

## National Disability Insurance Scheme (Children) Rules 2013

*FRLI: F2013L01070*

*Portfolio: Social Services*

*Tabled in the House of Representatives and the Senate: 20 June 2013*

### Summary of committee concerns

2.153 The committee seeks further information regarding the assistance to be provided to children with disabilities to exercise their right to have their views heard and the limitations on human rights referred to in the statement of compatibility.

### Overview

2.154 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>102</sup> The NDIS Act provides for who may make decisions or do things on behalf of children who are participants in the NDIS and sets out processes around how this will occur.<sup>103</sup>

2.155 This instrument sets out the rules relating to persons who are responsible for undertaking acts and making decisions on behalf of a child for the purposes of the NDIS Act. In particular, the instrument prescribes factors which the Chief Executive Officer of DisabilityCare Australia must have regard to in making determinations about whether or not a child needs a representative and who a child's representative should be (including determinations relating to who has parental responsibility for a child).

### Compatibility with human rights

#### *Statement of compatibility*

2.156 The statement of compatibility that accompanies the instrument states that the instrument engages the rights of people with disabilities in the Convention on the Rights of Persons with Disabilities (CRPD),<sup>104</sup> the rights of children in the Convention on the Rights of the Child (CRC),<sup>105</sup> and the right to protection of the family in the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>106</sup>

---

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

103 *National Disability Insurance Scheme Act 2013*, s 74 – 76.

104 Especially articles 3 and 7 of the CRPD.

105 Especially articles 3, 5, 9, 12, 18, 19 and 23 of the CRC.

106 Article 10 of the ICESCR.

2.157 The statement concludes that the instrument is compatible with human rights because the instrument advances the protection of the rights of children with disabilities and '[t]o the extent that its limits human rights in some circumstances, those limitations are reasonable, necessary and proportionate to ensure the long-term integrity and sustainability of the scheme'.<sup>107</sup>

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

#### ***Rights of children with a disability***

2.158 The CRC and the CRPD provide that the best interests of the child shall be a primary consideration in all actions concerning children.<sup>108</sup> The CRPD provides that children with disabilities have the right to express their views freely on all matters affecting them, their views being given due weight in accordance with their age and maturity, on an equal basis to other children and be provided with disability and age-appropriate assistance to realise that right.<sup>109</sup>

2.159 The statement of compatibility accompanying the instrument states that the instrument promotes these rights by requiring the CEO to have regard to the views of the child when:

- making a determination to appoint a child representative;<sup>110</sup>
- determining that one or more persons have parental responsibility for the child;<sup>111</sup> and
- determining that a child participant in the NDIS does not need a child representative and is able to make decisions for themselves for the purposes of the scheme.<sup>112</sup>

2.160 The NDIS Act places a duty on a child's representative to ascertain the wishes of the child and act in the best interests of that child<sup>113</sup> and this instrument requires a child's representative to consult the guardian of the child or any other person who assists the child to manage their day-to-day activities and make decisions.<sup>114</sup>

2.161 While the statement of compatibility notes the provision in the CRPD that children with disabilities are to be provided with disability and age-appropriate assistance to realise the right to express their views, it is not clear to the committee

---

107 Statement of compatibility, p 11.

108 Article 3 of the CRC and article 7 of the CRPD.

109 Article 7 of the CRPD.

110 Paragraph 3.5 of the Rules.

111 Paragraph 4.6 (b)(i) of the Rules.

112 Paragraph 5.3(b)(i) of the Rules.

113 NDIS Act 2013, s 76(1).

114 Paragraph 6.4 of the Rules.

whether the CEO or the child's representative will be required to ensure such assistance is provided.

*Limitations on rights*

2.162 As noted above, the statement of compatibility notes that to the extent that the instrument limits human rights in some circumstances, those limitations are 'reasonable, necessary and proportionate to ensure the long-term integrity and sustainability of the scheme'. However, there is no indication in the statement of compatibility of the specific rights that are referred to here, and accordingly it is not possible for the committee to assess whether any limitations on those rights are permissible.

**2.163 The committee intends to write to the Minister for Social Services to seek further information regarding:**

- **the assistance to be provided to children with disabilities to exercise their right to have their views heard and the guidance that is to be provided to the CEO and the child's representative when having regard to the preferences of the child; and**
- **the limitations on rights referred to by the statement of compatibility and the justification for those limitations.**

