



Australian
Human Rights
Commission

National Disability Insurance Scheme Bill 2012

**AUSTRALIAN HUMAN RIGHTS COMMISSION
SUBMISSION TO THE SENATE COMMUNITY AFFAIRS
LEGISLATION COMMITTEE**

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ABN 47 996 232 602
Level 3, 175 Pitt Street, Sydney NSW 2000
GPO Box 5218, Sydney NSW 2001
General enquiries 1300 369 711
Complaints info line 1300 656 419
TTY 1800 620 241

Australian Human Rights Commission
www.humanrights.gov.au

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1 Introduction

1. The Australian Human Rights Commission makes this submission to the Senate Community Affairs Committee in its Inquiry regarding the National Disability Insurance Scheme Bill 2012.
2. The Commission commends the Government for referring this draft legislation to the Senate Committee for review and public consultation prior to its formal introduction to Parliament. The Commission believes that such a referral process should be used for significant pieces of legislation on a more regular basis in order to enable better public participation in the development of laws.
3. Article 4.3 of the *Convention on the Rights of Persons with Disabilities (CRPD)*,¹ provides that in the development of legislation and policies to implement the CRPD governments should consult and actively involve people with disability. The Commission acknowledges and congratulates the Australian Government on the extent of consultation undertaken in the development of the Bill and of the National Disability Insurance Scheme (NDIS).
4. The Commission would be happy to appear before the Committee inquiry and to assist in providing further clarification on any issues raised by this submission or other issues of interest to the Committee.

2 Summary

5. The focus of the Commission's analysis in the present submission is on issues the Commission considers should be included in the legislative underpinnings of the NDIS. These issues are:

- The Australian Government's leadership role on employment of people with disability
- The importance of independent review mechanisms and complaints processes for the NDIS and advocacy support for participants and prospective participants.
- Ensuring accessible procurement by the NDIS Launch Transition Agency and the development of procurement standards
- The importance of individual and systemic advocacy on the part of the Agency.

3 Recommendations

Recommendation 1: The Commission recommends the inclusion of a requirement in the legislation that at least 25 per cent of Agency staff be people with disability.

Recommendation 2: The Commission recommends the inclusion in the Bill of a mechanism for the Agency to provide sessional advocacy support to participants or prospective participants making an application to the Administrative Appeals Tribunal (AAT) for review of a reviewable decision.

Recommendation 3: The Commission recommends that the development of NDIS rules in relation to the process for handling complaints involving registered providers of supports and complaints involving staff of the Agency, staff seconded to the Agency or consultants engaged to assist the Agency be commenced at the earliest opportunity.

Recommendation 4: The Commission recommends the Agency be provided with the express capacity to develop, sponsor or participate in developing standards relevant to the Agency's functions.

Recommendation 5: The Commission recommends that the Bill include express recognition of standing for the Agency to pursue individual and systemic advocacy. Such pursuit would be a matter of last resort.

4 NDIS Bill Statement of Compatibility

6. The Commission welcomes the intention behind the Bill to progressively implement human rights obligations contained in the CRPD and other treaties.
7. The Commission notes that the Committee on the Rights of Persons with Disabilities will be considering the initial report of Australia's implementation of the CRPD in September 2013. The appearance by the Australian Government before the UN Committee will provide an opportunity to speak to the legislation and its contribution to the promotion of human rights of people with disability in Australia.

