



Secretary
Senate Community Affairs Legislation Committee
PO Box 6100
Parliament House
Canberra ACT 2600

25 January 2013

Dear Senate Community Affairs Legislation Committee,

Brain Injury Australia welcomes the opportunity of being able to provide this submission to your inquiry into the National Disability Insurance Scheme Bill 2012.

Before offering a critique of the Bill, Brain Injury Australia believes it important to recognise the Australian Government's initiative in applying a social insurance model to the provision of disability services and supports. The proposed National Disability Insurance Scheme is a genuinely once-in-a-lifetime opportunity that Brain Injury Australia and its Member organisations not only want to seize, but also perfect. As a result of the legislators' perfectly reasonable pursuit of a "one size fits all" approach to a Scheme fit for the one in every five Australians with a disability, the needs specific to certain disabilities, such as acquired brain injury (ABI), have been allowed to fall out of the Bill. It is that neglect this submission seeks to redress.

The majority of people with an ABI – around three in every four – make a good *physical* recovery but will often experience debilitating and ongoing cognitive and behavioural disability such as: poor memory and concentration; a reduced ability to learn, to plan and to solve problems; increased irritability, poor impulse control; and verbal, sometimes physical, aggression. Numerous iterations of the Australian Bureau of Statistics' *Survey of Disability, Ageing and Carers* have found that people with an ABI, when compared with other disabilities, were much more likely to require assistance with, for example, "self-care, cognitive and emotional tasks, paperwork, transport, health care and meal preparation". These are many of the exact same skills necessary to access and navigate what will be, in effect, the brand new services and supports system entailed in the National Disability Insurance Scheme.

Brain Injury Australia's primary concern with the National Disability Insurance Scheme Bill 2012 is that, at key places in its depiction of the architecture of the Scheme, it fails to take into account the cognitive capacity limitations of many Scheme "participants or prospective participants" with an ABI. In particular, while the "CEO [of the National Disability Insurance Scheme Launch Transition Agency] must facilitate preparation of participant's plan[sic]" (p.25, below), there is no provision in the Bill stating that prospective participants who lack the capacity to prepare their plans, let alone engage in the applications

Brain Injury Australia Inc.
PO Box 220, Marrickville NSW 1475
Weemala Flat, Royal Rehabilitation Centre Sydney, 257 Morrison Road, Ryde NSW 2112

process for the scheme overall, will have access to independent and funded support in the form of, for example, registered "Plan Management Providers". Neither does the Bill provide for independent and funded support where "a participant or a prospective participant" is "entitled to compensation in respect of a personal injury" and the CEO "requires...[legal] action to claim or obtain the compensation" (p.66). Many Scheme participants with traumatic brain injury (TBI) from, for example, motor vehicle or workplace accidents may be entitled to such compensation but will rightly find pursuing litigation themselves an onerous responsibility. The Bill's provisions in relation to participant cessation from the Scheme (p.23) and participant cancellation of a nominee (p.58) should include safeguards to protect participants who, as a result of their ABI, exhibit poor impulse control; such as a specified "cooling off period" allowing for participants to reverse their decisions and/ or a requirement that the CEO inquire into such decisions to ensure they reflect both the participants' direct wishes and best interests. Provisions in the Bill requiring "certification" that "access requests" include "all the information and is accompanied by all the documents...that are in possession or control of the person" (p.33) and the "retention of records of NDIS amounts paid to participants and other persons, including requiring that prescribed records be retained for a prescribed period" (p.33 - in the first draft of the Bill the "prescribed period" was "5 years beginning when the [NDIS] amount is paid") are unreasonable for participants with an ABI experiencing impairments with planning, organisation and memory (the most commonly reported cognitive disability, affecting between half and three-quarters of people with an ABI). While Brain Injury Australia understands that much of the operational mechanics of the Scheme will be set out in the NDIS "Rules" and/or the policies and procedures of the National Disability Insurance Scheme Launch Transition Agency, these aspects of the Bill are inconsistent with, and so undermine, the fundamental philosophy of the Scheme, namely that "people with disability should be supported in all their dealings and communications with the Agency so that their capacity to exercise choice and control is maximised in a way that is appropriate to their circumstances and cultural needs."

The Bill allows for the CEO of the Agency to "request" prospective Scheme participants to "undergo a medical, psychiatric or psychological examination...and provide to the CEO the report, in the approved form, of the person who conducts the examination" (p.21) but makes no provision for which publicly-funded "persons" will conduct such examinations, or how they will otherwise be paid for. Neuropsychological assessments remain the standard for measuring cognitive disability post-ABI but can cost as much as \$2,500.00 to complete. ABI, like many other disabilities, tracks economic disadvantage. Residential postcode information for the 450 participants in New South Wales' Lifetime Care and Support Scheme – the majority sustaining a severe TBI from motor vehicle accidents – found fewer than 1 in every 5 came from areas with a mean taxable income in the top four deciles (\$55,361 and above). A recent *Medical Journal of Australia* study of over 3,000 Australians and New Zealanders experiencing stroke – the largest subgroup of ABI – found "that people living in areas that are relatively more deprived in socioeconomic terms experience higher rates of stroke" due, in part, to risk factors such as hypertension, diabetes and cigarette smoking.

Appended to this covering letter is the Bill, with Brain Injury Australia's 44 specific comments placed in the margin. In formulating these comments, Brain Injury Australia has, with the Department of Families, Housing, Community Services and Indigenous Affairs' permission, received the assistance of our lawyers, Herbert Smith Freehills (formerly Freehills).

Please let us know if any of these comments require clarification. Brain Injury Australia would, of course, welcome any opportunity to appear before the Committee at its public hearings.

Sincerely,

Nick Rushworth, Executive Officer
Brain Injury Australia

Phone: (02) 9808 9390

Dr. Derek Brookes, Policy Officer
Brain Injury Australia

Phone: (02) 9808 9390

ABOUT BRAIN INJURY AUSTRALIA

Brain Injury Australia is the national peak acquired brain injury (ABI) advocacy organization representing, through its State and territory member organizations and network relationships, the needs of people with an ABI, their families and carers. The major components of Brain Injury Australia's role are: advocacy for Australian Government program allocations and policies that reflect the needs and priorities of people with an ABI and their families, and the provision of effective and timely input into policy, legislation and program development through active contact with Australian Government ministers, parliamentary representatives, Australian Government departments and agencies, and national disability organizations.

ABOUT ACQUIRED BRAIN INJURY (ABI)

Acquired brain injury (ABI) refers to any damage to the brain that occurs *after* birth (with the exception of Fetal Alcohol Spectrum Disorders – “FASD”). Common causes of ABI include accidents, stroke, infection, alcohol and other drug abuse and neurological disease. Traumatic brain injury (TBI) is an ABI caused by external force applied to the head from, for example, an assault, a fall or a motor vehicle accident. ABI is common in Australia. According to a 2003 Australian Bureau of Statistics survey, 432,700 people (2.2% of the population) had an ABI with “activity limitations” or “participation restrictions” due to their disability.

