

EXPLANATORY STATEMENT

Issued by the Authority of the Minister for Social Services

National Disability Insurance Scheme Act 2013

*National Disability Insurance Scheme (Specialist Disability Accommodation) Rules
2016*

Section 209 of the *National Disability Insurance Scheme Act 2013* (the Act) provides that the Minister may, by legislative instrument, create rules prescribing 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 (Specialist Disability Accommodation) Rules 2016* (the SDA Rules) are made for the purposes of sections 33 and 35, and sections 70, 72, 73 and 209 of the Act. The SDA Rules are about the funding of specialist disability accommodation (SDA) for participants under the NDIS.

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

The SDA 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 these Rules.

Commencement

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

Consultation

The Commonwealth and each host jurisdiction have agreed to the making of the SDA Rules.

As part of developing the pricing and payments approach for SDA, the public consultations were held in all States and Territories and with all State and Territory governments. On 1 June 2016 the SDA Decision Paper on Pricing and Payments (SDA Decision Paper) was released.

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

Explanation of provisions

The SDA Rules are in eight Parts:

- **Part 1** explains what the SDA Rules are about;
- **Part 2** provides an outline of the SDA Rules;
- **Part 3** sets out the criteria to be applied in deciding whether SDA may be funded for a participant, and the materials that may be used in assessing relevant matters. It also deals with the requirement to consider whether capacity building supports should be funded for a participant for a period of time before SDA is funded for the participant;
- **Part 4** deals with the determination of the appropriate SDA type (design category and building type) and location for a participant. If a dwelling of that type and location is not available an alternative interim option is determined for the participant. It also deals with the situation where a participant is already residing in an SDA dwelling and wishes to continue to reside there for a period of time;
- **Part 5** deals with how SDA will be specified in a participant's plan;
- **Part 6** sets out other requirements that must be met in order for SDA included in a participant's plan to be funded, including the requirement to enrol SDA dwellings;
- **Part 7** deals with the requirement for SDA providers to be registered providers of supports and additional SDA-specific requirements that apply to registered providers; and
- **Part 8** deals with other matters, including the interpretation of the SDA Rules.

Part 1 – What these Rules are about

Part 1 provides some context for the SDA Rules. It explains that SDA is one of the supports that may be funded for participants who have an extreme functional impairment or very high support needs.

SDA is defined in **paragraph 1.2** as accommodation for people who require specialist housing solutions, including to assist with the delivery of supports that cater for their extreme functional impairment or very high support needs. SDA does not refer to the support services, but the homes in which these are delivered. SDA may, for example, have specialist designs for people with very high needs or a location or features that make it feasible to provide complex or costly supports for independent living.

Part 1 refers to a number of objects and principles of the NDIS which are set out in the Act and which are particularly relevant to the SDA Rules.

Part 1 also makes it clear that in giving effect to the objects of the Act it is important to ensure the financial sustainability of the NDIS (see s.3(3) of the Act).

Part 2 – Outline of these Rules

Part 2 describes, by way of context, how SDA will be considered for a participant as part of the broader process of preparing or reviewing a participant's plan. It also explains that the SDA Rules are not the only Rules that need to be applied in making the decision to include SDA in a participant's plan; other matters in the Act and other NDIS Rules will also be relevant.

The SDA Rules do not replace or modify any of the other NDIS Rules (except where this is clearly indicated). Rather, they set out additional, specific matters that apply in relation to SDA, which then operate alongside the other NDIS Rules. This reflects that, while certain matters need to be prescribed specifically for SDA, it is simply one of the types of reasonable and necessary support that may be funded for certain NDIS participants.

This Part also contains an outline of Parts 3-8 of the Rules.

Part 3 – Eligibility for SDA

Part 3 deals with eligibility for SDA funded under the NDIS.

Paragraph 3.1 sets out the eligibility criteria. It provides that SDA may be funded for a participant if:

- firstly, consideration has been given to suitable supports and pathways that would assist the participant either as an alternative to providing supports that include SDA or in combination with SDA; and
- secondly, the participant meets the SDA assessment criteria.

The note under paragraph 3.1 clarifies that these are not the only criteria that will need to be met in order to fund SDA for a participant. This is because SDA is a type of reasonable and necessary support for the purposes of the Act, and the matters in the Act and other NDIS Rules dealing with reasonable and necessary supports (the *National Disability Insurance Scheme (Supports for Participants) Rules 2013*) will therefore also need to be applied in the same way as for other reasonable and necessary supports.

Before considering the SDA assessment criteria **paragraphs 3.2 and 3.3** required the CEO is to consider the availability and likely effectiveness of suitable supports and pathways either as an alternative to SDA or in combination with SDA. For example, the CEO will consider matters including capacity building supports, assistance with daily living, home modifications, assistive technologies or life transition planning. In doing so, the CEO is to have regard to:

- the extent to which suitable supports and pathways have been attempted and their success;
- the extent to which informal supports could be sustained or developed; and
- whether support coordination should be funded to explore the availability and viability of suitable supports and pathways. This may be appropriate, for example, if it is not yet clear whether suitable supports and pathways such as capacity building supports would be effective for the participant.

