

## National Disability Insurance Scheme (Children) Rules 2013

FRLI: F2013L01070

Portfolio: Social Services

Tabled: House of Representatives and Senate, 20 June 2013

PJCHR comments: First Report of 44<sup>th</sup> Parliament, tabled 10 December 2013

Response dated: 3 February 2014

### Information sought by the committee

3.132 The committee sought 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 of the National Disability Insurance Scheme (NDIS) 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.

3.133 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.<sup>1</sup>

### Committee's response

3.134 The committee thanks the Assistant Minister for his response.

3.135 The Assistant Minister's response sets out the general principles that will govern the operation of the NDIS and the rights of participants (including children) set out in the Act. The response also refers to the guidance contained in the relevant *Operational Guidelines* adopted for the operation of the NDIS.<sup>2</sup> The committee notes that these *Operational Guidelines* are available on the NDIS website.<sup>3</sup>

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

2 *Operational Guideline – Children – Determining the Child's Representative* (v 1.01).

3 <http://www.ndis.gov.au/about-us-1> (accessed 19 February 2014).

3.136 On the issue of limitations on rights, the Minister's response notes:

Although there are no explicit limits on the rights of children in the rules, the phrase 'any limitation[s] imposed by the instrument are reasonable, necessary and proportionate', was used in the statement of compatibility to cover the situation where the CEO would need [to] make balanced decisions about children's supports under the NDIS. Any such decision that might be seen as limiting the rights of the child would be reasonable, necessary and proportionate.

3.137 It is not clear to the committee that it is possible to state in advance that decisions yet to be taken will necessarily be reasonable limitations on rights. However, the committee accepts that as a matter of statutory interpretation and policy intention that any decision to limit a right will need to be justified as a reasonable and proportionate measure and be authorised by the legislation.

**3.138 In the light of the information provided, the committee makes no further comment on this instrument.**

## RESPONES TO THE SPECIFIC ISSUES RAISED BY THE COMMITTEE

*National Disability Insurance Scheme (Children) Rules 2013*

**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.**

As a starting point, the National Disability Insurance Agency (NDIA) will engage with child participants in all decision making processes that affect them. This underlying proposition reflects a number of general principles at the core of the National Disability Insurance Scheme (NDIS) (see sections 4 and 5 of the NDIS Act), including that:

- (a) people with disability have the right to be able to determine their own best interests, including the right to exercise choice and control, and to engage as equal partners in decision that will affect their lives, to the full extent of their capacity;
- (b) people with disability should be involved in decision making processes that affect them, and where possible make decisions for themselves; and
- (c) if the person with disability is a child – the best interests of the child are paramount, and full consideration should be given to the need to protect the child from harm, promote the child's development and strengthen, preserve and promote positive relationships between the child and the child's parents, family members and other people who are significant in the life of the child.

Ordinarily, a child participant will have a representative to undertake actions and make decisions on his or her behalf. However, consistently with the general principles set out above, the NDIA will still engage with child participants in all decision making processes that affect them, including when they have a representative appointed to act on their behalf.

While a child will generally have a representative appointed, under the NDIS Act, a child who is a participant will be able to do things for his or herself if a delegate makes a determination under section 74(5). To make a determination under section 74(5), a delegate must:

- (a) be satisfied that the child is capable of making their own decisions;
- (b) be satisfied that, in the circumstances, it is appropriate that things that are to be done under the NDIS Act in relation to the child be done by the child rather than by the person or people who have parental responsibility for the child or the person a delegate has determined under section 74(1)(b) is to have parental responsibility; and
- (c) be satisfied that, in the circumstances, it is appropriate that the child make the plan management request rather than the request being made by the person or people who have parental responsibility for the child or the person a delegate has determined under section 74(1)(b) is to have parental responsibility.

In determining whether the child is capable of making their own decisions, the delegate must:

- (a) consult with the child's guardian (if any) and any other person with parental responsibility for the child; and
- (b) have regard to the following:
  - whether the child:
    - is able to understand the kind of information relevant to decisions that need to be made under the National Disability Insurance Scheme (NDIS);
    - is able to use information of that kind when making decisions;
    - is able to understand the consequences of decisions that need to be made under the NDIS; and
    - is able to communicate decisions in some way, and
  - whether there are people in the child's life who can support them to make their own decisions.

