

## 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 – Accounting for Compensation) 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- Accounting for Compensation) Rules 2013* (the Accounting for Compensation Rules) are made for the purposes of section 35 of the Act. People who are participants in the scheme will be assisted to develop a personal, goal-based plan describing how they will be provided with general supports and reasonable and necessary supports. These Rules are about assessment and determination of the reasonable and necessary supports that will be funded for participants under the scheme and specifically how compensation payments for personal injury are taken into account in such assessments and determinations.

DisabilityCare Australia 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 National Disability Insurance Scheme as required under subsection 209(3).

The Supports for Participants Rules include Category A rules for the purposes of the National Disability Insurance Scheme. Accordingly the Commonwealth and each host jurisdiction have agreed to the making of these rules.

### **Background**

In 2011, the Productivity Commission Report, *Disability Care and Support*, found that 'current disability support arrangements are inequitable, underfunded, fragmented and inefficient, give people with disability little choice' (Overview, p.5), and recommended, inter alia, the establishment of a National Disability Insurance Scheme (DisabilityCare Australia). 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 DisabilityCare Australia to administer the scheme. The Act is to be supplemented by the National Disability Insurance Scheme Rules (the Rules). These Rules address the more detailed operation aspects of the scheme.

The Accounting for Compensation Rules form part of the Rules.

### **Commencement**

The Accounting for Compensation Rules commence on the day they are registered.

### **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 Accounting for Compensation Rules is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

## **Explanation of the provisions**

### **Part 1 – What these Rules are about**

Part 1 sets out the context for the Rules addressed in this instrument.

### **Part 2 – Outline of these Rules**

Part 2 outlines that these Rules are about how compensation payments in respect of an injury suffered by a participant are taken into account by the CEO in determining the reasonable and necessary supports that will be funded or provided under the scheme.

### **Part 3 – Compensation**

#### ***Application***

**Paragraph 3.1** sets out to whom and to what the Part applies.

The word “compensation” is defined in section 11 of the Act.

NDIS component is defined in paragraph 4.4 – “NDIS component, of an amount of compensation under a judgement or settlement, means the component that relates to the provision of supports of a kind that may be funded or provided under the NDIS after the date of the judgement or settlement, and may include a component that consists of periodic payments.”

This Part applies to a person who is a participant, or who becomes a participant, and who has an impairment caused by a personal injury and one or more of the following applies:

- the person receives compensation for personal injury under a judgement or settlement where:
  - it is possible to identify in the compensation paid the NDIS component;
  - the NDIS component is either fixed in a judgement (a judgement that is not a consent judgement) or is otherwise objectively identifiable (i.e. the material available to identify the NDIS component must objectively support the value attributed);
- the person receives compensation for personal injury under a judgement or settlement where;
  - the requirements above are not satisfied; and
  - an amount of compensation is fixed (e.g. a consent judgement or settlement negotiated between the parties);
- the person receives compensation under a scheme of insurance or compensation under a Commonwealth, State or Territory law, including a payment under a contract entered into under such a scheme;

- the person;
  - entered into an agreement to give up his or her right to compensation for the personal injury; and
  - as a result of entering the agreement, the person does not receive any compensation, or receives an amount less than is reasonable given the specific circumstances relating to the injury; and
  - the CEO is not satisfied that it was reasonable, in the circumstances for the person to have entered into the agreement.

**Paragraph 3.2** sets out the matters to which to CEO is to have regard in considering whether the person's entry into an agreement set out in paragraph 3.1(d)(iii) is reasonable.

**Paragraph 3.3** addresses how a series of periodic payments will be assessed where the NDIS component of a compensation payment under a judgement or settlement includes an element that consists of periodic payments (e.g. structured settlements). The amount (i.e. the total value) of the periodic payments is:

- if the total value of the periodic payments is specified in the judgement – that amount;
- if the total value of periodic payments is not specified, but the CEO is satisfied that a specified amount was paid by the defendant to ensure the provision or the periodic payments – that amount;
- otherwise – the total value of the periodic payments as assessed in accordance with accepted actuarial standards, in consultation with the scheme actuary.

#### ***Compensation, or forgone compensation, to be taken into account***

**Paragraph 3.4** provides that if a person is a participant and receives compensation the CEO is to revise the participants plan. This clause only applies to a participant with a plan.

