

EXPLANATORY STATEMENT

Issued by the Authority of the Minister for Social Services

National Disability Insurance Scheme Act 2013

National Disability Insurance Scheme (Facilitating the Preparation of Participants' Plans—New South Wales) Rules 2016

Section 209 of the *National Disability Insurance Scheme Act 2013* (the 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.

The *National Disability Insurance Scheme (Facilitating the Preparation of Participants' Plans—New South Wales) Rules 2016* (the Phasing Rules—New South Wales) are made pursuant to sections 32 and 32A (other than subsection 32A(4)) of the Act.

The Phasing Rules—New South Wales are about the order in which the CEO of the National Disability Insurance Agency will commence the facilitation of the preparation of plans for different classes of participants in New South Wales. They should be read with the *National Disability Insurance Scheme (Becoming a Participant) Rules 2016*, which set out when people in particular areas of New South Wales will be able to become participants: a person will only be able to have a plan once they are a participant.

The Minister in making the Phasing Rules—New South Wales has had regard to financial sustainability of the National Disability Insurance Scheme (the scheme) as required under subsection 209(3).

The Phasing Rules—New South Wales are Category B rules for the purposes of the Act. Accordingly the Commonwealth and the host jurisdiction, the Government of New South Wales, have agreed to the making of the rules (see section 209 of the Act).

The Phasing Rules—New South Wales revoke and replace the *National Disability Insurance Scheme (Facilitating the Preparation of Participants' Plans—New South Wales) Rules 2013*, which had dealt with the facilitation of participants' plans in two regions of New South Wales.

Commencement

The Phasing Rules—New South Wales commence on the day after this instrument is registered.

Consultation

The Phasing Rules—New South Wales were developed in close consultation with the Government of New South Wales.

The Phasing Rules—New South Wales are a legislative instrument for the purposes of the *Legislation Act 2003*.

Explanation of provisions

The Phasing Rules—New South Wales have three Parts:

- **Part 1** explains what these Rules are about.
- **Part 2** deals with the preparation of plans for residents of New South Wales.
- **Part 3** deals with other matters, including interpretation of the Phasing Rules—New South Wales.

Part 1 – What these Rules are about

Paragraphs 1.1 to 1.5 are explanatory and contextual. The phasing process is based on an agreement that has been reached between the Government of the Commonwealth and the Government of New South Wales and is intended to give effect to that agreement.

Part 2 – Preparation of plans for residents of New South Wales

Paragraphs 2.1 to 2.4 explain how the CEO is to commence facilitating the preparation of a plan for a participant. The process for commencing the facilitation of the preparation of plans for participants in New South Wales is set out in tables in paragraphs 2.7 and 2.8. These tables set out two classes of participants in New South Wales, each of which has four subclasses, and set out the circumstances in which the CEO is to commence the facilitation of the preparation of those participants' plans. The CEO will deal with each class sequentially; facilitation for a class or subclass will generally be commenced once the CEO has decided that the Agency has the capacity to do so.

Paragraph 2.5 summarises the effect of subsection 32(3) of the Act.

Paragraph 2.6 summarises the effect of subsection 32A(3) of the Act.

Paragraph 2.7 sets out two classes of participants in New South Wales and sets out the circumstances in which the CEO is to commence the facilitation of the preparation of those participants' plans. **Paragraph 2.8** sets out subclasses of the main classes.

The classes, subclasses and circumstances in which the CEO is to commence facilitation have been defined jointly with the State of New South Wales to ensure

that there is a smooth and steady transition for participants within these classes and subclasses from the service or support they previously received to the scheme. This arrangement will provide certainty for:

- individuals about when they will enter the new scheme;
- providers to assist their business planning; and
- governments to ensure that they can plan for the future of affected programs and the expected impact on their budgets.

The CEO has a discretionary power to delay the commencement of several classes and subclasses according to the Agency's capacity to begin facilitating new plans. This discretion would allow the CEO to respond to unforeseen events in New South Wales, or unanticipated levels of demand.

The details within the tables are intended to give legal effect to the Bilateral Agreement between the Commonwealth and New South Wales.

