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

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Portfolio: Social Services

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Response dated: 3 February 2014

Information sought by the committee

3.72 The committee sought further specific information on 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 right to social security.

3.73 The committee's concerns were referred to the Assistant Minister for Social Services as the matters fall within his portfolio responsibilities. The response appears as part of the overall response to the concerns raised by the committee in relation to the National Disability Insurance Scheme Legislation Amendment Bill 2013, the DisabilityCare Australia Fund Bill 2013 (and related bills) and a number of other legislative instruments relating to the NDIS. The relevant extract from the Assistant Minister's response is attached.¹

Committee's response

3.74 The committee thanks the Assistant Minister for his response. The response provides detailed and helpful answers to the majority of the issues raised by the committee. However, the committee retains the concerns detailed below.

3.75 The Minister's response states that under rule 3.10, where a participant has unreasonably given up a right to seek compensation, 'there is a further safeguard to prevent the participants falling below the minimum enjoyment of the right to an adequate a standard of living'. This is because the CEO is empowered to waive a reduction in supports if the CEO thinks 'it is appropriate to do so in the special circumstances of the case (which may include financial hardship suffered by the participant)'.¹

3.76 This would appear to give discretion to the CEO to take financial hardship into account and does not appear to impose a duty on the CEO to waive the

1 Letter from Senator the Hon Mitch Fifield, Assistant Minister for Social Services, to Senator Dean Smith, Chair PJCHR, 3 February 2014, Attachment, pp 9-11.

reduction in supports if reducing the supports would mean that the participant's right to a minimum adequate standard of living was not realised. The committee considers that there should be a *duty* on the CEO not to take steps that would result in a person falling below minimum levels necessary to fulfil the right to an adequate standard of living.

3.77 The committee also notes that where the CEO has required a person to seek compensation under other laws and the participant has not done so, resulting in the suspension of the participant's plan, the plan is suspended even if the participant seeks a review of the decision. The plan is suspended until the original decision is varied or set aside. The effect of this appears to be that if there is a disagreement between the participant and the CEO about the reasonableness of a decision not to seek compensation under another law or scheme, the CEO's view prevails. This results in a potential restriction on the right to an adequate standard of living, with the possibility that a person will fall below the minimum levels required during the time that the decision is under review.

3.78 The committee will write to the Assistant Minister to seek clarification on:

- **why it is not appropriate to impose a *duty* on the CEO under rule 3.10 to take into account financial hardship to ensure that supports are not reduced or withdrawn if that may lead to a participant falling below the minimum level of enjoyment of the right to an adequate standard of living; and**
- **why it is necessary to suspend the provision of supports to a participant pending the resolution of a dispute over whether it is reasonable for the participant not to seek compensation under another law or scheme and how this is compatible with the obligation to ensure the right to an adequate standard of living.**

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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.**

Whether the rules relating to compensation payments are compatible with the right to equality and non-discrimination

The compensation provisions are designed to ensure that participants have adequate access to reasonable and necessary supports while preventing cost shifting from insurers of personal injury (such as insurers for workers compensation or motor accidents) to the NDIS.

The rules prevent cost shifting by providing a mechanism by which the supports provided by the NDIS can be reduced in relation to the entitlement of a participant to other systems of obtaining support (such as a claim for compensation). If the participant decides not to pursue support from those other systems, and the CEO of the NDIA is not satisfied that it was a reasonable decision, then the forfeited entitlement could still be taken into account and result in a reduction in the supports provided by the NDIA.

When considering whether the person's decision not to pursue support from other systems was reasonable the CEO must consider the impact on the person and their circumstances and family, including in a financial sense, the reasons given by the participant, the impact of the person's disability on their decision, and the circumstances giving rise to the possible entitlement. These aspects provide safeguards against any consideration of unequal treatment or discrimination of participants who may be able to access compensation payments from other schemes.

