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# National Disability Insurance Scheme Bill 2012

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## **Senate Standing Committee on Community Affairs**

**25 January 2012**

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## Table of Contents

<b>Summary .....</b>	<b>3</b>
<b>Chapter 1 - Introduction .....</b>	<b>3</b>
No disadvantage .....	3
Matters to be dealt with under NDIS Rules .....	4
Objects and principles .....	5
<b>Chapter 3 – Participants and their plans .....</b>	<b>5</b>
Part 1 – Becoming a participant.....	5
Eligibility.....	5
Psychiatric conditions .....	6
Part 2 - Reasonable and necessary supports .....	7
Impact of compensation on care and support plans.....	7
<b>Chapter 4 – Administration .....</b>	<b>8</b>
Part 2 - Privacy.....	8
Part 5 - Nominees .....	8
Supported decision-making.....	8
Recognition of State and Territory guardianship laws .....	9
Review rights .....	9
Suspension of an appointment.....	9
Additional oversight and accountability .....	10
Part 6 - Review provisions.....	10
<b>Chapter 5 - Compensation payments .....</b>	<b>12</b>
General comments .....	12
Requirement to obtain compensation .....	12
Recommended approach in relation to common law and statutory negligence claims .....	14
Recovery of past NDIS amounts from common law judgments and settlements .....	15
Recovery of amounts awarded for future care and support .....	15
<b>Additional issues .....</b>	<b>16</b>
Appointment of Board Members .....	16
<b>Attachment A: Profile of the Law Council of Australia .....</b>	<b>17</b>

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## Summary

1. The Law Council of Australia is pleased to provide this submission to the Senate Standing Committee on Community Affairs in response to its inquiry into the *National Disability Insurance Scheme Bill 2012* (the NDIS Bill).
2. As outlined in Attachment A, the Law Council represents the 16 Australian state and territory law societies and bar associations and the Large Law Firm Group (collectively referred to as the “Constituent Bodies” of the Law Council). In this way, the Law Council effectively acts on behalf of some 59,000 lawyers across Australia.
3. This submission has been lodged by the authority delegated by the Law Council’s Board of Directors to the acting Secretary-General, but does not necessarily reflect the personal views of each Director of the Law Council of Australia.
4. The Law Council generally supports the NDIS Bill, subject to the comments outlined below. The Law Council makes the following general comments in relation to the Bill:
  - (a) The Law Council considers that the criteria around eligibility, supports and other entitlements should be outlined in legislation, not rules or regulations that are subject to limited Parliamentary scrutiny;
  - (b) Definitions should be made clearer under the Bill, to ensure greater certainty and the long term viability of the NDIS;
  - (c) Although the Law Council supports the general principle of compensation recovery, the provisions in Chapter 5 of the Bill require redrafting; and
  - (d) The provisions relating to merits review, including internal review followed by a right of appeal to the Administrative Appeals Tribunal (AAT), represent best practice and are supported.
5. The Law Council has also identified a number of technical issues, which are outlined below.
6. This submission has been prepared with the advice and support of the Law Council’s NDIS Working Group, comprised of legal experts in the fields of disability law and compensation schemes. The Law Council is very grateful to the Law Institute of Victoria and the Law Society of South Australia, which provided substantial contributions to this submission.

## Chapter 1 - Introduction

### **No disadvantage**

7. The Law Council supports the creation of a NDIS, as a comprehensive national scheme to provide long-term care and support for people with serious disabilities, regardless of how their disability was acquired.
8. The Law Council’s threshold position is that no-one should be disadvantaged as a result of the establishment of the NDIS. That is, no-one should lose access to services, compensation or rights that they currently enjoy, either as a condition of

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eligibility or to subsidise the cost of the scheme itself, including the right to sue at common law.

9. The Law Council considers that the NDIS Authority (NDIA) should have the capacity to access existing funding streams, either through compensation recovery processes, agreements between the NDIA, insurers and other government agencies or a clear statutory framework.
10. The Law Council considers that common law compensation is a civil law right belonging to those who have suffered injury as a result of negligence. This right should not be abrogated, limited or subject to any coercion under the scheme.
11. The Law Council recommends that the Bill incorporate a statement in the 'general principles outlined in clause 4 of the Bill, to the effect that all disabled people have the same right as other members of Australian society to pursue their entitlements at common law or any other statutory compensation framework.

