

## 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) Amendment Rules 2017*

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

The *National Disability Insurance Scheme (Becoming a Participant) Amendment Rules 2017* (Amendment Rules) amend the Becoming a Participant Rules. The Amendment Rules are made for the purposes of sections 22 and 209 of the Act to align the age requirements for residents of South Australia more closely with other jurisdictions.

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.

### **Commencement**

The Amendment Rules commence on 1 January 2017.

Retrospective commencement of legislative instruments is permitted by subsection 12(2) of the *Legislation Act 2003*. That section provides that retrospective commencement can only be done to the extent that it does not result in the below scenarios:

*“(a) the person’s rights as at that day would be affected so as to disadvantage the person; or*

*(b) liabilities would be imposed on the person in respect of anything done or omitted to be done before that day.”*

This instrument removes additional age requirements for access to the NDIS in South Australia. Prior to this instrument commencing, the effect of the Becoming a Participant Rules was that people living in South Australia had to be under the age of 65 years at two points of time, firstly when they make their request for access to the NDIS and secondly, at the time their NDIS participant plans were facilitated. This arrangement was different to other

jurisdictions where, consistent with the Act, the person need only be under the age of 65 at the time they make their request for access to the NDIS.

Therefore, the amendments in this instrument do not disadvantage or impose liabilities on any person, nor do their retrospective commencement.

### **Consultation**

The Amendment Rules are Category B rules for the purposes of section 209 of the Act. Accordingly, as required under subsection 209(5) of the Act, the Commonwealth has consulted with South Australia about the making of the Amendment Rules. South Australia 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.

The Department of Social Services has also consulted with the National Disability Insurance Agency (NDIA) on the form of the Amendment Rules.

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

## **Explanation of provisions**

**Paragraph 1** provides how the Amendment Rules are to be cited, that is, as the *National Disability Insurance Scheme (Becoming a Participant) Amendment Rules 2017*.

**Paragraph 2** provides that the Amendment Rules commence on 1 January 2017.

**Paragraph 3** provides that Schedule 1 to the Amendment Rules amends the Becoming a Participant Rules.

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

**Schedule 1, item 1** amends the table of residence requirements for South Australia to remove the additional age requirements in column 3 for persons over 18 years of age.

## **Statement of Compatibility**

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

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**

This instrument is made for the purposes of sections 22 and 209 of the Act and clarifies the additional age requirements for residents of South Australia.

This instrument amends the *National Disability Insurance Scheme (Becoming a Participant) Rules 2016* (Becoming a Participant Rules).

### **Human rights implications**

The 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 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, this instrument 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 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.

Accordingly, differential treatment will not constitute discrimination if the differences in treatment are aimed at achieving a legitimate purpose and are reasonable.

### *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 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.

### **Conclusion**

This 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 NDIS.