

EXPLANATORY STATEMENT

Issued by the Authority of the Assistant Minister for Social Services

National Disability Insurance Scheme Act 2013

National Disability Insurance Scheme (Facilitating the Preparation of Participants' Plans—Australian Capital Territory) Rules 2014

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 (Facilitating the Preparation of Participants' Plans—Australian Capital Territory) Rules 2014* (the Phasing Rules—Australian Capital Territory) are made pursuant to sections 32 and 32A of the Act (but not under subsection 32A(4)).

The Phasing Rules—Australian Capital Territory are about the order in which the CEO of the National Disability Scheme Launch Transition Agency (National Disability Insurance Agency) will commence the facilitation of the preparation of plans for different classes of participants in the Australian Capital Territory.

The Minister in making the Phasing Rules—Australian Capital Territory has had regard to financial sustainability of the National Disability Insurance Scheme (the scheme) as required under subsection 209(3).

The Phasing Rules—Australian Capital Territory are Category B rules for the purposes of the Act. Accordingly the Commonwealth and the host jurisdiction, the Government of the Australian Capital Territory, have agreed to the making of the rules (as required under section 209 of the Act).

The Phasing Rules—Australian Capital Territory is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

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 Agency 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 Phasing Rules—Australian Capital Territory is one of a number of instruments that comprise these rules.

To enable an orderly implementation of the trial in the Australian Capital Territory, participants will be phased into the scheme. There are two steps involved in accessing supports under the scheme. The first is to become a participant: the prospective participant makes an access request and the CEO decides that they meet the access criteria. The second is for the participant to have a plan approved by the CEO of the National Disability Insurance Agency. These Rules relate to the second step, and the order in which the CEO will commence the facilitation of the preparation of plans for different classes of participants.

The Phasing Rules—Australian Capital Territory explain how participants in the Australian Capital Territory will be phased into the scheme. The Phasing Rules—Australian Capital Territory set out the process for working out when the CEO of the National Disability Insurance Agency must commence facilitating the preparation of the plan of a participant in the Australian Capital Territory.

The phasing process is based on an agreement that has been reached between the Government of the Commonwealth and the Government of the Australian Capital Territory (the Intergovernmental Agreement for the National Disability Insurance Scheme (NDIS) Launch, Schedule E – Bilateral Agreement for NDIS Launch between the Commonwealth and Australian Capital Territory) and is intended to give effect to that agreement.

Commencement

The Phasing Rules—Australian Capital Territory commence on 1 July 2014.

Consultation

The Phasing Rules—Australian Capital Territory were developed in close consultation with the Government of the Australian Capital Territory.

Explanation of provisions

The Phasing Rules—Australian Capital Territory has three Parts:

- **Part 1** explains what these Rules are about.
- **Part 2** deals with the preparation of plans for residents of the Australian Capital Territory.
- **Part 3** deals with other matters, including interpretation of the Phasing Rules—Australian Capital Territory.

Part 1 – What these Rules are about

Paragraphs 1.1 to 1.5 are explanatory and contextual paragraphs. For participants in the Australian Capital Territory, the CEO will commence the facilitation of preparation of plans in an order that depends on the participant's age, school year and the nature of the accommodation in which the participant resides.

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Part 2 – Preparation of plans for residents of the Australian Capital Territory

Paragraphs 2.1 to 2.3 explain how the CEO is to commence facilitating the preparation of a plan for a participant. The process for commencing the facilitation of the preparation of plans for participants in the Australian Capital Territory is set out in a table in paragraph 2.6.

This table sets out classes of participants in the Australian Capital Territory and the circumstances in which the CEO is to commence the facilitation of the preparation of those participants' plans. The CEO is required to deal with each class sequentially; facilitation for a class will be commenced once the CEO has decided that the National Disability Insurance Agency has the capacity to do so, in light of the number of participants in previous classes whose plans have been dealt with, and the number yet to be dealt with. The CEO cannot make a decision to commence facilitating the preparation of plans for a class before the date specified in the table for that class.

Paragraph 2.4 summarises the effect of subsection 32(3) of the Act.

Paragraph 2.5 summarises the effect of subsection 32A(3) of the Act.