**Paragraph 3.5** sets out the action the CEO must take into account in relation to compensation received by a participant when approving a statement of participant supports. The CEO is required to reduce the amount of reasonable and necessary supports funded by the compensation reduction amount. The method for determining the relevant compensation reduction amount is addressed in clauses 3.11 to 3.21.

**Paragraph 3.6** clarifies that in relation to a compensable event the compensation a person receives may be determined or agreed in a number of different ways. The paragraph provides that if the person receives compensation in relation to a compensable event then all the compensation paid is taken into account.

**Example:** A person claims for personal injury due to negligence (not a motor vehicle accident) and there are two tortfeasors. The person settles with one tortfeasor and receives a judgement from a court for the other tortfeasor. The compensation reduction amount in relation to the settlement is to be worked out by applying the rules in paragraph 3.13 i.e. the compensation is not objectively identified in the settlement. The compensation reduction amount in relation to the judgement is to be worked out by applying the rules in paragraph 3.11 i.e. the compensation is objectively identifiable. In deciding the level of reasonable and necessary supports to be provided to the participant, the CEO will take account of both compensation reduction amounts.

**Paragraph 3.7** deals with how the compensation reduction amounts are taken into account. A participant is not excluded from receiving support for a period; rather the participant and DisabilityCare Australia jointly contribute to the funding of the participant's supports.

The paragraph provides that the compensation reduction amount may be amortised over the period of the participant's expected lifetime but not longer.

Through the planning process participants can make arrangements with the CEO about how the compensation will be attributed to funding supports. If a participant's compensation reduction amount is small the plan could be adjusted to apply the amount in single year.

**Paragraph 3.8** provides that the CEO may provide a person, who has suffered an injury and is considering entering into a settlement or other agreement for compensation, with information about the likely impact of the application of these Rules. This includes providing information about the likely compensation reduction amount or elements of the compensation reduction amount that would apply if the proposed settlement or agreement was entered into. The level of information that may be provided by the CEO will be dependent upon the level of information that the person can provide.

**Paragraph 3.9** clarifies that the information provided by the CEO under paragraph 3.8 will not ground any action against the CEO or other person.

### ***Special circumstances***

**Paragraph 3.10** provides that in relation to decisions made under paragraph 3.5 the CEO may ignore the whole or part of a compensation reduction amount as not being made if the CEO considers that it is appropriate in the special circumstances of the case. The rule clarifies that financial hardship can be taken into account when assessing special circumstances.

### ***Compensation reduction amount – support component objectively identified***

**Paragraph 3.11** sets out the method to identify the compensation reduction amount where the person receives compensation by way of judgement or settlement described in paragraph 3.1(a).

The CEO is to identify the compensation reduction amount as follows:

- step 1 – ***identify*** the NDIS component of the amount of compensation;
- step 2 – ***subtract*** amounts the participant has paid that are of a kind that are funded or provided under the scheme in the time between the date of judgement or settlement and when the person became a participant
- step 3 – ***subtract*** the amount of any reduction in funding that has occurred under a previous plan.

Example:

Peter sustained a catastrophic brain injury in a motor vehicle accident in 2008. He was 45 years old at the time of the accident and was travelling to work. In addition to lodging a claim with his workers compensation insurer, Peter pursues a common law action against the at-fault driver and their CTP insurer.

The claim proceeded to court in 2013 and the court awarded damages, including \$4 million for future care and support and \$1 million for past care.

In 2015 DisabilityCare Australia is rolled out into the area where Peter lives, and he becomes a participant in the scheme. Peter is assessed as requiring a package of care and support of around \$200,000 per year. Peter's compensation reduction amount is calculated as follows:

- Step 1 – Identify the NDIS component of the amount of compensation. This is the amount awarded for future care and support – in this case \$4 million.
- Step 2 – Subtract amounts the participant has paid that are of a kind that are funded or provided under the scheme in the time between the date of judgement or settlement and when the person became a participant. In this case, Peter used a commercial provider to provide his own care and support between the time of the judgement in 2013 and the date he became a participant in the scheme in 2015. The cost of this care and support was \$400,000. Peter also spent \$250,000 modifying his house. The CEO assesses that these were items of a kind that would be funded by DisabilityCare Australia, and therefore subtracts \$650,000 from the amount identified in Step 1.
- Step 3 – Subtract the amount of any reduction in funding that has occurred under a previous plan. This is Peter's first plan with DisabilityCare Australia, so there are no amounts to deduct.

Peter's compensation reduction amount is \$3.35 million.

