

## **EXPLANATORY STATEMENT**

Issued by the authority of the Minister for Families and Social Services

*National Disability Insurance Scheme Act 2013*

*National Disability Insurance Scheme Amendment (Specialist Disability  
Accommodation) Rules 2019*

### **Purpose**

Section 209 of the *National Disability Insurance Scheme Act 2013* (the Act) provides that the Minister may, by legislative instrument, make rules prescribing 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 (Specialist Disability Accommodation) Rules 2016* (SDA Rules) have been made under section 209 of the Act for the purposes of sections 33, 35, 70, 72 and 73 of the Act. The SDA Rules are about the funding of specialist disability accommodation (SDA) for participants under the National Disability Insurance Scheme (NDIS) and the requirements that NDIS providers who provide SDA must comply with.

The *National Disability Insurance Scheme Amendment (Specialist Disability Accommodation) Rules 2019* amend the SDA Rules. This instrument is made under section 209 of the Act for the purposes of sections 35, 48, 70, 72 and 73 of the Act.

In addition to the power to make this instrument under 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.

### **Background**

This instrument supports the implementation of several recommendations arising out of a review of the Specialist Disability Accommodation Pricing and Payments Framework (SDA Framework), commissioned by the Council of Australian Governments' (COAG) Disability Reform Council. This review was brought forward by the Disability Reform Council in response to concerns expressed by SDA participants, providers and investors.

As part of the review, it was identified that the operation of SDA could be markedly improved by making changes to the SDA Rules. These changes remove obstacles to SDA being included in participant plans in cases where an appropriate dwelling is yet to be identified. They clarify that when a participant is eligible for SDA, the range of design categories, building types and locations for which they are eligible is recorded in the participant's plan, regardless of whether a particular dwelling has

been identified. This will allow the participant to approach the market. In addition, they remove the requirement for a participant to exhaust all other options before they can be eligible for SDA. These changes signal to SDA providers and investors that there is a demand for SDA and encourage increased investment in SDA dwellings. They also allow eligible SDA participants to approach providers or investors, including to commission the construction of purpose-built housing which meets their needs and goals. These changes recognise that supply of SDA is still developing and allow participants to be funded to reside in SDA of a design category, building type or location they have not been determined as eligible for, including basic design category SDA which meets the definition of existing stock.

Additional consequential amendments have been made to the SDA Rules in order to give effect to these changes. This includes providing for the Chief Executive Officer (CEO) of the National Disability Insurance Agency (NDIA) to consider whether support coordination and other capacity building supports are required to assist the participant in finding and moving into any SDA where they choose to live, regardless of whether or not it is specified in a participant's plan. It also includes providing for the CEO to conduct a review of a participant's plan when a participant moves to different SDA, in order to confirm that their other NDIS supports are still reasonable and necessary. These changes ensure the portability of NDIS supports and are consistent with the overarching principles in the Act of participant choice and control.

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

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

### **Commencement**

The instrument commences on the day after it is registered.

### **Consultation**

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

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)**

A RIS is not required for this instrument (OBPR ID 24834).

## **Explanation of the provisions**

### Section 1 – Name

Section 1 states the name of the instrument.

### Section 2 – Commencement

Section 2 states the commencement date of the instrument.

### Section 3 – Authority

Section 3 states the authority under which the instrument is made.

### Section 4 – Schedules

Section 4 provides that each instrument that is specified in a Schedule is amended or repealed as set out in that Schedule, and any other item in a Schedule to the instrument has effect according to its terms.

### Schedule 1 – Amendments

#### **Item 1 and 7 – Sections 2.10 and 4.5(e)**

These are consequential amendments to the repeal of paragraph 4.10 by item 10.

#### **Item 2 – Sections 3.1-3.3**

This item repeals paragraphs 3.1, 3.2 and 3.3 and replaces them with new paragraph 3.1.

New paragraph 3.1 ensures that eligibility for SDA is solely determined based on whether or not the participant meets the assessment criteria outlined in paragraphs 3.4 to 3.8. As a result of item 2, determining eligibility for SDA no longer involves consideration of other suitable supports and pathways for the participant that would assist the participant either as an alternative to providing SDA, or in combination with SDA. This item gives effect to the policy position that a participant's eligibility for SDA should be based on an assessment of whether or not they need SDA and not on whether or not they are able to access other accommodation or supports. It is anticipated that this may lead to decreased delays in the plan approval process.

