

## **EXPLANATORY STATEMENT**

Issued by the authority of the Minister for the National Disability Insurance Scheme

*National Disability Insurance Scheme Act 2013*

*National Disability Insurance Scheme (Management of Funding) Rules 2024*

### **Purpose**

The *National Disability Insurance Scheme (Management of Funding) Rules 2024* (the Instrument) is made for the purpose of subsections 44(5) and 74(6) of the *National Disability Insurance Scheme Act 2013* (NDIS Act). It provides a number of matters that the Chief Executive Officer (CEO) of the National Disability Insurance Agency (NDIA) must, or must not, have regard to in assessing whether a person is unlikely to comply with section 46 of the NDIS Act (which relates to spending of funding provided in a participant's plan) for the purpose of sections 43 and 44 of the NDIS Act (which relate to management of funding for supports under a participant's plan) and section 74 of the NDIS Act (which relates to arrangements for a participant who is a child, including management of funding for supports under their plan).

Section 46 of the NDIS Act requires funding provided under a participant's plan to be spent only on 'NDIS supports' and to be spent 'in accordance with the participant's plan'.

Sections 43 and 44 of the NDIS Act provide that a participant is not able to manage funding for supports under their plan if the CEO is satisfied that this will result in section 46 being unlikely to be complied with for that plan. Similarly, a participant's nominee is not able to manage funding for supports under the participant's plan if the CEO is satisfied that this will result in section 46 being unlikely to be complied with for that plan. If a participant has requested a registered plan management provider to manage funding for supports under their plan, the CEO may refuse to give effect to this request if they are satisfied that this will result in section 46 being unlikely to be complied with.

Similarly, section 74 of the NDIS Act provides that a child's representative (being the person with parental responsibility, or other person determined by the CEO) cannot manage funding for supports under the child's plan if the CEO is satisfied that this will result in section 46 being unlikely to be complied with.

The Instrument assists the CEO's consideration of whether section 46 is unlikely to be complied with by providing a range of matters that the CEO must, and must not, have regard to in considering this question.

### **Background**

#### **Management of funding for supports**

Participants in the National Disability Insurance Scheme (NDIS) receive funding for supports through a participant plan. The participant plan is developed by the CEO with

the participant and includes the participant's statement of goals and aspirations and the statement of participant supports. The statement of participant supports includes a number of matters, including the supports that will be funded or provided for the participant and the management of the funding for supports under the plan. This means that the CEO must make a decision on how the funding for supports will be managed in the plan as part of their decision to approve the statement of participant supports.

Managing funding for supports under the participant's plan is defined in subsection 42(1) of the NDIS Act to be doing one or more of the following:

- purchasing the supports identified in the plan (including paying any applicable indirect costs, such as taxes, associated with the supports);
- receiving any funding provided by the Agency;
- managing any funding provided by the Agency;
- acquitting any funding provided by the Agency.

Subsection 42(2) of the NDIS Act provides that funding for supports under a participant's plan can be managed by:

- the participant; or
- a registered plan management provider; or
- the Agency; or
- the plan nominee.

Where the participant is a child, subsection 74(1) of the NDIS Act provides that a thing that is otherwise to be done by the participant (such as managing funding for supports under a plan) is to be done by their representative.

A participant can make a 'plan management request' under subsection 43(1), which is a request that funding for supports under their plan be managed wholly, or to a particular extent, by the participant themselves ('self-managed'), a registered plan management provider ('plan-managed'), or the NDIA ('Agency-managed'). A plan nominee can also manage funding for supports if their terms of appointment deal with this ('nominee-managed'; see subsection 43(5)). If the participant is a child, the child's representative may make a plan management request under subsection 74(2). This includes the same options, being that the funding for supports under the plan will be self-managed, plan-managed, or Agency-managed.

Generally, the NDIA must give effect to a participant's request: subsections 43(2) and 74(3). This is in line with the Objects and Principles in Part 2 of the NDIS Act and promotes choice and control for people with disability. However, this is subject to some exceptions which are outlined in subsections 43(2A) to (6) and section 44 for adult participants, and subsections 74(3A) to (5) for children. The relevant exceptions for the purpose of the Instrument are discussed further below.

A plan management decision is taken afresh by the CEO at each plan reassessment based on the participant's plan management request and current participant circumstances. In the same way that supports funded or provided for a participant may change over time, a participant's plan management arrangements may change when

each new statement of participant supports is approved. Participants are entitled to make a fresh plan management request as part of any plan reassessment and will be provided an opportunity to explain why they have made such a request if it is different to their previous arrangements. Additionally, the NDIS Act permits a variation of plan management type in a participant's plan. This means that a participant's plan management type can be changed while the plan remains in effect if there is a change in their circumstances supporting it (for example, decision-making supports are implemented which ensure the participant is able to comply with the requirements of section 46 making self-management of their funding an appropriate option).