As explained in the note under paragraph 3.3, the consideration of these matters will also assist in assessing whether the participant meets the SDA assessment criteria.

Paragraph 3.4 introduces the SDA assessment criteria. A participant meets the SDA assessment criteria if either:

- the participant has an extreme functional impairment and requires an SDA response (paragraphs 3.5-3.6); or
- the participant has very high support needs most appropriately met by an SDA response (paragraphs 3.7-3.8).

The assessment criteria set out in paragraphs 3.5-3.6 can be seen as a short cut in that a participant with an extreme functional impairment that requires an SDA response does not have to be considered under the criteria in paragraphs 3.7-3.8.

Paragraph 3.5 sets out the circumstances in which a participant will be considered to have an extreme functional impairment for the purposes of the first assessment criterion. This will be the case where the participant's impairment results in extremely reduced functional capacity of the participant to undertake one or more of the activities of mobility, self-care or self-management and where the participant has a very high need for person to person supports in undertaking the activity even with the use of assistive technology, equipment or home modifications.

Paragraph 3.6 sets out the circumstances in which the participant will be considered to require an SDA response for the purposes of the first assessment criterion. Broadly speaking, this requires a comparison between the benefits (in terms of specified matters relating to the participant's goals, objectives and aspirations; the effectiveness of the supports; value for money, and stability and continuity) for the participant of SDA in combination with other supports on the one hand, and other supports alone (not including SDA), on the other.

Paragraph 3.7 sets out the circumstances in which a participant will be considered to have very high support needs for the purposes of the second assessment criterion mentioned in paragraph 3.4. It sets out two alternative circumstances in which this test may be satisfied.

One is where the participant has previously lived in SDA for extended periods and this has impacted on the capacity of the participant to transition to alternative living arrangements and supports. The SDA Rules have been drafted with regard to ensuring the continuity of a participant's supports during the progressive implementation of the NDIS (see s.3(3) of the Act).

The other is where the participant has a very high need for person to person supports, either immediately available or constant, for a significant part of the day, and either:

- there are limitations in the availability, capacity or capability of the participant's informal support network, or risks to its sustainability; or
- the participant is at risk or poses a risk to others, and that risk could be mitigated by the provision of SDA, having particular regard to how the participant responds to risk and how they interact with the environment.

Paragraph 3.8 sets out the circumstances in which the participant's very high support needs will be regarded as most appropriately met by an SDA response. This will involve a comparison between the benefits (in terms of specified matters relating to the participant's goals, objectives and aspirations, the effectiveness of the supports and value for money) of SDA in combination with other supports on the one hand, and other supports alone (not including SDA), on the other.

Paragraphs 3.9 and 3.10 deal with the materials the CEO may use in assessing whether a participant has an extreme functional impairment (for paragraph 3.5) or very high support needs (for paragraph 3.8). These paragraphs do not limit the materials that can be used.

Paragraphs 3.11 and 3.12 require the CEO, where a participant has been assessed as being eligible for SDA, to consider whether capacity building supports should be funded for the participant for a period of time before SDA is funded for the participant. In doing so, the CEO is to have regard, among other things, to whether this would enhance the opportunity for the participant to move to accommodation other than SDA (or to lower cost SDA) and better enhance the participant's skill development, particularly independent living skills.

The requirement to consider suitable supports and pathways under paragraph 3.1 and capacity building supports under paragraphs 3.11 and 3.12 indicate the focus in the SDA Rules on the fact that SDA is only one of the reasonable and necessary supports that may be funded under the Act, and that SDA is not intended for everyone. The consideration of SDA is to be undertaken as part of the decision made with a participant about the reasonable and necessary supports that may be funded in the participant's plan.

For example, for children, participant's under 18 years of age, the application of the SDA assessment criteria, the requirements of paragraphs 3.1, 3.11 and 3.12 and the exclusion from SDA funding of the parental home under paragraph 6.1 will lead in almost all cases to the family remaining responsible for a participant child and lead to children and young adults residing in the family (parental) home until a natural life transition point where this is possible.

Part 4 – Determination of SDA type and location

Part 4 deals with the determination of the appropriate SDA type (that is, design category and building type) and location for participants who have been assessed as eligible for SDA. It also deals with:

- the determination of an alternative interim option if SDA of the appropriate type and in the appropriate location for the participant is not available; and
- the situation where a participant who is already residing in SDA that is not of the appropriate SDA type or in the appropriate location determined for them wishes to stay there for a period of time.

Paragraph 4.2 sets out the steps to be followed:

Step 1

- Determine the appropriate SDA type (design category and building type) and location for the participant, applying paragraphs 4.3-4.9. The matters in these paragraphs are to be considered in the context of the overall package of supports for the participant, including having regard to the participant's preferences, goals and aspirations and the total cost of the package of supports.

