National Disability Insurance Scheme Bill 2012

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The Bills Digest at a glance

Purpose of the Bill

- The Bill establishes the framework for the National Disability Insurance Scheme (NDIS), a new program for funding care and support for people with a disability which is intended to commence in full across Australia from 2018.
- The Bill also establishes the NDIS Launch Transition Agency, the body that will manage the first stage of the NDIS in five locations around Australia from July 2013 (the launch stage).

Structure of the Bill

- The Bill is divided into chapters dealing with the objectives and principles of the NDIS; the role of the Launch Transition Agency; the processes for becoming a participant in the NDIS; the structure of the NDIS; the interaction between the NDIS and other compensatory schemes; the establishment of the Launch Transition Agency; and other matters.

Background

- The Productivity Commission has described the current disability support system as ‘underfunded, unfair, fragmented, and inefficient’ and recommended that the Australian Government work with the states and territories to establish the NDIS to better meet the care and support needs of Australians with a disability.
- The Gillard Government has committed to introducing the NDIS, providing $1 billion in the 2012–13 Federal Budget for the launch stage to begin from 1 July 2013.

Key elements

- Reflecting the Productivity Commission’s recommendation, the NDIS will consist of three tiers: Tier 1 will have a broad role that includes promoting opportunities for people with a disability, while Tier 2 will provide information and referral services to people with a disability. Tier 3 will be the main part of the scheme and will provide individualised support to people with a significant and ongoing disability and who meet age and residency criteria (around 410 000 people).

Key issues

- The NDIS will be a complex scheme that will transform the disability care sector in Australia. It has broad support throughout the disability sector, although concerns have been raised about lack of detail in the Bill and the impact on small service providers.
- Further questions raised by the Bill include how the full version of the NDIS will be financed; whether there be sufficient monitoring and other protections in place for participants; who specifically will receive support and what specific supports will they receive; and whether people aged over 65 should be able to become participants.
National Disability Insurance Scheme Bill 2012

Date introduced: 29 November 2012

House: House of Representatives

Portfolio: Families, Housing, Community Services and Indigenous Affairs

Commencement: On the day of Royal Assent: Sections 1 and 2 commence. On the day after Royal Assent: Sections 3 to 12; Chapter 4, Part 1, Divisions 2 and 3; Chapter 4, Parts 2 and 3; Chapters 6 and 7. On a day to be fixed by Proclamation or the day after six months from the date of Royal Assent: Chapters 2 and 3; Chapter 4, Part 1, Division 1; Chapter 5.

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill’s home page, or through http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation. When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website at http://www.comlaw.gov.au/.

Purpose of the Bill

The purpose of the National Disability Insurance Scheme Bill 2012 (the Bill) is to establish the framework for the National Disability Insurance Scheme (NDIS), a new program for funding care and support for people with a disability which is intended to commence in full across Australia from 2018.

The Bill also establishes the NDIS Launch Transition Agency, the body that will manage the first stage of the NDIS in five locations around Australia from July 2013.

Structure of the Bill

The NDIS will be a significant and complex new Australian Government program. The Bill, in establishing the framework for the NDIS and the Launch Transition Agency, is wide-ranging in scope. It is divided into six chapters as follows:

- Chapter 1 outlines the objects and general principles underpinning the legislation and defines key terms
- Chapter 2 sets out the broad role of the NDIS Launch Transition Agency
- Chapter 3 sets out the processes for how to become a participant in the NDIS and how to receive supports through the Launch Transition Agency
- Chapter 4 relates to the administration of the NDIS, including rules to protect personal information and rights to review of decisions
- Chapter 5 explains the interaction between the NDIS and other compensatory schemes
- Chapter 6 establishes the NDIS Launch Transition Agency, including its functions and governance arrangements and
• Chapter 7 addresses a range of other matters, including handling of debts owed to the agency; constitutional matters; arrangements for an independent review of the Act; and disallowable legislative instruments made under the Act, which will provide for the more detailed operational aspects of the scheme.

Background

The current system

In recent years, there have been increasing calls from within the disability and carers sector in Australia for the introduction of a new mechanism for funding support for people with disability—national disability insurance. Problems identified with the current system included:

• the fragmented and complex nature of the current disability services system
• the persistent failure of funded services to meet demand
• the lack of an entitlement to disability care and support services based on need, equivalent to the entitlement provisions present in Australia’s social security and universal health care systems
• differential treatment between those who acquire a disability through a workplace or motor vehicle accident and those who acquire permanent disabilities in other ways (including at birth)—that is, while the former generally receive financial support, there is no automatic support for the latter
• projections of a significant increase in the number of people with a severe or profound disability—according to the Australian Institute of Health and Welfare, around 2.3 million Australians will have a high level of disability by 2030¹ and
• a likely shortfall in the number of people available to undertake caring responsibilities.

In addition, people with disability experience significant barriers to their full participation in the economic and social life of the community.² In Australia, a person with a disability has a poverty risk around 2.7 times higher than a person without a disability, which puts Australia 27th out of 27 Organisation of Economic Cooperation and Development (OECD) countries on this measure.³

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Until recently, the provision and funding of disability services by the Commonwealth, state and territory governments was dealt with under the Commonwealth State Territory Disability Agreement (CSTDA). Under the Council of Australian Governments (COAG) reforms to Commonwealth-state financial relations, announced in March 2008, the CSTDA was replaced with the National Disability Agreement (NDA). In the new agreement the areas of responsibility remain essentially the same.

Under the NDA, open and supported employment services, as well as targeted employment support services, are administered by the Commonwealth Government. State and territory governments administer accommodation support, community support and community access services for people with disability, along with respite care services that provide relief and support to families or carers of people with disability.4

Productivity Commission Report

In 2009, in response to the campaign for national disability insurance, the then Rudd Government requested that the Productivity Commission (the Commission) investigate ‘the feasibility of new approaches, including a social insurance model, for funding and delivering long-term disability care and support for people with severe or profound disabilities however they are acquired’.5 The Commission reported to Government on 31 July 2011, finding that:

The current disability support system is underfunded, unfair, fragmented, and inefficient, and gives people with a disability little choice and, no certainty of access to appropriate supports. The stresses on the system are growing, with rising costs for all governments.6

In response, the Commission presented recommendations for a new disability care and support scheme, the NDIS. The scheme proposed by the Commission would have three tiers, focused on three groups of people.

According to the Commission, Tier 1 of the NDIS would effectively focus on the entire Australian population in that it would provide insurance (in the form of guaranteed support) for all Australians who acquire a significant disability. Note, however, that the insurance aspects of the NDIS do not apply to those over 65 (unless they are already participating in the NDIS when they turn 65). See below for a more detailed discussion of the Aged provisions. A further focus of Tier 1 would be to ‘minimise the impacts of disability’ through such activities as promoting opportunities for people

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5. B Shorten (Parliamentary Secretary for Disabilities and Children’s Services) and J Macklin (Minister for Families, Housing, Community Services and Indigenous Affairs), Disability Investment Group report released, media release, 3 December 2009, viewed 22 January 2013, http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query%3Did%3A22media%2Fpressrel%2FWYUV6%2

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with a disability and creating awareness in the community about issues affecting people with a disability.\footnote{Ibid., p. 11-12.}

Tier 2 would include anyone with a disability and their primary carers (estimated by the Commission at around 4.8 million people).\footnote{Ibid., p. 12-13.} The primary form of support provided in Tier 2 would be information and referral services, as distinct from funded care and support.

Tier 3 would provide long-term care and support to people with a significant and ongoing disability and who meet age and residency criteria (around 410,000 people).\footnote{Ibid., pp. 13-16.} People receiving supports under Tier 3 would have a disability that is, or is likely to be, permanent (that is, irreversible, even though it may be of a chronic episodic nature).\footnote{Ibid., p. 14} They would also have ‘significantly reduced functioning in self-care, communication, mobility or self-management and require significant ongoing support’ and/or be assessed as belonging to a group ‘for whom there was good evidence that [early] intervention would be safe, significantly improve outcomes and would be cost-effective’.\footnote{Ibid.}

The Commission also recommended a second, smaller scheme, the National Injury Insurance Scheme (NIIS), which would cover the lifetime care and support needs of people who acquire a catastrophic injury from an accident (based on the motor accident compensation schemes that operate in some states and territories).

The Commission proposed that Tier 3 would include the following features:

- entitlements to individually tailored supports based on the same assessment process
- certainty of funding based on need
- genuine choice over how needs are met (including choice of provider)
- local area coordinators and disability support organisations to provide grass roots support and
- a long term approach to care with a strong incentive to fund cost effective early interventions.\footnote{Ibid., p. 3.}

Commonwealth, state and territory governments would establish a single agency, the National Disability Insurance Agency, to administer and fund the NDIS. Services would be provided by non-government organisations, disability service organisations, state and territory disability service providers, individuals and mainstream businesses.\footnote{Ibid., p.2.}

The Commission emphasised the role of increased choice for people with disabilities under the proposed NDIS:

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... support packages would be tailored to their individual needs. People could choose their own provider(s), ask an intermediary to assemble the best package on their behalf, cash out their funding allocation and direct the funding to areas of need (with appropriate probity controls and support), or choose a combination of these options.\textsuperscript{14}

The Commission estimated that the NDIS would require an additional $6.5 billion annually. When added to current annual expenditure on disability services of $7.1 billion, this would amount to an increase in funding of around 90 per cent. Noting that ‘current funding for disability is subject to the vagaries of governments’ budget cycles’, the Commission proposed that the Commonwealth Government ‘should finance the entire costs of the NDIS by directing payments from consolidated revenue into a ‘National Disability Insurance Premium Fund’, using an agreed formula entrenched in legislation’.\textsuperscript{15}

The Commission proposed the NDIS would commence in stages with:

- regional implementation in several states and territories beginning in July 2014 and
- progressive coverage of all groups in subsequent years, with a fully operational scheme by 2018–19.\textsuperscript{16}

Similarly the NIIS would commence for motor vehicle accidents in all jurisdictions ‘by 2013’ and other forms of injury by ‘at least 2015’.\textsuperscript{17}

**Australian Government response**

On release of the Commission’s report, the Gillard Government announced that it would ‘start work immediately with states and territories on measures that will build the foundations for a National Disability Insurance Scheme’.\textsuperscript{18}

Initially, the Government:

- provided $10 million to support the technical policy work associated with establishing the NDIS
- established a COAG Select Council of Ministers from the Commonwealth, states and territories to lead reform in this area and
- established an Advisory Group to the Select Council to provide expert advice on delivering the foundations for reform and preparation for launch.\textsuperscript{19}

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14. Ibid., p. 3.
15. Ibid.
16. Ibid., p. 90.
17. Ibid.
19. Ibid.