### **Matters to be dealt with under NDIS Rules**

12. The Law Council considers that the Bill presently leaves important issues to be determined or defined under the proposed NDIS Rules.
13. As a general principle, the Law Council considers it is appropriate that there be Parliamentary scrutiny of changes to the rights, entitlements and protections afforded to NDIS participants.
14. At present the NDIS Bill provides a framework, while the proposed NDIS Rules are expected to define the power conferred on the NDIA to determine matters, such as:
  - (a) the eligibility of people to enter the scheme (including age, residency or disability criteria);
  - (b) entitlement to access certain supports;
  - (c) degree of control over care and support arrangements;
  - (d) disclosure of private information;
  - (e) the interests of children and their carers; and
  - (f) the method and calculus of the recovery of debts deemed to be owed to the NDIS.
15. The Law Council submits that it would be desirable for there to be Parliamentary scrutiny of these matters, to ensure the integrity of the NDIS is maintained. Historically, when beneficial compensation schemes have come under financial pressure, significant political pressure is created to wind back entitlements and compromise the rights of participants. The Law Council considers that Executive power to amend these matters should be subject to appropriate Parliamentary oversight, to ensure the rights of scheme participants and their carers are protected. Accordingly, these matters should not be embedded in the proposed NDIS Rules.
16. Under clause 209 of the Bill, there is a limitation on the regulation making power of the Commonwealth, to the extent that proposed NDIS Rules made in relation to certain provisions of the Bill will require the agreement of the host jurisdiction(s).

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However, the Law Council considers it would be better if the scope of matters to be determined under the proposed NDIS Rules was narrowed.

## Objects and principles

17. The Law Council notes that one aim of the NDIS is to support the independence and 'social and economic participation' of people with a disability (under clause 3(1)(b)). This principle is reflected in the criteria for access to funding under the Scheme - under the 'disability requirements' the relevant impairment or impairments must 'affect the person's capacity for social and economic participation' (clause 24(1)(d)).
18. The Bill also seeks to give effect, in part, to Australia's obligations under the United Nations Convention on the Rights of Persons with Disabilities (clause 3(1)(h)). However, the Convention goes further than 'social and economic' participation in its general principles, by seeking to promote 'full and effective participation and inclusion in society' (under article 3), which includes the full enjoyment by persons with disabilities of their human rights and fundamental freedoms.
19. The Law Council is concerned to ensure that support available under the Scheme is broadly available to assist people with disabilities to achieve full enjoyment of their human rights. The Law Council submits that participation in society should not be limited by the words 'social and economic'. For example, the Bill should ensure that its objectives extend to supporting religious or cultural participation by a person with a disability.

## Chapter 3 – Participants and their plans

### Part 1 – Becoming a participant

#### Eligibility

20. Part 1 of Chapter 3 sets out the eligibility criteria. Under this Part, people may apply to the NDIA to enter the NDIS. The CEO of the NDIA must make a decision based of 4 broad criteria, including:
  - (a) Age – requiring entrants to be under 65 years of age (clause 22); and
  - (b) Geographic location – applying only to Australian residents and enabling the CEO to limit the NDIS to pilot locations in the early stages (clause 23); and
  - (c) Disability – limiting eligibility to those with a disability attributable to one or more intellectual, cognitive, neurological, sensory or physical impairments, or a psychiatric condition (clause 24); or
  - (d) Early intervention (clause 25).
21. The Law Council considers that these provisions may render the boundaries of the NDIS somewhat porous and uncertain. There is significant scope for differing interpretations by medical practitioners and no guidance appears to be contemplated in the Bill or the proposed NDIS Rules under clause 209. Clause 27(2) appears to enable the NDIA to prescribe or certify 'persons' who may conduct assessments to determine whether the disability or early intervention criteria are met (although the lack of any reference to medical practitioners appears to envisage that assessments could be carried out by persons other than medical practitioners).

