

EXPLANATORY STATEMENT

Issued by the Authority of the Minister for Social Services

National Disability Insurance Scheme Act 2013

*National Disability Insurance Scheme (Prescribed Program—Western Australia)
Rules 2018*

Purpose

The *National Disability Insurance Scheme (Prescribed Programs – Western Australia) Rules 2018* prescribe the Western Australian delivered National Disability Insurance Scheme (WA NDIS) as a program for the purposes of subparagraph 21(2)(b)(iii) of the *National Disability Insurance Scheme Act 2013* (the NDIS Act).

This instrument is made so that the transition to full rollout of the National Disability Insurance Scheme (NDIS) in Western Australia does not disadvantage a person with a disability who is receiving disability services from the WA NDIS model. This instrument will ensure that current WA NDIS participants who are aged 65 years or older, but who were aged under 65 years when they made a WA NDIS eligibility request, will be eligible to make an access request for NDIS supports and services, subject to certain limitations. Without this instrument, WA NDIS participants aged 65 years or older would be ineligible to transfer to the NDIS due to the age restrictions outlined in subsection 22(1) of the NDIS Act, and would lose their current supports and services.

Background

This instrument is made for the purposes of paragraph 21(2)(b) and section 209 of the NDIS Act, and give effect to agreements between the Commonwealth and the State of Western Australia relating to the full transition of Western Australia to the NDIS.

Paragraph 21(2)(b) of the NDIS Act provides that an applicant to the NDIS who does not meet the access criteria outlined in subsection 21(1) may meet the access criteria if the person was receiving supports at the time of their request from a program prescribed by the NDIS rules in a prescribed time period.

Section 209 of the NDIS Act provides that the Minister may, by legislative instrument, prescribe matters required or permitted by this Act to be prescribed, or which are necessary or convenient to be prescribed, in order to carry out or give effect to this Act.

In addition to the power to make this instrument under sections 21 and 209 of the NDIS Act, subsection 33(3) of the *Acts Interpretation Act 1901* provides that where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by-laws), the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.

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

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

Commencement

This instrument commences on the day after it is registered.

Consultation

This instrument contains rules that are Category B rules for the purposes of subsection 209(5) of the NDIS Act. Accordingly, as required under subsection 209(5) of the NDIS Act, the Commonwealth has consulted closely with the State of Western Australia as the relevant host jurisdiction. The State of Western Australia has agreed to the form of this instrument as a result of that consultation.

Within the Commonwealth, the Department of Social Services has consulted with the National Disability Insurance Agency (the Agency) on the form of this instrument.

Explanation of provisions

This instrument has three Parts:

- **Part 1** explains what this instrument is about.
- **Part 2** prescribes a program for the purpose of paragraph 21(2)(b) of the NDIS Act.
- **Part 3** deals with other matters, including interpretation of this instrument.

Part 1 – What the instrument is about

Paragraphs 1.1 to 1.6 are explanatory and contextual.

Part 2 – Prescribed program

Paragraph 2.1 is made for the purpose of paragraph 21(2)(b) of the NDIS Act. It prescribes the WA NDIS Model (as defined in paragraph 3.5 of the instrument) as a program for the purpose of subparagraph 21(2)(b)(iii) of the NDIS Act.

Subsection 21(1) of the NDIS Act sets out the access criteria that a person must meet in order to become a participant under the NDIS. One of the criteria is that the person meets the age requirement set out in section 22, namely that the person is aged under 65 at the time of making the access request (subject to any other age requirements in rules made for the purpose of paragraph 22(1)(b) of the NDIS Act).

Under subsection 21(2) of the NDIS Act, if the CEO is satisfied that a person does not meet the access criteria specified under subsection 21(1), the person will still meet the access criteria (**alternative access criteria**) under subsection 21(2), provided the CEO is satisfied of each of the matters set out at paragraphs 21(2)(a), (b) and (c).

Subparagraph 21(2)(b)(iii) of the NDIS Act confers a power to prescribe a program for the purposes of subsection 21(2). By virtue of section 209 of the NDIS Act that power can be exercised by the Minister (or delegate – see section 201 of the NDIS Act). Provided the person under subsection 21(2):

- satisfies the requirements in relation to residence prescribed as mentioned in subsection 23(3); and
- was receiving supports under a program prescribed for the purposes of subparagraph 21(2)(b)(iii) at the time of considering the request (noting no other time or period has been specified in this instrument for the purposes of subparagraphs 21(2)(b)(i) and (ii)); and
- would not otherwise be entitled to the supports under the prescribed program,

then the CEO may consider that person against the alternative access criteria.

By making the WA NDIS Model a prescribed program for the purposes of subparagraph 21(2)(b)(iii) of the NDIS Act, existing WA NDIS Participants may be

transitioned into the NDIS, even when aged 65 or over and so not meeting the age requirements under subsection 21(1) of the NDIS Act.

As set out above, persons making an access request are required to meet the access criteria either under subsection 21(1) or 21(2) of the NDIS Act. Where the CEO is considering an access request under subsection 21(2), the person must satisfy only the requirements set out in that subsection. This includes the residence requirements in subsection 23(3) of the NDIS Act, but does not include the citizenship requirements in subsection 23(1), the disability requirements in subsection 24(1), or the early intervention requirements in subsection 25(1), of the NDIS Act.

However, a WA NDIS Participant must still satisfy the requirements equivalent to subsections 23(1) and (2) of the NDIS Act by virtue of the requirements of the WA NDIS Model, as set out in subsection 26H(1) of the *Disability Services Act 1993* (WA) (**WA DSA**). The WA DSA also requires WA NDIS Participants to meet disability requirements or the early intervention requirements equivalent to those under subsections 24(1) and 25(1) of the NDIS Act, in order to participate in the WA NDIS Model.

