

EXPLANATORY STATEMENT

Issued by the Authority of the Assistant Minister for Social Services

National Disability Insurance Scheme Act 2013

National Disability Insurance Scheme (Becoming a Participant) Amendment Rules 2015

Purpose

The purpose of the *National Disability Insurance Scheme (Becoming a Participant) Amendment Rules 2015* (the Amendment Rules) is to give effect to the agreement between the Commonwealth and New South Wales (the host jurisdiction) that, as part of the transition to full scheme, the National Disability Insurance Scheme (NDIS) will roll out in the Nepean Blue Mountains region of New South Wales, in advance of other areas in that host jurisdiction. These areas are early transition areas and are referred to in the Amendment Rules as “the 2015 NDIS launch areas”. The areas which comprise the 2015 NDIS launch areas include the City of Blue Mountains, the City of Hawkesbury, the City of Lithgow and the City of Penrith. The NDIS will be implemented in these areas from 1 July 2015 for children and young people aged 17 years and under.

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 the Act to be prescribed or which are necessary or convenient to be prescribed in order to carry out or give effect to the Act.

The *National Disability Insurance Scheme (Becoming a Participant) Rules 2013* (the Becoming a Participant Rules) set out, among other things, the age and residence requirements for a person to become a participant for the purposes of the Act.

The Amendment Rules are made for the purposes of sections 22 and 23 of the Act and amend the age and residence requirements in the Becoming a Participant Rules, in relation to the 2015 NDIS launch areas.

The Minister in making the Amendment Rules has had regard to the financial sustainability of the NDIS as required under subsection 209(3) of the Act.

The Amendment Rules are 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 (NDIS).

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 is supplemented by rules made under the Act, which address the more detailed operational aspects of the NDIS.

An early NDIS transition site in New South Wales will commence in the Nepean Blue Mountains region on 1 July 2015 and is the first step in transition to full scheme NDIS in New South Wales. This location was chosen particularly to assess the effectiveness of early intervention processes and provide benefits to children in terms of reduced lifelong support needs.

Commencement

The Amendment Rules commence on 1 July 2015.

Consultation

The Amendment Rules are Category B rules under section 209 of the Act. Accordingly, as required under subsection 209(5) of the Act, the Commonwealth has consulted with the host jurisdiction, New South Wales, about the making of the Amendment Rules. New South Wales has agreed to the form of the Amendment Rules as a result of that consultation. The Commonwealth has also notified other host jurisdictions about the changes made by the Amendment Rules.

Within the Commonwealth, the Department of Social Services has consulted with the National Disability Insurance Agency (known in the Act as the National Disability Insurance Scheme Launch Transition Agency) on the form of the Amendment Rules.

Regulation Impact Statement (RIS)

The Office of Best Practice Regulation has been consulted and has advised that a RIS is not required (OBPR ID 19284).

Explanation of the provisions

Section 1

Section 1 provides how the Amendment Rules are to be cited, that is, as the *National Disability Insurance Scheme (Becoming a Participant) Amendment Rules 2015*.

Section 2

Section 2 provides that the Amendment Rules commence on 1 July 2015. The 1 July 2015 date aligns with the date that parallel amendments to existing rules will take effect (the *National Disability Insurance Scheme (Facilitating the Preparation of Participants' Plans) Amendment Rules 2015*), which will enable the CEO to commence facilitating the plans for children and young people aged 17 years and under who have been deemed to meet the access criteria for becoming a participant. This date will also ensure that access requests for plans are able to be made and determined prior to the time that plans will be facilitated: that is, from 1 September 2015.

Section 3

Section 3 provides that Schedule 1 amends the Becoming a Participant Rules.

Schedule 1

Schedule 1 sets out the amendments to the Becoming a Participant Rules.

Schedule 1, item 1

Item 1 makes an amendment which specifies that, although generally speaking, a person meets the age requirements if the person was aged from birth up to 65 when the access request in relation to the person was made, additional age requirements apply to persons who reside in one of the new 2015 NDIS launch areas of New South Wales, namely the City of Blue Mountains, City of Hawkesbury, City of Lithgow and the City of Penrith.

Schedule 1, item 2

Item 2 explains the additional age requirements that apply to persons who reside in one of the 2015 NDIS launch areas. To reflect the agreement between the Commonwealth and New South Wales, for access requests made between 1 July 2015 and 30 June 2016 (or made before 1 July 2015 and decided by the CEO on or after 1 July 2015), a person residing in one of the 2015 NDIS launch areas must be aged 17 years or under on 1 July 2015 to meet the age requirements.

Schedule 1, item 3

Item 3 makes a minor technical amendment to substitute the phrase “proclaimed under” to ‘constituted under’ in relation to how these areas should be described under the *Local Government Act 1993* (NSW). There is no substantive difference intended in the new form of words.

