

EXPLANATORY STATEMENT

Issued by the Authority of the Minister for Families, Community Services and
Indigenous Affairs and Minister for Disability Reform

National Disability Insurance Scheme Act 2013

National Disability Insurance Scheme (Becoming a Participant) Rules 2013

Section 209 of the *National Disability Insurance Scheme Act 2013* (the Act) provides that the Minister may, by legislative instrument, prescribe matters required or permitted by this Act to be prescribed or which are necessary or convenient to be prescribed in order to carry out or give effect to this Act.

The *National Disability Insurance Scheme (Becoming a Participant) Rules 2013* (the Becoming a Participant Rules) are made pursuant to sections 22, 23, 25, 27 and 209 of the Act. The Becoming a Participant Rules are about becoming a participant and the requirements relating to age, residence and disability or early intervention that must be met for a person to become a participant.

The Minister in making the Becoming a Participant Rules has had regard to financial sustainability of the National Disability Insurance Scheme (the scheme) as required under subsection 209(3).

The Becoming a Participant Rules include Category A rules for the purposes of section 209 of the Act. Accordingly the Commonwealth and each host jurisdiction have agreed to the making of the Becoming a Participant Rules.

Background

In 2011, the Productivity Commission report, *Disability Care and Support* (Report No. 54), 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 the establishment of a National Disability Insurance Scheme. People who are participants in the scheme will be assisted to develop a personal, goal-based plan about how they will be provided with general supports and reasonable and necessary supports.

The Act was enacted in March 2013 giving 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 scheme, and for the National Disability Insurance Scheme Launch Transition Agency (DisabilityCare Australia) to administer the scheme. The Act is to be supplemented by National Disability Insurance Scheme rules, which address the more detailed operational aspects of the scheme. The Becoming a Participant Rules is one of a number of instruments that comprise these rules.

Commencement

The Becoming a Participant Rules commence on 1 July 2013.

Consultation

The design of the scheme 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, some of whom live with disability, who have 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.

The Becoming a Participant Rules is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

Explanation of provisions

The Becoming a Participant Rules has eight Parts:

- **Part 1** explains what the Becoming a Participant Rules are about.
- **Part 2** provides an outline of the Becoming a Participant Rules.
- **Part 3** sets out the additional age requirements that apply to persons in South Australia and Tasmania.
- **Part 4** sets out additional residence requirements which ensure that the scheme applies in launch areas.
- **Part 5** sets out when an impairment is, or is likely to be, permanent and when an impairment results in substantially reduced functional capacity (which are elements of the disability requirements).
- **Part 6** sets out when an impairment is, or is likely to be, permanent and when the provision of early intervention supports is likely to benefit a person (which are elements of the early intervention requirements).
- **Part 7** deals with the use of assessment tools in assessing whether a person meets the disability or early intervention requirements.
- **Part 8** deals with other matters, including interpretation of the Becoming a Participant Rules.

Part 1 – What these Rules are about

Part 1 provides some context for the Becoming a Participant Rules.

Paragraph 1.1 makes it clear that the scheme is being launched in certain areas of Australia, before being implemented nationally.

Paragraph 1.2 puts the Becoming a Participant Rules into a broader context which includes the development of a personal goal-based plan that may provide supports for the participant.

Paragraph 1.3 refers to relevant objects and principles, drawn from sections 3 and 4 of the Act.

Part 2 – Outline of these Rules

Part 2 is explanatory and contextual only. It provides some information about how a person becomes a participant, the requirements that must be met (access criteria) and references other Rules that may be relevant once a person has become a participant (for example, relating to supports for participants).

Part 3 – When does a person meet the age requirements?

Paragraph 3.1 summarises paragraph 22(1)(a) of the Act, which provides that a person meets the age requirements if the person was aged from birth up to 65 years when their access request was made.

Paragraph 3.2 states that the additional age requirements that must also be met by persons in South Australia and Tasmania.

Paragraph 3.3 applies to a person who resides in South Australia. If the person's access request is made before 1 July 2014, the person must be under the age of 6 on 1 July 2013 (this includes children born after 1 July 2013). Where the person's access request is made between 1 July 2014 and 30 June 2015 or is made before 1 July 2014 and determined after that date, the person must be under the age of 14 on 1 July 2014 (this includes children born after 1 July 2014). Where the person's access request is made on or after 1 July 2015 or is made before 1 July 2015 and determined after that date, the person must be under the age of 15 on the date of the access request.