Part 3 – Other matters

Paragraph 3.1 specifies the citation for this instrument.

Paragraphs 3.2 to 3.4 gives guidance on interpretation and definitions for certain terms used in this instrument.

Statement of Compatibility

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

This Rule is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview

This instrument is made pursuant to subparagraph 21(2)(b)(iii) and 209 of the *National Disability Insurance Scheme Act 2013* (Cth) (the NDIS Act).

Human rights implications

This instrument engages the following human rights:

- The rights of persons with disabilities in the Convention on the Rights of Persons with Disabilities (CRPD), especially Articles 5, 15, 17 and 18.
- The rights of all persons in the International Covenant on Economic, Social and Cultural Rights (ICESCR), especially Articles 4, 5, 9 and 11.
- The rights of all persons in the International Covenant on Civil and Political Rights (ICCPR), especially Articles 2, 5 and 7.
- The rights of the child in the Convention on the Rights of the Child (CRC), especially Articles 2 and 18.

General Principles underpinning the CRPD

The CRPD recognised the barriers that persons with disabilities may face in realising their rights. While the rights under human rights treaties apply to everyone, including persons with disabilities, the CRPD applies human rights specifically to the context of persons with disabilities.

The establishment of the NDIS promotes the rights of people with disabilities in Australia by providing access to nationally consistent funding and support to help them realise their aspirations, and to participate in the social and economic life of the community.

The preamble of the CRPD, and the General Principles set out in Article 3 reflect the need for the respect for the inherent dignity, individual autonomy (including the freedom to make one's own choices and the independence of the person), the need for persons with disabilities to be able to participate fully and effectively and be included in society, the need for respect for difference and acceptance of persons with disabilities as part of human diversity and providing persons with disabilities the opportunity to be involved actively in decision-making processes about policies and programmes, including those directly concerning them.

This instrument recognises that contributing to social and economic life to the extent of their ability is integral to participants' sense of belonging and wellbeing in their communities, a right that is promoted in Articles 3 and 19 of the CRPD.

The objects and the guiding principles of the NDIS also recognise the rights of persons with disabilities to be provided with reasonable and necessary supports and to have certainty that they will receive the lifelong care and support they need.

This instrument provides a mechanism for existing WA NDIS Participants who are aged 65 or over (but were under the age of 65 at the time they became a WA NDIS Participant) to meet the alternative access criteria and therefore continue to receive supports when Western Australia transitions to the NDIS, when the WA NDIS Model ceases. This instrument is indicative of the proactive approach taken by the Commonwealth to ensure that people with disabilities are not disadvantaged and not subjected to unfavourable or inhumane treatment as a result of government policy.

The principle of non-discrimination

The right to equality and non-discrimination is protected by Article 2 of the ICCPR which prohibits denying a person rights on certain grounds, including on the basis of age or place of residence. This is reinforced in the context of human rights for persons with disabilities by Article 3 (b) of the CRPD which provides that non-discrimination is a general principle in relation to all rights in the CRPD. As noted by the Human Rights Committee in General Comment No. 18 on equivalent rights in the International Covenant on Civil and Political Rights (ICCPR), the rights to equality and non-discrimination in the ICCPR sometimes require nation states 'to take affirmative action in order to diminish or eliminate conditions which cause or help perpetuate discrimination'.

Under the NDIS Act, a person must meet the access criteria in subsection 21(1) in order to become an NDIS participant. One of the access criteria is that the person must be aged under 65 at the time of making the access request and subject to any other age requirement in the rules (age requirement). According to the Explanatory Memorandum to the NDIS Act, this age requirement:

“...implements part of recommendation 3.6 of the Productivity Commission report, and reflects that the NDIS is one part of a broader system of support in Australia with people over the age of 65 able to access the aged care system. Those people who are receiving support under the NDIS and turn 65 can choose either to remain in the NDIS or to move to the aged care system.”

The usual access criteria under subsection 21(1) of the NDIS Act would exclude Existing WA NDIS Participants who are aged 65 or over to receive supports under the NDIS. Subsection 21(2) of the NDIS Act provides for alternative access criteria to subsection 21(1).

This instrument is made for the purposes of subsection 21(2) of the NDIS Act and facilitates an alternative access criteria for participants in the WA NDIS Model. This

instrument enables Existing WA NDIS Participants who are aged 65 or over to continue to receive supports they were receiving under the WA NDIS Model, which commenced on 1 July 2014 and was designed to provide supports in the same manner as the NDIS.

Without the provisions contained in this instrument, WA NDIS Participants aged 65 or over would lose their supports once Western Australia transitions to the NDIS, an outcome which is contrary to the intention and objective of the NDIS.

Best Interests of the Child

This instrument does not affect, vary or limit the current provisions in the NDIS Act and rules made under the NDIS Act enabling the transition to the NDIS of a child who is an Existing WA NDIS Participant.

Conclusion

This instrument is compatible with human rights because it advances the protection of the rights of people with disabilities in Australia, consistent with the CRPD. In particular, it prevents Existing WA NDIS Participants from being unreasonably disadvantaged on the basis of the particular transition arrangements agreed between the State of Western Australia and the Commonwealth of Australia. To the extent that this instrument limits human rights in some circumstances, those limitations are reasonable, necessary and proportionate to ensure the long term integrity, safety and sustainability of the NDIS.

The Hon. Dan Tehan MP, Minister for Social Services