**NATIONAL DISABILITY INSURANCE SCHEME BILL 2012
NO. , 2012**

**A BILL FOR AN ACT TO ESTABLISH THE NATIONAL DISABILITY
INSURANCE SCHEME, AND FOR RELATED PURPOSES**

EXPOSURE-DRAFT

FAMILIES, HOUSING, COMMUNITY SERVICES AND INDIGENOUS AFFAIRS

Contents

Chapter 1—Introduction	1
Part 1—Preliminary	1
Part 2—Objects and principles	3
Part 3—Simplified outline.....	6
Part 4—Definitions	8
Part 5—Ministerial Council.....	14
Chapter 2—Assistance for people with disability and others.....	15
Chapter 3—Participants and their plans.....	17
Part 1—Becoming a participant.....	17
Part 2—Participants' plans	24
Division 1—Principles relating to plans.....	24
Division 2—Preparing participants' plans.....	25
Division 3—Managing the funding for supports under participants' plans.....	31
Division 4—Reviewing and changing participants' plans	34
Chapter 4—Administration.....	36
Part 1—General matters	36
Division 1—Participants and prospective participants.....	36
Division 2—Other persons.....	38
Division 3—Interaction with other laws.....	40
Part 2—Privacy.....	41
Part 3—Registered providers of supports	45
Part 4—Children	48
Part 5—Nominees	51
Division 1—Functions and responsibilities of nominees	51
Division 2—Appointment and cancellation or suspension of appointment.....	57
Division 3—Other matters relating to nominees	62
Part 6—Review of decisions.....	63
Chapter 5—Compensation payments	66
Part 1—Requirement to take action to obtain compensation	66
Part 2—Agency may recover compensation fixed after NDIS amounts have been paid	68
Part 3—Recovery from compensation payers and insurers	71
Part 4—CEO may disregard certain payments.....	76
Chapter 6—National Disability Insurance Scheme Launch Transition Agency ...	77
Part 1—National Disability Insurance Scheme Launch Transition Agency	77
Part 2—Board of the Agency	80
Division 1—Establishment and functions	80
Division 2—Members of the Board.....	81
Division 3—Meetings of the Board.....	86
Part 3—Independent Advisory Council	88
Division 1—Establishment and function.....	88
Division 2—Members of the Advisory Council.....	90
Division 3—Procedures of the Advisory Council	95
Part 4—Chief Executive Officer and staff etc.....	96
Division 1—Chief Executive Officer.....	96
Division 2—Staff etc.....	99
Part 5—Reporting and planning	100
Division 1—Reporting	100

Subdivision A—Reporting by Board members	100
Subdivision B—Reporting by the Agency	102
Subdivision C—Reporting by the Minister	102
Division 2—Planning	104
Part 6—Finance	105
Part 7—Miscellaneous	106
Chapter 7—Other matters	107
Part 1—Debt recovery	107
Division 1—Debts	107
Division 2—Methods of recovery	108
Division 3—Information relating to debts	111
Division 4—Non-recovery of debts	113
Part 2—General matters	116
Part 3—Constitutional matters	119
Part 4—Review of the Act	121
Part 5—Legislative instruments	122

The Parliament of Australia enacts:

Chapter 1—Introduction

Part 1—Preliminary

1 Short title

This Act may be cited as the *National Disability Insurance Scheme Act 2012*.

2 Commencement

- (1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

Commencement information

Column 1 Provision(s)	Column 2 Commencement	Column 3 Date/Details
1. Sections 1 and 2 and anything in this Act not elsewhere covered by this table	The day this Act receives the Royal Assent.	—
2. Sections 3 to 12	The day after this Act receives the Royal Assent.	—
3. Chapters 2 and 3	A day or days to be fixed by Proclamation. However, if any of the provision(s) do not commence within the period of 6 months beginning on the day this Act receives the Royal Assent, they commence on the day after the end of that period.	—
4. Chapter 4, Part 1, Division 1	A day or days to be fixed by Proclamation. However, if any of the provision(s) do not commence within the period of 6 months beginning on the day this Act receives the Royal Assent, they commence on the day after the end of that period.	—
5. Chapter 4, Part 1, Divisions 2 and 3	The day after this Act receives the Royal Assent.	—
6. Chapter 4, Parts 2 and 3	The day after this Act receives the Royal Assent.	—

Column 1 Provision(s)	Column 2 Commencement	Column 3 Date/Details
7. Chapter 4, Parts 4, 5 and 6	A day or days to be fixed by Proclamation. However, if any of the provision(s) do not commence within the period of 6 months beginning on the day this Act receives the Royal Assent, they commence on the day after the end of that period.	—
8. Chapter 5	A day or days to be fixed by Proclamation. However, if any of the provision(s) do not commence within the period of 6 months beginning on the day this Act receives the Royal Assent, they commence on the day after the end of that period.	—
9. Chapters 6 and 7	The day after this Act receives the Royal Assent.	—

Note: This table relates only to the provisions of this Act as originally enacted. It will not be amended to deal with any later amendments of this Act.

- (2) Any information in column 3 of the table is not part of this Act. Information may be inserted in this column, or information in it may be edited, in any published version of this Act.

Part 2—Objects and principles

3 Objects of Act

- (1) The objects of this Act are to:
 - (a) provide for the National Disability Insurance Scheme in Australia; and
 - (b) support the independence and social and economic participation of people with disability; and
 - (c) provide reasonable and necessary supports, including early intervention supports, for participants in the National Disability Insurance Scheme launch; and
 - (d) enable people with disability to exercise choice and control in the pursuit of their goals and the planning and delivery of their supports; and
 - (e) facilitate the development of a nationally consistent approach to the access to, and the planning and funding of, supports for people with disability; and
 - (f) promote the provision of high quality and innovative supports to people with disability; and
 - (g) raise community awareness of the issues that affect the social and economic participation of people with disability, and facilitate greater community inclusion of people with disability; and
 - (h) give effect to certain obligations that Australia has as a party to the Convention on the Rights of Persons with Disabilities.
- (2) These objects are to be achieved by:
 - (a) providing the foundation for governments to work together to develop and implement the National Disability Insurance Scheme launch; and
 - (b) adopting an insurance-based approach, informed by actuarial analysis, to the provision and funding of supports for people with disability.
- (3) In giving effect to the objects of the Act, regard is to be had to:
 - (a) the **progressive** implementation of the National Disability Insurance Scheme; and
 - (b) the need to ensure the financial sustainability of the National Disability Insurance Scheme.

4 General principles guiding actions under this Act

- (1) People with disability have the same right as other members of Australian society to realise their potential for physical, social, emotional and intellectual development.
- (2) People with disability should be supported to participate in and contribute to social and economic life to the extent of their ability.

Comment [DR1]:

BIA COMMENT: As stated by the Productivity Commission (PC), "many people have been waiting a long time for better services, so the process for incorporating people into the scheme must not be open-ended." Hence, the PC proposes that "the [Agency's] legislation should give [the Agency] some flexibility, but should specify that all those who met the criteria for entitlement must be receiving services by 2018-19." (PC, p. 933) In other words, this "legislation should include a timetable for the transition to a full scheme." (PC, p. 929)

- (3) People with disability and their families and carers should have certainty that people with disability will receive the care and support they need over their lifetime.
- (4) People with disability should be supported to exercise choice and control in the pursuit of their goals and the planning and delivery of their supports.
- (5) People with disability should be supported to receive reasonable and necessary supports, including early intervention supports.
- (6) People with disability have the same right as other members of Australian society to respect for their worth and dignity and to live free from abuse, neglect and exploitation.
- (7) People with disability have the same right as other members of Australian society to pursue any grievance.
- (8) 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.
- (9) People with disability should be supported in all their dealings and communications with the Agency so that their capacity to exercise choice and control is maximised in a way that is appropriate to their circumstances and cultural needs.
- (10) People with disability should have their privacy and dignity respected.
- (11) Reasonable and necessary supports for people with disability should:
 - (a) support people with disability to pursue their goals and maximise their independence; and
 - (b) support the capacity of people with disability to undertake activities that enable them to participate in the community and in employment.
- (12) The role of families, carers and other significant persons in the lives of people with disability is to be acknowledged and respected.
- (13) People with disability should be supported to receive supports outside the National Disability Insurance Scheme, and be assisted to coordinate these supports with the supports provided under the National Disability Insurance Scheme.
- (14) Innovation, quality, continuous improvement, contemporary best practice and effectiveness in the provision of supports to people with disability are to be promoted.
- (15) It is the intention of the Parliament that the Ministerial Council, the Minister, the Board, the CEO and any other person or body is to perform functions and exercise powers under this Act in accordance with these principles, having regard to:
 - (a) the progressive implementation of the National Disability Insurance Scheme; and
 - (b) the need to ensure the financial sustainability of the National Disability Insurance Scheme.

