all persons and entities must comply with in the course of providing relevant supports or services to persons with disability.

The Code applies to all persons to whom money may be payable under an arrangement made, or who receive a grant of financial assistance, under section 13 of the Act. The Transitional Code applies to existing providers of disability supports and services receiving funding under the *Disability Services Act 1986* (the DS Act) and the *Financial Framework (Supplementary Powers) Act 1997* (FF(SP) Act).

It is the responsibility of covered persons to ensure that its employees and key personnel comply with the Code or Transitional Code, and the covered person may be held responsible if it fails to do so.

### **Background**

This instrument is made in the context of the repeal and replacement of the DS Act. One key reason for replacing the DS Act was to establish a more consistent approach to regulation and safeguarding in relation to Commonwealth funded disability services outside of the National Disability Insurance Scheme (NDIS).

The Code and Transitional Code together contribute to ethical and safe delivery of disability supports and services outside of the NDIS, supporting quality and safeguarding arrangements to uphold the rights of people with disability. The Code and Transitional Code articulate the standards and obligations that people with disability, their families and carers can expect from persons delivering Commonwealth funded disability services.

The Code and Transitional Code align with the existing NDIS Code of Conduct, contributing to regulatory alignment between the NDIS and Commonwealth funded disability services more broadly. This alignment benefits people with disability accessing services and supports by clarifying that the same behavioural and attitudinal expectations apply to providers, regardless of the sources of funding. It

also simplifies requirements and training for persons who provide disability related supports and services both within and outside of the NDIS.

The Code will strengthen quality and safeguards arrangements across the sector. By setting clear expectations and contributing to regulatory alignment, the Code and Transitional Code will help to shape the behaviour and culture of service providers and their employees and key personnel. It is intended to have a preventative effect by setting out expectations of providers and workers, and a corrective effect through the power to take action in response to identified breaches. It will support people with disability to fully participate in society, providing an avenue for recourse in the event that their rights related to safety and quality of service are breached.

## **Commencement**

The instrument commences on the later of the day on which the Act commences and the day after this instrument is registered.

The instrument is made in reliance on subsection 4(2) of the *Acts Interpretation Act 1901*, which allows for the exercise of a power following enactment but before the commencement of an Act.

## **Consultation**

The instrument was circulated to Disability Representative Organisations along with all service providers who are currently funded by the department to provide disability services and supports outside the NDIS for input. The Australian Services Union was also given opportunity to comment. The combined feedback from this consultation was considered for the final version of the instrument.

The department will continue to work and engage with stakeholders in relation to individual programs so that they deliver the intended outcomes for people with disability into the future.

## **Regulation Impact Analysis (RIA)**

A RIA is not required for this instrument (OIA23-05099).

## **Explanation of the provisions**

### **Part 1 - Preliminary**

#### **Section 1 – Name**

Section 1 provides the name of the instrument being the *Disability Services and Inclusion (Code of Conduct) Rules 2023*.

## Section 2 – Commencement

Section 2 provides that the instrument commences on the later of:

- the day on which the Act commences
- the day after this instrument is registered.

The Act commences 28 days after it receives Royal Assent.

## Section 3 – Authority

Section 3 provides that the authority for the instrument is the *Disability Services and Inclusion Act 2023* and the *Disability Services and Inclusion Act (Consequential Amendments and Transitional Provisions) Act 2023*.

Specifically, this instrument is made under section 20 of the Act, which provides for rules prescribing a Code of Conduct and section 36 of the Act, which allows the Minister to make relevant rules.

The instrument is also made for the purposes of item 11 of the Transitional Provisions Act, allowing the Minister to make rules prescribing a transitional code of conduct.

## Section 4 – Definitions

Section 4 sets out the definitions for terms used in the instrument.

A number of terms are defined in the Act, including:

- eligible activity
- key personnel

The instrument also provides for the following definitions:

**Act** means the *Disability Services and Inclusion Act 2023*.

**covered person** has the meaning given in subsection 6(1)

**Social Services Department** means the Department administered by the Minister administering the Disability Services and Inclusion Act 2023.

**specified program** means a program, or part of a program, specified in section 11.

**Transitional Provisions Act** means the *Disability Services and Inclusion Act (Consequential Amendments and Transitional Provisions) Act 2023*.

## **Part 2 – Main Code of Conduct**

### **Section 5 – Purpose of this Part**

Section 5 provides that Part 2 is made for the purposes of subsection 20(1) of the Act, which makes provision for and in relation to a code of conduct that applies to a covered person.