Paragraphs 2.9 to 2.11 sets out that the CEO is to commence facilitating the preparation of participant plans for participants in the subclass when the CEO decides it is appropriate to do so. These paragraphs also provide the considerations which the CEO must have, but is not limited to, in making decisions relating to subclasses.

Paragraphs 2.12 to 2.13 requires the CEO when considering making certain phasing decisions after the first possible dates on which they can be made, the CEO must consult with the Government of New South Wales and of the Commonwealth Department that administers the Act and use his or her best endeavours to reach an agreements with those entities about the proposed decisions.

Part 3 – Other matters

Citation

Paragraph 3.1 specifies the citation for these Rules.

Interpretation

Paragraphs 3.2 to 3.4 give guidance on interpretation and definitions for certain terms used in the Phasing Rules—New South Wales.

Schedule A provides details as to the boundaries of the geographical regions to which the phasing provisions refer. The boundaries are based on New South Wales local government areas.

Statement of Compatibility

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

This 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

This instrument sets out the circumstances in which the facilitation of the preparation of participants' plans will commence in the State of New South Wales. The instrument identifies classes of New South Wales participants and sets out the circumstances in, or periods within, which the CEO is to commence the facilitation of the preparation of those participants' plans.

Progressive implementation

Consistent with the recommendations of the Productivity Commission, the scheme will be implemented progressively. The initial NDIS sites were the Hunter region in New South Wales, the Barwon region in Victoria, South Australia and Tasmania for specified age cohorts, the Australian Capital Territory, the Barkly region in the Northern Territory and the Perth Hills area in Western Australia. It is now proposed that the Scheme will be fully operational in New South Wales.

In New South Wales there will be a gradual intake of participants to ensure that all participants are well supported as they make the transition to the scheme.

Human rights implications

The Phasing Rules—New South Wales engage the following human rights:

- The rights of persons with disabilities in the Convention on the Rights of Persons with Disabilities (CRPD), especially Articles 3 (general principles), 4 (general obligations) and 9 (accessibility) and 19 (living independently and being included in the community);
- Article 10 of the International Covenant on Economic, Social and Cultural Rights (ICESCR); and
- Articles 2 and 26 of the International Covenant on Civil and Political Rights (ICCPR).

General Principles underpinning the CRPD

The CRPD recognised the barriers that persons with disabilities may face in realising their rights. While the rights under all 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 scheme 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.

The objectives and general principles of the Act provide that:

- People with disability should be supported to participate in, and contribute to social and economic life to the extent of their ability;
- People with disability and their families and carers should have certainty that people with disability will receive the care and support they need over their lifetime; and
- People with disability should be supported to receive reasonable and necessary supports, including early intervention supports.

The Phasing Rules—New South Wales recognise 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 scheme also recognise the rights of persons with disabilities to be provided with reasonable and necessary supports to live independently, engage in the life of the community, and to have certainty that they will receive the lifelong care and support they need. The role of carers, families and other significant persons is also recognised and respected. In this way, the Rules promotes Article 10 of ICESCR, which requires that the widest possible protection and assistance should be accorded to the family, especially while it is responsible for the care and education of dependent children.

Progressive implementation of the scheme and the principle of non-discrimination

The right to equality and non-discrimination is protected by Article 2 of the ICCPR and Article 2 of the CRC which prohibits denying a person or child rights on certain grounds. 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 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'.

Non-discrimination ensures that no one is denied their rights because of factors such as race, colour, sex, language, religion, political or other opinion, national or social origin, property or birth. In addition to those grounds, discrimination on certain other grounds may also be prohibited. These grounds include age, nationality, marital status, disability, place of residence within a country and sexual orientation.

Accordingly differential treatment will not constitute discrimination if the differences in treatment are aimed at achieving a legitimate purpose and are reasonable and proportionate to this purpose.

Conclusion

This instrument is compatible with human rights because it advances the protection of the rights of persons with disabilities in Australia, consistent with the CRPD. It creates additional opportunities for persons with disabilities to exercise those rights by providing support to enable participation in the social, economic and cultural life of the community. To the extent that it limits human rights in some circumstances, those limitations are reasonable, necessary and proportionate to ensure the long-term integrity and sustainability of the scheme.