

## National Disability Insurance Scheme (Supports for Participants – Accounting for Compensation) Rules 2013

*FRLI: F2013L01414*

*Portfolio: Social Services*

*Tabled: House of Representatives and Senate, 12 November 2013*

### Summary of committee concerns

2.206 The committee seeks further information whether the rules relating to compensation payments are compatible with the right to equality and non-discrimination, the right to an adequate standard of living, and the rights to social security and social protection.

### Overview

2.207 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>149</sup> The NDIS Act provides that the NDIS rules may prescribe the criteria to be applied or the matters to be taken into account, when deciding whether to provide or fund specific supports for NDIS participants.<sup>150</sup>

2.208 These rules set out how compensation payments for a personal injury suffered by an NDIS participant are to be taken into account in determining the reasonable and necessary supports that will be funded or provided under the NDIS.

### Compatibility with human rights

#### *Statement of compatibility*

2.209 The statement of compatibility accompanying the bill states that the bill engages the right to privacy;<sup>151</sup> the right to self-determination;<sup>152</sup> and the rights of persons with disabilities.<sup>153</sup> The statement concludes that any limitations imposed by the instrument are reasonable, necessary and proportionate 'to ensure the long-term integrity and sustainability of the [NDIS] and prevent abuse of the scheme'.

#### *Committee view on compatibility*

2.210 The committee considers that the instrument does not raise issues of incompatibility with the right to privacy. The committee does not consider that the

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

150 NDIS Act 2013, s 35.

151 Article 17 of the International Covenant on Civil and Political Rights (ICCPR).

152 Article 1 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

153 Convention on the Rights of Persons with Disabilities (CRPD).

instrument engages the right to self-determination under the ICESCR as this is a collective right that applies to peoples rather than individuals. The committee, however, considers that the instrument raises other issues of concern which are not adequately addressed in the statement of compatibility. The committee's concerns are set out below.

*Right to equality and non-discrimination*

2.211 Under article 26 of the ICCPR, article 2(2) of the ICESCR, and article 5(2) of the CRPD, persons with disability are guaranteed protection against discrimination in the enjoyment of various rights, including the guarantee of equal and effective legal protection against discrimination on all grounds.

2.212 The statement of compatibility explains that the instrument applies to participants whose impairment was caused or aggravated by a personal injury and who have either received a payment of compensation (including under a statutory scheme), or have entered into an agreement to give up their right to compensation where the CEO of DisabilityCare thinks that it was unreasonable to do so. Where this is the case, the participant may have their reasonable and necessary supports reduced by a 'compensation reduction amount'.

2.213 The statement of compatibility states that the aim of the instrument is 'to establish that the [NDIS] is intended to complement existing compensation arrangements for personal injury, rather than one designed to replace them'. The statement of compatibility, however, acknowledges that, '[while] it is typically not the case that a person will be asked to justify a decision not to make a claim for compensation,'

[t]he instrument may, however, appear to influence a person's rights in making a decision as to whether to pursue a claim for compensation. An agreement not to pursue such a claim may impact on the amount for reasonable and necessary supports that will be approved for their plan (paragraph 3.1(d)).<sup>154</sup>

2.214 These rules would therefore appear to disadvantage individuals accessing the NDIS compared to non-NDIS participants who suffer a personal injury to the extent that they effectively remove personal choice with regard to a decision as to whether or not to pursue a compensation claim. Differential treatment, however, will not be discriminatory, if it is aimed at a legitimate objective, and is reasonable necessary and proportionate to that objective.

*Rights to social security/right to an adequate standard of living*

2.215 The effect of the rules is that, in a case where the CEO of DisabilityCare considers that a decision not to seek compensation is unreasonable, the estimated amount of the compensation foregone may be deducted from any sums that would have otherwise been payable under the NDIS.

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154 Statement of compatibility, p 16.

2.216 The statement of compatibility states that the rules do not engage the right to social security 'as the person is still eligible to receive [NDIS] payments, despite a potential compensation reduction amount being imposed to account for assistance that the person has already been provided with through other sources.'

2.217 However, the committee is concerned that there may be circumstances in which the amount to be deducted is such that the person affected may be significantly affected in his or her ability to pay for the support that is needed for the person to participate in a non-discriminatory basis in everyday activities. This may have an impact on the person's right to an adequate standard of living,<sup>155</sup> and the rights to social security<sup>156</sup> and social protection.<sup>157</sup>

2.218 The statement of compatibility does not indicate whether the rules represent a justifiable limitation on these rights. Nor does it describe any safeguards to ensure that a person who has such sums deducted will not fall below the minimum level of enjoyment of those rights to which everyone is entitled.

**2.219 The committee intends to write to the Minister for Social Services to seek clarification:**

- **whether the rules relating to compensation payments are compatible with the right to equality and non-discrimination;**
- **whether the recovery of compensation amounts may exceed the difference between compensation amounts and the sum of amounts payable under the NDIS;**
- **whether the rules are compatible with the right to an adequate standard of living and the rights to social security and social protection, including whether there are safeguards in place to ensure that a person who has compensation amounts deducted does not fall below the minimum level of enjoyment of these rights;**
- **whether provision is made for the CEO's decisions to be appealed or subject to external merits review; and**
- **whether a participant's supports will be suspended while seeking a review of the CEO's decision.**

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155 Article 11 of the ICESCR and article 28(1) of the CRPD.

156 Article 9 of the ICESCR.

157 Article 28(1) of the CRPD.

