

Legislation (Deferral of Sunsetting—National Disability Insurance Scheme Instruments) Certificate (No. 1) 2023

EXPLANATORY STATEMENT

Issued by the Attorney-General in compliance with
section 15G of the *Legislation Act 2003*

INTRODUCTION

The *Legislation (Deferral of Sunsetting—National Disability Insurance Scheme Instruments) Certificate (No. 1) 2023* (the Certificate) is made under paragraph 51(1)(c) of the *Legislation Act 2003* (Cth) (the Legislation Act). It is a legislative instrument for the purposes of the Legislation Act and must be registered on the Federal Register of Legislation. The Certificate will be subjected to the disallowance provisions of the Legislation Act as the deferred sunseting day specified in the Certificate is after the first anniversary of the originally scheduled sunseting day, which means that subsection 51(4) of that Act (which provides an exemption from disallowance for deferrals of 12 months or less) does not apply.

OUTLINE

Sunseting is the automatic repeal of legislative instruments after a fixed period.

The Australian Government's sunseting framework is established under Part 4 of Chapter 3 of the Legislation Act. The purpose of the sunseting framework is to ensure that legislative instruments are kept up to date and only remain in force for so long as they are needed.

Subsection 50(1) of the Legislation Act provides that a legislative instrument is automatically repealed on 1 April or 1 October immediately on or following the tenth anniversary of its registration. Under paragraph 51(1)(c) of the Legislation Act the Attorney-General can issue a certificate to defer the sunseting day of an instrument for a period of either 6, 12, 18 or 24 months.

The instrument will then be repealed on the day specified in the certificate instead of the previously scheduled sunseting day. This allows instruments to continue to be in force for a further but limited period of time when they would otherwise sunset. This removes the administrative burden of remaking instruments which would have a limited duration prior to their repeal and potential

replacement, or where circumstances prevent the making of replacement instruments prior to the sunseting day.

The Certificate defers the sunseting date of the following instruments by 24 months from 1 October 2023 to 1 October 2025 (together, the ‘National Disability Insurance Scheme Instruments’):

- (a) the *National Disability Insurance Scheme (Children) Rules 2013*;
- (b) the *National Disability Insurance Scheme (Nominees) Rules 2013*;
- (c) the *National Disability Insurance Scheme (Plan Management) Rules 2013*;
- (d) the *National Disability Insurance Scheme (Protection and Disclosure of Information) Rules 2013*;
- (e) the *National Disability Insurance Scheme (Supports for Participants) Rules 2013*; and
- (f) the *National Disability Insurance Scheme (Supports for Participants—Accounting for Compensation) Rules 2013*.

The ability to defer sunseting dates is an integral part of the sunseting framework. It provides the necessary flexibility to ensure the standard 10 year sunseting period does not result in unintended consequences or impose an unreasonable administrative burden on Commonwealth agencies or the Parliament. In this case, the National Disability Insurance Scheme Instruments are expected to be reviewed and amended within 24 months of their current sunseting date as a result of the Government’s comprehensive review of the design, operation and sustainability of the National Disability Insurance Scheme (NDIS), which commenced in October 2022 and will report to Government by October 2023.

PROCESS BEFORE CERTIFICATE WAS MADE

Regulatory impact analysis

Certificates of deferral of sunseting are machinery of government instruments, and are therefore not subject to the regulatory impact assessment requirements set out by the Office of Impact Analysis (OIA). The OIA reference for this standing exemption is ID19633.

Consultation before making

Before the Certificate was issued, the Attorney-General considered the general obligation to consult imposed by section 17 of the Legislation Act.

The Government’s comprehensive review of the NDIS will consider how to ensure the NDIS market and workforce is responsive and capable of supporting the delivery of high-quality and safe NDIS

services. The Government is engaged in co-design and transparency on all aspects of the NDIS, which entails consultation on changes with NDIS participants, the disability community and other affected parties.

The *National Disability Insurance Scheme Act 2013* (NDIS Act) imposes statutory consultation requirements on the responsible Minister when making NDIS rules, including the National Disability Insurance Scheme Instruments. Specifically, the Minister must consult with all States and Territories, and gain varying levels of agreement in respect of all NDIS rules depending on their classification under the NDIS Act. Unanimous agreement of all States and Territories is required to remake all but one of the National Disability Insurance Scheme Instruments. These requirements reflect that the NDIS is a federal scheme for which both the Commonwealth and States and Territories have responsibility, and highlight that meaningful inter-governmental consultation is necessary. Since coming into office in May 2022, the Minister for the National Disability Insurance Scheme and the Minister for Government Services, the Hon Bill Shorten MP, has commenced work on the review, and on the intensive policy development and consultation necessary to remake the National Disability Insurance Scheme Instruments.