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22. Moreover, the lack of certainty around eligibility is compounded by the fact that clause 27 provides for determination of eligibility criteria to be largely contained in the Rules, provided for in clause 209 of the Bill.
  23. This lack of certainty is problematic. For example, there is clear potential for the eligibility criteria to be changed, without Parliamentary approval, if the scheme comes under financial pressure. There is also potential for differing interpretations by medical practitioners – as evidenced by the common divergence of opinion among medico-legal experts consulted by plaintiffs and defendants in personal injury litigation.
  24. As the rules are yet to be finalised it is also difficult at this stage to assess any cost estimates in relation to the scheme.
  25. Given the importance of the Scheme and its capacity to provide disabled people with increased supports depending on their eligibility, the Law Council believes that it is important that Executive power to enact or amend the eligibility provisions should be constrained.
  26. The Law Council submits that the definition of “eligibility” should be expanded in the Bill. The Law Council considers it would be appropriate to incorporate detailed guidance as to the level of disability or the forms of disability. If these matters are to be covered in subordinate legislation, it would be helpful to enable public consideration of the criteria set out in the proposed NDIS Rules before the Bill is enacted by Parliament.
  27. The Law Council also suggests the following specific amendments, in order to tighten the eligibility criteria:
    - (a) It may be necessary to define “substantially” under clause 24(c); and
    - (b) Clause 24(d) should be amended to state “...the impairment or impairments significantly affect the person’s capacity for social and economic participation”.

#### Psychiatric conditions

28. The Law Council queries why clause 24(1)(a) distinguishes between ‘disability’ (attributable to intellectual, cognitive, neurological, sensory or physical impairments) and ‘impairments’ attributable to psychiatric conditions. The distinction is flawed: many people with organic physiological disabilities also have a concurrent psychological diagnosis contributing to their overall disability. The Productivity Commission recommended that “individuals with significant and enduring psychiatric disability”<sup>1</sup> have access to support under the Scheme and the Law Council is concerned that any distinction between psychiatric and non-psychiatric conditions might limit that access.
29. The Law Council recommends that clause 24(1)(a) be amended to delete the words ‘or one or more impairments attributable to’, so that it states:

“the person has a disability that is attributable to one or more intellectual, cognitive, sensory or physical impairments or a psychiatric condition”.

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<sup>1</sup> Productivity Commission Inquiry Report – Disability Care and Support – Overview and Recommendations, No. 54, 31 July 2011, p 28

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## Part 2 - Reasonable and necessary supports

30. Clause 34 of the Bill sets out the criteria for 'reasonable and necessary supports'.
31. The Law Council considers that, as drafted, the criteria leaves room for subjective assessment or value judgments about what the community would regard as 'reasonable and necessary'. While the Law Council can see merit in providing room for subjective assessment, the lack of clear guidance under the Bill as to what this means may potentially result in greater disputation.
32. The Law Council notes that clause 35 provides that the proposed NDIS Rules may prescribe matters that are not reasonable and necessary supports and will provide guidance on the methods for determining what are reasonable and necessary supports. As noted previously, it is very difficult to assess the appropriateness of the definition given the Rules are not available for consideration alongside the Bill.
33. Moreover, if those Rules have not been the subject of detailed consideration in the context of determining the likely cost of the scheme, it is difficult to have confidence in the accuracy of any assessment of the potential costs of the scheme at this stage.
34. The Law Council considers that clarity around the definition of what constitutes 'reasonable and necessary support' is a fundamental first step, which requires careful drafting and attention both before and during the proposed pilot launches.
35. The outcomes of that task, aligned with experiences during the pilot programs, will inform, both in financial and fairness terms, the future direction and scope of the NDIS.
36. The Law Council is able to draw upon a wealth of experience in matters concerning eligibility for various government schemes, through its specialist Committees, Sections and Constituent Bodies, and would wish to be closely involved in the process by which the criteria for "reasonable and necessary support" are clarified.
37. At the very least, the Law Council suggests that a definition of "support" be incorporated into the Bill. Further, the Law Council recommends that sub-clauses 34(g) and (h) be removed, as they simply add to the perception of arbitrariness in determining supports that will be funded or refused by the NDIA.

### Impact of compensation on care and support plans

38. Under clause 35(4) of the Bill, the proposed Rules may prescribe the criteria and methods for assessing reasonable and necessary supports on how to take into account:
  - (a) lump sum compensation payments that specifically include an amount for the cost of supports; and
  - (b) lump sum compensation payments that do not specifically include an amount for the cost of supports; and
  - (c) periodic compensation payments that the CEO is satisfied include an amount for the cost of supports.
39. The Law Council submits that clause 35(4) is unclear as to how compensation payments are to be taken into account in determining reasonable and necessary supports. The Law Council seeks greater clarity as to how these provisions are

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intended to be applied, given the significant impact this may have on participants' entitlements under the NDIS.