#### **Items 3 and 4 – Sections 3.11-3.12**

These items repeal paragraphs 3.11 and 3.12, including the heading to paragraph 3.11.

These repeals remove the requirement for the CEO to consider whether capacity building supports should be funded before SDA. As a result, once a participant is found eligible for SDA, the appropriate design category or categories, building type or types and location or locations must be determined for them in accordance with new paragraph 4.1. This supports the intention that SDA should be funded for a

participant based on eligibility and should not depend on whether or not the participant could access other accommodation or supports.

#### **Item 5 – Sections 4.1-4.2**

Item 5 repeals paragraphs 4.1 and 4.2 and replaces them with new paragraph 4.1.

New paragraph 4.1 provides that if a participant is eligible for SDA, the CEO must determine the appropriate SDA for that participant. It simplifies the process for determining the appropriate SDA for a participant by removing the previous 5 step process.

This provides for a range of design categories, building types and locations to be determined as appropriate for a participant, providing both flexibility and choice in the SDA that may be funded. It also provides, in combination with new paragraph 5.1, that if SDA is being provided as an in-kind support, this is recorded in a participant's plan in accordance with the *National Disability Insurance Scheme (Plan Management) Rules 2013*.

New paragraph 4.1 also has the result that determination of appropriate SDA is not dependent on the availability, or impending availability of a particular dwelling.

#### **Items 6 and 8 – Sections 4.4 and 4.6**

These items repeal the text boxes at the end of paragraphs 4.4 and 4.6. These text boxes either duplicate information contained elsewhere in substantive provisions, or reference now repealed paragraphs of the SDA Rules.

#### **Item 9 – Section 4.8**

Item 9 adds text to the end of paragraph 4.8 to reinforce the position that there may be a range of locations in which it may be appropriate for a participant's SDA to be located. This is consistent with and supported by new paragraph 4.1.

#### **Items 10 and 11 – Section 4.10**

Items 10 and 11 repeal paragraph 4.10, including the heading and the text box.

An alternative interim option is no longer considered a necessary addition to the SDA Rules as:

- new paragraph 4.1 provides for the determination of a range of SDA to be considered appropriate for the participant;
- new paragraph 4.1 provides that determination of appropriate SDA is no longer dependent on the availability of a particular dwelling; and
- new paragraph 5.7 provides for a participant to reside in and have specified in their plan SDA for which they have not been determined as eligible.

As a result, there will be no need to specify an alternative interim option for a participant to reside in until appropriate SDA is available. If there is a need for SDA which does not meet the type identified as appropriate for a participant, the participant may request it under new paragraph 5.7 inserted by item 15 or it may be the participant's current dwelling determined for them under paragraph 4.11.

## **Item 12 – Section 4.11**

Item 12 amends paragraph 4.11 to clarify that the purpose of determining a participant's current dwelling under paragraph 4.11 is to ensure that they can be funded for SDA while residing in their current enrolled SDA property.

## **Item 13 – Section 4.12**

Item 13 amends paragraph 4.12 to clarify that the CEO may consider whether support coordination and other capacity building supports are required to assist the participant in finding and moving into any SDA, regardless of whether or not it is specified in the participant's plan.

## **Item 14 – Sections 5.1-5.3**

Item 14 repeals paragraphs 5.1, 5.2 and 5.3 and substitutes new paragraphs 5.1 and 5.2.

New paragraph 5.1 provides that once a participant is found eligible for SDA, certain matters are to be recorded in their plan.

New paragraph 5.1(a) provides that a determination of eligibility under new paragraph 4.1 is recorded in a participant's plan. This will provide certainty to the participant that they are eligible for SDA funding, and that eligibility is not conditional upon the availability of SDA and other supports. Even if a participant is eligible for SDA, and this is recorded in their plan to indicate that they can access SDA, funding cannot be provided until the conditions in Part 6 of the SDA Rules are satisfied. The recording of eligibility in plans will also operate as a signal to the market, including SDA property developers and investors, of the level of demand and potential funding for SDA.