Certificates of deferral are machinery in nature, and enable legislative instruments that would otherwise sunset to remain in force for a further, but strictly limited, period of time. This will minimise the administrative burden on stakeholders associated with consultation on a deferral that will only have effect for a limited amount of time. The National Disability Insurance Scheme Instruments are currently subject to consultation, which may result in their repeal and replacement. A 24-month deferral will allow sufficient time for further consultation prior to determining whether it is appropriate to make replacement instruments. The deferral will avoid the need to remake the National Disability Insurance Scheme Instruments in their current form for the short period of time before they may be repealed and replacement instruments made. As such, given that deferral of the sunset date of the National Disability Insurance Scheme Instruments is consistent with the policy intent of the sunset regime, and does not significantly alter existing arrangements, appropriate consultation has occurred for the purposes of section 17 of the Legislation Act.

Statutory preconditions relevant to the Certificate

If the statutory conditions in section 51 of the Legislation Act are met, an instrument's sunset day can be deferred for 6, 12, 18 or 24 months by means of a certificate made under that section. In terms of process, the Legislation Act requires:

- (a) the responsible rule-maker to apply to the Attorney-General in writing, and
- (b) the Attorney-General to be satisfied that:

- (i) the instrument would (apart from the operation of the sunset provisions) be likely to cease to be in force within 24 months after its sunset day
 - (ii) the proposed replacement instrument will not be able to be completed before the sunset day for reasons that the rule-maker could not have foreseen and avoided
 - (iii) the dissolution or expiration of the House of Representatives or the prorogation of the Parliament renders it inappropriate to make a replacement instrument before a new government is formed, or
 - (iv) the Attorney-General has approved Part 4 of Chapter 3 of the Legislation Act (Sunsetting) not applying to that instrument, and
- (c) the Attorney-General to issue a certificate. The explanatory statement for the certificate must include a statement of reasons for the issue of the certificate.

The rule-maker for the National Disability Insurance Scheme Instruments, the Minister for the National Disability Insurance Scheme and the Minister for Government Services, the Hon Bill Shorten MP, provided a written application to the Attorney-General seeking a certificate of deferral of sunset for the National Disability Insurance Scheme Instruments. On the basis of the information contained in the statement of reasons below, the Attorney-General is satisfied that the National Disability Insurance Scheme Instruments would, apart from the operation of Part 4 of Chapter 3 of the Legislation Act, be likely to cease to be in force within 24 months after its sunset day. As such, the criterion in subparagraph 51(1)(b)(i) of the Legislation Act is met.

Statement of Reasons for issuing of the Certificate

For the purposes of subsection 51(5) of the Legislation Act this section sets out the statement of the reasons for issuing the Certificate.

The National Disability Insurance Scheme Instruments are made under section 209 of the NDIS Act. The NDIS Act establishes the NDIS. The NDIS provides funding to eligible individuals for costs associated with specialised disability supports. The NDIS Act allows for the creation of legislative instruments called NDIS rules to operationalise certain aspects of the NDIS Act.

The Government has launched a comprehensive review of the design, operation and sustainability of the NDIS, which will also consider how to ensure the NDIS market and workforce is responsive and capable of supporting the delivery of quality and safe NDIS services. The review commenced in October 2022 and will report to Government by October 2023.

The review will, amongst other things, explore ways to improve participant experience, improve key scheme design and administration, and consider governance arrangements, pricing, workforce development and regulatory arrangements and how the NDIS works alongside other service systems. The review has a key objective of putting people with disability at the centre of the NDIS, and restoring trust, confidence and pride in the NDIS amongst people with disability and their families and carers, as well as amongst the broader Australian community.

The findings of the review will play a significant role in determining whether and how the National Disability Insurance Scheme Instruments are remade. In particular, the review may recommend changes to the NDIS Act or National Disability Insurance Scheme Instruments, which will require further work to implement. A deferral would minimise consultation fatigue and costs for people with disability and the broader disability sector, and avoid the potential need to remake the National Disability Insurance Scheme Instruments in their current form for a short period of time. Accordingly, the National Disability Insurance Scheme Instruments will likely cease to be in force in their current form within 24 months of their original sunset day.

