

EXPLANATORY STATEMENT

Issued by the authority of the Minister for the National Disability Insurance Scheme

National Disability Insurance Scheme Act 2013

National Disability Insurance Scheme (Specialist Disability Accommodation) Rules 2020

Purpose

Section 209 of the *National Disability Insurance Scheme Act 2013* (the Act) provides that the Minister may, by legislative instrument, make rules prescribing 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 (Specialist Disability Accommodation) Rules 2016* (SDA Rules 2016) were made under section 209 of the Act for the purposes of sections 33, 35, 70, 72 and 73 of the Act. The SDA Rules 2016 are about the funding of Specialist Disability Accommodation (SDA) for participants under the National Disability Insurance Scheme (NDIS) and the requirements with which NDIS providers who provide SDA must comply.

SDA is one of the supports that may be funded for some participants who have an extreme functional impairment or very high support needs. SDA refers to 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 services 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.

In addition to the power to make this instrument under the Act, subsection 33(3) of the *Acts Interpretation Act 1901* provides that where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by-laws), the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.

The *National Disability Insurance Scheme (Specialist Disability Accommodation) Rules 2020* (SDA Rules 2020) repeals and replaces the SDA Rules 2016, while also making several amendments, including those that give effect to a Council of Australian Governments' (COAG) Disability Reform Council (DRC) commitment to implement the recommendations of the 2018 Review of the SDA Pricing and Payment Framework (SDA Framework). This instrument is made under section 209 of the Act for the purposes of sections 33, 34, 35, 48, 70, 72 and 73 of the Act.

The purpose of repealing and replacing the SDA Rules 2016 is to bring the Rules into line with regulatory best practice, and to refine and rationalise the instrument in accordance with best practice drafting standards. Further amendments have been drafted to remove limits upon occupancy of SDA in order to provide support that is more flexible for families, and make other technical amendments.

Background

The SDA Rules 2020 are part of a suite of legislative instruments that place obligations on SDA providers, including the *National Disability Insurance Scheme (Specialist Disability Accommodation Conditions) Rules 2018*, *National Disability Insurance Scheme (Plan Management) Rules 2013*, and the *National Disability Insurance Scheme (Provider Registration and Practice Standards) Rules 2018*.

In bringing the SDA Rules 2020 into line with regulatory best practice, duplication with the Act and other legislative instruments applicable to SDA providers has been removed. For example, paragraph 2.5 of the SDA Rules 2016 previously highlighted that in relation to each support to be provided or funded, including SDA, the CEO would need to be satisfied of a number of elements including that the support represents value for money in that the costs of the support are reasonable, relative both to the benefits achieved and the costs of alternative support. Paragraph 2.5 simply outlined the requirements already contained in paragraphs (a) to (f) of section 34 of the Act and hence has been removed.

Further, through the principles of the *National Disability Insurance Scheme (Plan Management) Rules 2013* it remains an expectation that SDA providers will consider the views of all participants (if any) already residing in an SDA dwelling before housing another participant in that dwelling even though this provision has been removed from the SDA Rules.

This instrument supports the implementation of several recommendations arising out of the Review of the SDA Framework (the Review), commissioned by the DRC. DRC agreed in-principle to all of the recommendations of the Review.

As part of the Review, it was identified that the operation of SDA could be markedly improved by making changes to the SDA Rules. An initial tranche of changes to the Rules came into effect in March 2019. These included changes to remove obstacles to SDA being included in participant plans in cases where an appropriate dwelling is yet to be identified; removing the requirement for a participant to exhaust all other options before they can become eligible for SDA; and clarifying when a participant is eligible for SDA.

The changes in this instrument implement a number of further recommendations from the Review including to remove restrictions for participants to live in SDA dwellings with people who are not eligible for SDA (such as their partner, children, other family and friends).

These changes also increase the scope of accommodation arrangements available to SDA participants including by incorporating flexibility for participants and residents of SDA dwellings to share a room where they choose to do so, and where this sharing would not adversely impact an eligible participant's needs. This will allow couples to share a bedroom where they choose to do so and children to share a room with their siblings where appropriate.

The SDA Rules 2016 required that all the shared areas and the majority of bedrooms in a dwelling meet the minimum design requirements specified for a SDA design category. This has been changed to allow a dwelling to be enrolled as SDA if the shared areas, at least one bedroom and at least one bathroom meet the minimum design requirements specified for a SDA design category. In addition, the rule has been adjusted to allow more than five longer-term residents in new or existing stock where these residents are from the same family. This will allow more dwellings to be enrolled as SDA, including dwellings appropriate for families, which will make it possible for family members, (for example, siblings) to share a room where appropriate.

This instrument has transferred the responsibility for enrolling dwellings from the NDIS Quality and Safeguards Commission to the National Disability Insurance Agency (NDIA). The NDIA is better placed to assess suitability of dwellings. The NDIS Quality and Safeguards Commission will continue to register SDA providers in participating jurisdictions.