Where the plan management request of the person or participant is not approved by the CEO, the reasons for this will be explained and participants will be able to seek review of this decision as it forms part of the decision to approve the participant's statement of participant supports (which is a reviewable decision under the NDIS Act). Nothing in this instrument or the *National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No. 1) Act 2024* (Back on Track Act) impacts on a participant's review rights in any way.

### Power to make the Instrument

The Instrument is made under subsection 209(1) of the NDIS Act. That subsection relevantly provides that the Minister may, by legislative instrument, prescribe matters required or permitted by this Act to be prescribed by NDIS rules.

Subsection 44(5) of the NDIS Act provides that NDIS rules may prescribe criteria the CEO is to apply and matters to which the CEO is, or is not, to have regard in considering whether section 46 (acquittal of NDIS amounts) would be unlikely to be complied with if any of the following people/entities were to manage the funding for supports under a plan to any extent:

- (a) the participant;
- (b) a registered plan management provider;
- (c) a plan nominee.

Subsection 74(6) of the NDIS Act provides that NDIS rules may make provision for determining any matter for the purposes of section 74, including but not limited to requirements with which the CEO must comply, methods or criteria that the CEO is to apply, and matters that the CEO may, must or must not take into account. Section 74 includes a requirement that the CEO must not give effect to a plan management request if satisfied this would result in section 46 being unlikely to be complied with, meaning rules made under subsection 74(6) can prescribe matters to which the CEO must take into account in considering whether section 46 (acquittal of NDIS amounts) would be unlikely to be complied with by the relevant person.

Since the commencement of the Back on Track Act all NDIS rules and other instruments made under the NDIS Act are exempt from sunseting (see changes to the *Legislation (Exemptions and Other Matters) Regulation 2015* made by item 123 of the Back on Track Act). The Instrument is therefore exempt from sunseting, but is still subject to disallowance under section 42 of the *Legislation Act 2003*.

## Outline of instrument

Subsection 44(5) was inserted into the NDIS Act by the Back on Track Act. The Back on Track Act also made relevant amendments to sections 43, 44 and 46 of the NDIS Act.

Section 46 of the NDIS Act previously provided that a participant who receives an NDIS amount, or a person who receives an NDIS amount on behalf of a participant, must spend the money in accordance with the participant's plan. This was changed by the Back on Track Act to require funding under a participant's plan to be spent only on NDIS supports for the participant (see section 10 of the NDIS Act) in addition to the requirement to spend funding in accordance with the participant's plan.

If a participant or other person for example, a nominee or plan manager, does not comply with section 46, either by purchasing a support that is not an NDIS support or by spending funding in a manner inconsistent with the participant's plan, then that person will owe a debt for the money not spent correctly. This is subject to section 5 of the *National Disability Insurance Scheme (Getting the NDIS Back on Track No. 1) (Miscellaneous Provisions) Transitional Rules 2024*, which provides that a debt will not arise in some circumstances for a period of 12 months commencing 3 October 2024. This means it is important that a participant, or other person responsible for managing funding under their plan, is able to comply with section 46 to avoid a debt being incurred.

To that end, the Back on Track Act amended sections 43 and 44 of the NDIS Act which relate to management of funding for supports under a participant's plan.

Relevantly, paragraph 43(3)(d) and paragraph 44(1)(c) when read together now provide that a participant cannot self-manage funding for supports in their plan to a particular extent if the CEO is satisfied that this would result in section 46 not being complied with. This means that a participant who has made a request to self-manage all, or part, of their funding for supports is unable to do so if the CEO is satisfied that this would result in funding under the participant's plan being unlikely to be used to purchase NDIS supports and/or being unlikely to be spent in accordance with the plan. Instead, funding for supports must be either wholly or partly managed by the NDIA (depending on the extent of the request and whether there are parts of the plan that may be self-managed without risking compliance with section 46).

Similarly, plan nominees who have responsibility for management of funding for supports cannot do so to a particular extent if the CEO is satisfied that this would result in section 46 being unlikely to be complied with (paragraphs 43(6)(e) and 44(2A)(c) when read together). In this circumstance, funding for supports must be wholly or partially managed by the NDIA (depending on the extent of the request and whether there are parts of the plan that may be nominee-managed without risking compliance with section 46).

If a participant who does not have a nominee has requested that a registered plan management provider either wholly or partly manage funding for supports under their plan and the CEO is satisfied this will result in section 46 being unlikely to be complied with, the CEO may decide to give effect to this request or may decide that funding for

supports under the plan should be managed wholly or partly by the NDIA (subsections 43(4A) and 44(2AA) when read together). There may be various reasons why a participant using a registered plan management provider may mean section 46 is unlikely to be complied with. For example, the participant may find it difficult to ensure all invoices are sent to the plan management provider and checked for accuracy, or they may have provided inaccurate invoices to a plan manager previously. Alternatively, there may be serious concerns raised about the conduct of a specific plan manager the participant has nominated. It is important to note that where concerns have been identified about potential non-compliance under the Act by a registered plan management provider, this would need to be referred to the NDIS Quality and Safeguards Commission for consideration and appropriate action. It is not intended to negatively impact on the plan management choice of the participant and pending the resolution of concerns made about a particular plan manager, the participant would be able to nominate a different plan management provider.

