

EXPLANATORY STATEMENT

Issued by the Authority of the Minister for Families, Community Services and
Indigenous Affairs and Minister for Disability Reform

National Disability Insurance Scheme Act 2013

National Disability Insurance Scheme (Supports for Participants) Rules 2013

Section 209 of the *National Disability Insurance Scheme Act 2013* (the Act) provides that the Minister may, by legislative instrument, prescribe matters required or permitted by 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 (Supports for Participants) Rules 2013* (the Supports for Participants Rules) are made for the purposes of sections 33 and 34 of the Act. People who are participants in the National Disability Insurance Scheme (the scheme) will be assisted to develop a personal, goal-based plan about they will be provided with general supports and reasonable and necessary supports. The Supports for Participants Rules are about assessment and determination of the reasonable and necessary supports that will be funded for participants under the scheme.

The scheme will respect the interests of people with disability in exercising choice and control about matters that affect them.

The Minister in making the Supports for Participants Rules has had regard to the financial sustainability of the scheme as required under subsection 209(3) of the Act.

The Supports for Participants Rules include Category A rules for the purposes of section 209 of the Act. Accordingly the Commonwealth and each host jurisdiction have agreed to the making of the Supports for Participants Rules.

Background

In 2011, the Productivity Commission report, *Disability Care and Support* (Report No. 54), found that 'current disability support arrangements are inequitable, underfunded, fragmented and inefficient, and give people with a disability little choice' (Overview, p. 5), and recommended the establishment of a National Disability Insurance Scheme. People who are participants in the scheme will be assisted to develop a personal, goal-based plan about how they will be provided with general supports and reasonable and necessary supports.

The Act was enacted in March 2013 giving effect to the commitment by the Commonwealth, State and Territory Governments to establish such a scheme, and for its progressive implementation from July 2013. The Act sets out the statutory framework for the scheme, and for the National Disability Insurance Scheme Launch

Transition Agency (DisabilityCare Australia) to administer the scheme. The Act is to be supplemented by National Disability Insurance Scheme rules, which address the more detailed operational aspects of the scheme. The Supports for Participants Rules is one of a number of instruments that comprise these rules.

On 19 April 2013, the Council of Australia Government agreed the “Principles to determine the responsibilities of the NDIS and other service systems”. Schedule 1 of the Supports for Participants Rules sets out considerations derived from these agreed principles. These principles and arrangements needed to operationalise these principles will be reviewed consistent with the relevant Intergovernmental Agreement for the launch.

Commencement

The Supports for Participants Rules commence on 1 July 2013.

Consultation

The design of the scheme has been a collaborative exercise, relying heavily on substantial contributions from stakeholders, including:

- the COAG Select Council on Disability Reform;
- joint Commonwealth/State/Territory Government working groups at official levels;
- extensive consultation with people with disabilities, their advocates, carers and families;
- the NDIS Advisory Group, comprising people, some of whom live with disability, who have expertise in social insurance principles, disability policy, service provision, performance monitoring, training and curriculum development, academia and research, psychological and intellectual disability, Indigenous disability services, young people and children with disability;
- four Expert Groups, comprising persons with disabilities, their carers, advocates, service providers and other sector experts, focused on:
 - a national approach to control and choice;
 - eligibility and assessment;
 - quality, safeguards and standards; and
 - disability workforce and sector capacity; and
 - the National Disability and Carer Alliance, which undertook public engagements around the country.

The Supports for Participants Rules is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

Explanation of provisions

The Supports for Participants Rules has six Parts and a Schedule:

- **Part 1** explains what the Supports for Participants Rules are about.
- **Part 2** provides an outline of the Supports for Participant Rules.
- **Part 3** sets out criteria or considerations the CEO of DisabilityCare Australia is to use in deciding whether certain of the criteria for determining whether a general support is to be provided or a reasonable and necessary support is to be funded, is satisfied.
- **Part 4** relates to needs assessment and the use of assessment tools when conducting such assessments.
- **Part 5** sets out general criteria for supports and supports that will not be funded or provided.
- **Part 6** deals with other matters, including interpretation of the Support for Participant Rules.
- **Schedule 1** sets out considerations relating to whether supports are most appropriately funded through DisabilityCare Australia.

