

Australian Capital Territory

# Legal Aid (Disclosure of Information) Guidelines 2022 (No 1)

Disallowable instrument DI2022–86

made under the

Legal Aid Act 1977, s 92AA (4) (Exceptions to secrecy provisions)

## EXPLANATORY STATEMENT

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This explanatory statement relates to the *Legal Aid (Disclosure of Information) Guidelines 2022 (No 1)* (the Guidelines) as notified by the Attorney-General under s 92AA (4) of the *Legal Aid Act 1977* (LA Act). It has been prepared to assist the Chief Executive Officer (CEO) of the Legal Aid ACT Commission (the Commission) to interpret the Guidelines and provide justification about the matters the CEO must consider before authorising the disclosure. It does not form part of the LA Act and has not been endorsed by the Assembly.

## INTRODUCTION

Section 92AA of the LA Act provide exceptions to secrecy provisions in the LA Act, where the Commission may authorise the disclosure of data or information in relation to the ‘affairs of a person’ if the disclosure meets the requirements set out in the Act.

For exceptions under subsections 92AA (2) and (3), the CEO must decide in which situations it is appropriate to make a disclosure, by balancing proportionality between the rights protected by the *Human Rights Act 2004* (HR Act), the Australian Privacy Principles (APPs) or other relevant privacy principles, and the disclosure’s objective and value.

The purpose of the Guidelines is to provide a transparent process for how disclosure requests pursuant to subsections 92AA (2) and (3) will be assessed by the CEO, and provide safeguards to minimise any impacts on the right to privacy. The Guidelines direct the CEO to consider if the limits imposed by the disclosure on human rights and privacy principles are reasonable, and ensure that any risk to privacy would be proportionate to the disclosure’s objective.

## HUMAN RIGHTS

Under section 28 of the HR Act, human rights may be subject only to reasonable limits set by laws that can be demonstrably justified in a free and democratic society. The Guidelines recognise that the disclosure of data or information about the

Commission's work and client affairs, even where the data or information is de-identified, can present a risk of identification. The risk of a client being identified is a limit on a person's right to privacy under section 12 of the HR Act.

However, in some situations, disclosing de-identified data or information about clients can be important to enable research, which contribute to improving Australia's legal system and access to justice outcomes. Improving access to justice is important to enabling everyone's participation in the legal system, as it gives effect to the right of recognition and equality before the law (section 8 of the HR Act).

The Guidelines therefore require the CEO to consider sensitivities and safeguards around identification, and be satisfied that the limit on human rights must be proportionate to the purpose of the request for disclosure. The greater the limit on the right to privacy or other human rights, the greater the justification for the restriction for disclosure.

## **PRIVACY PRINCIPLES**

The meaning of 'Commonwealth entities' and 'Australian Privacy Principles' are defined in subsection 92AA (6). The *Information Privacy Act 1988* (Cth) and the APP Guidelines set out which Commonwealth entities the APPs are binding upon and their rights and obligations around the collection and disclosure of data.

Where the requesting entity is an entity in which the APPs do not apply, the Guidelines direct the CEO to determine which privacy legislation, if any, is binding upon the entity seeking disclosure. For example, a State or Territory's legislation or regulation, such as the ACT's Territory Privacy Principles (TPPs), may bind an entity.

## **GUIDELINES**

The Guidelines outline three stages that the CEO must consider when considering a request for disclosure.

Stage 1 requires the CEO to determine the requirements for disclosure. Subsection 92AA (2) permits the CEO to authorise the disclosure if the disclosure, in accordance with the Guidelines, was made to a Commonwealth entity for the purpose of complying with a national agreement for the provision of legal assistance services, and the APPs are binding upon the disclosed material.

Subsection 92AA (3) allows the CEO to authorise the disclosure if the disclosure, in accordance with the Guidelines, was made to a third party entity for the purpose of conducting research in relation to improving access to justice outcomes, or the provision of legal assistance services, and the disclosure complies with the APPs or other relevant privacy principles. If the request for disclosure was made for research purposes under subsection 92AA (3), the CEO must be satisfied of evidence that the data disclosed is required and valuable to achieve the research objective.

Stage 2 requires the CEO to assess the entity's data management governance and maturity. Only if the CEO assesses the entity's data management maturity as inadequate, do they need to progress to Stage 3. Under Stage 3, the CEO may impose

terms and limits on the disclosure to ensure any issues identified in Stage 2 are adequately addressed. For example, the CEO may impose restrictions on how the data is used and stored after the project's completion.

Once the CEO is satisfied that the disclosure meets all required legislative requirements and is consistent with the Guidelines, the CEO may authorise the disclosure in writing.

## **COMMENCEMENT**

The Guidelines commence the day after notification.