The instrument also increases the breadth of properties that can be enrolled as SDA dwellings. This is to ensure SDA eligible participants who are residing in properties intended to be enrolled, but could not be enrolled under previous definitions, are not displaced.

The Minister, in making this instrument has had regard to the financial sustainability of the NDIS as required by subsection 209(3) of the Act.

This instrument is a legislative instrument for the purposes of the *Legislation Act 2003*.

Commencement

This instrument commences the day after this instrument is registered.

Consultation

This instrument is a Category A rule for the purposes of section 209 of the Act. Accordingly, as required under subsection 209(4) of the Act, the Commonwealth and each host jurisdiction have agreed to the making of this instrument. Each host jurisdiction has had the opportunity to review this instrument and provide comments and feedback. Each host jurisdiction has agreed to the form of this instrument as a result of that consultation.

The Commonwealth has consulted with both the NDIA and the NDIS Quality and Safeguards Commission on the making of this instrument.

The Commonwealth has also undertaken a targeted consultation process with the SDA Reference Group that includes peak bodies representing people with disability and carers, providers of services for people with disability and SDA providers.

Regulation Impact Statement (RIS)

A RIS is not required for this instrument (OBPR ID 25204).

Explanation of the Provisions

Part 1 - Preliminary

Name

Section 1 states that the name of the instrument is the *National Disability Insurance Scheme (Specialist Disability Accommodation) Rules 2020*.

Commencement

Section 2 provides that the instrument commences the day after this instrument is registered.

Authority

Section 3 provides that the instrument has been made under the *National Disability Insurance Scheme Act 2013* (the Act).

Schedules

Section 4 provides that each instrument that is specified in Schedule 3 to this instrument is amended or repealed as set out in that Schedule, and any other item in that Schedule has effect according to its terms.

Definitions

Section 5 defines a number of terms used in this instrument. A number of definitions have been removed from the SDA Rules 2016 to reflect the restructure of the SDA Rules 2020. Additional definitions have been included to help refine and clarify the language used in the instrument. An explanation of each definition is provided in the explanation of the section where it is used in the instrument.

The note at the beginning of this section identifies a number of terms already defined in section 9 of the Act, including 'Agency', 'CEO', 'National Disability Insurance Scheme', 'NDIS provider', 'parental responsibility', 'participant', 'participant's statement of goals and aspirations', 'plan', 'registered NDIS provider', and 'registered provider of supports'.

Section 5 includes references to documents that are currently in force, which inform operative sections of the instrument as in force from time to time. Subsection 209(2) of the Act allows the NDIS rules to incorporate documents by reference that are existing or in force from time to time.

Meaning of 'existing stock'

Section 6 provides the definition of 'existing stock'.

Section 6 expands on the definition set out in the SDA Rules 2016 to allow a dwelling to be enrolled where it will house: 5 or fewer longer-term residents; more than 5 longer-term residents from the same family; or where an eligible participant intends to provide SDA to themselves.

Where an eligible participant intends to provide SDA to themselves it must also be the case where there are more than 5 longer-term residents that the eligible participant reside at the dwelling with only their spouse or de facto partner and their children or the children of their spouse or de facto partner.

The revised definition also removes the requirement that all shared areas of a dwelling and the majority of its bedrooms should comply with the minimum design requirements for a design category. 'Minimum design requirements' is defined in section 5 in relation to an SDA design category as meaning the minimum design requirements set out in the SDA Price Guide. The 'SDA Price Guide' means the *National Disability Insurance Scheme Price Guide for Specialist Disability Accommodation*, published by the CEO, as in force from time to time, which may be viewed without charge at <http://www.ndis.gov.au>.

This requirement has been replaced with a requirement that only the shared areas and at least one bedroom and one bathroom of the dwelling satisfy the minimum design requirements specified for an SDA design category. 'SDA design category' is defined in section 5, which points to Schedule 2 to this Rule, where each of the categories are set out in a table, along with the features for each category.

Meaning of 'legacy stock'

Section 7 provides the definition of 'legacy stock'.

Section 7 expands on the definition set out in the SDA Rules 2016 to allow a dwelling to be enrolled as legacy stock where the dwelling housed a resident who otherwise met the requirements of the section, where the resident was not housed between 1 July 2013 and 1 December 2016 because the dwelling was not completed. This expanded definition will allow a dwelling where construction commenced after 1 July 2013 but was completed on or before 31 December 2018 and otherwise meets the requirements of the definition to be enrolled, subject to additional factors set out in paragraph 26(2)(e).

The revised definition also removes the requirement that all shared areas of a dwelling and the majority of its bedrooms should comply with a design category. This requirement has been replaced with a requirement that the shared areas and at least one bedroom and one bathroom of the dwelling satisfy or substantially satisfy the minimum design requirements specified for an SDA design category.