New paragraph 5.1(b) provides for the matters determined in new paragraph 4.1 to be recorded in a participant's plan. This includes listing the design category or range of design categories, the building type or range of building types and the location or range of locations determined as appropriate for the participant. The recording of these matters will act as a signal to the market, including SDA property developers and investors, of the demand for SDA, and provide an indication of the specific needs of participants. It is anticipated that participants will be able to use the specification of these matters in their plan in order to commission the development of purpose-built SDA, which carries with it certainty of funding. New paragraph 5.1(b) also provides that, in conjunction with new paragraph 4.1(a)(iv), if SDA is being provided as an in-kind support, this is recorded in the participant's plan in accordance with the *National Disability Insurance Scheme (Plan Management) Rules 2013*.

New paragraph 5.2 provides for a wide variety of other matters to be recorded in a participant's plan in a range of forms. It confirms that what is to be recorded in a plan is not limited to the matters specified in new paragraph 5.1. This may include, but is not limited to, recording that a participant is currently residing in SDA of a design category, building type or location not determined under new paragraph 4.1(a) for which the participant has been found eligible.

## **Item 15 – Section 5.7**

Item 15 repeals paragraph 5.7 and substitutes new paragraphs 5.7, 5.7A, 5.7B and 5.7C.

New paragraph 5.7 recognises that a participant may reside in and, in conjunction with Part 6 of the SDA Rules, at their request be funded for, SDA of a design category, building type or location for which they have not been determined as eligible under new paragraph 4.1. This recognises that a participant may exercise choice and control over the SDA they reside in and are potentially funded for.

In order to reside in and potentially be funded for SDA of a design category, building type or location which has not been determined for them under new paragraph 4.1, a participant may request the CEO to have that other SDA specified in their plan. New paragraph 5.7 also confirms that a participant may request to have a basic design category dwelling specified in their plan. This specification is however subject to new paragraph 5.7B.

New paragraph 5.7A clarifies that the specification of other SDA in a participant's plan under new paragraph 5.7 allows that SDA to be funded for the participant, however it does not result in that other SDA being found appropriate for the participant under new paragraph 4.1.

New paragraph 5.7B provides a limitation on the circumstances in which basic design category SDA will be specified in a participant's plan in accordance with a request under new paragraph 5.7. This also limits the circumstances under which basic design category SDA will be funded. Basic design category SDA will only be specified in a participant's plan if the participant requests it under new paragraph 5.7, and it either meets the definition of existing stock in paragraphs 6.11 and 6.12 of the SDA Rules, or is the participant's current dwelling determined for the participant under paragraph 4.11.

If a participant is residing in and being funded for basic design category or other SDA as the result of a request under new paragraph 5.7, it is expected that the NDIA will consider whether support coordination is required to assist the participant to find and move into a more suitable SDA, as per new paragraph 4.12. It is also expected that an assessment of the participant's statement of participant supports may change depending on the SDA the participant resides in as per paragraph 5.12. For example, a participant residing in basic design category SDA may require additional other supports to meet their needs.

New paragraph 5.7C only applies if SDA is specified as the result of a request under new paragraph 5.7, or is the participant's current dwelling determined for the participant under paragraph 4.11.

New paragraph 5.7C(a) requires that if SDA is specified as a result of a request under paragraph 5.7 or is the participant's current dwelling determined under paragraph 4.11, the participant's plan is to note that the participant is residing in or intends to reside in SDA for which they were not determined as eligible, and whether the participant intends to move into other SDA in the future. This may occur, for example, in the case where appropriate SDA for which the participant is eligible as

determined under new paragraph 4.1(a) is not available, and the participant resides in other SDA until appropriate SDA is available. It may also occur, for example, where a participant is residing in their current dwelling determined under paragraph 4.11 until appropriate SDA that they have commissioned is built for them.

New paragraph 5.7C(b) requires that if SDA is specified as a result of a request under paragraph 5.7 or a dwelling determined under paragraph 4.11, the SDA determined as appropriate for that participant under new paragraph 4.1 must also be recorded in the plan. This should be recorded as an annotation rather than as a reasonable and necessary support which will be funded, as the participant is not actually residing there and does not therefore satisfy the requirements in Part 6 of the SDA Rules.

Requiring these two matters to be recorded in a participant's plan will provide a record that the participant is not currently living in SDA determined to be appropriate for them under new paragraph 4.1(a), and that it is still possible for the participant to reside in and be funded for that appropriate SDA, provided the requirements in Part 6 of the SDA Rules are satisfied. It will also signal to SDA property developers and investors there is demand for the SDA determined as appropriate under new paragraph 4.1.

