

EXPLANATORY STATEMENT

Issued by the authority of the Minister for Social Services

National Disability Insurance Scheme Act 2013

National Disability Insurance Scheme Amendment (Specialist Disability Accommodation – Participating Jurisdictions) Rule 2018

Purpose

Section 209 of the *National Disability Insurance Scheme Act 2013* (the NDIS Act) provides that the Minister may, by legislative instrument, make rules prescribing matters required or permitted by the NDIS Act to be prescribed, or which are necessary or convenient to be prescribed in order to carry out or give effect to the NDIS Act.

The *National Disability Insurance Scheme (Specialist Disability Accommodation) Rules 2016* (the SDA Rules) have been made for the purposes of sections 33, 35, 70, 72, 73 and 209 of the NDIS Act. The SDA Rules are about the funding of specialist disability accommodation for participants under the National Disability Insurance Scheme (NDIS) and the requirements that NDIS providers who provide specialist disability accommodation must comply with.

The *National Disability Insurance Scheme Amendment (Specialist Disability Accommodation – Participating Jurisdictions) Rule 2018* amend the SDA Rules. This instrument is made for the purposes of sections 35, 70, 72, 73 and 209 of the NDIS Act.

In addition to the power to make this instrument under the NDIS 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.

Background

The NDIS Quality and Safeguards Commission (the Commission) is an independent national commission established under the NDIS Act as amended by the *National Disability Insurance Scheme Amendment (Quality and Safeguards Commission and Other Measures) Act 2017* (the Quality and Safeguards Act). The Commission was established to protect and prevent people with disability from experiencing harm arising from poor quality or unsafe supports or services provided under the NDIS.

The Commission has jurisdiction in states and territories who are participating jurisdictions. A participating jurisdiction is a host jurisdiction that has agreed to be specified as a participating jurisdiction. Becoming a participating jurisdiction establishes the jurisdiction of the Commission over NDIS providers who are providing supports or services in that state or territory.

Persons or entities may become registered to provide certain supports or services. A person or entity who is registered in a participating jurisdiction is registered by the Commissioner of the Commission (the Commissioner) under section 73E of the Act and is known as a registered NDIS provider. A person or entity who is registered in a host jurisdiction that is not a participating jurisdiction is registered by the CEO of the National Disability Insurance Agency under section 70 of the Act and is known as a registered provider of supports.

The SDA Rules do not provide for specialist disability accommodation to be funded in participating jurisdictions. This instrument amends the SDA Rules so that funding for specialist disability accommodation can continue to be provided in all jurisdictions, including participating jurisdictions. Without this instrument, the SDA Rules will not allow registered NDIS providers to receive funding for specialist disability accommodation provided to participants in participating jurisdictions.

The Minister, in making this instrument has had regard to the financial sustainability of the NDIS as required by subsection 209(3) of the NDIS Act.

This instrument is a legislative instrument for the purposes of the *Legislation Act 2003*.

Commencement

This instrument commences on 1 July 2018.

Consultation

This instrument is a Category A rule for the purposes of section 209 of the NDIS Act. Accordingly, as required under subsection 209(4) of the NDIS Act, the Commonwealth and each host jurisdiction have agreed to the making of this instrument. Each host jurisdiction has agreed to the form of this instrument as a result of that consultation.

Each host jurisdiction has had the opportunity to review this instrument and provide comments and feedback. The Commonwealth has also undertaken a targeted consultation process with peak bodies representing people with disability and carers, providers of services for people with disability and workers providing supports or services to people with disability.

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:18793).

Explanation of the provisions

Section 1 - Name

This section provides how this instrument is to be cited, that is, as the *National Disability Insurance Scheme Amendment (Specialist Disability Accommodation – Participating Jurisdictions) Rule 2018*.

Section 2 - Commencement

This section provides that this instrument commences on 1 July 2018.

Section 3 - Authority

This section provides that Schedule 1 to this instrument is made under the *National Disability Insurance Scheme Act 2013*.

Section 4 - Schedules

This section provides that each instrument specified in a Schedule is amended as set out in that Schedule, and any other item in a Schedule has effect according to its terms.

