



25 January 2013

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Committee Secretary  
Senate Standing Committees on Community Affairs  
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AUSTRALIA

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Dear Secretary

***National Disability Insurance Scheme Bill 2012***

I refer to the inquiry in relation to the National Disability Insurance Scheme Bill 2012 (**the Bill**) and thank you for the opportunity to provide comments in relation to the Bill.

The Law Society of South Australia (**Society**) was founded in 1879. Its continued existence is enshrined in Part 2 of *Legal Practitioners Act 1981* ("the Act") and it is the peak body representing the legal profession in South Australia. It currently has approximately 3,500 members. The Society is also a constituent member of the Law Council of Australia (**Law Council**), the national body representing 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 Society has received an invitation to give comments on the Bill from the Law Council, and has provided detailed feedback to it. The Society supports the Law Council's submission. This submission seeks to further emphasise some matters, and is therefore supplementary to the Law Council submission.

This submission concerns the following matters:

- eligibility criteria needs more clarity and understanding;
- review processes must include access to legal advice and representation;
- a person should not be forced to take legal action to participate in the NDIS;
- existing rights should not be undermined.

### ***Eligibility criteria and reasonable and necessary supports need more clarity***

The Society emphasises the Law Council's submission that the Bill should set out clearly the guidelines upon which eligibility, services and supports are to be delivered, and what is to be delivered. The success or failure of the project will depend on it sustainably delivering identifiable services which fulfil unmet needs

Most criteria for eligibility are to be the subject of Rules and Regulations subsequently to be passed under clauses 209 and 210. The criteria are thus at present unclear or unknown. The Society submits that matters of a substantive nature, such as the eligibility criteria, should be included in the Act rather than the Rules and Regulations. Including matters of a substantial nature in delegated legislation has been found in the past to be problematic, particularly in cases where the delegated legislation contains powers of a discretionary nature or contains Rules and Regulations that exceed the empowering provisions under the Act. In our view, the eligibility criteria and other substantive criteria should be subject to the full scrutiny of the Parliament.

The proposed definition of 'reasonable and necessary supports' appears in clause 34 of the Bill. The explanatory memorandum states that what is reasonable will include an assessment of whether the cost of the support represents 'value for money' and other factors. The actual 'supports' are at present unclear. We note there exist policies and guidelines on 'value for money' in other contexts, but it is unclear whether such existing policies are to apply to the NDIS.

The objects under clause 3(2)(b) indicate that an insurance-based approach, informed by actuarial analysis, will apply to the provision of funding of supports. How this will be achieved is unclear, and the financial sustainability of the scheme is thus unclear, particularly having regard to the objects under clause 3(3)(b).

### ***Administrative review processes must be transparent and have procedural fairness***

The persons who will be most affected by decisions will be the disabled, one of the most vulnerable sectors of the community.

With that in mind, it is unacceptable that legal assistance for participants and potential participants is denied in clause 6(2) of the Bill. Access to justice includes access to legal advice and representation. Denial of funding is an effective denial of a core element of the rule of law.

The Society suggests that, as a minimum, there needs to be an acceptance that "reasonable and necessary supports" includes access to legal services.

### ***A person should not be forced to take legal action to participate in the NDIS***

Clause 104 of the Bill requires a participant in the NDIS to take action to recover compensation where there is a reasonable prospect of success. If the participant

does not take such action, and this is not considered reasonable, the CEO can suspend their entitlements under the NDIS.

The NDIS will provide benefits for those who have a disability which may or may not arise in compensable circumstances. The Society would expect a number of participants, particularly those who are at fault or partly at fault in causing their injuries, will not pursue a claim for compensation.

If a claim is not pursued a statutory right of recovery cannot be exercised as is envisaged by clauses 106 and 107 of the Bill. Therefore, the Bill insists that where there is a reasonable prospect of success, that the participant be required to pursue a claim to ensure a recovery can be made by NDIS. We note that clause 107 would suggest that this recovery would come after any amounts are repaid to Medicare and Centrelink.

Therefore, the participant may well be put in a position where they are forced to pursue proceedings and be put at risk of incurring a liability, or at least solicitor-client costs, with no reimbursement by the NDIS and no guarantee there would be any damages left over to meet such costs.

In summary, the Society is concerned that a participant may be coerced to pursue legal proceedings whether they want to or not, and they may be or will be required to bear all the risk of the outcome. Having a right of subrogation may be a more appropriate method of securing the NDIS's ability to recoup costs from a wrongdoer.

### ***Retention of rights***

Finally, the Society strongly endorses the 'no disadvantage' submission of the Law Council. A participant should not be forced to choose between entering the NDIS and pursuing an action under the common law outside the scheme. The payments received from a common law action or the NDIS will often be the only income the disabled person will ever receive for the rest of their lifetime. With that in mind, it is imperative that people are provided with the best possible avenues to pursue a claim. Taking away the option of pursuing an action under the common law and instead forcing a person to enter the NDIS will be unjust and unfair, particularly in circumstances where it is unclear that the outcome for the individual would be better under the NDIS. It may also cause unnecessary hardship for the participant's family and carers.

We strongly suggest that these provisions in the Bill be reconsidered, with a view to allowing a participant to retain the right to pursue an action in the common law. However, if a participant must be forced to enter the NDIS, then the Society submits that the NDIS must guarantee a better outcome than what the participant could potentially receive in a common law action.

I trust these comments are of assistance.

Yours sincerely

John White  
**PRESIDENT**