Step 2

- Consider whether SDA of the appropriate SDA type and in the appropriate location for the participant is, or will very soon be, available to be provided to the participant as an in-kind support.
- If so, then subject to the National Disability Insurance Scheme (Plan Management) Rules 2013, the participant's plan is to record:
 - the appropriate SDA type and location determined for the participant; and
 - that the SDA will be provided by the in-kind provider.
- If not, proceed to Step 3.

Step 3

- Consider whether other SDA of the appropriate SDA type and in the appropriate location for the participant is, or will very soon be, available and whether (in respect of at least one vacancy) the participant and the provider are likely to agree to the participant residing there.
 - If so, the participant's plan is to record the appropriate SDA type and location determined for the participant.
- If not, proceed to Step 4.

Step 4

- Consider whether there is SDA of another SDA type or in another location that:
 - would be suitable as an alternative interim option; and
 - is, or will very soon be, available to be provided to the participant as an in-kind support.
- If so, then subject to the *National Disability Insurance Scheme (Plan Management) Rules 2013*, the participant's plan is to record:
 - the SDA type and location of one of those dwellings, as an alternative interim option; and
 - that the SDA will be provided by the in-kind provider.
- If not, proceed to Step 5.

Step 5

- Consider whether there is other SDA (of an SDA type or in a location other than the appropriate SDA type and location determined for the participant) that:
 - would be suitable as an alternative interim option; and
 - is, or will very soon be, available; and
 - the participant and the provider would agree to the participant living in.
- If there is more than one option, make a determination using paragraph 4.10 and include the SDA type and location in the participant's plan as an alternative interim option.
- If there is only one option, include its SDA type and location in the participant's plan as the alternative interim option.
- Otherwise, consider support coordination (see paragraph 4.12) and other non-SDA supports for the participant.

The appropriate SDA design category, SDA building type and location for the participant, applying paragraphs 4.3-4.9 of the Rules.

Paragraphs 4.3-4.4 deal with determining the appropriate SDA design category for the participant. There are five SDA design categories – Basic design (which can only be determined for participants as an alternative interim option or if the participant is currently residing in an SDA dwelling falling in this design category and wishes to stay there for a period of time – see below), Improved liveability design, Fully accessible design, Robust design and High physical support design.

These are described in **paragraph 4.3** as well as detailed in the NDIS Price Guide, which also sets out the Minimum Requirements that apply in relation to each design category (For example, the features that are required).

The appropriate design category for a participant is to be determined (out of the Improved liveability, Fully accessible, Robust design, and High physical support design categories) by considering the participant's specific needs.

Paragraphs 4.5-4.7 deal with determining the appropriate SDA building type for the participant. There are five SDA building types – apartments; duplexes, villas and townhouses; houses; group homes, and larger dwellings. Larger dwellings can only be determined for a participant as an alternative interim option or if the participant is currently residing in an SDA dwelling of this building type and wishes to stay there for a period of time (see further below). The building types are also described and detailed in the NDIS Price Guide.

The appropriate SDA building type for a participant is to be determined (out of the SDA building types other than larger dwellings), having regard to a range of considerations including the participant's preferences, the participant's support needs, and the extent to which the building type would facilitate or hinder the provision of other supports required by the participant. Another consideration is the support model that is most appropriate for the participant. **Paragraph 4.7** explains

that the most appropriate support model for the participant is considered having regard to their support needs. For example, concierge or mobile support may be the most appropriate support model if the participant requires immediately available person to person supports but can be left alone for periods of time. Shared onsite support may be the most appropriate support model if the participant requires constant person to person supports and cannot be left alone for periods of time;

Paragraphs 4.8-4.9 deal with determining the appropriate location for SDA for a participant. The location may be specified as an area such as a Statistical Area Level 4. It may be specified as a large area or a small area depending on the circumstances.

The appropriate location for a participant is to be determined having regard to a range of factors listed in paragraph 4.9.

If more than one suitable alternative interim options has been identified then one of the options is to be determined applying the factors in **paragraph 4.10**. An alternative interim option would not need to be determined under paragraph 4.10 if the participant is already living in an SDA dwelling that is not of the appropriate SDA type or in the appropriate location determined for the participant under Step 1 but which the participant wishes to continue to live in for a period of time. This might be the case if either the dwelling had previously been determined for the participant as an alternative interim option or if they were residing there before a determination was made in relation to the participant under Step 1. In this situation, the participant's current SDA dwelling may be determined for the participant under paragraph 4.11.

Paragraph 4.11 ensures continuity of a participant's current SDA arrangements. Paragraph 4.11 deals with the circumstance where a participant is residing in SDA that is not the appropriate SDA type and location determined for the participant under paragraph 4.3 to 4.9. In the circumstances described in paragraph 4.11 a participant, if the participant wishes, can remain in the SDA in which they reside for a period of time despite the SDA not being the appropriate SDA type and location for the participant. As a result, when paragraph 4.11 applies, nothing in the Plan Management Rules or the SDA Rules requires a participant to move from their current home.

