



The Parliament of the Commonwealth of Australia -: House of Representatives

National Disability Insurance Scheme Bill 2012

Submission by
Physical Disability Council of NSW

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About the Physical Disability Council of NSW (PDCN)

The Physical Disability Council of NSW (PDCN) is the peak body representing people with physical disability across New South Wales. Physical disability is part of the lives of 937,000 residents, from young children and their representatives to aged people. They live across the state, from the Greater Sydney Metropolitan area to rural NSW and they are from a wide range of socio-economic circumstances.

Physical Disability Council of NSW (PDCN) appreciates the opportunity to provide comment on the National Disability Insurance Scheme (NDIS) Bill 2012 as part the implementation of the National Disability Insurance Scheme Launch Agency in July 2013.

Discussion

Further comment has been provided by PDCN on the following sections of the NDIS Bill 2012:

Section 3	Objects of the Act
Section 4	General principles guiding actions under this Act
Section 9	Definitions
Section 22	Age requirements
Section 24	Disability requirements
Section 25	Early intervention requirements
Section 27	National Disability Insurance Scheme rules relating to disability requirements and early intervention requirements
Section 32	Principles relating to plans
Sections 34- 35	Reasonable and necessary supports
Sections 42- 44	Managing the funding for supports under participants' plans
Section 60	Protection of information held by the Agency etc.
Sections 61- 64	Offences – misuse of protected information
Sections 79- 98	Nominees
Section 127	Appointment of Board members
Section 145	Membership of the Advisory Panel

Section 3 Objects of the Act

It is not clear which obligations the phrase '*give effect to certain obligations*' is referring to in s 3 (1) (h), and consequently should be replaced with 'give effect to all obligations that Australia has as a party to the Convention on the Rights of Persons with Disabilities'.

As part of the Australian's National Human Rights Action Plan, the significance of the National Disability Insurance Scheme (NDIS) is recognised as part of actions 254 and 255 aimed at improving the care and support available to people with disability. ¹

¹ Commonwealth of Australia - Attorney General's Department (2012) Australia's National Human Rights Action Plan 2012

Section 4 **General principles guiding actions under this Act**

PDCN would recommend that general principles with the phrase '*should be*' be replaced with a more inclusive term such as that used in section 4 (1), as the term '*should be*' infers a concession and subsequently is not available to all relevant members of our community.

Section 4 (7) identifies the same right as other members of Australian society to pursue a grievance as articulated in Article 14 – Liberty and security of the person, in the UN Convention on the Rights of Persons with Disabilities. Though a complaint mechanism was not included as part of this Bill, it is suggested as a requirement of registered providers of support, later to be included as part of the NDIS *rules*. The importance of this legal instrument needs to be reinforced as part of the NDIS Bill, and not only included in the NDIS *rules*.

It concerns PDCN that guiding principles such as identified in section 4 (8), will not be achieved or have a reduced impact, without the provision of information services separate from registered providers of supports and independent individual and systemic advocacy services. This section specifies the following:

'People with disability have the same right as other members of Australian society to be able to determine their own best interests, including the right to exercise informed choice and engage as equal partners in decisions that will affect their lives, to the full extent of their capacity'.²

Section 9 **Definitions**

With the focus on healthy ageing there have been substantial changes in delivery of aged care over the past ten years. With these changes and the probability of many new industry representatives requiring to access the NDIS Bill, PDCN believes that further explanation is required in subsection 9 when defining the following terms to avoid or confusion and/or misunderstanding;

- *Community care*
- *Residential care support*

Additionally PDCN suggests that each of the following Acts referenced in this Bill be identified in the explanatory notes with a statement explaining the purpose of each Act and how it is relevant to the NDIS Bill:

- *Commonwealth Authorities and Companies Act 1997*
- *Human Services (Centrelink) Act 1997*
- *Aged Care Act 1997*

² The Parliament of the Commonwealth of Australia -: House of Representatives (2012) National Disability Insurance Scheme Bill 2012