5 General principles guiding actions of people who may do acts or things on behalf of others

It is the intention of the Parliament that, if this Act requires or permits an act or thing to be done by or in relation to a person with disability by another person, the act or thing is to be done, so far as practicable, in accordance with both the general principles set out in section 4 and the following principles:

- (a) people with disability should be involved in decision making processes that affect them, and where possible make decisions for themselves;
- (b) people with disability should be encouraged to engage in the life of the community;
- (c) the judgements and decisions that people with disability would have made for themselves should be taken into account;
- (d) the cultural and linguistic circumstances of people with disability should be taken into account;
- (e) the supportive relationships, friendships and connections with others of people with disability should be recognised.

6 Agency may provide support and assistance

- (1) The Agency may provide support and assistance (including financial assistance) to prospective participants and participants in relation to doing things or meeting obligations under, or for the purposes of, this Act.

Note: For example, the Agency might assist a participant to prepare the participant's statement of goals and aspirations by assisting the participant to clarify his or her goals, objectives and aspirations.

- (2) However, subsection (1) does not permit or require the Agency to fund legal assistance for prospective participants or participants in relation to review of decisions made under this Act.

Comment [DR2]:

BIA COMMENT: It might be helpful to mention here that S69 of the AAT Act 1975 provides for the Commonwealth to provide assistance to any party to an appeal by way of legal representation or financial assistance.

7 Provision of notice, approved form or information under this Act etc.

- (1) The contents of any notice, approved form or information given under this Act, the regulations or the National Disability Insurance Scheme rules to a person with disability must be explained by the giver of the notice, approved form or information to the maximum extent possible to the person in the language, mode of communication and terms which that person is most likely to understand.
- (2) An explanation given under subsection (1) must be given both orally and in writing if reasonably practicable.

Part 3—Simplified outline

8 Simplified outline

The following is a simplified outline of this Act:

This Act provides for the National Disability Insurance Scheme.

The National Disability Insurance Scheme comprises:

- (a) the provision of services or activities that are in the nature of coordination, strategic or referral services or activities (Chapters 2 and 3); and
- (b) funding for persons or entities to enable them to assist people with disability to participate in economic and social life (Chapter 2); and
- (c) individual plans under which reasonable and necessary supports will be funded for certain people, called participants (Chapter 3).

This Act includes administrative provisions supporting the operation of the National Disability Insurance Scheme (Chapters 4 and 5), such as:

- (a) provisions to ensure the National Disability Insurance Scheme's integrity, including limited powers to obtain information, and requirements relating to protection of information; and
- (b) provisions relating to children; and
- (c) provisions for nominees; and
- (d) provisions for review of decisions; and
- (e) provisions about the treatment of compensation.

This Act also provides for the establishment of the National Disability Insurance Scheme Launch Transition Agency (Chapter 6).

The functions of the Agency include delivering the National Disability Insurance Scheme.

The Agency also has more general functions, such as:

- (a) developing and enhancing the disability sector, including by facilitating innovation, research and contemporary best practice in the sector; and
- (b) building community awareness of disabilities and the social contributors to disabilities.

Chapter 6 also:

- (a) establishes the Board of the Agency; and
- (b) establishes an Independent Advisory Council; and

- (c) provides for the Chief Executive Officer and staff of the Agency; and
- (d) provides for reporting and financial matters.

Chapter 7 includes provisions relating to general matters, such as:

- (a) debts; and
- (b) review of the Act; and
- (c) legislative instruments.

Part 4—Definitions

9 Definitions

In this Act:

access request has the meaning given by section 18.

Advisory Council means the Independent Advisory Council established by section 143.

Agency means the National Disability Insurance Scheme Launch Transition Agency established by section 117.

Board means the Board of the Agency established by section 123.

Board member means a member of the Board (and includes the Chair).

CAC Act means the *Commonwealth Authorities and Companies Act 1997*.

carer means an individual who:

- (a) provides personal care, support and assistance to another individual who needs it because that other individual is a person with disability; and
- (b) does not provide the care, support and assistance:
 - (i) under a contract of service or a contract for the provision of services; or
 - (ii) in the course of doing voluntary work for a charitable, welfare or community organisation; or
 - (iii) as part of the requirements of a course of education or training.

centrelink program has the same meaning as in the *Human Services (Centrelink) Act 1997*.

CEO means the Chief Executive Officer of the Agency.

Chair means the Chair of the Board.

child means a person who is under 18 years of age.

COAG means the Council of Australian Governments.

community care has the same meaning as in the *Aged Care Act 1997*.

compensation has the meaning given by section 11.

Convention on the Rights of Persons with Disabilities means the Convention on the Rights of Persons with Disabilities, done at New York on 30 March 2007.

Note: The text of the Convention is set out in Australian Treaty Series 2008 No. 12 (2008 ATS 12). In 2012, the text of a Convention in the Australian Treaty Series was accessible through the Australian Treaties Library on the AustLII website (www.austlii.edu.au).

correspondence nominee means a person who is appointed as the correspondence nominee of a participant under section 87.

developmental delay means a delay in the development of a child under 6 years of age that:

- (a) is attributable to a mental or physical impairment or a combination of mental and physical impairments; and
- (b) results in substantial reduction in functional capacity in one or more of the following areas of major life activity:
 - (i) self-care;
 - (ii) receptive and expressive language;
 - (iii) cognitive development;
 - (iv) motor development; and
- (c) results in the need for a combination and sequence of special interdisciplinary or generic care, treatment or other services that are of extended duration and are individually planned and coordinated.

early intervention supports means supports that are identified in the National Disability Insurance Scheme rules as early intervention supports.

enters into an agreement to give up his or her right to compensation: a participant or prospective participant **enters into an agreement to give up his or her right to compensation** if he or she:

- (a) enters into an agreement to waive his or her right to compensation; or
- (b) enters into an agreement to withdraw his or her claim for compensation.

entity means a partnership or an unincorporated association.

entry, in relation to a person and a residential care service, has the same meaning as in the *Aged Care Act 1997*.

Finance Minister means the Minister administering the *Financial Management and Accountability Act 1997*.

financial institution means a corporation that is an ADI for the purposes of the *Banking Act 1959*.

general supports has the meaning given by subsection 13(2).

grace period has the meaning given by subsection 40(2).

holder, in relation to a visa, has the same meaning as in the *Migration Act 1958*.

host jurisdiction has the meaning given by section 10.

managing the funding for supports under a participant's plan has the meaning given by section 42.

medicare program has the same meaning as in the *Human Services (Medicare) Act 1973*.

meets the access criteria has the meaning given by section 21.

meets the age requirements has the meaning given by section 22.

meets the disability requirements has the meaning given by section 24.

meets the early intervention requirements has the meaning given by section 25.

meets the residence requirements has the meaning given by section 23.

Ministerial Council means a body:

- (a) that consists of Ministers of the Commonwealth, States and Territories; and
- (b) that has been designated by COAG as having responsibilities relating to the National Disability Insurance Scheme.