## Chapter 4 – Administration

### Part 2 - Privacy

40. The Law Council considers privacy issues surrounding a scheme such as the NDIS to be of paramount importance. Potential for such privacy breaches are real, as demonstrated by a recent report of a serious privacy breach under the New Zealand Accident Compensation Scheme, involving the unauthorised release of personal details of around 6700 claimants to a member of the public.<sup>2</sup>
41. The Law Council queries how the provisions of the Bill relating to privacy will interact with the *Privacy Act 1988* (Cth) (Privacy Act). The Law Council notes that the clauses in the Bill appear to adopt different language for example the concept of 'protected information' in the Bill, compared to 'personal information' under the *Privacy Act*, and 'sensitive information', as opposed to 'health information' in s 6(1) of the *Privacy Act*.
42. It would be helpful to clarify whether the Privacy Act is intended to apply to the NDIS. If it does apply, a definition for 'personal information' should be included that has the same meaning set out in the Privacy Act. This would mean that personal information that is collected, used, disclosed and stored in the NDIS would be subject to the same protections and security measures that agencies are currently required to comply with under the Information Privacy Principles set out in the Privacy Act
43. It would be appropriate for applicants to receive a 'Privacy Notice' before the agency collects any personal information. The Bill provides for the agency to collect, use, store and disclose personal information in a variety of ways, including to other agencies. It is important that applicants and other users of the NDIS are notified of how their personal information will be collected, used, disclosed and stored so that they may make an informed decision before disclosing the information to the agency.
44. Clauses 61 to 64 of the Bill set out a number of offences relating to unauthorised access, use or disclosure of protected information. While this is commendable, the Bill does not include a complaints procedure or other mechanism for a person to lodge a complaint about a breach of privacy. It is unclear whether a complaint should be submitted to the NDIS or whether complaints would fall within the jurisdiction of the Privacy Commissioner.

### Part 5 - Nominees

#### Supported decision-making

45. The Law Council is concerned that the Bill does not fully implement a supported decision-making approach in relation to implementation of the NDIS, as required by the United Nations Convention on the Rights of Persons with Disabilities. In

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<sup>2</sup> Adam Benet 'ACC faces new privacy breach claim', The New Zealand Herald, 10 August 2012  
[http://www.nzherald.co.nz/nz/news/article.cfm?c\\_id=1&objectid=10825889](http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=10825889)



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particular, the Law Council submits that amendments should be made to Part 5 of the Bill with respect to the appointment and role of nominees.

46. The Scheme aims to 'enable people with disability to exercise choice and control in the pursuit of their goals and in the planning and delivery and their supports' (clause 3(1)(d)). For some NDIS participants, support will be required to assist them to exercise choice and control. Further, people with a significant cognitive impairment or mental ill-health, which impairs their decision-making capacity, may require a substitute decision-maker for some or all aspects of their interaction with the NDIS.
47. The Law Council notes that under clause 78, a nominee can act on behalf of the participant only where the nominee considers that the participant is not capable of doing that particular act themselves. Further guidance should be provided in the Bill as to when a person has capacity to do an act. Further, the draft Bill should provide participants with the right to dispute a decision of their nominee to act on their behalf in doing a particular thing.

#### Recognition of State and Territory guardianship laws

48. State and Territory laws provide for substitute decision-making under laws relating to powers of attorney, guardianship and administration. Many people with disabilities who are eligible for support will already be subject to guardianship and administration orders under these laws. The Bill provides limited recognition of these orders in clause 88(4), so that when appointing a nominee, the CEO of the Agency must have regard to whether a person has guardianship of the participant under a law of the Commonwealth, or a State or Territory.
49. The Law Council submits that the link between the NDIS and State and Territory guardianship laws should be strengthened to provide explicit recognition of State and Territory-based substitute decision-making arrangements. Unless an order is subject to review (for example because allegations of abuse are made), it is appropriate for state-appointed guardians or administrators to be nominees under the NDIS to avoid multiple substitute decision-makers for people with a disability.
50. Further, the Law Council recommends that people should be able to appoint their own nominees and not be limited to making a request for an appointment.

#### Review rights

51. The Law Council submits that, where the CEO appoints a nominee under clause 86, the participant should have the right to apply for a review of the decision by the CEO to appoint that nominee. An interested third party should also have the right to apply for a review of a decision of the CEO to appoint a particular nominee, where there are concerns for the personal and/or social wellbeing of NDIS participant. The review should be independent.