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It was recognised that preliminary work was needed in a number of areas in developing the NDIS, including:

- developing common assessment tools to determine eligibility for support
- developing service and quality standards so that people with disability can expect high quality support irrespective of what disability they have or how they acquired it
- developing a national pricing structure
- building the capacity of the disability sector and
- building workforce capacity.\(^{20}\)

According to the Government, ‘work on these foundation reforms will recognise the roles and responsibilities of governments as outlined in the National Disability Agreement and reaffirmed in the National Health Reform Agreement’.\(^{21}\)

The work of the NDIS Advisory Group was informed by four expert groups established by the Australian Government in May 2012.\(^{22}\) The Australian Government also funded the national Disability and Carer Alliance to undertake public consultations on the NDIS during 2012 and 2013.\(^{23}\)

2012–13 Budget

On 30 April 2012, the Prime Minister, Julia Gillard, announced that the Government would fund its ‘share’ of the cost of the first stage of the NDIS in the 2012–13 Budget.\(^{24}\) The Government’s NDIS media release accompanying the Budget stated that its share includes ‘the total administration and running costs for the first stage of an NDIS’.\(^{25}\) In addition the media release said that ‘states and territories that host the initial locations will also be required to contribute to the cost of personal care and support for people with disability’.

The funding provided by the Australian Government was for the following:

\(^{20}\) Ibid.
\(^{21}\) Ibid.
\(^{24}\) J Gillard (Prime Minister) and J Macklin (Minister for Families, Housing, Community Services and Indigenous Affairs and Minister for Disability Reform), National Disability Insurance Scheme to launch in 2013, media release, 30 April 2012, viewed 23 January 2013, http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query%3DId%3A%22media%2Fpressrel%2F2031818%22
\(^{25}\) J Gillard (Prime Minister) and J Macklin (Minister for Families, Housing, Community Services and Indigenous Affairs and Minister for Disability Reform), Budget 2012: funding the first stage of the National Disability Insurance Scheme, media release, 8 May 2012, viewed 23 January 2013, http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2F1622419%22
• $342.5 million over three years from July 2013 to provide up to 10 000 individually funded
personalised care packages for people with significant and permanent disability in 2013–14, and
for up to 20 000 people from 2014–15
• $240.3 million over four years from 2012–13 to build and operate the information technology
system required to collect and analyse data to monitor client outcomes and measure the
performance of the new arrangements
• $154.8 million over three years from 2013–14 to employ Local Area Coordinators to provide a
more individually focused approach to delivering assistance to people with a significant and
permanent disability
• $122.6 million over four years from 2012–13 to prepare the disability sector for the new way of
delivering disability services with a focus on launch locations
• $58.6 million over three years from 2013–14 to conduct assessments of people with a disability
in launch locations to determine their eligibility and the appropriate level of individual care and
support
• $53.0 million over four years from 2012–13 to establish a new National Disability Transition
Agency to coordinate the implementation and manage the delivery of care and support to
people with a disability in the launch locations from 2013–14
• $18.3 million over four years from 2012–13 to continue the Commonwealth Taskforce
responsible for providing policy advice to the government on the design, governance and
funding of the NDIS
• $11.7 million over four years from 2012–13 to undertake research into early interventions to
improve support for people with a disability and to support the implementation of the NDIS, and
provide training of Local Area Coordinators and
• $5.2 million over three years from 2013–14 to evaluate the outcomes being achieved in launch
locations to inform further decision-making. 26

The Government had previously committed $19.5 million in December 2011 to design the launch of
the NDIS. 27 As can be seen above, much of the funding for the NDIS launch stage will be devoted to
developing institutions necessary to implement and facilitate the gradual expansion of the scheme.
It is also likely that a significant amount of resources will be devoted to administration of the scheme
in general.

First stage launch agreements

At the 25 July 2012 COAG meeting, it was announced that the Commonwealth had reached
in-principle agreement with South Australia, Tasmania and the Australian Capital Territory for a NDIS
launch to commence from July 2013:

13/content/bp2/download/bp2Expense.pdf
27. Ibid., p. 143.

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These jurisdictions agreed to work together on the development of Commonwealth legislation to establish both the scheme and a national launch agency to administer the scheme during the launch phase. The agency will be responsible for managing Commonwealth and State funds in a single national pool, and undertaking planning, assessment and approval of individual support packages.

The Commonwealth, South Australia, Tasmania and the Australian Capital Territory welcomed the opportunity to establish launch sites so that, from July next year, governments will start the first stage of an NDIS and improve the quality of support for people with a disability and their carers. These jurisdictions agreed that participants in the launch sites will receive ongoing support until a decision is taken to move to a full NDIS. All governments also agreed that the funding and governance arrangements agreed for launch do not create a precedent for the full scheme.\(^28\)

Since the COAG meeting, the Commonwealth has reached agreements with New South Wales (NSW) and Victoria about participation in the first stage of the NDIS.\(^29\) Western Australia and Queensland are yet to reach agreement with the Commonwealth on involvement in the NDIS. Western Australia has sought to have funding for its existing ‘My Way’ disability scheme counted as part of its contribution to the NDIS, while Queensland has cited budgetary constraints for failing to agree to a funding contribution.\(^30\)

As a result of the COAG agreement and subsequent agreements with NSW and Victoria, the first stage of the NDIS will be launched in South Australia, Tasmania, the ACT, the Hunter in NSW and the Barwon region of Victoria.

According to the Australian Government:

First stage locations were chosen based on their ability to ensure that we are able to fully assess all aspects of the operation of an NDIS. This involved a mix of considerations including demographics of the regions, the capacity and readiness of the workforce and a range of different locations. This will enable us to understand how to roll-out an NDIS across the country.\(^31\)

Specifically, the NDIS launch will include:

- the whole of South Australia through a children’s cohort model, for eligible children from 0-14 (expected to benefit a total of around 5000 children with disability in South Australia)

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29. See J Macklin (Federal Minister for Disability Reform), T Baillieu (Premier of Victoria), and M Wooldridge (Minister for Mental Health, Minister for Women’s Affairs, Minister for Community Services), *Launching a National Disability Insurance Scheme in the Barwon region*, media release, 12 August 2012, viewed 8 February 2013, [http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p?query%3DId%3A%22media%2Fpressrel%2F1845644%22](http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p?query=Id%3A%22media%2Fpressrel%2F1845644%22); J Macklin (Federal Minister for Disability Reform) and A Constance (Minister for Disability Services), *Launching a National Disability Insurance Scheme in the Hunter*, media release, 1 August 2012, viewed 8 February 2013, [http://parlinfo.aph.gov.au/parlinfo/search/display/display.w3p?query=Id%3A%22media%2Fpressrel%2F1823952%22](http://parlinfo.aph.gov.au/parlinfo/search/display/display.w3p?query=Id%3A%22media%2Fpressrel%2F1823952%22)


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in Tasmania, around 1000 eligible young people aged 15 to 24. This is intended to provide an opportunity to examine and improve the range of supports that need to be in place for young people with disability to ensure a smooth transition between school and work or higher education.

- 10,000 people in the NSW Hunter local government areas of Newcastle, Maitland and Lake Macquarie.
- 4000 people in the Barwon region of Victoria including the local government areas of the City of Greater Geelong, the Colac-Otway Shire, the Borough of Queenscliffe and the Surf Coast Shire and
- 5000 people in the ACT (beginning 1 July 2014).  

The first stage of the NDIS is being overseen by the NDIS Launch Transition Agency.  

On 7 December 2012, COAG signed an Intergovernmental Agreement for the NDIS Launch. New South Wales, Victoria, South Australia, Tasmania and the Australian Capital Territory signed bilateral agreements with the Commonwealth which confirm the operational and funding details for the roll-out of the NDIS in each launch site.  

On 6 December 2012, the Commonwealth and New South Wales Governments announced they had reached an agreement to establish the full NDIS in New South Wales by 1 July 2018.  

Design issues  

At its 13 April 2012 meeting, COAG released ‘high-level principles that will guide governments’ consideration of the Productivity Commission’s recommendations on an NDIS’ and a progress report which identifies some of the challenges associated with establishing the NDIS. At this time, the Select Council on Disability Reform commenced work on funding, governance and the scope of eligibility and support of the NDIS for consideration at the next COAG meeting.

Funding and governance issues were discussed at the 25 July 2012 COAG meeting and these were to be considered further at the next meeting in 2012. Further, according to the meeting communiqué:

As part of its report, the Select Council has proposed an approach to defining eligibility and reasonable and necessary support under an NDIS, building on the work of the Productivity Commission. COAG agreed that, as a first step to settling the design of an NDIS, consultation with people with a disability, their families and

32. In South Australia, the age criteria will be: 0 to 5 years in the first year, 0 to 13 years in the second year and 0 to 14 years in the third year. Australian Government, ‘Launch locations’, NDIS website, 2013, viewed 23 January 2013, http://www.ndis.gov.au/ndis-launc/launch-locations/

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carers, the workforce and disability sector and peak bodies would commence from late August on this approach. These consultations would occur through Commonwealth and State Advisory Groups that have been established to support government consideration of an NDIS. The consultations will inform the final approach to eligibility and reasonable and necessary support to be agreed by COAG, as well as further work on how these definitions would work in practice, and how they would be reflected in legislation, regulations or guidelines.  

By the 7 December 2012 COAG meeting, the Bill had been released. No further details related to the design of the scheme were released following this meeting, and, as will be seen below, the Bill leaves many details to be resolved in legislative instruments.

The Bill

In relation to the scheme proposed by the Bill, the Prime Minister, in her second reading speech, noted that:

The risk of disability is universal, so our response must be universal.

The only solution is therefore a nation-wide, demand-driven system of care tailored to the needs of each individual and established on a durable, long-term basis.  

The Prime Minister added that, while the Bill had been developed through extensive consultation, it would be subject to ‘further scrutiny, to further work’ through a Senate Committee inquiry and consultation with the states and territories, people with disability, their families, carers and advocates.  

Legislative instruments developed in conjunction with the Bill will also be the subject of consultation. These will be known as the NDIS rules and will set out the operational details of the scheme. The Government intends to bring a final version of the Bill for a vote in the Budget session of Parliament in 2013.

According to the Explanatory Memorandum, the Bill establishes a scheme agreed by Commonwealth, state and territory governments, which:

• takes an insurance approach that shares the cost of disability services and supports across the community

• funds reasonable and necessary services and supports which are directly related to an eligible person’s individual ongoing disability support needs and

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 http://parlinfo.aph.gov.au/parlinfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansardr%2F9b96ae59-96ca-4e39-b984-8b520b432ef5%2F0005%22
39. Ibid., pp. 13 877-878.
40. Ibid., p. 13 877.
41. Ibid.
enables people with disability to exercise more choice and control in their lives, through a person-centred, self-directed approach, with individualised funding.\textsuperscript{42}

The main components of the scheme introduced by the Bill are described and analysed in the key issues and provisions section below.

**Senate Community Affairs Legislation Committee**

The Bill has been referred to the Senate Community Affairs Legislation Committee for inquiry and report by 13 March 2013. Details of the inquiry are at:


**Senate Scrutiny of Bills Committee**

The Senate Standing Committee for the Scrutiny of Bills has commented on the Bill and sought advice from the Minister on a number of matters, some of which are discussed in the key issues and provisions section of this Digest.\textsuperscript{43}

**Parliamentary Joint Committee on Human Rights**

The Statement of Compatibility with Human Rights (the Human Rights Statement) can be found at the end of the Explanatory Memorandum to the Bill. As required under Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011 (Cth), the Government has assessed the Bill's compatibility with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of that Act. The Government considers that the Bill is compatible.

