



National Disability Insurance Scheme (Children) Rules 2013

National Disability Insurance Scheme Act 2013 (the Act)

The Act establishes the National Disability Insurance Scheme (the NDIS).

People who are participants in the NDIS 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 NDIS will respect the interests of people with disability in exercising choice and control about matters that affect them.

National Disability Insurance Scheme (Children) Rules 2013

These Rules are made for the purposes of sections 74, 75 and 76 of the Act.

These Rules are about persons who are responsible for undertaking acts and making decisions on behalf of children (known as ***child's representatives***).

These Rules commence on 1 July 2013.

The Hon Jenny Macklin MP
Minister for Families, Community Services and Indigenous Affairs
Minister for Disability Reform

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Part 1 What these Rules are about

- 1.1 These 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 as **child's representatives** in these Rules).
- 1.2 It is recognised (for example, in the *Convention on the Rights of the Child*) that a child's ability to undertake acts and make decisions on their own behalf increases as they develop. This principle is given effect by various provisions of the Act and these Rules that relate to child's representatives, including rules that require children to be consulted in relation to, and involved in, decision-making that affects them, and in the ability of the CEO to decide that a particular child does not need a child's representative (and to determine that the child will be able to undertake acts and make decisions on their own behalf).
- 1.3 The existence of a child's representative for the purposes of the Act does not affect duties or responsibilities of other carers who are responsible for undertaking acts and making decisions on behalf of children.
- 1.4 The Act sets out a number of principles for the NDIS. The following principles are particularly relevant to these Rules:
 - (a) the role of families, carers and other significant persons in the lives of people with disability is to be acknowledged and respected;
 - (b) 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:
 - (i) protect them from harm; and
 - (ii) promote their development; and
 - (iii) strengthen, preserve and promote positive relationships between them and their parents, family members and other people who are significant in their life;
 - (c) positive personal and social development of people with disability, including children and young people, is to be promoted;
 - (d) where acts or things are done on behalf of a person with disability:
 - (i) they should be involved in decision-making that affects them, including making decisions for themselves, to the extent possible; and
 - (ii) they should be encouraged to engage in the life of the community; and
 - (iii) the judgements and decisions they would have made for themselves should be taken into account; and
 - (iv) their cultural and linguistic circumstances, and gender, should be taken into account; and

- (v) their supportive relationships, friendships and connections with others should be recognised.

Part 2 Outline of these Rules

- 2.1 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.
- 2.2 **Part 4** deals with determining who has parental responsibility.
- 2.3 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 NDIS. **Part 5** deals with determining whether a child does not need a child's representative.
- 2.4 **Part 6** deals with the duties of a child's representative.
- 2.5 **Part 7** deals with other matters, including interpretation of these Rules.

Part 3 Who is the child's representative?

- 3.1 A child's representative need not be an individual, and could, for example, be a State or Territory government agency.
- 3.2 The **child's representative** will normally be the person who has, or the persons who jointly have, parental responsibility for the child. (See section 75 of the Act and Part 4 of these Rules for how to determine who has parental responsibility.)
- 3.3 However, in exceptional circumstances, the CEO might be satisfied that this is not appropriate. (For example, in a particular case, there might be a substantial degree of doubt as to what persons have parental responsibility under section 75 of the Act, and in view of this doubt, the CEO might be satisfied that it is not appropriate for the persons referred to in paragraph 3.2 to be the child's representative.) In such circumstances, the CEO may determine that the **child's representative** should be a different person, or a different group of persons. A person determined by the CEO in this way need not have parental responsibility.
- 3.4 There is 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 of a State or Territory, has parental responsibility for the child. In such a case, the CEO is able to make this determination only with the written agreement of that person. A Minister or departmental head will normally delegate powers relating to parental responsibility. A delegation might include the power to make the agreement on that person's behalf.

Paragraphs 3.1 to 3.4 summarise the effect of subsections 74(1) and (1A) of the Act.