Paragraph 3.4 applies to a person who resides in Tasmania. The person would need to be aged 15-24 on the date the access request was made and under 25 years on 1 July 2013.

Paragraphs 3.2 to 3.4 are made for the purposes of paragraph 22(1)(b) of the Act.

Part 4 – When does a person meet the residence requirements?

Part 4 sets out additional residence requirements which ensure that the scheme applies only in launch areas. In broad terms, the scheme initially will be launched in South Australia, Tasmania and specified areas in New South Wales and Victoria from 1 July 2013. The scheme will be launched in the Australian Capital Territory from 1 July 2014. Although governments have agreed in principle to a launch in the Barkly Region of the Northern Territory, at the time that these Becoming a Participant Rules are being made, that agreement has not been formalised.

Paragraph 4.1 summarises the residence requirements in paragraphs 23(1)(a) and (b) of the Act (person must reside in Australia and be either an Australian citizen, the holder of a permanent visa or a special category visa holder who is a protected SCV holder).

However, paragraph 4.1 also provides that a person is required to meet the qualifying residence requirement and the ongoing residence requirement in order to meet the residence requirements. The qualifying residence requirement is set out in paragraphs 4.6 to 4.8 while the ongoing residence requirement is set out in paragraphs 4.9 to 4.11. These requirements are made for the purposes of paragraph 23(1)(c) of the Act.

Paragraph 4.2 summarises paragraph 30(1)(a) of the Act which allows for a person's participant status to be revoked if they stop meeting the residence requirements. This means that the residence requirements continue to apply to a person after they become a participant.

Paragraph 4.3 states that a person can only meet the residence requirements if the person resides in a particular area of Australia (the NDIS launch areas), at a particular time.

Paragraphs 4.4 and 4.5 provide relevant definitions.

Paragraph 4.4 defines the 2013 NDIS launch areas as meaning:

- South Australia;
- Tasmania;
- Colac-Otway Shire, City of Greater Geelong, Borough of Queenscliffe and Surf Coast Shire in Victoria; and
- Lake Macquarie City, Maitland City and Newcastle City in New South Wales.

The NDIS launch areas are then defined in **paragraph 4.5** as the 2013 NDIS launch areas, together with the Australian Capital Territory.

Qualifying residence requirement

Paragraph 4.6 provides that a person meets the qualifying residence requirement if the person resides in a 2013 NDIS launch area on 1 July 2013 or resides in the Australian Capital Territory on 1 July 2014.

However, there are circumstances in which a person who moves into an NDIS launch area after the relevant date can also meet the qualifying residence requirement. This is the case where the dominant reason for the person starting to reside in the NDIS launch area is to access supports not provided under the scheme (for example, health services) and there are exceptional circumstances. An example of exceptional circumstances is where the person would suffer significant financial or personal hardship which could significantly undermine their wellbeing or social or economic participation, by reason of not being a participant. The relevant rule is in **paragraph 4.7**.

Paragraph 4.8 sets out some rules that apply in relation to children (persons under the age of 18).

A child can meet the qualifying residence requirement if the child is born after 1 July 2013 and a birth parent who cares for the child resides in a 2013 NDIS launch area on the day the child is born. There is a comparable rule for children born after 1 July 2014 to a parent residing in the Australian Capital Territory.

A child can also meet the qualifying residence requirement if the child comes into the care of a person with ongoing parental responsibility for the child after 1 July 2013 provided the person has resided in a 2013 NDIS launch area since 1 July 2013 and this will be the child's residence. There is a comparable rule for children who come into the care of a resident of the Australian Capital Territory after 1 July 2014.

In the case of a child whose parents are separated and who spends time with each parent, the child meets the qualifying residence requirement if one of the child's parent's resides in a relevant launch area on the day of the launch. However, if a parent of the child moves into a launch area after the day of the launch for the dominant purpose of the child accessing supports that are not provided under the scheme and there are exceptional circumstances, then the child meets the qualifying residence requirement.