National Disability Insurance Scheme means:

- (a) the arrangements set out in Chapter 2; and
- (b) the arrangements set out in Chapter 3 in relation to people who meet the residence requirements because of their residence in a prescribed area and meet the age requirements (if any) in relation to a prescribed area; and
- (c) the arrangements referred to in paragraph (b) as they apply when those arrangements are not limited on the basis of residence in a prescribed area.

National Disability Insurance Scheme launch means:

- (a) the arrangements set out in Chapter 2; and
- (b) the arrangements set out in Chapter 3 in relation to people who meet the residence requirements because of their residence in a prescribed area and meet the age requirements (if any) in relation to the prescribed area.

National Disability Insurance Scheme rules means the rules mentioned in section 209.

NDIS amount means an amount paid under the National Disability Insurance Scheme in respect of reasonable and necessary supports funded under a participant's plan.

nominee means the correspondence nominee of a participant or the plan nominee of a participant.

officer means:

- (a) a member of the staff of the Agency under section 169; or
- (b) a person assisting the Agency under section 170.

parent: without limiting who is a parent of anyone for the purposes of this Act, a person is the **parent** of another person if the other person is a child of the person within the meaning of the *Family Law Act 1975*.

parental responsibility has the meaning given by section 75.

participant means a person who is a participant in the National Disability Insurance Scheme launch (see sections 28, 29 and 30).

participant's impairment means an impairment in relation to which the participant meets the disability requirements, or the early intervention requirements, to any extent.

participant's statement of goals and aspirations has the meaning given by subsection 33(1).

permanent visa has the same meaning as in the *Migration Act 1958*.

plan, for a participant, means the participant's plan that is in effect under section 37.

plan management request has the meaning given by subsection 43(1).

plan nominee means a person who is appointed as the plan nominee of a participant under section 86.

prescribed area means an area prescribed by the National Disability Insurance Scheme rules for the purposes of paragraph 22(2)(a) or subsection 23(3).

Principal Member means the Principal Member of the Advisory Council.

prospective participant means a person in relation to whom an access request has been made but not yet decided.

prospective participant's impairment means an impairment in relation to which the prospective participant claims to meet the disability requirements, or the early intervention requirements, to any extent.

protected information means:

- (a) information about a person that is or was held in the records of the Agency; or
- (b) information to the effect that there is no information about a person held in the records of the Agency.

protected SCV holder: a person is a **protected SCV holder** if:

- (a) the person was in Australia on 26 February 2001, and was a special category visa holder on that day; or
- (b) the person had been in Australia for a period of, or for periods totalling, 12 months during the 2 years immediately before 26 February 2001, and returned to Australia after that day.

recoverable amount has the meaning given by sections 106 and 107.

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).

registered provider of supports means a person approved under section 70 as a registered provider of supports.

residential care service has the same meaning as in the *Aged Care Act 1997*.

reviewable decision has the meaning given by section 99.

review date of a participant's plan means the date specified in the plan under paragraph 33(2)(c).

reviewer has the meaning given by subsection 100(5).

special category visa has the same meaning as in the *Migration Act 1958*.

statement of participant supports has the meaning given by subsection 33(2).

supports includes general supports.

10 Definition of *host jurisdiction*

The Minister may, by legislative instrument, specify that a State or Territory is a **host jurisdiction**, with the agreement of that State or Territory.

Note: Section 42 (disallowance) of the *Legislative Instruments Act 2003* does not apply to the instrument (see subsection 44(1) of that Act).

11 Definitions relating to compensation

(1) In this Act:

compensation means a payment (with or without admission of liability) in respect of:

- (a) compensation or damages in respect of personal injury; or
- (b) personal injury, under a scheme of insurance or compensation under a Commonwealth, State or Territory law, including a payment under a contract entered into under such a scheme; or
- (c) personal injury, in settlement of a claim for damages or a claim under such an insurance scheme;

that is wholly or partly in respect of the cost of supports that may be provided to a participant (whether or not specifically identified as such). It does not matter whether the payment is made directly to the person who sustained the personal injury or to another person in respect of that person.

(2) A payment referred to in subsection (1) may be:

- (a) in the form of a lump sum or in the form of a series of periodic payments; and

- (b) made within or outside Australia.
- (3) In this Act, a reference to an insurer who is, under a contract of insurance, liable to indemnify a compensation payer or a potential compensation payer includes a reference to an authority of a State or Territory:
- (a) that is liable to indemnify a compensation payer or a potential compensation payer against such a liability, whether under a contract, law or otherwise; or
 - (b) that determines to make a payment to indemnify a compensation payer or a potential compensation payer against such a liability, whether or not the authority is liable to do so.

Part 5—Ministerial Council

12 Ministerial Council functions etc.

- (1) The Ministerial Council is to:
 - (a) consider policy matters that relate to the National Disability Insurance Scheme or arise under this Act; and
 - (b) advise the Minister about such matters; and
 - (c) make recommendations to COAG about such matters.
- (2) The advice and recommendations must not relate to a particular individual.
- (3) The Minister must consult the Ministerial Council about policy matters that relate to the National Disability Insurance Scheme or arise under this Act.

Chapter 2—Assistance for people with disability and others

13 Agency may provide coordination, strategic and referral services etc. to people with disability

- (1) The Agency may provide general supports to, or in relation to, people with disability who are not participants.

Note: Chapter 3 deals with the provision of general supports to, or in relation to, participants.

- (2) In this Act:

general support means:

- (a) a service provided by the Agency to a person; or
- (b) an activity engaged in by the Agency in relation to a person;

that is in the nature of a coordination, strategic or referral service or activity, including a locally provided coordination, strategic or referral service or activity.

14 Agency may provide funding to persons or entities

The Agency may provide assistance in the form of funding for persons or entities:

- (a) for the purposes of enabling those persons or entities to assist people with disability to:
 - (i) realise their potential for physical, social, emotional and intellectual development; and
 - (ii) participate in social and economic life; and
- (b) otherwise in the performance of the Agency's functions.

15 Agency may provide information

- (1) The Agency may provide information about the following:
- (a) matters relevant to the National Disability Insurance Scheme;
 - (b) the functions of the Agency.
- (2) The Agency must use its best endeavours to provide timely and accurate information to people with disability and other people in order to assist them in making informed decisions about matters relevant to the National Disability Insurance Scheme.

16 Agency may assist in relation to doing things under Chapter

The Agency may provide support and assistance to people in relation to doing things under, or for the purposes of, this Chapter.

Comment [DR3]:

BIA COMMENT: Should be 'this Chapter'.

17 National Disability Insurance Scheme rules

The National Disability Insurance Scheme rules may prescribe matters for and in relation to this Chapter.

Chapter 3—Participants and their plans

Part 1—Becoming a participant

18 Person may make a request to become a participant

A person may make a request (an **access request**) to the Agency to become a participant in the National Disability Insurance Scheme launch.

Note: Once a person becomes a participant, the CEO must commence to facilitate the preparation of his or her plan (see section 32).

19 Matters relating to access requests

(1) An access request must:

- (a) be in the form (if any) approved by the CEO; and
- (b) include any information, and be accompanied by any documents, required by the CEO; and
- (c) certify that it includes all the information, and is accompanied by all the documents, required as mentioned in paragraph (b) that are in the possession or control of the person.

Note: The CEO is not required to make a decision on the access request if this section is not complied with (see section 197).

(2) If:

- (a) a person has made an access request; and
- (b) the CEO decides that the person does not meet the access criteria, or is taken to have so decided because of subsection 21(3);

the person may make another access request at any time, unless at that time either of the following has been commenced, but not finally determined:

- (c) a review (the **initial review**) under subsection 100(5) of the CEO's decision;
- (d) a review under section 103 of a decision on the initial review.

