

EXPLANATORY STATEMENT

Issued by the authority of the Minister for Social Services

National Disability Insurance Scheme Act 2013

National Disability Insurance Scheme (NDIS Provider Definition) Rule 2018

Purpose

The *National Disability Insurance Scheme (NDIS Provider Definition) Rule 2018* prescribes certain persons and entities to be NDIS providers for the purposes of section 9 of the *National Disability Insurance Scheme Act 2013* (the NDIS Act).

Background

This instrument is made for the purposes of section 9 and section 209 of the NDIS Act. The *National Disability Insurance Scheme Amendment (Quality and Safeguards Commission and Other Measures) Act 2017* amended the NDIS Act.

Section 209 of the NDIS 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. This instrument is made by the Commissioner of the NDIS Quality and Safeguards Commission (Commissioner) as delegate for the Minister for Social Services.

The NDIS Act (as amended) establishes the NDIS Quality and Safeguards Commission (the Commission) as an independent national commission to protect and prevent people with disability from experiencing harm arising from poor quality or unsafe supports or services under the National Disability Insurance Scheme (NDIS).

Under the NDIS Act an NDIS provider means:

- (a) a person (other than the Agency) who receives:
 - (i) funding under the arrangements set out in Chapter 2; or
 - (ii) NDIS amounts (other than as a participant); or
- (b) a person or entity:
 - (i) who provides supports or services to people with disability other than under the National Disability Insurance Scheme; and
 - (ii) who is prescribed by the National Disability Insurance Scheme rules for the purposes of this subparagraph

This instrument prescribes that NDIS Provider includes a person or entity who is providing supports or services to older people with disability who are receiving continuity of support under the Commonwealth Continuity of Support Programme.

The Commonwealth Continuity of Support Programme was established to meet the Council of Australian Governments' (COAG) commitment that older people with disability who were receiving state-administered specialist disability services, but who are ineligible for the NDIS as a result of their age, will be provided with continuity of support. In this context, continuity of support means supporting clients to achieve similar outcomes to those they were achieving prior to transitioning to the new arrangements.

Prescribing an entity to be an NDIS provider means that they will be subject to the jurisdiction of the Commission if they provide supports or services to people with disability in participating jurisdictions.

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

Section 4 of the *Acts Interpretation Act 1901* (AI Act), concerns the exercise of power between the passing and commencement of an Act. It applies if, at a time (the start time), an Act will confer a power to make an appointment or to make an instrument of legislative or administrative character, and either (a) the Act will commence at the start time, or (b) the Act will be amended by another Act that commences at the start time: subsection 4(1). Subsection 4(2) of the AI Act permits, in limited circumstances, the power to be exercised before the commencement of the Act. These circumstances include, bringing the appointment or instrument into effect, bringing the Act concerned into operation, making the Act concerned or the other Act as amended fully effective at or after the start time of the Act concerned. Subsection 4(3), of the AI Act authorises anything to be done before the start time for the purpose of enabling the exercise of the power, or of bringing the appointment or instrument into effect, as if the relevant commencement had occurred. Paragraph 13(1)(a) of the *Legislation Act 2013* provides that the AI Act applies to any instrument so made as if it were an Act and as if each provision of the instrument were a section of an Act. The instrument of appointment of the Commissioner of the NDIS Quality and Safeguards Commission and the Minister's delegation instrument operate subject to section 4 of the AI Act.

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

Commencement

The instrument commences on 1 July 2018 (immediately after the instrument of appointment of the Commissioner of the NDIS Quality and Safeguards Commission and the delegation instrument to the Commissioner commence).

Consultation

This instrument contains rules that are Category D rules for the purposes of subsection 209(7) of the NDIS Act. Accordingly, as required under subsection 209(7) of the NDIS Act, the Commonwealth has consulted with each host jurisdiction.

Within the Commonwealth, the Department of Social Services has consulted on the content of this instrument with the National Disability Insurance Agency, and with the Department of Health since the Commonwealth Continuity of Support Programme is administered by the Department of Health.

Regulation Impact Statement (RIS)

The Office of Best Practice Regulation (OBPR) has been consulted and has advised that a RIS is not required (OBPR ID 16842).

Explanation of the provisions

Preamble

The Preamble sets out the overall policy objectives underlying the instrument. The content of the preamble is based in part on the NDIS Quality and Safeguarding Framework, available on the Department of Social Services website at <https://www.dss.gov.au/disability-and-carers/programs-services/for-people-with-disability/ndis-quality-and-safeguarding-framework>.

