

National Disability Insurance Scheme (Plan Management) Rules 2013

FRLI: F2013L01064

Portfolio: Social Services

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

Summary of committee concerns

2.174 The committee seeks clarification about whether an NDIS participant may request a review of the CEO's decision regarding self-management of funding supports under a plan or is able to submit a request to vary the arrangements for management of funding supports under a plan. The committee also seeks clarification of the criteria to be considered in determining whether a payment will be made in a single payment or by instalments and the circumstances in which the Chief Executive Officer of DisabilityCare Australia (the CEO) should require the provision of information or documents relating to the expenditure of previous instalments.

Overview

2.175 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.¹²³ The NDIS Act provides for the making and management of participant plans, which will, among other things, set out the supports that will be funded for the participant. The Act also provides that the NDIS rules may further prescribe matters relating to the making and management of participant plans.¹²⁴

2.176 This instrument prescribes criteria and considerations which the CEO must consider in relation to the management of a participant's plan, including how to assess whether it would pose an unreasonable risk to a participant to manage their own plan, how and when NDIS amounts are to be paid and considerations to be taken into account when determining whether to extend the grace period for temporary absences from Australia.¹²⁵

Compatibility with human rights

Statement of compatibility

2.177 The statement of compatibility accompanying the instrument states that the instrument engages the right to self-determination in the International Covenant on

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

124 NDIS Act, s 35, 40, 44, 45 and 46.

125 Statement of compatibility, p 11.

Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR),¹²⁶ the right to freedom of movement in the ICCPR,¹²⁷ the right to protection of the family in the ICESCR,¹²⁸ the rights of persons with disabilities in the Convention on the Rights of Persons with Disabilities (CRPD)¹²⁹ and the rights of children in the Convention on the Rights of the Child (CRC).¹³⁰

Committee view on compatibility

2.178 The committee does not consider that the instrument engages the right to self-determination in the ICCPR and ICESCR as this is a collective right that applies to peoples rather than individuals. However, the concept of an individual right to self-determination is reflected, as the statement of compatibility notes, in the principles set out in article 3 of the CRPD, which include respect for the inherent dignity, individual autonomy including the freedom to make one's own choices and independence of persons, as well as other articles of the CRPD and other treaties.

2.179 The statement of compatibility states that the instrument engages article 4 of the ICCPR which provides that in time of public emergency threatening the life of the nation, States parties may take measures derogating from certain of their obligations under the ICCPR. The statement of compatibility does not elaborate on this. The committee does not consider that the instrument does engage this right. It may be that the intended reference was to article 4 of the ICESCR, which permits limitations to be placed on the rights in the Covenant.

Right to control own financial affairs

2.180 Article 12 of the CRPD provides that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life. States parties are to ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse.¹³¹ Under article 12(5) of the CRPD, States parties must also ensure the equal right of persons with disabilities to control their own financial affairs.

2.181 The NDIS Act provides that an NDIS participant is able to make a plan management request specifying who the participant wishes to manage the funding for supports under the plan. The plan must specify that the funding is to be managed

126 Article 1 of the ICCPR and the ICESCR.

127 Article 12 of the ICCPR.

128 Article 10 of the ICESCR.

129 Especially articles 3, 4, 7, 9, 12, 16, 18, 19, 20, 22, 23, 24 and 27 of the CRPD.

130 Especially articles 3, 5 and 19 of the CRC.

131 See UN Committee on the Rights of Persons with Disabilities, *Draft General Comment on Article 12 – on Equal Recognition before the Law*, September 2013.

wholly, or to an extent specified in the plan, by the participant, a registered plan management provider, DisabilityCare Australia or the plan nominee.

2.182 The NDIS Act imposes some restrictions on the extent to which participants are able to self-manage the funding for supports under their plan. A participant will not be able to self-manage funding supports if they are an insolvent under administration or if the CEO is satisfied that self-management would present an unreasonable risk to the participant. The statement of compatibility states that any restriction on the participant's ability to self-manage funding supports is only to be imposed to the extent necessary.¹³²

2.183 The instrument sets out the criteria the CEO is to have regard to in deciding if self-management would pose an unreasonable risk to the participant. These criteria include consideration of safeguards or strategies that the Agency could put in place through the participant's plan to mitigate any risks.

2.184 The committee is unclear as to what rights of review are available to a participant in relation to a decision that self-management would pose an unreasonable risk to the participant.

2.185 Paragraph 4.3 of the Plan Management Rules provides that the CEO may pay an NDIS amount in a single payment or by instalments. Paragraph 4.4 provides that if the CEO is paying the amount in instalments, and if the CEO requires the participant to provide information or documents relating to the expenditure of the previous instalment, the CEO may pay the next instalment only after the information of document has been received.

2.186 It is not clear to the committee what criteria the CEO will have regard to in determining whether to make a payment in a single payment or by instalments. It is also not clear to the Committee when, in relation to the rule in paragraph 4.4 on payment by instalments, the CEO should require the participant to provide information or a document relating to expenditure of previous instalments.

2.187 The committee intends to write to the Minister for Social Services to seek clarification on whether an NDIS participant may seek a review of the CEO's decision regarding self-management of funding supports under a plan or may submit a subsequent request to vary the arrangements for management of funding supports under a plan. The committee also intends to seek clarification of the criteria to be considered in determining whether a payment will be made in a single payment or by instalments and in what circumstances the CEO should require the participant to provide information or a document relating to expenditure of previous instalments.

132 Statement of compatibility, p 14.