#### Suspension of an appointment

52. The Law Council submits that participants in the Scheme must be protected against all harm. The Law Council suggests that the word 'severe' should be removed from clause 91(1), so that the CEO may suspend an appointment of a nominee where they have reasonable grounds to believe that the person has 'caused, or is likely to cause, physical, mental or financial harm to the participant'.
53. In addition to this, the Law Council considers that a participant should have the ability to seek suspension of their nominee. It may also be appropriate in certain

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circumstances for interested third parties to be able to bring an application for suspension of a participant's nominee, where they are concerned about harm or potential harm to a participant. The Law Council suggests that these types of applications could be heard by the AAT or another independent review body.

#### Additional oversight and accountability

54. The Law Council is concerned to ensure there is sufficient external scrutiny of nominees, to protect people with disabilities from risk of abuse. The Law Council notes this has been the subject of recent inquiry, including in the Victorian Law Reform Commission's April 2011 report on Guardianship Laws, which makes significant recommendations to improve monitoring and accountability of substitute decision-makers.

### **Part 6 - Review provisions**

55. The Law Council generally supports the provisions in Chapter 4, Part 6 of the Bill.
56. The provisions set out a typical scheme for administrative review of decisions by the NDIA, including internal review of decisions made at first instance by a senior NDIA officer, with a subsequent right to seek review in the AAT of decisions at internal review.
57. The Law Council considers that provision for independent merits review of reviewable decisions by the AAT represents best-practice. Independent review processes are necessary to promote stronger primary decision-making and ensure fair outcomes for scheme participants. Independent external review processes provide a strong incentive for agencies, such as the proposed NDIA, to employ rigorous decision-making processes, designed to withstand independent oversight. In this way, independent review processes significantly enhance natural justice for those affected by administrative decisions, by substantially diminishing the potential for perceived bias or jurisdictional error.
58. The Law Council submits there is a very strong empirical basis for providing robust merits review processes. For example, in 2009/10 the AAT reported that of all appeals lodged against decisions by Commonwealth workers compensation providers (Comcare, Seacare, self-insurers, etc):<sup>3</sup>
- (a) 39% (549 of 1406) were set aside either by order of the AAT or by consent;
  - (b) 5% (68 of 1406) were varied, either by order of the AAT or by consent; and
  - (c) just **30%** of decisions (434 of 1406) were affirmed by the AAT (while most of the remaining applications – around 25% - were withdrawn by the applicant).
59. These data indicate that participants in the NDIS are likely to be subject to substantial prejudice if denied the right to independent merits review.
60. The case for independent external review processes is particularly strong in relation to those likely to be accepted into the NDIS, given the consequences of incorrect decisions by the NDIA may have severe consequences for those with serious disabilities.
61. The Law Council makes the following specific comments:

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<sup>3</sup> AAT Annual Report 2009/10, page 134.

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- (a) The Bill should attempt to identify those who are “directly affected” by a decision, as required under clause 100(2). For example, a number of persons (other than the scheme participant) may be affected by a decision of the NDIA, including carers, parents, children or other friends or relatives of the participant. The Law Council considers it is important to clarify who will have standing to seek internal review or to appeal a decision by the NDIA.
  - (b) The Bill may need to incorporate provisions dealing with complaints and disagreements between directly affected parties. For example, a participant may have separated parents, both of whom are guardians, who have a dispute over the best course of care for their child.
  - (c) Clause 100(6) requires that the internal reviewer must “as soon as reasonably practicable” make a decision confirming, varying or setting aside the decision at first instance. The Law Council considers that it would be more appropriate to set a time frame (for example, 14 days) within which the reviewer must make a decision. This is important in terms of natural justice, to avoid hardship to the participant and their carer/family any to avoid delay in the review process.
  - (d) The Law Council notes that under the Bill, the reviewer is not required to give written reasons for a decision made under clause 100(6). It may be very difficult for an applicant to seek a review in the AAT if they do not understand the reasons for a decision and the basis on which it was made. Clause 100(6) should be amended to require the reviewer to provide reasons for any decision made under that provision and that all decisions must be made within a specified period of time after a request for a review is lodged by an applicant.
  - (e) It is important that care and support plans are reviewable under the scheme and subject to external review in the AAT. The Law Council understands independent oversight of treatment plans in other jurisdictions has contributed positively to the quality of plans and has improved confidence in the system by people subject to treatment plans.
  - (f) Clause 99 sets out what is a reviewable decision but appears not to include decisions made under clause 192 (waiver of debt arising from administrative error) or clause 195 (waiver in special circumstances). The Law Council considers that such decisions are highly likely to be contested by participants and provision should be made for such decisions to be reviewable. Also, there appear to be no provisions dealing with the ‘date of effect’ of new decisions made under review.
  - (g) Participants must have the right to legal representation in both internal and external appeals processes.
  - (h) The Law Council submits that additional funding should be provided to disability advocacy groups to ensure they have the capacity to advise and assist NDIS participants in review and appeals processes under the NDIS.
  - (i) The Bill should make specific provision for reimbursement of costs to NDIS participants who are successful in appealing decisions in the AAT.