Ongoing residence requirement

Paragraph 4.9 provides that a person meets the ongoing residence requirement while they reside in an NDIS launch area.

Paragraph 4.10 enables a participant to continue to meet the ongoing residence requirement for 12 months after they stop residing in an NDIS launch area.

In the case of a child whose parents are separated and who spends time with each parent, the child meets the ongoing residence requirements if at least one parent resides in an NDIS launch area. A child who is a participant also continues to meet the residence requirements for 12 months after both parents have stopped residing in an NDIS launch area. **Paragraph 4.11** provides the relevant rule.

Part 5 – When does a person meet the disability requirements?

Paragraphs 5.1 and 5.2 set out the conditions that need to be met for a person to meet the disability requirements. These paragraphs summarise section 24 of the Act.

Paragraph 5.3 clarifies that the rules in Part 5 relate to some of these conditions but that a person is still required to satisfy all of the conditions in order to meet the disability requirements.

When is an impairment permanent or likely to be permanent for the disability requirements?

Paragraph 5.4 to 5.7 set out the circumstances in which an impairment is, or likely to be, permanent for the purposes of the disability requirements (paragraph 5.1(b) refers). These paragraphs are made for the purposes of paragraph 27(1)(a) of the Act.

Paragraph 5.4 looks to whether there are known, available and appropriate evidence based clinical, medical or other treatments that would likely remedy the person's impairment. If not, then the impairment is, or is likely to be, permanent.

Paragraph 5.5 makes it clear that an impairment can be permanent even if the severity of its impact on functional capacity fluctuates or there are prospects of improvement in functional capacity (including psychosocial functioning).

Under **paragraph 5.6**, an impairment is, or is likely to be, permanent only if the impairment doesn't require further medical treatment or review in order for its permanency or likely permanency to be demonstrated. However, an impairment may require treatment and review before such an assessment can be made and may continue to be treated and reviewed after that.

Paragraph 5.7 relates to impairments of a degenerative nature. Such an impairment is, or is likely to be, permanent if medical or other treatment cannot improve it.

When does an impairment result in substantially reduced functional capacity to undertake relevant activities?

Paragraph 5.8 sets out when an impairment results in substantially reduced functional capacity of a person to undertake a relevant activity (being communication, social interaction, learning, mobility, self-care, self-management) for the purposes of the disability requirements (paragraph 5.1(c) refers). An impairment results in substantially reduced functional capacity to undertake a relevant activity in the following situations:

- where the person cannot undertake, or participate in, the activity effectively or completely, without assistive technology, equipment (other than commonly used items such as glasses) or home modifications;
- where the person usually requires assistance from other people to undertake, or participate in, the activity; or
- where the person cannot undertake, or participate in, the activity, even with assistive technology equipment, home modifications or assistance from another person.

Paragraph 5.8 is made for the purposes of paragraph 27(1)(b) of the Act.

Part 6 – When does a person meet the early intervention requirements?

Paragraph 6.1 summarises subsection 25(3) of the Act which ensures that a person cannot meet the early intervention requirements if early intervention support for the person is more appropriately provided or funded through other systems of service delivery or support services other than the scheme, for example, the health system.

Paragraph 6.2 sets out the conditions that need to be met for a person to meet the early intervention requirements. This paragraph summarises subsection 25(1) of the Act.

Paragraph 6.3 clarifies that the rules in Part 6 relate to some of these conditions but that a person is still required to satisfy all of the conditions in order to meet the early intervention requirements.

When is an impairment permanent or likely to be permanent for the early intervention requirements?

Paragraph 6.4 to 6.7 set out the circumstances in which an impairment is, or likely to be, permanent for the purposes of the early intervention requirements (subparagraphs 6.2(a)(i) and (ii) refer). These paragraphs are made for the purposes of paragraph 27(1)(a) of the Act.

Paragraph 6.4 looks to whether there are known, available and appropriate evidence based clinical, medical or other treatments that would likely remedy the person's impairment. If not, then the impairment is, or is likely to be, permanent.

Paragraph 6.5 makes it clear that an impairment can be permanent even if the severity of its impact on functional capacity fluctuates or there are prospects of improvement in functional capacity.