For a participant that is a child, their representative may make a request to manage funding for supports under the child's plan or a request for funding to be managed by a registered plan management provider. In the same way outlined above for when a participant requests a plan management provider, this request cannot be actioned (meaning funding cannot be managed by the representative or a registered plan management provider, depending on the request that was made) if the CEO is satisfied this would result in section 46 being unlikely to be complied with (subparagraph 74(4)(b)(iii)).

These changes mean that it is now necessary for the CEO to consider whether a particular plan management arrangement will result in section 46 being unlikely to be complied with before giving effect to a participant's plan management request. However, the NDIS Act does not contain any specific criteria or requirements to assist the CEO in assessing this. The Instrument provides this assistance by prescribing matters the CEO must, and must not, take into account when considering whether a particular plan management arrangement will result in section 46 being unlikely to be complied with.

The matters the CEO must take into account are matters that may indicate a person or participant will have difficulty complying with section 46. The matters the CEO must not take into account are matters that may unfairly disadvantage a person or participant in achieving the plan management type they wish to use.

When considering whether a particular plan management arrangement will result in section 46 being unlikely to be complied with, the CEO will enquire about and explore reasonably available supports or safeguards that could be put in place to address any identified capacity issues or mitigate compliance or behavioural risks.

## **Commencement**

The Instrument commences the day after it is registered on the Federal Register of Legislation.

## Consultation

The design of the Back on Track Act has been a collaborative exercise, relying heavily on substantial contributions made by the disability community through the NDIS Review.

The NDIS Review found that NDIS processes should be fair and clear and easier for people with disability and their families to understand. Participants should know and understand how decisions about the way the funding in their NDIS plans will be managed are made. The way NDIS plans are developed should support participants to have opportunities to build capacity to manage their plan funding while providing safeguards where required to protect against potential coercion and fraudulent activity. Everyone should be confident that the NDIS is managed well. The Australian community should see the NDIS is fair and supports participants to achieve their goals, participate in the community and have similar opportunities to other Australians.

The Back on Track Act requires the NDIA improve its approach to determining the management of a participant's plan, with consideration for physical, mental and financial risks, and the likelihood of compliance with the acquittal of NDIS funding. The introduction of the s44(5) rule supports a more proactive and consistent approach to identifying risks, applying appropriate safeguards and supporting informed delegate decision-making when determining the plan management decision.

From July to September 2024, the NDIA held external engagement sessions with participants, nominees, child representatives and members of Disability Representative and Carer Organisations (DRCOs). The sessions covered how decisions are made about the management of funding for supports in a participant's plan and how supports and safeguards can be used to reduce the risk of inappropriate spending and the risk of harm due to a participant's circumstances.

Further targeted engagement sessions related to plan management decisions occurred with members of:

- Independent Advisory Council
- DRCOs
- Participant Reference Group
- Participant First representatives
- Self-Management Working Group
- Better Planning Reform for Outcomes co-design group

Feedback provided in relation to the management of funding from the disability community included:

- The need for shared responsibility between NDIS participants and the NDIA for ensuring appropriate spending.
- NDIS participants need appropriate systems, guidelines and capability building approaches which support spending in accordance with their plan and on NDIS supports, reducing the risk of inadvertent or unintentional spending.

- The need for the NDIA to understand and consider individual circumstances in instances where a person has not spent NDIS funding appropriately to ensure appropriate responses and safeguards are put in place, acknowledging differing factors will warrant a differing or alternate response.
- When the NDIA is considering a change to the plan management type, broader consideration needs to be given to other risks such as thin markets, or where the participant employed staff directly.
- Previous misspending, fraud and criminal offences are relevant to considering whether a person is likely to comply with section 46 for this purpose.
- Acknowledging dignity of risk and supporting capacity for people to learn from mistakes is important. If a person is unlikely to spend in accordance with their plan but wants to work towards this in future, the NDIA should consider support or capacity building undertaken to date, and further opportunities for this, where relevant.

Other relevant feedback from the disability community included:

- The NDIS has a responsibility to help participants succeed and should actively support them to build the capacity they need to manage their plan.
- Safeguards can be used to build capacity and confidence – not just in response to risk or as a punitive measure.
- 'Inappropriate spending' and 'not providing information when asked' are highly subjective and may be a cause of insufficient support rather than intentional actions.
- Concerns the new legislation and rules may result in denial of self-management and the use of plan management providers reducing participant choice and control.