Paragraph 4.12 deals with support coordination, which is a separate reasonable and necessary support that will be considered for a participant when SDA is being considered for the participant. The CEO will consider whether this support is required to assist the participant in, among other things, clarifying their need for SDA, ascertaining the availability of dwellings of the appropriate SDA type and in the appropriate location, considering other options where such dwellings are not available, and negotiating and entering into an agreement with a registered provider in relation to an SDA dwelling.

Part 5 – Specifying SDA in a participant’s plan

Part 5 deals with how SDA is to be specified in a participant’s plan. It also indicates matters that may be specified in a participant’s plan and how the SDA Rules interact with matters specified or detailed elsewhere. For example, in the NDIS Price Guide or Legacy Stock Price List.

Paragraphs 5.1-5.2 explain that the rules in Part 5 build on the *National Disability Insurance Scheme (Plan Management) Rules 2013*, which are relevant to all reasonable and necessary supports (including SDA). Among other things, the *National Disability Insurance Scheme (Plan Management) Rules 2013* deal with how supports in a participant’s plan are to be specified and the circumstances in which the provider of the support will also be specified. This Part sets out additional matters that apply specifically in relation to the inclusion of SDA in a participant’s plan.

Paragraph 5.3 provides that SDA is to be specified in a participant’s plan by reference to its SDA type and location, and that other features, allowances or factors may also be specified.

Paragraph 5.4 provides that the amounts that will be funded for SDA are the amounts set out in the NDIS Price Guide or the Legacy Stock Price List. These are documents published by the Agency.

Paragraphs 5.5 makes it clear that the amounts specified in these documents may be adjusted from time to time. In the case of Legacy Stock, it is intended that the amounts will be reduced over time, so as to phase out funding of, and encourage the phasing out of the use of this stock.

Paragraph 5.6 makes it clear that the amount that will be funded for particular SDA dwellings may in some cases be zero. In particular, it is envisaged that the amounts that will be funded for Legacy Stock will be reduced to zero over time.

Paragraph 5.7 deals with the total cost of accommodation for a participant and the amount that is funded under the NDIS. Paragraph 5.7 provides that the specification in the participant’s plan of a particular SDA type and location:

- does not mean that the NDIS will fund the full cost of living in that SDA. A participant will be required to make a reasonable rent contribution. The amount of the reasonable rent contribution is determined as set out in the Agency’s terms of business (available on the Agency’s website); and
- does not stop a participant accessing higher-cost SDA (than the SDA funding and reasonable rent contribution) if the participant wishes to make a discretionary rent contributions. For example, a participant may make discretionary rent contributions to access a higher-cost SDA type or location than that specified in the participant’s plan or to access a particular SDA dwelling where its market rental value is higher than the amount funded by the NDIS plus the reasonable rent contribution. This would only be in exceptional circumstances and any registered provider who proposes to charge an amount above the amount funded by the NDIS plus the reasonable rent contribution must notify the Agency of the proposal and attest as required by the Agency, including that the rent has been certified by a property valuer as

fair and reasonable. These provision are intended to stop inappropriate practices. For example, registered providers are not to allow or encourage bidding between participants and consideration will be given to taking action against providers who do not comply with the SDA Rules.

Paragraph 5.8 allows the participant's plan to specify the appropriate SDA type and location even if the participant is not living in that accommodation. This is to ensure that the appropriate SDA type and location is recorded for each participant to facilitate planning in the future. For example, a participant can later move to the appropriate SDA type and location. That is, the appropriate SDA type and location determined under Step 1 in paragraph 4.2 may be recorded for a participant when the participant is living in an alternative interim option determined under paragraph 4.11 or where continuity of the participant's current SDA arrangements has been determined under paragraph 4.12.

Paragraph 5.9 allows for a participant's plan to specify:

- the individual registered provider or category of registered providers who will provide SDA to a participant; or
- the specific SDA dwelling that will be funded for a participant.

Paragraph 5.9 does not limit the operation of the *National Disability Insurance Scheme (Plan Management) Rules 2013* as is emphasised by paragraph 5.10-5.11.

Paragraphs 5.10-5.11 deal with the interaction between the *National Disability Insurance Scheme (Plan Management) Rules 2013* (the Plan Management Rules) and the SDA Rules.

Except for the circumstance dealt with in paragraph 5.11 the SDA Rules do not limit the operation of the Plan Management Rules. This means that where in-kind SDA is available the participant's plan will record that SDA will be provided by the in-kind provider when that outcome is required by the operation of the Plan Management Rules. For example, the rules in Part 6 of the Plan Management Rules deal with in-kind supports that are made available by an in-kind provider that are part of the contribution to the NDIS made by the Commonwealth, a State or a Territory. Where an in-kind support is available to be provided to a participant, the Plan Management Rules provide that the participant's plan must specifically identify that the support will be provided by the relevant provider of that in-kind support (unless an exception in the Plan Management Rules applies).