#### *Accounting for contributory negligence*

If a court makes a finding of contributory negligence, the amount identified in step 1 would be reduced by the amount of the reduction awarded by the Court.

Example: If in the example above the court found that the Peter had been contributory negligent at 20% then the amount of future care and support identified in step 1 would be reduced by 20%; the future care and support identified would be \$3,200,000. After applying the further steps the compensation reduction amount would be \$2,550,000.

**Paragraph 3.12** provides that the compensation reduction amount cannot be negative. If after identifying the compensation reduction amount in paragraph 3.9 the compensation reduction amount is nil or less than nil, the CEO must:

- only subtract so much of the amounts in steps 2 and 3 that would reduce the compensation reduction amount to nil;
- not subtract any further amounts under paragraph 3.9.

#### ***Compensation reduction amount – other circumstances***

**Paragraph 3.13** sets out the method to identify the compensation reduction amount where the person receives compensation by way of judgement or settlement described in paragraph 3.1(b).

There are three phases to the calculation of the compensation reduction amount:

- Phase 1 estimates the amount of compensation that is notionally available to the participant for the costs of care and support, recognising that the participant's compensation payment may have included amounts other than for care and support e.g. lost earnings, past medical costs.
- Phase 2 compares the amount calculated in Phase 1 to the expected cost of providing care and support through DisabilityCare Australia. This ensures that no participant can ever have a compensation reduction amount greater than the expected cost of providing care and support by DisabilityCare Australia.
- Phase 3 takes the amount calculated in phase 2 and subtracts from it any amounts that the participant has already contributed towards their care and support, either before they became a participant in the scheme, through the repayment of the cost of care and support to DisabilityCare Australia upon receipt of compensation, or through reductions in the amount of care and support provided by DisabilityCare Australia in relation to a previous plan.

The CEO is to identify the compensation reduction amount as follows:

**Phase 1** – estimates the amount of compensation that is notionally available to the participant for care and support:

- step 1 – **calculate** the amount of compensation fixed under the judgement or settlement;
- step 2 – **subtract** the sum of all of the amounts (if any) payable in respect of the amount of compensation under:
  - a Commonwealth, State or Territory statutory scheme of entitlements (e.g. the *Social Security Act 1991*, *Health and Other Services (Compensation) Act 1995*);
  - a law of the Commonwealth, State or Territory, prescribed by the National Disability Insurance Scheme rules;
- step 3 – **subtract** an amount the CEO considers reflects the value of a period of preclusion:
  - a Commonwealth, State or Territory statutory scheme of entitlements (e.g. the *Social Security Act 1991*); and
  - is in respect of the injury
- step 4 – **subtract** 50% of the amount of compensation, if:
  - the person is not subject to a preclusion period for the purposes of paragraph (c) (see step 3 above) (e.g. the person is not receiving a *compensation affected payment* as that term is defined in the *Social Security Act 1991*) and the CEO is satisfied:
    - the participant claimed damages for lost earnings or lost capacity to earn; and
    - the final quantum under the judgement or settlement included an amount in respect of those damages;

**Phase 2** – ensures that the compensation reduction amount cannot exceed the expected cost of providing care and support by DisabilityCare Australia:

- step 5 – **replace** the amount after applying paragraphs (a) to (d) with the value of the reasonable and necessary supports that the CEO considers would have been funded and provided to the participant under the Act over the participant's lifetime, had the person been a participant from the time of the compensable event, *if* this value is less than the amount calculated after applying paragraphs (a) to (d);

**Phase 3** – ensures that amounts that have already been recovered or appropriately spent on care and support are deducted:

- step 6 – **subtract** amounts the CEO considers were paid for by the participant for supports of the kind that may be funded or provided under the scheme in the period between the compensable event and the date the person became a participant;



- step 7 – **subtract** any amounts recovered by DisabilityCare Australia under sections 106 and 107 of the Act – these are NDIS amounts paid by DisabilityCare Australia before the day of judgement;
- step 8 – **subtract** any amount deducted under section 105B – these amounts are NDIS amounts that are recovered where DisabilityCare Australia institutes or takes over a claim under section 105A. Steps 7 and 8 are alternatives.
- step 9 – **subtract** the amount of any reduction in funding that has occurred under a previous plan (if any).