8. The Commission also notes that the Statement of Compatibility accompanying the Bill recognises that the Bill engages a number of human rights contained in the CRPD. The Commission congratulates the Australian Government on the extensive promotion of human rights of people with disability.
9. The Commission also notes that the Bill engages or has the potential to positively engage further articles of the CRPD including:
 - Article 9 Accessibility: In particular the development of standards. The Commission considers that the development of standards should be expressly included in the functions of the Agency. This issue is discussed in section 7 below.
 - Article 13 Access to justice. The Commission is however, concerned about the absence of a complaints mechanism in the Bill and the absence of the principle of subrogation. These issues are discussed in sections 6 and 8 below.
 - Article 27: Work and employment. The Commission welcomes the initiative to ensure the inclusion of people with disability in the composition of the Advisory Council and considers this initiative be extended to the staff of the Agency. This issue is discussed in section 5 below.
10. The Commission considers that monitoring of implementation of the legislation and the functions of the Agency will be crucial to ensure that the rights of people with disability are in fact progressively realised as intended. The Commission accordingly welcomes the plan for review on the second anniversary of implementation.

5 Employment of people with disability within the National Disability Insurance Agency

11. Article 27 of the CRPD recognises the right to work and employment for people with disability. The obligations contained within this human right include States Parties promoting the realisation of the right to work through legislation to promote employment opportunities, including in the public sector.²
12. The Commission accordingly welcomes the initiative in section 147 of the Bill requiring that the composition of the 13 member NDIS Advisory Council include at least 4 people (approximately 25 per cent) with disability (with relevant skills, experience or knowledge), 2 carers (with relevant skills, experience or knowledge), and at least one member with skills, experience or knowledge in the supply or provision of equipment or services to people with disability. This initiative will provide an opportunity for the Agency to take a lead in the area of employment of people with disability.
13. The Commission also welcomes the 'expression of interest' process aimed at recruiting people with disability into the Agency workforce.³

14. However, the Commission is disappointed to note that the Bill makes no reference to the employment of people with disability among the general staff of the Agency. The Commission considers that a similar approach to that of the Advisory Council be adopted for the employment of the general staff of the Agency.
15. The Commission encourages the federal government to include a requirement that at least 25 per cent of the general staff of the Agency be people with disability. This initiative would not only further engage CRPD Article 27, but would also begin to address the reduction in the employment levels of people with disability in the Australian Public Service that has occurred over the last 15 years.
16. The Commission notes that should this approach be adopted the Bill will require amendment.

Recommendation 1

The Commission recommends the inclusion of a requirement in the Bill that at least 25 per cent of Agency staff be people with disability.

6 Independent review mechanism for the NDIS scheme and complaints process

17. Article 13 of the CRPD is concerned with ensuring effective access to justice for people with disability on an equal basis with others. This human right incorporates effective access to decision-review process as well as complaint mechanisms.

6.1 Independent Review Mechanism

18. The Commission considers that the Agency governance arrangements include effective mechanisms for review of NDIS funding and eligibility decisions, including independent merits review.
19. Section 99 of the Bill makes provision for reviewable Agency decisions, at the first instance to be reviewed by an internal reviewer not involved in making the initial reviewable decision (section 100(5)) and that the reviewer must either confirm, vary or set aside the decision (section 100(6)). The Commission also notes that section 103 provides that applications may be made to the AAT for review of a decision made under subsection 100(6).
20. The Commission notes that section 6(1) of the Bill provides that the Agency may provide financial support to participants or prospective participants in relation to meeting participant obligations. The Commission also notes that section 6(2) does not permit or require the Agency to fund legal assistance in relation to review of decisions.
21. The Commission considers however, that it is essential to ensure the presence of effective mechanisms to address traditional power-imbalances in review processes (that of individual applicants versus decision-makers).

22. The Commission is of the view that consideration could be given to the provision of paid advocacy support on a sessional basis for participants or prospective participants making applications to the AAT. This approach would promote the right contained in section 4(7) of the Bill entitling people with disability the same rights as other members of Australian society to pursue grievances. It would also be pragmatic and promote efficiency as it would provide to a participant or prospective participant access to an advocate who understands the NDIS as well as the prospects of success of a particular request for review. This approach would be similar to the approach adopted through the Department of Veterans Affairs Ex-Service Organisation (ESO) Advocacy and Welfare Services.⁴
23. The Commission notes that should this approach be adopted the Bill will require amendment.