20 CEO must consider and decide access requests

If a person (the **prospective participant**) makes an access request, the CEO must, within 21 days of receiving the access request:

- (a) decide whether or not the prospective participant meets the access criteria; or
- (b) make one or more requests under subsection 26(1).

21 When a person meets the access criteria

(1) A person **meets the access criteria** if:

Comment [DR4]:

BIA COMMENT: This certification process must make allowances for the fact that people with ABI, due to their cognitive impairments (e.g. short-term memory loss) may have (a) inadvertently failed to include all documentation, and yet (b) certified that they have done so. They should not thereby be disadvantaged (in terms of the CEO not being required to make a decision).

- (a) the CEO is satisfied that the person meets the age requirements (see section 22); and
 - (b) the CEO is satisfied that, at the time of considering the request, the person meets the residence requirements (see section 23); and
 - (c) the CEO is satisfied that, at the time of considering the request:
 - (i) the person meets the disability requirements (see section 24); or
 - (ii) the person meets the early intervention requirements (see section 25).
- (2) If the CEO is not satisfied as mentioned in subsection (1), the person **meets the access criteria** if the CEO is satisfied of the following:
- (a) at the time of considering the request, the person satisfies the requirements in relation to residence prescribed as mentioned in subsection 23(3) (whether or not the person also satisfies the requirements mentioned in subsection 23(1));
 - (b) the person:
 - (i) was receiving supports at the time of considering the request or, if another time is prescribed by the National Disability Insurance Scheme rules for the purposes of this subparagraph, at that other time; and
 - (ii) received the supports throughout the period (if any) prescribed by the National Disability Insurance Scheme rules for the purposes of this subparagraph; and
 - (iii) received the supports under a program prescribed by the National Disability Insurance Scheme rules for the purposes of this subparagraph;
 - (c) if the person becomes a participant, the person would not be entitled to receive the supports referred to in paragraph (b), or equivalent supports.
- (3) The CEO is **taken to have decided** that the prospective participant does not meet the access criteria if:
- (a) the CEO does not do a thing referred to in paragraph 20(a) or (b) within the 21-day period referred to in section 20; or
 - (b) if subsection 26(2) applies—the CEO does not do one of the things referred to in that subsection within the 14-day period referred to in that subsection.

Note 1: The periods may be extended under National Disability Insurance Scheme rules made under section 204.

Note 2: Notice of a decision that the CEO is taken to have made must be given because of subsection 100(1) and will be automatically reviewed because of subsection 100(5).

Comment [DR5]:

BIA COMMENT: In order (a) to maintain organisational transparency, (b) to minimise anxiety or misunderstanding in prospective participants and their families, and (c) to ensure that the term 'reasonably necessary' in section 26(1)(a) is (and is seen to be) adhered to, the CEO should be required to give the justification for this decision in any written notice of the decision that the prospective participant does not meet the access criteria.

22 Age requirements

- (1) A person **meets the age requirements** if:

- (a) the person was aged under 65 when the access request in relation to the person was made; and
 - (b) if the National Disability Insurance Scheme rules for the purposes of this paragraph prescribe that on a prescribed date or a date in a prescribed period the person must be a prescribed age—the person is that age on that date.
- (2) Without limiting paragraph (1)(b), National Disability Insurance Scheme rules made for the purposes of that paragraph:
- (a) may prescribe that a person must be a prescribed age on a prescribed date or a date in a prescribed period only if the person resides in a prescribed area of Australia; and
 - (b) may prescribe different ages and different dates in relation to different areas of Australia.

Comment [DR6]:

BIA COMMENT: This cut off date will (at least in borderline cases) necessitate a 'date of receipt' from the Agency of the access request.

23 Residence requirements

- (1) A person **meets the residence requirements** if the person:
- (a) resides in Australia; and
 - (b) is one of the following:
 - (i) an Australian citizen;
 - (ii) the holder of a permanent visa;
 - (iii) a special category visa holder who is a protected SCV holder; and
 - (c) satisfies the other requirements in relation to residence that are prescribed by the National Disability Insurance Scheme rules.
- (2) In deciding whether or not a person resides in Australia, regard must be had to:
- (a) the nature of the accommodation used by the person in Australia; and
 - (b) the nature and extent of the family relationships the person has in Australia; and
 - (c) the nature and extent of the person's employment, business or financial ties with Australia; and
 - (d) the nature and extent of the person's assets located in Australia; and
 - (e) the frequency and duration of the person's travel outside Australia; and
 - (f) any other matter relevant to determining whether the person intends to remain permanently in Australia.
- (3) Without limiting paragraph (1)(c), National Disability Insurance Scheme rules made for the purposes of that paragraph:

- (a) may require that a person reside in a prescribed area of Australia on a prescribed date or a date in a prescribed period in order to meet the residence requirements; and
- (b) may require that a person has resided in a prescribed area for a prescribed period in order to meet the residence requirements; and
- (c) may require that a person continue to reside in a prescribed area of Australia in order to meet the residence requirements.

24 Disability requirements

- (1) A person ***meets the disability requirements*** if:
 - (a) the person has a disability that is attributable to one or more intellectual, cognitive, neurological, sensory or physical impairments or to one or more impairments attributable to a psychiatric condition; and
 - (b) the impairment or impairments are, or are likely to be, permanent; and
 - (c) the impairment or impairments result in substantially reduced functional capacity to undertake, or psychosocial functioning in undertaking, one or more of the following activities:
 - (i) communication;
 - (ii) social interaction;
 - (iii) learning;
 - (iv) mobility;
 - (v) self-care;
 - (vi) self-management; and
 - (d) the impairment or impairments affect the person's capacity for social and economic participation; and
 - (e) the person's support needs in relation to his or her impairment or impairments are likely to continue for the person's lifetime.
- (2) For the purposes of subsection (1), an impairment or impairments that vary in intensity may be permanent, and the person's support needs in relation to such an impairment or impairments may be likely to continue for the person's lifetime, despite the variation.

25 Early intervention requirements

A person ***meets the early intervention requirements*** if:

- (a) the person:

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

26 Requests that the CEO may make

- (1) The requests the CEO may make under this subsection after a prospective participant has made an access request (see paragraph 20(b)) are as follows:
- (a) that the prospective participant, or another person, provide information that is reasonably necessary for deciding whether or not the prospective participant meets the access criteria;
 - (b) that the prospective participant do either or both of the following:
 - (i) undergo an assessment and provide to the CEO the report, in the approved form, of the person who conducts the assessment;
 - (ii) undergo a **medical**, psychiatric or psychological examination (whether or not at a particular place), and provide to the CEO the report, in the approved form, of the person who conducts the examination.
- (2) If:
- (a) information or one or more reports are requested under subsection (1); and
 - (b) the information and each such report are received by the CEO within 28 days, or such longer period as is specified in the request, after that information or report is requested;
- the CEO must, within 14 days after the last information or report is received:
- (c) decide whether or not the prospective participant meets the access criteria; or
 - (d) make a further request under subsection (1).
- (3) If:
- (a) information or one or more reports are requested under subsection (1); and

Comment [DR7]:

BIA COMMENT: The Bill should state that the Agency should cover the cost of these examinations if they are either (a) not covered under mainstream services, or (b) at a cost that — even if mostly covered by mainstream services — would nevertheless prohibit the participant from satisfying the CEO's request to undergo such an examination.

With respect to people with ABI, this specifically includes neurological and neuropsychological examinations, the costs of which are routinely reported by people with ABI to be prohibitive.