General insights regarding the Plan Management Decision:

- Participants want the right to choose how their plan is managed and want support to do so effectively. Planners and partner staff want to support participants to get the most out of their plan.
- Identifying and assessing risks relies on staff capability to create a safe space and ask the right questions, as well as willingness of the participant to share information.
- Safeguards need to be a proportionate response to the identified risks and removal of self-management or the use of a plan management provider should be a last resort.
- Participants, nominees, child representatives and staff need resources and training to confidently manage funding and make decisions. Training modules,

videos, peer support and decision-making tools were mentioned in almost every session.

In addition to engagement with the disability community, there has been consultation with States and Territories utilising established governance arrangements under the Disability Reform Ministerial Council.

All feedback has formed a key part of the input into the Rule and how it will be implemented. Feedback around the need to balance opportunities for capacity building around compliance with section 46 with safeguarding for participants informed the way the rule was drafted and will be implemented and communicated. Feedback was consistent with the rule intent to support and protect participants to use plan funding in accordance with their plan rather than be used only in response to inappropriate spending. For example, where a participant has unintentionally purchased a support not in accordance with their plan they will be provided with education and support rather than automatically change the plan management type. However, if a participant or their plan nominee has repeatedly purchased supports not in accordance with the plan despite being advised this is not permitted, this may be considered by the NDIA as indicating the participant or plan nominee are unlikely to comply with section 46 which may indicate a change in plan management type is appropriate.

Feedback provided has also informed the way the NDIA will operationalise the Instrument including staff training and how the new rule will be communicated with the disability community.

## **Regulation Impact Analysis (RIA)**

The Office of Impact Analysis has agreed to the use of the Final Report of the Independent Review of the NDIS delivered to Governments in December 2023 as an Impact Analysis Equivalent. A link to the report can be found on the NDIS Review website - <https://www.ndisreview.gov.au/resources/reports/working-together-deliver-ndis>.

## **Explanation of the provisions**

### **Part 1 – Preliminary**

#### **Section 1 – Name**

This instrument is the *National Disability Insurance Scheme (Management of Funding) Rules 2024*.

Although the Instrument currently relates only to compliance with section 46, the name of the Instrument is broader as it is intended that other matters relevant to management of funding for supports (such as unreasonable risk) will be included in the same instrument in the near future. Once this occurs, there will be a single location for all matters relevant to decisions about management of funding for supports under a participant's plan which will ensure that participants and other relevant persons are able to easily identify relevant matters.

Until that has happened, the *National Disability Insurance Scheme (Plan Management) Rules 2013* continue to apply including the considerations for unreasonable risk contained in Part 3 of those rules.

## **Section 2 – Commencement**

This instrument commences the day after it is registered on the Federal Register of Legislation.

## **Section 3 – Authority**

This instrument is made under the NDIS Act.

Specifically, the Instrument is an NDIS rule made under subsection 209(1) for the purpose of subsection 44(5) of the NDIS Act.

## **Section 4 – Definitions**

The Instrument provides definitions for terms used in the Instrument. This includes defining the NDIS Act, along with a note to advise the reader that a number of expressions used in this instrument are defined in the NDIS Act. Those expressions include the following:

- (a) CEO
- (b) funding component amount
- (c) participant
- (d) plan
- (e) supports
- (f) total funding amount.

## **Part 2—Compliance with section 46 of the NDIS Act**

### **Section 5 – Considering whether section 46 of the NDIS Act is unlikely to be complied with**

**Subsection 5(1)** states that this section is made for the purposes of subsections 44(5) and 74(6) of the NDIS Act. Subsections 44(5) and 74(6) of the NDIS Act both relevantly allows NDIS rules to prescribe matters that the CEO must, and must not, have regard to in considering whether section 46 of the NDIS is unlikely to be complied with if a particular plan management arrangement is implemented.

#### **Matters to which the CEO must have regard**

**Subsection 5(2)** prescribes matters to which the CEO must have regard in considering, for the purposes of sections 44 and 74 of the NDIS Act, whether section 46 of the NDIS Act would be unlikely to be complied with if a particular person were to manage the funding for supports under a participant’s plan to any extent.

The matters prescribed in subsection 5(2) must be considered by the CEO in assessing whether section 46 of the NDIS Act would be unlikely to be complied. This consideration will not necessarily lead to any particular outcome. Rather, the CEO will

need to consider each matter as it relates to the particular person (if at all) and decide whether that weighs or does not weigh in favour of a conclusion that the person managing funding for supports in the plan will result in section 46 being unlikely to be complied with.

In considering each of these matters, the CEO will only have regard to suitable information and evidence that is available to them at the time of their decision. There will be no change to the information gathering process currently in place as part of the planning process where information is provided by the participant during planning conversations. Where issues arise, for example if the participant disclosed a history of being financially exploited by the person (plan nominee) who is requesting to manage the plan, the CEO may ask for further information from the participant or person.