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## Chapter 5 - Compensation payments

62. Chapter 5 of the Bill sets out a range of complex provisions providing for recovery of:
- (a) past NDIS amounts paid or awarded to a scheme participant under a judgment or settlement;
  - (b) NDIS amounts paid or payable by an insurer or another statutory compensation scheme.

### General comments

63. The Explanatory Memorandum (EM) to the Bill states that these provisions exist because the NDIS is not intended to replace existing entitlements to compensation. However, the Law Council considers there is an overarching justification for these provisions which is not made clear in the Bill or the EM: that in order for the NDIS to be sustainable in the long term, it is appropriate that existing compensation authorities and insurers are required to assist in defraying the costs of long term care and support, as presently required under existing arrangements.
64. It is not the purpose of the NDIS to 'socialise' these cost by making tax-payers liable, rather than insurers and other compensation providers. It is reasonable and appropriate, therefore, for the Commonwealth to establish a framework under which amounts paid under the NDIS are recovered from common law judgments and settlements, and claims against private insurers and compensation authorities, where appropriate.
65. The Law Council believes those who are negligently injured should have the right to claim compensation at common law. Those same people should not be coerced into making a common law claim, if they do not wish to. However, consistent with the principles underlying these provisions, the Commonwealth should still have the capacity to recover NDIS payment that would otherwise be the liability of a private insurer or other compensation provider.

### Requirement to obtain compensation

66. Part 1 of Chapter 5 of the Bill enables the NDIA to issue a notice to a participant in the NDIS requiring them to seek compensation, if that option is available to them through a common law negligence claim or by claiming against an insurer or another compensation authority.
67. Under sub-clause 104(2), the action required by the notice must be 'reasonable', which is defined in sub-clause 104(3) to require the NDIA to consider a range of factors relevant to the participant's disabilities, incapacity, financial circumstances, their reasons for not claiming compensation and the circumstances of their family or carers.
68. Under sub-clause 104(4), the NDIA is prevented from issuing a notice under sub-clause 104(2) unless satisfied the participant has reasonable prospects of success in obtaining compensation. Sub-clause 104(5) provides that the period for responding to the notice should not be shorter than 28 days. Sub-clause 104(6) provides that the NDIA may issue a notice, notwithstanding any agreement to waive or transfer compensation rights, if satisfied that any such agreement is void or unenforceable.