Meaning of 'new build'

Section 8 sets out the definition of 'new build'.

Section 8 expands on the definition set out in the SDA Rules 2016 to allow a dwelling to be enrolled where it will house: 5 or fewer longer-term residents; more than 5 longer-term residents from the same family; or where it will house an eligible participant who intends to provide SDA to themselves.

Where an eligible participant intends to provide SDA to themselves it must also be the case where there are more than 5 longer-term residents that the eligible participant reside at the dwelling with only their spouse or de facto partner and their children or the children of their spouse or de facto partner.

The revised definition also removes the requirement that all shared areas of a dwelling and the majority of its bedrooms should comply with a design category. This requirement has been replaced with a requirement that the shared areas and at least one bedroom and one bathroom of the dwelling satisfy the minimum design requirements specified for an SDA design category, other than basic.

Part 2 – Eligibility to receive support for specialist disability accommodation

This Part determines whether a participant is eligible to receive support for SDA and includes matters to which the CEO must have regard. 'CEO' is defined in section 9 of the Act as meaning the Chief Executive Officer of the NDIA.

This Part substantially re-makes Parts 4 and 5 of the SDA Rules 2016. It does not introduce any new requirements or any other factors affecting a participant's eligibility to receive support for SDA. It also does not introduce any new matters that the CEO must have regard to in determining an appropriate SDA building type, design category and location for an eligible participant. Any deviations from Parts 4 and 5 of the SDA Rules 2016 are minor amendments to wording and phrasing to remove duplication and provide greater clarity.

Division 1 – Introduction

Section 9 provides a simplified outline of Part 2.

Section 10 clarifies that Part 2 is made for the purposes of subsections 33(7), 34(2), 35(1) and 209(2A) of the Act.

Division 2 – Eligibility to receive support for specialist disability accommodation

Section 11 defines when a participant is eligible to receive support for SDA.

A participant is eligible to receive support for SDA under the NDIS if the CEO is satisfied that the participant meets the SDA needs requirements (as defined in section 14) and either the participant has an extreme functional impairment (as defined in section 12) or has very high support needs (as defined in section 13).

Section 12 defines 'extreme functional impairment'. The definition remains the same as in the 2016 SDA Rules, except for minor rephrasing to improve readability.

A participant has 'extreme functional impairment' if the impairment results in extremely reduced functional capacity or psychosocial functioning affecting activities of mobility, self-care, and/or self-management.

Another aspect to the definition of 'extreme functional impairment' is the participant has a very high need for person to person supports in undertaking the activity even with assistive technology, equipment or home modifications.

Section 13 sets out two alternative circumstances in which a participant will be considered to have 'very high support needs'. The tests remain the same as in the SDA Rules 2016.

Firstly, a participant has 'very high support needs' if the participant has lived in SDA for extended periods, and living in that accommodation has impacted on their capacity to transition to alternative living arrangements and support.

Alternatively, a participant may also have 'very high support needs' if 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
- having regard to the participant's response to risk and their interaction with the environment, the participant is at risk or poses a risk to others, and that risk could be mitigated by the provision of SDA.

In assessing whether a participant has 'extreme functional impairment' under section 12 or 'very high support needs' under section 13, the CEO may have regard to a number of factors, including:

- any assessment conducted in relation to the participant, including any assessments requested by the CEO under section 36 or 50 of the Act; and
- the daily support requirements of the participant; and
- any assessment tool specified by the CEO for the purposes of this paragraph.

The CEO may also have regard to any other matters they consider appropriate.

Section 14 describes when a participant 'meets the SDA needs requirement'. This is a rephrasing of what was previously known as 'requires an SDA response' in the SDA Rules 2016, but the eligibility criteria remain the same.

Amongst other things, the SDA needs requirement is met if, when compared to how other supports alone would assist the participant, combined SDA and other supports would:

- better assist the participant in pursuing their goals, objectives and aspirations set out in the participant's statement of goals and aspirations and,

- is more beneficial and effective in improving and maintaining the participant's functional capacity and skill development.

If the participant also has 'very high support needs', the 'SDA needs requirement' would be met if combined SDA and other supports would be more effective and beneficial in reducing the participant's future needs for supports which might be required due to inappropriate accommodation, and assisting the participant to pursue goals related to life opportunities and life transitions.

If the participant has an 'extreme functional impairment', the 'SDA needs requirement' would be met if combined SDA and other supports would be more effecting in providing the participant with stability and continuity of support.

When compared to other supports alone, the combined SDA and other supports must also represent better value for money.

For the purposes of considering what represents better value for money for participants with very high support needs, the CEO must have regard to further matters, such as the likelihood that the combined supports will substantially improve the life stage outcomes of the participant, and the cost of the supports.