- (b) the information and each such report are not received by the CEO within 28 days, or such longer period as is specified in the request, after that information or report is requested;

the prospective participant is taken to have withdrawn the access request, unless the CEO is satisfied that it was reasonable for the prospective participant not to have complied with the request made by the CEO within that period.

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

- (1) The National Disability Insurance Scheme rules may prescribe circumstances in which, or criteria to be applied in assessing whether:
 - (a) one or more impairments are, or are likely to be, permanent for the purposes of paragraph 24(1)(b); or
 - (b) one or more impairments result in substantially reduced functional capacity of a person to undertake, or psychosocial functioning of a person in undertaking, one or more activities for the purposes of paragraph 24(1)(c); or
 - (c) one or more impairments affect a person's capacity for social and economic participation for the purposes of paragraph 24(1)(d); or
 - (d) the provision of early intervention supports is likely to reduce a person's future needs for supports in relation to disability for the purposes of subparagraph 25(b); or
 - (e) the provision of early intervention supports is likely to mitigate, alleviate or prevent the deterioration of a person's functional capacity to undertake one or more of the activities referred to in subparagraph 25(c)(i); or
 - (f) the provision of early intervention supports is likely to strengthen the sustainability of the informal supports available to the person, including through building the capacity of the person's carer for the purposes of subparagraph 25(c)(ii).
- (2) The National Disability Insurance Scheme rules may prescribe for and in relation to the following:
 - (a) the persons who may conduct assessments for the purposes of deciding whether a person meets the disability requirements or the early intervention requirements;
 - (b) the kinds of assessments that may be conducted for those purposes.

28 When a person becomes a participant

- (1) A person becomes a participant in the National Disability Insurance Scheme launch on the day the CEO decides that the person meets the access criteria.
- (2) The CEO must give written notice of the decision to the participant, stating the date on which the person became a participant.

29 When a person ceases to be a participant

Comment [DR8]:

BIA COMMENT: Again, the legislation should stipulate that the notice must include the reasons for the decision. Also, whilst there is a time period by which the CEO must make a decision (within 21 days of receiving the access request) there should also be a time period by which the written notice of this decision is provided to the participant.

- (1) A person ceases to be a participant in the National Disability Insurance Scheme launch when:
- (a) the person dies; or
 - (b) the person is aged at least 65 years and has entered a residential care service, or is being provided with community care, on a permanent basis; or
 - (c) the person's status as a participant is revoked under section 30; or
 - (d) the person notifies the CEO in writing that he or she no longer wishes to be a participant.

Note: **Residential care service** and **community care** have the same meanings as in the *Aged Care Act 1997*.

- (2) A person is not entitled to be paid NDIS amounts so far as the amounts relate to reasonable and necessary supports that would otherwise have been funded in respect of a period after he or she ceased to be a participant.

30 Revocation of participant status

- (1) The CEO may revoke a person's status as a participant in the National Disability Insurance Scheme launch if:
- (a) the CEO is satisfied that the person does not meet the residence requirements (see section 23); or
 - (b) the CEO is satisfied that the person does not meet at least one of the following:
 - (i) the disability requirements (see section 24);
 - (ii) the early intervention requirements (see section 25).
- (2) The CEO must give written notice of the decision to the participant, stating the date on which the revocation takes effect.

Comment [DR9]:

BIA COMMENT: This condition should somehow protect participants who — because of an ABI or a psychiatric disorder — give (e.g. due to impulsivity issues) such a written notice to the CEO against their best interests or without due consultation with their informal support persons, etc.

Possible provisions: (a) a 'cooling off period' (i.e. a right to reinstatement as a participant within a specified time frame), (b) the CEO ensuring that the notice was (i) the wish of the participant and (ii) in their best interests.

Comment [DR10]:

BIA COMMENT: This notice should include the reasons why the status has been revoked.

Part 2—Participants' plans

Division 1—Principles relating to plans

31 Principles relating to plans

The preparation, review and replacement of a participant's plan, and the management of the funding for supports under a participant's plan, should so far as reasonably practicable:

- (a) be individualised; and
- (b) be directed by the participant; and
- (c) where relevant, consider and respect the role of family, carers and other persons who are significant in the life of the participant; and
- (d) where possible, strengthen and build capacity of families and carers to support participants who are children; and
- (e) consider the availability to the participant of informal support and other support services generally available to any person in the community; and
- (f) support communities to respond to the individual goals and needs of participants; and
- (g) be underpinned by the right of the participant to exercise control over his or her own life; and
- (h) advance the inclusion and participation in the community of the participant with the aim of achieving his or her individual aspirations; and
- (i) maximise the choice and independence of the participant; and
- (j) facilitate tailored and flexible responses to the individual goals and needs of the participant; and
- (k) provide the context for the provision of disability services to the participant and, where appropriate, coordinate the delivery of disability services where there is more than one disability service provider.

Division 2—Preparing participants' plans

32 CEO must facilitate preparation of participant's plan

- (1) If a person becomes a participant, the CEO must facilitate the preparation of the participant's plan.
- (2) The CEO must commence facilitating the preparation of the plan within 14 days after the person becomes a participant.

33 Matters that must be included in a participant's plan

- (1) A participant's plan must include a statement (the **participant's statement of goals and aspirations**) prepared by the participant that specifies:
 - (a) the goals, objectives and aspirations of the participant; and
 - (b) the environmental and personal context of the participant's living, including the participant's:
 - (i) living arrangements; and
 - (ii) informal community supports and other community supports; and
 - (iii) social and economic participation.
- (2) A participant's plan must include a statement (the **statement of participant supports**), prepared with the participant and approved by the CEO, that specifies:
 - (a) the general supports (if any) that will be provided to, or in relation to, the participant; and
 - (b) the reasonable and necessary supports (if any) that will be funded under the National Disability Insurance Scheme; and
 - (c) the date by which, or the circumstances in which, the Agency must review the plan under Division 4; and
 - (d) the management of the funding for supports under the plan (see also Division 3); and
 - (e) the management of other aspects of the plan.
- (3) The supports that will be funded or provided under the National Disability Insurance Scheme may be specifically identified in the plan or described generally, whether by reference to a specified purpose or otherwise.
- (4) The CEO must endeavour to decide whether or not to approve the statement of participant supports as soon as reasonably practicable, including what is reasonably practicable having regard to section 36 (information and reports).
- (5) In deciding whether or not to approve a statement of participant supports under subsection (2), the CEO must:

- (a) have regard to the participant's statement of goals and aspirations; and
 - (b) have regard to relevant assessments conducted in relation to the participant; and
 - (c) be satisfied as mentioned in section 34 in relation to the reasonable and necessary supports that will be funded and the general supports that will be provided; and
 - (d) apply any methods and have regard to any criteria prescribed by the National Disability Insurance Scheme rules in relation to the reasonable and necessary supports that will be funded and the manner in which they will be funded; and
 - (e) have regard to the principle that a participant should manage his or her plan to the extent that he or she wishes to do so; and
 - (f) have regard to the operation and effectiveness of any previous plans of the participant.
- (6) To the extent that the funding for supports under a participant's plan is managed by the Agency, the plan must provide that the supports are to be provided only by a registered provider of supports.
- (7) A participant's plan may include additional matters, including such additional matters as are prescribed by the National Disability Insurance Scheme rules.

Note: For example, a participant's plan may include arrangements for ongoing contact with the Agency.

- (8) A participant's statement of goals and aspirations need not be prepared by the participant in writing, but if it is prepared other than in writing, the Agency must record it in writing.

Note: Section 38 requires a copy of a participant's plan to be provided to him or her.

