

## **EXPLANATORY STATEMENT**

### **Select Legislative Instrument No. 126, 2014**

Issued by the authority of the Minister for Social Services

*Child Support (Assessment) Act 1989*

*Child Support (Assessment) Amendment (Excluded Income) Regulation 2014*

#### **General outline**

The *Child Support (Assessment) Amendment (Excluded Income) Regulation 2014* (the Regulation) is made under the *Child Support (Assessment) Act 1989* (the Act).

Section 164 of the Act provides, in part, that the Governor-General may make regulations, not inconsistent with this Act, prescribing all matters required or permitted by this Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to this Act.

The Regulation amends regulation 7D of the *Child Support (Assessment) Regulations 1989* (the Principal Regulations) so that an 'NDIS amount' within the meaning of the *National Disability Insurance Scheme Act 2013* (NDIS Act) would be excluded from the definition of 'income' for certain child support decisions.

#### **Background**

The Act makes provision for determining the financial support payable by parents for their children. Part 5 of the Act deals with administrative assessment of child support to determine the annual rate of child support payable by a parent for a child. Under section 66A of the Act, if the Registrar has made an assessment under section 66 in respect of the minimum annual rate of child support payable by a parent for a child, the Registrar may on an application made by the parent, reduce the annual rate of child support for a nominated period to nil in certain cases (for example, where the parent is incarcerated for a period). In considering the application, the Registrar must determine the parent's income under subsection 66A(4) of the Act. Subsection 66A(4) defines income and provides that money prescribed by the Principal Regulations is excluded from the definition of income.

Similarly, under section 65B of the Act, if the Registrar has made a child support assessment set at the fixed annual rate of child support payable by a parent for a child, the Registrar may on an application made by the parent, determine that the fixed annual rate should not apply. In considering the application, the Registrar must determine the parent's income within the meaning of subsection 66A(4) of the Act.

Paragraphs 66A(4)(a) and (b) of the Act provide that the Principal Regulations may prescribe payments that are excluded for the purposes of the definition of 'income' in subsection 66A(4). Under paragraph 66A(4)(a), 'income' means any money earned, derived or received by the parent for his or her own use or benefit, *other than money earned, derived or received in a manner, or from a source, prescribed by the regulations for the purposes of this paragraph*. Under paragraph 66A(4)(b), 'income' in relation to a person means a periodical

payment by way of a gift or allowance, *other than a payment of a kind prescribed by the regulations for the purposes of this paragraph*. Regulation 7D of the Principal Regulations prescribes payments for this purpose.

An ‘NDIS amount’ under section 9 of the NDIS Act means ‘an amount paid under the National Disability Insurance Scheme in respect of reasonable and necessary supports funded under a participant’s plan.’ Under section 52-180 of the *Income Tax Assessment Act 1997*, an ‘NDIS amount’ derived by a participant (within the meaning of the *NDIS Act*) is exempt from income tax. NDIS payments are not taxable and are not part of a parent’s adjusted taxable income for child support purposes.

The proposed Regulation would amend regulation 7D of the Principal Regulations to ensure that decisions made by the Registrar under section 65B and section 66A of the Act, in relation to the rate of child support payable, would not consider an ‘NDIS amount’ received by a person for their own benefit as income. The amendment would also ensure that an ‘NDIS amount’ that is either paid by a single payment or by instalments provided under the NDIS Act to a parent for someone else’s benefit would not be considered ‘income’ under subsection 66A(4) for the parent’s child support assessment.

The Regulation is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

#### Commencement

The Regulation commences on the day after it is registered.

#### Consultation

Consultation has occurred with the Department of Human Services, as the Department that is responsible for child support service delivery, as well as with the National Disability Insurance Agency.

#### Regulatory Impact Statement

A Regulatory Impact Statement is not required as the Regulation does not impose any new obligations on an individual or business. The amendments to the Principal Regulations are of a minor or machinery nature and do not substantially alter the existing arrangements.

#### Explanation of the provisions

##### Section 1 (Name of regulation)

This section provides that the name of the Regulation is the *Child Support (Assessment) Amendment (Excluded Income) Regulation 2014*.

##### Section 2 (Commencement)

This section provides that the Regulation commences on the day after it is registered.

