

EXPLANATORY STATEMENT

Issued by the Authority of the Minister for Social Services

National Disability Insurance Scheme Act 2013

*National Disability Insurance Scheme (Prescribed Programs—New South Wales)
Rules 2016*

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 (Prescribed Programs—New South Wales) Rules 2016* (the Prescribed Programs Rules—New South Wales) are made for the purposes of sections 21(2)(b) and 209 of the Act. The Prescribed Programs Rules—New South Wales are about ensuring that the transition to full roll-out of the National Disability Insurance Scheme (NDIS) in New South Wales does not disadvantage anyone in New South Wales with a disability who was receiving disability services under certain Commonwealth or New South Wales programmes but does not meet the residence requirements as prescribed in section 23(1) of the Act due to the staggered full roll-out as outlined in the *National Disability Insurance Scheme (Becoming a Participant) Rules 2016* and the *National Disability Insurance Scheme (Facilitating the Preparation of Participants' Plans—New South Wales) Rules 2016*.

The Minister, in making the Prescribed Programs Rules—New South Wales, has had regard to the financial sustainability of the NDIS as required under subsection 209(3).

The Prescribed Programs Rules—New South Wales include Category B rules for the purposes of section 209(5) of the Act. Accordingly the host jurisdiction, New South Wales, has agreed to the making of the Prescribed Programs Rules—New South Wales.

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 1 July 2013. The Act sets out the statutory framework for the scheme, and for the National Disability Insurance Scheme Launch Transition Agency to administer the scheme.

In New South Wales, the scheme launch was initially restricted to particular launch areas, being local government areas of Newcastle City, Lake Macquarie City and Maitland City, and subsequently including City of Blue Mountains, City of Hawkesbury, City of Lithgow and City of Penrith.

The Government of the Commonwealth and the Government of New South Wales have agreed that the NDIS will be implemented throughout the entirety of New South Wales, and that the remaining areas will transition into the NDIS in accordance with the timeframes set out in the Bilateral Agreement between the Commonwealth and New South Wales: Transition to a National Disability Insurance Scheme, Schedule A—Participant Transition Arrangements in New South Wales. These documents are available at www.coag.gov.au.

As part of this implementation, certain Commonwealth and New South Wales disability services which are currently being provided in New South Wales will cease to be provided and the funding applicable to those programs transferred to the NDIS. Some persons who are currently receiving supports from such programs may not meet the access criteria set out in the Act because they do not meet the residency requirements.

The Prescribed Programs Rules—New South Wales are about ensuring that the transition to full roll-out of the NDIS in New South Wales does not disadvantage those who, prior to the full roll-out of the NDIS, were receiving disability services under certain Commonwealth or New South Wales programs but do not meet all the residence requirements as prescribed in section 23(1) of the Act.

It achieves this goal by prescribing a qualifying time, qualifying period and list of qualifying programs for the purpose of the requirements in subsection 21(2)(b) of the Act. If a person meets these requirements, and meets the requirements in subsections 21(2)(a) and (c) of the Act, then that person meets the access criteria and may become a participant, even though the person does not meet the access criteria for the purposes of section 21(1)(b) of the Act.

Commencement

The Prescribed Programs Rules—New South Wales commence on the day after the instrument is registered.

Consultation

The Prescribed Programs Rules—New South Wales were developed in close consultation with the Government of New South Wales.

The Prescribed Programs Rules—New South Wales are a legislative instrument for the purposes of the *Legislation Act 2003*.

Explanation of provisions

The Prescribed Programs Rules—New South Wales have four Parts:

- **Part 1** explains what the Prescribed Programs Rules—New South Wales are about.
- **Part 2** provides an outline of the Prescribed Programs Rules—New South Wales.
- **Part 3** prescribe a qualifying time, qualifying period and list of qualifying programs for the purposes of section 21(2)(b) of the Act.
- **Part 4** deals with other matters, including interpretation of the Prescribed Programs Rules—New South Wales.

Part 1 – What these Rules are about

Paragraphs 1.1 to 1.6 are explanatory and contextual. The prescribed programs arrangements are based on an agreement that has been reached between the Government of the Commonwealth and the Government of New South Wales (the Bilateral Agreement between the Commonwealth and New South Wales: Transition to a National Disability Insurance Scheme, especially Schedule D—Continuity of Support Arrangements in New South Wales), and is intended to give effect to that agreement. These documents are available at www.coag.gov.au.

Paragraph 1.7 refers to relevant objects and principles, drawn from sections 3 and 4 of the Act.

Part 2 – Outline of these Rules

Paragraphs 2.1 to 2.4 are explanatory and contextual only. They provide some information about how a person becomes a participant, and the requirements that must be met (access criteria) under section 21(1) the Act.

