

Our ref: 2013/006012

Committee Secretary  
Senate Standing Committees on Community Affairs  
PO Box 6100  
Parliament House  
Canberra ACT 2600

Dear Sir/Madam

### **Submission on National Disability Insurance Scheme Bill 2012**

We welcome the development of the National Disability Insurance Scheme (NDIS) to improve support and outcomes for Australians with disability, and appreciate the opportunity to comment on the NDIS Bill 2012.

Our comments on the Bill have been informed by our extensive work and consultations with people with disability, carers, disability services and other stakeholders over the past decade. Under the *Community Services (Complaints, Reviews and Monitoring) Act 1993*, the responsibilities of our office include a range of key functions targeted at improving the delivery of services to people with disability in NSW, including:

- receiving and resolving complaints about disability services, and assisting people with disability to make complaints;
- reviewing the pattern and causes of complaints about disability services, and making recommendations to improve how services handle and resolve complaints;
- monitoring and reviewing the delivery of disability services, and making recommendations for improvement;
- inquiring into matters affecting people with disability and disability services, and reviewing the situation of people with disability in care;
- reviewing the causes and patterns of the deaths of people with disabilities in care, and making recommendations to reduce preventable deaths; and
- overseeing and coordinating the Official Community Visitor scheme.

We have had the opportunity to consider the comments of the Disability Services Commissioner (DSC) in Victoria in relation to the NDIS Bill, and strongly support his submission. In particular, we agree with the Commissioner's comments relating to the need to ensure that the NDIS enables a high degree of flexibility for participants to facilitate innovative and appropriate supports. Furthermore, we also acknowledge the need to:

### **Strengthen the focus in the legislation on the rights of people with disability**

We agree with the DSC that the legislation would be bolstered by including an explicit reference in the Objects of the Act to promoting and protecting the rights of people with disability (section 3); and by strengthening the capacity for participants to make decisions and to obtain a review of decisions that affect them. This includes:

- building into the Act a requirement that nominees must support decision-making by the participant personally, and have regard to, and give appropriate weight to, the views of the participant at all times (section 80); and
- ensuring that all aspects of decisions in section 33(2) are subject to review, including decisions by the CEO relating to the reasonable and necessary supports to be funded or provided by the NDIS, the management of the plan, and assessment of risks that prevent a person from managing their own plan.

### **Strengthen the safeguards in the legislation**

Consistent with the DSC's comments, we consider that the Act would be strengthened by providing enhanced requirements relating to safeguards for participants, including:

- providing protection against retribution or disadvantage for people with disability who make a complaint or request a review of a decision (section 4(7));
- prescribing criteria relating to the compliance by registered providers of supports with prescribed standards (including safeguards relating to abuse, complaints, restrictive interventions and critical incidents) [section 73];
- specifying that the criteria relating to safeguards, quality assurance standards and procedures, qualifications of staff, and associated compliance requirements should also apply to the Agency with respect to any services or supports it provides (section 73); and
- incorporating provisions for the Agency and registered providers of supports to have complaint processes, and for participants or potential participants to have access to an independent oversight body which would deal with complaints.<sup>1</sup>

In relation to an independent oversight body, we also believe that it should have 'own motion' complaint handling and investigative powers, and legislative responsibilities to conduct ongoing reviews into the effectiveness of aspects of the NDIS. In this regard, we refer to the provisions of the NSW *Community Services (Complaints, Reviews and Monitoring) Act 1993* (and related provisions in the NSW *Ombudsman Act 1974*) which require our office to exercise the broad range of functions that we referred to earlier in this letter.

As an additional rights-based safeguard, we believe that there would be merit in requiring specified registered providers of supports to notify the independent body of serious abuse allegations that are made against individuals employed (or engaged) by the provider. Concerning this proposal, we note that NSW is already considering the need to provide additional safeguards to ensure appropriate responses to alleged serious abuse (including serious physical and sexual abuse). We have attached a copy of the Minister's media statement of 13 September 2012 in this regard. Since the release of the statement, substantial work has been undertaken examining various proposals for addressing the Minister's legitimate concerns. At the Conference of National Disability Services CEOs on 3 December 2012, a session was also devoted to

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<sup>1</sup> We acknowledge that it may be impractical to establish an independent complaints body at this stage in the NDIS process. However, the absence of work on this issue is of significant concern. It is important that the issue of an independent complaints body is addressed as the development of the NDIS progresses.

this topic. Mr Kinmond, as NSW's Community and Disability Services Commissioner, participated in a forum facilitated by Liz Jackson from the ABC, to discuss this important issue.

In addition to supporting the submission of the DSC, we provide the attached additional comments for consideration by the Committee.

Yours sincerely



Bruce Barbour  
**Ombudsman**

25 January 2013



Steve Kinmond  
**Deputy Ombudsman  
Community and Disability Services Commissioner**

25 January 2013

## **Chapter 3 – Participants and their plans**

### **Principles relating to plans (section 31)**

Section 31 (k) indicates that the preparation, review and replacement of a participant's plan, and the funding for supports under the plan, should *'provide the context for the provision of disability services to the participant and, where appropriate, coordinate the delivery of disability services where there is more than one disability service provider.'*

It is not clear what is meant by *'disability services'* or *'disability service provider'*. The term *'disability services'* has specific connotations in the existing disability system, typically referring to services that provide specialist disability support. To ensure that coordination of support covers both NDIS-funded supports and those outside the NDIS – consistent with section 4(13) – and is not restricted to traditional disability services, we suggest amending section 31(k) in a way that addresses this issue.