Part 1 – What these Rules are about

Part 1 sets out the context for the Supports for Participants Rules addressed in this instrument including identifying relevant objects and principles.

Paragraphs 1.1 to 1.4 are explanatory and contextual.

Part 2 – Outline of these Rules

Part 2 provides an introduction to the development of a participant's plan and outlines the issues addressed in each Part of the Support for Participant Rules beginning at Part 3.

Paragraphs 2.1 to 2.5 summarise a number of provisions of the Act including aspects of sections 3, 33 and 34 of the Act and are explanatory and contextual.

There are a number of other rules that are relevant to have regard to in the context of the Supports for Participants Rules. In particular these include the:

- *National Disability Insurance Scheme (Plan Management) Rules 2013*; and
- *National Disability Insurance Scheme (Supports for Participants – Accounting for Compensation) Rules 2013*.

Paragraphs 2.6 to 2.10 are explanatory and contextual.

Part 3 – Assessing proposed supports

Part 3 sets out criteria or considerations the CEO is to use in deciding whether certain of the criteria for determining whether a general support is to be provided or a reasonable and necessary support is to be funded, is satisfied. The criteria or considerations are for use in determining the following matters:

- value for money;
- effective and beneficial and current good practice;
- reasonable family care and other support;
- supports appropriately funded or provided through DisabilityCare Australia.

In deciding whether to approve a statement of participant's supports, the CEO is to have regard to a range of matters set out in the Act including the participant's statement of goals and aspirations. The statement of goals and aspirations take account of the environmental and personal context relevant to the participant and development of their plan. In determining the general supports to be provided and the reasonable and necessary supports to be funded, the CEO is to be satisfied of the matters set out in subsection 34(1) of the Act.

Value for money

Paragraph 3.1 sets out the criteria or considerations for deciding whether a support represents value for money, in that the costs of the support are reasonable, relevant to both the benefits achieved and the cost of alternative supports.

Effective and beneficial and current good practice

Paragraph 3.2 sets out the criteria or considerations for deciding whether the support will be, or is likely to be, effective and beneficial to the participant, having regard to current good practice. The CEO is to consider available evidence of the effectiveness of the support for others in like circumstances. The evidence the CEO may take into account can include;

- published and referred literature and any consensus of expert opinion;
- the lived experience of the participant and their carers, including any preferences they may have;
- knowledge acquired by DisabilityCare Australia in the course of its experience from working with participants and managing the scheme.

Paragraph 3.3 provides that the CEO may, and where necessary, seek expert opinion when determining whether the current good practice in relation to a support will be, or is likely to be effective and beneficial for a participant.

Reasonable family, carer and other support

Paragraph 3.4 sets out the considerations the CEO is to take into account when considering what is reasonable to expect families, carers, informal networks and the community to provide.

Paragraph 3.4 addresses matters that the CEO should specifically consider, including factors which pertain to the suitability and sustainability of these supports and the extent to which these informal supports are positive for the wellbeing of the participant. It addresses considerations which are relevant for all participants and, separately, considerations specific to children.

Supports appropriately funded or provided through the scheme

Paragraph 3.5 provides that Schedule 1 sets out matters for the CEO to have regard to in considering whether supports are most appropriately funded or provided through DisabilityCare Australia rather than through other service systems. “Service systems” is defined in paragraph 6.4.

Paragraph 3.6 lists the headings used in the Schedule 1 of the matters to which the CEO is to have regard.

