**EXPLANATORY STATEMENT**

Issued by the Authority of the Assistant Minister for Social Services

National Disability Insurance Scheme Act 2013

*National Disability Insurance Scheme (Becoming a Participant) Amendment Rules 2014*

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 the Act.

The National Disability Insurance Scheme (Becoming a Participant) Rules 2013 (the Becoming a Participant Rules) set out, among other things, the residence requirements for a person to become a participant for the purposes of the Act.

The National Disability Insurance Scheme (Becoming a Participant) Amendment Rules 2014 (the Amendment Rules) are made for the purposes of section 23 of the Act and amend the residence requirements in the Becoming a Participant Rules. The amendments relate to residence in the Australian Capital Territory, the Northern Territory and Western Australia.

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

The Amendment Rules are Category B rules for the purposes of section 209 of the Act. The Commonwealth and each of the host jurisdictions to which the Amendment Rules relate have agreed to the making of the Amendment Rules as required under subsection 209(5) of the Act.

The Amendment Rules is a legislative instrument for the purposes of the Legislative Instruments Act 2003.

**Commencement**

The Amendment Rules commence on 1 July 2014.

**Consultation**

The Commonwealth has consulted with the Governments of the Australian Capital Territory, the Northern Territory and Western Australia in making the Amendment Rules. The Commonwealth has also notified Governments of other host jurisdictions about the changes made by the Amendment Rules.

**Explanation of provisions**

**Section 1** states the name of the Amendment Rules.

**Section 2** provides that the Amendment Rules commence on 1 July 2014.

**Section 3** provides that Schedule 1 amends the Becoming a Participant Rules.

**Schedule 1** sets out the amendments to the Becoming a Participant Rules.

**Item 1** inserts a new definition of 2014 NDIS launch areas, which includes:

* Shire of Kalamunda, Shire of Mundaring and City of Swan in the Perth Hills area in Western Australia;
* Barkly Region in the Northern Territory; and
* the Australian Capital Territory.

This definition specifies areas where trials of the National Disability Insurance Scheme (NDIS) will commence on 1 July 2014. This includes the Australian Capital Territory and specified areas in Western Australia and the Northern Territory.

It is noted that in Western Australia, from 1 July 2014, there will be a two-year trial of the NDIS using two different models:

• WA NDIS My Way model, which will operate in the Lower South West (LSW) and Cockburn/Kwinana areas; and

• Commonwealth National Disability Insurance Agency (NDIA) model, which will operate in the Perth Hills area.

These Rules relate to the NDIS trial run by NDIA.

For some purposes Jervis Bay Territory is treated as if it were part of the Australian Capital Territory. However, for the purposes of the Becoming a Participant Rules, the Jervis Bay Territory is separate and distinct from the Australian Capital Territory. An explanatory note has been included to make this clear.

**Item 2** amends the definition of NDIS launch areas to mean the 2013 launch areas together with the 2014 launch areas. The term NDIS launch areas identifies all areas where the NDIS will be trialled.

**Items 3 and 5** amend subparagraphs 4.6(b), 4.7(b), 4.8(b), 4.8(d) and 4.8(e)(ii)(A) of the Becoming a Participant Rules by replacing references to “the Australian Capital Territory” with references to “a 2014 NDIS launch area”, as those subparagraphs should also apply to areas in Western Australia and the Northern Territory where the NDIS will be trialled.

**Item 4** amends subparagraph 4.7(d) so that the requirement for exceptional circumstances does not apply where a person starts to reside in the Australian Capital Territory after 1 July 2014 for the dominant purpose of accessing supports not provided under the Act. This is to give effect to an agreement between the Commonwealth and the Australian Capital Territory Governments. The exceptional circumstances requirement continues to apply to other host jurisdictions.

**Item 6** amends subparagraph 4.8(e)(ii)(B) of the Becoming a Participant Rules to reflect the amendment made by **Item 4.** Paragraph 4.8 provides the qualifying residence requirement for a child and subparagraph 4.8(e)(ii) applies in the case of a child whose parents are separated and who spends time with each parent. The amendments exclude the requirement for exceptional circumstances where at least one of the child’s parents started to reside in the Australian Capital Territory after 1 July 2014 for the dominant purpose of the child accessing supports that are not provided under the Act. The requirement for exceptional circumstances continues to apply for other host jurisdictions.