### **Matters that must be included in a participant's plan (section 33)**

#### **Participant's statement of goals and aspirations – section 33(1)(a)**

The proposed legislation prescribes that the participant's plan must include a statement that specifies, inter alia, their *'goals, objectives and aspirations'*. The wording of this section suggests that the statement must address each of these aspects separately. In traditional disability services' individual planning processes, *'goals'* and *'objectives'* have tended to be poorly understood by all parties, and this has adversely affected the quality of the planning, and outcomes for individuals.

Given that the statement is to be prepared by the participant, it would be beneficial to simplify this section by either referring to *'the goals and aspirations of the participant'* or *'what the participant wants to achieve'*.

Simplified wording should also apply to section 34(a), which refers to supports only being funded if they will assist the participant to pursue the *'goals, objectives and aspirations'* stated in their plan.

#### **Restrictions on providers of supports where the funding is managed by the Agency – section 33(6)**

The draft legislation specifies that if the funding for supports under a participant's plan is managed by the Agency, *'the plan must provide that the supports are to be provided only by a registered provider of supports'*.

This requirement limits the breadth of options available to these participants and does not appear to be consistent with the objects of the Act relating to enabling people with disability to exercise choice and control in the pursuit of their goals and the planning and delivery of their supports (section 3(1)(d)).

### **Choice for the participant in relation to plan management (section 43)**

Section 43 states that a participant for whom a plan is in effect, or is being prepared, may *'make a request'* for the funding for supports to be managed (either wholly or in part) by them, by a registered plan management provider, or by a person specified by the Agency.

This requirement on participants to have to *'request'* one of these options does not appear to be consistent with the objects and principles of the Act – in particular, maximising people with disabilities' capacity to exercise choice and control. We propose that the terminology be amended to simply acknowledge that: *'A participant... may nominate.'*

Section 43(4) provides that if a participant does not make a plan management request, the funding for supports under the plan is to be managed by a registered plan management provider specified by the Agency, or by the Agency itself. To maximise the choice of support providers available to participants, the Act should specify that the funding for supports under a plan should only be managed by the Agency where there are no other options (unless the Agency is specifically nominated by the participant or by their plan nominee).

### **Participant may change participant's statement of goals and aspirations at any time (section 47)**

Section 47 provides for participants to *'give the CEO'* a changed version of their statement of goals and aspirations at any time. The wording suggests that the participant must provide the changed version of the statement in writing. Consistent with section 33(8), the Act should include a subsection that specifies that the changed version of the statement does not need to be prepared by the participant in writing.

Section 47(2) indicates that if a participant changes their statement of goals and aspirations, the plan is taken to be replaced by a new plan. However, while the new plan includes the changed goals and aspirations, the statement of participant supports remains unchanged. In some instances, this may result in disconnect between the participant's stated goals and aspirations, and the supports that have been funded or provided to the participant under the NDIS.

The NDIS Rules should specify that a significant change in the participant's goals and aspirations should be a circumstance that requires the CEO to conduct a review of the participant's plan (section 48(6)).

### **Review of participant's plan (section 48)**

It would be useful to clarify in the Act what a review of a participant's plan involves. The wording of section 48 suggests that, while a participant may request a review of their plan, they are not involved in the review itself.

The Act should indicate that reviews of a participant's plan should occur with the participant, and should only occur without the participant in exceptional circumstances. The NDIS Rules should specify the kind of exceptional circumstances in which a review may occur without the involvement of the participant, and the circumstances that would trigger the CEO to conduct a review of a participant's plan on the CEO's own initiative (per section 48(4)).

## **Chapter 4 – Administration**

### **Division 2 – Appointment and cancellation or suspension of appointment**

#### **Appointment of plan nominee and correspondence nominee (sections 86 and 87)**

The draft legislation states that appointment of a plan nominee and a correspondence nominee may be made *‘at the request of the participant’* or on the initiative of the CEO. Consistent with maximising NDIS participants’ choice and control, we propose that the terminology be amended to: *‘on the nomination of the participant’*.

#### **Provisions relating to appointments (section 88)**

Decision-making authority relating to the appointment of nominees is heavily weighted towards the CEO, and away from participants. While section 88(2)(b) indicates that the CEO must take into consideration the wishes of the participant regarding the making of the appointment, it would be preferable to reframe this section to give greater weight to the choice of the participant.

We suggest that this section be amended to indicate that, where a participant nominates a person as a nominee, the CEO is to appoint the person unless the CEO has reasonable grounds to believe that the person is unable to comply with section 80 (or with other criteria outlined in the NDIS Rules).

### **Part 6 – Review of decisions**

#### **Reviewable decisions (section 99)**

In section 99(j), the reference to paragraph 74(4)(c) appears to be an error. The relevant reference appears to be paragraph 74(5)(c).

#### **Review of reviewable decisions (section 100)**

It is positive that the legislation requires the Agency to provide written notice of a reviewable decision to participants and others directly affected by the decision (section 100(1)). However, for participants to be in a position to fully exercise their right to seek a review of, or appeal, a reviewable decision, reasons for decisions must also be provided.

We consider that the Act should require the Agency to provide notice of a reviewable decision **and** the reason(s) for the decision. The notice and related reasons should be provided in a form that is appropriate to the communication needs of the participant.

## **Chapter 6 – National Disability Insurance Scheme Launch Transition Agency**

### **Division 1 – Reporting**

Section 172(2)(c) requires the annual report by the Board of the Agency to include information (including statistics) and analysis that relates to participants and/or funding or provision of supports by the Agency. To gain an understanding of the effectiveness of the operation of the NDIS and the Agency, and to assist in identifying systemic issues affecting participants, we consider that the information and analysis should include:

- data and other information relating to requests for reviews of reviewable decisions, and the outcomes; and
- data and other information relating to complaints made to the Agency, and the outcomes.

We consider that the above information and analysis (broken down by host jurisdiction) should also be included in the Board's quarterly report to the Ministerial Council (section 174(2)).