Paragraph 3.7 reminds the reader that although a matter may be set out in the Schedule as being appropriately funded or provided through DisabilityCare Australia, the matters listed are not exhaustive and in some cases it will be appropriate for the CEO to have regard to other relevant considerations. In all instances the CEO is to be satisfied of the matters referred to in paragraph 2.3 of the Support for Participant Rules and paragraphs 34(a) to (e) of the Act.

Part 4 – Needs assessment

Part 4 relates to needs assessments and the use of assessment tools when conducting such assessments.

Method

Paragraph 4.1 sets out the method of assessment when deciding whether or not to approve a statement of participants supports under section 33 of the Act: The CEO is to:

- identify the participant’s goals, aspirations, strengths, capacity, circumstance and context;
- assess activity limitations, participation restrictions and support needs arising from a participant’s disability;
- assess risks and safeguards in relation to the participant; and
- relate support needs to the participant’s statement of goals and aspirations.

Use of assessment tools

Paragraph 4.2 provides that when following the method set out in paragraph 4.1, the CEO is to use any appropriate assessment tools that are specified in operational guidelines. The operational guidelines are those used by DisabilityCare Australia from time to time.

Paragraph 4.3 provides that the CEO is to ensure that assessment tools are applied appropriately to each participant. A participant should only be assessed on matters which are relevant to them.

Specification of assessment tools in guidelines

Paragraph 4.4 provides that the CEO is to specify in guidelines, assessment tools that are to be used to conduct assessments under paragraph 4.2.

Paragraph 4.5 sets out the CEO may specify different tools to be used for adults and children and tools that are specifically tailored to particular impairments.

Paragraph 4.6 sets out the requirements of the design of a tool. The tool must:

- be designed to ensure the fair and transparent assessment of reason and necessary supports for participants (including early intervention supports); and
- have reference to areas of activity and social and economic participation identified in the World Health Organisation International Classification of Functioning, Disability and Health as in force from time to time.

Part 5 – General criteria for supports, and support that will not be funded and provided

Part 5 sets out general criteria for supports, and supports that will not be funded or provided.

General criteria for supports

Paragraph 5.1 sets out the criteria to be applied generally to determine whether a support will not be provided or funded under by DisabilityCare Australia. The criteria are, if the support:

- is likely to cause harm to the participant or pose a risk to others; or
- is not related to the participant's disability;
- duplicates other supports delivered under alternative funding through DisabilityCare Australia – see the Plan Management Rules Part 6;
- relates to day-to-day living costs that are not attributable to a participant's support needs. Day-to-day living costs include rent, groceries and utility fees (e.g. rates, electricity, water and sewerage fees).

Paragraph 5.2 sets out that certain day-to-day living cost may be funded as a reasonable and necessary funded support if:

- the additional day-to-day cost living incurred by a participant is solely and directly as a result of the participant's disability;
 - for example, DisabilityCare Australia may fund specialised formula for a person who requires Percutaneous Endoscopic Gastrostomy (PEG) feeding;
- the cost is ancillary to another support that is funded or provided under a participant's plan and which the participant would not otherwise incur;
 - for example: DisabilityCare Australia has approved as reasonable and necessary for a participant who has Multiple Sclerosis the installation of an air conditioner, DisabilityCare Australia may fund the additional cost of electricity incurred in running that air conditioner.

Supports that will not be funded or provided

Paragraph 5.3 sets out the supports that will not be funded in any circumstances. This includes:

- a support the provision of which would be contrary to:
 - a law of the Commonwealth;
 - a law of the State or Territory in which the support would be provided;
- a support that consists of income replacement.

Part 6 – Other matters

Citation

Paragraph 6.1 specifies the citation for the Supports for Participants Rules.

Interpretation

Paragraphs 6.2 to 6.4 give guidance on interpretation and definitions for certain terms used in the Supports for Participants Rules.

Schedule 1 – Considerations relating to whether support are most appropriately funded through the scheme

Schedule 1 sets out considerations in relation to whether supports are most appropriately funded through DisabilityCare Australia. While the Schedule provides examples of supports DisabilityCare Australia will or will not be responsible for, these are not intended to be exhaustive.