The Parliamentary Joint Committee on Human Rights has commented on the Bill and sought advice from the Minister on a number of matters, some of which are discussed in the Key issues and provisions section of this Digest.\textsuperscript{44}

Probably the most contentious limitation on access to the NDIS is that only people aged under 65 years can apply to become participants. As noted in the Key issues and provisions section of the Bills Digest (below), the Human Rights Statement argues this limitation is ‘reasonable and necessary because it supports the broader intent of an integrated system of support operating nationally and

\textsuperscript{42} Explanatory Memorandum, p. 1.

\textsuperscript{43} Senate Standing Committee for the Scrutiny of Bills, Alert Digest No. 1, relating to the National Disability Insurance Scheme Bill 2012, 1 February 2013, p. 1-2, viewed 7 February 2013,


\textsuperscript{44} Parliamentary Joint Committee on Human Rights, Examination of legislation in accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, First report of 2013, 6 February 2013, pp. 39-47, viewed 7 February 2013,


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providing seamless transition through different phases of life’.\textsuperscript{45} In other words, the policy intention is that the NDIS and aged care systems remain separate systems that address the different needs of separate cohorts of people (people with a disability and older people with a disability respectively).

Arguably, this assumes that there will be some equivalence in the care and support available between the NDIS and aged care systems. The extent to which this assumption can be sustained is briefly addressed in the Key issues and provisions section.

**Position of major interest groups**

As noted above, the NDIS originated from a campaign by disability and carer sector organisations across Australia.\textsuperscript{46} The concept of a NDIS is therefore widely supported by disability, carer and other interest groups.\textsuperscript{47} Nevertheless, the introduction of the Bill has resulted in criticism of aspects of the NDIS by some in the disability and carers sector.

One concern raised about the Bill is the lack of information about how key aspects of the NDIS will operate, with the details of many provisions to be introduced later via legislative instruments (the NDIS rules).\textsuperscript{48} As can be seen below, the Bill does contain a number of provisions whose details and substance is to be filled by way of NDIS rules—disallowable legislative instruments. While there may be benefits of leaving certain details to NDIS rules, there is a tension between the benefit of flexibility and timely response and the need for transparency and accountability. Delegated legislation does not receive the same Parliamentary attention as a primary Bill. Furthermore the lack of information about future arrangements can render parliamentary consideration of a legislative package difficult. As set out above, the Scrutiny of Bills Committee has sought advice from the Minister on a number of issues raised by the Bill. One of these issues is whether clause 209, which allows the Minister to prescribe the NDIS rules, represents an inappropriate delegation of legislative power.\textsuperscript{49} This question assumes particular importance in relation to this Bill, given the acknowledgement in the Explanatory Memorandum that some of the NDIS rules will relate to ‘significant policy matters’.\textsuperscript{50}

Another concern relates to the potential impact of the scheme’s market-based approach on small not-for-profit disability service providers. For example, disability sector commentator, Eleanor Gibbs, has argued that larger providers will have a competitive advantage over smaller, local providers:

\textsuperscript{45}. Statement of Compatibility with Human Rights, op. cit., p. 9.

\textsuperscript{46}. For a list of supporters of the NDIS, see the Every Australian Counts campaign website, viewed 5 February 2013, http://everyaustraliancounts.com.au/supporters/

\textsuperscript{47}. For a summary of early responses to the Bill by disability sector organisations, see E Gibbs, ‘Can Gillard get the NDIS details right?’, newmatilda.com, 3 December 2012, viewed 6 February 2013, http://newmatilda.com/2012/12/03/can-gillard-get-ndis-details-right

\textsuperscript{48}. See, for example, ibid.

\textsuperscript{49}. Senate Standing Committee for the Scrutiny of Bills, op. cit., p. 4.

\textsuperscript{50}. Explanatory Memorandum, p. 75.
Large charities have the skills and staff to navigate contracts, negotiate fairly with private sector partners and tick off on funding requirements. They have the ability to weather the potential unpredictability of individualised funding through centralised back-end services, not available to the local community centre.\(^\text{51}\)

One potential problem arising from such a situation is that it could inhibit the diversity of service providers and choice available to participants in the NDIS. A similar concern is that for-profit providers may focus on providing services capable of delivering a profit, rather than more costly services such as those targeted at Indigenous Australians or the needs of people with complex disabilities.\(^\text{53}\) Others in the sector have welcomed the opportunity for transforming the sector presented by the NDIS. For example, an analysis from Christine Regan of the New South Wales Council of Social Services (NC OSS), while acknowledging that the changes will be disruptive, argued that the overall objective of the NDIS is ‘a better deal for people with disability, not to protect the industry’:

Thus the changes are progressive, not negative. Many service providers have told NC OSS they are fully supportive of this.\(^\text{51}\)

Regan argued that concerns raised about the impact of competition on the disability sector should be addressed in the design of the NDIS, through, for example, maintaining universal access by people with a disability to government and other agencies (such as health services) and funding to small local agencies or specific providers.\(^\text{54}\) It is also worth noting that the 2012–13 Federal Budget included Commonwealth funding to ‘prepare the disability sector for the new way of delivering disability services’ (see above).

A further concern about the NDIS in general is that it based on a ‘medical’ or ‘individual’ model of disability, rather than a ‘social’ model:

A social model of disability looks at structural and societal barriers to people with a disability being able to fully participate in the world. This model promotes accessibility of public spaces, not the NDIS emphasis on private accessibility in the home.

If the NDIS worked within this model, there would have been recommendations for funding to ensure all transport and public spaces were fully accessible. Most public and private transport, particularly outside the inner city, is not accessible. Footpaths are poorly maintained or non-existent. Many of the busiest rail stations in Sydney are completely inaccessible, and universal accessible housing guidelines are still voluntary.\(^\text{55}\)

In response to such criticisms, Christine Regan has argued that issues of accessibility for people with a disability should continue to be a priority for governments but that ‘the NDIS is not designed to be the panacea to ‘fix the world’ but rather an attempt to improve the life of a person with disability’. Inclusion of people with a disability in community life is a priority of the through the National


\(^{52}\) Ibid.

\(^{53}\) C Regan, ‘Sorting the wheat from the chaff: the National Disability Insurance Scheme and individual budgets’, NC OSS blog, June 2012, viewed 6 February 2013, [http://www.ncoss.org.au/content/view/6767/100/](http://www.ncoss.org.au/content/view/6767/100/)

\(^{54}\) Ibid.

\(^{55}\) E Gibbs, ‘Is disability a private matter?’, op. cit.
Disability Strategy (NDS). This is also a specific objective of Tier 1 supports under the NDIS. Regan also argues that the ‘basic premise’ of the NDIS is consistent with the social model of disability in that it enables ‘people with disability to decide on and spend according to their own priorities … and in assuming this decision-making role, also provide people with disability and their families with any supports they need to make decisions’. 56

Criticism has also been made of the role of individualised funding packages in the NDIS, whereby participants in the scheme will be able to choose among various disability service providers. Gibbs, for example, argues that, rather than provided individually, disability services should be provided on the same basis as public education and health services:

... as a universal right to all citizens; that is, funded through collective revenue. This model is meant to ensure equal access for all; regardless of the ability to pay. 57

Arguably, though, while the entitlement to funded services under the NDIS is to be provided individually, the scheme will operate on a universal basis. The particular package of supports received by a participant will be designed around their individual needs but this will be provided universally to all who qualify for funding under the NDIS.

Another concern raised is that the NDIS model recommended by the Commission and largely reflected in the Bill has the potential to become overly bureaucratic and centralised, with, for example, decisions about the supports available to participants in the scheme controlled by NDIS officials, rather than people with disability themselves. 58 It is certainly the case that tensions between what NDIS participants would regard as ‘reasonable and necessary supports’ and what the NDIS will provide are inevitable (this is discussed in further detail in a later section of this Digest). A 2011 report of the Victorian Auditor-General into individualised funding for disability services in Victoria made a series of recommendations for, inter alia, improving the processes of assessment and allocation of individual disability support packages by the Victorian Department of Human Services. This resulted from findings that while the Victorian program had benefited many people, accessing an individualised support package (ISP) ‘is unnecessarily complex and people are not treated consistently when applying for and planning their ISP. This is leading to inequitable outcomes, which is exacerbated by the fact that demand for ISPs exceeds supply’. 59

**Financial implications**

The Explanatory Memorandum lists the financial impact of the Bill as $1 billion over four years from 2012–13. This refers to the first stage of the NDIS and is consistent with the amount announced in the 2012–13 Budget.

56. C Regan, op. cit.

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How will the NDIS be financed?

The Bill does not include any provisions establishing a funding mechanism for the NDIS. This could be seen as reasonable, given that funding has been provided in the federal budget for the NDIS launch and the full version of the scheme will not begin until 2018–19. However, given that the Bill establishes the framework for the full version of the NDIS in other areas (such as the governance of the scheme), some observers may have hoped that the Bill would have included a framework for funding the scheme.

The Shadow Treasurer, Joe Hockey, has argued on a number of occasions that a commitment to the scheme is meaningless in the absence of information about how it is to be financed.60 In May 2012 Mr Hockey expressed his own concern about committing to the NDIS prior to determining how it could be funded:

I’m not going to gild the lily. I’m not going to gild the lily. I cannot make commitments to promises and I will not make commitments to promises that we cannot fund. And we’re not going to raise false hope for people out there.61

As noted in the Parliamentary Library’s *Budget Review 2012–13*:

The NDIS will be a major and highly complex reform to the way in which disability care and support are funded. It is likely to have far-reaching effects throughout the disability services sector. The NDIS will also represent a significant new area of Commonwealth responsibility and expenditure. The estimated annual cost (nearly $14 billion) is around the same amount spent on the Disability Support Pension, more than the current annual cost of the Pharmaceutical Benefits Scheme ($10 billion), and not substantially less than the current annual cost of Medicare ($18 billion) ...

... The question of how the NDIS will be funded (will be there be an agreed formula entrenched in legislation?) is crucial in determining whether the longstanding problem of funding shortfalls will be adequately addressed. In the absence of an adequate and secure funding base, the NDIS would, in the long run, provide little advance on current arrangements.62

Indeed, along with continuity and adequacy of care and support for people with a disability, one of the main arguments advanced by proponents of the NDIS is the need for a secure source of funding into the future. To this end, the Commission recommended (14.1) that:

The costs of supporting people with a significant disability from year to year through the NDIS should be viewed as a core funding responsibility of government and met from claims on general government revenue (a ‘pay as you go’ scheme):

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but would be subject to the strong disciplines for certainty of funding specified in recommendation 14.2
- supplemented by payments from government to create reserve funds.

However, the scheme should be managed and reported as if it were a ‘fully-funded’ scheme in which each year’s funding is considered in the context of the scheme’s expected future liabilities.63

Recommendation 14.2 stated that:

The Australian Government should be the single funder of the NDIS. It should direct payments from consolidated revenue into a National Disability Insurance Premium Fund, using an agreed formula entrenched in legislation that:

- provides stable revenue to meet the independent actuarially-assessed reasonable needs of the NDIS
- includes funding for adequate reserves.