This means that, except in the circumstance dealt with in paragraph 5.11, the Plan Management Rules dealing with in-kind supports apply in relation to SDA in the same way as they apply in relation to other supports. For example, if there are multiple SDA dwellings of the appropriate SDA type and in the appropriate location that are available to a participant and one of those is available to be provided by an in-kind provider, then the in-kind dwelling will be specified in the participant's plan (unless an exception in the Plan Management Rules applies).

Paragraph 5.11 deals with the circumstance where a participant is residing in SDA that is not the appropriate SDA type and location determined for the participant under paragraph 4.3 to 4.9. In the circumstances described in paragraph 4.11 a participant,

if the participant wishes, can remain in the SDA in which they reside for a period of time despite the SDA not being the appropriate SDA type and location for the participant.

Paragraph 4.11 ensures continuity of a participant's current SDA arrangements. As a result, paragraph 5.11 makes it clear that when paragraph 4.11 applies nothing in the Plan Management Rules or the SDA Rules requires a participant to move from their current home.

Part 6 – Requirements for SDA to be funded

Part 6 deals with requirements that must be satisfied in order for SDA specified in a participant's plan to be funded.

Paragraph 6.1 lists the requirements:

- the provider of the SDA is a registered provider (see Part 7);
- the participant resides in the dwelling, or in a dwelling of the type and in the location (or of a higher-cost type or in a higher-cost location in accordance with paragraph 5.3(b)), specified in their plan (see paragraphs 6.2-6.4);
- the parent or parents of the participant do not reside in the dwelling. The exclusion of the parental (family) home is to ensure, in almost all cases, that the parents remain responsible for a participant who is their child (under 18 years of age) or a young adult (over 18 years of age) when the participant resides with their parent or parents. The term "parents" is defined in Part 8 and is broad. It includes parents from a de facto relationship. It also includes, for a participant who are now over 18 years of age, any person who was a parent under the definition when the participant was under 18 years of age. This is to ensure that the parent/s remain/s responsible for a participant who resides in the parental home after the child turns 18 years of age and until a natural transition point when moving out of the family (parental) home is possible;
- at least one private bedroom has been made available for the participant or, if the participant is a member of a couple, at least one private bedroom and a second room that may be a bedroom or another similar sized private room has been made available to the couple;
- the dwelling is eligible to be enrolled, has been enrolled and continues to be enrolled by the registered provider (see paragraphs 6.5-6.13);
- the number of bedrooms and similar sized private rooms in the dwelling is at least equal to the number of residents for which it is enrolled; and
- for New Builds and re-purposed Existing stock under 6.12, where there are multiple dwellings on a single parcel of land, the funding for the participant is not contrary to the density restrictions in paragraphs 6.14-6.17 because the density restrictions were satisfied immediately after the person began to reside in the dwelling.

The participant resides in the dwelling

Paragraph 6.2 provides that SDA will only be funded in relation to periods when the participant resides in the dwelling. The word ‘resides’ is not defined and takes its ordinary meaning. For example, a short temporary absence would not mean that a participant is no longer residing in the dwelling.

Paragraphs 6.3 and 6.4 provide for an additional period of funding in respect of an SDA dwelling after a vacancy arises. A participant is taken to reside in a dwelling for either 90 days or 60 days (depending on how many residents the dwelling is enrolled to house) or until the vacancy is filled, whichever is earlier.

Enrolment of dwellings

Paragraphs 6.5-6.17 deal with the requirement to enrol dwellings, which is an administrative process that is required to be completed by registered providers in order to receive SDA funding.

Paragraph 6.5 provides that SDA is only to be funded for a participant if the dwelling is eligible to be enrolled by the registered provider. If the CEO specifies a manner for the enrolment the registered provider must enrol the dwelling in accordance with the CEO’s requirements.

Paragraph 6.6 sets out the conditions a dwelling must meet to be eligible to be enrolled:

- it meets the minimum conditions (see below and paragraphs 6.8-6.9);
- it is either a New Build, Existing Stock or Legacy Stock (see below and paragraphs 6.10-6.13);
- for New Builds and re-purposed Existing stock under 6.12 where there are multiple dwellings on a single parcel of land, the density restriction that applies to the parcel of land is met immediately before the enrolment;
- the registered provider holds any written certification that may be required by the CEO, from any person or entity and in any form required by the CEO, relating to:
 - the dwelling’s compliance with the requirements in these Rules or the NDIS Price Guide for the relevant SDA type;
 - its location; or
 - other features, allowances or factors (such as on-site overnight assistance rooms or fire sprinklers); and
- the registered provider holds a certification to the effect that the dwelling meets relevant building codes and laws:
 - in the case of dwellings owned or operated by a State or Territory Government—from either a building authority determined by the CEO (or, in the absence of such a determination, any appropriately authorised building authority), or from the relevant State or Territory government department responsible for disability or housing; or

- in the case of other dwellings—from a building authority determined by the CEO or, in the absence of such a determination, any appropriately authorised building authority.