### **Section 6 – Code of Conduct**

Section 6 prescribes the application of the Code to all persons undertaking eligible activities under the Act.

Subsection 6(1) provides that the Code applies to a person (a covered person):

- to whom money may be payable under an arrangement made under section 13 of the Act; or
- who receives a grant of financial assistance under section 13 of the Act.

Subsection 6(2) sets out the substantive requirements of the Code.

It provides that in undertaking an eligible activity to which the arrangement or grant relates, the covered person must:

- Act with respect for the individual rights of people with disability to freedom of expression, self-determination and decision-making, in accordance with applicable laws and conventions.

This reflects the fact that all people with disability have full and equal human rights to make their own decisions, live how they choose and receive the support they need.

- Respect the privacy of people with disability.

This reflects the fact that people with disability have the right not to have their personal information disclosed to others without their informed consent - unless mandatory reporting is required. Privacy also goes beyond handling personal information to delivering services in a way that maintains personal dignity.

- Provide the eligible activity in a safe and competent manner, with care and skill.

A covered person providing eligible activities is expected to have adequate expertise and competence necessary for safe and skilful service delivery and maintain any required qualifications and skills. This extends to the employees and staff of a covered person.

- Act with integrity, honesty and transparency.

Integrity, honesty and transparency are crucial to developing trust-based relationships between people with disability and their service providers that are required for high-quality service delivery. This may include declaring, or putting measures in place to avoid, any real or perceived conflict of interest, including in the provision of support and services and in relation to management and resolution of complaints.

- Promptly take steps to raise and act on concerns about matters that may impact the quality and safety of the provision of the eligible activity to people with disability.

Covered persons should take immediate action if the safety or the quality of support for people with disability is at risk, and to address the reasons why. This requirement works alongside the requirements to implement and maintain a complaints management and resolution system (subsection 15(4) of the Act) and an incident management system (subsection 15(5) of the Act).

- Take all reasonable steps to prevent and respond to all forms of violence against, and exploitation, neglect and abuse of, people with disability.

People with disability are at a far greater risk of and are more likely to experience violence, abuse, neglect and exploitation than those without a disability. Covered people play a critical role in helping to prevent, intervene early and respond to violence, abuse, neglect and exploitation.

- Take all reasonable steps to prevent and respond to sexual misconduct.

People with disability have a right to sexual expression and to develop and maintain sexual relationships. However, they are at an increased risk of all forms of sexual violence and sexual misconduct. A covered person must adhere to the highest standards of behaviour, by having professional boundaries with people with disability. This includes preventing and responding to any inappropriate behaviour by anyone to a person with disability.

## **Section 7 – When covered person breaches code of conduct because of conduct by other persons**

It is the responsibility of a covered person, as the person with a direct relationship with the Commonwealth, to ensure that its key personnel and employees comply with the Code, and to take necessary and appropriate action if they fail to do so. A failure to comply with the Code by a member of the key personnel or an employee of a covered person will be a breach of a statutory funding condition by the covered person. The covered person may therefore be held responsible for the actions of its employees or key personnel and action could be taken under section 14(6) of the Act.

Covered persons will be expected to use existing employee engagement, human resource and governance arrangements to ensure compliance with the Code. This could include considering whether operational policies and procedures, and training activities reflect the Code.

Subsection 7(1) sets out the circumstances in which the covered person breaches the Code because of an act, or an omission to perform an act, by a member of the key personnel of the covered person, or another person who is employed, or otherwise engaged by the person, including contractors and volunteers.

Subsection 7(2) sets out relevant circumstances in which covered persons must ensure that other persons comply with the Code:

- the member or employee undertakes, or participates in undertaking, an eligible activity for or on behalf of the covered person by:
  - providing the eligible activity to a person with disability; or
  - engaging with a person with disability (or the person's family or carers) regarding the person's participation in the eligible activity; or
  - performing duties in relation to the complaints management and resolution system implemented and maintained by the covered person; or
  - performing duties in relation to the incident management system implemented and maintained by the covered person; or
  - doing anything incidental to any of the matters mentioned in the preceding subparagraphs; and
- while undertaking, or participating in undertaking, the eligible activity, the member or employee does not comply with the Code.

Subsection 7(3) clarifies that the above circumstances apply whether or not the member or employee undertakes, or participates in undertaking, the eligible activity during the ordinary working hours of the member or employee.