If a decision is made on the basis of available information but further information subsequently becomes available to suggest a different decision is more appropriate, the CEO is able to vary a participant's plan to change their plan management type. This will allow participants further time to gather any required information while still accessing supports, where further information is necessary. It will also ensure that a specific registered plan management provider is able to manage funding for supports if new information becomes available, for example where a review or investigation has been undertaken which clarifies that the provider had a good reason for not complying with the requirements.

When considering each of the considerations in paragraphs (a) to (g), the CEO will consider the following (where appropriate):

- whether there has been non-compliance / issues in the past and whether they have been repeated
- whether the non-compliance / issues have been intentional or inadvertent
- whether the non-compliance / issues were recent
- what supports or safeguards (if any) are in place to prevent the non-compliance / issues from occurring in the future, including when they are being put in place for the first time as part of the plan under consideration

It is important to note that any previous behaviour will not automatically lead to a particular outcome. Any past behaviour is simply one of a number of matters the individual decision-maker must consider as part of their overarching decision about whether the relevant person is unlikely to comply with section 46. It will be a matter for the particular decision-maker to decide whether past behaviour supports, or does not support, a conclusion that the person is unlikely to comply with section 46 in the future.

**Paragraph (a)** requires the CEO to consider the person's history of compliance with section 46 of the Act in relation to the management of the funding for particular supports under a participant's plan while the person was responsible for managing the funding for those supports. In effect, this requires the CEO to consider whether the person was previously responsible for managing funding under the participant's plan and if they complied with the requirements of section 46 while doing so.

In considering a person's history of compliance it will be relevant to consider whether the failure to comply has occurred in the past and has not been repeated. The reasons

for the failure to comply may be one of the matters explored to determine whether the failure to comply is a relevant factor to consider in the plan management decision. For instance, the failure to comply could have been due to a simple innocent error, a lack of adequate support to understand section 46 requirement, intentional incorrect claiming, or coercion. In such cases, an educative approach will generally be implemented to support compliance going forward with an emphasis on safeguarding where specific risks have been identified. Each situation will be assessed based on the individual circumstances of the participant or person and will only impact on the overall decision to the extent the decision-maker has assessed it as relevant.

For example, if a participant spent the majority of their previous plan on supports that are not NDIS supports, this could weigh in favour of a conclusion that section 46 is unlikely to be complied with if they were to self-manage supports in their current plan. On the other hand, if a participant has made one or two accidental purchases of supports that are not NDIS supports in a previous plan, or has never purchased a support that is not an NDIS support, this could weigh against a conclusion that they are unlikely to comply with section 46 by self-managing their current plan.

**Paragraph (b)** requires the CEO to consider the person's history of compliance with requests or requirements made under the NDIS Act to give or produce information or documents and, if the person has refused or failed to comply with such a requirement:

- (i) whether the person has a reasonable excuse for that refusal or failure; and
- (ii) whether the person took reasonable steps to comply with the request or requirement, including after the time by which the requirement needed to be complied with.

For example, if the CEO had requested a participant or nominee provide records to explain the purchase of particular supports out of a previous plan, and the CEO had grounds to believe that the participant or nominee had custody or control of those documents but they did not comply with a written request for this document and had no reasonable excuse for this failure, this may weigh in favour of a conclusion that section 46 is unlikely to be complied with if they were to manage supports in the current plan.

**Paragraph (c)** requires the CEO to consider whether the person has engaged in any conduct involving fraud or the mismanagement or misapplication of funds or other assets.

This is an important consideration because a person who has previously been found to have engaged in conduct involving fraud, or the mismanagement or misappropriation of funds or assets may be less likely to comply with the requirements of section 46. It is important to be aware that any previous behaviour will not automatically lead to a particular outcome and the person's culpability, intent or responsibility as well as any vulnerabilities will be considered by the CEO.

For example, the CEO might consider whether:

- the person has been convicted of an offence against a law of the Commonwealth, a State or a Territory involving fraud or the mismanagement or misapplication of funds or assets.

The NDIS Act provides that a participant cannot self-manage funding for supports, and a nominee cannot manage funding for supports, if they have been convicted of an offence (paragraphs 43(3)(b)/44(1)(aa) and 43(5)(6)(b)/44(2A)(aa)). However, there is no such consideration for plan managers. A plan manager who has previously been convicted of an offence of this kind will have clearly engaged in conduct involving fraud or the mismanagement or misapplication of funds or other assets. This would suggest that they may be less likely to comply with the requirements of section 46, putting the participant at risk. It is important to note that where issues have been identified with compliance of a specific registered plan management provider this will be addressed through the NDIS Quality and Safeguards Commission. A participant will not be disadvantaged in their plan management choice due to the non-compliance of a specific plan management provider as they will have the option to nominate a different plan management provider if needed.