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69. The Law Council notes that there are two broad circumstances in which a notice might be issued:
- (a) where a participant may have a common law or statutory negligence claim, resulting in a lump sum payment; or
  - (b) where a participant may have an entitlement to lodge a claim under another no-fault scheme, resulting in periodic entitlements or a statutory benefit.
70. The Law Council has concerns about the existence of a power to compel a person to pursue a negligence claim.
71. The right to pursue a compensation claim is a personal civil law right. However, it is problematic to compel a person to exercise these rights. The capacity to pursue an action will often depend on factors, which may be difficult to assess in any given circumstances.
72. At a practical level, it is unclear whether the 28 day minimum timeframe under sub-clause 104(5) for taking action in response to a notice issued under sub-clause 104(2) is sufficient. This is largely because there is nothing in the legislation stipulating what 'actions' the NDIA may require participants to complete.
73. For example, if the authority requires a person to obtain legal advice about their prospects of success (which seems to be a reasonable first step in any claim for compensation), it is conceivable that it may not be immediately obvious whether there is an entitlement to claim compensation. Any such advice may depend on acquisition of information not held by the participant and not readily obtainable from the parties believed to hold the information. In such circumstances it may be difficult to stipulate a minimum timeframe.
74. Referring to the example above, 'reasonable action' (as required under clause 104(1)(b)(ii)) would seem to require, as a threshold step, seeking legal advice to ascertain prospects of success in litigation. However, it is unclear what flows from this. Is it envisaged that a person could be obliged to disclose legal advice they have received about their prospects of success in litigation? If so, this may compel scheme participants to waive client legal privilege, which the Law Council would consider to be unacceptable.
75. In any event, it is unclear whether a person could be compelled to reveal legal advice, notwithstanding these provisions. Client legal privilege is a fundamental common law immunity which cannot be abrogated, except by express statutory provisions or by 'necessary implication'.<sup>4</sup> The threshold for 'necessary implication' is high, requiring that client legal privilege be upheld unless the relevant power being exercised would be rendered practically useless if client legal privilege were to apply.<sup>5</sup> The Law Council considers it is unlikely that this threshold would be reached under the NDIS Bill. Arguably, a person could not be compelled to disclose even the fact that they had obtained legal advice.
76. Where privilege has not been abrogated and is not waived, it would be inappropriate to coerce a person to disclose legal advice by suspending care and support entitlements under the scheme, as provided for under clause 105. It may also place the participant at a disadvantage in any subsequent litigation they might be required, or choose, to pursue.

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<sup>4</sup> *Daniels Corporation International Pty Ltd v ACCC* (2002) 213 CLR 543

<sup>5</sup> *Ibid*, per McHugh J at [45]

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77. Accordingly, the provisions may be unworkable, even to ascertain whether a reasonable claim exists, if a scheme participant refuses to waive privilege. The Law Council would strongly oppose abrogation of client legal privilege in these circumstances, and opposes any provisions which may operate to coerce a person to do so.
78. Notwithstanding these concerns, the Law Council considers that there may be only a very small number of participants who might refuse to seek legal advice or pursue an action. The vast majority of claims are brought by clients who are represented by lawyers acting on a 'no win, no fee' basis. However, this does not amount to a risk-neutral enterprise. In the vast majority of cases, the plaintiff remains at risk in respect of costs, if they are unsuccessful or only partly successful, and the plaintiff will usually be expected to cover disbursements.
79. If participants are unable to or unwilling to pursue an action they might have, or even to seek legal advice in respect of such an action, the Law Council considers it would be inappropriate to coerce them into doing so.

Recommended approach in relation to common law and statutory negligence claims

80. Instead, the Law Council recommends the following approach:
- (a) Section 104(1) should be amended to state that, "this section applies where a participant is, or in the opinion of the CEO may be, entitled to compensation under the common law or a statutory compensation scheme, in respect of injuries suffered by them, for which another person may be liable; and the participant or prospective participant has taken no reasonable action to claim or obtain the compensation."
  - (b) Section 104(2) should be amended to state that: "The CEO may write to the participant or prospective participant to advise that:
    - (i) in the opinion of the CEO, the participant or prospective participant may have a cause of action at common law or a claim in negligence under a statutory compensation scheme;
    - (ii) the CEO recommends that the participant or prospective participant:
      - 1. seek legal advice about their possible entitlements; and
      - 2. is entitled to client legal privilege and should seek legal advice before revealing the content of their legal advice to any person.
  - (c) Sub-clauses 104(3), (4), (5) and (6) should be removed.
  - (d) A new section 104(3) should be inserted stating that, if the participant or prospective participant does not wish to pursue a claim they might have at common law or under a statutory compensation scheme, the NDIA may exercise a right to subrogate the claim.
81. The Law Council submits that, if the above (or a similar) approach is not adopted under the Bill, and the Agency retains the power to compel an individual to pursue a claim, then the Agency should indemnify that individual against adverse costs consequences or alternatively, could subrogate the risk and take the action on behalf of the person.

