

## **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 (No. 2)*

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 (Becoming a Participant) Rules 2016* (the Becoming a Participant Rules) are made pursuant to sections 22, 23, 25, 27 and 209 of the Act. The Becoming a Participant Rules are about becoming a participant and the requirements relating to age, residence and disability or early intervention that must be met for a person to become a participant.

The *National Disability Insurance Scheme (Becoming a Participant) Amendment Rules 2016 (No. 2)* (Amendment Rules) amend the Becoming a Participant Rules. The Amendment Rules are made for the purposes of sections 22, 23 and 209 of the Act and give effect to the agreement between the Commonwealth of Australia and the State of Queensland relating to the transition to full scheme of the National Disability Insurance Scheme (NDIS) in Queensland from 1 July 2016. The Amendment Rules set out the additional age and residence requirements for prospective participants during transition to full scheme NDIS.

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

### **Commencement**

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

### **Consultation**

The Amendment Rules are Category B rules for the purposes of 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 Scheme Launch Transition Agency (NDIA) on the form of the Amendment Rules.

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

## Explanation of provisions

**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 (No. 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) Amendment Rules 2016*. This registration timeframe will ensure that access requests are able to be made by prospective participants and decided by the National Disability Insurance Agency (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) Amendment Rules 2016*.

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

**Schedule 1** sets out the amendments to the *National Disability Insurance Scheme (Becoming a Participant) Rules 2016 (Becoming a Participant Rules)*.

**Schedule 1, item 1** amends paragraph 8.4 to omit the definition of “2016 NDIS early transition areas”. These areas of Townsville, Charters Towers and Palm Island are now included as Queensland NDIS Areas, as defined in Schedule B to the *Becoming a Participant Rules*.

**Schedule 1, item 2 and item 3** amend Schedule A to the *Becoming a Participant Rules* to insert the additional access requirements for the remaining NDIS Areas in Queensland to reflect the transition to full scheme NDIS in Queensland from 1 July 2016. The *Becoming a Participant Rules* currently only deal with the additional age and residence requirements for the areas of Townsville, Charters Towers and Palm Island, previously defined as 2016 NDIS early transition areas.

The effect of this amendment is that the remaining eligible population in Townsville, Charters Towers and Palm Island will transition into the NDIS from 1 July 2016. Transition of all other areas in Queensland to the NDIS will occur progressively between 1 July 2016 and 30 June 2019, as detailed in the table at Schedule A, item 2 to the Amendment Rules, and noting the residence and age requirements.

Once the NDIS is fully operational in Queensland, that is from 1 July 2018, it is open to all residents up to the age of 65 in accordance with section 22(1)(a) of the Act.

The amendment at **Schedule 1, item 4** provides that from 1 July 2016, there are no additional age requirements for persons residing in Townsville or Charters Towers. This amendment allows the remaining population in these areas, who did not meet the additional age requirements set out in the first row of the table entitled

*Queensland* in Schedule A to the Becoming a Participant Rules, to access the NDIS from 1 July 2016.

**Schedule 1, item 5** amends Schedule B to the Becoming a Participant Rules to insert a new table to define the NDIS Areas in Queensland to which the Amendment Rules relate. These areas are defined by local government area, except the districts of Brisbane North and Brisbane South which are defined by postcode due to the size of the geographical area.

## 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 22, 23 and 209 of the Act and deals with the additional access requirements to facilitate the transition of participants across Queensland into the NDIS.

This instrument amends the *National Disability Insurance Scheme (Becoming a Participant) Rules 2016* (Becoming a Participant Rules).

## Human rights implications

The 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 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.

### *Progressive implementation by age*

The Becoming a Participant Rules impose additional limitation on access to the scheme 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 scheme 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 Becoming a Participant Rules there is progressive implementation of the scheme by age in certain jurisdictions. The additional age limitations are temporary and designed to ensure the orderly implementation of the scheme in accordance with agreements between the Commonwealth and the relevant jurisdictions. The temporary age restrictions are considered reasonable and proportionate.

### *Residence Requirements*

Both the Becoming a Participant Rules and this instrument impose additional limitations on access to the scheme on the basis of residence. These restrictions are temporary in nature, and the intent of this limitation is the integrity and financial sustainability of the Scheme during its transition.

### *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.

## **Conclusion**

This 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.