Schedule 1

Schedule 1 to this instrument sets out the amendments made to the *National Disability Insurance Scheme (Specialist Disability Accommodation) Rules 2016* (the SDA Rules).

Schedule 1, Item 1

Item 1 amends paragraph 2.7 of the SDA Rules to insert the words, “*or a registered NDIS provider*” after the words, “*registered provider of supports*”. This amendment makes it clear that for the purposes of the SDA Rules, specialist disability accommodation can be provided by a registered NDIS provider in participating jurisdictions, as well as registered providers of supports.

Under the Act a ‘registered provider of supports’ means a person or entity approved under section 70 of the Act as a registered provider of supports.

Schedule 1 - Item 2

Item 2 amends paragraph 2.13 of the SDA Rules by inserting the words, “*in a host jurisdiction that is not a participating jurisdiction*” after the words, “*under the NDIS*”. This amendment makes it clear that for the purposes of Part 7 of the SDA Rules deals only with providers who are providing supports or services in host jurisdictions that are not participating jurisdictions.

Schedule 1 - Item 3

Item 3 inserts a new heading “*Division 1 General Requirements*” after the heading for Part 6 of the SDA.

This amended heading reflects that Part 6 of the SDA Rules is being amended by dividing this part into two divisions. Division 1 of the SDA Rules is amended to encompass paragraphs 6.1 to 6.4 and addresses requirements for specialist disability accommodation to be funded in both participating jurisdictions and in host jurisdictions that are not participating jurisdictions. Division 2 of Part 6 of the SDA Rules is created by item 6 of Schedule 1 to this instrument and addresses

requirements for specialist disability accommodation to be funded in host jurisdictions that are not participating jurisdictions.

Schedule 1 - Item 4

Item 4 amends subparagraph 6.1(a) of the SDA Rules to omit the words, “*registered provider (see Part 7)*” and replace these words with the words, “*registered provider of supports or a registered NDIS provider*”.

This amendment makes it clear that specialist disability accommodation can be:

- provided by a registered provider of supports and by a registered NDIS provider; and
- funded in participating jurisdictions and host jurisdictions that are not participating jurisdictions.

Schedule 1 - Item 5

Item 5 amends subparagraph 6.2(e) of the SDA Rules to insert the words, “*in relation to registered providers of supports and see the National Disability Insurance Scheme (Specialist Disability Accommodation Conditions) Rules 2018 for registered NDIS providers*” after the words, “*see paragraphs 6.5-6.13*”.

This amendment clarifies that paragraphs 6.5-6.13 of the SDA Rules relate to enrolment requirements for dwellings in host jurisdictions that are not participating jurisdictions because the enrolment requirements for specialist disability accommodation dwellings in participating jurisdictions are set out in the *National Disability Insurance Scheme (Specialist Disability Accommodation Conditions) Rules 2018* (Specialist Disability Accommodation Conditions Rules).

Schedule 1 - Item 6

Item 6 repeals the heading after 6.4 of the SDA Rules, “*Enrolment of dwellings*” and replaces this with the heading, “*Division 2 Enrolment of dwellings by registered providers of supports*”.

This amendment creates a new Division 2 of Part 6 of the SDA Rules. Division 2 contains paragraphs 6.5 to 6.18 and relates only to the requirements to enrol a dwelling in host jurisdictions that are not participating jurisdictions.

The requirements to enrol a dwelling in participating jurisdictions are set out in the Specialist Disability Accommodation Conditions Rules.

Schedule 1 - Item 7

Item 7 amends paragraph 6.5 of the SDA Rules to omit the words, “*registered provider may enrol a dwelling*” and replace these words with the words, “*registered provider of supports may enrol a dwelling in a host jurisdiction that is not a participating jurisdiction*”.

This amendment makes it clear that paragraph 6.5 of the SDA Rules applies only to registered providers or supports, not to registered NDIS providers. The amendment

also clarifies that registered providers of supports can only enrol dwellings in host jurisdictions that are not participating jurisdictions.

Schedule 1 - Item 8

Item 8 amends the heading of Part 7 of the SDA Rules by inserting the words, *“who are registered providers of supports”* after the words, *“SDA providers”*.

