**EXPLANATORY STATEMENT**

Issued by the authority of the Secretary of the Department of Social Services

*Disability Services and Inclusion Act 2003*

*Disability Services and Inclusion (Regulated Activities) Determination 2023*

**Purpose**

The *Disability Services and Inclusion (Regulated Activities) Determination 2023* (the instrument) specifies the kinds of eligible activities that are regulated activities for the purposes of section 11 of the *Disability Services and Inclusion Act 2023* (the Act). People undertaking regulated activities are subject to a higher degree of scrutiny and regulation.

**Background**

The Act replaces the *Disability Services Act 1986* (the DS Act). One of the key drivers for replacing the DS Act was to establish a more consistent approach to regulation and safeguarding in relation to Commonwealth funded disability services outside of the National Disability Insurance Scheme (NDIS). The intent is also to reduce unnecessary regulatory burden on providers of disability related supports and services.

While some of the eligible activities may be very low risk and involve little to no direct contact with people with disability, other activities may be higher risk and more complex. It is appropriate for these higher risk activities to have a greater level of oversight and regulation. It would be unnecessarily burdensome, and could be prohibitive, if persons providing lower risk activities are required to meet the same regulatory requirements.

In developing a new activity, the relative risks and complexity of the supports and services needs to be taken into consideration. A determination will then be made as to whether the activity fits within one of the kinds of activities that is a regulated activity. If it does, then the person is required to hold a certificate of compliance in relation to that activity, or to be covered by a determination under subsection 9(2) of the Act.

**Commencement**

The instrument commences on the later of the day on which the Act commences and the day after this instrument is registered.

The instrument is made in reliance on subsection 4(2) of the Acts Interpretation Act 1901, which allows for the exercise of a power following enactment but before the commencement of an Act.

**Consultation**

The instrument was circulated to Disability Representative Organisations along with all service providers who are currently funded by the department to provide disability services and supports outside the NDIS for input. The Australian Services Union was also consulted. The combined feedback from this consultation was considered for the final version of the instrument.

The department will continue to work and engage with stakeholders in relation to individual programs so that they deliver the intended outcomes for people with disability into the future.

**Regulation Impact Analysis (RIA)**

A RIA is not required for this instrument (OIA23-05099).

**Explanation of the provisions**

**Part 1 - Preliminary**

**Section 1 – Name**

Section 1provides that the title of the instrument is the *Disability Services and Inclusion (Regulated Activities) Determination 2023*.

**Section 2 – Commencement**

Section 2provides that the instrument commences on the later of:

* the day on which the Act commences
* the day after this instrument is registered.

The Act commences 28 days after it receives the Royal Assent.

**Section 3 – Authority**

Section 3provides this instrument is made under the *Disability Services and Inclusion Act 2023*.

Specifically, it is made under section 11 of the Act, allowing the Secretary to determine that a specified kind of eligible activity is a regulated activity.

**Section 4 – Definitions**

Section 4 sets out the definitions for terms used in the determination.

A number of expressions used in the instrument are defined in the Act, including eligible activity.

This section also provides that a reference to ***Act*** means the *Disability Services and Inclusion Act 2023*.

**Section 5 – Regulated activities**

Section 5prescribes the kinds of eligible activities that are regulated activities.

Paragraph 5(a) provides that an eligible activity is a regulated activity if it involves the delivery of higher-risk or complex supports to people with disability.

Higher-risk or more complex supports and services may require greater or more specific technical skill to deliver, or a greater degree of coordination or collaboration to be effective. They could also be services or supports which, if delivered poorly or incorrectly, could expose a person with disability to a risk of harm. Further, these supports and services may place the person with disability in a position where they must be able to trust the service provider to uphold their rights.

For example, an advocate is in a highly trusted position, potentially having access to sensitive and personal information about a person with disability. They have the potential to guide or influence a person with disability towards a course of action. The service that they provide is expected to be in the best interests of the person with disability and be directly connected to upholding their human rights.

It is necessary to ensure that supports of this nature are subject to sufficient scrutiny to assure people with disability and government that the chosen providers deliver safe and quality services.

Paragraph 5(b) provides that an eligible activity is a regulated activity if it is delivered by persons undertaking the activity through substantial one‑on‑one contact with people with disability to whom the activity is provided.

An eligible activity that involves substantial one-on-one contact will generally pose a higher risk to a person with disability due to the increased opportunity for private interaction. Incidental or shorter interactions with people with disability pose minimal risk to people with disability.

For example, where providers of disability related supports and services have substantial private one-on-one appointments with people with disability, this poses a higher risk to a person with disability than one-on-one interaction in the course of providing information (such as at a conference or other publicly accessible setting).

Paragraph 5(c) provides that an eligible activity is a regulated activity if it involves regular engagement over a prolonged period between persons undertaking the activity and people with disability to whom the activity is provided (whether the engagement or contact is in person or by other means).

Regular engagement between providers of disability related supports and services under the Act and people with disability receiving the subject supports and services over prolonged periods may pose a higher level of risk as it provides the opportunity to develop a more substantial relationship of trust. For example, engagement between providers of disability related supports and services and people with disability receiving the subject supports and services every week over a period of 12 months, even if that engagement is in the context of a group of people, will pose a higher risk to people with disability and therefore requires a greater level of oversight.

## Statement of Compatibility with Human Rights

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

***Disability Services and Inclusion (Regulated Activities) Determination 2023***

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

**Overview of the legislative instrument**

The *Disability Services and Inclusion (Regulated Activities) Determination 2023* (the instrument) specifies the kinds of eligible activities that are regulated activities for the purposes of section 11 of the *Disability Services and Inclusion Act 2023* (the Act).

People undertaking regulated activities are subject to a higher degree of scrutiny and regulation. This is an important quality and safeguarding arrangement to promote a safe and skilled workforce of persons providing supports and services under the Act.

**Human rights implications**

This instrument engages the right to freedom from exploitation, violence and abuse set out in article 16 of the *Convention on the Rights of Persons with Disabilities* (CRPD).

Article 16 provides that States Parties shall take all appropriate measures to protect persons with disabilities from all forms of exploitation, violence and abuse and that to facilitate this, State Parties must ensure that all facilities and programmes designed to serve persons with disabilities are effectively monitored by independent authorities.

This instrument prescribes the kinds of supports or services provided under the Act that are ‘regulated activities’ and therefore subject to certain safeguarding and compliance requirements. Entities providing regulated activities are required to obtain a certificate of compliance, either through an audit against the compliance standards set out in the *Disability Services and Inclusion (Compliance Standards and Alternative Compliance Requirements) Rules 2023* (Compliance Rules), or by meeting the alternative compliance requirements prescribed in the Compliance Rules.

These compliance requirements support the rights of people with disability by ensuring that appropriate safeguards are in place for higher-risk activities, particularly where those activities could pose a risk of exploitation, violence or abuse against people with disability.

**Conclusion**

This instrument is compatible with human rights as it forms part of an overall legislative framework designed to deliver improved quality and safeguards for people with disability receiving supports and services by persons funded under this Act.