- the person has been ordered to pay a pecuniary penalty under a law of the Commonwealth, a State or a Territory for a contravention involving fraud or the mismanagement or misappropriation of funds or assets.

This is another example of the person having engaged in conduct that involves fraud or the mismanagement or misappropriation of funds or assets, where that resulted in a civil penalty order rather than a criminal conviction. An order of this kind may suggest that the person is less likely to comply with the requirements of section 46.

- the person has been the subject of an adverse finding or action taken following an investigation or inquiry under a law of the Commonwealth, a State or a Territory in relation to a matter involving fraud or the mismanagement or misappropriation of funds or assets.

For example, a person may be investigated for misappropriating funds in their workplace and have their employment terminated as a result of an investigation into that behaviour confirming the person's culpability or involvement. This may not involve being charged with an offence or ordered to pay a pecuniary penalty, but is still a very relevant matter for the CEO to consider and could weigh in favour of a conclusion that the person managing funding for supports under the participant's plan will result in section 46 being unlikely to be complied with.

- the person is an insolvent under administration, or has been disqualified under the *Superannuation Industry (Supervision) Act 1993*. These are matters that could suggest the person has previously engaged in conduct that involves mismanagement or misapplication of funds or other assets, which may weigh in favour of a conclusion that they are unlikely to comply with section 46.

**Paragraph (d)** requires the CEO to consider whether the person has been the subject of exploitation or undue influence in the management of legal or financial affairs.

If there is evidence a participant or person has been the subject of exploitation or undue influence in the management of their financial affairs, this is a relevant consideration to be taken into account by the CEO when considering whether they are unlikely to comply with section 46 if they manage funding for supports under the plan.

Coercion or duress to spend funding under a participant's plan in a certain way may lead to section 46 not being complied with. This could have an adverse impact on a participant in the form of a debt being raised or their funding for supports being exhausted too quickly (leaving them without access to appropriate supports for the rest of their plan). If this has occurred previously and there have been no changes to the participant's circumstances since that time, it may weigh in favour of a conclusion that section 46 is unlikely to be complied with for the plan and consideration about what other safeguarding measures might need to be put in place with the participant. Together with a participant, consideration will be given to whether additional safeguards have been or can be put in place in the plan under consideration to prevent a recurrence before making a decision that section 46 is unlikely to be complied with. This will enable a participant to be clear about what may need to be put in place to be able to request a different type of plan management.

**Paragraph (e)** requires the CEO to consider the person's ability or capacity to make decisions or to appropriately manage finances including where they are being supported to do so. This is a relevant consideration to identify whether there is evidence a person is likely to be able to comply with section 46 including by making appropriate decisions about how funding is spent under the plan and what decision or other support may be required. For example, a participant with impaired cognitive function who has no informal or formal decision-making supports may find it difficult to understand and comply with the requirements of section 46.

While the CEO must not consider the nature of the participant's impairments (per subsection 5(3)), this does not prevent the CEO from considering the *impact* of a participant's impairment on their functional capacity where relevant. The impact of the impaired cognitive function in the above example may mean the participant is unlikely to be able to comply with the requirements of section 46, but if the same participant was being supported to make decisions they may be able to comply with the requirements of section 46. It is important to note the CEO will not be undertaking a formal capacity assessment, but will consider evidence available related to the person's ability or capacity to make decisions or manage finances. As part of this consideration the CEO will consider supported decision making supports available or that can be provided for the participant in the plan under consideration in line with the NDIS Supported Decision Making Policy, noting that a participant with appropriate decision-making supports may be assessed as able to make decisions they would not be able to make without those supports.

**Paragraph (f)** requires the CEO to consider any relevant matters raised by the person, and if the person is not the participant, the participant. This will ensure participants can bring matters to the attention of the decision-maker who is considering their plan management request, and provide supporting evidence or information if they would

like to do so. Matters that are raised will only be considered where they are relevant to the decision the CEO is making, which is whether the person is unlikely to comply with section 46 of the NDIS Act.

To ensure that a participant or person has the opportunity to provide information not specified above, they may raise a relevant matter such as goals to manage money more independently and have supports in place to do so, or strategies to mitigate the risk of non-compliance. The participant or person may raise these or any other relevant matters at any point during the planning process. As part of the usual planning process, the CEO ensures participants have an opportunity to share any other relevant detail they wish to. Once the plan is approved, participants can raise any concerns or matters related to their plan management method through their preferred contact method with their My NDIS Contact or through the NDIS call centre. The My NDIS Contact will consider the information and if needed can commence or request a plan variation to change the plan management method. The CEO will consider and weight these matters based on the individual personal circumstances of the participant.

**Paragraph (g)** requires the CEO to consider any other matters the CEO considers relevant. This ensures that all relevant matters to a participant's unique circumstances can be taken into account. Matters will only be considered where they are relevant to the decision the CEO is making, which is whether the person is unlikely to comply with section 46 of the NDIS Act.

