

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 (Children) 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 (Children) Rules 2013* (the Children Rules) are made pursuant to sections 74, 75 and 76 of the Act. The Children Rules are about persons who are responsible for undertaking acts and making decisions in relation to the Act on behalf of a child (referred to in the Children Rules as child's representatives).

The Minister in making the Children Rules has had regard to the financial sustainability of the National Disability Insurance Scheme (the scheme) as required under subsection 209(3) of the Act.

The Children 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 Children 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 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 Children Rules is one of a number of instruments that comprise these rules.

Commencement

The Children 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 Children Rules are a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

Explanation of provisions

The Children Rules has seven Parts:

- **Part 1** explains what the Children Rules are about.
- **Part 2** provides an outline of the Children Rules.
- **Part 3** deals with determining who is the child's representative.
- **Part 4** deals with who has parental responsibility for a child.
- **Part 5** concerns the issue of when a child does not need a representative.
- **Part 6** concerns the duties of a child's representatives.
- **Part 7** deals with other matters, including interpretation of the Children Rules.

Part 1 – What these Rules are about

Paragraphs 1.1 to 1.4 are explanatory and contextual.

Part 2 – Outline of these Rules

Paragraphs 2.1 to 2.5 are explanatory and contextual.

Part 3 – Who is the child's representative?

A child's representative is usually a person with parental responsibility. Part 3 deals with determining whether a person other than a person with parental responsibility should be the child's representative.

Paragraphs 3.1 to 3.4 summarise the operation of subsections 74(1) and (1A) of the Act. Paragraph 3.4 gives a special rule that applies in relation to such a determination when a State or Territory Minister, or the head of a Department of State or Territory, has parental responsibility for the child. In such a case, the CEO of DisabilityCare Australia is able to make this determination under subsection 74(1) only with the written agreement of that person.

Paragraph 3.5 specifies the requirements with which the CEO must comply and criteria that the CEO is to apply in deciding whether to make such a determination under subsection 74(1).

Part 4 – Who has parental responsibility?

This Part deals with the issue of who has parental responsibility of a child.

Paragraphs 4.1 to 4.5 summarise the operation of subsections 75(1) to (3A) of the Act. Paragraph 4.1 explains that there are different rules for determining who has parental responsibility depending on whether or not the child has a guardian.

Children who have guardians

Paragraph 4.6 specifies the requirements with which the CEO must comply and criteria that the CEO is to apply or matters to consider when deciding whether to make a determination that one or more of the persons who satisfy parental condition 1 or parental condition 2 (specified in paragraph 4.2) have parental responsibility for the child.

Children who do not have guardians

Paragraphs 4.7 and 4.8 summarise subsections 75(1) and (3) of the Act. Paragraph 4.8 provides that where the rule in paragraph 4.7 would result in more than one person having parental responsibility for a child, the CEO is able to determine that one or more of those persons have parental responsibility for the child for the purposes of the Act.

Paragraph 4.9 specifies the requirements, criteria and matters to consider when deciding to make a determination referred to in paragraph 4.8.

Part 5 – When a child does not need a child’s representative

In some cases, a child does not need a child’s representative, and is able to make decisions for himself or herself for the purposes of the scheme. Part 5 deals with determining whether a child does not need a child’s representative.

Paragraph 5.1 summarises subsection 74(5) of the Act.

Paragraph 5.2 specifies the requirements, criteria and matters to be considered when deciding whether the child is capable of making their own decisions (see paragraph 74(5)(a) of the Act).

Paragraph 5.3 specifies the requirements, criteria and matters to be considered when deciding whether it is appropriate in the circumstances for certain provisions of the Act not to apply to the child (see paragraph 74(5)(b) of the Act).

Part 6 – Duties of child’s representative

Paragraph 6.1 notes that the Act provides guidance as to how a child’s representative is to act under the scheme.

Paragraph 6.2 sets out the obligation in subsections 76(1).

Paragraph 6.3 sets out the obligation in subsections 76(2) and (3).

Paragraph 6.4 specifies duties on a child’s representative to consult wherever practicable in relation to doing things under, or for the purposes of, the Act of consultation with person specified in the paragraph.

Part 7 – Other matters

Citation

Paragraph 7.1 specifies the citation for the Children Rules.

Interpretation

Paragraphs 7.2 to 7.4 give guidance on interpretation and definitions for certain terms used in the Children Rules.

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 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview

The purpose of this legislative instrument is to deal with persons who are responsible for undertaking acts and making decisions in relation to the Act on behalf of a child (referred to as child's representatives). It also allows the CEO of DisabilityCare Australia to make a determination that the child can make decisions under the scheme.