More information

Further details on the provisions of the Certificate are provided in [Attachment A](#).

The National Disability Insurance Scheme Instruments, which are subject to the Certificate, and which will now sunset at a later day as specified in the Certificate, are available on the Federal Register of Legislation.

Further information may be requested from the Attorney-General's Department about the operation of the Certificate, and from the Department of Social Services about the National Disability Insurance Scheme Instruments to which the Certificate applies.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

The *Legislation (Deferral of Sunsetting—National Disability Insurance Scheme Instruments) Certificate (No. 1) 2023* (the Certificate) is compatible with human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (the Human Rights Act).

Overview of the Certificate

The Certificate is made under paragraph 51(1)(c) of the *Legislation Act 2003*. Under that paragraph the Attorney-General can issue a certificate to defer the sunseting day of an instrument for a period of either 6, 12, 18 or 24 months. The instrument will then be repealed on the day specified in the Certificate instead of the originally scheduled sunseting day. The instruments specified in the Certificate are (together ‘the National Disability Insurance Scheme Instruments’):

- the *National Disability Insurance Scheme (Children) Rules 2013*;
- the *National Disability Insurance Scheme (Nominees) Rules 2013*;
- the *National Disability Insurance Scheme (Plan Management) Rules 2013*;
- the *National Disability Insurance Scheme (Protection and Disclosure of Information) Rules 2013*;
- the *National Disability Insurance Scheme (Supports for Participants) Rules 2013*; and
- the *National Disability Insurance Scheme (Supports for Participants—Accounting for Compensation) Rules 2013*.

The National Disability Insurance Scheme Instruments are expected to be repealed and replaced within 24 months of their scheduled sunseting date as part of a comprehensive review of the design, operation and sustainability of the National Disability Insurance Scheme.

The Certificate allows the National Disability Insurance Scheme Instrument to continue to be in force for a further, but limited, period of time when they would otherwise sunset. This removes the administrative burden of remaking the instruments which would have a limited duration prior to their expected repeal and replacement, or where circumstances prevent the making of replacement instruments prior to the sunseting day.

Human Rights Implications

A certificate of deferral of sunseting extends the operation of the instrument but does not change or affect the rights engaged under the original instrument. The National Disability Insurance Scheme Instruments engage certain human rights and freedoms recognised or declared by the international instruments in section 3 of the Human Rights Act, including:

- Articles 1, 7 and 10 of the International Convention on Economic, Social and Cultural Rights (ICESCR);
- Articles 1, 4, 9, 12, 14, 17 and 20 of the International Covenant on Civil and Political Rights (ICCPR);

- the rights of persons with disabilities in the Convention on the Rights of Persons with Disabilities (CRPD), especially the Preamble and Articles 3, 4, 7, 9, 12, 16, 18, 19, 20, 22, 23, 24, 25, 27 and 28; and
- the rights of children in the Convention on the Rights of the Child (CRC), especially Articles 3, 5, 7, 9, 12, 16, 18, 19, 23, 24 and 26.

Overall, the National Disability Insurance Scheme (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. The National Disability Insurance Scheme Instruments facilitate the efficient and effective operation of the NDIS.

Noting that many of the National Disability Insurance Scheme Instruments impact these human rights and freedoms in similar ways, the below analysis summarises some important positive engagement of human rights and some key limitations on rights. This analysis does not exhaustively cover all the Articles engaged, as further information is available in the explanatory statements published when each instrument was made.

The right to self-determination

The National Disability Insurance Scheme Instruments engage positively with the right to self-determination (Article 1 of the ICCPR and Article 1 of the IESCR) and the right of persons with disability to engage in full and effective participation in society (Article 3 of the CRPD). A key object and principle under the NDIS Act is to provide NDIS participants with choice and control in the pursuit of their goals and the planning and delivery of their supports.