Similarly to subsection 5(f), this subsection provides that the CEO may take into consideration any other relevant matter in addition to those raised by the participant or other person. For example, the CEO may consider the participant's goals as set out in their plan and whether these identify a plan to manage funding and finances more effectively.

#### Matters to which the CEO must not have regard

**Subsection 5(3)** provides that the CEO must not have regard to a number of matters. This applies despite subsection 5(2), meaning the CEO must not consider a matter that falls within subsection 5(3) even if it also falls within subsection 5(2).

**Paragraph (a)** provides that the CEO must not consider the nature of any of the participant's impairments. This is because the nature of a participant's impairment is not itself a relevant factor, as a particular impairment will not in and of itself be the reason why section 46 is unlikely to be complied with.

While this does not prevent the CEO from considering the impact of a participant's impairment on their functional capacity where that is relevant, it does prevent the CEO from specifically considering the nature of the impairment.

For example, a participant with an intellectual disability will not necessarily be unlikely to comply with section 46 just because they have an intellectual disability. Many participants with intellectual disability will have no difficulties complying with the requirements of the NDIS Act, including section 46. However, a participant may have an intellectual disability that impacts on their ability to understand the requirements of section 46 or their ability to make appropriate financial decisions. If they do not have

access to appropriate decision-making supports, these factors may impact on their ability to comply with section 46 and would be relevant to consider under paragraph (2)(e) discussed above.

**Paragraph (b)** provides that the CEO must not consider any total funding amount or funding component amount under the plan. This ensures that a participant will not be assessed as unlikely to comply with section 46 based on the amount of funding in their plan.

**Paragraph (c)** provides that the CEO must not consider (if applicable) the fact that the amount of funding provided under a plan for the participant for a funding period was less than the amount that could have been provided for that period. This ensures that a participant will not be assessed as unlikely to comply with section 46 simply because they did not use all the funding available in their previous plan.

**Paragraph (d)** provides that the CEO must not consider any bankruptcy of the person under the *Bankruptcy Act 1966* from which the person has been discharged. This ensures that participants and nominees who have been discharged from bankruptcy are not treated unfairly as a result of that fact.

#### Other provisions

**Subsection 4** provides that subsection (3) applies despite subsection (2), to the extent that subsection (2) would otherwise require the CEO to have regard to a matter mentioned in subsection (3). This ensures that the CEO cannot consider something that falls within subsection (3), even if it would otherwise be something the CEO must consider under subsection (2).

## Statement of Compatibility with Human Rights

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

### **National Disability Insurance Scheme (Management of Funding) Rules 2024**

The legislative 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 legislative instrument**

The *National Disability Insurance Scheme (Management of Funding) Rules 2024* (the Instrument) is made for the purpose of subsection 44(5) of the *National Disability Insurance Scheme Act 2013* (NDIS Act). It provides a number of matters that the Chief Executive Officer (CEO) of the National Disability Insurance Agency (NDIA) must, or must not, have regard to in assessing whether a person is unlikely to comply with section 46 of the NDIS Act (which relates to spending of funding provided in a participant's plan) for the purpose of sections 44(5) and 74(6) of the NDIS Act (which relate to management of funding for supports under a participant's plan).

Section 46 of the NDIS Act requires funding provided under a participant's plan to be spent only on 'NDIS supports' and to be spent 'in accordance with the participant's plan'.

Sections 43 and 44 of the NDIS Act provide that a participant is not able to manage funding for supports under their plan if the CEO is satisfied that this will result in section 46 being unlikely to be complied with for that plan. Similarly, a participant's nominee is not able to manage funding for supports under the participant's plan if the CEO is satisfied that this will result in section 46 being unlikely to be complied with for that plan. If a participant has requested a registered plan management provider to manage funding for supports under their plan, the CEO may refuse to give effect to this request if they are satisfied that this will result in section 46 being unlikely to be complied with.

The Instrument assists the CEO's consideration of whether section 46 is unlikely to be complied with by providing a range of matters that the CEO must, and must not, have regard to in considering this question.

#### **Human rights implications**

The Instrument engages the following human rights:

- Right of people with disability – Articles 3, 4, 5, 7 and 12 of the *Convention on the Rights of Persons with Disabilities* (CRPD) and Articles 2, 16, 24 and 26 of the *International Covenant on Civil and Political Rights* (ICCPR).
- Right for all people to self-determination and to freely pursue economic, social and cultural development – Article 1 of the ICCPR and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR).

Right to equality and non-discrimination – Articles 3, 4, 5, 7, 12 of the CRPD and Articles 2, 16, 24 and 26 of the ICCPR

Article 3 of the CRPD reflects the need for respect of the inherent dignity, individual autonomy (including the freedom to make one's own choices and the independence of the person), non-discrimination, full and effective participation and inclusion in society, the need for respect for difference, acceptance of persons with disability, equality of opportunity, accessibility, gender equality and respect for the evolving capacities of children with disability including their right to preserve their identities.

