

EXPOSURE DRAFT



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National Disability Insurance Scheme (Nominees) 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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Preliminary **Part 1**

Section 1

Part 1—Preliminary

1 Name

This instrument is the *National Disability Insurance Scheme (Nominees) 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Note: This table relates only to the provisions of this instrument as originally made.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Each instrument that is specified in a Schedule to this instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.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

In some cases, a participant will require another person, known as a nominee, to do certain acts on behalf of the participant under, or for the purposes of, the Act. This instrument prescribes matters relating to nominees.

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Part 1 Preliminary

Section 6

A participant's nominee has a duty under the Act to ascertain the wishes of the participant and to act in a manner that promotes the personal and social wellbeing of the participant. Part 2 of this instrument prescribes additional duties of a nominee of a participant, including the duties to consult certain persons and to develop the participant's capacity to make the participant's own decisions. It also prescribes additional duties of certain plan nominees and nominees that are bodies corporate.

A nominee may be appointed under the Act at the request of a participant or on the initiative of the CEO. Part 3 of this instrument prescribes matters relating to the appointment of nominees. It prescribes certain persons who must not be appointed as a nominee. It also prescribes certain matters relevant to the CEO considering whether it is necessary for a nominee to be appointed, deciding who to appoint as a nominee, and whether a term of appointment is to be specified.

A nominee's appointment may be cancelled or suspended in certain circumstances under the Act. Part 4 of this instrument prescribes matters relating to the cancellation or suspension of nominee appointments.

6 Definitions

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

- (a) Agency;
- (b) CEO;
- (c) child;
- (d) National Disability Insurance Scheme;
- (e) nominee;
- (f) participant;
- (g) plan nominee.

In this instrument:

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

conflict of interest: see section 7.

court-appointed decision-maker for a participant means a person who, under a law of the Commonwealth, a State or a Territory:

- (a) has guardianship of the participant; or
- (b) is a person appointed by a court, tribunal, board or panel (however described) who has power to make decisions for the participant and whose responsibilities in relation to the participant are relevant to the duties of a nominee.

participant-appointed decision-maker for a participant means a person:

- (a) who has entered into a formal arrangement with the participant under which the person has the power to make decisions for the participant; and
- (b) whose responsibilities in relation to the participant are relevant to the duties of a nominee.

Note: Examples of such an arrangement might include a power of attorney, an advance health directive or an appointment as an enduring guardian under a law of a State or Territory.

proposed nominee: see section 17.

7 Meaning of *conflict of interest*

- (1) A nominee has a ***conflict of interest*** in relation to a participant if the nominee has, acquires, or is likely to acquire, any interest, pecuniary or otherwise, that conflicts or could conflict with the performance of the nominee's duties in relation to the participant.
- (2) Without limiting subsection (1), a nominee has a ***conflict of interest*** in relation to a participant if the nominee is, other than in a personal capacity, directly or indirectly responsible for, or involved in, the provision of a service to the participant for a fee or other reward.
- (3) If the nominee is a body corporate, the interests of the nominee include the interests of any officer or employee of the nominee who is closely involved in the performance of the nominee's duties in relation to the participant.

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Part 2 Duties of nominees

Section 8

Part 2—Duties of nominees

8 Purpose of this Part

This Part prescribes duties of nominees for the purposes of subsection 80(4) of the Act.

9 Duty to consult

- (1) In relation to doing acts under, or for the purposes of, the Act, a participant's nominee has a duty to consult with:
 - (a) any other person who is a court-appointed decision-maker or participant-appointed decision-maker for the participant; and
 - (b) any other person, including a carer, who assists the participant to manage the participant's day-to-day activities and to make decisions.
- (2) If more than one person is appointed as a plan nominee of a participant, each plan nominee has a duty to consult with the other plan nominees before doing an act under, or for the purposes of, the Act.

10 Duty to develop participant's capacity

A participant's nominee has a duty to use the nominee's best endeavours:

- (a) to develop the participant's capacity to make the participant's own decisions; and
- (b) to the extent possible, to develop that capacity so that the participant no longer requires a nominee.

11 Duty to avoid or manage conflicts of interest

A participant's nominee has a duty:

- (a) to avoid any conflict of interest the nominee has, or could have, or to manage any conflict of interest the nominee has, in relation to the participant; and
- (b) to inform the CEO if a conflict of interest in relation to the participant arises.

12 Duty of certain plan nominees

If a plan nominee is appointed at the request of a participant, the nominee has a duty to only do an act in relation to:

- (a) the preparation, variation, reassessment or replacement of the participant's plan; or
- (b) the management of the funding for supports under the participant's plan; if the nominee considers that:
 - (c) the participant is not capable of doing, or being supported to do, the act; or
 - (d) the participant does not wish to do the act.