Recommendation 2

The Commission recommends the inclusion in the Bill of a mechanism for the Agency to provide sessional advocacy support to participants or prospective participants making an application to the AAT for review of a reviewable decision.

6.2 Complaints and resolution process

24. The Commission notes that the Bill does not currently include a complaints process but provides for the development of NDIS rules by the Minister.⁵ This includes rules in relation to the process for handling complaints involving registered providers of supports.⁶ The Commission also notes that the making of these particular rules requires the agreement of the Commonwealth and a majority of host jurisdictions.⁷
25. As noted above, section 4 (7) of the Bill provides that people with disability have the same right as other members of Australian society to pursue any grievance. However, the Bill makes no provision for complaints about the conduct of Agency staff, persons made available to the Agency from other agencies or other jurisdictions, or consultants engaged to assist in the performance of Agency functions.
26. The Commission understands that during the implementation of the first stage of the NDIS, State jurisdiction complaint mechanisms will be utilised for the process of handling complaints made by participants against registered providers of supports.
27. The Commission considers that access to a nationally consistent and independent complaint process for participants is essential. The Commission also considers that the development of NDIS rules in relation to the process for handling complaints involving registered providers of supports and complaints involving staff of the Agency, staff seconded to the Agency or consultants engaged to assist the Agency be commenced at the earliest opportunity. This initiative would engage Article 13 of the CRPD and promote access to justice for people with disability.

28. The NDIS rules developed to ensure a nationally consistent complaints process should not be of a lower standard to that of existing Commonwealth and State regimes and will need to be in compliance with the CRPD.
29. The Commission's expectation is that the *Disability Discrimination Act 1992* (Cth) will apply in instances of disability discrimination and other anti-discrimination law where relevant.

Recommendation 3

The Commission recommends that the development of NDIS rules in relation to the process for handling complaints involving registered providers of supports and complaints involving staff of the Agency, staff seconded to the Agency or consultants engaged to assist the Agency be commenced at the earliest opportunity.

7 Procurement roles

30. The Statement of Compatibility correctly sets out that the Bill engages article 4 of the CRPD. This article specifies general obligations which the Australian Government has agreed to undertake. These obligations include the promotion of research, development and availability at the least cost of enabling technologies, assistive devices, universally designed goods, services, equipment and facilities, and to promote universal design in standards and guidelines.⁸
31. The Commission notes that the Bill also potentially engages CRPD article 9 (Accessibility) as there are clear benefits in taking measures to ensure that accessibility features are built into universally designed goods, services, equipment and facilities, instead of people with disability needing to be served by specialised, segmented and thus inevitably less competitive and more expensive markets.
32. There is a direct efficiency reason for the Agency to insist on universal design to the greatest extent possible in its procurement decisions, both for the organisation itself, and for the supports it is funding. The Commission considers that this approach could be implemented by the Agency setting standards for its own procurement decisions.
33. The Commission acknowledges that the functions of the Agency (section 118) include the facilitation of innovation, research and contemporary best practice in the sector and to do anything incidental or conducive to the performance of the Agency functions.⁹ These two functions would appear to enable the Agency to develop standards relevant to its functions.
34. The Commission considers that for the purposes of certainty it would be appropriate to expressly provide the Agency with the capacity to develop, sponsor or participate in developing standards relevant to the Agency's functions, in particular for its own procurement decisions.
35. Should this approach be adopted, the Commission considers that examination of section 508 of the United States *Rehabilitation Act 1973*,¹⁰ would assist with the development of procurement standards. This Act imposes

mandatory accessible procurement requirements on Federal government agencies regarding information and communications technology. While the Commission is aware that procurement standards or policies go beyond accessible information and communication technology, the United States Act provides a good model for the development of procurement standards.

Recommendation 4

The Commission recommends the Agency be provided with the express capacity to develop, sponsor or participate in developing standards relevant to the Agency's functions.

