

## National Disability Insurance Scheme (Becoming a Participant) Rules 2013

*FRLI: F2013L01066*

*Portfolio: Social Services*

*Tabled: House of Representatives and Senate, 20 June 2013*

### Summary of committee concerns

2.138 The committee re-iterates its concerns raised previously on related legislation in relation to the narrow definition of 'disability' and the compatibility of the requirement for applicants to participate in the NDIS to be aged under 65 with the right to equality and non-discrimination.

### Overview

2.139 The *National Disability Insurance Scheme Act 2013* (NDIS Act) makes provision for various matters, including 'significant policy matters', to be covered by the NDIS rules, which are to be made as disallowable legislative instruments.<sup>94</sup> The NDIS Act provides that the NDIS rules may prescribe matters for the purposes of the criteria relating to becoming a participant in the scheme.<sup>95</sup>

2.140 These rules supplement the requirements set out in the NDIS Act relating to age, residence and disability or early intervention requirements that must be met for a person to become a participant.

### Compatibility with human rights

#### *Statement of compatibility*

2.141 The statement of compatibility accompanying the instrument states that the instrument engages the rights of person with disabilities in the Convention on the Rights of Persons with Disabilities (CRPD),<sup>96</sup> the rights of children in the Convention on the Rights of the Child (CRC),<sup>97</sup> the right to protection of the family in the International Covenant on Economic, Social and Cultural Rights (ICESCR)<sup>98</sup> and the right to equality and non-discrimination in the International Covenant on Civil and Political Rights (ICCPR).<sup>99</sup>

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94 Explanatory memorandum to the National Disability Insurance Scheme Bill 2012, p 75.

95 NDIS Act, s 22, 23, 25, 27 and 209.

96 Especially articles 3, 7, 22 and 23 of the CRPD.

97 Especially articles 2, 9, 18 and 23 of the CRC.

98 Article 10 of the ICESCR.

99 Article 2 of the ICCPR.

2.142 The statement concludes that the instrument is compatible with human rights because it advances the protection of the rights of persons and children with disabilities and creates additional opportunities for person with disability to exercise those rights by providing support to enable participation in social, economic and cultural life. The statement states that any limitations imposed by the instrument are reasonable, necessary and proportionate to ensure the long-term integrity and sustainability of the NDIS.<sup>100</sup>

### ***Committee view on compatibility***

#### *Definition of disability*

2.143 In its consideration of the National Disability Insurance Scheme Bill 2012, the predecessor to this committee (the former committee) expressed concern that the concept of disability used for the purposes of the NDIS appeared not to be as broad as that contained in the CRPD.

2.144 In her response to the committee the Minister stated that

The purpose of Clause 24 of the Bill is to set out disability requirements for a person to become a participant in the NDIS. It is not intended to be a definition of disability or to limit who may be considered a person with a disability.

2.145 The Minister went on to state that the access requirements would meet the needs of the NDIS for equitable, transparent and rigorous decisions on who is able to receive support.

2.146 The former committee noted the Minister's response and noted that the definition in subclause 24(1)(e) of the bill (now section 24(1)(e) of the National Disability Insurance Scheme Act 2012) provides that a person with an impairment will only meet the eligibility requirements if 'if the person's support needs in relation to his or her impairment or impairments are likely to continue for the person's lifetime.' The committee compared this requirement to article 1 of the CRPD which provides in part that '[p]ersons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.'

2.147 The Becoming a Participant Rules stipulate that a person meets the disability requirements if the person satisfies all of the requirements set out in paragraph 5.1 of the Rules. This reflects the concept of disability as recognised in the NDIS Act.

2.148 The statement of compatibility acknowledges that the definition of disability under the instrument does not reflect the corresponding CRPD definition, however states that the 'narrower definition of 'disability' employed by the scheme is aimed

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100 Statement of compatibility, p 16.

at achieving a legitimate purpose by targeting those people with disability who have a significant impairment to their functional capacity'.<sup>101</sup>

**2.149 The committee remains concerned regarding the use of a narrower concept of disability.**

*Equality and non-discrimination*

2.150 The committee notes that the instrument relies upon the requirement set out in the NDIS Act that access to the scheme will be limited to persons aged under 65 at the time of application. The committee notes that its concerns regarding the right to equality and non-discrimination and the general exemption from the *Age Discrimination Act 2004* are addressed further in this report under 'Responses to the committee's comments on bills and legislative instruments' in relation to the National Disability Insurance Scheme Legislation Amendment Bill 2013.

*Limitations on rights*

2.151 As noted above, the statement of compatibility concludes that where the instrument limits rights, those limitations are reasonable, necessary and proportionate to ensure the long-term integrity and stability of the scheme. However, there is no indication in the statement of the specific rights that are referred to here

**2.152 Accordingly, it is not possible for the committee to assess whether any limitations on those rights are permissible.**

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101 Statement of compatibility, p 15.

