

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

FRLI: F2013L01008

Portfolio: Social Services

Tabled: House of Representatives, 18 June 2013 and Senate, 19 June 2013

PJCHR comments: First Report of the 44<sup>th</sup> Parliament, tabled 10 December 2013

Response dated: 3 February 2014

### Information sought by the committee

3.144 The committee sought clarification as to:

- the interaction between the powers of the CEO to disclose information under sections 60 and 66(1)(a) of the *National Disability Insurance Scheme Act 2013* and whether provision should be made in the rules for the de-identification of personal information or to obtain a person's consent prior to its release for research, analysis or policy development; and
- how the instrument engages the right of a child to be registered immediately after birth and the right to a fair trial.

3.145 The committee's concerns were referred to the Assistant Minister for Social Services as the matters fall within his portfolio responsibilities. The response appears as part of the overall response to the concerns raised by the committee in relation to the National Disability Insurance Scheme Legislation Amendment Bill 2013, the DisabilityCare Australia Fund Bill 2013 (and related bills) and a number of other legislative instruments relating to the NDIS. The relevant extract from the Assistant Minister's response is attached.<sup>1</sup>

### Committee's response

3.146 The committee thanks the Assistant Minister for his response.

3.147 In relation to the interaction between sections 60 and 66(1)(a) of the NDIS Act, the Minister's response explains that disclosure under section 60(2)(d)(i) is for the purposes of the NDIS Act (further explained in section 60(3)), whereas disclosure under section 66(2)(d)(i) is for the purposes of the public interest. The response also explains that section 60 deals with protected information (information about a person held in the National Disability Insurance Agency's (NDIA) records) and

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1 Letter from Senator the Hon Mitch Fifield, Assistant Minister for Social Services, to Senator Dean Smith, Chair PJCHR, 3 February 2014, Attachment, pp 6-7.

section 66 deals with a broader range of information that goes beyond protected information. The response explains the steps taken to de-identify any personal information that may be disclosed, and that the formal approval of the CEO is required before personal information can be released. The response also notes that participants are asked to consent to the disclosure and use of information and that it is possible for participants to opt out initially or subsequently.

3.148 The response further states that information held by the NDIA may be disclosed where it is necessary for the enforcement of laws, provided that the CEO is satisfied that the information cannot be reasonably obtained from a source other than the NDIA and that the person to whom disclosure is made has a sufficient interest.

3.149 The Assistant Minister's response in relation to the second point explains that the CEO may disclose information held by the NDIA where this is necessary to assist a child welfare agency to contact a parent or relative in relation to a child or to carry out its responsibilities relating to the safety, welfare or wellbeing of a child. While the committee is not persuaded that this engages the right of a child to be registered immediately after birth, the committee recognises that these provisions are likely to promote other rights of the child including rights to life, physical integrity and health.

**3.150 In light of the information provided, the committee makes no further comment on this instrument.**

**2.198 The committee intends to write to the Minister for Social Services to seek clarification as to:**

- **the interaction between these provisions and whether provision should be made in the rules for the de-identification of personal information or to obtain a person's consent prior to its release for research, analysis or policy development; and**
- **how the instrument engages the right of a child to be registered immediately after birth and the right to a fair trial.**

The NDIS Act authorises the CEO to disclose information under both section 60 and section 66 of the NDIS Act. The distinction between those two sections is that disclosures under section 60(2)(d)(i) are limited to purposes associated with the NDIS Act whereas disclosures under section 66(2)(d)(i) are authorised for the purposes of the public interest. While certain disclosures of protected information may be authorised under both provisions because they are both for the purposes of the NDIS Act and they have been certified by the CEO as being in the public interest, it is not necessary that this be the case.

Section 60(3) provides further guidance on the exercise of the CEO's power to disclose under section 60(2)(d)(i) by providing three instances where a disclosure will be for the purposes of the NDIS Act (namely, research into matters relevant to the NDIS, actuarial analysis of matters relevant to the NDIS and policy development). Importantly, the NDIS Act's purposes are not limited to those matters and the power in section 66(1)(a) does not interact with these matters.

A further distinction between these two provisions is the information to which each section relates. Section 60 deals specifically with protected information (which is defined in section 9 as information about a person that is or was held in the NDIA's records, including that there is no information) whereas section 66 is concerned with a broader range of information (namely, information acquired by a person in the performance of his or her functions or duties or in the exercise of his or her powers under the NDIS Act).

The NDIA employs a number of steps to de-identify personal information (name, gender and date of birth) before its disclosure. Before personal information is released for the purposes of the NDIS Act (under section 60(2)(d)(i)), formal approval must be sought from the CEO.

People with disability who complete and submit an access request form to become participants in the NDIS are asked for their consent to the disclosure or use of information for the purposes of the NDIS Act. This consent is provided by the participant or their parent/legal guardian and is recorded in the NDIA system against the participant's case record.

Participants can effectively opt out of their data being used for research, analysis and policy development by not providing consent initially or by withdrawing consent at a later time.

### The right of a child to be registered immediately after birth (Article 7 of the CRC)

The NDIS Act limits the circumstances in which protected information can be lawfully disclosed. One circumstance where disclosure is permitted is where the CEO certifies that the disclosure is in the public interest. The Information Rules provide further guidance on what circumstances may constitute the public interest.

This aspect of the NDIS Act (as elaborated on by the Information Rules) engages the right of a child to be registered immediately after birth because it authorises the CEO to disclose information held by the NDIA where, amongst other reasons, it is necessary to assist a child welfare agency to contact a parent or relative in relation to a child or to carry out its responsibilities relating to the safety, welfare or wellbeing of a child. The NDIA *Operational Guidelines on Information Handling* also provide guidance on the exercise of this discretion by the CEO to enable the CEO to disclose when it is necessary for the public interest.

Although the Information Rules heighten the level of protection generally afforded to the child's right to know and be cared for by his or her parents, there may be circumstances where they may negatively engage this right in the interests of protecting the child's welfare. These possible restrictions are considered proportionate, as they seek to ensure a child's right to privacy remains an important consideration whilst recognising circumstances where this may be outweighed by concern for a child's welfare.

### The right to a fair trial (Article 14 of the ICCPR)

The NDIS Act limits the circumstances in which protected information can be lawfully disclosed. One circumstance where information may be disclosed, as set out above, is if the CEO certifies that the disclosure is in the public interest. The Information Rules provide further guidance on what circumstances may constitute the public interest.

This aspect of the NDIS Act (as expanded in the Information Rules) engages the right to a fair trial (in particular the right to protection against self-incrimination) because it authorises the CEO to disclose information held by the NDIA where, amongst other reasons, it is necessary for the enforcement of laws.

There are strict limitations imposed on the disclosure of information for this purpose. Before information can be disclosed for the enforcement of laws, the CEO must be satisfied that the information cannot reasonably be obtained from a source other than the NDIA, and the person to whom the information will be disclosed has sufficient interest in the information.

The disclosure must also be necessary for the enforcement of laws, for example, where information about the whereabouts of a person suspected of committing an offence or breaching a relevant law is required.

The restrictions set out above are reasonable and proportionate because of the safeguards in relation to disclosure of the information and are consistent with accepted best practice in other contexts.

Section 65 of the NDIS Act prevents a court, tribunal or authority from enforcing a requirement to produce documents where that would require disclosure of information acquired by a person in the performance of his or her functions or duties or in the exercise of his or her powers under the NDIS Act.