34 Reasonable and necessary supports

For the purposes of specifying, in a statement of participant supports, the general supports that will be provided, and the reasonable and necessary supports that will be funded, the CEO must be satisfied of all of the following in relation to the funding or provision of each such support:

- (a) the support will assist the participant to pursue the goals, objectives and aspirations included in the participant's statement of goals and aspirations;
- (b) the support will assist the participant to undertake activities, so as to facilitate the participant's social and economic participation;
- (c) the support represents value for money in that the costs of the support are reasonable, relative to both the benefits achieved and the cost of alternative support;
- (d) the support will be, or is likely to be, effective and beneficial for the participant, having regard to current good practice;
- (e) the funding or provision of the support takes account of what it is reasonable to expect families, carers, informal networks and the community to provide;

- (f) the support is most appropriately funded or provided through the National Disability Insurance Scheme, and is not more appropriately funded or provided through other general systems of service delivery or support services offered by a person, agency or body, or systems of service delivery or support services offered:
 - (i) as part of a universal service obligation; or
 - (ii) in accordance with reasonable adjustments required under a law dealing with discrimination on the basis of disability;
- (g) the support is not prescribed by the National Disability Insurance Scheme rules as a support that will not be funded or provided under the National Disability Insurance Scheme;
- (h) the funding of the support complies with the methods or criteria (if any) prescribed by the National Disability Insurance Scheme rules for deciding the reasonable and necessary supports that will be funded under the National Disability Insurance Scheme.

35 National Disability Insurance Scheme rules for statement of participant supports

- (1) The National Disability Insurance Scheme rules may prescribe:
 - (a) a method for assessing, or criteria for deciding, the reasonable and necessary supports or general supports that will be funded or provided under the National Disability Insurance Scheme; and
 - (b) reasonable and necessary supports or general supports that will not be funded or provided under the National Disability Insurance Scheme; and
 - (c) reasonable and necessary supports or general supports that will or will not be funded or provided under the National Disability Insurance Scheme for prescribed participants.
- (2) The methods or criteria prescribed by the National Disability Insurance Scheme rules for assessing or deciding the reasonable and necessary supports that will be funded may include methods or criteria relating to the manner in which the supports are to be funded and by whom the supports so funded are to be provided.
- (3) The methods or criteria prescribed by the National Disability Insurance Scheme rules for assessing or deciding the general supports that will be provided may include methods or criteria relating to the manner in which the supports are to be provided.
- (4) The methods or criteria prescribed by the National Disability Insurance Scheme rules for assessing or deciding the reasonable and necessary supports that will be funded under the National Disability Insurance Scheme may include methods or criteria relating to 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.
- (5) The methods or criteria prescribed by the National Disability Insurance Scheme rules for assessing or deciding the reasonable and necessary supports that will be funded under the National Disability Insurance Scheme may include methods or criteria relating to how to take into account amounts that a participant or prospective participant did not receive by way of a compensation payment because he or she entered into an agreement to give up his or her right to compensation.

36 Information and reports for the purposes of preparing and approving a participant's plan

- (1) For the purposes of preparing a statement of participant supports, or deciding whether to approve a statement of participant supports, the CEO may make one or more requests under subsection (2).
- (2) The requests the CEO may make are as follows:
- (a) that the participant, or another person, provide information that is reasonably necessary for the purposes of preparing the statement of participant supports, or deciding whether to approve the statement of participant supports;
 - (b) that the participant do either or both of the following:
 - (i) undergo an assessment and provide to the CEO the report, in the approved form, of the person who conducts the assessment;
 - (ii) undergo a medical, psychiatric or psychological examination (whether or not at a particular place), and provide to the CEO the report, in the approved form, of the person who conducts the examination.
- (3) The CEO may prepare the statement of participant supports, or decide whether to approve a statement of participant supports, before all the information and reports requested under subsection (2) are received by the CEO, but must give the participant a reasonable opportunity to provide them.

Note: If information or reports are provided after the plan is approved, the plan can be reviewed and if necessary replaced.

37 When plan is in effect

- (1) A participant's plan comes into effect when the CEO has:
- (a) received the participant's statement of goals and aspirations from the participant; and
 - (b) approved the statement of participant supports.
- (2) A participant's plan cannot be varied after it comes into effect, but can be replaced under Division 4.

Comment [DR11]:

BIA COMMENT: It would be helpful if the Bill included in the definitions a reference to the fact that a "person" in Commonwealth Law includes corporations associations, companies etc. (Interpretation Act 1901 definitions).

Comment [DR12]:

BIA COMMENT: See comment in relation to subsection 26(b)(ii) on p. 21.

Comment [DR13]:

BIA COMMENT: Presumably this is so as to allow for cases in which the need for support is urgent? Might it be worth stating this, at least as an example?

Note: Under Division 4, a participant may request a review of his or her plan at any time and may revise the participant's statement of goals and aspirations at any time, which results in the replacement of the plan.

- (3) A participant's plan ceases to be in effect at the earlier of the following times:
- (a) when it is replaced by another plan under Division 4;
 - (b) when the participant ceases to be a participant.

38 Copy of plan to be provided

The CEO must provide a copy of a participant's plan to the participant **within 7 days** after the plan comes into effect.

Comment [DR14]:

BIA COMMENT: Presumably, the participant will have access to a draft of the plan prior to its coming into effect (otherwise the notion of 'person-centered planning' would be seriously compromised). This should be explicitly included in the Bill.

The participant should also have a right to correct or amend any draft plan (in consultation with the Agency).

39 Agency must comply with the statement of participant supports

The Agency must comply with the statement of participant supports in a participant's plan.

40 Effect of temporary absence on plans

- (1) A participant for whom a plan is in effect may be temporarily absent from Australia for the grace period for the absence without affecting the participant's plan.
- (2) The **grace period** for a temporary absence of a participant is:
- (a) 6 weeks beginning when the participant leaves Australia; or
 - (b) if the CEO is satisfied that it is appropriate for the grace period to be longer than 6 weeks—such longer period as the CEO decides, having regard to the criteria (if any) prescribed by the National Disability Insurance Scheme rules for the purposes of this paragraph.
- (3) If a participant for whom a plan is in effect is temporarily absent from Australia after the end of the grace period for the absence, the participant's plan is suspended from the end of the grace period until the participant returns to Australia.
- (4) For the purposes of this section, a person's absence from Australia is temporary if, throughout the absence, the person does not cease to reside in Australia (within the meaning of paragraph 23(1)(a)).

41 Suspension of plans

- (1) A statement of participant supports in a participant's plan is suspended:
- (a) as mentioned in subsection 40(3) (which deals with temporary absence from Australia); and
 - (b) as mentioned in subsection 105(2) (which deals with obtaining compensation).
- (2) The effect of suspension of a statement of participant supports in a participant's plan is that the plan remains in effect but, during the period of suspension:

- (a) the person is not entitled to be paid NDIS amounts, so far as the amounts relate to reasonable and necessary supports that would otherwise have been funded in respect of that period; and
- (b) the Agency is not required to provide or fund other supports under the plan, but is not prevented from doing so if the CEO considers it appropriate; and
- (c) the participant is not entitled to request a review of the plan under subsection 48(1).

Division 3—Managing the funding for supports under participants' plans

42 Meaning of *managing the funding for supports* under a participant's plan

- (1) For the purposes of this Act, ***managing the funding for supports*** under a participant's plan means:
 - (a) purchasing the supports identified in the plan (including paying any applicable indirect costs, such as taxes, associated with the supports); and
 - (b) receiving and managing any funding provided by the Agency; and
 - (c) acquitting any funding provided by the Agency.
- (2) For the purposes of the statement of participant supports in a participant's plan, in specifying the management of the funding for supports under the plan as mentioned in paragraph 33(2)(d), the plan must specify that such funding is to be managed wholly, or to a specified extent, by:
 - (a) the participant; or
 - (b) a registered plan management provider; or
 - (c) the Agency; or
 - (d) the plan nominee.

