

## 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) Amendment Rules 2017*

### **Purpose**

The purpose of the National Disability Insurance Scheme (Facilitating the Preparation of Participants' Plans—Tasmania) Amendment Rules 2017 (Amendment Rules), is to amend the *National Disability Insurance Scheme (Facilitating the Preparation of Participants' Plans—Tasmania) Rules 2016* (the Phasing Rules—Tasmania) to enable the CEO to commence facilitating the preparation of participant's plans in Tasmania at an earlier date if both the Commonwealth and Tasmanian Governments agree and the NDIA has capacity to bring those participants into the Scheme early.

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. Under subsection 33(3) of the *Acts Interpretation Act 1901*, 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.

The Amendment Rules are made under sections 32 and 32A of the Act (but not under subsection 32A(4)).

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

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 National Disability Insurance Scheme (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 is supplemented by rules made under the Act, which address the more detailed operational aspects of the NDIS.

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. The Amendment Rules amend the Phasing Rules—Tasmania to reflect the agreement between the Commonwealth of Australia and the State of Tasmania to commence earliest possible facilitation of the preparation of participant plans in Tasmania. The Phasing Rules – Tasmania, as amended by the Amendment Rules, 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.

### **Commencement**

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

### **Consultation**

The Amendment Rules are Category B rules for the purposes of the Act. Accordingly, as required under subsection 209(5) of the Act, the Commonwealth has consulted with the host jurisdiction, Tasmania, about the making of the Amendment Rules. Tasmania 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 NDIA 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 reference number: 22937).

## **Explanation of provisions**

### Section 1

This section provides how the Amendment Rules are to be cited, that is, as the *National Disability Insurance Scheme (Facilitating the Preparation of Participants' Plans—Tasmania) Amendment Rules 2017*.

### Section 2

This section provides that the Amendment Rules commence on the day after the instrument is registered.

### Section 3

This section provides that Schedule 1 to the Amendment Rules amends the Phasing Rules—Tasmania.

### Schedule 1

Schedule 1 to the Amendment Rules sets out the amendments made to the Phasing Rules—Tasmania.

#### Schedule 1, item 1

Item 1 contains minor amendments to paragraph 2.3 of the Phasing Rules - Tasmania to clarify that the facilitation of participant's plans in Tasmania are to commence in accordance with the sequence specified in the table at paragraph 2.6.

#### Schedule 1, Item 2

Item 2 inserts new paragraph 2.5A to the Amendment Rules, which enables the CEO, where possible, to commence facilitation of the preparation of participant's plans at the earliest possible opportunity, noting changes to phasing arrangements must be agreed between the Commonwealth of Australia and the State of Tasmania. This will provide the CEO with a degree of flexibility and will ensure a more seamless transition.

## 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 is made pursuant to sections 32 and 32A of the Act (but not under subsection 32A(4)). This instrument amends the *National Disability Insurance Scheme (Facilitating the Preparation of Participants' Plans—Tasmania) Rules 2016* to enable the CEO, where possible, to commence facilitating the preparation of participant's plans at the earliest possible opportunity, noting changes to phasing arrangements need to be agreed between the Commonwealth of Australia and the State of Tasmania.

### *Progressive implementation*

Consistent with the recommendations of the Productivity Commission, the NDIS is being implemented progressively in Tasmania to ensure that all participants are well supported, as they make the transition to the scheme.

### 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 (general principles), 4 (general obligations), 7 (children with disabilities), 9 (accessibility), 19 (living independently and being included in the community), 22 (respect for privacy) 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 *National Disability Insurance Scheme (Facilitating the Preparation of Participants' Plans—Tasmania) Rules 2016*, as amended by the *National Disability Insurance Scheme (Facilitating the Preparation of Participants' Plans—Tasmania) Amendment Rules 2017*, 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 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. 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.

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.

### **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 Amendment 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 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.

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