If the Australian Government does not adopt that option, it should:

- legislate for a levy on personal income (the National Disability Insurance Premium), with an increment added to the existing marginal income tax rates, and hypothecated to the full revenue needs of the NDIS
- set a tax rate for the premium that takes sufficient account of the pressures of demographic change on the tax base and that creates a sufficient reserve for prudential reasons.64

The main offset for the Commonwealth against this additional expenditure would be to ‘[make] no further special purpose payments to state and territory governments for disability supports’ (Recommendation 14.3).

The Commission’s preference for payments directed from consolidated revenue rather than a levy or tax was that the latter ‘would lack the flexibility and efficiency’ of the former.65

The Commission provided an alternative option (Recommendation 14.4) in the event that the Commonwealth did not accept that it should be the sole funder of the NDIS:

... it should sign an intergovernmental agreement with state and territory governments that creates a pooled funding arrangement that:

- provides a transparent and accountable basis for contributions by each jurisdiction
- uses the aggregate formula entrenched in legislation as spelt out in recommendation 14.2 to ensure the total pool size is sufficient to meet people’s entitlements
- ensures that state and territory governments that provide less own-state funding for disability supports than the average should not be rewarded for doing so.66

It was envisaged that this pooled option would still require the creation of a NDIS Premium Fund with a legislated formula that sets out the level of contributions to the fund. Under this model,

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64. Ibid.
65. Ibid., p. 34.
66. Ibid., p. 86.
states and territories would need to contribute a clearly formulated and agreed amount to the premium fund.\textsuperscript{67}

The Commission’s recommendation that the Commonwealth take the role of single funder of the NDIS was based on the view that:

\begin{quote}
... this would provide certainty, clear lines of funding responsibility, avoid the inefficiencies of the Commonwealth-State ‘blame game’ that afflicts some shared funding arrangements, and reflect the Australian Government’s unique capacity to raise efficient and sustainable taxes of the magnitude required.\textsuperscript{68}
\end{quote}

As such, the ‘pooled funding’ approach was seen by the Commission as a ‘weaker (and therefore less preferred)’ option.\textsuperscript{69} Nevertheless, it suggested that such a model, if using a formula-based approach, would ‘provide clarity about the long-run obligations of both levels of government (unlike some other agreements between governments)’.\textsuperscript{70} However, the PC added that it would ‘need to be policed by transparent accounting and clear indications to state and territory governments that if they reneged on their commitments, they would face reduced future transfers or other financial penalties’.\textsuperscript{71}

At this stage, the financing model that will be used for the full version of the NDIS is not publicly known. In December 2012, the Prime Minister is reported to have given an assurance that the funding of the NDIS will be ‘inscribed’ in the finances of the nation, though the details of how this would be done had not then been agreed.\textsuperscript{72} According to a media report, the Prime Minister indicated that (at least some of) the funds may come from ‘responsible savings’ across government outlays and that more information about financing the NDIS would be made available in the 2013–14 Budget.\textsuperscript{73} She is also reported to have suggested that one of the obstacles to finalising details of the scheme were that Queensland and Western Australia had not agreed to be part of the NDIS.\textsuperscript{74}

It may be that by ‘inscribed’ the Prime Minister meant that financing of the NDIS would be entrenched in legislation, though it could also simply refer to intergovernmental agreements not backed by legislation. However, any financing arrangement not backed by legislation would fall short of the scheme envisaged by the Commission, given its emphasis on the need for funding certainty for the NDIS and people with disability.

\begin{thebibliography}{70}
\bibitem{67} Ibid., p. 35.
\bibitem{68} Ibid., p. 33.
\bibitem{69} Ibid., p. 35.
\bibitem{71} Ibid.
\bibitem{72} M Grattan, ‘Gillard vows to entrench NDIS billions’, \textit{Canberra Times}, 4 December 2012, p. 6, viewed 24 January 2013, \url{http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query%3Did%3A22media%2Fpressclp%2F2085613%22}
\bibitem{73} Ibid.
\bibitem{74} Ibid.
\end{thebibliography}
As noted above, the Commonwealth and NSW have reached an agreement over funding the NDIS that will underpin the full introduction of the scheme in that state by July 2018. Under the agreement:

- the Commonwealth will provide funding of $3.32 billion in 2018—equivalent to 51.4 per cent of the funding needed. This is intended to provide for the administration of the scheme and contribute to the cost of individual care and support packages and other supports
- New South Wales will provide more than $3.13 billion in 2018—equivalent to 48.6 per cent of the funding needed. This is intended to provide for the cost of individual packages and other supports and
- the full scheme costs will be reviewed by the Productivity Commission in 2018–19 to inform COAG agreement on final scheme funding arrangements.  

The media release announcing the agreement between the Commonwealth and NSW stated that ‘implementation of the NDIS in NSW provides a framework for a national scheme to be rolled out in all states and territories’. This could be an indication that the preferred financing model for the NDIS will be a pooled funding approach with a 50/50 split between Commonwealth and states. As suggested above, any such arrangement not backed by legislation would lack the level of funding certainty highlighted by the Commission as a key element of the NDIS.

**Key issues and provisions**

As can be seen below, the Bill introduces both the framework for the broader NDIS and provisions related specifically to the NDIS launch. In some cases, the Government has indicated that the NDIS launch related provisions are intended to be temporary—for example, those relating to certain geographically based age restrictions and residential limitations on participation in the scheme. In other cases, this is less clear. For example, it is not clear whether the provisions establishing the National Disability Launch Transition Agency will provide the framework for the National Disability Insurance Agency (NDIA) when this is eventually introduced to oversee the full version of the NDIS.

Further, as noted above, the Bill also contains a number of provisions whose details and substance is to be filled by way of NDIS rules.

**Objects and principles**

The NDIS is to be underpinned by objects and principles set out in subclause 3(1) of the Bill, which include:

- establishing the NDIS

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75. J Gillard (Prime Minister), B O’Farrell (Premier of New South Wales), J Macklin (Federal Minister for Disability Reform) and A Constance (Minister for Disability Services), Agreement for full roll out of National Disability Insurance Scheme in NSW by July 2018, joint media release, 6 December 2012, viewed 24 January 2013, http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2F2090918%22

76. Ibid.
• supporting the independence and social and economic participation of people with disability
• providing reasonable and necessary support to participants in the NDIS launch
• enabling participants to exercise choice and control over planning and delivery of their supports and
• giving effect to certain obligations Australia has as a party to the Convention on the Rights of Persons with Disabilities (CRPD).77

These objects of the Bill are broadly consistent with those recommended by the Productivity Commission in its list of objectives and indicators.78 Unlike the Productivity Commission list, the Bill does not specifically list moving away from ‘excessive and unfair reliance on the unpaid work of informal carers’ as an object.

The Bill specifies two mechanisms through which these objects are to be achieved. First, it requires that governments work together to develop and implement the NDIS launch (paragraph 3(2)(a)). This is to be given effect through a Ministerial Council, defined in clause 9 of the Bill as a body that consists of Ministers of the Commonwealth, states and territories, which has been designated by COAG as having responsibilities in relation to the NDIS. The functions of the Ministerial Council are specified in subclause 12(1) as considering and advising the Commonwealth Minister on NDIS policy matters, and making recommendations to COAG about such matters. The Bill also specifies that the Commonwealth Minister must consult the Ministerial Council about policy matters relating to the NDIS or arising under the Act (subclause 12(3)).

The second mechanism is that the NDIS operates under an ‘insurance-based approach, informed by actuarial analysis, to the provision and funding of supports for people with disability’ (paragraph 3(2)(b)). The term ‘insurance-based’ is not specifically defined.79

Clause 4 sets out a list of general principles which ‘focus on the rights of people with disability’80 and are to be used in guiding actions by any person performing functions or exercising powers under the Act (subclause 4(15)). However this is qualified by subclauses 4(15)(a) and (b) which state that such a person is to do things having regard to the progressive implementation and financial sustainability


79. According to the Commission, use of the word insurance in the context of the NDIS ‘simply reflects the need to ensure the community pools resources to provide reasonable long-term supports for people acquiring a significant disability’. Productivity Commission, op. cit., vol. 1, p. 12.

80. Explanatory Memorandum, p. 4.
of the NDIS. This qualification and context mirrors that in subclause 3(3) in relation to the operation of objects of the legislation.

These objects and principles are moderated to some extent by subclauses 3(3) and 4(15), which state that, in giving effect to the objects and principles of the NDIS, regard is to be had to the progressive implementation and financial sustainability of the NDIS.

Clause 5 sets out general principles to guide the actions of people who may wish to do acts or things on behalf of participants under the Act. These general principles reflect an emphasis on protection and respect for difference, autonomy, self-determination and supported decision-making which is also to be found in Article 3 (general principles) of the CRPD. The general principles in clause 5 serve to assist in giving effect to the core objects of the Bill, in particular paragraphs 3(1)(b), (d), (g), and (h).

Framework for the NDIS

The Bill establishes the framework for the NDIS, which is intended to comprise:

- general supports (see definition below)
- funding for persons or entities to enable them to provide assistance to people with disability and
- individual plans under which reasonable and necessary supports are funded for NDIS participants.

General supports

A general support is defined as a service or activity ‘that is in the nature of a coordination, strategic or referral service’ (subclause 13(2)). General supports are intended to ensure that people with disability have a single point of contact for enquiries regarding disability care and support services.

The Bill provides that general supports may be provided both to, or in relation to, participants in the NDIS and people with disability who are not participants. For those who are not participants, the kinds of general support that may be provided include help to ‘access mainstream services, such as in the health, education and transport systems, and by non-government organisations’.

Coordination and other general supports may be provided to, or in relation to, participants as part of their participation in the NDIS (paragraph 33(2)(a)).

Information and referral services were recommended by the Commission as supports available to people under Tier 2 of its NDIS model. It noted, however, that with the potential population of

81. The text of the CRPD can be viewed at: http://www.austlii.edu.au/au/other/dfat/treaties/ATS/2008/12.html
82. ‘Simplified outline’ of the Bill in clause 8 (Part 3, Chapter 1).
83. Explanatory Memorandum, p. 7.
84. Tier 2 is defined above and includes all those with a disability and their primary carer. The level of disability is not considered for inclusion in Tier 2, nor does it appear to be age limited, in the same way as access to the services for Tier 3.
customers very high, ‘it would be critical to provide any referral and information services cost-effectively’.  

The Commission also suggested that the point of such services would be to strengthen links between the community and people with disability, rather than ‘crowd out’ existing relationships—‘[f]or example, local area coordinators (the scheme’s case managers) could help link people with disabilities to local community groups (for example, a sailing club)’.  

Funding for persons or entities to assist people with disability

A further aspect of the NDIS is that funding may be provided to individuals and organisations to assist people with disability to:

- realise their potential for physical, social, emotional and intellectual development and
- participate in economic and social life (paragraph 14(a)).

