

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 2018

Authority for this Instrument

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 2016* (the Becoming a Participant Rules) were 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 2018* (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 agreements between the Commonwealth and the State of Western Australia relating to the full transition of Western Australia to the National Disability Insurance Scheme (NDIS).

In addition to the power to make this Instrument under sections 32, 32A and 209 of the Act, subsection 33(3) of the *Acts Interpretation Act 1901* provides that 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 Minister, in making the Amendment Rules, has had regard to the financial sustainability of the NDIS as required by subsection 209(3) of the Act.

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

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 closely with the State of Western Australia as the relevant host jurisdiction. Western Australia has 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 Agency (the Agency) on the form of the Amendment Rules.

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 2018*.

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

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

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

Schedule 1, items 1-6, 11-12, and 14 amend paragraphs 1.1, 1.2, 1.3, 2.2, 2.7, 3.2, 8.1, 8.2, and 8.4 to replace references to the term “these Rules” with “this Instrument”. This is to be consistent with the *Acts Interpretation Act 1901*, the *Legislation Act 2003* and the wording of section 209 of the Act, which permits the Minister to make rules via legislative instrument. This also complies with paragraph 7(a) of the Office of the Parliamentary Counsel’s *Drafting Direction No. 1.1A* (issued 14 November 2016).

Schedule 1, items 7-10 reflect the removal of additional residence requirements for people residing in Western Australia that are contained in paragraphs 4.6- 4.12, due to Western Australia fully transitioning to the NDIS.

New paragraph 4.6 creates an exemption for Existing WA NDIS Participants to the additional residence requirements set out in Schedule 1 of the Instrument. This is to ensure persons who are Existing WA NDIS Participants are not disadvantaged by the transition of Western Australia to the NDIS.

Schedule 1, item 13 amends paragraph 8.3 by removing references to the term “these Rules” and replacing these with “this Instrument”. This is to be consistent with the *Acts Interpretation Act 1901*, the *Legislation Act 2003* and the wording of section 209 of the Act, which permits the Minister to make rules via legislative instrument. This amendment also omits the reference to the *Legislative Instruments Act 2003* and replaces this with a reference to the *Legislation Act 2003*.

Schedule 1, items 15-16 amend paragraph 8.4 to include the new definitions of “Existing WA NDIS Participant” and “WA NDIS Model”. A person is an Existing WA NDIS Participant if they are a participant of the WA NDIS Model (whether or not they already have a plan prepared in accordance with the Disability Services Commission’s requirements), and reside, or resided at any time on or after 1 July 2014, in one of the areas specified in the definition. The WA NDIS Model is the disability supports and services model, designed to mirror the NDIS and administered by the Western Australian Department of Communities.

Paragraph 8.4 is also amended to include the definitions “Victorian Government”, and “Instrument”.

Schedule 1, item 17 amends Schedule A to insert a new table of additional residence requirements for people residing in Western Australia. This amendment reflects the staged transition of Western Australia to the NDIS. The effect of this amendment is that people

residing in an area listed in the table, and on the date specified in the table, will meet the residence requirements to be an NDIS participant.

Schedule 1, item 18 amends Schedule B to the Becoming a Participant Rules to insert a new table that sets out the districts comprising the regions, and shires comprising the territories, which are the NDIS Areas in Western Australia. The districts are constituted under the *Local Government Act 1995* (WA) as at 1 December 2017.

Statement of Compatibility with Human Rights

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

The *National Disability Insurance Scheme (Becoming a Participant) Amendment Rules 2018* (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* (Cth).

Overview

This legislative instrument (Instrument) is made for the purposes of sections 22, 23 and 209 of the *National Disability Insurance Scheme Act 2013* (Cth) (the Act) and deals with amendments to *National Disability Insurance Scheme (Becoming a Participant) Rules 2016* (Becoming a Participant Rules) regarding the full transition of Western Australia to the NDIS, including those areas that are currently delivering the Western Australia disability supports and services model (the WA NDIS Model).

In particular, this Instrument sets out the areas that constitute the NDIS areas of Western Australia, and the new additional residency requirements that a resident of Western Australia must meet in order to meet the residency requirements of the NDIS access criteria. This Instrument also provides for the continuity of services for people in Western Australia who are currently receiving supports or funding under the WA NDIS Model (Existing WA NDIS Participants) when their area of residence transitions to the NDIS, by exempting them from the additional residence requirements.

Human rights implications

This Instrument is essential to the transitional implementation of the NDIS in Western Australia. The NDIS is designed to advance the human rights of people with severe and permanent disability. Specifically, this Instrument will help to ensure that the Agency would be able to efficiently process the large number of NDIS access requests from Existing WA NDIS Participants, as well as new applicants. Accordingly, this Instrument engages, either directly or indirectly, 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 recognises the barriers that people with disability may face in realising their rights. While the rights under all human rights treaties apply to everyone, including people with disability, the CRPD applies human rights specifically to the context of people with disability.

The establishment of the NDIS promotes the rights of people with disability in Australia by providing access to nationally consistent funding and support to help them realise their goals and 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: 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 people with disability to be able to participate fully and effectively and be included in society, the need for respect for difference and acceptance of people with disability as part of human diversity and providing people with disability 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 this Instrument align closely with the CRPD principles. The objectives and general principles of the Act and Becoming a Participant 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.

This Instrument recognises 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 people with disability 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, this Instrument 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, including on the basis of age or place of residence. This is reinforced in the context of human rights for people with disability 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.

Residence Requirements

Both the Becoming a Participant Rules and this Instrument impose additional limitations on access to the NDIS on the basis of residence. These restrictions are temporary in nature, to ensure the integrity and financial sustainability of the NDIS and minimal disruption to Existing WA NDIS Participants as Western Australia transitions to the NDIS, which is scheduled to be completed by 1 July 2020.

Protection of Privacy

Article 22 of the CRPD is engaged by the Becoming a Participant Rules to the extent that it allows the 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 this Instrument 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 people with disability in Western Australia, consistent with the CRPD. The NDIS creates opportunities for people with disability in Western Australia to exercise their rights by providing support to enable participation in the social, economic and cultural life of the community. To the extent that this Instrument limits human rights in some circumstances, those limitations are temporary, reasonable, proportionate and necessary to enable the full transition of Western Australia to the NDIS and ensure the long-term integrity and sustainability of the NDIS.

The Hon. Dan Tehan, Minister for Social Services