- 3.5 In deciding whether to make such a determination, the CEO is to have regard to the following:
- (a) the preferences (if any) of the child;
 - (b) the desirability of preserving family relationships and informal support networks of the child;
 - (c) who is best placed to carry out the duties set out in section 76 of the Act and Part 6 of these Rules;
 - (d) for a particular person that the CEO is considering appointing:
 - (i) any existing arrangements that are in place between that person and the child; and
 - (ii) whether that person has responsibility for day-to-day parenting decisions; and
 - (iii) whether that person can act in conjunction with other representatives and supporters of the child in the best interests of the child; and

- (iv) where the CEO has asked the person to answer any questions or provide any information in relation to the possible appointment of that person as a child's representative (including requesting the person to consent to the release of information concerning their criminal history or suitability to work with children):
 - (A) any answers or information that have been provided by the person; and
 - (B) any refusal by the person to provide answers or information; and
- (v) any relevant conviction for an offence under Commonwealth, State or Territory law; and
- (vi) any relevant information relating to the suitability of the person to work with children.

Part 4 Who has parental responsibility?

4.1 There are different rules for determining who has parental responsibility, depending on whether or not the child has a guardian. Under these rules, in each case, the person with parental responsibility will either be:

- (a) the child's guardian; or
- (b) 1 or more of the persons who satisfy parental condition 1 or parental condition 2.

4.2 The parental conditions are as follows:

parental condition 1 is that the person:

- (a) is a parent of the child; and
- (b) has not ceased to have parental responsibility for the child because of an order made under the *Family Law Act 1975* or a law of a State or a Territory.

parental condition 2 is that, under a parenting order (within the meaning of the *Family Law Act 1975*):

- (a) the child is to live with the person; or
- (b) the child is to spend time with the person; or
- (c) the person is responsible for the child's long-term or day-to-day care, welfare and development.

<p><i>Persons who satisfy parental condition 1 or parental condition 2 will also satisfy paragraph 75(1)(a) or (b) of the Act.</i></p>
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Children who have guardians

4.3 If a child has a guardian, the guardian normally has **parental responsibility** for the child (and will therefore normally be the child's representative—see paragraph 3.2).

4.4 However, the CEO is able to determine instead that 1 or more of the persons who satisfy parental condition 1 or parental condition 2 have parental responsibility for the child.

4.5 In some cases, a State or Territory Minister, or the head of a Department of State of a State or Territory, will have guardianship of the child. If so, the CEO is able to make this determination only with the written agreement of that person.

Paragraphs 4.1 to 4.5 summarise the operation of subsections 75(1) to (3A) of the Act.

- 4.6 When deciding whether to make such a determination, the CEO is to:
- (a) consult, in writing, with the child's guardian; and
 - (b) have regard to the following:
 - (i) the preferences (if any) of the child;
 - (ii) the principle that the child's guardian should be the child's representative unless the CEO is satisfied that this is not appropriate;
 - (iii) whether the child's guardian recommends that another person should be the child's representative;
 - (iv) the extent to which the child's guardian is willing and able to perform the functions of child's representative set out in section 76 of the Act and Part 6 of these Rules;
 - (v) whether a person who satisfies parental condition 1 or parental condition 2 is more willing and able to carry out the duties to children set out in section 76 of the Act and Part 6 of these Rules.

Children who do not have guardians

- 4.7 If a child does not have a guardian, then any person who satisfies parental condition 1 or parental condition 2 has **parental responsibility** for the child.
- 4.8 Where this results in more than 1 person having parental responsibility for a child, the CEO is able to determine that 1 or more of those persons have parental responsibility for the child for the purposes of the Act. This is discretionary; the CEO does not need to make this determination.

Paragraphs 4.7 and 4.8 summarise subsections 75(1) and (3) of the Act.

- 4.9 When deciding whether to make a determination referred to in paragraph 4.8, the CEO is to have regard to the following:
- (a) the preferences (if any) of the child;
 - (b) the views of any person who has parental responsibility for the child;
 - (c) whether 1 or more of those persons are best placed to carry out the duties to children set out in section 76 of the Act and Part 6 of these Rules, taking into account:
 - (i) existing arrangements that are in place between those persons and the child; and

- (ii) which persons have responsibility for day-to-day parenting decisions; and
 - (iii) which persons can act in conjunction with other representatives and supporters of the child in the best interests of the child;
- (d) whether 1 or more of those persons are willing and able to work together in the best interests of the child;
- (e) the desirability of preserving family relationships and informal support networks of the child;
- (f) for any of the persons:
 - (i) where the CEO has asked the person to answer any questions or provide any information in relation to making a determination that applies to that person (including requesting the person to consent to the release of information concerning their criminal history or suitability to work with children):
 - (A) any answers or information that have been provided by the person; and
 - (B) any refusal by the person to provide answers or information; and
 - (ii) any relevant conviction for an offence under Commonwealth, State or Territory law; and
 - (iii) any relevant information relating to the suitability of the person to work with children.