Under **paragraph 6.6** an impairment is, or is likely to be, permanent only if the impairment doesn't require further medical treatment or review in order for its permanency or likely permanency to be demonstrated. However, an impairment may require treatment and review before such an assessment can be made and may continue to be treated and reviewed after that.

Paragraph 6.7 relates to impairments of a degenerative nature. Such an impairment is, or is likely to be, permanent if medical other treatment cannot improve it.

Deciding whether provision of early intervention supports is likely to benefit the person

Paragraph 6.8 is descriptive and summarises the effect of paragraphs 6.9 to 6.11.

Paragraph 6.9 provides some guidance as to the matters that are expected to inform the CEO's consideration of whether the provision of early intervention supports is likely to benefit a person in the required ways. It is expected that consideration would be given to the likely trajectory and impact of the person's impairment over time, the potential benefits of early intervention on the person's functional capacity and in reducing their need for future supports and evidence from a range of sources (which may include expert opinion).

Paragraphs 6.10 and 6.11 are rules that deal with early intervention in early childhood. Paragraph 6.10 is made for the purposes of subsection 25(2) of the Act. Paragraph 6.11 is made for the purposes of paragraphs 27(1)(d), (e) and (f) of the Act.

Paragraph 6.10 provides that the CEO is taken to be satisfied that the provision of early intervention supports for a child under the age of 6 is likely to benefit the child in the required ways if the child's impairment is a physical or mental impairment that results in developmental delay. This means that further evidence of the potential benefits of early intervention for a child with developmental delay would not be required.

The note at the end of this paragraph reproduces the definition of developmental delay, which is in section 9 of the Act.

Paragraph 6.11 provides that the provision of early intervention supports is likely to benefit a child aged 6 or under in the required ways if the child's impairment results from a condition which is on a list of conditions published by the CEO. These would be conditions that are known to respond to early intervention supports such that a child with the condition would benefit from early intervention supports in the required ways.

Part 7 – Assessing whether a person meets the disability or early intervention requirements

This Part contains rules that are made for the purposes of subsection 209(2A) of the Act.

Paragraph 7.1 provides that the CEO may conduct an assessment, as appropriate, in deciding whether or not a person meets the disability or early intervention requirements. Any such assessment is to be done using an assessment tool specified in operational guidelines in accordance with Part 7.

Paragraph 7.2 then enables the CEO to specify, in operational guidelines, assessment tools to be used for the purpose of deciding whether a person meets the disability or early intervention requirements. These can be the same tools that are specified for the purposes of determining reasonable and necessary supports for a person, under paragraph 4.4 of the *National Disability Insurance Scheme (Supports for Participants) Rules 2013* (paragraph 7.3 refers).

Paragraph 7.4 allows the CEO to specify different tools for adults and children and tools that are specifically tailored to particular impairments.

Paragraph 7.5 requires a tool to be designed to ensure fair and transparent assessment and have reference to areas of activity and social and economic participation identified in the World Health Organisation International Classification of Functions, Disability and Health, as in force from time to time.

Part 8 – Other matters

Citation

Paragraph 8.1 specifies the citation for the Becoming a Participant Rules.

Interpretation

Paragraphs 8.2 to 8.4 give guidance on interpretation and definitions for certain terms used in the Becoming a Participant Rules.

Statement of Compatibility

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

This Rule 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

This instrument is made pursuant to sections 22, 23, 25, 27 and 209 of the Act, and deals with becoming a participant and the requirements relating to age, residence and disability or early intervention that must be met for a person to become a participant.

Human rights implications

The Becoming a Participant Rules engage the following human rights:

- The rights of persons with disabilities in the Convention on the Rights of Persons with Disabilities (CRPD), especially Articles 3, 7, 22, and 23.
- The rights of children in the Convention on the Rights of the Child (CRC), especially Articles 2, 9, 18 and 23.
- Article 10 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).
- Article 2 of the International Covenant on Civil and Political Rights (ICCPR).

General Principles underpinning the CRPD

The CRPD recognised 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 establishment of the scheme promotes the rights of people with disabilities in Australia by providing access to nationally consistent funding and support to help them realise their aspirations, and to participate in the social and economic life of the community.