- *Financial Management and Accountability Act 1997*
- *Banking Act 1959*
- *Migration Act 1958*
- *Human Services (Medicare) Act 1973*
- *Family Law Act 1975*
- *Legislative Instruments Act 2003*
- *Crimes Act 1914*
- *Freedom of Information Act 1982*
- *Acts Interpretation Act 1901*
- *Administrative Appeals Tribunal Act 1975*
- *Health and Other Services (Compensation) Act 1995*
- *Health and Other Services (Compensation) Care Charges Act 1995*
- *Social Security Act 1991*
- *Remuneration Tribunal Act 1973*
- *Public Service Act 1999*
- *A New Tax System (Goods and Services Tax) Act 1999*
- *Fringe Benefits Tax Assessment Act 1986*

Section 22 Age requirements

Previous enquiries into disability care and support have recommended that for a person assessed as eligible of NDIS funding prior to 65 years, have the option of continuing to receive the NDIS entitlement or otherwise accessing aged care supports dependent on the support system that best meets their needs.³ PDCN believes that having the option of retaining NDIS funding and supports, assists by maintaining healthy ageing by reducing the risk of illness, and disease and subsequently minimising the risk of needing high level residential care facilities.

Additionally people from Aboriginal communities are able to access the Aged Pension at a younger age than the general community, partly due to the impact of health and disease amongst Aboriginal communities. PDCN is unclear on whether the age requirement identified above for a with a disability aged 65 and above, and that for Aboriginal communities will be considered as part of s 22(2) (b), or considered as part of the NDIS *rules*. Either way PDCN believes that this needs to be clarified and not be left to the interpretation of the reader.

Section 24 Disability requirements

PDCN considers the following six categories of impairment identified in s24 (1) (c) as a comprehensive list of impairment types, and commends the recognition that whilst the impairment needs to be permanent, it may vary in intensity from time to time:

a. Communication

³ Australian Government – Productivity Commission (2011) Disability, Care and Support Inquiry

- b. Social interaction
- c. Learning
- d. Mobility
- e. Self- care
- f. Self- management

Section 25 Early intervention requirements

Younger people with disabilities using home and community care services may not necessarily meet the disability requirements of the NDIS, but be at an increased risk of requiring costly and long- term supports without the support of early intervention services. Commonly users of these community- based may use of community transport occasionally, with the more frequent need for domestic assistance and/or personal care.

The COAG NDIS Regulatory Impact Statement refers to the importance of ensuring the importance of early intervention in planning the design of the NDIS Launch sites. It also identifies that innovative approaches and strategies need to be available when appropriate, but not necessarily strategies that have a clear evidence base. ⁴

Section 26 Requests that the CEO may make

PDCN is concerned that it would be daunting for people facing financial hardship, if they are expected to fund additional professional examinations or assessments even before they know whether they have been accepted or not..

Section 27 National Disability Insurance Scheme rules relating to disability requirements and early intervention requirements

Section 27 (1) (a) refers to the requirement of the disability needing to be permanent, but for young children where diagnosis may be complicated and not necessarily straight forward, proving a permanent disability may prove to be of concern.

Section 32 Principles relating to plans

To avoid reinforcing traditional models of service provision where the disability service provider is in control of all service provision, PDCN would recommend replacing the term 'disability services' with 'supports' in s32 (k).

⁴ Commonwealth of Australia – Council of Australian Governments Consultation (2012) National Disability Insurance Scheme Regulatory Impact Statement

Sections 34 and 35

Reasonable and necessary supports

Sections 34 and 35 refer to the need for the supports identified in the plan to represent value for money in that the costs of the support are reasonable, relative to both the benefits achieved and the cost of alternative support. Whilst PDCN appreciates the worthy objects of the Act, will it be necessary that the provision of supports will only be available if the CEO can see a link between the supports and the goals and aspirations identified in the plan?

If the CEO is not a favour of the articulated goals and aspirations, is the perspective participant at risk of not being approved personal care supports? For a person with a physical disability needing essential supports such as personal care to get up out of bed, to toilet and to shower each day, these tasks are considered as mandatory even if the goal identified by the individual is thought to be unrealistic. Is it reasonable for the CEO to make this determination?