- Note 1: Similar obligations apply under subsection 78(5) of the Act in relation to plan nominees who were appointed on the initiative of the CEO.
- Note 2: This section is not intended to affect any other obligations or restrictions on a plan nominee under a law of a State or Territory, for example if the plan nominee is a court-appointed decision-maker or participant-appointed decision-maker: see section 207 of the Act (concurrent operation of State laws).

13 Duty of corporate nominees

- (1) If a participant's nominee is a body corporate, the nominee has a duty:
 - (a) to ensure that an officer or employee (the *designated individual*) of the nominee is closely involved in the performance of the nominee's duties in relation to the participant; and
 - (b) to inform the CEO of the designated individual's name and contact details; and
 - (c) if the officer or employee ceases to be the designated individual—the nominee must, within 7 days of the cessation, inform the CEO of:
 - (i) the cessation; and
 - (ii) the new designated individual's name and contact details.
- (2) The contact details for a designated individual must include the following:
 - (a) a telephone number at which the designated individual may be contacted personally;
 - (b) the designated individual's email address;
 - (c) a physical address to which documents may be sent to the designated individual;
 - (d) the position of the designated individual with the nominee.

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Part 3 Appointing nominees

Section 14

Part 3—Appointing nominees

14 Purpose of this Part

This Part prescribes matters related to appointing nominees.

15 Persons who must not be appointed as nominee

For the purposes of paragraph 88(6)(a) of the Act, the following persons must not be appointed as a nominee:

- (a) a child;
- (b) the Agency;
- (c) any of the following persons, other than in a personal capacity:
 - (i) a Board member;
 - (ii) the CEO;
 - (iii) an Agency officer;
 - (iv) a consultant (or contractor) engaged by the Agency to assist in the performance of the Agency's functions;
 - (v) a member of the Advisory Council;
 - (vi) a registered NDIS provider;
 - (vii) a person provided assistance in the form of funding under section 14 of the Act.

16 Matters to which CEO must have regard in considering appointment of nominee

- (1) For the purposes of paragraph 88(6)(b) of the Act, this section prescribes matters to which the CEO is to have regard in considering the appointment of a nominee.
- (2) If the participant has requested that a nominee be appointed, the CEO is to have regard to the principle that a nominee should ordinarily be appointed if requested by the participant.
- (3) If the participant has not requested that a nominee be appointed, the CEO is to have regard to the following matters:
 - (a) whether the participant is capable of requesting the appointment of a nominee;
 - (b) whether the participant is capable of participating effectively in the National Disability Insurance Scheme without a nominee;
 - (c) the principle that a nominee should be appointed only if necessary, as a last resort, and subject to appropriate safeguards;
 - (d) whether the participant has a court-appointed decision-maker or participant-appointed decision-maker;
 - (e) whether the participant has supportive relationships, friendships or connections with others that:

- (i) could be relied on or strengthened to assist the participant to make the participant's own decisions; or
- (ii) could be improved by the appointment of an appropriate person as a nominee of the participant;
- (f) any relevant views of:
 - (i) the participant; and
 - (ii) any court-appointed decision-maker or participant-appointed decision-maker for the participant; and
 - (iii) any person, including a carer, who assists the participant to manage the participant's day-to-day activities and to make decisions.

17 General matters to which CEO must have regard in appointing nominee

For the purposes of section 93 of the Act, in appointing a person (the *proposed nominee*) as a nominee of a participant, the CEO is to have regard to the following matters:

- (a) any expression of the participant's wishes mentioned in paragraph 88(2)(b) of the Act, including:
 - (i) a non-verbal expression; or
 - (ii) an expression to a person other than the CEO that has subsequently been communicated to the CEO;
- (b) if the participant requested that a particular person be appointed as the nominee:
 - (i) the principle that the person the participant has requested should ordinarily be appointed; and
 - (ii) any evidence that the person might have unduly or improperly induced or influenced the participant to request the appointment; and
 - (iii) any conflict of interest that the person would have in relation to the participant if the person were appointed;
- (c) whether the participant has a participant-appointed decision-maker;
- (d) the principle that, if the participant has a court-appointed decision-maker or participant-appointed decision-maker, and the powers and responsibilities of that person are comparable with those of a nominee, that person should be appointed as nominee;
- (e) whether the proposed nominee:
 - (i) knows, and is in a relationship of trust with, the participant; and
 - (ii) understands and is committed to performing the duties of a nominee; and
 - (iii) is sensitive to the cultural and linguistic circumstances of the participant; and
 - (iv) is familiar with, and able to work with, any communication system or other technological supports of the participant;
- (f) whether the proposed nominee is willing and able to:
 - (i) act in conjunction with any other persons who represent, support or are carers for the participant to maximise the participant's wellbeing; and

