

EXPOSURE DRAFT



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National Disability Insurance Scheme (Children) Rules 2021

I, Linda Reynolds CSC, Minister for the National Disability Insurance Scheme, make the following rules.

Dated 2021

Linda Reynolds CSC [**DRAFT ONLY—NOT FOR SIGNATURE**]
Minister for the National Disability Insurance Scheme

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Part 1—Preliminary

1 Name

This instrument is the *National Disability Insurance Scheme (Children) Rules 2021*.

2 Commencement

- (1) Each provision of this instrument specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

Commencement information		
Column 1	Column 2	Column 3
Provisions	Commencement	Date/Details
1. The whole of this instrument	The later of: (a) the day the <i>National Disability Insurance Scheme Amendment (Participant Service Guarantee and Other Measures) Act 2021</i> commences; and (b) the day after this instrument is registered.	

Note: This table relates only to the provisions of this instrument as originally made. It will not be amended to deal with any later amendments of this instrument.

- (2) Any information in column 3 of the table is not part of this instrument. Information may be inserted in this column, or information in it may be edited, in any published version of this instrument.

3 Authority

This instrument is made under the *National Disability Insurance Scheme Act 2013*.

4 Schedules

Each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

5 Simplified outline of this instrument

This instrument prescribes matters relating to a child's representative, who is responsible for undertaking acts and making decisions in relation to the Act for, and on behalf of, the child.

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Part 1 Preliminary

Section 6

A child's representative is usually a person with parental responsibility for the child. Division 1 of Part 2 of this instrument prescribes matters related to determining that a person who does not have parental responsibility for a child is the child's representative.

In some cases, a child does not need a representative and is able to make decisions for themselves in relation to the Act. Under the Act, the CEO may determine that a child does not need a representative. Division 2 of Part 2 of this instrument prescribes matters related to making such a determination.

If a child has a guardian, under the Act the guardian is the child's representative unless the CEO determines otherwise. The Act also provides that if more than one person would have parental responsibility, the CEO may determine which of those persons has parental responsibility for the purposes of the Act. Part 3 of this instrument prescribes matters related to making such a determination.

A child's representative has a duty under the Act to ascertain the wishes of the child and to act in the best interests of the child. Part 4 of this instrument prescribes that a child's representative has an additional duty to consult certain other persons.

6 Definitions

Note: A number of expressions used in this instrument are defined in the Act, including the following:

- (a) CEO;
- (b) child;
- (c) National Disability Insurance Scheme;
- (d) parental responsibility.

In this instrument:

Act means the *National Disability Insurance Scheme Act 2013*.

guardian of a child means a person who has guardianship of the child under a law of the Commonwealth, a State or a Territory.

NDIS means the National Disability Insurance Scheme.

representative of a child means:

- (a) if a person is determined under paragraph 74(1)(b) of the Act in relation to the child—that person; or
- (b) otherwise—the person who has, or each of the persons who jointly have, parental responsibility for the child.

Part 2—Children

Division 1—Matters relating to determination of child's representative

7 Deciding whether to make determination of child's representative

For the purposes of paragraph 74(6)(a) of the Act, in deciding whether to make a determination under paragraph 74(1)(b) of the Act that a person (other than a person with parental responsibility for a child) is the child's representative, the CEO must have regard to the following matters:

- (a) the views (if any) of the child in relation to who should or should not be determined as the child's representative;
- (b) the impact the decision may have on the family relationships or informal support networks of the child;
- (c) whether there are any existing arrangements between the person and the child including living, decision-making and other arrangements that are relevant to the decision;
- (d) whether the person has responsibility for the child's long-term or day-to-day care, welfare and development;
- (e) whether the CEO is satisfied that the person can act, in conjunction with any other persons who represent or support the child, in the best interests of the child;
- (f) whether the information available to the CEO indicates that the person has been convicted of an offence against a law of the Commonwealth, a State or a Territory that is relevant to the decision;
- (g) whether, based on the information available to the CEO, the CEO considers the person is suitable to work with children;
- (h) if the CEO has requested that the person answer questions or provide information in relation to the proposed determination, or that the person consent to the release of information concerning the person's criminal history or suitability to work with children:
 - (i) any answers or information provided by the person or released to the CEO; and
 - (ii) any refusal or failure by the person to comply with the request;
- (i) whether the CEO considers the person to be the most suitable person to perform the duties to the child imposed by subsection 76(1) of the Act and section 12 of this instrument.

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Part 2 Children

Division 2 Matters relating to determination that child does not need representative

Section 8

Division 2—Matters relating to determination that child does not need representative

8 Deciding whether child is capable of making own decisions

For the purposes of paragraph 74(6)(c) of the Act, in deciding whether a child is capable of making decisions for themselves:

- (a) the CEO must consult:
 - (i) the child; and
 - (ii) if a State or Territory Minister or the head (however described) of a Department of State of a State or Territory is a representative of the child—that representative of the child; and
 - (iii) any other representative of the child to the extent that the consultation is appropriate and reasonably practicable in the circumstances; and
- (b) the CEO must have regard to the following matters:
 - (i) whether the child is able to understand information of the kind that is relevant to decisions that must be made as a participant in the NDIS;
 - (ii) whether the child is able to use information of that kind when making decisions;
 - (iii) whether the child is able to understand the consequences of decisions that need to be made by participants in the NDIS;
 - (iv) whether the child is able to communicate decisions in some way;
 - (v) if the child requires support to make decisions that must be made as a participant in the NDIS—whether there are persons who can support the child to make those decisions.