These rights are reinforced by Article 2 of the ICCPR which states that all steps must be taken to respect and ensure that all individuals have their rights recognised free of distinction of any kind such as, race, colour, sex, language, religion, political, or other opinion, national or social origin, property, birth or other status. This is enforced further by Article 12 of the CRPD and Article 26 of the ICCPR, ensuring that all persons are equal before the law without discrimination.

The instrument ensures that participants have clarity over what is being considered by the CEO when determining whether section 46 is not likely to be complied with. It is critical to the effective functioning of the NDIS that all participants are made aware of the processes for decisions being made about their plans. It is the intention of this instrument to carefully consider a range of factors before making a decision on the management of funding under a plan.

Article 4 of the CRPD outlines the need for ensuring the full realisation of all human rights and fundamental freedoms for persons with disability, free of discrimination of any kind on the basis of disability. Article 5 of the CRPD supports Article 2 of the ICCPR by acknowledging all persons as equal under the law and entitled, without discrimination to equal benefit of the law. However, Article 5 of the CRPD recognises the inherent vulnerability of people with disability stating they must be free of discrimination on this basis.

The Instrument outlines that the provisions apply also to children on the Scheme. Applying Article 7 of the CRPD ensures the full enjoyment by children on their fundamental freedoms on an equal basis with other children. Further, the Instrument protects a child's best interests, ensuring they have funding available to meet their disability specific needs.

The Instrument specifically sets out matters to which the CEO must not have regard, which includes a participant's impairments. Non-discrimination is an integral part of the principle of equality, it ensures that no one is denied their rights because of factors identified by the Instrument. It is important to acknowledge that the circumstances of some people in a scheme such as the NDIS can make it difficult for them to enjoy their full rights without support.

Further, the CEO must not consider the total funding amount or funding component amount and any previous bankruptcy of the participant. This is to ensure that participants are free from discrimination on the basis of their prior economic status or the amount of funding in their NDIS plan. This strengthens the application of the right

to be free from discrimination as participants can be assured that only the matters set out at section 5(1) of the Rule are to be given regard by the CEO.

Right for all people to self-determination and to freely pursue economic, social and cultural development - Article 1 ICESCR

As provided for under Article 1 of the ICESCR, all people have the right to self-determination and to freely pursue their economic, social and cultural development. Paramount to the Instrument is the clear setting out of factors that the CEO must, or must not, take into account when considering whether a participant is unlikely to comply with section 46.

These considerations firstly ensure that participants are given the opportunity to manage their own funding. The CEO must only take into account the matters contained in this Instrument if the participant has made a plan management request.

In the event that a participant is considered to be unlikely to comply with section 46, there is assurance from the Instrument that their history of compliance with the section was taken into account among other matters. This promotes greater economic development, by ensuring that broader factors surrounding a participant's circumstances are considered. Participants will be able to utilise their funding under Agency management (for old and new framework plans) or a plan nominee or registered plan-management provider (for new framework plans).

To the extent that there is a limitation upon a participant's right to self-determination in managing their own funding, this is reasonable and proportionate to achieving a legitimate aim. In the circumstance that a participant is not able to manage their own funding due to non-compliance with section 46 due to the matters set out in the Instrument, this ensures that a participant continues to have access to NDIS supports and the supports specified under their plan, for the duration of the plan. This additionally pursues a legitimate aim of ensuring the long-term sustainability of the NDIS so it remains available to support Australians with disability for many years to come.

The Instrument works with other related instruments to provide participants with certainty and clarity about the manner in which NDIS funding can be used. These related instruments are the *National Disability Insurance Scheme (Getting the NDIS Back on Track No. 1) (NDIS Supports) Transitional Rules 2024* and the *National Disability Insurance Scheme (Old Framework Plans) Determination 2024*.

The Instrument promotes these rights by clearly setting out factors that a decision-maker must have regard to when determining the plan management type in creating a statement of participant supports. Further, when determining a funding period, a decision-maker must take into account matters including whether the participant is at risk of experiencing fraud or financial exploitation, whether section 46 of the NDIS Act is unlikely to be complied with and whether there is other risk associated. This promotes greater economic development, by ensuring that broader factors surrounding a participant's circumstance are considered when deciding how NDIS funding is managed.

Further, a decision-maker must have regard to whether the participant has appropriate decision-making supports. This provides assurance that a participant's individual supports have been taken into consideration, thus promoting the right to economic development and freedom.

### ***Conclusion***

This legislative instrument is compatible with human rights as it advances the protection of the rights of people with disability in Australia, consistent with the CRPD, ICESCR and ICCPR. To the extent that it may limit human rights, those limitations are reasonable, necessary and proportionate to ensure the long-term integrity and sustainability of the NDIS, for the benefit of all persons with disability who have access to the NDIS.