This amendment makes it clear that Part 7 of the SDA Rules relates to the registration of registered providers of supports only. Registration requirements for registered NDIS providers providing specialist disability accommodation supports are set out in the Specialist Disability Accommodation Conditions Rules.

Schedule 1 - Item 9

Item 9 amends paragraph 7.1 of the SDA Rules by inserting the words, *“This part applies to registered providers of supports and does not apply to registered NDIS providers”* at the end of that paragraph.

This amendment makes it clear that Part 7 of the SDA Rules makes provision for the registration requirements of registered providers of supports only. The registration requirements and conditions of registration for registered NDIS providers providing specialist disability accommodation supports are set out in the Specialist Disability Accommodation Conditions Rules.

Schedule 1 -Item 10

Item 10 amends paragraph 7.4 of the SDA Rules by inserting the words, *“of supports”* after the words, *“with which registered providers”*.

This amendment makes it clear that Part 7 of the SDA Rule sets out the registration requirements of registered providers of supports only. The registration requirements and conditions of registration for registered NDIS providers providing specialist disability accommodation supports are set out in the Specialist Disability Accommodation Conditions Rules.

Schedule 1 - Item 11

Item 11 inserts a new paragraph 7.5A after paragraph 7.5 of the SDA Rules. New paragraph 7.5A provides that *“For the registration of SDA providers who are registered NDIS providers see the National Disability Insurance Scheme (Specialist Disability Accommodation Conditions) Rules 2018”*.

This amendment points to the Specialist Disability Accommodation Conditions Rules, and clarifies that the registration requirements and conditions of registration for registered NDIS providers providing specialist disability accommodation supports can be found in those rules.

Schedule 1 - Item 12

Item 12 amends paragraph 7.6 of the SDA Rules by inserting the words, *“in a host jurisdiction that is not a participating jurisdiction”* after the words, *“under the NDIS”*.

This amendment makes it clear that paragraph 7.6 of the SDA Rules imposes the requirement to be a registered provider of supports when providing specialist disability accommodation in host jurisdictions that are not participating jurisdictions.

The *National Disability Insurance Scheme (Provider Registration and Practice Standards) Rules 2018* require persons or entities who provide specialist disability accommodation in participating jurisdictions to be registered NDIS providers.

Schedule 1 - Item 13

Item 13 amends the note after paragraph 7.6 of the SDA Rules by inserting the words, “*in a host jurisdiction that is not a participating jurisdiction*” after the words, “*under the NDIS*”.

This amendment makes it clear that the requirement to become a registered provider of supports in order to provide specialist disability accommodation only applies to providers in host jurisdictions that are not participating jurisdictions.

This is because a person or entity can only provide supports, as a registered provider of supports, to participants that are not in a participating jurisdiction (see paragraph 70(1)(ca) of the Act).

Schedule 1 - Item 14

Item 14 amends the note after paragraph 7.33 of the SDA Rules by replacing the words, “*registered provider’s*” with the words, “*registered provider of supports*”.

This amendment makes it clear that the CEO may only revoke the registration of a person or entity who is a registered provider of supports, and not a registered NDIS provider. The registration of a registered NDIS provider may only be revoked by the Commissioner.

Statement of Compatibility with Human Rights

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

National Disability Insurance Scheme (Specialist Disability Accommodation – Participating Jurisdictions) Rule

The *National Disability Insurance Scheme Amendment (Specialist Disability Accommodation – Participating Jurisdictions) Rule* 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 of the legislative instrument

The *National Disability Insurance Scheme Amendment (Specialist Disability Accommodation – Participating Jurisdictions) Rule 2018* amends *National Disability Insurance Scheme (Specialist Disability Accommodation) Rules 2016*. This instrument is made for the purposes of sections 35, 70, 72, 73 and 209 of the *National Disability Insurance Scheme Act 2013* (NDIS Act).

The *National Disability Insurance Scheme (Specialist Disability Accommodation) Rules 2016* only enable payments to be made to registered providers operating in a host jurisdiction. The amendments made by the instrument extend funding for specialist disability accommodation to a registered NDIS provider operating in a participating jurisdiction.