8 Subrogation of rights

36. Article 13 of the CRPD is concerned with ensuring effective access to justice for people with disability on an equal basis with others. As well as being a human right in itself, access to justice is one means for securing implementation of human rights more generally. While measures to bring the operation of justice system institutions into compliance with the CRPD would be expected to be the financial responsibility of governments, rather than calling on NDIS funding, there could be a role for the Agency to support the development and implementation of procedures to promote equal and effective access to justice.
37. The Commission is concerned about the Bill's reliance on disadvantaged people to take action to obtain compensation (section 104) and the consequences of failure to comply with a requirement to take action to obtain compensation (section 105). These consequences include suspension of the support plan until the participant takes the required action and where the plan is not in effect, the failure of the plan to come into effect until the participant takes the required action.
38. The Commission considers that serious consideration be given to the inclusion of the insurance law principle of subrogation in the Bill, thus enabling the Agency to pursue compensation litigation. This inclusion would ensure that rather than participants or families deciding whether to risk incurring court costs pursuing an individual compensation claim, the Agency would have the ability to manage risk and make decisions about whether to pursue an individual matter purely on the basis of its merits, and prospects of success.
39. In addition, the provision of standing to allow the Agency to take appropriate legal action to achieve large scale change would enable the Agency to advocate on a systemic level. This approach would reduce the cost of delivering individual services, because the environment would be more accessible. More importantly, it would move people with disability closer to substantive equality as it would provide a fairer and more effective means of achieving large scale change and resolution of issues either through negotiated settlements or court decisions where necessary while also enhancing access to justice and effective compliance with the legislation. This would be consistent with the objects of the Bill aimed at raising community awareness of issues that affect the social and economic

participation of people with disability and facilitating the inclusion of people with disability in the community.¹¹ The Commission considers that the pursuit of individual and systemic advocacy would be a matter of last resort.

Recommendation 5

The Commission recommends that the Bill include express recognition of standing for the NDIS Launch Transition Agency to pursue individual and systemic advocacy. Such pursuit would be a matter of last resort.

¹ *International Convention on the Rights of Persons with Disabilities*, 2006. At <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersonsWithDisabilities.aspx> (viewed 16 January 2013).

² *International Convention on the Rights of Persons with Disabilities*, 2006, art 27(1)(e) and (g). At <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersonsWithDisabilities.aspx> (viewed 16 January 2013).

³ Minister for Disability Reform and Parliamentary Secretary for Disabilities and Carers, 'Help launch a National Disability Insurance Scheme', (Joint Media Release, 19 September 2012).

⁴ Department of Veteran's Affairs, *Department of Veterans' Affairs (DVA)–Funded Ex-Service Organisation (ESO) Advocacy and Welfare Services*. At http://www.dva.gov.au/ex-service_organisations/grants/Pages/index.aspx (viewed 21 January 2013). This service ensures that current and future veterans and ex-service personnel, and their families, have access to advocacy and welfare services, and support through Veteran and Community Grants. The ESO Advocacy and Welfare service underwent a review in 2010. The report is available at the above link.

⁵ National Disability Insurance Scheme Bill 2012, s 209.

⁶ National Disability Insurance Scheme Bill 2012, s 73(2)9d).

⁷ National Disability Insurance Scheme Bill 2012, s 209(6).

⁸ *International Convention on the Rights of Persons with Disabilities*, 2006, art 4(f)-(h). At <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/ConventionRightsPersonsWithDisabilities.aspx> (viewed 16 January 2013).

⁹ National Disability Insurance Scheme Bill 2012, s 118(1)(c).

¹⁰ *Rehabilitation Act 1973 (US)*, 29 USC 794d. For a copy of the legislation, standards and commentary see: <http://www.section508.gov/> (viewed 16 January 2013).

¹¹ National Disability Insurance Scheme Bill 2012, s3(1)(g).