According to the Explanatory Memorandum, this, for example, could include funding to an organisation to provide a service to a cohort of people with disabilities, such as counselling for young adults with disability on the transition from school to work or university.  

This funding reflects objects and principles set out above. More broadly, individuals and organisations may be provided with funding to assist ‘otherwise’ in the performance of functions under the NDIS (paragraph 14(b)). What this might include is not specified in the Bill or Explanatory Memorandum.

The Commission also envisaged funding to individuals and organisations to assist people with disabilities as part of the ‘capacity-building’ aspect of Tier 2 of the NDIS, suggesting that:

Not-for-profit organisations would take the lead in community capacity building, marshalling the voluntarily provided resources that they previously used to prop up under-funded direct services.  

The Commission further suggested that local government could also take on this role.  

86. Ibid., p. 13.
89. Ibid.
Individual plans

The Bill specifies arrangements for participation in the first stage of the scheme, the NDIS launch. As noted above, the NDIS will commence in limited form in New South Wales, the ACT, Victoria, Tasmania and South Australia from July 2013.

People may seek to become participants in the NDIS launch by making an access request (clause 18). Prospective participants must meet various criteria in relation to age (clause 22), residency (clause 23) and either disability (clause 24) or suitability for early intervention (clause 25). Those accepted as participants in the NDIS launch will be entitled to funding for ‘reasonable and necessary supports’ as part of a ‘participant’s plan’ (clause 33).

The participant’s plan encompasses a ‘participant’s statement of goals and aspirations’ (prepared by the participant (subclause 33(1)) and a ‘statement of participant’s supports’ prepared with the participant and which includes the supports to be provided under the NDIS (subclause 33(2)).

Participant plans equate to Tier 3 of the Commission’s recommended model. The Commission envisaged that individualised supports would be targeted only to those with ‘significant care and support needs’. While a much smaller group of people than those benefiting from Tiers 1 and 2, the overwhelming costs of the NDIS will relate to Tier 3.

Management of participant plans

Under the proposed scheme, the NDIS Launch Transition Agency will provide funding to be used in meeting the costs of supports identified in a participant’s plan (clause 33).

The statement of participant supports will specify how this funding is to be managed (paragraph 33(2)(d)). The funding may be managed either wholly, or to a specific extent, by the participant, a registered plan management provider, the Agency, or the plan nominee (subclause 42(2)). The participant may choose to direct how their plan is to be managed through a plan management request (subclause 43(1)) or may leave this to the Agency (subclause 43(4)).

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90. Ibid.
91. Ibid., pp. 15-16.
92. A registered plan management provider means a registered provider of supports who is approved in relation to managing the funding for supports under plans as mentioned in paragraph 70(1)(a). Clause 69 provides that a person or entity may apply to the CEO to become a registered provider of supports in relation to either or both of the following: managing the funding for supports under plans, the provision of supports. The CEO must approve the application if the applicant makes an application in the manner and form required with the relevant information and if the CEO is satisfied that the applicant meets the criteria prescribed by the NDIS rules (subclause 70(1)).
93. Subclause 86(1) enables the CEO to appoint a person to be the plan nominee of a participant. This means that the nominee is able to stand in the participant’s shoes and do things that can be done by the participant under the Act such as making a request, preparing, reviewing or organising their plan (subclauses 78(1), (2) and (3)). However, the instrument of appointment may also limit the matters that the plan nominee can deal with on behalf of the participant (subclause 86(3) and subclause 78(5)).
This is consistent with the ‘individual choice’ model proposed by the Commission, according to which ‘people could choose how much control they wanted to exercise’. The Commission envisaged three main options under this model through which people could:

- receive a package of supports (possibly through service providers they have chosen), rather than a budget amount
- cash out their support package and manage it themselves, allocating it to specific supports they themselves have assembled, including hiring the support workers they want (possibly including neighbours, friends and family) and
- take charge of some aspects of their care and support but hand control to a service provider for other matters.

Under the Bill, where the participant has sought to make a choice about how their plan will be managed, this must be acceded to except in certain circumstances—for example, if the participant is insolvent or management of the plan would present an unreasonable risk to the participant (clause 44). Payments made under a participant’s plan must be spent in accordance with the details set out in the plan (subclause 46(1)). It should be noted that the Bill does not include specific provisions for monitoring or enforcing expenditure, other than providing that NDIS rules may be made which ‘make provision for and in relation to the retention of records of NDIS amounts paid to participants and other persons, including requiring that prescribed records be retained for a prescribed period’ (subclause 46(2)).

A participant who is temporarily absent from Australia for longer than six weeks (or a longer period allowed by the CEO), will have their plan suspended (clause 40). The effect of the suspension is that while the statement of participation in the person’s plan remains in effect, the person is not entitled to be paid NDIS amounts in so far as they relate to reasonable and necessary supports that would otherwise have been funded in respect of that period (paragraph 41(2)(a)). The Agency is also not required to provide or fund other supports under the plan, but is not prevented from doing so if the CEO considers it appropriate (paragraph 41(2)(b)).

The Parliamentary Joint Committee on Human Rights has commented on this provision, noting

> A person with disability, like any other Australian, has the right to liberty of movement, which would include the right to travel overseas for extended periods.

### Eligibility for support

Given the significant level of unmet need for (equal) access to disability care and support in the community, questions relating to who may access the scheme and their capacity to do so will be important in determining the success of the NDIS. The Bill seeks to address these problems by

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94. Ibid., p. 30.
96. Parliamentary Joint Committee on Human Rights, op. cit., p. 43.
establishing the framework for a scheme that is free, non means tested and available to all who meet residency, age and disability/early intervention criteria.

To qualify as a participant in the NDIS launch, an applicant must meet the access criteria, which include:

- age requirements
- residence requirements and
- disability requirements or early intervention requirements.

The Bill provides that a prospective participant, or another person, may be required to provide information reasonably necessary for deciding whether a person meets the access criteria (paragraph 26(1)(a)). Further, the CEO may also request the prospective participant to undergo an assessment or a medical, psychiatric or psychological examination (paragraph 26(1)(b)).

Age requirements

The first age requirement under the NDIS launch is that the person must be under the age of 65 on the day the access request is made (paragraph 22(1)(a)). People aged over 65 are expected to access the aged care system.

The Bill also provides that the NDIS rules may prescribe additional age requirements, including that a person be a specified age on a particular date in a particular prescribed area in Australia (paragraph 22(1)(b) and subclause 22(2)). This is to allow for the agreement with Tasmania and South Australia that only certain age cohorts would be included in the NDIS launch, however, rather than including an expiry clause in these provisions which allow age distinctions to be made, the provisions will stay functional.

The Human Rights Statement says that:

This is because the NDIS is one part of a broader system of support in Australia. The intent is that people over the age of 65 should access the aged care system. Those people who are receiving support under the NDIS and turn 65 can choose either to remain in the NDIS or to move to the aged care system. The limitation is reasonable and necessary because it supports the broader intent of an integrated system of support operating nationally and providing seamless transition through different phases of life.  

The Human Rights Statement says that the second age restriction is temporary and aimed (like restrictions in each of the five sites) at ‘testing the effectiveness of processes and supports for particular sub-groups within the general population of people with disability’:

In Tasmania, this will be 15-24 year olds, a group that is seen as particularly high risk as they make the transition from adolescence to adulthood. In South Australia, the focus will be on children: 0 – 5 years olds in the first year, 0-13 year olds in the second year, and 0-14 year olds in the third year. This group was

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chosen particularly to assess the effectiveness of early intervention processes, and because of the potential benefits to individual children in terms of reduced lifelong support needs.\textsuperscript{98}

The Statement says that ‘NDIS operations and outcomes in these sites will be evaluated and, if necessary, processes refined to ensure optimal effectiveness when the scheme is extended nationally’.\textsuperscript{99}

\textbf{Comment}

The Bill reflects the Commission’s recommendation (3.6) that the NDIS and aged care systems should remain separate due to differences in ‘philosophy, employment goals and the appropriateness of co contributions’.\textsuperscript{100} (It is worth noting that the CRPD does not define disability in terms of a specific age group.) The Commission recommended (3.6) that participants reaching Age Pension age be given the choice of remaining with the NDIS or entering the aged care system, a provision aimed at ensuring continuity of care. This is reflected in the Bill, which specifies that new entrants to the NDIS be aged under 65 years, the current Age Pension age for men.\textsuperscript{101} It should be noted that from July 2017, the Age Pension age will begin to increase until 2023 when it will be 67 years of age. It is not clear whether the intention is that the age criteria for the NDIS will be similarly raised.

The Explanatory Memorandum states that ‘those people who are receiving support under the NDIS and turn 65 can choose to remain in the NDIS or to move to the aged care system.’\textsuperscript{102} The Bill’s \textit{clause 29} provides that an individual ceases to be a participant in the NDIS when a person of 65 or over ‘has entered a residential care service, or is being provided with community care, on a permanent basis’.

Australian Greens Senator, Rachel Siewert, has raised concerns about the restriction on applications for entry to the NDIS to people aged under 65:

\begin{quote}
This approach is likely to create a two tier system. Our aged care services are not necessarily the right services to provide care for people living with a disability simply because they are over 65. This seems to be contrary to the spirit of the NDIS.\textsuperscript{103}
\end{quote}

According to a recent analysis of the Bill by academics working in the disability policy area, the 65 years age ‘cut-off’ for the NDIS might be justified on a number of policy grounds. These include:

\begin{itemize}
\item the additional cost to the scheme of including people aged over 65
\end{itemize}

\textsuperscript{98}. Ibid.
\textsuperscript{99}. Ibid.
\textsuperscript{100}. Ibid., p. 16.
\textsuperscript{101}. From July 1995 the age of eligibility for women applying for Age Pension began to gradually rise from 60 years to 65 years. The process will take until July 2013 to complete with the eligibility age increasing by six months every two years.
\textsuperscript{102}. Explanatory Memorandum, p. 11.
\textsuperscript{103}. R Siewert, ‘A NDIS for Australia’, Australian Greens website, viewed 5 February 2013, \url{http://rachel-siewert.greensmps.org.au/campaigns/ndis}

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• the potential workforce participation gains arising from targeting support at those aged under 65 years and
• the fact that many older people who become disabled after 65 do have some assets from a lifetime of work, so arguably, should be assessed differently from young people.\textsuperscript{104}

There is some evidence that the aged care system may not be an appropriate choice for some people with a disability.\textsuperscript{105} For example, a survey of people with intellectual disabilities living in residential aged care in Victoria raised a number of questions about the appropriateness of such arrangements for this group, including the extent to which such facilities offer sufficient opportunities for participation in community activities and the development of meaningful relationships.\textsuperscript{106} Aged care providers also identified a number of difficulties associated with residents with intellectual disabilities, namely ‘fitting in’ to the activities and support provided by the facility.\textsuperscript{107} Some providers, however, indicated that these could be overcome by working with specialist disability services.\textsuperscript{108}

The review of the Act will presumably consider these issues and it may be appropriate in some cases to allow dual access with appropriate management.