Division 3 – Design, type and location of specialist disability accommodation

This Division specifies the design, type and location of SDA.

Once a participant has been assessed as being an eligible participant for SDA, the CEO must determine the SDA that is appropriate to support the eligible participant. 'Eligible participant' is defined in section 5 and means a participant who is eligible under Division 2 of Part 2 to receive support for SDA.

Subsection 15(1) sets out that the CEO must determine the SDA building type (in accordance with section 16), design category (in accordance with section 17), location of the accommodation (in accordance with section 18) and whether the SDA is to be provided as an in-kind support. In-kind support has the meaning given by section 6.8 of the *National Disability Insurance Scheme (Plan Management) Rules 2013*.

The Note following section 15 alerts the reader that the SDA building type, SDA design category and location must then be specified in the participant's plan (in accordance with section 19). More than one of each type may be determined for an eligible participant.

Subsection 15(2) allows an eligible participant to reside in a dwelling that does not meet the matters determined by the CEO under subsection 15(1) and receive support for SDA, if certain circumstances are met.

The eligible participant must notify the CEO in writing that they wish to remain residing in the dwelling and the dwelling must have been either:

- a dwelling that the eligible participant resided in immediately before the CEO made their own independent assessment of appropriate SDA in accordance with subsection (1); or
- a dwelling that the eligible participant had moved to in accordance with an earlier determination made by the CEO under subsection (1); or
- a temporary dwelling of the eligible participant while they find and transition to accommodation that satisfies the matters in subsection (1).

The Notes under section 15 clarify that the matters determined by the CEO under this section affect the amount of support that can be paid to an eligible participant for SDA, in accordance with the SDA Price Guide (Note 2). The reference to Legacy Stock in the SDA Rules 2016 has been removed as the Legacy Stock Price List has been consolidated into the SDA Price Guide.

Note 1 clarifies that an eligible participant who receives support for SDA under subsection 15(2) may also receive support even though the dwelling only satisfies the SDA design category of basic. The CEO must not determine a dwelling for an eligible participant of the SDA design category of basic unless the requirements in subsection 15(2) are met.

Section 16 sets out matters that the CEO must have regard to, for the purposes of determining the appropriate SDA building type for the eligible participant. The matters include the eligible participant's preferences, support needs, the extent to which the building type would meet those needs, its impact on the participant's daily functioning, capacity, skill development, and the extent to which the building type would facilitate or hinder the provision of other supports required by the participant.

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.

Section 16 also specifies value for money considerations that the CEO must take into account in determining the appropriate SDA building type, in the context of considering all of the supports that may be determined as reasonable and necessary for a participant and included in their plan under the Act.

Section 17 provides that for the purposes of determining the appropriate SDA design category to support an eligible participant, the CEO must have regard to the specific needs of the eligible participant.

The SDA design categories and features for each category is set out in the table in clause 1 of Schedule 2 to this instrument.

The CEO must not determine for an eligible participant the SDA design category of basic for the purposes of eligibility, although basic may be determined at the participant's request under subsection 15(2).

Section 18 establishes the matters the CEO must have regard to when determining the area in which the SDA for an eligible participant is to be located. The relevant matters include the eligible participant's preference, the extent to which the location would assist the eligible participant to pursue their goals and aspirations, the history of where the eligible participant has lived, their connections to the community, social and economic participation and whether the location represents value for money.

Subsection 18(2) provides that the area determined by the CEO must be either an area, multiple areas or part of an area designated by the Australian Bureau of Statistics (ABS) as a Statistical Area Level 4 under the Australian Statistical Geography Standard. The *Australian Statistical Geography Standard* means, under section 5, the geographical framework of that name published by the ABS from time to time, which can be viewed without charge on the ABS' website (<http://www.abs.gov.au>).

Division 4 – Other matters

Division 4 sets out other matters relevant to eligibility for support for SDA.

Section 19 specifies the matters that must be included in an eligible participant's NDIS plan. The matters include the participant's eligibility to receive support for SDA, the matters determined by the CEO under subsection 15(1), the amount of support, and specific matters if the CEO makes a determination under subsection 15(2). The plan may also specify the SDA provider to provide the SDA to the eligible participant.

Section 20 explains that the CEO will consider whether support coordination and other capacity building supports are required to assist the eligible participant in finding and moving into the SDA. For example, the eligible participant may require assistance clarifying their need for SDA or the appropriate SDA type and location. The participant may also require assistance considering other options (such as assistance with daily living or supports) where the determined appropriate SDA dwelling type is not available, negotiating with SDA providers, or entering into and managing an agreement with an SDA provider.

Any support coordination and other capacity building supports determined by the CEO to be required, must be included in the eligible participant's plan.