Paragraph 6.7 deals with dwellings owned or operated by a State or Territory Government. For these dwellings paragraph 6.6(d)(i) does not require a registered provider to obtain a further certification if a certification has been issued by the State or Territory Government or other appropriate authority in the three years prior to the day the dwelling is enrolled.

The minimum conditions

To be enrolled for SDA the dwelling must meet the minimum conditions set out in **paragraphs 6.8-6.9**:

- it must be a permanent dwelling (and not, for example, a mobile home);
- it must be intended to provide long-term accommodation for at least one participant (rather than being intended to be used only for respite, emergency or temporary accommodation);
- it must not receive Commonwealth or State or Territory funding for accommodation under a scheme unrelated to disability (For example, aged care funding). This is ensure that providers do not double dip by receiving SDA funding and another form of funding for accommodation. A dwelling will not meet the minimum conditions if it receives funding for accommodation but may still meet the minimum conditions if the funding is not related to accommodation. For example, if residents of the dwelling receive funding under a scheme unrelated to disability; and
- the NDIS must not have funded certain home modifications for the dwelling. This is to ensure that a provider or person does not double dip by benefiting from SDA funding and funding for home modifications. More specifically, the dwelling does not meet the minimum conditions if:
 - the NDIS has funded home modification that the Agency classifies as 'complex home modifications' for the dwelling at any time after 1 December 2016 and less than 10 years before the day of the enrolment of the dwelling; or
 - the NDIS has funded home modifications that are not classified by the Agency as 'complex home modifications' for the dwelling at any time after 1 December 2016 and less than 5 years before the day of the enrolment of the dwelling.

New Builds, Existing Stock and Legacy Stock

To be enrolled for SDA a dwelling must be either a 'New Build', 'Existing Stock' or 'Legacy Stock'. New Builds receive higher payments than Existing Stock. Legacy Stock receives the lowest payments and it is intended that the payments for Legacy Stock will be phased to zero over time. The definitions and payments structure make it clear that New Builds and Existing Stock are to have no more than five people residing in any one SDA dwelling at any time. Only Legacy Stock may house more

than five residents and payments for properties that have more than five residents will be phased out over time.

New Builds

A dwelling is a *New Build* if (**paragraph 6.10**):

- a certificate of occupancy (or equivalent) was either first issued in relation to it on or after 1 April 2016 or was issued in relation to it on or after 1 April 2016 following renovations or refurbishments resulting in the dwelling meeting the Minimum Requirements in the NDIS Price Guide for one or more of the design categories mentioned in paragraph 4.4 other than Basic design. The cost of the refurbishment must also have been greater than the cost set out in the costs schedule published by the Agency on its website;
- it is enrolled, or will be enrolled, to house five or fewer long-term residents (excluding support staff). There is a limited exception to the requirement for five or fewer long-term residents and it applies to large families. More than five long-term residents can reside in the dwelling only when it is the home of a participant who intends to provide SDA to themselves (as a registered provider) and to reside there with their spouse or de facto partner and children, including after the children turn 18 years of age. The limit to five or fewer long-term residents is not intended to stop the children or young adults of a participant residing with the participant. For example, six residents when a participant who provides SDA to themselves resides in the dwelling with a partner and four children, one of whom is 19 years of age; and
- all its shared areas and the majority of its bedrooms and similar sized private rooms comply with the Minimum Requirements in the NDIS Price Guide for a design category other than Basic design.

Existing Stock

A dwelling that is not a New Build will be *Existing Stock* if either:

- it meets the definition of Existing Stock in paragraph 6.11; or
- it is a re-purposed dwelling that meets the requirements of paragraph 6.12. These dwellings are treated as Existing Stock because they meet the critical standards for a New Build (maximum number of residents and Minimum Requirements) and therefore they do not have to meet some of the requirements for Existing Stock. These dwellings also have to meet the density restrictions that apply to New Builds under paragraphs 6.14-6.17.

A dwelling meets the definition of Existing Stock in **paragraph 6.11** if:

- it does not have a certificate of occupancy (or equivalent) required of a New Build under paragraph 6.10(a);
- it is enrolled, or will be enrolled, to house five or fewer long-term residents (excluding support staff);

- it has been, at some time between 1 July 2013 and 1 December 2016, primarily used as accommodation for people with disability who have an extreme functional impairment or very high support needs;
- it is not an aged care, health care or other facility that is not specifically intended for use as disability accommodation;
- it housed at least one resident who received disability related support accommodation (or equivalent) payments from a State, Territory or Commonwealth Government at some time between 1 July 2013 and 1 December 2016; and
- all its shared areas and the majority of its bedrooms and similar sized private rooms comply or substantially comply with the Minimum Requirements in the NDIS Price Guide for a design category mentioned in paragraph 4.3 (which, unlike for New Builds, may be Basic design).