Human rights implications

The Children Rules engage the following human rights:

- The rights of persons with disabilities in the Convention on the Rights of Persons with Disabilities (CRPD), especially Articles 3, and 7.
- The rights of children in the Convention on the Rights of the Child (CRC), especially Articles 3, 5, 9, 12, 18, 19 and 23.
- Article 10 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

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

The establishment of the scheme promotes the rights of people with disabilities (including children) in Australia by providing access to nationally consistent funding and support to help them realise their aspirations, and to participate in the social and economic life of the community.

The preamble of the CRPD, and the General Principles set out in Article 3 reflect the need the respect for the inherent dignity, individual autonomy (including the freedom to make one's own choices and the independence of the person), the need for persons with disabilities to be able to participate fully and effectively and be included in society, the need for respect for difference and acceptance of persons with disabilities as part of human diversity and providing persons with disabilities the opportunity to be involved actively in decision-making processes about policies and programmes, including those directly concerning them.

The general principles in the Act that have been applied in the Children Rules in paragraph 1.4 align closely with the CRPD principles. The key principles of the Act that is reflected in the Children Rules are:

- the role of families, carers and other significant persons in the lives of people with disability is to be acknowledged and respected;
- where acts or things are done on behalf of a child with disability, the best interests of the child are paramount, and full consideration should be given to the need to:
 - protect them from harm;
 - promote their development;
 - strengthen, preserve and promote positive relationships between them and their parents, family members and other people who are significant in their life;
- positive personal and social development of people with disability, including children and young people, is to be promoted;
- where acts or things are done on behalf of a person with disability:
 - they should be involved in decision-making that affects them, including making decisions for themselves, to the extent possible;
 - they should be encouraged to engage in the life of the community;
 - the judgements and decisions they would have made for themselves should be taken into account;
 - their cultural and linguistic circumstances, and gender, should be taken into account; and
 - their supportive relationships, friendships and connections with others should be recognised.

The objects and the guiding principles of the scheme also recognise the rights of persons with disabilities (including children) to be provided with reasonable and necessary supports and to have certainty that they will receive the lifelong care and support that they need. The role of carers, families and other significant persons is also recognised and respected. In this way, the Children Rules promotes Article 10 of ICESCR, which requires that the widest possible protection and assistance should be accorded to the family, especially while it is responsible for the care and education of dependent children.

The status of children with disabilities

The vulnerability of children with disabilities is recognised in Article 23 of the CRC and Article 7 of the CRPD. Article 23 of the CRC requires that states 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. Similarly Article 7 of the CRPD provides that states should take all necessary measures to ensure the full enjoyment by children with disabilities of all human rights and fundamental freedoms on an equal basis with other children.

The Children Rules positively engages with these Articles by providing for safeguards for the appointment of child representatives whether it be the child's parents, a legal guardian or another person that is appointed by the CEO.

The Children Rules also recognise the capacity of a child with a disability to make a decision for themselves with appropriate supports which positively engages with the tenets of Articles 23 of the CRC and Article 7 of the CRPD.

Best Interests of the Child a primary consideration

Under Article 3 (b) of the CRC, states are required to apply the principle of the best interests of the child being a primary consideration. This principle promotes the protection of a child's best interests as a primary consideration as part of the process for the taking of actions that concern children. This is further recognised in Article 7 (2) of the CRPD which provides that in all actions concerning children with disabilities, the best interests of the child shall be a primary consideration. This includes measures to support and assist parents and others who have responsibility for ensuring the recognition of children's rights.

The Children Rules positively engage with this principle in two key ways. The first way is that the CEO in making a determination to appoint a child representative is to consider the best interests of the child. For example in paragraph 3.5 the CEO can make a determination as to whether to appoint a person (other than a person with parental responsibility under section 75 of the Act) to be the child representative. In the making of that determination, the requirements that the CEO must comply with and the criteria that the CEO must apply in paragraph 3.5 are focused on making a decision that is in the best interests of the child.

Similarly in paragraphs 4.6 (Child has a guardian) and 4.9 (Child has no guardian) of the Children Rules, the CEO can make a determination that one or more persons who satisfy Parental Condition 1 or Parental Condition 2 have parental responsibility. In the making of that determination, the requirements that the CEO must comply with and the criteria that the CEO must apply under those provisions are focused on determining what is in the best interests of the child.

The second key way that the Children Rules positively engage with this principle is the duty in paragraph 6.2 that a child representative must act in a manner that promotes the best interests of the child. This applies to all acts and decisions undertaken by the child representative under the Act and the Children Rules.

