

## **EXPLANATORY STATEMENT**

Issued by the Authority of the Minister for Social Services

*National Disability Insurance Scheme Act 2013*

*National Disability Insurance Scheme (Plan Management) Amendment Rules 2017*

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 (Plan Management) Rules 2013* (the Plan Management Rules) are made for the purposes of sections 35, 40, 44, 45 and 46 of the Act. The Plan Management Rules are about the management of a participant's plan, including rules dealing with how to assess whether it would pose an unreasonable risk for a participant to manage their own plan; how and when National Disability Insurance Scheme (NDIS) amounts are paid; extension of the grace period for temporary absences from Australia; and how supports in a participant's plan are to be specified.

The *National Disability Insurance Scheme (Plan Management) Amendment Rules 2017* (the Amendment Rules) amend the Plan Management Rules. The Amendment Rules are made for the purposes of sections 33 and 35 of the Act.

The Amendment Rules amend the Plan Management Rules to address situations where a support is made available to be provided to participants under an in-kind arrangement with the Commonwealth or with a State or Territory as part of the contribution to the NDIS made by the Commonwealth, the State or the Territory (as the case may be). Where an in-kind support is available to be provided to a participant, the Amendment Rules provide that the participant's statement of participant supports must specifically identify that the support will be provided by the relevant provider of that in-kind support.

The Amendment Rules also make other minor amendments to the Plan Management Rules, including amendments to reflect amendments to relevant provisions of the Act.

The Minister, in making the Amendment Rules, has had regard to the need to ensure the 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 A rules for the purposes of section 209 of the Act. Accordingly, as required under subsection 209(4) of the Act, the Minister has consulted with the Commonwealth and each host jurisdiction about the making of the Amendment Rules. The Commonwealth and each host jurisdiction have agreed to the form of the Amendment Rules as a result of that consultation.

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**

**Paragraph 1** provides how the Amendment Rules are to be cited, that is, as the *National Disability Insurance Scheme (Plan Management) Amendment Rules 2017*.

**Paragraph 2** provides that the Amendment Rules commence on the day after the instrument is registered.

**Paragraph 3** provides that Schedule 1 to the Amendment Rules amends the Plan Management Rules.

**Schedule 1** sets out the amendments to the Plan Management Rules.

**Schedule 1, item 1** amends paragraph 6.3 of the Plan Management Rules to omit the second sentence. This sentence was included in the Plan Management Rules to summarise subsection 35(3) of the Act which was repealed by the *National Disability Insurance Scheme Legislation Amendment Act 2013*.

**Schedule 1, item 2** amends the text box at the end of paragraph 6.3 to omit the reference to subsection 35(3) of the Act which was repealed by the *National Disability Insurance Scheme Legislation Amendment Act 2013*.

**Schedule 1, item 3** inserts paragraph 6.3A after the text box at the end of paragraph 6.3. Paragraph 6.3A describes the function of paragraphs 6.4 to 6.7 and 6.9, which is to set out rules that apply to the description of a support in a participant's statement. The insertion of paragraph 6.3A has the effect that all references in paragraphs 6.4, 6.5, 6.6, 6.7 and 6.9 to "the support" or "the participant" are to be read as applying to the description of *each* support in *each* participant's statement.

**Schedule 1, items 4-7** make minor amendments to paragraphs 6.4, 6.6 and 6.7, as a consequence of the inclusion of new paragraph 6.3A by item 3. The amendments made by items 4-7 do not affect the operation of paragraphs 6.4, 6.6 and 6.7; they merely make minor changes to those provisions so that those provisions refer back to "the support" and "the participant" referred to in paragraph 6.3A.

**Schedule 1, item 8** omits paragraph 6.8 and inserts new paragraphs 6.8 to 6.13. The effect of these paragraphs is that, subject to limited exceptions, where an in-kind support is available to be provided to a participant, the participant's statement must specifically identify that the support will be provided by the relevant provider of that in-kind support.

New paragraph 6.8 defines "in-kind support" and provides that the rule in paragraph 6.9 applies to a support that is an "in-kind support". The definition of in-kind support has two elements. First, it must be a support that is available to be provided to the participant by a provider who is one of the following:

- the relevant jurisdiction – meaning the State or Territory in which the participant is provided with the support
- the Commonwealth
- a provider under a service delivery mechanism operated by the relevant jurisdiction or the Commonwealth
- a person engaged or funded by the relevant jurisdiction or the Commonwealth.

Second, an in-kind support must be a support that is made available to the Agency on an in-kind basis as part of the contribution to the NDIS made by the relevant jurisdiction or the Commonwealth. Where both of these elements are satisfied for a support, the support is an in-kind support, to which the rule in paragraph 6.9 applies.

Under paragraph 6.8 a support can be an in-kind support regardless of whether the participant has previously been provided with the support.

Paragraph 6.9 sets out the general rule that, subject to paragraphs 6.10-6.12, where a support is an in-kind support, the participant's statement must identify that the support will be provided by the in-kind support provider.

Paragraph 6.10 creates an exception to the rule in paragraph 6.9 where the relevant jurisdiction or the Commonwealth provides the CEO with written notification that an in-kind provider is not available to be specified as an in-kind provider in the participant's statement. The relevant jurisdiction or the Commonwealth can withdraw the availability of the services of an in-kind provider in relation to a particular participant or a class of participants, or in relation to a particular support or a class of supports.

Paragraph 6.11 creates an exception to the rule in paragraph 6.9 where the CEO considers that the provision of the support to the participant by the in-

kind provider would involve a serious threat to the participant's life, health or safety.