A re-purposed dwelling that is not a New Build meets the requirements of **paragraph 6.12** and is also *Existing Stock* if:

- it does not have a certificate of occupancy (or equivalent) required by paragraph 6.10(a);
- it meets the requirements of a New Build in paragraphs 6.10(b) and 6.10(c). That is, it is an existing dwelling has been re-purposed and meets the New Builds requirements of:
 - it is enrolled, or will be enrolled, to house five or fewer long-term residents (excluding support staff) or meets the limited exemption under 6.10(b)(ii) related to a participant who provides SDA to themselves and resides with their spouse or de facto partner and children, including after the children turn 18 years of age; and
 - all its shared areas and the majority of its bedrooms and similar sized private rooms comply with the Minimum Requirements in the NDIS Price Guide for a design category other than Basic design; and
- it meets the density restrictions in paragraphs 6.14-17 (see paragraph 6.1(g)).

These re-purposed dwellings do not have to meet any of the requirements about the past use of the dwelling in the paragraphs 6.11(c), (d) or (e).

Legacy Stock

A dwelling that is not a New Build or Existing Stock will be *Legacy Stock* if:

- it does not have a certificate of occupancy (or equivalent) required of a New Build under paragraph 6.10(a);
- it is enrolled or will be enrolled to house more than five long-term residents (excluding support staff);
- it has been, at some time between 1 July 2013 and 1 October 2016, primarily used as accommodation for people with disability who have an extreme functional impairment or very high support needs;

- it housed at least one resident who received disability related supported accommodation (or equivalent) payments from a State, Territory or Commonwealth Government at some time between 1 July 2013 and 1 December 2016;
- it is not an aged care, health care or other facility that is not specifically intended for use as disability accommodation; and
- all its shared areas and the majority of its bedrooms and similar sized private rooms comply or substantially comply with the Minimum Requirements in the NDIS Price Guide for a design category mentioned in paragraph 4.3 (which may include Basic design).

Restrictions applying to New Builds and re-purposed stock

Paragraphs 6.14-6.17 set out, for New Builds and repurposed stock under paragraph 6.12, restrictions that apply to stop the enrolment and funding of unacceptable concentrations of SDA. The restrictions relate to the maximum number of participants with SDA in their plan who can reside on a single parcel of land when there are multiple dwellings on that single parcel of land. For example, a number of participants with SDA in their plan in a single apartment block or live in one of a number of stand-alone dwellings on a single site. A single parcel of land is defined in Part 8. These restrictions are in place to ensure SDA provides for inclusive communities and that people with disability who have SDA in their plan are included in general market areas and are not segregated from the community.

In the case of intentional communities paragraph 6.17 sets out the higher concentrations of SDA that are acceptable. A feature of intentional communities is that members of the community make a commitment to provide support and assistance to other members of the community, including those with disability. Intentional communities is defined in Part 8.

Dwellings that are treated as Existing Stock under paragraph 6.12, because they meet the critical standards for a New Builds, also have to meet the restrictions under paragraphs 6.14-6.17.

Information required to enrol

Paragraph 6.18 sets out some of the information that the CEO may require a registered provider to provide in order to enrol a dwelling for SDA.

Part 7 – Registration of SDA providers

Part 7 deals with the requirement for providers of SDA to be registered providers of supports (approved under s 70 of the Act) and imposes additional SDA-specific requirements on these providers.

Paragraphs 7.1-7.5 explain, by way of introduction, that a person or entity can apply to be a registered provider of supports under s 69 of the Act and that the CEO must approve the person or entity as a registered provider of supports under s 70 of the Act if certain criteria are met, including criteria specified in the *National Disability Insurance Scheme (Registered Providers of Supports) Rules 2013*.

The *National Disability Insurance Scheme (Registered Providers of Supports) Rules 2013* also set out requirements with which registered providers are to comply, and certain circumstances in which a provider's approval as a registered provider of supports can be revoked. These are relevant to all registered providers, including registered providers that provide SDA.

Part 7 of the SDA Rules sets out additional criteria and requirements specific to the provision of SDA, and deals with the consequences of failing to meet these criteria and requirements.

Paragraph 7.6 sets out the requirement that, to provide SDA funded under the NDIS, a provider must be a registered provider of supports. That is, the provider must be approved as a registered provider of supports under s 70 of the Act. Further, the approval must allow the provision of SDA rather than be limited to the provision of another type of support.

The note under paragraph 7.6 clarifies that an entity does not need to apply for a separate approval under the Act to provide SDA. For example, if an entity is already approved as a registered provider of supports under the Act before the commencement of these Rules, the entity will not need to re-apply for registration (unless their approval is restricted to particular classes of supports that do not include SDA).

Paragraphs 7.7-7.9 set out some additional criteria for approval as a registered provider of supports that must be met by applicants for approval who are intending to provide SDA. The paragraphs require the applicant to make declarations.

Paragraph 7.10 requires entities that are already approved as registered provider before the SDA rules commence to make the declarations required by paragraphs 7.7-7.9. Registered providers are required to make these declarations before enrolling any dwellings under Part 6.