“Participating jurisdiction” is defined as a host jurisdiction that the Minister has specified, by legislative instrument, as a participating jurisdiction: section 10A of the NDIS Act. Under the *National Disability Insurance Scheme (Participating Jurisdiction) Specification 2018* the Minister has specified that New South Wales and South Australia are participating jurisdictions with effect from 1 July 2018.

Background

The NDIS Quality and Safeguards Commission (the Commission) is an independent national agency established by the *National Disability Insurance Scheme Amendment (Quality and Safeguards) Act 2017*. The Commission was established to protect and prevent people with disability from experiencing harm arising from poor quality or unsafe supports or services provided under the NDIS.

The Commission has jurisdiction in states and territories who are participating jurisdictions. A participating jurisdiction is a host jurisdiction that has agreed to be specified as a participating jurisdiction. Becoming a participating jurisdiction establishes the jurisdiction of the Commission over NDIS providers who are providing supports or services in that state or territory.

Persons or entities may become registered to provide certain supports or services. A person or entity who is registered in a participating jurisdiction is registered by the Commissioner of the Commission (the Commissioner) under section 73E of the NDIS Act and is known as a registered NDIS provider. A person or entity who is

registered in a host jurisdiction that is not a participating jurisdiction is registered by the CEO of the National Disability Insurance Agency under section 70 of the NDIS Act and is known as a registered provider of supports.

The *National Disability Insurance Scheme (Specialist Disability Accommodation) Rules 2016* do not provide for specialist disability accommodation to be funded in participating jurisdictions. This instrument amends the *National Disability Insurance Scheme (Specialist Disability Accommodation) Rules 2016* so that funding for specialist disability accommodation can continue to be provided in all jurisdictions, including participating jurisdictions. Without this instrument, the *National Disability Insurance Scheme (Specialist Disability Accommodation) Rules 2016* will not allow registered NDIS providers to receive funding for specialist disability accommodation provided to participants in participating jurisdictions.

Human rights implications

The *National Disability Insurance Scheme (Specialist Disability Accommodation) Rules 2016* and this instrument 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, 9, 19 and 28;
- Article 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

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 NDIS 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
- the need to provide persons with disabilities the opportunity to be involved actively in decision-making processes about policies and programmes, including those directly concerning them.

The NDIS Act sets out objects and general principles that are closely aligned with the CRPD rights recognised by Articles 3, 9 and 19. These objects and general principles have been directly applied in the substance of the *National Disability Insurance Scheme (Specialist Disability Accommodation) Rules 2016*. The general

principles, references in paragraph 1.4 of the *National Disability Insurance Scheme (Specialist Disability Accommodation) Rules 2016* Rules include:

- supporting the independence and social and economic participation of people with disability;
- providing reasonable and necessary supports, including early intervention supports, for participants in the National Disability Insurance Scheme launch;
- enabling people with disability to exercise choice and control in the pursuit of their goals and the planning and delivery of their supports;
- promoting the provision of high quality and innovative supports that enable people with disability to maximise independent lifestyles and full inclusion in the community.

The CRPD (for persons with disabilities) and Article 11 of the ICESCR recognise the right to an adequate standard of living including adequate housing and to the continuous improvement of living conditions. For NDIS participants with extreme functional impairment or very high support needs specialist disability accommodation supports are important in securing this right.

In particular, the *National Disability Insurance Scheme (Specialist Disability Accommodation) Rules 2016* and the *National Disability Insurance Scheme Amendment (Specialist Disability Accommodation – Participating Jurisdictions) Rule 2018* and the funding model for specialist disability accommodation promote the right to adequate housing by:

- assisting people with disability to access accommodation that is well-suited to their needs where it is available, and to access other suitable options or support where such accommodation is not currently available; and
- stimulating increased supply of specialist housing that responds to the needs and preferences of participants, as well as innovation in supported disability housing solutions.

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, and promotes the right to adequate housing recognised in Article 11 of the ICESCR.

The Hon Dan Tehan MP, Minister for Social Services

National Disability Insurance Scheme Amendment (Specialist Disability Accommodation – Participating Jurisdictions) Rule 2018