Respect for the rights and duties of parents and guardians

Article 5 of the CRC requires states to respect the responsibilities, rights and duties of parents, legal guardians or other persons legally responsible for the child to provide, in a manner consistent with the evolving capacities of the child, the appropriate direction and guidance in the exercise by the child of the rights recognised in the CRC. This is consistent with the principle expressed in Article 3(2) of the CRC that states are to ensure the child's protection and care for their well-

being, taking into account the rights and duties of their parents, legal guardians, or other individuals legally responsible for them.

Article 18 of the CRC requires the recognition of the principle that both parents have common responsibilities for the upbringing and development of the child and to provide appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities, in particular that they are aware of their rights to access information on services to which they are entitled to for the benefit of children. This is read in conjunction with Article 9 of CRC which requires that states respect the rights of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis.

The Children Rules positively engages with these rights in the decision-making process by the CEO in making a determination. For example in paragraph 3.5 the CEO in making a determination as to whether to appoint a person (other than a person with parental responsibility) to be the child representative, one of the criteria that the CEO must have regard to is the desirability of preserving family relationships and informal support networks of the child.

This is also positively engaged in paragraphs 4.6 (child has a guardian) and 4.9 (child has no guardian) of the Children Rules where the CEO can make a determination that one or more persons who satisfy Parental Condition 1 or Parental Condition 2 have parental responsibility. In the making of that determination some of the criteria that the CEO must have regard to are:

- the principle that the child's guardian (in the case of where the child has a legal guardian) should be the child's representative unless the CEO is satisfied that this is not appropriate;
- the views of any person who has parental responsibility of the child;
- existing arrangements in place between the person who has parental responsibility and the child; and
- the desirability of preserving family relationships and informal support networks of the child.

Separation from parents against the will of the child when in the best interests of the child

Article 9 of the CRC requires states to ensure that a child shall not be separated from their parents against their will except when competent authorities determine it is necessary for the best interests of the child. An example of this is where there is abuse or neglect of the child by the parents or where the parents are living separately and a decision must be made as to the child's place of residence. This also recognises the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, unless it is contrary to the child's best interests.

The Children Rules positively engages with this right in the decision-making process by the CEO in making a determination. In paragraph 3.5 the CEO in making a

determination whether to appoint a person (other than a person with parental responsibility) to be the child representative, one of the criteria that the CEO must apply is the desirability of preserving family relationships and informal support networks of the child.

This is also positively engaged in paragraphs 4.6 (Child has a guardian) and 4.9 (Child has no guardian) of the Children Rules where the CEO can make a determination that one or more persons who satisfies Parental Condition 1 or Parental Condition 2 have parental responsibility. In the making of that determination the CEO must take into account the desirability of preserving family relationships and informal support networks of the child.

Ascertaining the views of the child

Article 12 of the CRC requires states to assure to the child who is capable of forming their own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. Article 7 (3) of the CRPD requires states to ensure that children with disabilities have the right to express their views freely on all matters affecting them, their views being given due weight in accordance with their age and maturity, on an equal basis with other children, and to be provided with disability and age-appropriate assistance to realise that right.

The Children Rules positively engage with this principle in two key ways. The first way is that the CEO in making a determination to appoint a child representative is to consider the views of the child. In paragraph 3.5 the CEO in making a determination whether to appoint a person (other than a person with parental responsibility) to be the child representative, one of the criteria that the CEO must regard to is the preferences of the child.

This is also positively engaged in paragraphs 4.6 (Child has a guardian) and 4.9 (Child has no guardian) of the Children Rules where the CEO can make a determination that one or more persons who satisfies Parental Condition 1 or Parental Condition 2 have parental responsibility for the child. In the making of that determination, one of the criteria that the CEO must regard to is the preferences of the child.

This right is also recognised in Part 5 of the Children Rules where it is recognised that in some cases a child participant does not need a child representative and they are able to make decisions for themselves for the purposes of the scheme. In making a determination that the CEO is satisfied that the child can make decisions for themselves under the scheme, the CEO is required to consult with the child and have regard to the preferences expressed by the child.

Part 6 of the Children Rules which imposes duties on a child representative also positively engages with this right in imposing a duty that the child representative must ascertain the wishes of the child. This applies to all acts and decisions undertaken by the child representative under the Act and the Children Rules.

Conclusion

This instrument is compatible with human rights because it advances the protection of the rights of children with disabilities in Australia in decisions affecting them, consistent with the CRC and CRPD. It creates additional opportunities for children with disabilities to exercise those rights by providing support through nominees to enable participation in the social, economic and cultural life of the community. To the extent that it limits human rights in some circumstances, those limitations are reasonable, necessary and proportionate to ensure the long-term integrity and sustainability of the scheme.