The preamble of the CRPD, and the General Principles set out in Article 3 reflect the need for the respect for the inherent dignity, individual autonomy (including the freedom to make one's own choices and the independence of the person), 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 in the Act that have been applied in the Rules in paragraph 1.3 align closely with the CRPD principles. The objectives and general principles of the Act and Rules provide that:

- People with disability should be supported to participate in, and contribute to social and economic life to the extent of their ability;
- People with disability and their families and carers should have certainty that people with disability will receive the care and support they need over their lifetime; and
- People with disability should be supported to receive reasonable and necessary supports, including early intervention supports.

The Becoming a Participant Rules recognise that contributing to social and economic life to the extent of their ability is integral to participants' sense of belonging and wellbeing in their communities, a right that is promoted in Articles 3 and 19 of the CRPD.

The objects and the guiding principles of the scheme also recognise the rights of persons with disabilities to be provided with reasonable and necessary supports and to have certainty that they will receive the lifelong care and support they need. The role of carers, families and other significant persons is also recognised and respected. In this way, the Rules promotes Article 10 of IESCR, which requires that the widest possible protection and assistance should be accorded to the family, especially while it is responsible for the care and education of dependent children.

Progressive implementation of the scheme and the principle of non-discrimination

The right to equality and non-discrimination is protected by Article 2 of the ICCPR and Article 2 of the CRC which prohibits denying a person or child rights on certain grounds, including on the basis of age or place of residence. This is reinforced in the context of human rights for persons with disabilities by Article 3 (b) of the CRPD which 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'.

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.

Accordingly 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.

Progressive implementation by age

The Becoming a Participant Rules impose additional limitation on access to the scheme based on age. It should be noted that the Act imposes a limitation that only persons aged under 65 can make a request to become a participant. This is because the scheme is one aspect of a broader system of support in Australia. The intention is that people over the age of 65 should access the aged care system.

Under the Becoming a Participant Rules there is progressive implementation of the scheme by age in South Australia and Tasmania with additional limitations on the age criteria. The additional age limitation are a temporary limitation for these two launch sites with the express purpose to test the effectiveness of processes and supports for particular sub-groups within the general population of people with disabilities. The scheme operations and outcomes in these two sites will be evaluated and if required processes will be refined to ensure optimal effectiveness when the scheme is rolled out nationally.

In Tasmania the 15 – 24 year old cohort is a group that is seen as particularly high risk as they make the transition from adolescence to adulthood. In South Australia, the focus on children from 0 – 5 years olds in the first year, 0 – 13 year olds in the second year, and 0 –14 year olds in the third year was chosen particularly to assess the effectiveness of early intervention processes. Allied with this were the potential benefits to individual children in terms of reduced lifelong support needs.

All Governments are keen to see the benefits of the scheme to individuals maximised, and support the incremental approach recommended by the Productivity Commission. 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 scheme when it is nationally extended.

Residence Requirements

The Becoming a Participant Rules imposes additional limitations on access to the scheme on the basis of residence to participants living in the launch site areas until commencement to full scheme. During the launch period, however, access to the scheme will be limited to those living within the designated launch sites. This restriction is temporary in nature, and the intent of this limitation is the integrity and financial sustainability of the scheme in launch.

The Becoming a Participant Rules are reasonable and proportionate in achieving this aim in ensuring the integrity of the scheme in launch. Reference is made to paragraph 4.7 describing the circumstances in which a person who moves into an NDIS launch area after the relevant date can also meet the qualifying residence requirement. This is the case where the dominant reason for the person starting to

reside in the NDIS launch area is to access supports not provided under the scheme (for example, health services) and there are exceptional circumstances. An example of exceptional circumstances is where the person would suffer significant financial or personal hardship which could significantly undermine their wellbeing or social or economic participation, by reason of not being a participant. This discretionary provision serves to ameliorate any harsh outcomes that would otherwise result from a strict application of the residency requirements. It also advances Article 12 of the ICCPR to people with disability by protecting their right to liberty of movement and freedom to choose their place of residence.