Paragraph 6.12 provides that the rule in paragraph 6.9 does not apply to supports provided after 30 June 2019. The effect of this is that the rule relating to in-kind supports will only apply during the roll-out period for the NDIS.

Paragraph 6.13 defines "relevant jurisdiction" and "in-kind contributor" for the purposes of Part 6 of the Plan Management Rules.

"Relevant jurisdiction" means the State or Territory in which the support is provided to the participant.

If a support is made available to the Agency on an in-kind basis as part of the contribution to the NDIS made by a State or Territory, the "in-kind contributor" for the support is that State or Territory. If a support is made available to the Agency on an in-kind basis as part of the contribution to the NDIS made by the Commonwealth, the "in-kind contributor" for the support is the Commonwealth. Under paragraph 6.10, the in-kind contributor can withdraw the availability of an in-kind provider.

**Schedule 1, item 8** replaces paragraph 6.8 of the Plan Management Rules. The previous paragraph 6.8 dealt with situations where supports had been provided to a person by the Commonwealth, a State or a Territory before they became a participant in the NDIS, and where there was a funding agreement in force relating to the provision of the support. The rule in that provision is subsumed and replaced by the new rule in paragraph 6.9 concerning in-kind supports.

## **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 33 and 35 of the *National Disability Insurance Scheme Act 2013* and deals with situations where a support is made available to be provided to participants under an in-kind arrangement with the Commonwealth or with a State or Territory as part of the contribution to the NDIS made by the Commonwealth, the State or the Territory (as the case may be).

This instrument amends the *National Disability Insurance Scheme (Plan Management) Rules 2013* (the Plan Management 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, 19, 20 and 22.
- Article 10 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

### *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 Plan Management Rules in paragraph 1.2 align closely with the CRPD principles. The key objective of the Act that is reflected in the Plan Management Rules is that:

- The Act should enable people with disability to exercise choice and control in the pursuit of their goals and planning and delivery of their supports.

This is reinforced by the following general principles contained in the Act and engaged in the Plan Management Rules:

- People with disability should be supported to exercise choice, including in relation to taking reasonable risks, in the pursuit of their goals and the planning and delivery of their supports
- People with disability have the same right as other members of Australian society to respect for their worth and dignity and to live free from abuse, neglect and exploitation
- People with disability have the same right as other members of Australian society to be able to determine their own best interests, including the right to exercise informed choice and engage as equal partners in decisions that will affect their lives, to the full extent of their capacity
- People with disability should be supported in all their dealings and communications with the Agency so that their capacity to exercise choice and control is maximised in a way that is appropriate to their circumstances and cultural needs
- People with disability should be involved in decision making processes that affect them, and where possible make decisions for themselves.

The Plan Management Rules also 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 that they need. The role of carers, families and other significant persons is also recognised and respected. In this way, the Plan Management 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.

*Choice and control in describing the supports in a participant's plan*

Part 6 of the Plan Management Rules and the amendments in this instrument relate to how supports in a plan are to be described, whether specifically or generally, and impact on the level of flexibility that can be exercised by the participant in obtaining the support. Supports that are to be specifically identified will have to be purchased in the way described in the plan, in the expectation that this will ensure the outcomes from the supports. The amendments made to the Plan Management Rules by this instrument will require that, where an in-kind support is available to be provided to a participant, the participant's statement of participant supports must specifically identify that the support will be provided by the relevant provider of that in-kind support unless a specified exemption to that requirement applies. The principles underlying this rule endeavour to strike a balance between giving persons with disability choice and control in a way that advances their goals and aspirations, and the need to ensure financial sustainability of the scheme.

Article 3 of the CRPD is positively engaged by Part 6 in expressing the need for states to respect the individual autonomy of persons with disabilities, including the freedom to make one's own choices and independence of such persons. Article 20 of the CRPD is specifically engaged which discusses the need for states to take effective measures to ensure personal mobility with the greatest possible independence for persons with disabilities including by facilitating this in the manner and at the time of their choice, and at an affordable cost.

Part 6 of the Plan Management Rules and the amendments to that Part in this instrument may appear to place a limitation on the ability of persons with disabilities to have choice and control in the manner and time of receiving a particular support. In particular, this instrument appears to limit this choice and control by providing that, where in-kind supports are available to be provided to a participant, the participant's plan must specify that supports will be provided by the relevant provider of that in-kind support. This limitation is justified on the basis that the legitimate objective for doing so is to ensure the financial sustainability of the scheme. If in-kind supports (provided as part of the contribution to the NDIS made by the Commonwealth, States and Territories) are under-utilised this may place financial pressure on the scheme. For this reason, ensuring that in-kind supports are fully utilised is important in ensuring the financial sustainability of the scheme.

It should also be noted that this limitation does not go beyond what is reasonable, necessary and proportionate, as there are exceptions to the general rule requiring the use of in-kind supports. First, there is an exception where the contributing jurisdiction provides the CEO with written notification that an in-kind provider is not available to be specified as an in-kind provider in a participant's statement. Second, there is an exception where the CEO considers that the provision of a support to a participant by an in-kind provider would involve a serious threat to the participant's life, health or



safety. Third, the rule is of limited duration: it will not apply after 30 June 2019. The rule will be in place only for the roll-out period of the NDIS.

### **Conclusion**

This legislative instrument is compatible with human rights because it advances the protection of the rights of persons with disabilities in Australia, consistent with the CRPD and ICECSR. The Plan Management Rules 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 this instrument amending the Plan Management Rules limits human rights in some circumstances, those limitations are reasonable, necessary and proportionate to ensure the long-term integrity and sustainability of the NDIS.