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Part 3 Appointing nominees

Section 18

- (ii) undertake the kinds of activities that are required to perform the duties of a nominee; and
- (iii) involve the participant in decision-making processes; and
- (iv) assist the participant to make the participant's own decisions; and
- (v) ascertain what judgements and decisions the participant would have made on the participant's own;
- (g) the desirability of preserving the family relationships and informal support networks of the participant;
- (h) any existing arrangements between the proposed nominee and the participant;
- (i) any conflict of interest that the proposed nominee would have in relation to the participant if the proposed nominee were appointed;
- (j) whether the proposed nominee has been convicted of an offence against a law of the Commonwealth, a State or a Territory;
- (k) if the CEO has requested that the proposed nominee answer questions or provide information in relation to the proposed appointment, or that the proposed nominee consent to the release of information concerning the proposed nominee's criminal history:
 - (i) any answers or information provided by the proposed nominee or released to the CEO; and
 - (ii) any refusal or failure by the proposed nominee to comply with the request;
- (l) any relevant views of:
 - (i) any court-appointed decision-maker or participant-appointed decision-maker for the participant; and
 - (ii) any person, including a carer, who assists the participant to manage the participant's day-to-day activities and to make decisions; and
 - (iii) any other person who supports the participant.

Note: In relation to paragraph (c), the CEO also must have regard to whether the participant has a court-appointed decision-maker in appointing a nominee: see subsection 88(4) of the Act.

18 Matters to which CEO must have regard in deciding whether appointment of nominee is to be for a specified term

For the purposes of section 93 of the Act, in deciding whether to appoint a nominee for a specified term and what that term is to be, the CEO is to have regard to the following matters:

- (a) whether the CEO considers that it would be desirable to review the requirement of the participant for a nominee at a future time;
- (b) whether the CEO considers that any of the following persons is unavailable to perform the duties of a nominee, but is likely to be available at a future time:
 - (i) a person the participant wishes to be appointed as nominee;
 - (ii) a court-appointed decision-maker or participant-appointed decision-maker for the participant;

- (c) if the proposed nominee is a court-appointed decision-maker or participant-appointed decision-maker for the participant—whether the appointment as a court-appointed decision-maker or participant-appointed decision-maker will cease at a future time;
- (d) any relevant views of:
 - (i) the participant; and
 - (ii) any court-appointed decision-maker or participant-appointed decision-maker for the participant; and
 - (iii) any person, including a carer, who assists the participant to manage the participant’s day-to-day activities and to make decisions.

19 Requirements for appointment of nominee

- (1) This section is made for the purposes of section 93 of the Act.
- (2) In appointing a person as a nominee of a participant, the CEO must consult any court-appointed decision-maker or participant-appointed decision-maker for the participant.
- (3) In appointing a body corporate as a nominee of a participant, the CEO must request the body corporate to identify an officer or employee of the body corporate who would be closely involved in the performance of the body corporate’s duties as a nominee if the appointment were made.
- (4) Section 17 applies in relation to a proposed nominee that is a body corporate as if any references to the proposed nominee included a reference to the officer or employee identified by the body corporate.

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Part 4 Cancellling or suspending nominee appointments

Section 20

Part 4—Cancellling or suspending nominee appointments

20 Purpose of this Part

This Part prescribes matters related to cancelling or suspending appointments of nominees.

21 Matters to which CEO must have regard in making certain decisions to cancel or suspend nominee appointments

For the purposes of section 93 of the Act, in deciding whether to cancel or suspend the appointment of a nominee of a participant, the CEO is to have regard to the following matters:

- (a) any relevant views of:
 - (i) the participant; and
 - (ii) any court-appointed decision-maker or participant-appointed decision-maker for the participant; and
 - (iii) any person, including a carer, who assists the participant to manage the participant's day-to-day activities and to make decisions;
- (b) the conduct of the nominee, and any breach of the nominee's duties, in relation to the participant;
- (c) whether the nominee is, and is likely to continue to be, able to perform the duties of a nominee in relation to the participant;
- (d) whether the nominee has been convicted of an offence against a law of the Commonwealth, or a State or Territory, and if so, whether that conviction is reasonably likely to affect the ability of the nominee to perform the nominee's duties;
- (e) the results of any variation or reassessment of the participant's plan;
- (f) the impact that the cancellation or suspension of the appointment would have on the participant;
- (g) whether the participant still requires a nominee and, in particular:
 - (i) whether the participant would be capable of participating effectively in the National Disability Insurance Scheme without a nominee; and
 - (ii) whether the participant has a court-appointed decision-maker or participant-appointed decision-maker; and
 - (iii) whether the participant has supportive relationships, friendships or connections with others that could be relied on or strengthened to assist the participant to make the participant's own decisions.

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Application, saving and transitional provisions **Part 5**

Section 22

Part 5—Application, saving and transitional provisions

22 Application of Part 2

Part 2 applies, on and after the commencement of this instrument, in relation to a nominee whether the nominee was appointed before, on or after that commencement.

23 Application of Part 3

Part 3 applies in relation to an appointment of a nominee made on or after the commencement of this instrument.

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Schedule 1 Repeals

Schedule 1—Repeals

National Disability Insurance Scheme (Nominees) Rules 2013

1 The whole of the instrument

Repeal the instrument.