

EXPLANATORY STATEMENT

Issued by the Authority of the Minister for Social Services

National Disability Insurance Scheme Act 2013

National Disability Insurance Scheme (Facilitating the Preparation of Participants' Plans—Tasmania) Rules 2016

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 (Facilitating the Preparation of Participants' Plans—Tasmania) Rules 2016* (the Phasing Rules—Tasmania) are made pursuant to sections 32 and 32A of the Act (but not under subsection 32A(4)).

The Phasing Rules—Tasmania are about the order in which the CEO of the National Disability Insurance Agency will commence the facilitation of the preparation of plans for different classes of participants in Tasmania. They should be read with the *National Disability Insurance Scheme (Becoming a Participant) Rules 2016*, which set out when people in Tasmania will be able to become participants. A person will only be able to have a plan once they are a participant.

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

The Phasing Rules—Tasmania are Category B rules for the purposes of the Act. Accordingly the Commonwealth and the host jurisdiction, the Government of Tasmania, have agreed to the making of the rules (see section 209 of the Act).

The Phasing Rules—Tasmania revoke and replace the *National Disability Insurance Scheme (Facilitating the Preparation of Participants' Plans—Tasmania) Rules 2013*, which had dealt with the facilitation of participants' in the age-based cohort that was the target group for the scheme's initial launch in Tasmania.

Commencement

The Phasing Rules—Tasmania commence on the day after this instrument is registered.

Consultation

The Phasing Rules—Tasmania were developed in close consultation with the Government of Tasmania.

The Phasing Rules—Tasmania are a legislative instrument for the purposes of the *Legislation Act 2003*.

Explanation of provisions

The Phasing Rules—Tasmania has three Parts:

- **Part 1** explains what the Phasing Rules—Tasmania are about.
- **Part 2** deals with the preparation of plans for residents of Tasmania.
- **Part 3** deals with other matters, including interpretation of the Phasing Rules—Tasmania.

Part 1 – What these Rules are about

Part 1 is explanatory and contextual.

Part 2 – Preparation of plans for residents of Tasmania

Paragraphs 2.1 to 2.3 explain how the CEO is to commence facilitating the preparation of a plan for a participant. The process for commencing the facilitation of the preparation of plans for participants in Tasmania is set out in a table in paragraph 2.6.

Paragraph 2.4 summarises the effect of subsection 32(3) of the Act.

Paragraph 2.5 summarises the effect of subsection 32A(3) of the Act.

Paragraph 2.6 contains a table which sets out seven classes of Tasmanian participants and the circumstances in which the CEO is to commence facilitating the preparation of those participants' plans.

The classes and circumstances in which the CEO is to commence each class have been defined jointly with the State of Tasmania to ensure that there is a smooth and steady transition for participants within these classes from the service or support they previously received to the scheme. This arrangement will provide certainty for:

- individuals about when they will enter the new scheme;
- providers to assist their business planning; and
- governments to ensure that they can plan for the future of affected programs and the expected impact on their budgets.

The CEO has a discretionary power to delay the commencement of several classes according to the Agency's capacity to begin facilitating new plans. This discretion would allow the CEO to respond to unforeseen events in Tasmania, or unanticipated levels of demand.

The details within this table are intended to give legal effect to the Bilateral Agreement between the Commonwealth and Tasmania.

Paragraph 2.7 provides clarification that participants who are co-residents in Tasmanian-funded shared Supported Accommodation will have their plans facilitated at the same time, within the earliest of the classes to which a participant who is a co-resident belongs.

Paragraph 2.8 provides clarification that individuals who are members of more than one class will be phased into the scheme in accordance with their earliest class.

Two changes from the predecessor Rules are:

- The CEO no longer has the capacity to determine subclasses within classes for the purposes of phasing.
- The CEO is not subject to a requirement to consult Tasmania and the Commonwealth about making a phasing decision.

Paragraph 2.9 requires that the CEO, when considering making certain phasing decisions after the date mentioned in the third column of the table in paragraph 2.6, must consult with the Government of Tasmania and of the Commonwealth Department that administers the Act and is his or her best endeavours to reach an agreement with those entities about the proposed decisions.

Paragraphs 2.10-2.13 set out subclasses of the main classes and the principles the CEO must have regard to in making decisions relating to these subclasses.

Paragraph 2.14 specifies that in considering whether to make a decision in relation to subclasses the CEO must, where practicable, consult with the Government of Tasmania.

Part 3 – Other matters

Citation

Paragraph 3.1 specifies the citation for the Phasing Rules—Tasmania.

Interpretation

Paragraphs 3.2 to 3.4 give guidance on interpretation and definitions for certain terms used in the Phasing Rules—Tasmania.

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 sets out the circumstances in which the facilitation of the preparation of participants' plans will commence in the State of Tasmania. The instrument identifies classes of Tasmania participants and sets out the circumstances in, or periods within, which the CEO is to commence the facilitation of the preparation of those participants' plans.

Progressive implementation

Consistent with the recommendations of the Productivity Commission, the scheme will be implemented progressively. The initial NDIS sites were the Hunter region in New South Wales, the Barwon region in Victoria, South Australia and Tasmania for specified age cohorts, the Australian Capital Territory, the Barkly region in the Northern Territory and the Perth Hills area in Western Australia. It is now proposed that the Scheme will be fully operational in Tasmania.

In Tasmania there is a gradual intake of participants to ensure that all participants are well supported as they make the transition to the scheme.

Human rights implications

The Phasing Rules—Tasmania engage the following human rights:

- The rights of persons with disabilities in the Convention on the Rights of Persons with Disabilities (CRPD), especially Articles 3 (general principles), 4 (general obligations) and 9 (accessibility), 19 (living independently and being included in the community) and 23 (respect for home and the family);
- Article 10 of the International Covenant on Economic, Social and Cultural Rights (ICESCR);
- Articles 2 and 26 of the International Covenant on Civil and Political Rights (ICCPR); and
- The rights of children in the Convention on the Rights of the Child (CRC), especially Articles 2, 9, 18 and 23.

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.

The objectives and general principles of the Act 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 Phasing Rules—Tasmania 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 to live independently, engage in the life of the community, 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. 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 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.

Progressive implementation by age

There is progressive implementation of the scheme by age in Tasmania. The additional age limitations are a temporary limitation with the express purpose to manage an orderly transition to the full Scheme.

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.

The Phasing Rules—Tasmania engage with Article 23 of the CRC which affirms the requirement for states to ensure a child with a disability should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community.

Conclusion

This instrument is compatible with human rights because it advances the protection of the rights of persons with disabilities in Australia, consistent with the CRPD. The Phasing Rules—Tasmania create 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 the Phasing

Rules—Tasmania limit human rights in some circumstances, those limitations are reasonable, necessary and proportionate to ensure the long-term integrity and sustainability of the scheme.