Section 21 clarifies that even if a participant is eligible to receive support for SDA, it does not mean that the NDIS will fund the full cost of living in that SDA. An eligible participant may still be required to make a reasonable rent contribution.

Part 3 – Funding of specialist disability accommodation

Part 3 outlines the circumstances in which the CEO or delegate may make a decision to fund an eligible participant for the provision of SDA. Once a participant has such funding, they may use this funding in the market to access SDA.

A substantive change from the SDA Rules 2016 is the capacity for SDA to be funded for a participant on a shared basis. Many participants would prefer to have the choice to share their bedroom in SDA with another person, for example, their partner. Amendments to the funding rules allow the participant to be funded on this basis, subject to some measures intended to avoid exploitation of participants, and ensure that funding such an arrangement does not adversely impact their needs.

The Part also provides for the enrolment of SDA for the purposes of the NDIS.

Division 1 - Introduction

Section 22 provides a simplified outline of Part 3.

Section 23 highlights the purpose of the Part, which is made for subsection 34(2), 35(1) and 99(2) of the Act. The Part deals with what are reasonable and necessary supports that will be funded, and prescribes a reviewable decision.

Division 2 – Requirements relating to the funding of specialist disability accommodation

Section 24 establishes rules about when SDA will be funded if it is specified in an eligible participant's plan.

The requirements are established in subsection 24(1). The SDA must be provided by an SDA provider. SDA provider is defined in section 5, to mean one of two bodies. It may be a registered NDIS provider that is registered to provide SDA. This will apply in all states and territories that are participating jurisdictions. Alternatively, it may also be a registered provider of supports that can provide SDA under its registration. This is expected to apply until 30 November 2020 only in Western Australia, when Western Australia will become a participating jurisdiction and registered providers of supports will become registered NDIS providers.

The accommodation must be provided at a dwelling (the SDA dwelling) that is enrolled to provide SDA (see Division 3 of this Part).

In order to be funded, the eligible participant must reside at the SDA dwelling. Section 32 provides further detail about this requirement.

The eligible participant must have a private bedroom at the SDA dwelling that satisfies the minimum design requirements for an SDA design category specified in the eligible participant's plan. This bedroom must be only occupied by the eligible participant unless the eligible participant freely chooses to reside in the bedroom with one or more other persons.

If the eligible participant has chosen to reside in a bedroom with one or more other persons, and the eligible participant is not providing SDA to themselves (as an SDA provider), the eligible participant must notify the CEO in writing of that choice. Additionally, unless the SDA is being provided by the participant to themselves, the CEO must be satisfied, having regard to the matters mentioned in subsection 24(2), that the eligible participant's needs are not adversely impacted by having more than one person residing in the bedroom.

The eligible participant must also have access to a bathroom at the SDA dwelling that satisfies the minimum design requirements for an SDA design category specified in the eligible participant's plan.

For the purposes of the CEO being satisfied that the eligible participant's needs are not adversely impacted by having more than one person residing in the bedroom (subparagraph 24(1)(e)(ii)), the CEO must have regard to the matters outlined in subsection 24(2).

Division 3 – SDA dwelling

A participant may only be funded in respect of an SDA dwelling which is enrolled as SDA (paragraph 24(1)(b)). This Division provides for the enrolment of SDA dwellings.

Subdivision A – Enrolment of dwelling

Section 25 provides for the application to enrol a dwelling. Under subsection 25(1) an SDA provider may apply to the CEO to enrol a dwelling as a dwelling at which SDA can be provided. An SDA provider must already be registered to provide SDA under the Act (refer to section 5).

Subsection 25(2) outlines the required form and necessary content of the application. The application must be in writing, include the information specified in subsection 25(3) and be accompanied by a written statement. The written statement must certify the matters set out in subsection 25(4), be signed by the applicant, and provide that the applicant has agreed to comply with the conditions of enrolment.

Subsection 25(3) sets out information that must be included in the application.

Subsection 25(4) sets out the matters the applicant must certify when seeking enrolment of the dwelling.

Subsection 25(5) allows the CEO, by written notice, to require an applicant to give the CEO such further information or documents in relation to the application as the CEO reasonably requires.

Section 26 provides for the CEO's decision to enrol a dwelling as a dwelling at which SDA may be provided (subsection 26(1)).

Subsection 26(2) sets out matters that the CEO must be satisfied of before enrolling a dwelling.

Additional requirements apply if a dwelling is legacy stock. Paragraph 26(2)(e) provides that if the construction of the dwelling was completed between 1 December 2016 and 31 December 2018, such that the building is not a new build, it may still be enrolled. This will only occur if the CEO finds there is considerable financial cost to the SDA provider if the dwelling is not enrolled, and there is limited availability of alternative SDA in the same area as the dwelling.