### **Part 3 – Transitional code of conduct**

The Transitional Code will apply to all existing providers of disability supports and services funded the DS Act and relevant items specified in the *Financial Framework (Supplementary Powers) Regulations 1997* (FF(SP) Regulations). It will mirror the Code set out in Part 2 of this instrument and ensure that all persons who provide Commonwealth funded disability supports and services outside of the NDIS are subject to the expectations and requirements.

### **Section 8 – Purpose of this Part**

Section 8 provides that Part 3 is made for the purposes of sub-item 11(1) of Schedule 3 to the Transitional Provisions Act and makes provision for and in relation to a Transitional Code of Conduct.

## Section 9 – Transitional code of conduct

Section 9 prescribes the Transitional Code.

Subsection 9(1) provides that the Transitional Code applies in relation to:

- an eligible organisation that receives a grant of financial assistance as mentioned in paragraph 11(1)(a) of Schedule 3 to the Transitional Provisions Act; or
- a person or body that is a party to an arrangement as mentioned in paragraph 11(1)(b) of Schedule 3 to the Transitional Provisions Act; or
- a person who is mentioned in paragraph 11(1)(c) of Schedule 3 to the Transitional Provisions Act because the person receives, for the purposes of a specified program, money under an arrangement under section 32B of the FF(SP) Act; or
- a person who is mentioned in paragraph 11(1)(d) of Schedule 3 to the Transitional Provisions Act because the person receives, for the purposes of a specified program, a grant of financial assistance under section 32B of the FF(SP) Act.

Subsection 9(2) sets out the substantive requirements of the Transitional Code. It provides that in undertaking an eligible activity to which the arrangement or grant relates, the eligible organisation, person or body must:

- Act with respect for the individual rights of people with disability to freedom of expression, self-determination and decision-making, in accordance with applicable laws and conventions.

This reflects the fact that all people with disability have full and equal human rights to make their own decisions, live how they choose and receive the support they need.

- Respect the privacy of people with disability.

This reflects the fact that people with disability have the right not to have their personal information disclosed to others without their informed consent - unless mandatory reporting is required. Privacy also goes beyond handling personal information to delivering services in a way that maintains personal dignity.

- Provide the eligible activity in a safe and competent manner, with care and skill.

A covered person providing eligible activities is expected to have adequate expertise and competence necessary for safe and skilful service delivery and maintain any required qualifications and skills. This extends to the employees and staff of a covered person.

- Act with integrity, honesty and transparency.

Integrity, honesty and transparency are crucial to developing trust-based relationships between people with disability and their service providers that are required for high-quality service delivery. This may include declaring, or putting measures in place to avoid, any real or perceived conflict of interest, including in the provision of support and services and in relation to management and resolution of complaints.

- Promptly take steps to raise and act on concerns about matters that may impact the quality and safety of the provision of the eligible activity to people with disability.

Covered persons should take immediate action if the safety or the quality of support for people with disability is at risk, and to address the reasons why. This requirement works alongside the requirements to implement and maintain a complaints management and resolution system (subsection 15(4) of the Act) and an incident management system (subsection 15(5) of the Act).

- Take all reasonable steps to prevent and respond to all forms of violence against, and exploitation, neglect and abuse of, people with disability.

People with disability are at a far greater risk of and are more likely to experience violence, abuse, neglect and exploitation than those without a disability. Covered people play a critical role in helping to prevent, intervene early and respond to violence, abuse, neglect and exploitation.

- Take all reasonable steps to prevent and respond to sexual misconduct.

People with disability have a right to sexual expression and to develop and maintain sexual relationships. However, they are at an increased risk of all forms of sexual violence and sexual misconduct. A covered person must adhere to the highest standards of behaviour, by having professional boundaries with people with disability. This includes preventing and responding to any inappropriate behaviour by anyone to a person with disability.

## **Section 10 – When eligible organisation, person or body breaches transitional code of conduct because of conduct by another person**

It is the responsibility a covered person, as the person with a contractual relationship with the Commonwealth, to ensure that its key personnel and employees comply with the Transitional Code, and to take necessary and appropriate action if they fail to do so. This means that a covered person may be held responsible for the actions of its employees or key personnel.

Covered persons will be expected to use existing employee engagement, human resource and governance arrangements to ensure compliance with the Transitional



Code. This could include considering whether operational policies and procedures, and training activities reflect the Transitional Code.