Section 1 – Name

The instrument is titled the *National Disability Insurance Scheme (NDIS Provider Definition) Rule 2018*.

Section 2 – Commencement

The instrument commences on 1 July 2018.

Section 3 – Authority

The instrument is made under the *National Disability Insurance Scheme Act 2013*.

Section 4 – Definitions

This section provides that in the instrument, references to ‘Act’ mean the *National Disability Insurance Scheme Act 2013*.

Section 5 – Definition of NDIS Provider

This section provides that an NDIS provider includes a person or entity who is providing supports or services to older people with disability who are receiving continuity of support under the Commonwealth Continuity of Support Programme relating to Specialist Disability Services for Older People.

Prescribing the above entities to be NDIS providers means that the entities will be subject to the jurisdiction of the Commission. This in effect expands the jurisdiction of the Commission and aligns with the COAG commitment to people with disability

under the Commonwealth Continuity of Support Programme relating to Specialist Disability Services for Older People.

Statement of Compatibility with Human Rights

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

National Disability Insurance Scheme (NDIS Provider Definition) Rule 2018

The *National Disability Insurance Scheme (NDIS Provider Definition) Rule 2018* (the 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 of the legislative instrument

The instrument prescribes certain persons and entities to be NDIS providers for the purposes of section 9 of the *National Disability Insurance Scheme Act 2013* (the NDIS Act).

Under the NDIS Act an NDIS provider means:

- (a) a person (other than the Agency) who receives:
 - (i) funding under the arrangements set out in Chapter 2; or
 - (ii) NDIS amounts (other than as a participant); or
- (b) a person or entity:
 - (i) who provides supports or services to people with disability other than under the National Disability Insurance Scheme; and
 - (ii) who is prescribed by the National Disability Insurance Scheme rules for the purposes of this subparagraph

This instrument prescribes that NDIS Provider includes a person or entity who is providing supports or services to older people with disability who are receiving continuity of support under the Commonwealth Continuity of Support Programme.

Background

The Commonwealth Continuity of Support Programme was established to meet the Council of Australian Governments' (COAG) commitment that older people with disability who were receiving state-administered specialist disability services, but who are ineligible for the NDIS as a result of their age, will be provided with continuity of support. In this context, continuity of support means supporting clients to achieve similar outcomes to those they were achieving prior to transitioning to the new arrangements.

The NDIS Act (as amended by the *National Disability Insurance Scheme Amendment (Quality and Safeguards Commission and Other Measures) Act 2017*) establishes the NDIS Quality and Safeguards Commission (the Commission) as an independent national commission to protect and prevent people with disability from

experiencing harm arising from poor quality or unsafe supports or services under the National Disability Insurance Scheme (NDIS).

Prescribing an entity to be an NDIS provider means that they will be subject to the jurisdiction of the Commission if they provide supports or services to people with disability in participating jurisdictions.

Human rights implications

The instrument advances the protection of the rights of people with disability in Australia consistent with the Convention on the Rights of Persons with Disabilities (CRPD) and engages the following rights under international human rights law:

- The rights of people with disabilities in the, *Convention on the Rights of Persons with Disabilities* (CRPD), especially articles 3, 4, 5, 12, 13, 16, 17, 19, 20, 21, 22, 25, 26, 28, 30 and 31;
- Articles 9 and 12 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR); and
- Article 17 of the *International Covenant on Civil and Political Rights* (ICCPR).

Overall, the Commission will promote the rights of people with disabilities in Australia by protecting and preventing people with disability from experiencing harm arising from poor quality or unsafe supports or services under the NDIS.

This instrument engages with these Articles by expanding the jurisdiction of the Commissioner of the Commission to cover older people with disability who are receiving supports or services under the Commonwealth Continuity of Support Programme relating to Specialist Disability Services for Older People. In particular, all NDIS providers, and any persons who are employed or otherwise engaged by an NDIS provider, are subject to the Code of Conduct and the complaints jurisdiction of the Commissioner of the Commission. Further, NDIS providers may be registered by the Commissioner, and thereby be covered by the Commissioner's full suite of regulatory powers.

Conclusion

This instrument is compatible with human rights because it advances the protection of human rights in particular, by expanding the jurisdiction of the Commissioner to older people with disability under the Commonwealth Continuity of Support Programme relating to Specialist Disability Services for Older People.

Graeme Head, Commissioner of the NDIS Quality and Safeguards Commission