Example: Jessie is injured in an accident that is not covered by a statutory scheme, and elects to sue an identifiable third party for damages, including past and future care and support, lost income and pain and suffering. The parties agree to settle the matter without admission of fault and compensation is fixed at \$70,000. At the time of settlement Jessie has a life expectancy of eleven years, and is estimated by the agency to require care and support worth \$7500 each year. The individual received one year of care and support from DisabilityCare Australia while the case was being decided, and received \$2,000 of medical services through Medicare.

Paragraph 3.13 applies because there is no objectively identifiable amount for future care and support. The compensation reduction amount is calculated as follows:

- Step 1: the amount of compensation is \$70,000.
- Step 2: subtract \$2,000 payable to Medicare.
- Step 3: if Jessie is not precluded from income support, there is no deduction at this step.
- Step 4: Jessie claimed damages in relation to lost income, and the CEO considers that the final settlement included an amount in relation to lost income, so in this case subtract \$35,000;
- Step 5: the amount remaining in this case is \$33,000, which is less than the value of reasonable and necessary supports the CEO considers will be funded over Jessie's lifetime (11 years at \$7,500 per year), so the amount of \$33,000 stands;
- Step 6: there is no subtraction for amounts paid by Jessie for care and support before becoming a participant;

- Step 7: subtract \$7,500 – the amount recovered by DisabilityCare Australia under section 107 of the Act;
- Step 8: The case was not conducted by DisabilityCare Australia using its powers in section 105A, so no deduction applies;
- Step 9: No deduction applies, as this is the first plan of the participant to which compensation reduction amounts will apply.

Jessie's compensation reduction amount is \$25,500.

**Paragraph 3.14** provides that the calculation of the expected cost of providing care and support to the participant undertaken in step 5 above must be accordance with any applicable actuarial model published by DisabilityCare Australia on its website at the time the calculation is undertaken.

**Paragraph 3.15** addresses how paragraph 3.11 and 3.13 will interact where a person has received a compensation payment that is made up of a part that satisfies paragraph 3.1(a) and a part that satisfies paragraph 3.1(b). The paragraph ensures that, if a participant has contributed toward the cost of his or her care and support, this is deducted from relevant compensation reduction amounts, but the total deductions made are not more than the participant's contribution.

If paragraph 3.15 applies, it provides that paragraph 3.13 is applied with the following modifications:

- in paragraph 3.11(f) (see step 6 in paragraph 3.13) – **reduce** the amount calculated under step 6 by any amount subtracted under step 2 in paragraph 3.9;
- in paragraph 3.11(i) (see step 9 in paragraph 3.13) – reduce the amount calculated under step 9 by any amount subtracted under step 3 in paragraph 3.9.

**Paragraph 3.16** provides that the compensation reduction amount cannot be negative. If after identifying the compensation reduction amount in paragraph 3.13 the compensation reduction amount is nil or less than nil, the CEO must:

- only subtract so much of the amount that would reduce the compensation reduction amount to nil;
- not subtract any further amounts under paragraph 3.11.

### ***Compensation reduction amount – participant in a Commonwealth, State or Territory statutory insurance scheme***

**Paragraph 3.17** sets out how the CEO is to identify the compensation reduction amount where a participant is receiving compensation from a Commonwealth, State or Territory statutory insurance scheme described in paragraph 3.1(c).

The CEO is to identify the compensation reduction amount by identifying the total value of the care and support expected to be provided to the person by the relevant Commonwealth, State or Territory statutory insurance scheme during the period of the participant's plan.

**Paragraph 3.18** provides that CEO is to identify the compensation reduction amount:

- in accordance with any applicable actuarial model identified on the DisabilityCare Australia website; and
- in consultation with the Agency who administers the Commonwealth, State and Territory statutory insurance scheme.

### ***Compensation reduction amount – agreement to give up compensation***

**Paragraph 3.19** sets out how the CEO is to identify the compensation reduction amount where a person enters into an agreement to give up compensation described in paragraph 3.1(d).

Where the CEO assess that it was not reasonable for the person to have entered into the agreement to give up compensation, the CEO is to identify the compensation reduction amount as follows:

- step 1 – **assess** the likely amount of NDIS compensation that would have been fixed under a judgement (other than consent judgement) had the participant made a claim for compensation in respect of personal injury – the CEO is chiefly interested in the amount that the person would have received for care and support
- step 2 – **subtract** the amount of any reduction in funding that has occurred under a previous plan (if any)
- step 3 – **subtract** amounts paid for by the participant for supports of the kind that may be funded or provided under the scheme in the period between the compensable event/injury and the date the person became a participant.