Paragraph 7.1 is explanatory and contextual. The paragraph informs the reader that the Act limits the supports that can be provided or funded by DisabilityCare Australia

to support that are not more appropriately funded under or provided through other service systems.

Paragraph 7.2 restates the issue addressed in paragraph 3.5 that the considerations set out in the Schedule must be taken into account by the CEO when deciding whether a support is more appropriately provided or funded by DisabilityCare or another service system.

Paragraph 7.3 clarifies and reinforces that the considerations set out in Schedule 1 do not purport or impose any obligations on another service system to fund or provide a particular support. The Schedules purpose is to set out considerations relevant to whether a support should be considered to be more appropriately provided or funded through another service system.

The service systems are addressed in the Schedule under the following headings:

- Health (excluding mental health);
- Mental health;
- Child protection and family support;
- Early childhood development;
- School education;
- Higher education and vocational education and training;
- Employment;
- Housing and community infrastructure;
- Transport;
- Justice.

Statement of Compatibility

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

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

Overview

This instrument prescribes criteria and considerations the CEO of DisabilityCare Australia must take into account when assessing and determining reasonable and necessary supports that will be funded or provided under the scheme.

Human rights implications

The Supports for Participants Rules engage the following human rights:

- Article 1, 9 and 20 of the International Covenant on Civil and Political Rights (ICCPR);
- Article 1 of the International Covenant on Economic, Social and Cultural Rights (ICESCR);
- The rights of persons with disabilities in the Convention on the Rights of Persons with Disabilities (CRPD), especially Articles 4, 9, 16, 19, 20, 23, 24, 25 and 28; and
- The rights of children in the Convention on the Rights of the Child (CRC), especially Articles 3, 5, 18, 19, 24 and 26.

Supporting participants to contribute to social and economic life — choice and control

Article 1 of the ICCPR and ICESCR enshrines the right for all people to self-determination and to freely pursue their economic, social and cultural development. In the context of children specifically, Article 23 of the CRC promotes the need for nation states to recognise that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community. The Supports for Participants Rules directly advances these obligations by detailing the mechanisms for which participants will receive reasonable and necessary supports, including early intervention supports, to contribute to realising their potential for physical, social, emotional and intellectual development.

Once a person becomes a participant under the scheme, they will develop a plan with DisabilityCare Australia. The plan comprises of two parts:

- The participant's statement of goals and aspirations, which is prepared by the participant and specifies their goals, objectives, aspirations and circumstances; and
- The statement of participant supports, which is prepared with the participant and approved by the CEO, and sets out, amongst other matters, the supports that will be provided or funded by the scheme.

The intention of these reasonable and necessary supports is to provide supports for people with disabilities to pursue their goals and maximise their independence, to live independently, to be included in the community as fully participating citizens and develop and support the capacity of people with disabilities to undertake activities that enable them to participate in the mainstream community and in employment.

In addition to the considerations set out in the Act and summarised in paragraph 2.3 of the Support for Participants Rules, the CEO needs to assess whether a particular support is effective, beneficial and current good practice. It also must provide value for money, considering the costs of the support are reasonable, relative to both the benefits achieved and the cost of alternative support. Finally, it must be most appropriately funded or provided through the scheme, rather than other service systems.

At the heart of the scheme is choice and control for participants which are a positive engagement with the right to self-determination in Articles 1 of ICCPR and ICESCR. The right for the participant to choose their supports in the manner and at the time of their choice is however limited by the discretion of the CEO in determining what the reasonable and necessary supports are. This is consistent with provisions in Article 4 of the CRPD which requires states to promote the development of universally designed goods, services, equipment and facilities which should require the minimum possible adaptation and the least cost to meet the specific needs of a person with disabilities.