The *National Disability Insurance Scheme (Supports for Participants) Rules 2013* (Supports for Participants Rules) directly advance these obligations by detailing the mechanisms by which participants will receive reasonable and necessary supports, including early intervention supports, which contribute to realising their potential for physical, social, emotional and intellectual development. The right for the participant to choose their supports in the manner and at the time of their choice is, however, limited by the discretion of the Chief Executive Officer (CEO) of the National Disability Insurance Agency (NDIA) to determine reasonable and necessary supports. This is a reasonable limitation as it is consistent with provisions in Article 4 of the CRPD which requires states to promote the development of universally designed goods, services, equipment and facilities which should require the minimum possible adaptation and the least cost to meet the specific needs of a person with disabilities.

The exercise of choice and control is limited by Part 6 of the *National Disability Insurance Scheme (Plan Management) Rules 2013* (Plan Management Rules), which enable the CEO to determine that a support should be provided by a particular provider or in a particular manner. This limitation is proportionate as it is a safeguarding measure to ensure participants receive safe and appropriate supports.

The right to equal recognition before the law

The legislative instruments positively engage with the right of persons with disability to be given equal recognition before the law (Article 12 of the CRPD). Under the NDIS, participants are presumed to have legal capacity to make decisions for themselves and, where necessary, the NDIS framework accommodates a participant's desire or need for additional support to make decisions through the *Plan Management Rules and the National Disability Insurance Scheme (Nominees) Rules 2013* (Nominees Rules).

The Plan Management rules positively engage the right to equal recognition before the law for people with disability in the context of managing funding for supports. The Plan Management Rules enable participants to make a plan-management request specifying who the participant wishes to manage the funding for supports under the plan. Under the NDIS Act such a request is to be given effect unless the request will pose an unreasonable risk. The Plan Management Rules provide a framework for assessing this risk and any limitation on participants' rights to manage their funding is designed to protect from the risk of having their funding for supports mismanaged in a way that is not conducive to them achieving their goals and aspirations as outlined in the plan.

The NDIS Act enables participants to request a nominee to undertake actions permitted under the NDIS Act, on behalf of the participant. The NDIS Act also enables the CEO to appoint a nominee on the CEO's own initiative. A nominee may take action in respect of the participant's plan and correspondence and the Nominees Rules set out what must be considered when appointing a nominee. The Nominees Rules positively engage with Article 12 (4) of the CRPD by prescribing a number of safeguards. Although appointing a nominee to undertake the decision-making function does place a limitation on the right of persons with disabilities to make their own choices, it is a reasonable and proportionate limitation with appropriate safeguards such as a requirement on the CEO to look for evidence of undue influence and conflict of interest before making a decision. It should also be borne in mind that, at their core, the provisions of the Nominees Rules intend that the appointment of a nominee is a last resort and where possible a temporary measure.

Acknowledging the role of families, carers and other significant persons

The various legislative instruments engage positively with a number of rights respecting parental rights and the need to protect and provide assistance to the family and home, including Article 10 of the IESCR, Article 23 of the CRPD and Articles 5 and 18 of the CRC. The engagement of these rights is particularly evident in the *National Disability Insurance Scheme (Children) Rules 2013* (Children Rules) and Supports for Participants Rules.

The Children Rules promote Article 10 of the IESCR by recognising and respecting the role of carers, families and other significant persons. Further, the Children Rules positively engage Article 23 of the CRC and Article 7 of the CRPD by providing for safeguards for the appointment of child representatives, whether this be the child's parents, a legal guardian or another person that is appointed by the CEO, and recognising the capacity of a child with a disability to make a decision for themselves with appropriate supports. Underpinning all of these safeguards is the primary consideration of whether the decision is in the best interests of the child. In this way, the Children Rules also positively engage with Article 7 of the CRD and Article 3 of the CRC.

The Children Rules positively engage Articles 9 and 18 of the CRC in the decision-making process by which the CEO makes a determination as to whether to appoint a person (other than a person with parental responsibility) to be the child's representative. Article 18 of the CRC requires the recognition of the principle that both parents have common responsibilities for the upbringing and development of the child and the provision of appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities, in particular that they are made aware of their rights to access information on services to which they are entitled to for the benefit of children. This is read in conjunction with Article 9 of CRC which requires that States respect the rights of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis.

The Supports for Participant Rules positively engage with Article 23 the CRPD, together with Article 19, by imposing a requirement on the CEO to have regard to the risks to the well-being of the participant arising from reliance on the support of family members, carers, informal networks and the community. This includes consideration of the suitability of family members, carers, informal networks and the community in light of their age and capacity, whether there are community supports sustaining them in their caring role, and the intensity and type of support required as to being age or gender appropriate.

