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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**NATIONAL DISABILITY INSURANCE SCHEME
LEGISLATION AMENDMENT BILL 2013**

EXPLANATORY MEMORANDUM

**(Circulated by the authority of the
Minister for Families, Community Services and Indigenous Affairs,
Minister for Disability Reform, the Hon Jenny Macklin MP)**

NATIONAL DISABILITY INSURANCE SCHEME LEGISLATION AMENDMENT BILL 2013

OUTLINE

This Bill makes minor amendments to the *National Disability Insurance Scheme Act 2013* to clarify the policy intention in relevant provisions, and to address minor anomalies and technical errors.

The Bill makes amendments to clarify the range of matters relating to the National Disability Insurance Scheme that can be prescribed by rules made under the Act, to ensure they are based soundly in the principal legislation for the scheme.

In the case of the early intervention supports, where there is no intention to make rules and where key eligibility criteria are set out clearly in the legislation, the current rule-making power is being removed to avoid any risk that those provisions would not be available to people who may benefit from them.

Further amendments strengthen the governance and financial framework of the National Disability Insurance Scheme Launch Transition Agency (DisabilityCare Australia) to support the Agency's accountable management of the significant public monies involved and to further strengthen the financial sustainability of the scheme.

The Bill clarifies the intended operation of provisions relating to compensation claims. It ensures that protections similar to those applying under the NDIS Act when a participant is required to claim or obtain compensation also explicitly apply when the CEO takes over the claim on behalf of the participant.

The Bill also makes consequential amendments to other Commonwealth Acts to complement the *National Disability Insurance Scheme Act 2013*. For example, amendments to the *Administrative Appeals Tribunal Act 1975* will strengthen the external merits review process for participants in the scheme by establishing a National Disability Insurance Scheme Division of the Administrative Appeals Tribunal, and requiring members assigned to the division to have relevant knowledge and experience.

Amendments to the social security law will include changes to ensure that amounts paid under the National Disability Insurance Scheme for supports funded under a participant's plan are not taken into account under the social security or veterans' entitlements income and assets tests. Similarly, amendments to the taxation legislation will include changes to ensure that payments and benefits provided under the National Disability Insurance Scheme to participants in the scheme are exempt from income tax.

Financial impact statement

This Bill is part of the legislation package underpinning the first stage of the National Disability Insurance Scheme, which will have a cost to the Commonwealth of \$1 billion over four years from 2012-13. Additional information on the costs of transition to a full scheme can be found in 2013-14 Budget Paper 2 and related documentation.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

The statement of compatibility with human rights appears at the end of this explanatory memorandum.

**NATIONAL DISABILITY INSURANCE SCHEME
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NOTES ON CLAUSES

Abbreviations used in this explanatory memorandum

- **NDIS** means the National Disability Insurance Scheme established by the *National Disability Insurance Scheme Act 2013*
- **NDIS Act** means the *National Disability Insurance Scheme Act 2013*
- **NDIS Rules** means the rules made under the NDIS Act
- **The Agency (DisabilityCare Australia)** means the National Disability Insurance Scheme Launch Transition Agency established by section 117 of the NDIS Act

Clause 1 sets out how the new Act is to be cited – that is, as the *National Disability Insurance Scheme Legislation Amendment Act 2013*.

Clause 2 provides a table that sets out the commencement dates of the various sections in, and Schedules to, the new Act.

Clause 3 provides that each Act that is specified in a Schedule is amended or repealed as set out in that Schedule.

**Schedule 1 – Amendment of the
National Disability Insurance Scheme Act 2013**

Summary

This Schedule makes minor amendments to the NDIS Act to clarify the policy intention in relevant provisions, and to address minor anomalies and technical errors.

Background

The Bill makes amendments to clarify the range of matters relating to the National Disability Insurance Scheme that can be prescribed by rules made under the Act, to ensure they are based soundly in the principal legislation for the scheme.

In the case of the early intervention supports, where there is no intention to make rules and where key eligibility criteria are set out clearly in the legislation, the current rule-making power is being removed to avoid any risk that those provisions would not be available to people who may benefit from them.

Further amendments strengthen the governance and financial framework of the Agency (DisabilityCare Australia) to support the Agency's accountable management of the significant public monies involved and to further strengthen the financial sustainability of the scheme.

The Bill also clarifies the intended operation of provisions relating to compensation claims. It ensures that protections similar to those applying under section 104 of the NDIS Act when a participant is required to claim or obtain compensation also explicitly apply when the CEO takes over the claim on behalf of the participant under section 105.

Most amendments made by this Schedule commence on the day after Royal Assent. Some amendments commence immediately after relevant provisions of the NDIS Act.

Explanation of the changes

Part 1 – Amendments relating to the National Disability Insurance Scheme Rules

Item 1 repeals paragraph 22(1)(b) and substitutes a more general rule-making power that allows for the NDIS Rules to prescribe any other requirements in relation to age. These could include a requirement that a person is of a specified age at a particular time, such as the date on which an access request was made. This is consistent with the rule-making power relating to the residence requirements.

Item 3 inserts a new paragraph 23(3)(d) to make it clear that the NDIS Rules may include a prescribed requirement relating to the purpose for which the person resides in a particular place – for example, where a person may start to reside in an area for the dominant purpose of accessing supports not provided under the Act. The new paragraph also allows for exceptional circumstances to be prescribed as a residence requirement..

Item 2 recasts the rule-making power in subsection 23(1) of the NDIS Act as a consequence of the additional scope for the rules provided by new paragraph 23(3)(d).

The amendments made by items 1 to 3 clarify the scope of the Minister's powers under the NDIS Act to make rules of the kind negotiated and agreed with the States and Territories.

Subsection 27(2) of the NDIS Act enables the rules to prescribe for, and in relation to, the persons who can conduct assessments relevant in determining whether a person meets the disability or early intervention requirements and the kinds of assessments that may be conducted. Because there is no intention to make rules under this provision, and because the key eligibility criteria are already set out clearly in the legislation, the current rule-making power is being removed to avoid any risk that these provisions would not be available to people who may benefit from them. Accordingly, **item 5** repeals subsection 27(2). A technical change is made by **item 4** as a consequence of this repeal.

Items 6, 10, 11, 12, 13, 15, 16, 19, 21, 22, 25 and 26 clarify the scope of rule-making powers in the NDIS Act by making amendments to paragraph 33(5)(d), section 34, subsection 35(1), paragraph 35(1)(a), subsections 35(2), (4) and (5), paragraph 40(2)(b), subsections 44(3), 74(6), and 75(4), and paragraphs 88(6)(b) and 93(b). As a consequence of the amendments in items 6 and 13, paragraphs 34(g) and (h) and subsection 35(3) have been repealed (**items 9 and 14**).

These amendments are to avoid any doubt that the Minister has the power under the NDIS Act to make NDIS Rules of the kind negotiated and agreed with the States and Territories.