Paragraphs 2.5 to 2.6 summarise subsection 21(2) of the Act, noting that there is an alternative method by which a person may meet the access criteria and become a participant if the CEO is not satisfied that a person meets the requirements set out in subsection 21(1) of the Act. The Act enables rules to be made for the purposes of subsection 21(2) of the Act to prescribe requirements which the CEO must be satisfied are met before a person meets the access criteria under subsection 21(2) of the Act.

Paragraph 2.7 states the principal operative effect of the Prescribed Programs Rules—New South Wales, namely, to prescribe requirements for the purposes of subsection 21(2) of the Act. These requirements are set out in Part 3.

Paragraph 2.8 outlines the purpose of Part 4 of the Prescribed Programs Rules—New South Wales.

Part 3 – When does a person meet the access criteria?

Paragraphs 3.1 to 3.4 are made for the purposes of paragraph 21(2)(b) of the Act.

Paragraph 3.1 provides that a person meets the access criteria if the five requirements listed in that paragraph are satisfied.

The requirements in paragraphs (a) and (e) of paragraph 3.1 summarise paragraphs 21(2)(a) and (c) of the Act respectively.

The requirements in paragraphs (b), (c) and (d) of paragraph 3.1 are made for the purposes of paragraphs 21(2)(b)(i), (ii) and (iii) of the Act respectively.

The requirement in paragraph 3.1(a) is that at the time of considering the request, the person satisfies the requirements in relation to residence prescribed as mentioned in subsection 23(3). **Paragraph 3.2** notes that these requirements have been prescribed by the *National Disability Insurance Scheme (Becoming a Participant) Rules 2013*.

Paragraph 3.2 prescribes a qualifying time for the purposes of paragraph 21(2)(b)(i) of the Act, namely, the day immediately before the date on which a region in which the person lives transitions into the NDIS under the *National Disability Insurance Scheme (Becoming a Participant) Rules 2016*.

Paragraph 21(2)(b)(i) of the Act also states that a person meets the access criteria if, provided the other requirements in subsection 21(2) are met, the person 'was receiving supports at the time of considering the request'. It should be noted that the prescription of the qualifying time by paragraph 3.2 is not intended to displace this requirement. That is, if a person meets the requirements of subsection 21(2)(a), (b)(ii), (b)(iii) and (c) of the Act, and was receiving supports at the time of considering the request, the person meets the access criteria under subsection 21(2) of the Act.

Paragraph 3.3 prescribes a qualifying period for the purposes of paragraph 21(2)(b)(ii) of the Act, namely, a period between the date these rules come into force and the date the person makes an access request.

Paragraph 3.4 prescribes a list of qualifying programs which provide supports for people with disability for the purposes of paragraph 21(2)(b)(iii) of the Act, to the extent of the operation of the programs in relation to people under 65 years of age. These programs reflect relevant service types in the Disability Services National Minimum Dataset.

Part 4 – Other matters

Paragraph 4.1 specifies the citation for the Prescribed Programs Rules—New South Wales.

Paragraphs 4.2 to 4.4 give guidance on interpretation and definitions for certain terms used in the Prescribed Programs Rules—New South Wales.

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 21(2)(b) and 209 of the Act.

Human rights implications

The Prescribed Programs Rules—New South Wales engage the following human rights:

- The rights of persons with disabilities in the Convention on the Rights of Persons with Disabilities (CRPD), especially Articles 5, 15, 17 and 18.
- The rights of all persons in the International Covenant on Economic, Social and Cultural Rights (ICESCR), especially Articles 4, 5, 9 and 11.
- The rights of all persons in the International Covenant on Civil and Political Rights (ICCPR), especially Articles 2, 5 and 7.
- The rights of the child in the Convention on the Rights of the Child (CRC), especially Articles 2 and 18.

General Principles underpinning the CRPD

The CRPD recognised the barriers that persons with disabilities may face in realising their rights. While the rights under 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 NDIS 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 Prescribed Programs Rules—New South Wales 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 NDIS 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 Prescribed Programs Rules—New South Wales seek to ensure that people with disabilities who have been recognised as being eligible for support under other government measures, but do not meet the NDIS residence requirements, do not have that support taken away as a result of the transition to the NDIS in NSW. The Prescribed Programs Rules—New South Wales are indicative of the proactive approach taken by governments to ensure that people with disabilities are not disadvantaged and not subjected to unfavourable or inhumane treatment as a result of government policy.

The principle of non-discrimination

The right to equality and non-discrimination is protected by Article 2 of the ICCPR which prohibits denying a person 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'.

Best Interests of the Child

Under Article 3 (b) of the CRC, state parties 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 and, 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 state

parties 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.

The Prescribed Programs Rules—New South Wales enable the flexibility of living arrangements by providing for access to the NDIS if support was being provided by other Commonwealth or New South Wales programs, particularly where a child's parents are separated.

Conclusion

This legislative instrument is compatible with human rights because it advances the protection of the rights of people with disabilities in Australia, consistent with the CRPD. In particular, it prevents people with disabilities from being unreasonably disadvantaged on the basis of not meeting the NDIS residence requirements where they had received disability supports from the government previously.