**Example:** An individual is injured in an accident that is not covered by a statutory scheme. Rather than pursuing the matter through the courts the individual attempts to ensure that DisabilityCare Australia covers the full cost of providing care and support by entering into an agreement waiving the right to compensation and immediately applying for a care and support through DisabilityCare Australia. The individual receives \$20,000 in exchange for entering into the agreement.

After examining the facts of this particular case, the CEO determines that paragraph 3.1(d) applies, with the result that two compensation reduction amounts are calculated. The first, calculated under paragraph 3.13, relates to the \$20,000 provided under the agreement. The second relates the value of the future care and support component of compensation that the individual would likely have received if the matter had proceeded to a judge judgement.

Step 1 – after examining the facts of the case and comparing it with the amount of compensation fixed in similar cases, the CEO determines that an amount of \$30,000 would likely have been awarded for future care and support. The CEO notes that amounts may have been fixed for other heads of damage – such as past care and support costs, lost income and pain and suffering – but does not take these into account.

Step 2 – The participant has not had an amount deducted regarding a compensation reduction amount for a previous plan, so there is no deduction at this step.

Step 3 – The individual applied for the scheme immediately after the accident, so there is no deduction at this step.

Subject to the operation of paragraph 3.20 below, the individual's compensation reduction amount is therefore \$30,000.

**Paragraph 3.20** addresses how paragraph 3.11 and 3.13 will interact where a person has received a compensation payment that is made up of a part that satisfies paragraph 3.1(a) or 3.1(b) and a part that satisfies paragraph 3.1(d). It ensures that where:

- a compensation reduction amount has been identified in respect of the injury under paragraphs 3.11 or 3.13, this amount is subtracted from the amount calculated under paragraph 3.19. This ensures that the combined compensation reduction amounts calculated under these paragraphs does not exceed the amount of compensation the participant would have been expected to receive for future care and support; and

- a participant has contributed towards the cost of their care and support, this is deducted from relevant compensation reduction amounts, but that the total deductions are not more than the participant's contribution.

If paragraph 3.20 applies, it provides that paragraph 3.19 is applied with the following modifications:

- between the steps in paragraph 3.19(a) and (b) – **subtract** any amount of compensation paid to the participant in respect of the injury under paragraphs 3.11 or 3.13;
- in paragraph 3.19(b) (see step 2 in paragraph 3.19) – **reduce** the amount calculated under step 2 by any amount subtracted under step 3 in paragraph 3.11 or step 9 in paragraph 3.13;
- in paragraph 3.19(c) (see step 3 in paragraph 3.19) – **reduce** the amount calculated under step 3 by any amount subtracted under step 2 in paragraph 3.11 or step 6 in paragraph 3.13.

**Paragraph 3.21** provides that the compensation reduction amount cannot be negative. If after identifying the compensation reduction amount in paragraph 3.19 the compensation reduction amount is nil or less than nil, the CEO must only subtract so much of the amount that would reduce the compensation reduction amount to nil.

#### **Part 4 – Other matters**

##### *Citation*

**Paragraph 4.1** specifies the citation for the rules.

##### *Interpretation*

**Paragraphs 4.2 to 4.4** give guidance on the interpretation of and definitions for certain terms used in the Support for Participant 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**

This instrument is about assessment and determination of the reasonable and necessary supports that will be funded for participants under the scheme and specifically how compensation payments for personal injury are taken into account in such assessments and determinations.

## **Human rights implications**

The instrument engages the following human rights:

- Article 17 of the International Covenant on Civil and Political Rights 1966 (ICCPR);
- Article 1 of the International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR); and
- The rights of persons with disabilities in the Convention on the Rights of Persons with Disabilities 2007 (CRPD), especially the Preamble and Article 12.

### *General Principles underpinning the CRPD*

The CRPD recognised 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 establishment of the scheme promotes the rights of people with disabilities 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 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 providing persons with disabilities the opportunity to be involved actively in decision-making processes about policies and programmes, including those directly concerning them.

This instrument is made for the purposes of section 35 of the Act. The instrument is about assessment and determination of the reasonable and necessary supports that will be funded for participants under the scheme, and specifically how compensation payments for personal injury are taken into account in such assessments and determinations.