The amendments either omit, or clarify the meaning of, 'criteria' in relation to these provisions. This is to clarify that the NDIS Rules may prescribe criteria of a kind that permit or require the CEO to take into account one or more matters in deciding whether the criteria are met.

Item 19 also clarifies that the NDIS Rules may prescribe criteria and matters which the CEO is to have regard to when determining whether the management of a participant's plan by the participant or a plan nominee would present an unreasonable risk to the participant. This amendment clarifies the scope of the power to make NDIS Rules in relation to unreasonable risk set out in the NDIS (Plan Management) Rules.

Item 7 is consequential to item 10, and inserts '(1)' before 'For' in section 34.

Item 17 inserts new subsection 44(1A). The new subsection provides that plan nominees who are insolvents under administration are not to manage the funding for supports under a participant's plan. A person will still be able to be a plan nominee even if they are an insolvent under administration, but will not be able to manage funding (if any) provided under the plan. Where this situation arises, the Agency (DisabilityCare Australia) or a registered plan management provider will manage the plan.

Item 18 inserts a new subsection 44(2A). The new subsection provides that, if the CEO is satisfied that the management of a participant's plan or part of a participant's plan by a plan nominee presents an unreasonable risk to the participant, the statement of participant supports must not provide that the plan nominee is to manage the participant's plan to the extent necessary. This amendment clarifies that, if the management of the participant's plan by a plan nominee would present an unreasonable risk to the participant, then the CEO may restrict the plan nominee from managing the funding associated with a participant's plan.

Item 20 inserts new paragraph 70(1)(e), which provides that, for a person or entity (the applicant) to be approved as a registered provider of supports, the CEO must be satisfied that the applicant is suitable to manage the funding for supports under plans or provide supports under plans, as the case requires. The amendment is to avoid any doubt that the NDIS Rules can include a requirement for the CEO to consider the suitability of a provider to manage the funding for supports under plans or provide supports under plans, as the case requires.

Item 23 repeals the heading to section 80 to reflect the amendment to subsection 80(4) made by item 24. The duties referred to in the subsection will include an expanded power to make rules to prescribe other duties of a nominee.

Item 24 makes an amendment to subsection 80(4). Subsection 80(4) provides that the NDIS Rules may prescribe certain duties on a nominee. The amendment adds to the duties of the nominee that may be prescribed, to include a duty to inform the CEO and the participant if the nominee has, acquires, or is likely to acquire, any interest, pecuniary or otherwise, that conflicts or could conflict with the performance of the nominee's duties. The effect of this amendment is to allow rules to be made to address a conflict of interests in the duties of the nominee. Where such a duty is prescribed, the duty will not only be to inform the participant, but also to require the nominee to inform the CEO.

Item 26 clarifies the scope of the rule-making powers in section 93 to ensure that the rules may prescribe the 'matters', as well as the 'criteria', to which the CEO is to have regard in appointing nominees.

Item 27 recasts subsection 209(2A) to make it clear that the NDIS Rules may provide for the specification of assessment tools by the CEO and the circumstances in which the CEO is to use the tools (for example, in deciding whether a person meets the disability or early intervention requirements).

Item 28 inserts a new provision dealing with NDIS Rules made before the commencement of this Act. The new provision provides that, for NDIS Rules made under the NDIS Act before the commencement of this item:

- a) those rules are taken to be, and to have been at all times, as valid as they would have been if the amendments made by this Schedule had been in effect when the rules were made; and
- b) anything done under those rules is taken to have been at all times as valid as it would have been if the amendments made by this Schedule had been in effect when the rules were made.

These provisions are necessary to ensure the validity of NDIS Rules made under the NDIS Act, and acts done under NDIS Rules, before the commencement of this Act. This is necessary because many of the NDIS Rules need to be made before 1 July 2013 so that the scheme commences from that date. No person's rights will be adversely affected by the retrospectivity.

Part 2 – General amendments

There are some references to 'mainstream community' in a small number of provisions in the NDIS Act. In the main, the NDIS Act refers to 'community', which is sufficient. **Items 29 and 44** therefore omit references to 'mainstream' where they occur.

Section 9 defines **early intervention supports** as supports that are identified in the NDIS Rules as early intervention supports. **Item 30** repeals this definition as rules are not being made under this provision.

Item 31 deletes the words, 'the plan nominee', from the definition in section 9 of **plan nominee**, and substitutes the words, 'a plan nominee'. This amendment is to clarify that more than one plan nominee may be appointed under subsection 86 (1) by the CEO.

Item 32 makes a minor amendment to the definition of **registered provider of supports** in section 9 to ensure that it is consistent with other provisions in the NDIS Act. Specifically, the definition is amended to include the words, 'or entity'. This reflects the fact that the CEO can approve a 'person' or an 'entity' as a registered provider of supports under section 70 of the NDIS Act. The term **entity** is defined in section 9 of the NDIS Act, while the term **person** is defined in section 2C of the *Acts Interpretation Act 1901*.

Section 24 of the NDIS Act sets out the disability requirements. One of these requirements, set out in paragraph 24(1)(d), is that the person's impairment or impairments affect the person's capacity for social and economic participation. **Item 33** amends this provision to replace the reference to 'and' with 'or', with the effect that the person could meet the requirement if one capacity or other is affected.

Item 34 repeals subsection 74(1A) and substitutes a new subsection 74(1A). The effect of this amendment is that, if a head (however described) of a Department of State of a State or Territory has parental responsibility for a child, the CEO must not make a determination under paragraph 74(1)(b) unless the head of a Department of State has agreed in writing to the making of the determination. A person who is the subject of a determination by the CEO under paragraph 74(1)(b) is able to do the things to be done by, or in relation to, the child as required or permitted under the Act. The effect of this amendment to this subsection is to provide that, when a head of a Department of State of a State or Territory has parental responsibility for a child, the same approach will be applied as when a State or Territory Minister has parental responsibility for a child.

Item 35 repeals subsection 75(3A) and substitutes a new subsection 75(3A). The effect of this amendment is that, if the head (however described) of a Department of State of a State or Territory has guardianship of a child, the CEO must not make a determination under subsection 75(2) or 75(3) unless the head of the Department of State has agreed in writing to the making of the determination.

A determination under subsection 75(2) provides that, despite subsection 75(1), if, under a law of the Commonwealth, a State or a Territory, a person has guardianship of a child, that person has parental responsibility for the child, unless the CEO determines that one or more of the persons referred to in subsection (1) instead have parental responsibility for the child.

A determination under 75(3) provides that, if subsection 75(1) would result in more than one person having parental responsibility for a child, the CEO may determine that one or more of those persons have parental responsibility for the child for the purposes of the Act. The effect of this amendment to this subsection is to provide that, when a head of a Department of State of a State or Territory has guardianship of a child, the same approach will be applied as when a State or Territory Minister has guardianship of a child under section.