##### Section 3 (Authority)

This section provides that the Regulation is made under the *Child Support (Assessment) Act 1989*.

#### Section 4 (Schedule(s))

This section provides that each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

#### Schedule 1, item 1

This item inserts new subregulation 7D(1A) before subregulation 7D(1) of the *Child Support (Assessment) Regulations 1989*. New subregulation 7D(1A) provides that for paragraphs 66A(4)(a) and (b) of the definition of ‘income’ in subsection 66A(4) of the *Child Support (Assessment) Act 1989* an ‘NDIS amount’ is prescribed. Under section 9 of the *National Disability Insurance Scheme Act 2013*, an ‘NDIS amount means an amount paid under the National Disability Insurance Scheme in respect of reasonable and necessary supports funded under a participant’s plan.’ An NDIS amount that is either paid as a single payment or by instalments to a person is excluded from the definition of income under subsection 66A(4) of the Act for child support purposes. A person receiving NDIS amounts by instalments on behalf of another person will also not have those NDIS amounts considered as income under subsection 66A(4) of the Act for child support purposes.

## Statement of Compatibility with Human Rights

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

### **Child Support (Assessment) Amendment (Excluded Income) Regulation 2014**

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 of the Legislative Instrument**

In March 2013, the *National Disability Insurance Scheme Act 2013* was enacted, and the Act gave effect to the commitment by the Commonwealth, State and Territory Governments to establish such a scheme, and for its progressive implementation from July 2013.

Since May 2013, the *National Disability Insurance Scheme Legislation Amendment Act 2013* provides that National Disability Insurance Scheme (NDIS) payments received by NDIS participants are non-taxable, although the bank interest earned from the payments is taxable. Accordingly, NDIS payments are not ‘taxable income’ and are not part of a person’s ‘adjusted taxable income’ for general child support purposes.

However, according to the current definitions of income, an NDIS amount could be considered as income for child support purposes for a participant who is responsible for self-managing their funds, and affect the participant’s application to have either the minimum annual rate of child support reduced to nil, or to have the fixed annual rate of child support not used. In considering such applications, under sections 65B or 66A of the *Child Support (Assessment) Act 1989* the Registrar must use the definition of income in subsection 66A(4). ‘Income’ is not restricted to taxable income, as subsection 66A(4) defines income as: any money received, earned or derived for personal use or benefit; or, any periodic payment by way of gift or allowance. Currently, the exclusions to the definition of ‘income’ in subsection 66A(4) of the *Child Support (Assessment) Act 1989*, are prescribed in regulation 7D of the *Child Support (Assessment) Regulations 1989*.

This Legislative Instrument makes an amendment to Regulation 7D in the *Child Support (Assessment) Regulations 1989* to ensure that an NDIS amount provided under the NDIS to a participant of the NDIS would not be ‘income’ for the purposes of subsection 66A(4) of the *Child Support (Assessment) Act 1989* and would not affect decisions made under sections 65B or 66A of the *Child Support (Assessment) Act 1989*. This amendment will align with the treatment of NDIS amounts in the *National Disability Insurance Scheme Legislation Amendment Act 2013*.

## **Human rights implications**

The amendment made to the instrument will engage the following right:

- Article 27 of the *Convention on the Rights of the Child*

This amendment engages the right of a child to a standard of living adequate for the child's development.

Article 27 of the *Convention on the Rights of the Child* recognises the right of a child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development. The parent(s) or others responsible for the child have the primary responsibility to secure, within their abilities and financial capacities, the conditions of living necessary for the child's development. Countries are required to take appropriate measures to assist parents and others responsible for the child to implement this right. Countries are also required to take all appropriate measures to secure the recovery of maintenance for the child from the parents or other people having financial responsibility for the child.

This amendment is consistent with the right of the child to a standard of living adequate for the child's development as it ensures that NDIS amounts are not to be counted as income for child support purposes when determining if the minimum annual rate or the fixed annual rate should not apply. If these NDIS amounts were to be considered as income, this could unduly place parents into hardship.

## **Conclusion**

This Legislative Instrument is compatible with human rights because it advances the protection of human rights and, to the extent that this change limits access to child support, these limitations are reasonable and proportionate.

**Minister for Social Services, the Hon Kevin Andrews MP**