Additionally sections 34 and 35 assume that people with disabilities can necessarily access the immediate support of family members, but similarly to other families in the community, people with disabilities do not necessarily live with family support, but may acquire their support in other ways, such as through advice and guidance, supervision, transportation, or via financial assistance.

Sections 42- 44

Managing the funding for supports under participants' plans

Section 42 identifies the following funding options under the NDIS:

- a. The participant; or
- b. A registered plan management provider; or
- c. The Agency; or via a
- d. Plan nominee.

Following selection of the most preferred funding option, the participant then needs to seek approval of the CEO, using a *plan management request*. The CEO can then reject this application, as in s 44 which identifies the following two circumstances where a participant is prevented from managing plan funding;

- Where the participant is an insolvent under administration, and
- Where there is a foreseen risk to the participant.

The Bill needs to articulate the time period when a participant is unable to manage plan funding due to a record of insolvency or whether this may depend on severity of insolvency or any other personal circumstance. Due to the increased likelihood of poverty and additional costs often associated with disability, this needs to be considered as part of consideration.

Additionally the Bill also articulates that the NDIS *rules* will provide further explanation into the criteria to be used by the CEO when determining capacity to manage plan funding or whether the participant is at increased risk.

Section 60 Protection of information held by the Agency etc.

PDCN is concerned that safeguards protecting the privacy and confidentiality of participants identified in this section are not strong enough, and would recommend that further advice be sought from the Office of the Australian Information Commissioner.

Section 60 (3) identifies for what purposes the CEO may need to access participant information and whilst credible, PDCN would recommend that guidelines identify privacy and confidentiality protocol requiring that only de-identified data be available for the following purposes.

- Research
- Actuarial analysis
- Policy development

Sections 61- 64 Offences – misuse of protected information

The Bill identifies a number of offences with regard to the misuse of protected information including:

- The unauthorised access to protected information,
- The unauthorised use or disclosure of protected information, and
- The offering to supply protected information

With each of these offences the Bill identifies a penalty of 2 years imprisonment or 120 penalty points or both, under the *Crimes Act 1914*. Whilst PDCN acknowledges that this may act as a deterrent, there is an assumption that people with disability seeking legal advice are aware of their legal rights and processes, are familiar with the law and can easily access legal assistance. This is not necessarily the situation.

Sections 79- 98 Nominees

The safeguards included in these sections are of concern to PDCN. Safeguards included in sections 78 (2), 78 (5), 79 (2), 80 (2), 80 (3), 86, 87 and 88 reduce or eliminate the decision making capacity of participants. Whilst these safeguards have been built in for the protection of people in extreme or adverse circumstances, it is concerning that these safeguards will become common practice, minimising the potential benefits of the NDIS.

Section 85 articulates that a participant can attend medical or psychological assessments or examinations with no one else but the participants' plan nominee. PDCN considers that participants attending appointments need to have the option of attending alone or with anyone that they desire without needing the approval of the Agency or CEO.

Section 127 Appointment of Board members

Section 127 (2) identifies the following criteria for the appointment of Board members:

That the person has skills, experience or knowledge in at least one of the following fields:

- A. The provision or use of disability services;
- B. The operation of insurance schemes, compensation schemes or schemes with long-term liabilities;
- C. Financial management;
- D. Corporate governance.

PDCN considers the knowledge and skills as not necessarily the same for a person familiar with the provision of disability services, as opposed to a person familiar with the use of disability services, and believes that this specification needs to be separated into two, with the provision of disability services separate from the use of disability services.

Section 145 Membership of the Advisory Panel

The Bill states the Advisory Panel shall consist of the Principal Member and no more than 12 other members, but fails to identify any other criteria or skill base of this panel. PDCN considers it preferable that the panel has as wide as possible representation, and includes representation from a range of host jurisdictions, aboriginal communities, aged services, regional and rural communities.