Item 36 inserts the phrase, 'or being supported to do', into subsection 78(5). As amended, subsection 78(5) will allow a participant's plan nominee, who has been appointed on the initiative of the CEO, to do something relating to the preparation, review or replacement of a participant's plan, or the management of the funding for supports under the plan, if the nominee considers that the participant is not capable of doing, or being supported to do, the thing for himself or herself. This amendment implements Recommendation 23 of the Senate Standing Committee on Community Affairs report *National Disability Insurance Scheme Bill, 2012 [Provisions]*.

Item 37 omits from subsection 86(1) the words, ‘the plan nominee’, and substitutes the words, ‘a plan nominee’. This amendment is to ensure that more than one plan nominee for a participant may be appointed by the CEO under subsection 86(1).

Item 38 adds a new subsection 86(6). This amendment is to clarify that the CEO may appoint more than one person to be a plan nominee of a participant for the purposes of this Act.

Item 39 clarifies in section 90 (General circumstances in which CEO may cancel or suspend appointment of nominees) that a nominee is to respond to a notice issued under section 83 (Nominee to inform Agency of matters affecting ability to act as nominee).

Item 40 omits from section 90 the requirement that a nominee, in addition to informing the CEO that an event or a change of circumstances has happened or is likely to happen, must inform the CEO that this change is likely to have an effect referred to in paragraph 83(1)(b). These words are being deleted so that the notice process does not rely on a nominee forming a view about the effect referred to in paragraph 83(1)(b).

Item 41 adds a new paragraph 90(4)(c), which requires the CEO to have regard to the response provided by a nominee to any notice issued under section 83. After having regard to the nominee’s response, the CEO may form a view that it is appropriate to suspend or cancel one or more of a nominee’s appointments.

Item 42 makes a technical correction to paragraph 99(j). The reference to paragraph 74(4)(c) is replaced with a reference to paragraph 74(5)(c).

Item 43 inserts at the end of section 99 new paragraphs (r), (s), (t), (u) and (v). The new paragraphs provide that the following matters in relation to the waiver and write-off of debts under the NDIS Act are reviewable decisions:

- a decision under section 190 not to write off a debt;
- a decision under section 192 that the CEO is not required to waive a debt;
- a decision under section 193 not to waive a small debt;
- a decision under subsection 194(3) or (4) that the CEO is not required to waive a debt in relation to a settlement;
- a decision under section 195 not to waive a debt because of a person’s special circumstances.

Item 45 omits the word ‘must’ and substitutes the word ‘may’ in section 193.

Item 46 is an application provision. The item clarifies that Chapter 5 of the NDIS Act, and the NDIS Rules made for the purposes of subsections 35(4) and (5), apply to claims for compensation for personal injury:

- made before or after the commencement of Chapter 5 of the NDIS Act;
- concluded before the commencement of Chapter 5 of the NDIS Act; and
- where the personal injury that gives rise to the claim occurred before the commencement of Chapter 5 of the NDIS Act.

Part 3 – Minor amendments relating to information

These amendments amend Part 2 of the NDIS Act, which deals with privacy. The amendments, which were suggested by the Privacy Commissioner, are designed to introduce greater consistency in language between the NDIS Act and the *Privacy Act 1988*.

Items 47, 49, 50, 51 and 52 substitute the term ‘collect’ (or variations of that term) for the term ‘obtain’ (or variations of that term). The term collect is intended to have the same meaning as the term obtain in this context. It is intended to be interpreted broadly, to include the receipt, or coming into possession, of unsolicited information.

Item 48 substitutes the term ‘consent’ for the term ‘authorisation’. The term consent is intended to have the same meaning as the term authorisation in this context. **Item 52** (which also substitutes the term ‘collect’ for ‘obtain’) recasts subparagraph 66(1)(b)(ii) to refer to the express or implied consent of the person to whom the information relates in substitution for the reference to the express or implied authorisation of that person. Again, the term consent is intended to have the same meaning as the term authorisation in this context.

Part 4 – Amendments relating to actuarial, audit and risk management activities

Item 53 replaces current section 125A with a new section 125A. The substantively new provision is paragraph 125A(b), which sets out the requirement that the Board must consider the advice and reports of the audit committee in addition to that provided by an actuary. This requirement is in line with the Australian National Audit Office’s best practice guide for public sector audit committees and the Australian Prudential Regulatory Authority’s (APRA’s) prudential standards.

Item 53 also adds a new section 125B. New section 125B empowers the Minister administering the *Insurance Act 1973* to determine rules regarding the management of risks with which the Board must comply. These rules will be guided by APRA's prudential standards for risk management and shaped to reflect the specific nature of the scheme. The risk management framework is the totality of systems, structures, processes and people within the Agency (DisabilityCare Australia) that identify, assess, mitigate and monitor all internal and external sources of risk that could have a material impact on its operations and financial sustainability.

Item 54 repeals current subparagraph 180B(1)(a)(iii), and substitutes a new subparagraph 180B(1)(a)(iii). The new subparagraph alters the description of content that the scheme actuary must include within the annual sustainability report, to ensure that the Agency (DisabilityCare Australia) is not required to report on information or data about other service systems it may not hold.

Item 55 inserts an application provision, which provides that the amendment to paragraph 180B(1)(a) effected by item 54 (above) applies to assessments to be made the first time, and each later time, an annual report on the Agency (DisabilityCare Australia) under section 9 of the *Commonwealth Authorities and Companies Act 1997* is being prepared.

Part 5 – Amendments relating to compensation

Item 56 inserts after paragraph 99(o) in section 99 new paragraphs (oa), (ob) and (oc). New paragraph 99(oa) provides that a refusal by the CEO to extend time to satisfy a notice issued under subsection 104(2) is a reviewable decision.

New paragraphs 99(ob) and (oc) provide that decisions made under paragraphs 105(4)(a) and 105(4)(b) are reviewable decisions. These decisions relate to the CEO taking action to claim or obtain compensation (paragraph 105(4)(a)) and to taking over the conduct of an existing claim (paragraph 105(4)(b)).

Item 57 inserts a new subsection 104(5A). The new subsection provides that the CEO may extend the period specified in the notice issued under subsection 104(2) if a participant or prospective participant makes an application to extend the time. During this time, a person will, for example, be able to further investigate or obtain independent legal advice, or medical assessments in relation to his or her compensation claim.

Item 58 inserts at the end of section 105 new subsections (5) and (6). New subsection 105(5) provides that, before the CEO may take action to claim or obtain compensation, or take over the conduct of an existing claim, the CEO must have regard to:

- the disability of the person;

- the circumstances that give rise to the entitlement or possible entitlement to compensation;
- any impediments the CEO may face in recovering compensation;
- any reason why the person has not claimed or obtained the compensation (including any response to a notice under subsection 104(2));
- the impact (including any financial impact) of the CEO taking action to claim or obtain compensation or taking over the conduct of an existing claim on the person and his or her family; and
- any other matter the CEO considers relevant, having regard to the objects and principles set out in Part 2 of Chapter 1 of the Act.