The aim of the instrument is to establish that the scheme is intended to complement existing compensation arrangements for personal injury, rather than one designed to replace them. Underpinning the instrument are the principles of respecting the independence, and choice and control of participants, as well as the need to ensure the financial sustainability of the scheme (paragraph 1.5 of the Accounting for Compensation rules). These interests are balanced by one another. The instrument takes measures not to go beyond what is necessary in ensuring the financial sustainability of the scheme. The instrument does not directly compel the participant to take any particular course of action. Rather the instrument is about taking informed actions, in response to the possibility of making a claim for compensation for personal injury.

*Application to persons who have received compensation, or given up a right to pursue compensation*

The instrument applies to participants whose impairment was caused or aggravated by a personal injury and who have either received a payment of compensation (including under a statutory scheme), or have entered into an agreement to give up their right to compensation where the CEO thinks that it was unreasonable to do so. Where this is the case, the participant may have their reasonable and necessary supports reduced by a "compensation reduction amount". In this respect, this instrument is related to the *National Disability Insurance Scheme (Supports for Participants) Rules 2013*.

*Supporting the independence, and social and economic participation of people with disability*

The instrument encourages people with a disability to consider their legal rights to compensation, and provide avenues for assistance in travelling down this path for the satisfaction of such claims. The importance for persons with disabilities of their individual autonomy and independence, including the freedom to make their own choices (Principle (n) in the Preamble to the CRPD), cannot be overlooked. This instrument does not seek to compel people with disabilities to take a particular action, such as instituting proceedings for compensation, but rather relates to considering the financial implications that a compensation payment may entail on the funding or provision of reasonable and necessary supports for a participant.

The concept of taking these compensation payments into account when determining supports for participants is to prevent “double-dipping” of benefits and ensure the financial sustainability of the scheme. Where the person is the recipient of a compensation award, directed in full or in part, to cover costs of a nature funded by the scheme, the person is not disadvantaged by this instrument as they have already been provided for to some extent in regards to reasonable and necessary supports.

Article 12 of the CRPD requires states to affirm equal recognition before the law of all persons with disabilities, which entails recognising that persons with disabilities enjoy legal capacity on an equal basis with others, and to take appropriate measures to provide access to support that may be required in exercising their legal capacity. Generally speaking, this would suggest that persons with a disability should also be able to choose when not to exercise legal capacity, on an equal basis with others. It is typically not the case that a person will be asked to justify a decision not to make a claim for compensation. The instrument may, however, appear to influence a person’s rights in making a decision as to whether to pursue a claim for compensation. An agreement not to pursue such a claim may impact on the amount for reasonable and necessary supports that will be approved for their plan (paragraph 3.1(d)).



In order to temper any potential encroachment on the capacity of the person to choose freely, the CEO must refer to certain considerations before imposing a compensation reduction amount on the basis that it was unreasonable for the participant to enter into such an agreement (paragraph 3.2). The CEO must consider the impact on the person and their circumstances and family, including in a financial sense, the reasons given by the participant, the impact of the person's disability on their decision, and the circumstances giving rise to possible entitlement. This offers some protection to the participant from their supports being affected by an arbitrary decision which overlooks their individual circumstances. It also reflects the interest that the state has in providing persons with disabilities and their families with the necessary protection and assistance to enable families to contribute towards the full and equal enjoyment of the rights of persons with disabilities (Principle x of the Preamble to the CRPD).

### *Protection of privacy for people with disabilities*

Article 17 of the ICCPR prohibits the arbitrary or unlawful interference with a person's privacy, family or home. To the extent that seeking information as to the circumstances of the injury arising, the agreement being made and the person's individual situation appears to be in breach of this human right, such steps will only be taken with the consent of the person and for the legitimate purpose of ensuring the financial sustainability of the scheme and preventing "double dipping". Further, the CEO must be proactive in providing information to a person at the outset and so supports informed decision making, with a requirement to advise on the likely compensation reduction amount where a person is considering entering into a settlement or agreement (paragraph 3.8).

### *Right to social security*

A decision by the CEO that an agreement not to seek compensation was unreasonable to enter into is limited towards reducing the funding for reasonable and necessary supports under the scheme and not towards a person's ability to access the scheme. As such, it does not engage Article 9 of the ICESCR which recognises the right of everyone to social security, including social insurance, as the person is still eligible to receive such payments, despite a potential compensation reduction amount being imposed to account for assistance that the person has already been provided with through other sources.