Privacy

Many of the deferred instruments also engage rights in respect of a person's privacy, namely Article 22 of the CRPD and Article 17 of the ICCPR.

The *National Disability Insurance Scheme (Protection and Disclosure of Information) Rules 2013* (Protection and Disclosure of Information Rules) engage positively with both Article 22 of the CRPD and Article 17 of the ICCPR. Generally, information collected under the NDIS Act and held by the NDIA is considered to be 'protected information'. The NDIS Act provides limited circumstances in which 'protected information' can be disclosed. The details in which these limited circumstances would arise are set out in more detail in the Protection and Disclosure of Information Rules. This is a positive engagement with Article 22 of the CRPD as the provisions are specific and require certain criteria to be met before the discretion of a decision maker to disclose information can be exercised. This satisfies the requirement in Article 17 of the ICCPR for any interference with privacy to be both lawful and non-arbitrary.

The Plan Management Rules provide for various matters in relation to the payment of NDIS amounts, and in particular, the timing of the payment and the manner of paying NDIS amounts. The Plan Management Rules provide that the CEO may, in some circumstances requires participants to provide information or a document before making payments of NDIS amounts. This limits the right to privacy recognised in Article 22 of the CRPD, however, the limitation is reasonable on the basis that it is a positive engagement with Article 15 of the CRPD, which requires states to take all appropriate measures to protect persons with disabilities from exploitation.

The *National Disability Insurance Scheme (Supports for Participants—Accounting for Compensation) Rules 2013* (Compensation Rules) also similarly limit the right to privacy. The Compensation Rules are about the assessment and determination of the reasonable and necessary supports that will be funded for participants under the NDIS and specifically how compensation payments for personal injury are taken into account in such assessments and determinations. This may include seeking information as to the circumstances of the injury, any agreement to pay compensation and information about the person's individual situation, including financial information. To the extent that seeking such information appears to limit the right to privacy, these steps will only be taken with the consent of the person and for the legitimate purpose of ensuring the financial sustainability of the scheme and preventing a duplication of funding. Further, the NDIA CEO must be proactive in providing information to a person at the outset and so this measure supports informed decision making, with a requirement to advise the participant on the likely compensation reduction amount where a person is considering entering into a settlement or agreement.

Before issuing the Certificate, the Attorney-General was satisfied that the National Disability Insurance Scheme Instruments would, apart from the operation of the sunset provisions, cease to be in force within 24 months of their sunset date. Issuing a certificate of deferral therefore avoids the need to replace the instruments in their current form for a short period of time before they are expected to be repealed and replaced.

Instruments that are replaced will be subject to parliamentary scrutiny and oversight through the disallowance processes unless otherwise exempt. The human rights impact of the National Disability Insurance Scheme Instruments will be assessed at the time any replacement instruments are made, including through the requirement to prepare further Statements of Compatibility with Human Rights.

Conclusion

This Certificate is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the Human Rights Act, as it does not raise any human rights issues, and ensures that any proposal to make replacement instruments will be subject to parliamentary oversight and scrutiny.

NOTES ON THE CERTIFICATE

Section 1 Name

This section provides that the Certificate is the *Legislation (Deferral of Sunsetting—National Disability Insurance Scheme Instruments) Certificate (No. 1) 2023*. The Certificate may be cited by this name.

Section 2 Commencement

This section provides for the Certificate to commence on the day after it is registered.

Section 3 Authority

This section provides that the Certificate is made under paragraph 51(1)(c) of the *Legislation Act 2003*.

Section 4 Deferral of sunsetting

This section provides that the following instruments, for which the sunseting day is 1 October 2023, are repealed by section 51 of the *Legislation Act 2003* on 1 October 2025:

- the *National Disability Insurance Scheme (Children) Rules 2013*;
- the *National Disability Insurance Scheme (Nominees) Rules 2013*;
- the *National Disability Insurance Scheme (Plan Management) Rules 2013*;
- the *National Disability Insurance Scheme (Protection and Disclosure of Information) Rules 2013*;
- the *National Disability Insurance Scheme (Supports for Participants) Rules 2013*; and
- the *National Disability Insurance Scheme (Supports for Participants—Accounting for Compensation) Rules 2013*.

Section 5 Repeal of the instrument

This section provides that the Certificate is repealed at the start of 2 October 2025.