Subsection 10(1) sets out the circumstances in which an eligible organisation, person or body breaches the Transitional Code of Conduct because of an act, or an omission to perform an act, by:

- a member of the key personnel (within the meaning of the Act) of the eligible organisation, person or body; or
- another person (an **employee**) who is employed, or otherwise engaged, by the eligible organisation, person or body, including contractors and volunteers.

Subsection 10(2) sets out relevant circumstances for the purposes of subsection 10(1):

- the member or employee undertakes, or participates in undertaking, an activity to which an arrangement or grant mentioned in subsection 9(1) relates for or on behalf of the eligible organisation, person or body by:
  - providing the activity to a person with disability; or
  - engaging with a person with disability (or the person's family or carers) regarding the person's participation in the activity; or
  - performing duties in relation to any complaints management and resolution system required to be implemented and maintained under the arrangement or grant]; or
  - performing duties in relation to any incident management system required to be implemented and maintained under the arrangement or grant;
  - doing anything incidental to any of the matters mentioned in the above; and
- while undertaking, or participating in undertaking, the eligible activity, the member or employee does not comply with the code of conduct.

Subsection 10(3) clarifies that the above circumstances apply whether or not the member or employee undertakes, or participates in undertaking, the eligible activity during the ordinary working hours of the member or employee.

### **Section 11 – Specified programs for the purposes of the *Financial Framework (Supplementary Powers) Act 1997***

Section 11 specifies programs and parts of programs for the purposes of subparagraphs 11(1)(c)(ii) and 11(1)(d)(ii) of the Transitional Provisions Act.

Subsection 11(2) provides that the programs mentioned in item 50, 54, 236, 356, 404, 502, 503, 539 and 559 of Part 4 of Schedule 1AB to the FF(SP) Regulations are specified.

Specifically, these programs include:

- Item 50 – Employment Assistance and Other Services
- Item 54 – NDIS Transitioning
- Item 236 – Boosting the Local Care Workforce Program
- Item 356 – Disability Royal Commission and Other Support Services
- Item 404 – National Auslan Interpreter Booking and Payment Services
- Item 502 – Individual Placement and Support
- Item 503 – Digital Work and Study Service
- Item 539 – Information, Linkages and Capacity Building
- Item 559 – Australia's Disability Strategy 2021-2031

Subsection 11(3) provides that the parts of a program mentioned in item 51, 52 or 511 of Part 4 of Schedule 1AB to the FF(SP) Regulations that is administered by the Social Services Department and provide a direct benefit to people with disability is specified.

Specifically, these programs include:

- Item 51 – Disability and Carer Support
- Item 52 – Disability and Carer Service Improvement and Sector Support
- Item 511 – National early childhood program for children with disability or developmental concerns

These programs are specified in part as there are some activities under these items that do not fall within the scope of the Act, for example programs that are directed at carers and do not provide a direct benefit to people with disability.

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

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

### ***Disability Services and Inclusion (Code of Conduct) Rules 2023***

The 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 *Disability Services and Inclusion (Code of Conduct) Rules 2023* (the Instrument) establishes the general code of conduct (Code) made under section 20 of the *Disability Services and Inclusion Act 2023* (the Act) and the transitional code of conduct (Transitional Code) made under the *Disability Services and Inclusion Act (Consequential Amendments and Transitional Provisions) Act 2023* (the Transitional Provisions Act). The instrument sets out the requirements that all persons and entities must comply with in the course of providing relevant supports or services to persons with disability.

The Code applies to all persons to whom money may be payable under an arrangement made, or who receive a grant of financial assistance, under section 13 of the Act. The Transitional Code applies to existing providers of disability supports and services receiving funding under the *Disability Services Act 1986* (the DS Act) and the *Financial Framework (Supplementary Powers) Act 1997* (FF(SP) Act).

It is the responsibility of covered persons to ensure that its employees and key personnel comply with the Code or Transitional Code as applicable, and the covered person may be held responsible if it fails to do so.

The Code and Transitional Code together contribute to ethical and safe delivery of disability supports and services outside of the National Disability Insurance Scheme (NDIS), supporting quality and safeguarding arrangements to uphold the rights of people with disability. The Code and Transitional Code articulate the standards and obligations that people with disability, their families and carers can expect from persons delivering Commonwealth funded disability services.

The Code and Transitional Code align with the existing NDIS Code of Conduct, contributing to regulatory alignment between the NDIS and Commonwealth funded disability services more broadly. This alignment benefits people with disability accessing services and supports by clarifying that the same behavioural and attitudinal expectations apply to providers, regardless of the sources of funding. It also simplifies requirements and training for persons who provide disability related supports and services both within and outside of the NDIS.