These amendments clarify for participants, prospective participants and their nominees the matters to which the CEO must have regard when considering whether to take action to claim or obtain compensation, or take over the conduct of an existing claim. They provide detailed guidance in relation to the exercise of the CEO's powers under section 105, consistent with the objectives of the scheme.

New paragraph 105(6) provides that the CEO may not take any action to claim or obtain compensation, or take over the conduct of an existing claim, unless the CEO has notified the person in writing that the action is being considered and 28 days have passed since the notice was given.

Schedule 2 – Amendments of other Acts

Summary

This Schedule makes consequential amendments to other Commonwealth Acts to complement the NDIS Act. Further consequential amendments, to the *Income Tax Assessment Act 1997*, are included in Schedule 3.

Background

Included in this Schedule are some amendments to the *Administrative Appeals Tribunal Act 1975*, which will strengthen the external merits review process for participants in the scheme by establishing a designated National Disability Insurance Scheme Division of the Administrative Appeals Tribunal, and requiring members appointed to the division to have relevant knowledge and experience.

Amendments to the *Social Security Act 1991* and the *Veterans' Entitlements Act 1986* will ensure that amounts paid under the NDIS in respect of supports funded under a participant's plan do not affect social security entitlements. This is done through amendments ensuring that NDIS amounts (and returns on these amounts) are not counted as income, liquid assets or financial assets (so as to invoke the deeming rules) and are exempt from the assets test.

Further social security amendments ensure that NDIS participants do not receive double funding of mobility assistance through the NDIS and social security systems.

Some amendments made by this Schedule commence on the day after Royal Assent. However, the majority of the amendments commence immediately after Chapter 3 of the NDIS Act commences.

Explanation of the changes

Administrative Appeals Tribunal Act 1975

Item 1 establishes the National Disability Insurance Scheme Division of the Administrative Appeals Tribunal by inserting a new paragraph 19(2)(baaa) into the *Administrative Appeals Tribunal Act 1975* (AAT Act).

Item 2 makes a small consequential change to paragraph 19(2)(c) of the AAT Act to take account of the amendment effected by item 1.

Item 3 inserts two new subsections 19(3C) and (3D) into the AAT Act. New subsection 19(3C) provides that the Minister responsible for administering the AAT Act must consult with the Minister responsible for administering the NDIS Act about a proposed assignment of a member to the NDIS Division of the AAT. This accords with the arrangements in subsection 19(3A) of the AAT Act, which require the Minister responsible for administering the AAT Act to consult with the Treasurer in relation to the assignment of a member to the Taxation Appeals Division of the AAT.

New subsection 19(3D) prescribes the qualifications for the assignment of non-presidential members to the NDIS Division, and requires that, for a non-presidential member to be assigned to the division, the Minister responsible for administering the AAT Act must be satisfied that the non-presidential member has training, knowledge or experience relating to a disability, or other relevant knowledge or experience that will assist the non-presidential member in considering matters relating to the NDIS.

Age Discrimination Act 2004

Item 4 inserts a new paragraph 41(1)(fba) into the *Age Discrimination Act 2004* (Age Discrimination Act). This amendment will exempt anything done by a person in direct compliance with the NDIS Act from Part 4 of the Age Discrimination Act.

Item 5 inserts a new subsection 41(2C) into the Age Discrimination Act. This amendment will exempt anything done by a person in direct compliance with a regulation, rule or other instrument under the NDIS Act from Part 4 of the Age Discrimination Act.

These exemptions from Part 4 are necessary because there are a number of age-related provisions, including the age 65 limit for entry to the scheme. Discussion under the statement of compatibility with human rights, appearing at the end of this explanatory memorandum, also refers.

Social Security Act 1991

To ensure that amounts paid under the NDIS in respect of supports funded under a participant's plan do not affect social security entitlements, amendments are made to ensure that NDIS amounts (and returns on these amounts) are not counted as income, liquid assets or financial assets (so as to invoke the deeming rules) and are exempt from the assets test.

Subsection 8(8) of the *Social Security Act 1991* (Social Security Act) lists amounts that are not considered as income for social security purposes. **Item 6** inserts new paragraphs into subsection 8(8) to ensure that an NDIS amount and any return on a person's NDIS amount do not count as income. An ***NDIS amount*** is an amount paid under the NDIS in respect of reasonable and necessary supports funded under a participant's plan.

A **financial asset** is defined in subsection 9(1) of the Social Security Act to include a **financial investment** which, in turn, includes money that has been deposited into an account with a financial institution. A person who has financial assets is taken to receive ordinary income on those assets in accordance with the deeming rules (which assume that financial assets are earning a certain rate of income). **Items 7 and 8** insert a new definition of **designated NDIS amount** into subsection 9(1) and amend the definition of **financial investment**. The effect is that an NDIS amount that is deposited into an account with a financial institution and any return on that amount is not a financial asset.

An assets test exempt income stream can be commuted in certain circumstances. Consideration of a person's liquid assets is relevant in determining whether a hardship amount can be commuted from such an income stream. Subsection 9A(7) defines **liquid assets** as cash and readily realisable assets, and includes amounts deposited with, or lent to, a bank or other financial institution. **Items 9 and 10** amend this definition so as to exclude NDIS amounts, plus any return on those amounts, less amounts already spent by the person in accordance with an NDIS plan.

Social security benefits have a liquid assets waiting period that precludes payment for a period if the claimant has liquid assets that exceed a specified amount. A person's **liquid assets** are defined in section 14A of the Social Security Act as cash and readily realisable assets, and include amounts deposited with, or lent to, a bank or other financial institution. The definition also provides a list of amounts that are excluded from a person's liquid assets. **Item 11** adds to this list, ensuring that a person's liquid assets do not include NDIS amounts, plus any return on those amounts, less amounts already spent by the person in accordance with an NDIS plan.

Section 19B contains a similar definition of **liquid assets** that is relevant in determining whether a person is exempt from the care receiver's assets test for carer payment. **Item 12** amends the definition so that a person's liquid assets do not include NDIS amounts, plus any return on those amounts, less amounts already spent by the person in accordance with an NDIS plan.

Item 13 inserts a number of definitions into subsection 23(1) of the Social Security Act. The terms **NDIS amount**, **NDIS participant** and **NDIS plan** are defined by reference to relevant definitions in the NDIS Act.

Item 14 inserts a new section 1038, which would provide that a mobility allowance is not payable to a person under the Social Security Act when that person is a participant in the NDIS and his or her participant's plan contains a statement specifying the reasonable and necessary supports that will be funded under the NDIS.

The purpose of mobility allowance is to help with transport costs for people with disability who are unable to use public transport without substantial assistance. This assistance is tied to the person being engaged in gainful employment, vocational training, job search activities, voluntary work or a vocational rehabilitation program.