Paragraphs 7.11-7.31 deal with additional requirements that registered providers must comply with if they provide SDA. They relate to a number of matters, including:

- a written service level agreements (**paragraph 7.12**). A registered provider must not provide SDA unless a written service agreement has been entered into between the provider and the participant in relation to the provision of the SDA or, in the circumstances where the an agreement cannot be reached, the provider has worked with the participant to establish a written service agreement, provides a copy of the proposed agreement to the participant and acts in accordance with the terms of the proposed agreement. Paragraph 7.12 does not apply if the registered provider is a participant providing SDA to themselves. The Agency's terms of business, published on its website, set out matters must be included in the agreement. Registered providers must comply with the terms set out in the Agency's terms of business even if those terms are not included in the agreement or proposed agreement with the participant;
- compliance with all Commonwealth, State or Territory laws that apply to a register provider who provides SDA (**paragraphs 7.16-17**). A registered provider must comply with these laws and have mechanisms in place to

ensure ongoing compliance, including in relation to employees, contractors or other persons engaged by the provider;

- enrolment of dwellings (**paragraphs 7.18-24**). The requirements include that registered providers:
 - must not enrol a dwelling that is not owned by the registered provider unless the owner of the dwelling has acknowledged in writing that the dwelling is to be enrolled and that the owner has not separately enrolled the dwelling;
 - must ensure that all information provided when enrolling a dwelling under Part 6 is accurate and correct, and must keep the enrolments up to date; and
 - must, within five working days after the CEO notifies the provider, cancel the enrolment of a dwelling if the density restrictions in paragraph 6.14-17 apply to the dwelling, the density restrictions are no longer met and the dwelling does not currently house a participant receiving SDA funding;
- the housing of residents (**paragraphs 7.25-27**). The requirements include that registered providers:
 - must ensure that no more residents are housed in an SDA dwelling than the number for which the dwelling is enrolled. This includes the limit to no more than 5 long-term residents in New Builds and Existing Stock and the requirements in paragraph 6.1 such as the minimum number of bedrooms;
 - who provide SDA to themselves and have more than five residents because of the limited exemption in paragraph 6.10(b)(ii) are not to house residents other than those permitted under the exemption. That is, the participant's spouse or de facto partner and children, including after the children turn 18 years of age; and
 - must consider the views of all participants who already reside in an SDA dwelling before housing another participant in that dwelling;
- access to providers of other supports (**paragraph 7.28**). In many cases SDA will be only one of many supports provided to a participant residing in SDA. A registered provider of SDA must allow other providers to access the SDA dwelling to provide supports to the participants residing there; and
- notifications and attestations (**paragraph 7.29-31**). Registered providers must keep the Agency up to date in relation to a number of matters. These include vacancies in SDA dwellings and any proposal to charge rent in excess of the reasonable rent contributions that are payable by the participant (at the level set out in the Agency's terms of business).

Other requirements may be specified in the Agency's terms of business.

Paragraph 7.32 provides that the CEO may revoke the approval of a person or entity as a registered provider of supports if the provider contravenes a requirement in this

Part and that circumstance presents an unreasonable risk to one or more participants.

Part 8 – Other matters

Paragraph 8.1 specifies the citation for the SDA Rules.

Paragraphs 8.2-8.4 provide guidance on the interpretation of the Rules and set out definitions of a number of terms used in the Rules.

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 33 and 35, and sections 70, 72 and 73 of the *National Disability Insurance Scheme Act 2013* (NDIS Act). The instrument deals with the funding of specialist disability accommodation (SDA) for participants under the National Disability Insurance Scheme (NDIS).

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, 9, 19 and 28;
- Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

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
- the need to provide persons with disabilities the opportunity to be involved actively in decision-making processes about policies and programmes, including those directly concerning them.

The NDIS Act sets out Objects and General Principles that are closely aligned with the CRPD rights recognised by Articles 3, 9 and 19. These Objects and General Principles have been directly applied in the substance of the SDA Rules. The General Principles, references in paragraph 1.4 of the SDA Rules include:

- supporting the independence and social and economic participation of people with disability;
- providing reasonable and necessary supports, including early intervention supports, for participants in the National Disability Insurance Scheme launch;
- enabling people with disability to exercise choice and control in the pursuit of their goals and the planning and delivery of their supports;
- promoting the provision of high quality and innovative supports that enable people with disability to maximise independent lifestyles and full inclusion in the community.

The CRPD (for persons with disabilities) and Article 11 of the ICESCR recognise the right to an adequate standard of living including adequate housing and to the continuous improvement of living conditions. For NDIS participants with extreme functional impairment or very high support needs SDA funding is important in securing this right.

In particular, the SDA Rules and the SDA funding model promote the right to adequate housing by:

- assisting people with disability to access accommodation that is well-suited to their needs where it is available, and to access other suitable options or support where such accommodation is not currently available; and
- stimulating increased supply of specialist housing that responds to the needs and preferences of participants, as well as innovation in SDA housing solutions.

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, and promotes the right to adequate housing recognised in Article 11 of the ICESCR. To the extent that it limits human rights in some circumstances, those limitations are reasonable, necessary and proportionate to enable both the implementation of the scheme and its long-term integrity and sustainability.