The age requirement has been commented on by the Parliamentary Joint Committee on Human Rights. The Committee noted the justification provided in the Statement of Compatibility with Human Rights, which argues, as set out above, that the approach is justified by the existence of a broader system of support that provides a ‘seamless transition through different phases of life’.\textsuperscript{109} However, the Committee was concerned that

This assumes that the aged care system does or will deliver all the forms of assistance and support required, and is organised in accordance with the principles and operates in compliance with the obligations set out in the CRPD and the NDIS. While the incidence of disability may increase with age, the assumption that a person who has lived with disability for many years can transition without difficulty to a different system that may be organised around different principles deserves further examination.\textsuperscript{110}

Accordingly, the Committee has sought the Minister’s advice as to whether the aged care system will deliver the same assistance and support as the NDIS, and whether the aged care system is organised, and operates, in a way that corresponds with the Convention and the obligations of the NDIS.\textsuperscript{111}

\begin{itemize}
  \item 104. For a further discussion of this issue, see: D McDonald, ‘NDIS for under 65s: ageism or a battle over priorities?’, \textit{The Conversation}, 31 January 2013, viewed 5 February 2013, \url{http://theconversation.edu.au/ndis-for-under-65s-ageism-or-a-battle-over-priorities-11774}.
  \item 105. For further discussion of this issue, see R de Boer, ‘The question of equivalence: aged care or the NDIS for those over the age of 65’, FlagPost, Parliamentary Library, Canberra, 6 February 2013, viewed 8 February 2013, \url{http://parliamentflagpost.blogspot.com.au/2013/02/the-question-of-equivalence-aged-care.html}.
  \item 107. Ibid., p. 411.
  \item 108. Ibid.
  \item 110. Parliamentary Joint Committee on Human Rights, op. cit., p. 42-43.
  \item 111. Ibid., p. 46.
\end{itemize}
Residence requirements

The main residency requirement for participation in the NDIS launch is that the applicant resides in Australia and is either an Australian citizen, permanent visa holder or holder of a protected special category visa (paragraphs 23(1)(a) and (b)). This is the only residency requirement that will apply when the NDIS is rolled out nationally.112

During the NDIS launch period, participation will be restricted to those living within the designated launch sites. The Bill enables this through provisions allowing additional residency requirements to be prescribed by the NDIS rules (paragraph 23(1)(c) and subclause 24(3)). As with some of the age requirements, these additional residency requirements are only intended to operate during the NDIS launch period, although there is no inbuilt sunset clause for the operation of these provisions.113

Comment

A broader issue related to residency is that, while the Bill creates an entitlement to support for all who meet the residency criteria, this is not the same as ensuring access to all residents on an equal basis. One way in which the success of the NDIS in the long term is likely to be measured is the extent to which it addresses the problem of unequal access to disability support by people in different regions across Australia. It could be argued that the NDIS will create incentives for improved levels of service provision in areas that currently experience high levels of unmet need. However, there is also the potential that such incentives will not be sufficient to overcome the structural sources of unmet need such as remoteness and absence of a trained disability workforce. The NDIS launch could potentially provide useful findings in relation to this matter.

On a similar note, the Commission’s report argues that because Indigenous disability rates are nearly twice that of non-Indigenous Australians and Indigenous people face significant access to barriers to disability services (one of the causes of which is remoteness), the NDIS may not by itself deliver adequate care and support to Indigenous people with a disability. As such, it suggests that an Indigenous strategy may be necessary.114 Recommendations (11.2) for what might be included in this strategy included:

- block funding suitable providers where services would not otherwise exist or would be inadequate
- fostering smaller community-based operations that consult with local communities and engage local staff, with support from larger experienced service providers, in particular those with a high level of community ownership
- employing and developing Indigenous staff and
- developing the cultural competency of non-Indigenous staff

112. Statement of Compatibility, op. cit., p. 10. While the Commission recommended that asylum seekers be included in the NDIS (recommendation 3.3), they are not included in the scheme in the Bill.
113. Ibid.
114. Productivity Commission, op. cit., vol. 1, p. 82.
• encouraging innovative, flexible and local problem solving, as well as conducting and publishing evaluations of trials in order to better understand what works and why

• developing an effective and cost-effective balance between bringing services to remote areas, and bringing people with a disability in remote areas to services and

• working with state and territory governments, indigenous advocacy groups and other community groups to develop and refine funding strategies, better understand local and systemic issues as well as successful (and unsuccessful) approaches and diffusing this knowledge to other service providers, researchers working in this field and the broader community.\textsuperscript{115}

The Commission adds that ‘ultimately, disadvantage and the disability that is one component of it, reflect a complex set of linked factors that require a whole of government approach and community involvement’.\textsuperscript{116}

It may be argued that the provisions in the Bill allow for (or at least do not preclude) the introduction of any of the above measures as part of the operation of the NDIS. Nevertheless, given the emphasis of the Commission on the importance of this issue, it is notable that the Bill does not include any reference to an Indigenous strategy or Indigenous access, more generally.

Disability and early intervention requirements

Under the disability requirements in the Bill, to participate in the NDIS launch a person must:

• have a disability attributable to one or more intellectual, cognitive, neurological, sensory or physical impairments, or psychiatric condition and

• the impairment/s are, or are likely to be, permanent

• the impairment/s result in substantially reduced functional capacity, including psychosocial functioning, of the person to undertake, or in undertaking, one or more of the activities of communication, social interaction, learning, mobility, self-care or self-management and

• the impairment/s affect the person’s capacity for social and economic participation and

• their support needs are likely to continue for the person’s lifetime (subclause 24(1)).

The above includes impairments which are chronic or episodic in nature, where the person’s support needs may be likely to continue for their lifetime (subclause 24(2)).

As an alternative to the disability requirements, a person may meet the early intervention requirements (clause 25). These are intended to provide support to those eligible to ‘help minimise

\textsuperscript{115} Ibid.
\textsuperscript{116} Ibid., p. 54.
the impact of disability from its earliest appearance’ and ‘improve the person’s functioning or prevent the progression of their disability over their lifetime’.  

The early intervention requirements will be met if the person either:

- has a disability attributable to one or more intellectual, cognitive, neurological, sensory or physical impairments, or psychiatric condition
- is a child who has developmental delay and
- the CEO of the NDIS Launch Transition Agency is satisfied that the provision of early intervention supports for the person is likely to reduce the person’s future needs for supports in relation to disability and either: (i) mitigate, alleviate or prevent the deterioration of the functional capacity of the person to undertake one or more of the activities of communication, social interaction, learning, mobility, self-care or self-management (referred to in paragraph 24(1)(c)); or (ii) strengthen the sustainability of the informal supports available to the person, including through building the capacity of the person’s carer.

Comment

The disability requirements for participation in the NDIS set out in the Bill largely reflect those suggested by the Commission. The main difference is that the Bill adds reduced functioning in ‘social interaction’ and ‘learning’ to the conditions proposed by the Commission for attracting support.

The Parliamentary Joint Committee on Human Rights has commented on the definition of disability used in the Bill, noting that the definition

… appears to be less extensive than the non-exhaustive definition of ‘disability’ in the [Convention], in particular in relation to the requirement of permanence and the likely lifetime requirements for support.

The Committee has sought clarification from the Minister as to whether the definition of disability in the Bill is more restrictive than the concept of ‘disability’ in the Convention and, if this is the case, clarification of why the definition in the Convention has not been used in the Bill.

The criteria in the Bill relating to early intervention support are also similar to those recommended in the Commission’s report. However, there are some differences. First, Recommendation 3.2 states that the ‘early intervention group’ would include ‘individuals for whom there is good evidence that the intervention is safe, significantly improves outcomes and is cost effective’. In addition, the Report refers to inclusion of those ‘for whom interventions would improve functioning … or delay or lessen a decline in functioning’. This would include people with autism, acquired brain injury, cerebral palsy and sensory impairments. The Bill refers to the inclusion of those for whom

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118. Ibid.
119. Parliamentary Joint Committee on Human Rights, op. cit., p. 42.
120. Ibid., p. 46.
122. Ibid.
functioning might improve, referring only to mitigating, alleviating or preventing decline. The inclusion of improved functioning in the criteria would potentially open the early intervention component of the NDIS to a wider range of participants, and arguably impact on costs, however, as discussed above, preventative action can be financially beneficial, particularly in the case of young people.

Perhaps of most importance in relation to the disability and early intervention requirements is that the provisions in the Bill are relatively general in nature. More specific detail will not be forthcoming until the relevant NDIS rules have been made under clause 27 of the Bill. It is only then that a more informed judgement can be made about precisely who might be included in the scheme.

The question of what specific supports a participant in the NDIS may expect to receive will be one of the key areas of contention surrounding the scheme during its implementation. As with schemes such as the Pharmaceutical Benefits Scheme and Medicare, it is likely that there will be debate over this question throughout the life of the NDIS.

As outlined above, the NDIS will fund ‘reasonable and necessary supports’. The Bill does not define what constitutes ‘reasonable and necessary’, and, while it is a commonly used phrase in such settings, it is also inherently and necessarily imprecise, being designed to allow individual judgements to be applied. The Bill sets out a number of conditions that must be satisfied in relation to funding or provision of supports provided to participants in the scheme (clause 34). These conditions provide a broad set of principles for what constitutes ‘reasonable and necessary supports’ under the NDIS. According to the Explanatory Memorandum, the criteria:

... balances what support is ‘necessary’ to assist the participant to pursue their goals (in accordance with the participant’s statement of goals and aspirations) and to facilitate their social and economic participation, with what is ‘reasonable’, including whether the cost of the support represents value for money and is reasonable, the efficacy of the support, whether it is not reasonable to expect families and carers to provide the support, and whether the support would be more appropriately provided by other mainstream services.

As an example of how reasonable and necessary supports should be defined, the Commission suggested that funded therapies would have to ‘be in keeping with current clinical practice, evidence-based practice and/or clinical guidelines’.

Supports proposed by the Commission for inclusion in the NDIS include:

• aids and appliances and home and vehicle modifications
• personal care that supports an individual to take care of themselves in their home
• community access supports—for example, continuing education, leisure, social interaction
• respite care
• specialist accommodation support
• transport assistance
• supported employment services and specialist transition to work programs
• therapies such as occupational and physiotherapy, counselling, and specialist behavioural interventions and
• guide dogs and assistance dogs.\textsuperscript{126}

Presumably these are the kinds of supports the Government has in mind for the NDIS. However, whether such supports would be included in a given participant’s plan would depend on the participant’s statement of goals and aspirations and the extent to which they were deemed reasonable and necessary. Further guidance may be forthcoming in the NDIS rules.

**NDIS Launch Transition Agency**

The NDIS launch will be implemented by a new, independent body, the NDIS Launch Transition Agency (the Agency) (Chapter 6). The Agency will have responsibility for providing services related to the functions of the NDIS listed above (paragraph 118(1)(a)). Additional functions of the Agency will include:

• managing, advising and reporting on the financial stability of the NDIS (paragraph 118(1)(b))
• developing and enhancing the disability sector (paragraph 118(1)(c))
• building community awareness of disabilities and the social contributors to disabilities (paragraph 118(1)(d))
• collecting, analysing and exchanging data about disabilities and supports for people with disabilities (paragraph 118(1)(e)) and
• undertaking research relating to disabilities, supports for people with disability and the social contributors to disabilities (paragraph 118(1)(f)).