The purpose of this amendment is to ensure that NDIS participants do not receive double funding of mobility assistance through the NDIS and social security systems. Under the NDIS Act and NDIS Rules, a person will be able to continue to participate in the NDIS for a period after the person moves out of the launch site. This will be achieved through the residence requirements. The amendment would ensure that those people who continue to be participants and whose plan specifies reasonable and necessary supports would not receive additional support for mobility allowance.

A participant who does not receive funded reasonable and necessary supports would be able to apply for and be paid mobility allowance if he or she qualifies for the allowance and it is payable to them.

Most social security payments are subject to an assets test. Where a person's assets exceed allowable limits, their payment may be reduced or cease to be payable. An **asset** is defined to mean property or money (section 11 of the Social Security Act refers). However, in calculating the value of a person's assets, certain amounts are disregarded. These are listed in subsection 1118(1).

Item 15 inserts a new paragraph 1118(1)(sb) into the Social Security Act, which applies where a person has received an NDIS amount, and ensures that the amount worked out under new subsection 1118(1AD) (as inserted by **item 16**) is disregarded from the person's assets. The amount of the disregard is the value of the sum of the NDIS amounts received, plus any return on those amounts, less amounts spent in accordance with the NDIS plan.

Item 17 contains an application clause that would, in effect, continue a participant's entitlement to an automatic issue health care card (HCC) in certain circumstances when mobility allowance is no longer payable to them because of their participation in the NDIS.

Under section 1061ZK of the Social Security Act, a person is qualified for an automatic issue HCC if the person is receiving mobility allowance. The purpose of the HCC is to assist social security benefit recipients, low income earners and selected other groups with certain health costs, by allowing access to specified services at a concessional rate. Under the Social Security Act, if a person stops receiving mobility allowance, his or her qualification for an automatic issue HCC also ceases.

This item will preserve the entitlement of an NDIS participant to an automatic issue HCC even though mobility allowance will cease to be payable to the participant because of the amendment proposed at item 14 – that is, when the participant’s plan specifies the reasonable and necessary supports to be funded under the NDIS. In these circumstances, subsection 1067ZK(7) of the Social Security Act will continue to apply to a participant as if he or she were receiving mobility allowance on that day. This will ensure that the NDIS participant’s automatic issue HCC is preserved until such time as the person ceases to have a plan in effect that specifies the funded reasonable and necessary supports. In such cases, the person may re-apply for mobility allowance and, if granted, regain the benefit of an automatic issue HCC.

Veterans’ Entitlements Act 1986

Item 18 amends the index of definitions in section 5 of the *Veterans’ Entitlements Act 1986* (Veterans’ Entitlements Act) to include references to newly defined terms that are inserted into subsection 5Q(1) by item 21.

The amendments to the Veterans’ Entitlements Act made by **items 19 to 26** mirror the amendments made to equivalent provisions in the Social Security Act.

Item 19 amends the definition of ***income*** in subsection 5H(8) of the Veterans’ Entitlements Act to exclude an NDIS amount and any return on a person’s NDIS amounts.

Items 20 and 21 insert a new definition of ***designated NDIS amount*** into subsection 5J(1) and amend the definition of ***financial investment***. The effect is that an NDIS amount that is deposited into an account with a financial institution, and any return on that amount, is not a financial asset.

Items 22 and 23 amend the definition of ***liquid assets*** in subsection 5JA(7). The effect is to exclude from the definition NDIS amounts, plus any return on those amounts, less amounts already spent by the person in accordance with an NDIS plan.

Item 24 inserts a number of definitions into subsection 5Q(1). The terms ***NDIS amount***, ***NDIS participant*** and ***NDIS plan*** are defined by reference to relevant definitions in the NDIS Act.

Items 25 and 26 amend section 52 so that the value of the sum of the NDIS amounts received, plus any return on those amounts, less amounts spent in accordance with the NDIS plan, is disregarded in working out the value of the person’s assets.

Schedule 3 – Income tax amendments

Summary

This Schedule amends the *Income Tax Assessment Act 1997* to ensure that payments and benefits provided under the NDIS to an NDIS participant are exempt from income tax and that deductions and depreciation of capital assets and certain other capital expenditure systems do not apply in relation to the expenditure of those exempt NDIS amounts, leading to a double tax benefit being obtained.

Abbreviations used in the explanatory memorandum for this Schedule

- **CGT** means capital gains tax
- **ITAA 1997** means the *Income Tax Assessment Act 1997*
- **NMETO** means net medical expenses tax offset

Background

The NDIS presumes that a person has the individual agency and the capacity to act in their own interests unless critical circumstances prove otherwise, and that there is no one-size-fits-all approach to the management of a participant's plan.

Delivering a framework that gives effect to these presumptions, while also giving people choice regarding how supports and services are to be provided under the NDIS to NDIS participants, may give rise to unintended income taxation consequences.

While, in most circumstances, payments and benefits provided under the NDIS would not be considered assessable income, providing the flexibility to enable an NDIS participant to self-manage their plan, under which they may receive a payment in place of receiving particular services, may result in circumstances in which such payments and benefits may be considered to be either ordinary or statutory income, depending on the nature of the benefit and the way that it is made.

As this raises ambiguity about the circumstances in which NDIS payments and benefits may be considered to be assessable income, this Bill seeks to address this uncertainty, by specifically outlining the tax treatment of NDIS amounts, including the circumstances in which NDIS payments and benefits are to be exempted from income tax.

This Schedule also seeks to achieve the following related objectives:

- it restricts the ability to claim a deduction in respect to the spending of an exempt NDIS amount;

- it reduces the 'cost' for depreciation of capital assets or other capital expenditure to the extent that the asset is purchased using exempt NDIS amounts; and
- it reduces the cost base of CGT assets to the extent that the asset is purchased using exempt NDIS amounts.

The amendments made by this Schedule commence on the day that the Bill receives the Royal Assent, and apply to assessments for the 2013-14 income year and later income years.

Explanation of the changes

Making an NDIS amount exempt from income tax

Depending on an NDIS participant's circumstances and the way that an NDIS amount is paid to the participant, there are some circumstances in which the NDIS amount may be considered to be ordinary or statutory income under the ITAA 1997. This would mean that NDIS participants could need to pay income tax on NDIS amounts they receive.

Ordinary and statutory income can be made exempt from income tax if it is exempted under the ITAA 1997 or another Commonwealth law (section 6-20 of the ITAA 1997). Exempt income is not included as assessable income when calculating taxable income.

Item 5 amends Subdivision 52-H of the ITAA 1997 to provide an exemption from income tax for an ***NDIS participant*** (as defined in the NDIS Act) in respect to an ***NDIS amount*** (as defined in the NDIS Act) that is derived (directly or indirectly) under the NDIS Act either from the Agency (DisabilityCare Australia) or another entity authorised to provide that benefit to the NDIS participant under the NDIS Act.

The exemption will apply to NDIS amounts paid directly to the NDIS participant (or a nominee of the participant), by DisabilityCare Australia, or benefits that are provided to the NDIS participant indirectly, by third parties (including service providers and registered plan management providers), funded under the NDIS Act.