Subsection 26(3) recognises that the decision under subsection 26(2) contains a question of judgement for the CEO about which reasonable minds may differ. This subsection therefore prescribes a decision by the CEO not to enrol a dwelling is a reviewable decision. This allows a registered provider to seek review of the CEO's decision, under Part 6 of Chapter 4 of the Act, as the result of section 99 of the Act.

The process for review involves the person who is directly affected by a reviewable decision making a request (either in writing or orally) to the decision-maker to review the decision, within 3 months after receiving notice of the decision. This is known as an internal review of the decision. The reviewer must then make a decision as soon as reasonably practical that either confirms, varies or sets aside the reviewable decision. Application can then be made to the Administrative Appeals Tribunal for a review of the internal reviewer's decision.

Subdivision B – Conditions of enrolment

Subdivision B provides for the conditions of enrolment. SDA providers must comply with these conditions, or the enrolment of an enrolled dwelling may be cancelled.

Section 27 provides for the consequences of failure to comply with the conditions of enrolment. If the CEO believes on reasonable grounds that an SDA provider is not complying with a condition of enrolment of the dwelling, the CEO may cancel the enrolment. However, this is subject to a precondition that the CEO has given the SDA provider notice in accordance with subsection 27(2) stating a period for compliance to be restored, and the period has expired.

Subsection 27(2) provides that the notice must state that unless the provider satisfies the CEO, within the period specified in the notice or such longer period as the CEO allows, that the provider is complying with the conditions of enrolment in relation to the dwelling, the CEO may cancel the enrolment.

Subsection 27(3) requires that the period specified in the notice must not be shorter than 14 days after the notice is given.

Subsection 27(4), as with subsection 26(3) above, recognises that a decision under subsection 27(1) contains a question of judgement for the CEO about which reasonable minds may differ. Accordingly, it is appropriate this decision is subject to review, where the decision-maker in respect of the decision is the CEO.

Subsection 27(4) prescribes a decision by the CEO cancel the enrolment of an enrolled dwelling is a reviewable decision. This allows a registered provider

to seek review of the CEO's decision, under Part 6 of Chapter 4 of the Act, as the result of section 99 of the Act.

Keeping enrolled dwelling in good state of repair

Section 28 provides that it is a condition of enrolment that SDA providers ensure that each dwelling enrolled by the provider is in a good state of repair and is being appropriately maintained.

The SDA Rules 2016 included a similar provision that required the service provider to provide an annual attestation to that effect. The requirement for an annual attestation has been replaced by a discretionary power for the CEO to require that the matters provided for at the time of enrolment continue to apply to the dwelling (section 30). This would include the certifying that the dwelling still meets the requirements set out under subsection 25(3).

This change is not intended to create an additional regulatory burden on SDA providers, rather it is intended to ensure that the dwelling in which the participant is residing is appropriately maintained.

Notifying the CEO of changes relating to an enrolled dwelling

Section 29 provides that it is a condition of enrolment that an SDA provider notify the CEO, in writing, if any of the specific events listed in subsection 29(1) occurs in relation to an enrolled dwelling of the provider.

The 'SDA Pricing and Payments Framework' is defined in section 5. It means the publication known as the SDA Pricing and Payments Framework, as endorsed by the Disability Reform Council of the Council of Australian Governments, as in force from time to time. A note to the provision states that the SDA Pricing and Payments Framework may be viewed on the Department's website (<http://www.dss.gov.au>), without charge.

Subsection 29(2) requires the provider to notify the CEO of the matters mentioned in subsection 29(1) within 5 days of the event occurring.

Subsection 29(3) requires that if the provider is notifying the CEO that the provider proposes to charge the participant rent that exceeds the amount provided for by paragraph 29(1)(g), the provider must include with the notice a certificate from a qualified property valuer stating that the rent to be charged is fair and reasonable.

Certification of enrolled dwellings

Section 30 allows the CEO, by notice in writing, to request a provider to arrange for another person to certify that the information provided at the time of enrolment for a dwelling continue to apply to the dwelling. The notice must specify both requirements relating to the qualifications and independence of the person that is to undertake the certification and the period within which the certification must be given to the CEO.

Subdivision C – Density restriction

This Subdivision substantially re-establishes the density restriction provisions of the SDA Rules 2016.

Section 31 sets out, for new builds or existing stock, 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 parcel of land when there are multiple dwellings on that parcel of land.

For example, a number of participants with SDA in their plan live in a single apartment block or live in one of a number of stand-alone dwellings on a single site. 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, paragraphs 31(2)(b) and (c) set out the higher concentrations of SDA that are acceptable. Subsection 31(3) provides a definition of *intentional community*. A feature of intentional communities is that the members have chosen to live together based on common social values and have committed to the principle of mutual support. The community is designed to have a high degree of social cohesion, and is controlled by the members or residents, and not governed by a single entity.

