

## **EXPLANATORY STATEMENT**

Issued by the Authority of the Minister for Social Services

*National Disability Insurance Scheme Act 2013*

*National Disability Insurance Scheme (Becoming a Participant) Amendment Rules 2016*

### **Purpose**

The purpose of the *National Disability Insurance Scheme (Becoming a Participant) Amendment Rules 2016* (the Amendment Rules) is to give effect to the agreement between the Commonwealth and Queensland (the host jurisdiction) that the National Disability Insurance Scheme (NDIS) will commence in the Townsville, Charters Towers and Palm Island regions of Queensland. These areas are early transition areas and are referred to in the Amendment Rules as “2016 NDIS early transition areas”. The areas which comprise the 2016 NDIS early transition areas include the local government areas of Townsville, Charters Towers and Palm Island. The NDIS will be implemented from the commencement of the *National Disability Insurance Scheme (Becoming a Participant) Amendment Rules 2016* for children and young people aged under 18 years in Townsville and Charters Towers, and for all people aged under 65 years in Palm Island.

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 the 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 age and residence requirements for a person to become a participant for the purposes of the Act.

The Amendment Rules are made for the purposes of sections 22, 23, and 209 of the Act and amend the age and residence requirements in the Becoming a Participant Rules, in relation to the 2016 NDIS early transition areas.

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

The Amendment Rules are a legislative instrument for the purposes of the *Legislation Act 2003*.

### **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 NDIS.

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 1 July 2013. The Act sets out the statutory framework for the NDIS, and for the NDIA (known in the Act as the National Disability Insurance Scheme Launch Transition Agency) to administer the NDIS. The Act is supplemented by rules made under the Act, which address the more detailed operational aspects of the NDIS.

2016 NDIS early transition areas in Queensland will commence in the Townsville, Charters Towers and Palm Island local government areas at the commencement of the *National Disability Insurance Scheme (Becoming a Participant) Amendment Rules 2016*. These locations were chosen particularly to assess the effectiveness of early intervention processes and provide benefits to children in terms of reduced lifelong support needs.

### **Commencement**

The Amendment Rules commence on the day after the instrument is registered.

### **Power to amend**

The Amendment Rules rely on subsection 33(3) of the *Acts Interpretation Act 1901*. Under subsection 33(3), where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by-laws), the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.

### **Consultation**

The Amendment Rules are Category B rules under section 209 of the Act. Accordingly, as required under subsection 209(5) of the Act, the Commonwealth has consulted with the host jurisdiction, Queensland, about the making of the Amendment Rules. Queensland has agreed to the form of the Amendment Rules as a result of that consultation. The Commonwealth has also notified other host jurisdictions about the changes made by the Amendment Rules.

Within the Commonwealth, the Department of Social Services has consulted with the National Disability Insurance Agency (known in the Act as the National Disability Insurance Scheme Launch Transition Agency) on the form of the Amendment Rules.

### **Regulation Impact Statement (RIS)**

The Office of Best Practice Regulation has been consulted and has advised that a RIS is not required (OBPR ID 20008).

### **Explanation of the provisions**

#### Section 1

Section 1 provides how the Amendment Rules are to be cited, that is, as the *National Disability Insurance Scheme (Becoming a Participant) Amendment Rules 2016*.

## Section 2

Section 2 provides that the Amendment Rules commence on the day after the instrument is registered. This aligns with the registration and commencement of the *National Disability Insurance Scheme (Facilitating the Preparation of Participants' Plans—Queensland) Rules 2016*. This registration timeframe will ensure that access requests are able to be made by prospective participants and decided by the NDIA prior to the time that plans may be approved in accordance with the *National Disability Insurance Scheme (Facilitating the Preparation of Participants' Plans—Queensland) Rules 2016*: that is, from 1 April 2016.

## Section 3

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

## Schedule 1

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

### Schedule 1, item 1

Item 1 makes an amendment which specifies that, although generally speaking, a person meets the age requirements if the person was aged from birth up to 65 when the access request in relation to the person was made, additional age requirements apply to persons who reside in the Townsville or Charters Towers 2016 NDIS early transition areas of Queensland.

### Schedule 1, item 2

Item 2 explains the additional age requirements that apply to persons who reside in the Townsville or Charters Towers 2016 NDIS early transition areas. To reflect the agreement between the Commonwealth and Queensland, for access requests made between the date these amended rules commence and 30 June 2016 (or made before the date these amended rules commence and decided by the CEO on or after the date these amended rules commence), a person residing in the Townsville or Charters Towers 2016 NDIS early transition areas must be aged under 18 years on 1 April 2016 to meet the age requirements (this includes children born on or after that day).

### Schedule 1, item 3

Item 3 establishes that a person can only meet the residency requirements if the person resides in an NDIS launch area or 2016 NDIS early transition area at a particular time.

