

EXPLANATORY STATEMENT

Issued by the Authority of the Minister for Social Services

National Disability Insurance Scheme Act 2013

National Disability Insurance Scheme (Becoming a Participant) 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 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 2016* (the Becoming a Participant Rules, or the 2016 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 (NDIS or 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.

The Becoming a Participant Rules are a legislative instrument for the purposes of the *Legislation Act 2003*.

The *National Disability Insurance Scheme (Becoming a Participant) Rules 2013* (the 2013 Rules) are revoked. These Rules dealt with the commencement of the scheme in NDIS sites in 2013, 2014 and 2015. The 2016 Rules do not have retrospective effect and are therefore not intended to affect any decisions made under the 2013 Rules prior to the 2016 Rules coming into effect.

Commencement

The 2016 Rules commence on the day after registration on the Federal Register of Legislation.

References to State and Territory legislation in the 2016 Rules are to be taken as references to the legislation as it was on the day of commencement of the 2016 Rules.

Consultation

The 2016 Rules are Category A and Category B rules under section 209 of the Act. Accordingly the Commonwealth and the States and Territories have agreed to the making of these rules as required under section 209 of the Act.

The Department of Social Services has consulted with the National Disability Insurance Agency on the form of the 2016 Rules.

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 and Schedule A** set out the additional age requirements that apply to persons in certain areas of Australia.
- **Part 4 and Schedule A** set out additional residence requirements, providing for the scheme in certain parts of Australia.
- **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 implemented nationally on a staged basis.

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, including 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).

Parts 3 and 4 and Schedule A – The age and residence requirements

Parts 3 and 4 operate with **Schedule A** to provide for additional residence and age requirements for the purposes of sections 22 and 23 of the Act. The overall effect is that at certain times, the NDIS will only be open to persons in certain age and/or residence cohorts. In most jurisdictions, these cohorts will gradually expand to a point where the scheme is fully operational. Once the scheme is fully operational in a jurisdiction, it is open to all residents up to the age of 65 (Act, paragraph 22(1)(a)).

The Becoming a Participant Rules deal with the circumstances in which a person is eligible to become a participant. There are separate rules, made for the purposes of subsection 32(2) of the Act, that deal with when a participant's plan is facilitated. It is only once a participant has a plan that NDIS supports can be provided or funded. In some cases the facilitation of the making of participants' plans is phased over a certain period. While a participant is waiting for their plan to be made, it is intended that they will continue to access supports under their existing arrangements (e.g. with a State or Commonwealth provider).

The effect of these provisions in relation to particular jurisdictions is as follows:

- **South Australia** – in South Australia, the scheme is presently open to people under the age of 15, pursuant to the 2013 Rules. The 2016 Rules provide for people aged under 18 on 1 January 2017 to apply for access to the scheme from 1 July 2016. Starting from 1 January 2017, people aged under 65 years on 1 July 2017 will be able to make access requests based on the progressive roll-out of the geographic location. From 1 April 2018, there will be effectively no additional age or residence requirements for making access requests in South Australia.
- **Tasmania** – in Tasmania, the scheme is presently open to a cohort of certain persons in the 12-24 years age group. The 2016 Rules provide for the ability to apply for access to the scheme to be incrementally expanded over the period from 1 July 2016 to 1 July 2018 by age cohort, at which point the scheme will be fully open in the State. The period 1 July 2016 to 1 July 2018 will see successive age cohorts enter the scheme.
- **Queensland** – the scheme in Queensland opens in 2016 in three areas: Townsville, Charters Towers and Palm Island. In Townsville and Charters Towers there will be additional age requirements; the scheme will only be open in those areas to persons under the age of 18 as of 1 April 2016.

- **New South Wales** – in New South Wales, the scheme is presently open in certain areas only: in Lake Macquarie, Maitland and Newcastle and, subject to additional age requirements limiting the scheme to those under 18, also in the Blue Mountains, Hawkesbury, Lithgow and Penrith.

Further, the 2016 Rules provide for people aged under 65 to request access to the scheme in the Blue Mountains, Hawkesbury, Lithgow and Penrith from 1 February 2016. On that date, access requests for the scheme can also be made by people aged under 65 in the Central Coast, the remainder of Hunter New England, Northern Sydney, South Western Sydney, Southern NSW, Western Sydney or Nepean Blue Mountains. People aged under 65 and living in the remainder of the State may apply for access to the scheme from 1 January 2017.

- **Victoria** – in Victoria, the scheme is presently open in Colac-Otway, Greater Geelong, Queenscliffe and Surf Coast. The 2016 Rules provide for the progressive expansion of the ability to apply for access to the scheme to the whole of the State by 1 July 2018. There are no additional age requirements; the expansion is based only on residence.
- **Western Australia** – the 2016 Rules do not affect the present operation of the scheme in Western Australia. The scheme operated in Western Australia under the 2016 Rules will continue to be limited to the areas of Kalamunda, Mundaring and Swan, with portability to be provided for 12 months if a participant moves out of an NDIS area.
- **Northern Territory** – the 2016 Rules do not affect the present operation of the scheme in the Northern Territory. The scheme will continue to be limited to the Barkly Region.
- **Australian Capital Territory** – the scheme is already fully operational in the Australian Capital Territory.

Importantly, **paragraphs 4.4 and 4.8** provide for children to meet the additional residence requirements in certain circumstances through a parent or carer.

Paragraph 4.5 provides that people who live in Victoria on or after 1 July 2016 and are on either the Victorian Disability Support Register (with an urgent need for support) or the Early Childhood Intervention Service Waitlist do not need to meet the additional residence requirements.

Paragraph 4.6 to 4.8 sets out the additional residence requirements for persons living in Western Australia or the Northern Territory.

Paragraphs 4.9 to 4.11 provide that in Western Australia and in the Northern Territory, a participant will continue to meet the residence requirement for 12 months after they stop residing in an NDIS area. The effect of this is that, as was previously the case, there is a 12 month period of continued eligibility for a participant who moves to a non-NDIS area in either Western Australia or the Northern Territory, from an NDIS area.

Paragraph 4.12 clarifies that, unless a participant moves to a non-NDIS area in Western Australia or the Northern Territory, the additional residence requirements are required to be satisfied only once, so the participant will have an unlimited portability period. Arrangements for Western Australia and the Northern Territory are set out in paragraphs 4.9 to 4.11.

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(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(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(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.

Paragraph 7.3 explains that a tool under paragraph 7.2 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 7.4 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.

Schedule B defines the NDIS areas, where these are not otherwise defined.

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 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, 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 certain jurisdictions. The additional age limitations are temporary and designed to ensure the orderly implementation of the scheme in accordance with agreements between the Commonwealth and the relevant jurisdictions. The temporary age restrictions are considered reasonable and proportionate.

Residence Requirements

The Becoming a Participant Rules imposes additional limitations on access to the scheme on the basis of residence. These restrictions are temporary in nature, and the intent of this limitation is the integrity and financial sustainability of the Scheme during its transition.

These Rules ameliorate earlier restrictions on participants who wanted to move to different areas within Australia. The Rules thus advance 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 the CEO of 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 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.

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.