### *Assessments in accordance with accepted actuarial standards*

There are some circumstances under the instrument where the compensation reduction amount cannot be easily ascertained, in which case it becomes necessary to conduct assessments in accordance with accepted actuarial standards published by DisabilityCare Australia and in consultation with the scheme actuary. This is the case where, for example, period payments have been made for which the value is not otherwise ascertainable (paragraph 3.3), or to calculate the amortisation of compensation reduction amounts over the participants lifetime (paragraph 3.14) or to assess the expected costs of providing care and support (paragraph 3.14).

### *Calculating the compensation reduction amount*

Technical calculations are undertaken to determine what the compensation reduction amount will be. Firstly, it is necessary to identify the NDIS component in the compensation payment. The NDIS component is related to the provision of supports of a kind that may be funded or provided under the NDIS after the judgment/settlement date. This could either be fixed or objectively identifiable (paragraph 4.4). Following that, certain amounts are to be deducted to find the compensation reduction amount. This includes amounts that the participant has paid for of a kind that are funded or provided under the scheme between the judgment date and becoming a participant. Any reduction in funding for a previous plan is also taken into account (paragraph 3.11). The compensation reduction amount cannot be negative (paragraph 3.12), nor can it be more than the expected cost of providing care and support by the scheme (paragraph 3.13(e)).

Where it is not possible to identify the NDIS component of the amount of compensation, the calculation is done in a different way. In this case, there is a calculation made of how much compensation is notionally available to the participant for costs of care and support as well as amounts for lost earnings and past medical costs. These amounts are then compared with the expected cost of care and support through the scheme. From this, the amount that the participant has already contributed to their care and support is subtracted, either before they became a participant in the scheme through the repayment of the cost of care and support, or through reductions in the amount of care and support provided by the scheme in relation to a previous plan.

The compensation reduction amount is also to take into account any claims the participant has made for lost earnings or lost capacity to earn as part of the damages (paragraph 3.13). Taking these amounts into account is critical to ensuring that persons with disabilities are given the same right as others to freely pursue their economic development (Article 1 of the ICESCR) and protect their entitlement to such damages that would generally be awarded in a typical case.

Any period of preclusion arising from a statutory scheme of entitlements is also to be taken into account (paragraph 3.13).

Where there has been an agreement to give up the right to compensation, the compensation reduction amount is calculated by reference to the likely amount that would have arisen under a judgment after having made a claim. Again, it would be necessary to subtract any compensation already paid, and any reduction in funding under a previous plan and any amounts paid by the participant on care and support arrangements (paragraph 3.19).

*Funding for reasonable and necessary supports may be reduced by taking into account compensation, or foregone compensation*

Where a compensation reduction amount is found to apply and calculated, the outcome is that the CEO is to reduce the funding for reasonable and necessary supports that would otherwise be approved. If the person is already a participant, and has a participant's plan, the CEO is to revise the plan (paragraph 3.4).

In deciding the level of reasonable and necessary supports to be provided to the participant, the CEO will take account of both compensation reduction amounts where there has been more than one amount of compensation fixed or foregone in respect of injury.

Decisions will have to be made in accordance with accepted actuarial standards, in consultation with the scheme actuary, where there are complexities in deciphering the compensation reduction amount, due to there being more than one compensation payout in respect of the injury. Again, this prevents the unfairness inherent in imposing an arbitrary amount on the participant without proper reference to actuarial models of analysis.

Under special circumstances, the CEO may ignore the whole or part of a compensation reduction amount that would otherwise arise. The special circumstances may include financial hardship suffered by the participant (paragraph 3.11). This provision seeks to minimise the chances that a participant will be unreasonably impacted by the reduction in the funding for supports, and allows for the unique circumstances of the individual to be considered in making such determinations. The participant can also, through the planning process, work out the way that the compensation will be attributed to the funding supports. If small, they may wish to apply the amount in a single year.

The consequence of this provision, to reduce funding for supports in some circumstances, may appear to impinge upon Article 12 of the CRPD, and in particular on the necessity to ensure that persons with disabilities are given freedom to control their own financial affairs. However, the intention of this instrument is not that the participant is excluded from receiving support for a period, but rather that the participant and DisabilityCare Australia jointly contribute to funding the supports.

## **Conclusion**

This legislative instrument is compatible with human rights because it is consistent with the rights protected by the CRPD, the ICCPR and the ICESCR, and does not engage any rights in the other human rights treaties. 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 and prevent abuse of the scheme.