

National Disability Insurance Scheme (Nominees) Rules 2013

FRLI: F2013L01062

Portfolio: Social Services

Tabled: House of Representatives and Senate, 20 June 2013

PJCHR comments: First Report of the 44th Parliament, tabled 10 December 2013

Response dated: 3 February 2014

Information sought by the committee

3.66 The committee wrote to the Minister to inquire whether a more explicit statement could be provided in the National Disability Scheme Rules (NDIS) Rules to reflect the desirability that the appointment of a nominee should be for the shortest time possible and subject to regular review by a competent, independent and impartial authority as provided for in the Convention on the Rights of Persons with Disabilities.

3.67 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.¹

Committee's response

3.68 The committee thanks the Assistant Minister for his response.

3.69 The Assistant Minister's response refers to the *Operational Guidelines* adopted for the purposes of the NDIS in relation to nominees.² The committee appreciates the information provided as to the contents of the relevant *Guidelines on Nominees*. While these appear in large to protect the interests of a person for whom a nominee has been appointed, the committee notes that the response does not specifically address the committee's suggestion that an explicit statement be included in the Rules relating to the length of appointment of a nominee and the need for regular review by a competent independent and impartial tribunal.

1 Letter from Senator the Hon Mitch Fifield, Assistant Minister for Social Services, to Senator Dean Smith, Chair PJCHR, 3 February 2014, Attachment, pp 3-4.

2 *Operational Guidelines on Nominees*.

3.70 The committee also notes that much of the detailed regulation is provided for under these and other *Operational Guidelines*, but that the *Operational Guidelines* do not appear to be legislative instruments.

3.71 The committee intends to write to the Assistant Minister to seek clarification as to:

- the legal status of the *Operational Guidelines* and the details of the power under which they have been made;
- whether the *Operational Guidelines* may be amended without parliamentary scrutiny; and
- whether any restrictions on rights carried out pursuant to the operational guidelines would be considered to be authorised by 'law'.



SENATOR THE HON MITCH FIFIELD
ASSISTANT MINISTER FOR SOCIAL SERVICES

MN13-002278

Senator Dean Smith
Chair
Parliamentary Joint Committee on Human Rights
S1.111
Parliament House
CANBERRA ACT 2600

Dear ~~Senator~~ *Dean*

Thank you for your letter of 10 December 2013 to the Hon Kevin Andrews MP, Minister for Social Services, in which you seek clarification on behalf of the Parliamentary Joint Committee on Human Rights, on aspects of:

- the National Disability Insurance Scheme Rules;
- the National Disability Insurance Scheme Legislation Amendment Bill 2013; and
- the DisabilityCare Australia Fund Bill 2013 and eleven related bills.

Your letter was referred to me as this matter falls within my portfolio responsibilities.

I am pleased provide the attached responses to issues the Committee has raised.

Yours sincerely


MITCH FIFIELD

Encl.

3/2/14

Guideline 17 requires a child's representative to consult, wherever practicable, with the child's guardian (if any) and any person with parental responsibility and any other person who assists the child to manage their day-to-day activities and make decisions.

Guideline 18 refers to principles in the NDIS Act that guide those making decisions for children requiring that they are aware that the best interests of the child are paramount and that full consideration is given to the need to protect the child from harm, promote the child's development and strengthen, preserve and promote positive relationships between the child and the child's parents, family members and other people who are significant in the life of the child.

Guideline 12 permits a delegate to revoke a determination that a person is to represent a child where the delegate is satisfied that it is no longer appropriate for the determination to remain in effect. A revocation may occur following a request by the child.

Any decision to appoint a person as a child's representative is open to review at the request of the child or any other affected person (NDIS Act sections 99(i) and (k)). This is internally reviewable under section 100(2) and externally reviewable by the Administrative Appeals Tribunal under section 103 if the child is dissatisfied with the internal review decision.

The limitations on rights referred to by the statement of compatibility and the justification for those limitations

Although there are no explicit limits on the rights of children in the rules, the phrase "any limitation imposed by the instrument are reasonable, necessary and proportionate" was used in the statement of compatibility to cover the situation where the CEO would need make balanced decisions about children's supports under the NDIS. Any such decision that might be seen as limiting the rights of the child would be reasonable, necessary and proportionate.

National Disability Insurance Scheme (Nominees) Rules 2013

2.173 The committee intends to write to the Minister for Social Services to inquire whether a more explicit statement could be provided in the NDIS Rules to reflect the desirability that the appointment of a nominee should be for the shortest time possible and subject to regular review by a competent, independent and impartial authority as provided for in the CRPD.

The Operational Guidelines on nominees contain guidance for decision makers when appointing nominees.

In the *Operational Guideline – Nominees – Overview*, guideline 8 stresses that appointments of nominees will be justified only when it is not possible for participants to be assisted to make decisions for themselves. Where a nominee is appointed and it later appears that the participant no longer requires a nominee and requests removal of the nominee, a delegate may cancel the appointment of the nominee.

In the *Operational Guideline – Nominees – Duties and Removal of Nominee*, guideline 24(a) states that the delegate is required to cancel an appointment of a nominee as soon as practicable if the nominee was appointed at the request of a participant and the participant requests the delegate to cancel the appointment.

In *Operational Guideline – Nominees – Appointing a Nominee*, guideline 15 states:

Setting a term for the appointment can be an important safeguard for the participant in appointing a nominee. Some examples of circumstances where the delegate may wish to limit the term of an appointment are:

- a. The delegate considers that it would be desirable to review the appointment of a nominee after a period to see whether the participant still needs a nominee.

This has the effect that planners understand that appointments may not be indefinite and delegates are made aware that the ongoing need for a nominee is a matter for active consideration.

A participant may request the cancellation of a nominee at any time. Under section 89 of the NDIS Act the CEO must, as soon as practicable, cancel the appointment of a nominee if the participant had requested the nominee and now requests the cancellation of the appointment. If the appointment was on the initiative of the CEO and the participant requests the cancellation of the appointment the CEO must decide within 14 days whether to cancel the appointment. If the CEO decides not to cancel the appointment they must provide the participant with a written notice of their decision.

When cancelling the appointment of a nominee the CEO is to have regard to the following:

- (a) any breach of a duty of the nominee to the participant under the Act or the Rules;
- (b) the previous conduct of the nominee in relation to the participant;
- (c) the results of any review of the participant's plan;
- (d) the views of the participant, and of any person who cares for or supports the participant;
- (e) the impact on the participant of any cancellation or suspension of appointment;
- (f) whether the nominee has been convicted of a criminal offence that is reasonably likely to compromise the ability of the person to act as nominee;
- (g) whether the participant still needs a nominee, having regard to the considerations mentioned in paragraph 3.14(b) of the *National Disability Insurance Scheme (Nominees) Rules 2013*.

If the CEO decides not to cancel the appointment then the participant can seek an internal review of that decision under section 100, and then if necessary, external review by the Administrative Appeals Tribunal (AAT). The AAT is a competent, independent and impartial authority. It has a dedicated division for NDIS cases and it has appointed disability experts to provide a lead in determining NDIS reviews.