Guidance as to what constitutes value for money is further explained by paragraph 3.1 which require consideration of substantially lower cost comparable supports, evidence for improvement of life stage outcomes for the long term benefit of the participant, the reduction of long term cost of funding supports, the cost of purchasing or leasing equipment and expected changes in technology and the ability of the support to increase the participant's independence and reduce needs for other kinds of supports.

Living independently and participation in the community

Paragraphs 3.2 and 3.3 require the CEO to determine the effectiveness and beneficial nature of a support, in light of current good practice. This involves a consideration by the CEO of the available evidence of the effectiveness of the support for others 'in like circumstances', including through:

- published and referenced literature and by taking into account and seeking expert opinion where necessary;
- lived experience of the participant or their carers; and
- DisabilityCare Australia experiences gained in delivering the scheme.

The need to consider the effectiveness of proposed supports is a positive engagement in delivering on the commitment of states in Article 19 of the CRPD to take effective and appropriate measures to facilitate the full enjoyment by persons with disabilities of full inclusion and participation in the community. Furthermore, it is expected that community services and facilities for the general population are available on an equal basis to persons with disabilities and are responsive to their needs. By considering these supports in relation to the matrix of goals and aspirations, with evidence derived from experts, participant and the experiences of DisabilityCare Australia, it is envisioned that the statement of supports will be responsive to these needs.

Acknowledging the role of families, carers and other significant persons

The participant's statement of goals and aspirations may specify the environmental and personal context of the participant's living situation. The CEO will need to take into account what is reasonable to expect families, carers, informal networks and the community to provide when deciding upon the funding or provision of supports. The focus of the Supports for Participants Rule is on the desirability of supporting and developing the potential contributions of informal supports and networks within the participant's community.

Principle (x) of the Preamble to the CRPD recognises the importance that the family plays in requiring the protection of the family by states and assistance to families to enable families to contribute towards the full and equal enjoyment of the rights of persons with disabilities. Similarly Article 23 of the CRPD commits states to respect for the home and family. Article 19 of the CRPD reinforces the need for persons with disabilities to have access to a range of in-home, residential and other community support services, including personal assistance to support living and inclusion in the community, and to prevent isolation or segregation from the community.

In positively engaging with these rights the Supports for Participants Rules require the CEO to consider different sets of standards applicable to children and adult participants as to what would be reasonable for their support networks to provide.

Articles 3, 5 and 18 of the CRC are positively engaged in relation to children giving effect to the principles that states are to ensure the child's best interests are a primary consideration. This is also balanced by taking into account the rights and duties of their parents, legal guardians or other individuals who are legally responsible for them. Related to this is respecting those members of the extended family or community, as provided for by local custom in providing appropriate direction and guidance in a manner consistent with the evolving capacities of the child.

These obligations are recognised in the criteria set out in paragraph 3.4 (a) (i) – (iv) of the Support for Participants Rules where the CEO is required to have regard to them in the decision-making process. It should also be noted Article 6 of the CRPD specifically recognises the need for states to take all measures to prevent girls with disabilities from being subjected to ‘double’ discrimination and to ensure the full development, advancement and empowerment of girls with disabilities. This is also recognised in the criteria under paragraph 3.4 (a) (i) – (iv) in the Support for Participants Rules

For adult participants, Article 23 of the CRPD requires states to respect the home and family. Article 19 of the CRPD further reinforces the need for persons with disabilities to have access to a range of in-home, residential and other community support services, including personal assistance to support living and inclusion in the community, and to prevent isolation or segregation from the community.

Under the Supports for Participants Rules the CEO is to have regard to the risks to the well-being of the participant from reliance on the support of family members, carers, informal networks and the community. This includes consideration of the suitability of family members, carers, informal networks and the community in light of their age and capacity, whether there are community supports sustaining them in their caring role, and the intensity and type of support required as to being age or gender appropriate.