Subsection 6-5(4) of the ITAA 1997 will operate so that, where a payment is made on behalf of an NDIS participant (for example, by DisabilityCare Australia to a third party service provider to the NDIS participant), then the payment will be taken to have been derived by the participant. Therefore, the exemption will ensure that the derived payment is exempt in the hands of the NDIS participant.

Example 1

Manuel is an NDIS participant and, as part of his plan, he is to be provided with carer support. As DisabilityCare Australia is able to get a better rate for NDIS participants by contracting directly with care providers, Manuel has elected in his plan for the Agency (DisabilityCare Australia) to pay Manuel's NDIS amount directly to the care provider.

In this situation, assuming that the NDIS amount was assessable income, the payment to the care provider would be considered to be derived by Manuel, and the income tax exemption would apply to that amount so that Manuel would not be assessed on that amount.

Intermediaries or other entities that are authorised to receive payments in respect of an NDIS participant may be assessed on that income according to the ordinary operation of the income tax law, and the NDIS income tax exemption will not extend to those entities. Where an intermediary is contracted to provide supports to a participant under the NDIS Act, the NDIS amounts received would be a normal business receipt and assessable income in their hands.

Example 2

As in Example 1 above, the NDIS amount paid to the commercial care provider would be assessable in the hands of the care provider. The tax exemption would only apply to Manuel to the extent that the NDIS amount is otherwise assessable.

Note: If the care provider was a registered charity and was an exempt entity themselves (under another section of the ITAA 1997), then it may be exempt in the hands of the care provider as well.

Item 1 is a consequential amendment for the income tax exemption in item 5, and amends section 11-15 of the ITAA 1997 to include NDIS amounts in the checklist of ordinary or statutory income which is exempt only if it is derived by certain entities.

Limiting eligibility for deductions and offsets in respect to an exempt NDIS amount

A taxpayer may deduct a loss or outgoing from their assessable income under Division 8 of the ITAA 1997 to the extent that it is incurred in the gaining or producing of assessable income or is necessarily incurred in carrying on a business for the purpose of gaining or producing assessable income.

However, a taxpayer cannot deduct a loss or outgoing to the extent that it is capital in nature, is of a private or domestic nature or is incurred in relation to gaining or producing exempt income or non-assessable non-exempt income.

The ITAA 1997 also has specific provisions that allow or deny deductions in particular instances.

Item 3 amends Division 26 of the ITAA 1997 to provide that an NDIS participant will not be able to claim a deduction for a loss or outgoing to the extent that the loss or outgoing is funded (including funded by way of reimbursement) by an NDIS amount the participant derives.

This means that a deduction will only continue to be available to the extent that the exempt NDIS amount is less than the loss or outgoing incurred.

Example 3

Fred is an NDIS participant, and is employed as an academic in a very specific and technical engineering field. Under Fred's NDIS plan, he is to be provided with annual updates to his voice recognition software, and is given an NDIS amount of \$200 to purchase the update software.

When Fred gets to the software provider, he finds that there are custom update products which would be good to use for developing his technical lectures. Based on this preference, he then contracts with the provider to develop custom update software built around recognition of technical engineering jargon. However, this custom update software costs \$300.

In this hypothetical example, it is taken that DisabilityCare Australia does not consider the additional cost for the custom update software to be reasonable or necessary (based on Fred's particular circumstances) and therefore does not agree to change Fred's plan to fund the extra amount.

Fred uses \$100 of his savings, on top of the \$200 from DisabilityCare Australia, to purchase the custom update software.

In this case, item 3 will operate so that Fred is unable to get a deduction for the \$200 as it is an exempt NDIS amount (and he is not, in substance, 'out of pocket' in respect of that amount), but he is able to get a deduction for the \$100.

Example 4

Continuing on from Example 3, in addition to the \$200 that Fred receives to purchase annual voice recognition software updates under his NDIS plan, he is also paid \$400 in respect of equipment maintenance and \$200 in respect of funding for personal care services. He is thus paid \$800 in total under his NDIS plan.

In working out the extent to which the voice recognition software, equipment maintenance and the personal care services are funded by his NDIS amount, it is necessary to have reference to Fred's NDIS plan and any variation that may subsequently be made to it.

If the maintenance of his equipment actually cost \$450 and his funding for personal care services was only \$150, having regard to Fred's plan, it would be said that the voice recognition software was funded to the extent of \$200, the equipment maintenance was funded to the extent of \$400 and the personal care services were entirely funded by Fred's NDIS amount.

Item 2 is a consequential amendment relating to item 3, and amends section 12-5 of the ITAA 1997 to include the deduction limitation for NDIS amounts in a checklist of particular kinds of deductions and limits on deductions.

Interaction with the net medical expenses tax offset

The amendments in this Schedule are consistent with the existing operation of the NMETO.

Taxpayers are eligible to claim the NMETO for certain rebateable medical expense amounts (which is defined in the *Income Tax Assessment Act 1936*), less any amount which the taxpayer is entitled to be paid in respect of those medical expenses by a government or public authority.

Similarly to the operation of the amendment made by item 3, the NMETO will only be available (in this context) to the extent that the expenditure is a 'medical expense' (as per the requirements for the NMETO) and it is not subsidised by or reimbursed from an NDIS amount, which would be considered an amount from a government or public authority.

Example 5

Emmalee is an NDIS participant and, under her plan, is to be paid an NDIS amount for a prosthetic limb (which is a 'medical expense' for the purposes of NMETO). The NDIS amount she receives is \$8,500. However, the expenses for the prosthetic limb are higher than the plan allows for as Emmalee decides that she wants to choose a more expensive option, which costs \$11,000.

In this hypothetical example, DisabilityCare Australia decides that the additional cost of \$2,500 is not reasonable or necessary in Emmalee's particular circumstances, and does not approve the additional cost of \$2,500 as part of the plan.

Emmalee decides to proceed with the more expensive purchase, and pays using the \$8,500 from the NDIS and \$2,500 from her own savings.

Emmalee would not be entitled to the NMETO in respect of the \$8,500 of the purchase price of her prosthetic limb because it is an amount which she is entitled to be paid in respect of that medical expense by government or a public authority. However, the remaining \$2,500 would be a rebateable medical expense amount under the NMETO as it is not an amount which she is entitled to be paid in respect of her prosthetic limb by a government or public authority and is instead a private expenditure.

Reducing the 'cost' of a depreciating asset or other capital expenditure in respect to an exempt NDIS amount

A taxpayer may deduct an amount equal to the decline in value of a depreciating asset that they hold for a taxable purpose over the effective life of the asset under Division 40 of the ITAA 1997.

The decline in value is measured against the effective life of the asset, and the starting amount is determined by the 'cost' of the asset. The 'cost' is determined under Subdivision 40-C of the ITAA 1997, and generally involves two elements – the cost when an asset begins to be held, and additions to the cost after starting to hold the asset.