Protection of Privacy

Article 22 of the CRPD is engaged by the Becoming a Participant Rules to the extent that it allows DisabilityCare Australia to require evidence of a person's age, residency, disability and early intervention needs. In particular, nation states are compelled to protect the privacy of personal, health and rehabilitation information. Any information that the person provides for the purposes of these Rules is considered protected information and must be dealt with in accordance with the National Disability Insurance Scheme (Protection and Disclosure of Information) Rules 2013 (Information Rules) on the collection, use and disclosure of personal information. The stringent conditions attached to the treatment of protected information under the Act and Information Rules serve to support and protect the right to privacy under the CRPD.

Best Interests of the Child

Under Article 3 (b) of the CRC, states are required to apply the principle of best interests of the child. This principle promotes the protection of a child's best interests as the primary consideration as part of the process for the taking of actions that concern children. This includes measures to support and assist parents and others who have responsibility for ensuring recognition of children's rights.

Article 18 of the CRC requires the recognition of the principle that both parents have common responsibilities for the upbringing and development of the child and to provide appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities, in particular are aware of their rights to access information on services to which they are entitled to for the benefit of children. This is read in conjunction with Article 9 of CRC which requires that states respect the rights of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis.

Part 4 of the Becoming a Participant Rules enables flexibility of living arrangements by providing for access in situations where either the child's parents have separated, or the child is cared for by persons other than their parents. Consequently, a child can also meet the qualifying residence requirement if the child comes into the care of a person with ongoing parental responsibility for the child after 1 July 2013 provided the person has resided in a 2013 NDIS launch area since 1 July 2013 and this will be

the child's residence. There is a comparable rule for children who come into the care of a resident of the Australian Capital Territory after 1 July 2014.

The Becoming a Participant Rules engage with Article 23 of the CRC which affirms the requirement for states to ensure a child with a disability enjoys a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community. The Rule draws on these principles by providing for a child to be eligible for access where a parent moves into the launch area after the relevant date for the dominant purpose of the child accessing supports that are not provided under the scheme and there are exceptional circumstances. This is reinforced by Article 7 of the CRPD in the context of actions concerning children with disability, and commits each nation state to protecting the best interests of children with disabilities.

In the context of a child whose parents are separated and who spends time with each parent, the qualifying residence criteria are broader than that applicable to an adult participant. By granting a child access to the scheme where parents have separated and the child spends time with a parent who meets the qualifying residence requirement is a positive engagement. In particular the Becoming a Participant Rules preserves the family relationship and supports parents who have separated from their partner to continue to provide for a child with disability rather than require a child to relocate in order to access supports.

Clarification of Disability and Early Intervention Definitions

The Becoming a Participant Rules provides greater specificity and clarity around the definitions for 'disability' and 'early intervention'. The scheme will be open to people with a permanent disability which results in substantially reduced functional capacity, each component of which is further explained in these Rules. An alternative to meeting these requirements are through the early intervention supports applicable to people who may not have substantially reduced functional capacity, but are considered to get benefit from these to reduce the impact of the impairment on the person's functional capacity. Evidence to be considered in determining this may include existing evidence or information from an individual or their family or carer. The CEO may also publish a list of conditions for which the benefits of early intervention have already been established.

The definitions of 'disability' and 'early interventions' under these Rules have been developed through extensive consultations with stakeholders, including with persons with disability and expert groups, and considerations of a strong evidence base. Although the definition of 'disability' under these Rules does not precisely correspond with that of the CRPD, the eligibility and assessment of need has been based on the World Health Organisation's International Classification of Functioning, Disability and Health (ICF). The narrower definition of 'disability' employed by the scheme is aimed at achieving a legitimate purpose by targeting those people with disability who have a significant impairment to their functional capacity. This functional definition of disability focuses on outcomes for the segment of the disability population that has the most unmet need. It should also be noted that the scheme operates in the

broader context alongside and complementing mainstream services which already offers support and services to people with disability.

The provisions in these Rules on early intervention for children are particularly pertinent to the best interest of the child principle in Article 3 of the CRC and Article 7 of the CRPD. This is a positive engagement with the main focus being on considering evidence whether a child with a disability is likely to benefit from early intervention if they have a physical or mental impairment that results in developmental delay under paragraph 6.10.

Conclusion

This legislative instrument is compatible with human rights because it advances the protection of the rights of persons and children with disabilities in Australia, consistent with the CRPD. It creates additional opportunities for persons with disabilities to exercise those rights 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 scheme.