9 Deciding whether it is appropriate for subsections 74(1) and (2) of the Act not to apply

For the purposes of paragraph 74(6)(d) of the Act, in deciding whether it is appropriate for subsections 74(1) and (2) of the Act not to apply to a child:

- (a) the CEO must consult:
 - (i) the child; and
 - (ii) if a State or Territory Minister or the head (however described) of a Department of State of a State or Territory is a representative of the child—that representative of the child; and
 - (iii) any other representative of the child to the extent that the consultation is appropriate and reasonably practicable in the circumstances; and
- (b) the CEO must have regard to the following matters:
 - (i) the views of the child and any representative of the child consulted under paragraph (a);
 - (ii) whether the CEO is satisfied that there are persons who support the child and would be willing and able to assist the child to carry out actions and make decisions as a participant in the NDIS;
 - (iii) the impact the decision may have on the family relationships or informal support networks of the child;

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Children **Part 2**

Matters relating to determination that child does not need representative **Division 2**

Section 9

- ;
- (iv) whether there are any existing arrangements in place for the child in relation to child protection or decision-making under a Commonwealth, State or Territory law that are relevant to the decision.

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Part 3 Parental responsibility

Section 10

Part 3—Parental responsibility

10 Deciding whether to determine person other than guardian to have parental responsibility

For the purposes of subsection 75(4) of the Act, in deciding whether to make a determination under subsection 75(2) of the Act that one or more persons referred to in subsection 75(1) of the Act (the *relevant persons*) have parental responsibility for a child instead of the guardian of the child:

- (a) the CEO must consult, in writing, with the guardian of the child; and
- (b) the CEO must have regard to the following matters:
 - (i) the views (if any) of the child in relation to who should or should not have parental responsibility for the child for the purposes of the Act;
 - (ii) any views of the guardian of the child that are relevant to the decision;
 - (iii) the principle that the guardian of the child should have parental responsibility unless the CEO is satisfied that this is not appropriate for the purposes of the Act;
 - (iv) whether, based on the information available to the CEO, the CEO is satisfied that the guardian of the child is willing and able to perform the duties imposed by subsection 76(1) of the Act and section 12 of this instrument;
 - (v) whether, based on the information available to the CEO, the CEO is satisfied that the relevant persons are more suitable and able than the guardian of the child to perform those duties.

Note: If the guardian of a child is a State or Territory Minister or the head (however described) of a Department of State of a State or Territory, the CEO must not make a determination under subsection 75(2) of the Act in relation to the child unless the Minister or head of the Department, as the case may be, has agreed in writing to the making of the determination: see subsection 75(3A) of the Act.

11 Deciding whether to limit parental responsibility to certain persons

For the purposes of subsection 75(4) of the Act, in deciding whether to make a determination under subsection 75(3) of the Act that one or more persons (the *relevant persons*) have parental responsibility for a child for the purposes of the Act, the CEO must have regard to the following matters:

- (a) the views (if any) of the child in relation to who should or should not have parental responsibility for the child for the purposes of the Act;
- (b) any views of the persons who have parental responsibility for the child in accordance with subsection 75(1) of the Act that are relevant to the decision;
- (c) whether, based on the information available to the CEO, the CEO is satisfied that the relevant persons are the most suitable persons to perform the duties imposed by subsection 76(1) of the Act and section 12 of this instrument;

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- (d) whether there are any existing arrangements between the relevant persons and the child including living, decision-making and other arrangements that are relevant to the decision;
- (e) whether the relevant persons have responsibility for the child's long-term or day-to-day care, welfare and development;
- (f) whether the CEO is satisfied that the relevant persons can act in conjunction with any other persons who represent or support the child, in the best interests of the child;
- (g) if there is more than one relevant person—whether the CEO is satisfied that the relevant persons are willing and able to work together in the best interests of the child;
- (h) the impact the decision may have on the family relationships or informal support networks of the child;
- (i) whether the information available to the CEO indicates that the person has been convicted of an offence against a law of the Commonwealth, a State or a Territory that is relevant to the decision;
- (j) whether, based on the information available to the CEO, the CEO considers the person is suitable to work with children;
- (k) if the CEO has requested that any of the relevant persons answer questions or provide information in relation to the proposed determination, or that any of the relevant persons consent to the release of information concerning that person's criminal history or suitability to work with children:
 - (i) any answers or information provided by that person or released to the CEO; and
 - (ii) any refusal or failure by that person to comply with the request.

Note: If the guardian of a child is a State or Territory Minister or the head (however described) of a Department of State of a State or Territory, the CEO must not make a determination under subsection 75(3) of the Act in relation to the child unless the Minister or head of the Department, as the case may be, has agreed in writing to the making of the determination: see subsection 75(3A) of the Act.

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Part 4 Duties to children

Section 12

Part 4—Duties to children

12 Duty to consult certain other persons

For the purposes of subsection 76(4) of the Act, a person who may do a thing in relation to a child because of section 74 of the Act has a duty to consult, so far as is practicable, with the following persons in relation to the doing of that thing:

- (a) any person who:
 - (i) has parental responsibility for the child; or
 - (ii) but for subsection 75(2) or (3) of the Act, would have parental responsibility for the child;
- (b) any other person who assists the child:
 - (i) to make decisions as a participant in the NDIS; and
 - (ii) to manage the child's day-to-day activities.

Schedule 1—Repeals

National Disability Insurance Scheme (Children) Rules 2013

1 The whole of the instrument

Repeal the instrument.