The final four of the above functions relate specifically to the role of the NDIS under Tier 1 of the Productivity Commission’s proposed model.\textsuperscript{127}

The Agency will be established as a body under the *Commonwealth Authorities and Companies Act 1997* (CAC Act) (subclause 117(2)).\textsuperscript{128} The Agency will be overseen a Board made up of people with

\textsuperscript{126} Ibid., p. 23.
\textsuperscript{127} Ibid., p. 12.
relevant skills, experience or knowledge (subclause 127(2)). The Board will consist of a Chair and eight other members (clause 126).

The Bill also establishes an Independent Advisory Council (the Council) to provide advice to the Board on its activities and effectiveness (subclause 144(1)). The Council will consist of a Principal Member and no more than 12 other members (clause 146). Members of the Council will include people with disability, their families and carers, and providers of equipment and/or services (subclause 147(5)).

Comment

The proposed governance arrangements for the NDIS/Launch Transition Agency are relatively uncontroversial, though have several interesting features.

First, as noted above, the Launch Transition Agency is to be an authority under the CAC Act, rather than a body under the Financial Management and Accountability Act 1997. CAC Act bodies are legally and financially separate from the Commonwealth and can be established due to a number of reasons, including:

- where ‘a governing board would provide effective governance for the body’
- where the body ‘operates commercially with the intention of making a profit, in a competitive environment’
- when there is a ‘clear rationale for the assets of the body to not be owned or controlled by the Commonwealth directly’ and
- where the body requires ‘a degree of independence from general policies of the Australian Government’.  

Key features of the proposed Agency include:

- the intention to have a governing board (clause 123)
- the constitution of the Agency as a body corporate (paragraph 117(2)(a))
- the intention that it will conduct itself with a corporate focus (as stated in the EM)

128. The Commonwealth Authorities and Companies Act 1997 is available at:  
129. Australian Government, Governance arrangements for Australian Government bodies, Department of Finance and Deregulation website, Financial management reference material, no. 2, August 2005, p. 24, viewed 24 January 2013,  
130. Explanatory Memorandum, p. 48. The Explanatory Memorandum did not elucidate on the features of a ‘corporate focus’, other than to comment it was in keeping with the insurance model and was associated with independence from government.
• the fact that the Agency will have significant financial management responsibilities and will hold long-term liabilities (clause 119) and
• the intention that the Agency will operate independently.

These features are consistent with the profile of a CAC Act body.

The proposed Board will be a governing board (clause 124). The Board will also will appoint (clause 160), and be able to terminate (clause 160) and give directions to (subclause 159(4)), the CEO. The criteria for the appointment of board members (set out in clause 127) also reflect the intended financial responsibilities and corporate focus of the Agency. These include skills, experience or knowledge in insurance schemes, compensation schemes or schemes with long-term liabilities; financial management and corporate governance. The criteria also include that the person may have background in the provision of disability services. The Bill does not specify that there should be any particular balance between the criteria for membership of the Board. For example, it does not specify that a minimum number of members must have experience in the disability services area, or financial management experience.

The Bill provides the Minister with a direction-giving power to the Agency subject to limits (for example, the direction must not be inconsistent with the Act or the CAC Act, and the Commonwealth and host jurisdictions must both agree) (clause 121). As such, there may be some limited potential for tension between the board’s governing role and the capacity for ministerial direction to the Agency.

One-feature worth noting is that, while the proposed Agency will be a CAC Act authority, employees will be employed under the Public Service Act 1999 (PSA 1999) (clause 169). The Department of Finance and Deregulation has stated that ‘bodies established under the CAC Act should generally have the power to engage staff outside the PSA 1999, unless there are good reasons to the contrary’. Indeed, the general principle is that CAC Act bodies should ‘generally be free to determine their own employment arrangements’. The proposed employment arrangements in the Bill may be for the purposes of more easily facilitating staff availability from Australian Public Service and state public service agencies as envisaged in clause 170, although this is not spelled out by the Explanatory Memorandum.

In addition, the Bill does not provide for arrangements for winding up the operation of the Launch Transition Agency. Presumably this will be dealt with in a later Bill establishing the agency that will manage the operation of the full version of the NDIS. Similarly, as noted above, there is no indication of how the Agency and the broader NDIS will be funded beyond the transition phase and the $1 billion that has been allocated.

There are also several areas in which Commission recommendations relating to governance have not been adopted (or entirely adopted) in the Bill. In some cases, these differences may be the result of

133. Ibid., p. 56.

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the fact that the Launch Transition Agency will ultimately be replaced by the NDIA to which different arrangements may apply. One notable example relates to the Commission’s recommendation that the legislation establishing the NDIA should create an Office of the Inspector-General (OIG) as an independent body within the NDIA, headed by a statutory officer, the Inspector-General, to be appointed by the Commonwealth.\(^{134}\) According to the Commission, the purpose of the OIG would be to oversee an independent complaints and appeals process for the NDIS. The OIG would:

- hear complaints about breaches of service charters established to specify the conduct of the NDIA and disability service providers
- review contested NDIA decisions on a merit basis (but with appeals on matters of law being heard by courts in the usual way)
- have the power to direct the NDIA to alter contested decisions
- oversee quality assurance of service providers and
- be separate from the other parts of the NDIA dealing with people with disabilities and service providers.\(^ {135}\)

The OIG would be required to ‘report to the public and to Parliament on the number, types and outcomes of complaints and appeals (subject to privacy protections), and regularly advise the NDIA board on issues arising from its independent investigations’.\(^ {136}\) The Commission proposed the OIG as an internal but independent mechanism for providing protection for participants in preference to external review mechanisms, which it argued could ‘undermine the financial integrity of the NDIA’.\(^ {137}\)

The Bill does not establish an OIG as part of the review processes for decisions made by the Launch Transition Agency. Under the review process in the Bill, participants or prospective participants may request the CEO of the NDIA to review a decision (subclause 100(2)). The decision must be one listed as reviewable (clause 99). A person wishing to contest a review by the CEO may make an application to the Administrative Appeals Tribunal (clause 103).

The complaints and appeals process for the Launch Transition Agency is therefore substantially different in character to that proposed by the Commission for the NDIA, in which the OIG would be required to play a more active and visibly independent role in protecting participants and prospective participants. It may be that this difference is because the establishment of an OIG was seen as unnecessary during the (more limited) launch phase of the NDIS, but will be included within the NDIA when the full version of the scheme begins. It would, however, have been possible to include the OIG’s establishment and provide for its commencement at some future time. Alternatively, the review and complaints processes in the Bill may be seen as adequate and be

\(^{135}\) Ibid.
\(^{136}\) Ibid., p. 463.
\(^{137}\) Ibid., p. 461.

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maintained when the full NDIS begins. The Review of the Act required under Part 4 of Chapter 7 will provide an opportunity to review this, and other, issues in more detail.

Interaction with compensation schemes

The Bill contains a number of provisions related to arrangements in situations where a person may be entitled to compensation from a compensation payer or insurer in respect of a personal injury. These include provisions related to:

- NDIS participants or prospective participants being required to take action to obtain any such compensation (clause 104), and
- the Agency’s entitlement to recover NDIS amounts paid to a participant where compensation has also been paid (from either the participant or the compensation payer/insurer) (clauses 106 and 111).

Comment

There have been concerns raised about those provisions in the Bill that indicate that participants or prospective participants in the NDIS may be required to take action to obtain compensation that they ‘may be entitled to’ in respect of a personal injury. There was no recommendation for provisions of this kind in the Commission’s proposed NDIS.

One media report described this requirement as a ‘controversial way to part fund the [NDIS]’. The Shadow Minister for Disability, Senator Mitch Fifield, is reported to have expressed ‘serious reservations’ about the provisions stating:

> It may be appropriate for the individual to be able to assign to the NDIS agency their right to take legal action on their behalf, but it is a big step for there to be a requirement that a vulnerable individual take legal action.

There are a number of elements of the Bill which would, however, appear to provide protections against such an outcome.

First, clause 104 requires the CEO of the Agency, when considering whether to require a person to seek compensation, to have regard to a number of matters, including:

- the disability of the person
- the circumstances giving rise to the possible entitlement to compensation
- any impediments the person may face in recovering compensation
- any reasons given by the person for not seeking compensation

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138. S Dunlevy, ‘Disabled will have to sue’, The Courier Mail, 6 December 2012, p. 13, viewed 8 February 2013, http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%22pressclip%22f2089618%22
139. Ibid.
the financial circumstances of the person and
the impact of the requirement to take action on the person and his/her family
(subclause 104(3)).

Second, under subclause 104(4) the CEO must not require a person to seek compensation ‘unless
the CEO is satisfied that the participant or prospective participant has reasonable prospects of
success in claiming or obtaining the compensation’. This means that it is unlikely that a person would
be required to seek compensation if they were not likely to succeed in their action, for instance, if
the person’s own actions contributed significantly to their injury. The terms outlined above would
appear to provide reasonable safeguards to avoid vulnerable people being subject to an
unreasonable request to obtain compensation in respect of a personal injury.

Third, ‘a decision under section 104 to require a person to take reasonable action to obtain
compensation’ is a reviewable decision (subclause 99(o)). Following initial review by the CEO,
applications for review may be made to the Administrative Appeals Tribunal (clause 103). This is a
merits review and would allow the AAT to make a decision taking into account the same criteria
which are outlined under the first point above. One concern about this arrangement might be that
an individual who feels that it is beyond them to pursue compensation through a court case would
have to pursue an exemption by commencing proceedings in the AAT. Hopefully it would prove both
cheaper and easier to approach the AAT.

Fourth, it should be noted that people with disabilities for which compensation may be payable are
likely to make up only a relatively small number of all people who apply to participate in the NDIS.
Rather, it is expected that the bulk of NDIS claimants will not have acquired a disability through
injury. Further, the injury would need to be one for which compensation may be payable (a smaller
group again). Or if the National Injury Insurance Scheme begins, this group is likely to be even
smaller, given the NDIS will not then be responsible for the support needs of people whose
disabilities are the result of catastrophic injuries. From this time the NDIS would only be responsible
for those whose disabilities are the result of injuries that do not meet the criteria of catastrophic
(however that is eventually defined). As such, the number of NDIS participants who would fall within
the category of people who may be required to seek compensation, is relatively small and will
become smaller.

The Government’s position is that the ‘NDIS is not intended to replace existing entitlements to
compensation’.\(^{140}\) This has been elaborated further by a spokeswoman for the Minister:

\begin{quote}
We don’t want to create an incentive for employers, for example, to soften their approach to workplace
safety because they will no longer have to pick up the bill for any injuries or disabilities caused at work ...
\end{quote}

\begin{quote}
This is not an either or. It’s about giving people access to the scheme and any compensation they are
entitled to and people can still be covered by the scheme while pursuing the compensation.\(^{141}\)
\end{quote}

\(^{140}\) Explanatory Memorandum, p. 42.
\(^{141}\) S Dunley, op. cit.
The key argument made by the spokeswoman is that the compensation requirement provisions will reduce the risk of ‘free riding’ on the scheme by employers and others who would otherwise be relieved of having to pay compensation. It should be noted, though, that the NDIS will only cover care and support expenses. As such, employers and others would still potentially be liable for compensation in the form of income support, so would be taking a substantial risk if they were to ‘soften their approach to workplace safety’.