Paragraph 2.6 contains a table which sets out classes of participants in the Australian Capital Territory and the circumstances in which the CEO is to commence the facilitation of the preparation of those participants' plans.

The classes and circumstances in which the CEO is to commence each class have been defined jointly with the Australian Capital Territory to ensure that there is a smooth and steady transition for participants within these classes from the service or support they previously received to the scheme. This arrangement will provide certainty for:

- individuals about when they will enter the new scheme;
- providers to assist their business planning; and
- governments to ensure that they can plan for the future of affected programs and the expected impact on their budgets.

The CEO has a discretionary power to delay the commencement of each class according to the National Disability Insurance Agency's capacity to begin facilitating new plans. This discretion would allow the CEO to respond to unforeseen events in the trial site, or unanticipated levels of demand.

The details within this table are intended to give legal effect to the Intergovernmental Agreement for the National Disability Insurance Scheme (NDIS) Launch, Schedule E—Bilateral Agreement for NDIS Launch between the Commonwealth and Australian Capital Territory.

Paragraph 2.7 provides clarification that individuals who receive programs that are specified within more than one class will be phased into the scheme in accordance with the earliest of the specified classes to which they belong.

Paragraph 2.8 provides an exception to the rule in paragraph 2.7 for residents of group homes. The term group home is defined in paragraph 3.4.

Paragraph 2.9 provides a special rule for participants residing in the same Group Home or same household as other participants. The CEO is required to commence facilitating the preparation of plans for all participants in the Group Home or household at the same time.

Paragraph 2.10 specifies that if the CEO is considering using the discretion to delay the opening of a class, he or she must consult with the Commonwealth and the Australian Capital Territory on the implications of that decision, including for the funding arrangements agreed between both governments. The CEO must use his or her best endeavours to reach an agreement with both governments about this decision.

Part 3 – Other matters

Citation

Paragraph 3.1 specifies the citation for these Rules.

Interpretation

Paragraphs 3.2 to 3.4 give guidance on interpretation and definitions for certain terms used in the Phasing Rules—Australian Capital Territory.

Statement of Compatibility

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

This legislative instrument 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 sets out the circumstances in which the facilitation of the preparation of participants' plans will commence in the Australian Capital Territory. The instrument identifies classes of participants in the Australian Capital Territory and sets out the circumstances in, or periods within, which the CEO is to commence the facilitation of the preparation of those participants' plans.

Progressive implementation

Consistent with the recommendations of the Productivity Commission, the scheme will be implemented progressively. The trial sites and the services to be offered in each have been selected to enable evaluation of operations and subsequent fine tuning, if necessary, to ensure the robustness and integrity of the scheme when it is rolled out nationally.

In each trial site there is a gradual intake of participants to ensure that all participants are well supported as they make the transition to the scheme.

Human rights implications

The Phasing Rules—Australian Capital Territory 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 (general principles), 4 (general obligations) and 9 (accessibility), 19 (living independently and being included in the community) and 23 (respect for home and the family);
- Article 10 of the International Covenant on Economic, Social and Cultural Rights (ICESCR);
- Articles 2 and 26 of the International Covenant on Civil and Political Rights (ICCPR); and
- The rights of children in the Convention on the Rights of the Child (CRC), especially Articles 2, 9, 18 and 23.

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 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 objectives and general principles of the Act 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 Phasing Rules—Australian Capital Territory 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 to live independently, engage in the life of the community, 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 promote Article 10 of ICESCR, 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. 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 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

There is progressive implementation of the scheme by age-related categories for some groups in the Australian Capital Territory. The use of the age-related categories supports the needs of children and young adults and ensures that older adults can enter the scheme before they reach age 65 (the age limit for entry into the scheme). These categories are reasonable, necessary and proportionate and non-discriminatory.

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.

The Phasing Rules—Australian Capital Territory engage with Article 23 of the CRC which affirms the requirement for states to ensure a child with a disability should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community.

Conclusion

This instrument is compatible with human rights because it advances the protection of the rights of persons with disabilities in Australia, consistent with the CRPD. The Rules create 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 the Rules limit human rights in some circumstances, those limitations are reasonable, necessary and proportionate to ensure the long-term integrity and sustainability of the scheme.