Item 4 amends Subdivision 40-C of the ITAA 1997 to include a new provision in Division 40 of the ITAA 1997 (regarding the calculation of cost for depreciating assets) that reduces the 'cost' of a depreciating asset to the extent the spending of the exempt NDIS amount would be denied as a deduction under the amendment in item 3.

This means that the 'cost' of the depreciating asset purchased will then exclude the equivalent exempt NDIS amount and be calculated in accordance with the existing rules in Division 40 of the ITAA 1997.

The effect of this will be that, where an NDIS participant has been given an NDIS amount to purchase a particular product (for example, a wheelchair), the NDIS participant will not be able to add that exempt NDIS amount to the cost of a depreciating asset and therefore claim depreciation/capital allowances for an amount for which they have not had to pay tax on.

This may also cover the situation where an NDIS participant also adds some of their own (non-NDIS) income to the NDIS amount to purchase a superior model than allocated in the NDIS plan.

Example 6

Carla is an NDIS participant and, under her NDIS plan, she is to be provided with a support that is a depreciating asset (with an effective life of four years) and is given an NDIS amount of \$50,000 to purchase the support.

When Carla goes to purchase her support, she finds another product which she has a preference for and can be used for her employment. However, her preferred support is \$80,000.

In this hypothetical example, DisabilityCare Australia decides that the additional cost of \$30,000 is not reasonable or necessary in Carla's particular circumstances, and does not approve the additional cost of \$30,000 as part of the plan.

In any case, Carla uses \$30,000 of her savings, on top of the \$50,000 from DisabilityCare Australia to purchase the support.

In this case, the provision operates so that Carla must exclude the \$50,000 from the cost of the depreciating asset as it is an exempt NDIS amount already excluded from the tax system. However, she is able to add the \$30,000 she has contributed to the cost of the depreciating asset and then claim depreciation in accordance with Division 40 of the ITAA 1997.

Reducing cost base of CGT assets in respect to an exempt NDIS amount

A taxpayer can make a capital gain or capital loss on an asset when a CGT event happens to that asset (for example, if the asset is disposed of). To work out the capital gain or loss, the taxpayer first needs to know the cost base of the asset (which is the starting cost), and then consider capital proceeds or losses arising from the CGT event.

The cost base of an asset (for CGT purposes) generally consists of five elements, listed in section 110-25 of the ITAA 1997. They are:

- 1st element – acquisition costs;
- 2nd element – incidental costs (for example, transaction costs);
- 3rd element – costs of owning the asset (for example, costs of maintaining or repairing the asset);
- 4th element – capital expenditure incurred to increase or preserve the asset's value, or that relates to installing or moving the asset; and
- 5th element – capital expenditure incurred to establish, preserve or defend the title to the asset or a right over the asset.

Exclusions from cost base are listed in section 110-38 of the ITAA 1997, while exclusions from reduced cost base are listed in subsections 110-55(4) to 110-55(9F) of the ITAA 1997.

Item 6 amends section 110-38 of the ITAA 1997 to add new subsection 110-38(7) of the ITAA 1997, to provide that expenditure of NDIS amounts does not form any part of any element of the cost base to the extent that section 26-100 prevents it being deducted (even if some other provision also prevents it being deducted).

That is, like item 4, it reduces the cost base of a CGT asset to the extent that the purchase was funded by an exempt NDIS amount and would be denied as a deduction under the amendment in item 3. This applies even if the exempt NDIS amount is derived after the asset is acquired.

Item 7 amends section 110-55 of the ITAA 1997 to insert new subsection 110-55(9G) of the ITAA 1997 in exactly the same way as item 6, except that it applies to the reduced cost base of the asset.

Definitions

Item 8 amends subsection 995-1(1) of the ITAA 1997 to insert a definition of ***NDIS amount***, to provide that this term has the same meaning given by the NDIS Act.

Application provisions

Item 9 specifies that these amendments will apply to assessments with respect to the 2013-14 and later years of income.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

NATIONAL DISABILITY INSURANCE SCHEME LEGISLATION AMENDMENT BILL 2013

This Bill 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 Bill

Background

In 2011, the Productivity Commission Report, *Disability Care and Support*, found that 'current disability support arrangements are inequitable, underfunded, fragmented and inefficient, and give people with a disability little choice' (Overview, p. 5), and recommended, *inter alia*, the establishment of a National Disability Insurance Scheme (NDIS).

National Disability Insurance Scheme Act 2013 (the NDIS Act) was enacted in March 2013. The Act gave effect to the commitment by the Commonwealth, State and Territory Governments to establish such a scheme, and for its progressive implementation from July 2013. The Act sets out the statutory framework for the NDIS, and for a National Disability Scheme Launch Transition Agency (the Agency – known as DisabilityCare Australia) to administer the scheme. The Act will be supplemented by disallowable legislative instruments known as NDIS rules, which will address some operational aspects of the scheme.

This Bill makes minor amendments to the NDIS Act to clarify the policy intention in relevant provisions, and to address minor anomalies and technical errors. It also makes consequential amendments to other Commonwealth legislation.

Consultation

The design of the NDIS has been a collaborative exercise, relying heavily on substantial contributions from stakeholders, including:

- the COAG Select Council on Disability Reform;
- joint Commonwealth/State/Territory Government working groups at official levels;
- extensive consultation with people with disabilities, their advocates, carers and families;

- the NDIS Advisory Group, comprising people with expertise in social insurance principles, disability policy, service provision, performance monitoring, training and curriculum development, academia and research, psychological and intellectual disability, Indigenous disability services, young people and children with disability;
- four Expert Groups, comprising persons with disabilities, their carers, advocates, service providers and other sector experts, focused on:
 - a national approach to control and choice;
 - eligibility and assessment;
 - quality, safeguards and standards; and
 - disability workforce and sector capacity; and
- the National Disability and Carer Alliance, which undertook public engagements around the country.

Outline of the National Disability Insurance Scheme Legislation Amendment Bill 2013

The Bill has three Schedules:

- Schedule 1 makes amendments to the NDIS Act and has five Parts:
 - Part 1 makes amendments to rule-making powers in relation to the National Disability Insurance Scheme Rules;
 - Part 2 makes general amendments to the NDIS Act, such as repealing definitions that are no longer required;
 - Part 3 makes minor amendments to the privacy provision of the NDIS Act to align the language of the amended provisions in line with the *Privacy Act 1988* (Cth);
 - Part 4 makes three technical amendments
 - Part 5 makes three amendments relating to compensation.
- Schedule 2 makes amendments to the following Acts:
 - *Administrative Appeals Tribunal Act 1975*;
 - *Age Discrimination Act 2004*;
 - *Social Security Act 1991*; and
 - *Veterans' Entitlements Act 1986*.

- Schedule 3 makes amendments to the *Income Tax Assessment Act 1997*.