A 'parcel of land' is defined in subsection 31(4), by reference to State and Territory laws and requirements. Subsection 31(5) clarifies that the reference to a law of a State or Territory is a reference to that law as in force from time to time.

Division 4 – Eligible participant to reside at dwelling

Section 32 establishes when an eligible participant resides at a dwelling. Subsection 32(1) provides that if an eligible participant ordinarily resides at a dwelling, or if they are taken to do so because of factors set out in subsection 32(2), they reside at a dwelling.

Paragraphs 32(2)(a) to (d) set out the circumstances where an eligible participant will be taken to reside at a dwelling. These are where the dwelling is enrolled to house 2 to 5 residents and the eligible participant either dies, gives notice to vacate or is given notice to vacate, the vacancy is available for another person and the CEO has been notified of the vacancy. The eligible participant is taken to reside at the dwelling until the earlier of the vacancy being filled or the elapse of either 60 or 90 days since the vacancy arose, depending upon the number of residents the dwelling is enrolled to house.

Part 4 – Criteria, requirements and circumstances that apply to registered providers of supports

Part 4 has limited application to providers of supports to participants who are not in a participating jurisdiction, and hence are not yet subject to the oversight of the NDIS Quality and Safeguards Commission. Currently, this only applies to providers of supports to participants in Western Australia.

For providers of SDA who are registered NDIS providers, ongoing registration criteria and requirements are provided for by the *National Disability Insurance Scheme (Specialist Disability Accommodation Conditions) Rule 2018*. It is intended that Western Australia will become a participating jurisdiction from 1 December 2020 and these provisions will no longer apply from that time.

Division 1 - Introduction

Section 33 provides a simplified outline of Part 4.

Division 2 – Additional criteria for approval of registered providers of supports

Section 34 provides additional criteria for the CEO's approval of registered providers of supports, for the purposes of paragraph 70(1)(d) of the Act. Subsection 34(1) provides that an applicant that has applied to be a registered provider of supports to provide SDA to one or more eligible participants must meet the criteria mentioned in subsection 34(2).

Subsection 34(2) requires that the applicant has declared, in writing, both that it will comply with, and has mechanisms in place to ensure compliance with, all applicable laws that relate to disability accommodation (including laws relating to building standards and tenancy arrangements); and that it has mechanisms in place to ensure that all employees, contractors or other persons engaged by the applicant will comply with all applicable laws that relate to SDA. The laws applicable are likely to be state and territory laws in the particular state or territory in which the accommodation is situated.

Division 3 – Requirements that apply specifically to registered providers of supports

Section 35 provides that Division 3 is made for the purposes of section 73 of the Act, which empowers the rules to provide for requirements with which registered providers of supports must comply.

Section 36 provides that a registered provider must not provide SDA unless it has put in place a service agreement with the eligible participant. The service agreement under subsection 36(1) must meet one of two criteria. It must either be in writing, entered into between the registered provider of supports and the eligible participant in relation to the provision of SDA, or a proposed agreement. The proposed agreement must be reached by the provider where they have worked with the eligible participant to establish a written service agreement in relation to the provision of SDA, provided a copy of the proposed agreement to the eligible participant; and then provided SDA to the eligible participant in accordance with the terms of the proposed agreement.

Subsection 36(2) provides for the terms that must be included in the service agreement. These must include the terms that set out the rights and responsibility for the registered provider of supports and the eligible participant, and the terms as set

out in the addendum to the Terms of Business for Registered Providers that must be included in a SDA service agreement.

The Terms of Business for Registered Providers (Terms of Business) is a key document prepared by the NDIA that contains protocols and processes that are binding on a registered provider. The Terms of Business that apply are those that are in force when the service agreement is reached. The Terms of Business can be viewed on the NDIA's website (<http://www.ndis.gov.au>).

Subsection 36(3) clarifies that this section does not apply in circumstances where eligible participants provide SDA to themselves.

Section 37 provides for access to providers of supports. A registered provider of supports must not restrict other NDIS providers from accessing an enrolled dwelling for the purposes of that NDIS provider delivering support to an eligible participant residing at the dwelling.

Section 38 provides for the number and kind of residents. A registered provider of supports must ensure that the number of residents at a dwelling enrolled by the provider does not exceed the number of residents for which the dwelling is enrolled.

Division 4 – Revocation of approval as a registered provider of supports

Section 39 prescribes circumstances for the revocation of approval as a registered provider of supports for the purposes of paragraph 72(1)(c) of the Act. A circumstance for the revocation of approval as a registered provider of supports is that the provider contravenes a requirement of Division 3 of Part 4.

Part 5 – Transitional, savings and application provisions

Division 1 – National Disability Insurance Scheme (Specialist Disability Accommodation) Rules 2020

Section 40 applies where an action took place under the SDA Rules 2016 as in force immediately before those rules were repealed and the same action could take place under this instrument for the same purpose. Where this section applies, the CEO has discretionary power to accept the action as done for that purpose under this instrument, or to accept the action as done, subject to the completion of additional matters.