The inclusion of the consideration of age and gender is a significant consideration as it positively engages with Article 16 of the CRPD which specifies that states are to take all appropriate measures to prevent all forms of exploitation, violence and abuse by ensuring, amongst other things, appropriate forms of gender and age-sensitive assistance and support for persons with disabilities and their families and carers. In terms of gender, Principle (s) of the Preamble to the CRPD reflects on the need to incorporate a gender perspective in all efforts to promote the full enjoyment of human rights and fundamental freedoms by persons with disabilities. Article 6 of the CRPD specifically refers to the need for states to take all measures to avoid women with disabilities being subject to ‘double’ discrimination and to ensure the full development, advancement and empowerment of women with disabilities.

The CEO must also consider the extent of any risks to the long term well-being of the family members or carers as well as whether the informal supports contribute to, or reduce a participant’s level of independence and other outcomes. This is clearly aligned to the focus of the CRPD which is on preserving and protecting family and community relations.

Most appropriately funded or provided through the scheme

Under paragraph 3.5 of the Supports for Participants Rules the CEO is to consider whether the supports are most appropriately funded or provided through the scheme, rather than through other service systems. The matters that the CEO must have regard to are contained in Schedule 1 of the Supports for Participants Rules.

This engages positively on the commitment of states to developing and improving access to systems of health, education, employment, infrastructure, transport and justice for persons with disabilities. Articles 9, 24 and 25 of the CRPD for example recognise the right to accessibility of facilities and service; education and health. In relation to children, Article 24 of the CRC emphasises states commitment to ensuring a child's enjoyment to the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. Similarly Article 28 of the CRC emphasises states commitment to ensuring a child's right to education.

It is important to acknowledge that the scheme is part of a broader framework of measures to further the rights of persons with disabilities in the areas of accessibility, education, employment, health, transport and justice. Accordingly DisabilityCare is not designed to replace other mainstream support services, but rather act in a complementary manner to it.

The Supports for Participants Rules do not prevent the CEO from approving supports that facilitate improvements in these arenas as outcomes, in particular where these are specified by the participant in their statement of goals and aspirations. What it not intended is for the supports to be solely geared towards the achievement of outcomes under the CRC and CPR that are the core focus of other established systems that are more appropriately placed to meet these needs.

Funding and supports will not be provided in certain circumstances — risk of harm

Paragraph 5.1 of the Supports for Participants Rules makes clear that the scheme will not allow the provision of funding and supports where the support is likely to cause harm. This is a positive engagement with the right to be protected from exploitation, violence and abuse which is a right recognised in Article 20 (2) of the ICCPR, Article 19 (1) of the CRC and Article 16 (1) of the CRPD. This right requires states to take all appropriate measures to protect persons with disabilities from all forms of exploitation, violence and abuse.

Funding and supports will not be provided in certain circumstances

Paragraph 5.1 of the Supports for Participants Rules makes clear that the scheme will not allow the provision of funding and supports that relates to the day to day living costs that are not attributable to a participant's disability support needs. This is qualified by the provision that the scheme will fund additional living costs that are attributable to the participant's disability support needs or that the costs are ancillary to another funded support that is funded or provided under the participant's plan. The intention is to make clear that the scheme will assist where there is a clear connection between the support need and the participant's disabilities.

Paragraph 5.2 of the Supports for Participants Rules make clear that the scheme will not fund income support as the intention of the scheme is to complement the social security system for people with disabilities which provide income support. In complementing the social security system, this is a positive engagement with the

right to an adequate standard of living and social protection under Article 9 of ICESCR, Article 26 of the CRC and Article 28 of the CRPD.

Conclusion

This legislative instrument is compatible with human rights as it forms part of an overall legislative scheme designed to deliver improved health, social security and living standards to people with disability (including women and children). It creates additional opportunities for persons with disabilities to exercise those rights by providing support to enable participation in the social, economic and cultural life of the community. To the extent that it limits human rights in some circumstances, those limitations are reasonable, necessary and proportionate to ensure the integrity of the scheme.