**Statement of Compatibility**

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

This 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 made for the purposes of sections 23 and 209 of the National Disability Insurance Scheme Act 2013 (the Act), and deals with requirements relating to residence in Western Australia, the Northern Territory and the Australian Capital Territory that must be met for a person to become a participant for the purposes of the Act.

The instrument amends the National Disability Insurance Scheme (Becoming a Participant) Rules 2013 (the Becoming a Participant Rules).

**Human rights implications**

This instrument engages the following human rights:

* The rights of persons with disabilities in the Convention on the Rights of Persons with Disabilities (CRPD), especially Articles 3, 7, 22, and 23.
* The rights of children in the Convention on the Rights of the Child (CRC), especially Articles 2, 9, 18 and 23.
* Article 10 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).
* Article 2 of the International Covenant on Civil and Political Rights (ICCPR).

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 National Disability Insurance Scheme (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.

The general principles in the Act that have been applied in the Becoming a Participant Rules in paragraph 1.3 align closely with the CRPD principles. The objectives and general principles of the Act and Rules provide that:

* People with disability should be supported to participate in, and contribute to social and economic life to the extent of their ability;
* People with disability and their families and carers should have certainty that people with disability will receive the care and support they need over their lifetime; and
* People with disability should be supported to receive reasonable and necessary supports, including early intervention supports.

The Becoming a Participant Rules recognise that contributing to social and economic life to the extent of their ability is integral to participants’ sense of belonging and wellbeing in their communities, a right that is promoted in Articles 3 and 19 of the CRPD.

The objects and the guiding principles of the scheme also recognise the rights of persons with disabilities to be provided with reasonable and necessary supports and to have certainty that they will receive the lifelong care and support they need. The role of carers, families and other significant persons is also recognised and respected. In this way, the 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.

Progressive implementation of the scheme and the principle of non-discrimination

The right to equality and non-discrimination is protected by Article 2 of the ICCPR and Article 2 of the CRC which prohibits denying a person or child rights on certain grounds, including on the basis of age or place of residence. This is reinforced in the context of human rights for persons with disabilities by Article 3 (b) of the CRPD which provides that non-discrimination is a general principle in relation to all rights in the CRPD. As noted by the Human Rights Committee in General Comment No. 18 on equivalent rights in the International Covenant on Civil and Political Rights (ICCPR), the rights to equality and non-discrimination in the ICCPR sometimes require nation states ‘to take affirmative action in order to diminish or eliminate conditions which cause or help perpetuate discrimination’.

Non-discrimination ensures that no one is denied their rights because of factors such as race, colour, sex, language, religion, political or other opinion, national or social origin, property or birth. In addition to those grounds, discrimination on certain other grounds may also be prohibited. These grounds include age, nationality, marital status, disability, place of residence within a country and sexual orientation.

Accordingly differential treatment will not constitute discrimination if the differences in treatment are aimed at achieving a legitimate purpose and are reasonable and proportionate to this purpose.

Residence Requirements

The Becoming a Participant Rules imposes additional limitations on access to the scheme on the basis of residence until commencement of the full scheme. During the trial period, access to the scheme will be limited to those living within designated trial sites (referred to in the rules as “launch areas”). This restriction is temporary in nature, and the intent of this limitation is the integrity and financial sustainability of the scheme during the trial.

The Becoming a Participant Rules are reasonable and proportionate in achieving this aim in ensuring the integrity of the scheme during the trial. Reference is made to paragraph 4.7 describing the circumstances in which a person who moves into an NDIS launch area after the relevant date can also meet the qualifying residence requirement. This is the case where the dominant reason for the person starting to reside in the NDIS launch area is to access supports not provided under the scheme (for example, health services) and there are exceptional circumstances. An example of exceptional circumstances is where the person would suffer significant financial or personal hardship which could significantly undermine their wellbeing or social or economic participation, by reason of not being a participant. This discretionary provision serves to ameliorate any harsh outcomes that would otherwise result from a strict application of the residency requirements. It also advances Article 12 of the ICCPR to people with disability by protecting their right to liberty of movement and freedom to choose their place of residence.