Human rights implications

The amendments made by the legislation will engage the following rights:

- The rights of people with disabilities in the *Convention on the Rights of Persons with Disabilities* (CRPD), especially Articles 3, 4, 7, 13 and 28;
- Article 9 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR); and
- Article 14 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 amendments in the Bill are consistent with the alignment of the NDIS Act with the seven international human rights instruments to which Australia is party.

The preamble of the CRPD, and the General Principles set out in Article 3, reflect the need for respect for the inherent dignity, individual autonomy (including the freedom to make one's own choices and the independence of the person) of persons with disabilities, 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 of the NDIS Act in section 4 align closely with the CRPD principles. Placement of the CRPD as the first of a number of objectives in the NDIS Act is designed to promote the status of the CRPD and emphasise its critical nature in the interpretation of the legislation.

The principle of non-discrimination and the age requirements

Article 3(b) of the CRPD provides that non-discrimination is a general principle in relation to all rights in the CRPD. As noted by the Human Rights Committee in General Comment No. 18 on equivalent rights in the *International Covenant on Civil and Political Rights* (ICCPR), the rights to equality and non-discrimination in the ICCPR sometimes require nation states 'to take affirmative action in order to diminish or eliminate conditions which cause or help perpetuate discrimination'. In this context, the consequential amendments made by the Bill promote and advance the rights of persons with disabilities in Australia by strengthening support for them to exercise their social, economic and cultural rights in the NDIS.

Non-discrimination ensures that no-one is denied their rights because of factors such as race, colour, sex, language, religion, political or other opinion, national or social origin, property or birth. In addition to those grounds, discrimination on certain other grounds may also be prohibited. These grounds include age, nationality, marital status, disability, place of residence within a country and sexual orientation.

Differential treatment will not constitute discrimination if the differences in treatment are aimed at achieving a legitimate purpose and are reasonable and proportionate to this purpose.

The NDIS Act limits access to the NDIS based on age in two ways. The first way is limiting entry to the NDIS to persons under the age of 65. The second limitation is a temporary one for the NDIS in South Australia and Tasmania, which will only extend to children up to 15 in South Australia and only from 15 to 24 in Tasmania. The Bill makes a consequential amendment to the *Age Discrimination Act 2004* making it clear that that Act does not apply to actions and decisions made in purported compliance with the NDIS Act.

As noted in the Human Rights Compatibility Statement for the NDIS Act, this is because the NDIS is part of a broader system of support available in Australia. Accordingly, persons over the age of 65 can access the aged care system, although NDIS participants will have the choice whether to continue receiving support under the NDIS after they turn 65. This limitation is reasonable and necessary because it supports the broader intent of an integrated system of support operating nationally and providing seamless transition through different phases of life.

Likewise, the temporary age-based restriction for South Australia and Tasmania will test the effectiveness of processes and supports for particular sub-groups within the general population of persons with disabilities. The temporary age restrictions in Tasmania and South Australia are considered reasonable and proportionate, because of the overarching aim to ensure the integrity of the NDIS when it is nationally extended.

Article 7 of the CRPD – Respect for the rights of children

Article 7 of the CRPD requires the taking of all necessary measures to ensure the full enjoyment by children with disabilities of all human rights and fundamental freedoms on an equal basis with other children. It also requires that, in all actions concerning children with disabilities, the best interests of the child shall be a primary consideration.

The Bill amends sections 74 and 75 of the NDIS Bill relating to the situation where a State or Territory Minister has parental responsibility or guardianship of a child. The CEO must not determine that another person has parental responsibility for the child, or to act as the child's representative, unless agreed to in writing by the State or Territory Minister. The amendment extends the scope to also include heads of departments or agencies who have guardianship of the child.

This amendment is drafted to recognise the guardianship system, with its checks and balances. Therefore, from a human rights perspective, the provision operates to avoid any uncertainty as to who would be regarded as the parent of the child, or to act as the child's representative.

Article 12 of the CRPD – Establishment of a NDIS Division in the Administrative Appeals Tribunal

Article 12(4) of the CRPD requires signatories to the Convention to ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible, and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.

Consistent with this, the Bill makes amendments to the *Administrative Appeals Tribunal Act 1975* to establish a new National Disability Insurance Scheme Division of the Administrative Appeals Tribunal and require that members appointed to the division have expertise relating to disability or other relevant experience. This ensures that applications for review of relevant decisions under the scheme are reviewed by Tribunal members with appropriate training, knowledge or experience in this specialised area.

These amendments also engage with Article 4 of the CRPD, which includes obligations for the training of professionals and staff working with persons with disabilities so as to better provide the assistance and services guaranteed by the rights in the Convention, Article 13 of the CRPD and Article 14 of the ICCPR, which sets out the principles of equality before the law and access to justice, including obligations on government to take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.

Article 28 CRPD and Article 9 ICESCR— Right to Social Security

Article 9 of ICESCR recognises the right to social security for all persons. Article 28 of CRPD require countries to recognise the right of people with disabilities to social protection and to take appropriate steps to ensure access by people with disabilities to social protection and poverty reduction programs and to retirement benefits and programs.

The consequential amendments to the following Acts engage with the right to social security under ICESCR and CRPD:

- *Income Tax Assessment Act 1997*;
- *Social Security Act 1991*; and
- *Veterans' Entitlements Act 1986*.

The amendments to the Income Tax Assessment Act make clear that an NDIS amount is exempt from income tax. Under a corresponding provision, an NDIS participant cannot claim an NDIS expenditure as a deduction. The amendments promote the right to social security in ensuring that a payment of an NDIS amount is not taxed.

The amendments to the Social Security Act make clear that an NDIS amount, or a return made on a NDIS amount, is not income, an asset, financial asset or a liquid asset for the purposes of the Social Security Act. These amendments promote the right to social security in ensuring that the entitlement to a social security benefit is not affected by a payment of an NDIS amount. The amendment to the mobility allowance provisions, so that an NDIS participant who, before joining the scheme, was receiving a mobility allowance is no longer eligible, is made on the basis that they will be receiving this level of support as part of their plan. This ensures the more efficient allocation of resources and, in some cases, there will be more funding allocated for NDIS participants who require assistance with transportation.

Similarly, the amendments to the Veterans' Entitlements Act make clear that an NDIS amount, or a return made on a NDIS amount, is not income, an asset, a financial asset or a liquid asset for the purposes of the Veterans' Entitlements Act. The amendments promote the right to social security in ensuring that the entitlement to a social security benefit is not affected by a payment of an NDIS amount.

Conclusion

The National Disability Insurance Scheme Legislation Amendment Bill 2013 is compatible with human rights because it advances the protection of the rights of persons with disabilities in Australia, consistent with the CRPD. It reinforces the additional opportunities for persons with disabilities to exercise those rights under the NDIS 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 National Disability Insurance Scheme.

**The Minister for Families, Community Services and Indigenous Affairs,
Minister for Disability Reform, the Hon Jenny Macklin MP**