Finally, it should be noted that participants in the scheme who are required to seek compensation because they have an entitlement to compensation will be able to receive NDIS supports while pursuing that compensation. In other words, participants will not be required to wait until a decision has been reached in respect of any compensation claim before they can begin receiving supports. Rather, the NDIA will provide funding for supports as per the Statement of Participant Supports. The Bill will allow the NDIA to recover amounts from any compensation obtained by the participant from either the participant or compensation payers/insurers. Provisions outlining how recoverable amounts are to be calculated and from whom (participants or compensation payers/insurers) can be found in clauses 106 to 115 of the Bill.

A further explanation is that the provisions are consistent with the established principle in the Australian welfare system that people accessing government support have not also received compensation from private sources for the same thing (that is, the prevention of ‘double dipping’). For example, under the Social Security Act 1991, payment of a ‘compensation affected payment’ can be withheld if a person or their partner fails to take action to either claim or obtain compensation. Compensation affected payments include Age Pension, Disability Support Pension and Newstart Allowance.

Further, the Health and Other Services (Compensation) Act 1995 provides for the Compensation Recovery Program, under which Commonwealth Medicare, nursing home or residential care benefits are recovered from people who are in receipt of compensation payments for the injury or illness for which they have claimed Medicare, nursing home or residential care benefits. Under the Compensation Recovery Program, the person who pays the compensation (usually the insurer) must tell the Department of Human Services (DHS) about the payment if it is for more than $5,000 (including all legal costs). When DHS is told about the compensation payment they contact the


recipient in order to determine if any money needs to be repaid. The recipient cannot receive their compensation payment until DHS been repaid for all Medicare benefits, nursing home benefits and residential care subsidies related to the claim. That said, the provisions in the NDIS take this principle a step further in providing that people may be required to seek compensation (albeit with the limitations outlined above).

**Administrative provisions**

The Bill also contains various provisions relating to the operation of the NDIS including:

- requirements relating to the provision of information to the CEO (Part 1, Chapter 4)
- requirements relating to the protection of personal information (Part 2, Chapter 4)
- the process under which a person or entity may become a registered provider of supports; meaning that they will be able to manage funding for participant’s supports under plans and/or provide supports to participants (Part 3, Chapter 4)
- arrangements for who may make decisions or do things on behalf of children under the Act (Part 4, Chapter 4)
- arrangements for what a plan nominee may do on behalf of a participant (Part 5, Chapter 4) and
- the process for reviewing decisions made under the Act, including a list of decisions that are reviewable (Part 6, Chapter 4).

Some of these issues are dealt with briefly below.

**Requirements to provide information to the CEO**

Part 1 of Chapter 4 (clauses 51 to 59) contains provisions setting out requirements for participants, and other people, to provide information to the CEO.

Clause 53 provides that if the CEO has reasonable grounds to believe that a participant or a prospective participant has information, or a document, that may be relevant to specified matters relating to the financial integrity of the NDIS (set out at subclause 53(2)), the CEO may require the participant or prospective participant to give the information, or produce the document, to the Agency.

Similarly, the CEO also has power, under clause 55, to require a person other than a participant or prospective participant, who the CEO believes has information or a document that may be relevant

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146. Ibid.
147. Ibid.
148. In the first instance, the Bill provides that the person(s) who can do things for a child would be those with parental responsibility for the child or (if not deemed appropriate), a person appointed by the CEO of the Agency (subclause 74(1)). However, the CEO may determine that the child is capable of making decisions for his or herself, in which case subclause 74(1) will not have effect (paragraph 74(5)(a)). This is in order to ‘maximise the choice and control a child with disability has over the provision of their supports’. Explanatory Memorandum, p. 30.
to certain matters relating to the operation of the NDIS (set out at subclause 55(2)), to produce the information or document. The matters in relation to which such information may be sought include whether a prospective participant meets the access criteria (paragraph 55(2)(a)) and whether a participant continues to meet the access criteria (paragraph 55(2)(b)). A person who refuses or fails to comply with such a request may be subject to a penalty of up to 30 penalty units (subclause 57(1)). However, a person is not liable to a penalty if they have a ‘reasonable excuse’ for not complying with the CEO’s request (subclause 57(2)).

The Senate Scrutiny of Bills Committee has commented on subclause 57(2), noting that the Guide to Framing Commonwealth Offences cautions against the use of ‘reasonable excuse’ defences. The Guide comments that such a defence is unwieldy for both the prosecution and defence and, as a result:

An offence-specific defence of ‘reasonable excuse’ should not be applied to an offence, unless it is not possible to rely on the general defences in the Criminal Code or to design more specific defences.  

As there is no indication in the Explanatory Memorandum as to why a reasonable excuse defence has been provided, or why general Criminal Code defences, such as duress, mistake or ignorance of fact, or intervening conduct or event would not be appropriate, the Scrutiny of Bills Committee has sought the Minister’s advice as to the justification for the proposed approach.

These provisions have also been commented on by the Parliamentary Joint Committee on Human Rights. The Committee has sought information from the Minister as to whether a person will be compelled, under clause 53 or 55, to provide information or produce a document where doing so may tend to incriminate the person. If a person is so compelled, the Committee has asked the Minister to explain the justification for this approach. If a person is not so compelled, the Committee has asked the Minister to consider whether this should be clarified.

Protection of personal information

The operation of the NDIS will involve the collection of sensitive personal information. Clause 60 sets out measures and parameters for dealing with ‘protected information’. Under this provision, a person may only obtain, record, disclose or use protected information in one or more of the following circumstances:

149. Section 4AA of the Crimes Act 1914 provides that a penalty unit is equivalent to $170. This means that the maximum penalty amounts to $5100 for an individual. Section 4B of the Crimes Act allows the imposition on a corporation of a pecuniary penalty that is up to five times the maximum penalty that may be imposed on an individual, in this case, $25 500. The text of the Crimes Act 1914 can be viewed at: http://www.comlaw.gov.au/Details/C2013C00031


151. For the same reasons, the Committee has also sought the Minister’s advice on the use of a ‘reasonable excuse’ defence in clause 84 and subclause 189(2).

152. Parliamentary Joint Committee on Human Rights, op. cit., p.46.

153. For example, see the information provision/ collection requirements in clauses 26, 36 and 50.

154. Clause 9 provides that protected information means information about a person that is or was held in the records of the Agency, or information to the effect that there is no information about a person held in the records of the Agency.
• for the purposes of the Act
• with the express or implied authorisation of the person to whom the information relates and
• if the person believes on reasonable grounds that the making of the record, or the disclosure or use of the information, is necessary to prevent or lessen a serious threat to an individual’s life, health or safety (subclause 60(2)).

The obtaining, recording, disclosure or use of information by a person is taken to be for the purposes of the Act if the CEO believes, on reasonable grounds, that it is reasonably necessary for one or more of the following purposes:

• research into matters relevant to the NDIS
• actuarial analysis of matters relevant to the NDIS or
• policy development (subclause 60(3)).

Clauses 61 to 63 create offences for unauthorised access to, or use or supply of, protected information. The maximum penalty for each offence is two years imprisonment or 120 penalty units, or both. 155

Both the Parliamentary Joint Committee on Human Rights and the Scrutiny of Bills Committee have commented on the Bill’s privacy provisions.

The Parliamentary Joint Committee on Human Rights noted that the breadth of the purposes for which personal information can be disclosed under subclause 60(3) is ‘likely to give rise to privacy concerns’. 156 The Committee questioned why it would be necessary to disclose personal, as opposed to de-identified, information for the research and analysis purposes set out at subclause 60(3), particularly for policy development. The Committee also noted that there does not seem to be any requirement in the Bill to de-identify information, or obtain the person’s consent, before disclosing the information, and has asked the Minister to consider whether such a requirement may be appropriate. 157

The Committee was also concerned that subclause 60(3) allows the disclosure or use of information if considered to be ‘reasonably necessary’ for one of the identified purposes. The Committee has sought the Minister’s advice as to why this more liberal test has been applied, when ‘the international standard is that a limitation on a right must be ‘necessary’ if it is to be justified’. 158

The Scrutiny of Bills Committee has sought the Minister’s advice on the interaction of the Bill with the Privacy Act 1988, including the role of the Information Commissioner, and noted that such

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155. That is, $20 400 for an individual or $102 000 for a corporation. See footnote 142 for an explanation of penalty units.
156. Parliamentary Joint Committee on Human Rights, op. cit., p. 45.
157. Ibid., p. 46-47.
158. Ibid., p. 46.
provisions existed in other Commonwealth legislation relating to sensitive information regarding people’s health.\textsuperscript{159}

**Concluding comments**

The Bill provides the legislative framework for the Gillard Government’s 2012–13 Federal Budget commitment to establish the first stage of the NDIS from 1 July 2013. The full version of the NDIS is intended to begin operating across Australia from 2018, though there is no agreement in place with the governments of Queensland and Western Australia to introduce the NDIS in those states.

The Digest has noted that, while there is widespread support for the NDIS throughout the disability and carers sector, the introduction of the Bill has led to some concerned being raised about issues such as:

- the absence of detailed information about key aspects of the NDIS
- the impact of the competitive aspects of the NDIS on small disability service providers
- the focus on individualised funding, rather than broader social needs such as accessibility and
- the potential for the NDIS to become overly bureaucratic, to the detriment of NDIS participants.

The Digest also identified a number of questions relating to the Bill and NDIS more generally, including:

- how will the NDIS be financed?
- will there be sufficient monitoring and other protections in place for participants, particularly those managing their plans for themselves?
- should entry to the NDIS be restricted to those aged under 65 years?
- how will the NDIS promote equitable access to supports for people in regional and remote areas?
- how will the NDIS promote equitable access to supports for Indigenous people?
- who specifically will receive support and what specific supports will they receive?
- will the complaints and appeals process for the NDIS launch (and later the full NDIS) be sufficient to protect the interests of participants? and
- how will the provisions relating to accessing compensation operate in practice? Will the safeguards relating to these provisions sufficiently protect the interests of participants in the NDIS?

\textsuperscript{159} Senate Standing Committee for the Scrutiny of Bills, op. cit., p. 6.
As noted above, the provisions in the Bill are not final. The Government has foreshadowed the possibility of changes to the Bill based on the Senate Inquiry, further consultation with interested parties and amendments made through the legislative process. What is unlikely to change, however, is the essentially complex and transformative nature of the NDIS and key features such as universal, free access to individualised funding for disability care and support.

What is reasonably clear is that, as with similar programs, this legislation will not be the end of the matter and that central issues related to how the NDIS will be financed and governed, who is included and what supports they are entitled to, and whether support is received on an equitable basis, will be subject to debate throughout the life of the scheme.