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## **Recovery of past NDIS amounts from common law judgments and settlements**

82. Part 2 of Chapter 5 enables the NDIA to recover past NDIS payments from compensation awarded under a judgment or settlement.
83. The Law Council supports the principle that the NDIA should have the capacity to recover past NDIS amounts from that component of lump-sum compensation payments awarded by judgment or agreed by way of common law settlement, particularly to avoid “double dipping”.
84. The Law Council supports these provisions, subject to implementation of necessary amendments to reflect the revised procedure outlined above with respect to recovery of NDIS amounts from common law judgments and settlements.
85. The Law Council notes that the clauses in this section of the Bill are largely based on the recovery provisions under the *Health and Other Services (Compensation) Act 1995* (HOSC Act).
86. The experience with these provisions when first introduced (in this form) was that all settlements were held up for months, causing significant hardship to people with a potential liability under the HOSC Act. Eventually the 10% provision was introduced and there would need to be a similar provision lest the problems previously encountered were repeated.
87. It should be made plain in the legislation that unless an insurer has received a notice from the NDIA, the insurer is not required to withhold payments to the injured person.

## **Recovery of amounts awarded for future care and support**

88. The Law Council notes that Chapter 5 does not deal with recovery of amounts awarded to a participant for future care and support, except in respect of judgments.
89. Instead, these matters appear to be addressed, in a limited way, under clause 35(4), which are discussed earlier in this submission.
90. As previously noted, the Law Council believes this creates considerable uncertainty with respect to the way in which compensation payments will affect decisions in relation to participants’ care and support plans.
91. The Law Council notes this is a challenging area in which to legislate. While judgments usually determine amounts by reference to specific heads of damage, including future care and support, only a very small proportion of matters proceed to judgment. The majority of cases settle in the interlocutory stages and many matters involve agreement to a lump-sum without specifying amounts for each head of damage. Accordingly, it may be difficult in any given case to determine what amount has been awarded for future care and support. This is further complicated by discount rates applying to damages awards for future losses in all jurisdictions, as well as cases involving contributory negligence by the plaintiff.
92. The Law Council suggests that the following alternative approaches may overcome these problems and minimise the prospects for disputes as to the appropriate contribution by the participant in respect of future care and support:

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- (a) The NDIA should provide notice to the participant as to the required contribution in advance of a settlement agreement or judgment, which will provide the basis for calculation of that head of damages. Following settlement or judgment, the participant may pay that amount to the NDIS, adjusted according to any reduction caused by a finding of contributory negligence, as well as the relevant discount rate; or
  - (b) The NDIA should simply require the participant to fund their own support for a certain period (the 'preclusion period'), which is similar to the process that is currently applied in relation to Centrelink benefits following an award of compensation in respect of future care and support or economic loss at common law.

## Additional issues

### Appointment of Board Members

- 93. Clause 127(2) limits appointments to the NDIS Board to persons with experience 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; and/or
  - (d) corporate governance.
- 94. The Law Council considers clause 127(2), may unduly limit the fields of expertise that might benefit a Board governing the NDIS.
- 95. For example, capable and responsible Board Members could be appointed from a range of other fields, including disability and health advocates, medical experts and administrators, legal and regulatory experts, consumer representatives, business leaders, etc.
- 96. The Law Council does not understand the rationale behind limiting appointments to certain fields, particularly to a Board that may be charged with functions as broad as those outlined under clause 124. The Law Council considers there is a risk that the limitation proposed by clause 127(2) may limit the capacity of the NDIS Board to benefit from the breadth of experience offered in other fields.
- 97. The Law Council appreciates that the intention of this limitation is to ensure the Board can draw from expertise in certain relevant fields. If this is the objective, the Law Council suggests that a better approach would be to reserve a certain number of positions on the Board for persons appointed from the fields identified in clause 127(2), while allowing broad discretion to appoint suitably qualified persons from other fields to the remaining 'unreserved' Board positions.
- 98. A further consideration that the Government would need to take into account is that Board members must not be conflicted and/or hold any other position which could result in a financial advantage for them or their employer from the operation of the NDIS.



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## **Attachment A: Profile of the Law Council of Australia**

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The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its constituent bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Large Law Firm Group, which are known collectively as the Council's constituent bodies. The Law Council's constituent bodies are:

- Australian Capital Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Independent Bar
- The Large Law Firm Group (LLFG)
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of approximately 60,000 lawyers across Australia.

The Law Council is governed by a board of 17 Directors – one from each of the constituent bodies and six elected Executives. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive, led by the President who serves a 12 month term. The Council's six Executive are nominated and elected by the board of Directors. Members of the 2013 Executive are:

- Mr Joe Catanzariti, President
- Mr Michael Colbran QC, President-Elect
- Mr Duncan McConnel, Treasurer
- Ms Fiona McLeod SC, Executive Member
- Mr Justin Dowd, Executive Member
- Ms Leanne Topfer, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.