#### **Item 16 – Section 5.8**

Item 16 repeals paragraph 5.8 and replaces it with new paragraph 5.8.

New paragraph 5.8 replicates previous paragraph 5.7 of the SDA Rules.

#### **Item 17 – Section 5.9(b)**

Item 17 inserts additional text into paragraph 5.9(b). This new text is to confirm that a participant's plan may specify a design category or range of categories that will be funded for the participant. This may be used to review whether or not a participant will be funded to live in a particular SDA dwelling of a category not determined as appropriate under new paragraph 4.1, and limit the categories of SDA a participant may be funded for via a request under new paragraph 5.7.

#### **Items 18 – Section 5.10**

This is a consequential amendment arising out of the repeal of paragraph 4.2 in item 5.

#### **Item 19 – Section 5.12**

Item 19 inserts new paragraph 5.12.

New paragraph 5.12 signals that the CEO may conduct a review of a participant's plan in circumstances where the CEO has been notified that a participant is, or is intending to reside in SDA of a design category, building type or location for which they have not been determined as eligible under new paragraph 4.1(a). New paragraph 5.12 acts as trigger for a review to occur in order to ensure that the participant's other NDIS supports are reasonable and necessary regardless of where they choose to reside. It is expected that the CEO will be made aware of these

circumstances as a result of the requirement under section 51 of the Act for participants to notify the CEO of a change in circumstances. Any review conducted will be in accordance with Division 4, Part 2, Chapter 3 of the Act.

New paragraph 5.12 does not oblige the CEO to conduct a review in these circumstances.

#### **Item 20 – Section 6.12**

Item 20 amends the extended definition of existing stock to expand it to allow basic design stock to potentially meet the definition. This recognises that much State and Territory existing SDA is basic design, although it is intended that these reforms will expand the SDA built in the future into other categories.

#### **Item 21 – Section 8.3**

This item repeals paragraph 8.3 and replaces it with new paragraph 8.3.

New paragraph 8.3 confirms that several terms used in the SDA Rules are defined in section 9 of the Act, outlines these terms, and places them at the beginning of Part 8 of the SDA Rules dealing in part with interpretation.

#### **Item 22 – Section 8.4**

Item 22 inserts definitions for the terms appropriate building type, appropriate design category and in-kind support. These terms were previously not defined in the SDA Rules and defining them will aid in interpreting and understanding the SDA Rules.

#### **Item 23 – Section 8.4**

This item repeals several definitions which are already defined in the Act. This has been signalled at new paragraph 8.3.

#### **Items 24 and 25 – Section 8.4**

These are amendments consequential to the repeal of paragraph 4.2 by item 5.

#### **Item 26 – Section 8.4**

Item 26 corrects an error in the definition of intentional community.

#### **Items 27 and 28 – Section 8.4**

These items amend the definitions of SDA building type and SDA design category to reflect that these terms are not used consistently throughout the SDA Rules. For example, the SDA Rules refer interchangeably to SDA building type and building type. The amended definitions confirm that the terms have the same meaning.



## Statement of Compatibility with Human Rights

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

### **National Disability Insurance Scheme Amendment (Specialist Disability Accommodation) Rules 2019**

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**

This instrument is made under section 209 of the *National Disability Insurance Scheme Act 2013* (Act) and amends the *National Disability Insurance Scheme (Specialist Disability Accommodation) Rules 2016* (SDA Rules) for the purposes of sections 35, 48, 70, 72, 73 and of the Act.

This instrument supports the implementation of several recommendations arising out of a 2018 review of the Specialist Disability Accommodation (SDA) Pricing and Payments Framework, and will increase flexibility, choice and control for participants.

The instrument removes certain restrictions for participants in their choice of living arrangements, optimising their independence and inclusion in the community, and provides important clarity around SDA policy and pricing arrangements in order to build market confidence and stimulate and encourage increased investment in SDA.

The instrument provides a strong signal that governments are committed to working together to address early market issues and ensure the long-term viability of SDA for participants, providers and investors.

#### **Human rights implications**

This instrument does not engage any of the applicable rights or freedoms outlined in the *Human Rights (Parliamentary Scrutiny) Act 2011*, such as encompassed in the International Covenant on Civil and Political Rights or the Convention on the Rights of Persons with Disabilities.

#### **Conclusion**

The instrument is compatible with human rights as it does not raise any human rights issues.

**[Paul Fletcher, Minister for Families and Social Services]**