The ‘exceptional circumstances’ test does not apply to people moving to the Australian Capital Territory, that is they are only required to pass the test that the dominant purpose of starting to reside in the Australian Capital Territory is to access supports not provided under the scheme (such as education, employment, health care or family support). This distinction between the Australian Capital Territory and other launch areas is reasonable due to the unique and comprehensive nature of the trial in the Australian Capital Territory. In the Australian Capital Territory there are no geographical boundaries or age limitations on how the trial will take place.  This means that the vast majority of disability services providers within the Australian Capital Territory will only provide services to participants of the NDIS. In this environment, if an individual, who would otherwise become a participant, is not given access to the NDIS they will find it difficult to get support. This is not necessarily the case in other jurisdictions, where only a specific geographical area or age cohort is transferred during the trial period. In these jurisdictions other existing systems of support will be more likely to be available outside of NDIS participation. This means people with disability who are not NDIS participants are more likely to receive support from the existing disability care and support system.

Protection of Privacy

Article 22 of the CRPD is engaged by the Becoming a Participant Rules to the extent that it allows the National Disability Insurance Agency to require evidence of a person’s age, residency, disability and early intervention needs. In particular, nation states are compelled to protect the privacy of personal, health and rehabilitation information. Any information that the person provides for the purposes of these Rules is considered protected information and must be dealt with in accordance with the National Disability Insurance Scheme (Protection and Disclosure of Information) Rules 2013 (Information Rules) on the collection, use and disclosure of personal information. The stringent conditions attached to the treatment of protected information under the Act and Information Rules serve to support and protect the right to privacy under the CRPD.

Best Interests of the Child

Under Article 3(b) of the CRC, states are required to apply the principle of best interests of the child. This principle promotes the protection of a child’s best interests as the primary consideration as part of the process for the taking of actions that concern children. This includes measures to support and assist parents and others who have responsibility for ensuring recognition of children's rights.

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 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.

Part 4 of the Becoming a Participant Rules enables flexibility of living arrangements by providing for access in situations where either the child’s parents have separated, or the child is cared for by persons other than their parents. Consequently, a child can also meet the qualifying residence requirement if the child comes into the care of a person with ongoing parental responsibility for the child after 1 July 2013 provided the person has resided in a 2013 NDIS launch area since 1 July 2013 and this will be the child’s residence. There is a comparable rule for children who come into the care of a resident of a 2014 NDIS launch area after 1 July 2014.

The Becoming a Participant Rules engage with Article 23 of the CRC which affirms the requirement for states to ensure a child with a disability enjoys a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community. This is reinforced by Article 7 of the CRPD in the context of actions concerning children with disability, and commits each nation state to protecting the best interests of children with disabilities. The Rule draws on these principles by providing for a child to be eligible for access where a parent moves into the launch area after the relevant date for the dominant purpose of the child accessing supports that are not provided under the scheme and there are exceptional circumstances. The ‘exceptional circumstances’ test does not apply to parents moving to the Australian Capital Territory, that is they are only required to pass the test that the dominant purpose of starting to reside in the Australian Capital Territory is for the child to access supports not provided under the scheme (such as education, employment, health care or family support). This distinction between the Australian Capital Territory and other launch areas is reasonable due to the unique and comprehensive nature of the trial in the Australian Capital Territory as noted above under the heading ‘Residence Requirements’.

In the context of a child whose parents are separated and who spends time with each parent, the qualifying residence criteria are broader than that applicable to an adult participant. By granting a child access to the scheme where parents have separated and the child spends time with a parent who meets the qualifying residence requirement is a positive engagement. In particular the Becoming a Participant Rules preserves the family relationship and supports parents who have separated from their partner to continue to provide for a child with disability rather than require a child to relocate in order to access supports.

**Conclusion**

This legislative instrument is compatible with human rights because it advances the protection of the rights of persons and children with disabilities in Australia, consistent with the CRPD. 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 long-term integrity and sustainability of the scheme.