When determining the reasonableness of the decision there are number of factors that the CEO must take into account. The CEO must consider:

- (a) the disability of the participant or prospective participant, including whether the disability affected his or her ability to reasonably assess the terms of the agreement;
- (b) the circumstances which gave rise to the entitlement or possible entitlement to compensation;
- (c) any reasons given by the participant or prospective participant as to why he or she entered into the agreement;

- (d) the impact (including any financial impact) on the participant or prospective participant and his or her family that would have occurred if the claim for compensation had been pursued or continued;
- (e) any other matter the CEO considers relevant, having regard to the objects and principles set out in Part 2 of Chapter 1 of the Act.

The requirement on the CEO to consider these factors safeguards against the decision being deemed unreasonable when an understanding of the participant's personal situation would have led to a conclusion that the decision was indeed reasonable.

In the unlikely event that the participant decides to give up a right to seek compensation in a manner that the CEO cannot be convinced is reasonable then there is a further safeguard to prevent the participant falling below the minimum enjoyment of the right to an adequate standard of living. Under rule 3.10 the CEO is empowered to waive a reduction in the supports given to a participant if they think it is appropriate to do so in the special circumstances of the case (which may include the financial hardship suffered by the participant).

These safeguards ensure that the compensation provisions are a reasonable, necessary and proportionate approach to ensuring the financial viability of the NDIS. The rules are therefore compatible with the right to an adequate standard of living and the rights to social security and social protection.

Whether the recovery of compensation amounts may exceed the difference between compensation amounts and the sum of amounts payable under the NDIS

The recovery of compensation amounts, or reduction in NDIS payments for reasonable and necessary supports, cannot exceed the difference between compensation amounts and the sum of amounts payable under the NDIS. In other words, a participant cannot be required to pay money to the NDIA because a compensation reduction amount exceeds the participant's allocation of NDIS funds for reasonable and necessary supports. Rules 3.12(a), 3.16 and 3.21 of the Compensation Rules are relevant.

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

The NDIS promotes rights to an adequate standard of living by providing support to participants with a permanent and significant disability where they cannot rely on existing rights to obtain that support.

The NDIS is not designed to provide income support for participants. The NDIS provides reasonable and necessary supports so that persons with disability are able, despite the effects of that disability, to participate in society and achieve their goals and aspirations to the extent that funding for this purpose is not available from another source such as a statutory compensation scheme.

The *National Disability Insurance Scheme (Accounting for Compensation) Rules 2013* ('the rules') provides rules for how the NDIS will treat participants whose impairment was caused by a personal injury that has given rise to an entitlement to compensation.

To ensure the financial sustainability of the scheme the rules provide the capacity for the NDIA to reduce the amount of support given to a participant by taking into account the support the individual is already entitled to under another scheme. This is referred to as the compensation reduction amount, and is only intended to consider the care and support component of a compensation payment.

For example, where the participant has an entitlement to compensation under a Commonwealth, State or Territory statutory insurance scheme the support provided by the NDIA will be reduced by identifying the care and support component to be provided under that other scheme.

The NDIS is not intended to replace existing compensation entitlements. If a participant decides to give up a right to seek compensation in respect of the relevant injury the NDIA retains the capacity to reduce the participant's supports in line with their forgone entitlement. However, this can only occur if the CEO cannot be satisfied that the decision to give up a right to seek compensation was taken reasonably. If the decision to forgo a right to seek compensation was taken reasonably then there is no effect on the reasonable and necessary supports provided under the scheme.

Whether provision is made for the CEO's decisions to be appealed or subject to external merits review

The CEO's decisions on compensation are reviewable decisions under sections 99(o), (oa), (ob), and (oc) of the NDIS Act and so are subject to internal review under section 100(2) and further review by the Administrative Appeals Tribunal under section 103 of the NDIS Act.

Whether a participant's supports will be suspended while seeking a review of the CEO's decision

Where the CEO has required a person to seek compensation from a scheme of compensation under a Commonwealth, state or territory law and the participant has not done so, the participant's plan is suspended. Under section 100(7) of the NDIS Act, if the participant seeks a review of the decision to suspend the plan, that suspension will remain until such times as the original decision is varied or set aside.