In determining whether it is appropriate for the child to do things for his or herself, the delegate must:

- (a) consult with the child's guardian (if any) and any other person with parental responsibility for the child; and
- (b) have regard to the following:
  - whether there are other people in the child's life who would be willing and able to assist them in carrying out actions and making decisions under the NDIS;
  - the need to preserve existing family relationships; and
  - any existing arrangements in place under Commonwealth, state and territory schemes.

Most children will have arrangements in place for people to either undertake actions on their behalf or support them to make decisions themselves. NDIA officers are sensitive to these existing support networks and the important role they play and take them into consideration in determining whether it is appropriate for a child to act on his or her own behalf.

A child's capacity for making decisions as well as the appropriateness of their acting for themselves will evolve over time. NDIA officers will be aware of the evolving nature of a child's capacity and take account of this in making determinations about whether a child can represent himself.

NDIA officers will also be aware that the child's decision-making capacity may vary according to the environment in which the child makes the decisions. NDIA officers should, wherever possible, make their assessment of whether the child is capable of making decisions in the environment in which the child feels most comfortable and having given the child ample time and support.

Where a person has parental responsibility and represents a child, it is clear from the NDIS Act that the person must act in the best interests of the child (section 76(2)(b)). This is reiterated in the *National Disability Insurance Scheme (Children) Rules 2013 (Children Rules)* (rules 6.2(b) and 6.3).

The Operational Guidelines of the NDIA also contain material in support of the position of a child participant affected by a decision. In *Operational Guideline – Children – Determining Parental Responsibility for a Child*, guideline 15 emphasises that a child's representative has a duty under the NDIS Act to ascertain the wishes of the child and act in a manner that is in the best interests of the child.

Guideline 17 requires a child's representative to consult, wherever practicable, with the child's guardian (if any) and any person with parental responsibility and any other person who assists the child to manage their day-to-day activities and make decisions.

Guideline 18 refers to principles in the NDIS Act that guide those making decisions for children requiring that they are aware that the best interests of the child are paramount and that full consideration is given to the need to protect the child from harm, promote the child's development and strengthen, preserve and promote positive relationships between the child and the child's parents, family members and other people who are significant in the life of the child.

Guideline 12 permits a delegate to revoke a determination that a person is to represent a child where the delegate is satisfied that it is no longer appropriate for the determination to remain in effect. A revocation may occur following a request by the child.

Any decision to appoint a person as a child's representative is open to review at the request of the child or any other affected person (NDIS Act sections 99(i) and (k)). This is internally reviewable under section 100(2) and externally reviewable by the Administrative Appeals Tribunal under section 103 if the child is dissatisfied with the internal review decision.

#### The limitations on rights referred to by the statement of compatibility and the justification for those limitations

Although there are no explicit limits on the rights of children in the rules, the phrase "any limitation imposed by the instrument are reasonable, necessary and proportionate" was used in the statement of compatibility to cover the situation where the CEO would need make balanced decisions about children's supports under the NDIS. Any such decision that might be seen as limiting the rights of the child would be reasonable, necessary and proportionate.

#### *National Disability Insurance Scheme (Nominees) Rules 2013*

**2.173 The committee intends to write to the Minister for Social Services to inquire whether a more explicit statement could be provided in the NDIS Rules to reflect the desirability that the appointment of a nominee should be for the shortest time possible and subject to regular review by a competent, independent and impartial authority as provided for in the CRPD.**

The Operational Guidelines on nominees contain guidance for decision makers when appointing nominees.

In the *Operational Guideline – Nominees – Overview*, guideline 8 stresses that appointments of nominees will be justified only when it is not possible for participants to be assisted to make decisions for themselves. Where a nominee is appointed and it later appears that the participant no longer requires a nominee and requests removal of the nominee, a delegate may cancel the appointment of the nominee.

In the *Operational Guideline – Nominees – Duties and Removal of Nominee*, guideline 24(a) states that the delegate is required to cancel an appointment of a nominee as soon as practicable if the nominee was appointed at the request of a participant and the participant requests the delegate to cancel the appointment.