The Code will strengthen quality and safeguards arrangements across the sector. By setting clear expectations and contributing to regulatory alignment, the Code and Transitional Code will help to shape the behaviour and culture of service providers

and their employees and key personnel. It is intended to have a preventative effect by setting out expectations of providers and workers, and a corrective effect through the power to take action in response to identified breaches. It will support people with disability to fully participate in society, providing an avenue for recourse in the event that their rights related to safety and quality of service are breached.

## **Human rights implications**

This instrument engages the following rights:

- Right to equality and non-discrimination – Articles 3, 4, 5 and 12 of the *Convention on the Rights of Persons with Disabilities* (CRPD) and Articles 2, 16 and 26 of the *International Covenant on Civil and Political Rights* (ICCPR)
- Right to freedom from exploitation, violence and abuse – Article 16 of the CRPD
- Right to freedom of opinion and expression – Article 21 of the CRPD and Articles 19 of the ICCPR
- Right to privacy and reputation – Articles 22 and 31 of the CRPD and Article 17 of the ICCPR.

### Right to equality and non-discrimination – Articles 3, 4, 5 and 12 of the CRPD and Articles 2, 16 and 26 of the ICCPR

Article 3 of the CRPD reflects 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), non-discrimination, full and effective participation and inclusion in society, the need for respect for difference and acceptance of persons with disabilities, equality of opportunity, accessibility, gender equality and respect for the evolving capacities of children with disabilities, including their right to preserve their identities.

In addition, Article 4 of the CRPD outlines the obligations of State Parties to ensure and promote the full realisation of all human rights and fundamental freedoms for all persons with disability without discrimination of any kind on the basis of disability.

Article 5(2) of the CRPD requires State Parties to prohibit all discrimination on the basis of disability and guarantee persons with disabilities equal and effective legal protection against discrimination on all grounds. Article 12 of the CRPD reaffirms that persons with disability have the right to recognition everywhere as persons before the law and shall enjoy legal capacity on an equal basis with others, with appropriate measures being taken to provide access and support in exercising their legal capacity, including appropriate safeguards. The article also provides that persons with disability should be ensured equal rights to, among other things, control their financial affairs and not be arbitrarily deprived of their property.

Similarly, Article 16 of the ICCPR states that everyone shall have the right to recognition everywhere as a person before the law, and Article 26 of the ICCPR

states that all persons are equal before the law and are entitled, without any discrimination on any grounds, to the equal protection of the law, including protection from discrimination. Article 2(3) of the ICCPR provides State Parties to undertake to ensure that any person whose rights or freedoms are violated shall have an effective remedy, and that competent authorities enforce such remedies when granted.

The Code and Transitional Code implement these rights as they require covered persons to act with respect for the individual rights of people with disability to freedom of expression, self-determination and decision-making.

#### Right to freedom from exploitation, violence and abuse – Article 16 of the CRPD

Article 16 of the CRPD requires States Parties to take all appropriate measures to protect persons with disabilities from all forms of exploitation, violence and abuse.

The Code and Transitional Code will establish expectations for provider conduct, and the safe and ethical delivery of their services and supports.

#### Right to freedom of expression and opinion and access to information – Article 21 of the CRPD and Article 19 of the ICCPR

Article 21 of the CRPD requires that States Parties shall take all appropriate measures to ensure that persons with disabilities can exercise the right to freedom of expression and opinion, including the freedom to seek, receive and impart information and ideas on an equal basis with others and through all forms of communication of their choice. Similarly, article 19 of the ICCPR provides that everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds

The Code and Transitional Code implement this right as they require covered persons to act with respect for the individual rights of people with disability to freedom of expression, self-determination and decision-making.

#### Right to privacy and reputation – Articles 22 and 31 of the CRPD and Article 17 of the ICCPR

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. The right to privacy in Article 17 includes respect for informational privacy, including in respect of storing, using and sharing private information and the right to control the dissemination of private information.

The Code and Transitional Code specifically require covered persons to respect the right to privacy of people with disability. The requirement to respect the privacy of people with disability goes beyond handling personal information to delivering services in a way that maintains personal dignity.

## **Conclusion**

The Bill advances the protection of the rights of people with disability in Australia, including in relation to preventing exploitation, violence and abuse in the disability sector.