Part 5 When a child does not need a child's representative

5.1 Under the Act, a child will sometimes be able to do things for himself or herself. For this to be the case, the CEO must:

- (a) be satisfied that the child is capable of making their own decisions; and
- (b) be satisfied that it is appropriate in the circumstances for certain provisions of the Act not to apply to the child (essentially, the CEO must be satisfied that it is appropriate for the child to do things for himself or herself); and
- (c) make a determination about these matters.

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

5.2 When making a decision in relation to the matter referred to in paragraph 5.1(a) above, the CEO is to:

- (a) consult with the child and the child's representative; and
- (b) have regard to the following:
 - (i) whether the child:
 - (A) is able to understand the kind of information relevant to decisions that need to be made under the NDIS; and
 - (B) is able to use information of that kind when making decisions; and
 - (C) is able to understand the consequences of decisions that need to be made under the NDIS; and
 - (D) is able to communicate decisions in some way;
 - (ii) whether there are people in the child's life who can support them to make their own decisions.

5.3 When making a decision in relation to the matter referred to in paragraph 5.1(b) above, the CEO is to:

- (a) consult with the child and the child's representative; and
- (b) have regard to the following:
 - (i) the preferences (if any) of the child;
 - (ii) whether there are other people in the child's life who would be willing and able to assist them in carrying out actions and making decisions under the NDIS;
 - (iii) the need to preserve existing family relationships;

- (iv) any existing arrangements in place under Commonwealth, State and Territory schemes.

Part 6 Duties of child's representatives

6.1 The Act provides guidance as to how a child's representative is to act under the NDIS.

6.2 One duty of a child's representative is to:

- (a) ascertain the wishes of the child; and
- (b) act in a manner that promotes the best interests of that child.

6.3 This duty is not breached if the child's representative does a thing, or refrains from doing a thing, so long as:

- (a) the child's representative reasonably believes that they have ascertained the wishes of the child in relation to the thing; and
- (b) the child's representative reasonably believes that doing the thing, or refraining from doing the thing, promotes the best interests of the child.

The duty set out in paragraph 6.2 and the qualification set out in paragraph 6.3 summarise subsections 76(1) to (3) of the Act.

6.4 A child's representative also has a duty to consult, wherever practicable, with the following in relation to doing things under, or for the purposes of, the Act:

- (a) the guardian of the child (if any) and any other person who satisfies parental condition 1 or parental condition 2 (see paragraph 4.2) in relation to the child;
- (b) any other person who assists the child to manage their day-to-day activities and make decisions.

Part 7 Other matters

Citation

- 7.1 These Rules may be cited as the *National Disability Insurance Scheme (Children) Rules 2013*.

Interpretation

- 7.2 These Rules include text that summarises provisions of the Act. The boxed notes identify such text, which does not form an operative part of these Rules.
- 7.3 Terms and expressions that are used in the Act have the same meaning in these Rules unless these Rules display a contrary intention—see the *Acts Interpretation Act 1901* and the *Legislative Instruments Act 2003*, which include definitions and rules of interpretation that apply to all Commonwealth legislation. For convenience, the more important definitions from the Act are identified or reproduced in paragraph 7.4.
- 7.4 In these Rules:

Act means the *National Disability Insurance Scheme Act 2013*.

CEO—see section 9 of the Act.

child—see section 9 of the Act.

child's representative means a person referred to in subsection 74(1) of the Act.

Convention on the Rights of the Child means the treaty known as the *Convention on the Rights of the Child* done at New York on 20 November 1989. The text of the Convention is set out in the Australian Treaty Series 1991 No. 4.

guardian means a guardian appointed under a law of the Commonwealth, a State or a Territory, and **guardianship** has a corresponding meaning.

NDIS means the National Disability Insurance Scheme (see section 9 of the Act).

parental responsibility—see section 9 of the Act.

parental condition 1—see paragraph 4.2 of these Rules.

parental condition 2—see paragraph 4.2 of these Rules.

Appointment of child's representative does not affect other duties or functions of carers

- 7.5 In some cases, carers will have been appointed by an appropriate State or Territory body. Some such carers will have been delegated powers, functions or duties, and will have corresponding obligations under the State or Territory law. Nothing in these Rules is intended to impact on obligations of that nature.