#### Schedule 1, item 4

Item 4 establishes the residence requirements which form part of the access criteria for becoming a participant. In particular subsection 23(3) of the Act enables the Minister to make rules to prescribe areas of Australia for the purposes of the residence requirements. The amendment inserts additional 2016 NDIS early transition areas to commence at the commencement of the *National Disability Insurance Scheme (Becoming a Participant) Amendment Rules 2016*. These comprise of the local government areas of Townsville, Charters Towers and Palm Island, which are located in Queensland. These areas are referred to as the “2016 NDIS early transition areas”.

#### Schedule 1, item 5

Item 5 amends paragraph 4.6 of the Becoming a Participant Rules to describe the qualifying residence requirement which applies to the 2016 NDIS early transition area. A person meets the qualifying residence requirement to become a participant of the NDIS if they reside in a 2016 NDIS early transition area at any time on or after the 2016 NDIS early transition date.

#### Schedule 1, items 6, 7 and 8

Items 6, 7 and 8 are amended to make clear that a child will also meet the qualifying residence requirements if the child is born on or after 1 April 2016, does not reside in one of the 2016 NDIS early transition areas, but has a carer or parent who does reside in one of the 2016 NDIS early transition areas on the date these rules come into effect, or the child later commences residing with a carer or parent, who lives in a NDIS early transition area on the date these rules come into effect. For the purposes of the 2016 NDIS early transition areas, due to the additional age requirements for participants living in Townsville or Charters Towers local government areas, a child means a person aged under 18 years.

#### Schedule 1, item 9

Item 9 establishes that a person meets the ongoing residence requirement if they live in an NDIS launch area or 2016 NDIS early transition area.

#### Schedule 1, items 10 and 11

Items 10 and 11 are amended to include participants in the 2016 NDIS early transition areas, so they can have the right to the 12 month period during which a participant will be deemed to continue to meet the residence requirements, if they stop residing in that area.

#### Schedule 1, item 12

Item 12 makes a consequential amendment to assist in the interpretation of the Amendment Rules by inserting a reference to the 2016 NDIS early transition areas.

The reader is directed to paragraph 4.4C in the Amendment Rules, which defines the 2016 NDIS early transition areas to comprise of Townsville, Charters Towers and Palm Island. The item also inserts a reference to the '2016 NDIS early transition date' which is the day on which this amendment commences.

## **Statement of Compatibility with Human Rights**

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

### ***National Disability Insurance Scheme (Becoming a Participant) Amendment Rules 2016***

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 of the legislative instrument**

The *National Disability Insurance Scheme (Becoming a Participant) Amendment Rules (No. 2) 2016* (the Amendment Rules) are made for the purposes of sections 22, 23, 25, 27 and 209 of the Act of the *National Disability Insurance Scheme Act 2013* (the Act), and deals with requirements relating to residence and age in the 2016 NDIS early transition areas in the Townsville, Charter Towers and Palm Island regions of Queensland 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 the National Disability Insurance Scheme (NDIS) 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 NDIS 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 Becoming a Participant Rules promote 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 NDIS 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.

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.

### **Implementation by age**

The Becoming a Participant Rules impose additional limitations on access to the NDIS based on age. It should be noted that the Act imposes a limitation that only persons aged under 65 can make a request to become a participant. This is because the NDIS is one aspect of a broader system of support in Australia. The intention is that people over the age of 65 should access the aged care system.

Under the Amendment Rules there are additional limitations on the age criteria in the Queensland 2016 NDIS early transition areas of the Townsville and Charters Towers local government areas. The additional age limitation is a temporary limitation until 30 June 2016, and will be reassessed at that point. The focus at this first stage of early transition is for eligible people aged under 18 years who may become participants from the date these amendments are registered and may have plans prepared from 1 April 2016 (in accordance with the *National Disability Insurance Scheme (Facilitating the Preparation of Plans – Queensland) Rules 2016*), particularly to assess the effectiveness of early intervention processes. Allied with this are the potential benefits to individual children in terms of reduced lifelong support needs.

All Governments are keen to see the benefits of the NDIS to individuals maximised, and support the incremental approach recommended by the Productivity Commission. The temporary age restrictions in the Townsville, Charters Towers early transition areas are considered reasonable and proportionate, because the age limitation will only be applied for a duration of three months (from when plans may be approved from 1 April 2016 until 30 June 2016).

### **Residence Requirements**

The Amendment Rules impose additional limitations on access to the NDIS on the basis of residence until commencement of the full scheme. During the period from when these amendments are registered to 30 June 2016, access to the NDIS will be limited to those living within the designated early transition area. This restriction is temporary in nature, and the intent of this limitation is the integrity and financial sustainability of the scheme during the early transition period.

### **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 the Amendment 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* 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.

### **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, consistently 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 NDIS.

**The Hon. Christian Porter MP  
Minister for Social Services**