For example, if under the SDA Rules 2016 the CEO had determined that the participant could reside in a dwelling that was not what they had been determined eligible for, the CEO may under this instrument determine that the participant may continue to reside in that dwelling. It is not intended that this provision will be exercised by the CEO to alter or amend a previous decision that was made under the SDA Rules 2016 including where an eligible participant is currently residing.

Section 41 is a transitional provision for dwellings enrolled under section 6 of the *National Disability Insurance Scheme (Specialist Disability Accommodation Conditions) Rule 2018* immediately before the commencement of this instrument. Where this section applies, the dwelling is taken to be enrolled by the CEO under section 26 of this instrument, and this instrument will then apply in respect of that dwelling.

Schedule 1 – SDA building types

Schedule 1 to the instrument sets out the SDA building types for the purposes of the CEO making a determination as to what SDA is reasonable and necessary to support the participant. Together with the SDA design category and location of the SDA, the SDA building type is used to determine the maximum amount that a participant can be funded under the NDIS.

Schedule 2 – SDA design category

Schedule 2 to the instrument sets out the SDA design categories for the purposes of the CEO making a determination as to what SDA is reasonable and necessary to support the participant. Together with the SDA building types and location of the SDA, the SDA design category is used to determine the maximum amount that a participant can be funded under the NDIS.

Schedule 3 – Repeals

Schedule 3 repeals the SDA 2016 Rules.

Statement of Compatibility with Human Rights

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

National Disability Insurance Scheme (Specialist Disability Accommodation) Rules 2020

This instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the legislative instrument

This instrument is made under section 209 of the Act for the purposes of sections 35, 48, 70, 72, 73 of the Act. This instrument repeals and replaces the SDA Rules 2016.

The instrument deals with the funding of SDA for participants under the NDIS. The instrument builds on an initial tranche of changes made to the SDA Rules 2016 in March 2019, and supports the implementation of recommendations arising out of a 2018 Review of the SDA Pricing and Payments Framework.

The instrument simplifies the operation of the SDA Rules and increases the scope of accommodation arrangements available to SDA participants, providing them with more flexibility, choice and control in whom they live with.

Human rights implications

This legislative instrument engages 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); and Articles 5 and 7 of the Convention on the Rights of the Child, (CRC).

The CRPD recognises the barriers that persons with disabilities may face in realising their rights. While the rights under all human rights treaties apply to everyone, including persons with disabilities, the CRPD applies human rights specifically to the context of persons with disabilities.

The 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 promotes the rights of people with disabilities in Australia by providing access to nationally consistent funding and support to help participants realise their aspirations and participate in the social and economic life of the community.

The Act sets out Objects and General Principles that are closely aligned with the CRPD rights recognised by Articles 3, 9, 19 and 28. The SDA Rules are made under the NDIS Act and these Objects and General Principles apply to the SDA Rules.

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.

In addition, the CRPD outlines the right for persons with disabilities to have the opportunity to choose their place of residence and where and with whom they live on an equal basis with others and are not obliged to live in a particular living arrangement. Previously the SDA Rules required a ratio of one resident to one bedroom in the SDA dwelling. This instrument incorporates flexibility for residents to share a bedroom where they choose to do so.

Some safeguards have been put in place to limit the possibility of the NDIS funding arrangements that include overcrowding, participants being forced into arrangements that are not their genuine choice, and any other risks to the participant and their family.

Specifically, the Chief Executive Officer (CEO) of the National Disability Insurance Agency (NDIA) will need to determine whether SDA funding will be provided where the participant is seeking to enter a sharing arrangement with non-SDA participants.

In making this funding decision, the CEO must have regard to principles that seek to ensure that the participant's needs are not adversely impacted by the proposed sharing arrangements. This principles-based approach acknowledges that, as all family forms and structures are different, a prescriptive approach is not appropriate.

This decision-making power by the CEO, is an important safeguard while the SDA market is immature and participant choice and control is restricted by a lack of supply.

The decision-making power also ensures that the sharing arrangement is the genuine choice of the participant rather than a choice of a family member, provider or other person.

The CRC recognises a child's rights to know and be cared for by his or her parents and the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community. The increased flexibility incorporated into this instrument makes it easier for children to live with their parents and to share a room with their sibling, where appropriate.

To the extent that this decision-making power by the CEO limits human rights, those limitations are reasonable, necessary and proportionate to provide appropriate safeguards for participants accessing NDIS funding.

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, those limitations are reasonable, necessary and proportionate to enable the implementation of the scheme, its long-term integrity and sustainability, and providing appropriate safeguards to prevent overcrowding or other risks to the participant and their family.