Schedule 1, item 4

Item 4 establishes the residence requirements which form part of the access criteria for becoming a participant. In particular subsection 23(3) of the Act enables the Minister to make rules to prescribe areas of Australia for the purposes of the residence requirements. The amendment inserts an additional NDIS launch area to commence from 1 July 2015. This is specified to comprise of the City of Blue Mountains, the City of Hawkesbury, the City of Lithgow and the City of Penrith, which are located in the Nepean Blue Mountains region of New South Wales. These areas are referred to as the “2015 NDIS launch areas”.

Schedule 1, item 5

Item 5 extends the definition of “NDIS launch areas” to include the 2015 NDIS launch areas for the purposes of the Becoming a Participant Rules.

Schedule 1, item 6

Item 6 amends paragraph 4.6 of the Becoming a Participant Rules to describe the qualifying residence requirement which applies to the 2015 NDIS launch areas. A person meets the qualifying residence requirement to become a participant of the NDIS if they reside in a 2015 NDIS launch area at any time on or after 1 July 2015. This is different to the qualifying residence requirements which apply to the 2013 NDIS launch areas and the 2014 NDIS launch areas, in that the amendment is intended to also cover persons who commence residing in one of the 2015 NDIS launch areas after 1 July 2015, for whom no further qualifying residence requirements will apply. This means that the dominant purposes and exceptional circumstances tests set out in paragraph 4.7 of the Becoming a Participant Rules are not applicable to the 2015 NDIS launch areas.

Schedule 1, item 7

Item 7 is amended to make clear that a child will also meet the qualifying residence requirements if the child is born after 1 July 2015, does not reside in one of the 2015 NDIS launch areas, but has a carer parent who does reside in one of the 2015 NDIS launch areas on the day the child is born. For the purposes of the 2015 NDIS launch areas, due to the additional age requirements, a child means a person aged 17 years or under.

Schedule 1, items 8 and 9

Items 8 and 9 make clear that, in the case of a child whose parents are separated and who spends time with each parent, the dominant purposes and exceptional circumstances tests set out in subsubsubparagraphs 4.8(e)(ii)(A) and 4.8(e)(ii)(B) do not apply where at least one of the child’s parents starts to reside in a 2015 NDIS launch area after 1 July 2015. This is broader than the exception which exists in relation to the Australian Capital Territory, which excludes the exceptional circumstances requirement.

Schedule 1, item 10

Item 10 makes a consequential amendment to assist in the interpretation of the Amendment Rules by inserting a reference to the 2015 NDIS launch areas. The reader is directed to paragraph 4.4B in the Amendment Rules, which defines the 2015 NDIS launch areas to comprise of the City of Blue Mountains, the City of Hawkesbury, the City of Lithgow and the City of Penrith.

Statement of Compatibility with Human Rights

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

National Disability Insurance Scheme (Becoming a Participant) Amendment Rules 2015

This 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 of the legislative instrument

The *National Disability Insurance Scheme (Becoming a Participant) Amendment Rules 2015* (the Amendment Rules) are made for the purposes of sections 22, 23 and 209 of the *National Disability Insurance Scheme Act 2013* (the Act), and deals with requirements relating to residence and age in the early NDIS transition site in the New South Wales Nepean Blue Mountains region that must be met for a person to become a participant for the purposes of the Act.

The instrument amends the *National Disability Insurance Scheme (Becoming a Participant) Rules 2013* (the Becoming a Participant Rules).

Human rights implications

This instrument engages 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 National Disability Insurance Scheme (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 general principles in the Act that have been applied in the Becoming a Participant 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 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 role of carers, families and other significant persons is also recognised and respected. In this way, the Becoming a Participant 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 NDIS 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.

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.

Implementation by age

The Becoming a Participant Rules impose additional limitations on access to the NDIS 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 NDIS 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 Amendment Rules there are additional limitations on the age criteria in the New South Wales early transition site of Nepean Blue Mountains. The additional age limitation is a temporary limitation until 1 July 2016, when remaining age groups will transition into the NDIS.

In the New South Wales early launch site of Nepean Blue Mountains, the focus is on people aged under 18 years on 1 July 2015, particularly to assess the effectiveness of early intervention processes. Allied with this are the potential benefits to individual children in terms of reduced lifelong support needs.

All Governments are keen to see the benefits of the NDIS to individuals maximised, and support the incremental approach recommended by the Productivity Commission. The temporary age restrictions in the New South Wales early transition site of the Nepean Blue Mountains region are considered reasonable and proportionate, because the age limitation is for nine months and it is the first step in NDIS transition in NSW, which will extend further from 1 July 2016.

Residence Requirements

The Amendment Rules impose additional limitations on access to the NDIS on the basis of residence until commencement of the full scheme. During the first year of the early transition site, access to the NDIS will be limited to those living within the designated early transition site. This restriction is temporary in nature, and the intent of this limitation is the integrity and financial sustainability of the scheme during the early transition period.

Protection of Privacy

Article 22 of the CRPD is engaged by the Becoming a Participant Rules to the extent that it allows the National Disability Insurance Agency 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 the Amendment 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* 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.

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, consistently 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 NDIS.

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