43 Choice for the participant in relation to plan management

- (1) A participant for whom a plan is in effect or is being prepared may make a request (a ***plan management request***):
 - (a) that he or she manage the funding for supports under the plan wholly or to the extent specified in the request; or
 - (b) that the funding for supports under the plan be managed wholly, or to the extent specified in the request, by a registered plan management provider he or she nominates; or
 - (c) that the funding for supports under the plan be managed wholly, or to the extent specified in the request, by a person specified by the Agency.
- (2) A statement of participant supports in a participant's plan must give effect to the plan management request other than as follows:
 - (a) if the participant is prevented from managing the funding for supports under the plan to any extent by section 44—the statement must make provision in accordance with subsection (3) of this section;
 - (b) if the participant has a plan nominee—the statement must provide that the funding for supports under the plan is to be managed in accordance with the terms of the plan nominee's appointment.

- (3) If the participant is prevented from managing the funding for supports under the plan wholly, or to a specified extent, by section 44, the statement of participant supports in the plan must provide that:
- (a) the funding for supports under the plan is to be managed in accordance with the plan management request, to the extent that the participant is not prevented from managing it; and
 - (b) the remainder of the funding for supports under the plan is to be managed by:
 - (i) a registered plan management provider specified by the Agency; or
 - (ii) the Agency.
- (4) If a participant does not make a plan management request, the statement of participant supports in the plan must provide that the funding for supports under the plan is to be managed by:
- (a) a registered plan management provider specified by the Agency; or
 - (b) the Agency.
- (5) If the funding for supports under a participant's plan is to be managed to any extent by a registered plan management provider specified by the Agency, or by the Agency, the CEO must, so far as reasonably practicable, have regard to the wishes of the participant in specifying who is to manage the funding for supports under the plan to that extent.

44 Circumstances in which participant must not manage plan to specified extent

- (1) The statement of participant supports in a participant's plan must not provide that the participant is to manage the funding for supports under his or her plan to any extent if the participant is an insolvent under administration.
- (2) The statement of participant supports in a participant's plan must not provide that the participant is to manage the funding for supports under his or her plan to a particular extent if the CEO is satisfied that management of the plan to that extent would:
- (a) present an unreasonable risk to the participant; or
 - (b) permit the participant to manage matters that are prescribed by the National Disability Insurance Scheme rules as being matters that must not be managed by a participant.
- (3) The National Disability Insurance Scheme rules may prescribe criteria to which the CEO is to have regard in considering whether a participant managing the funding for supports under the plan would present an unreasonable risk to the participant.

45 Payment of NDIS amounts

- (1) An NDIS amount that is payable to a participant, or to a person who is managing the funding for supports under a participant's plan, is to be paid:

Comment [DR15]:

BIA COMMENT: The CEO should also have regard to the suitability of the plan management provider (PMP) for that person's specific needs, including (a) whether the PMP has adequate knowledge about and expertise with (i) people who have the type of disability in question, (ii) the best services available for that kind of disability, and (b) whether there would be any conflict of interest in using a particular PMP.

To protect against conflict of interest situations, the Bill (or the Rules) should specify that, if the PMP also provides services for that particular type of disability, then either (a) that PMP must be prohibited from managing the participants plan or (b) it must (i) disclose the potential conflict of interest to both the Agency, the participant and any carers, and (ii) ensure that the participant is offered a genuine choice of alternative disability service providers (DSPs), and (iii) the Agency must monitor that these conditions (and any others) are met.

Cf. The Productivity Commission suggests that a DSP could incorporate the functions of a disability support organization (DSO), so long as it avoids situations in which there is likely to be a conflict of interest: "For example, it would not be appropriate for a DSO to provide the supports to which they might refer people as part of a brokering role. Similarly, DSOs should not be able to accept commissions (either in the form of direct payment or through brokers 'keeping the change' on any discount they negotiate) from the service providers." (p. 419)

- (a) at the time or times determined by the CEO in accordance with the National Disability Insurance Scheme rules; and
 - (b) in the manner (if any) prescribed by the National Disability Insurance Scheme rules.
- (2) Without limiting paragraph (1)(b), the National Disability Insurance Scheme rules may provide that:
- (a) an NDIS amount is to be paid to the credit of a bank account nominated and maintained by the person to whom it is to be paid; and
 - (b) an NDIS amount is not payable to the person until the person nominates an account.

46 Acquittal of NDIS amounts

- (1) A participant who receives an NDIS amount, or a person who receives an NDIS amount on behalf of a participant, must spend the money in accordance with the participant's plan.
- (2) The National Disability Insurance Scheme rules may 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.

Comment [DR16]:

BIA COMMENT: Either the Bill or the Rules should make provisions that will allow "the person to 'bank' up to 10 per cent of the annual allocation to the subsequent year." (PC, p. 375.) But "there should be a limit to the accumulation of surpluses—say to two years—with any further surpluses returned to the [the Agency]." (PC, p. 371)

Division 4—Reviewing and changing participants' plans

47 Participant may change participant's statement of goals and aspirations at any time

- (1) A participant may give the CEO a changed version of the participant's statement of goals and aspirations at any time.

Note: The participant may also request a review of his or her plan at any time under subsection 48(1) and the CEO may review a participant's plan at any time under subsection 48(4).

- (2) If a participant gives a changed version of the participant's statement of goals and aspirations to the CEO, the plan is taken to be replaced by a new plan comprising:
 - (a) the changed version of the participant's statement of goals and aspirations;
and
 - (b) the statement of participant supports in the existing plan.
- (3) The Agency must provide a copy of the new plan to the participant within 7 days of receiving the changed version of the participant's statement of goals and aspirations.

48 Review of participant's plan

- (1) A participant may request that the CEO conduct a review of the participant's plan at any time.
- (2) The CEO must decide whether or not to conduct the review within 14 days after receiving the request. If the CEO does not make a decision within that period, he or she is taken to have decided not to conduct the review.

Note 1: The period may be extended under National Disability Insurance Scheme rules made under section 204.

Note 2: Notice of a decision that the CEO makes, or is taken to have made, must be given because of subsection 100(1), and a decision the CEO is taken to have made will be automatically reviewed because of subsection 100(5).

- (3) If the CEO decides to conduct a review under subsection (1), the CEO must commence to facilitate the review within 14 days after so deciding and must complete the review as soon as reasonably practicable.
- (4) The CEO may, on the CEO's initiative, conduct a review of a participant's plan at any time.
- (5) The CEO must conduct a review of a participant's plan before the plan's review date and in the circumstances, if any, specified in the plan.
- (6) The CEO must conduct a review of a participant's plan in the circumstances (if any) prescribed by the National Disability Insurance Scheme rules.

49 Outcome of review

If the CEO conducts a review of a participant's plan under section 48, the CEO must facilitate the preparation of a new plan with the participant in accordance with Division 2.

Note 1: If the participant does not wish to change the participant's statement of goals and aspirations, the statement remains unchanged and forms part of the new plan.

Note 2: Because the new plan is prepared in accordance with Division 2, a decision to approve the statement of participant supports in the plan would be made under subsection 33(2) and be reviewable under paragraph 99(d).

50 Information and reports for the purposes of reviewing a participant's plan

- (1) For the purposes of reviewing a participant's plan, the CEO may make one or more requests under subsection (2).
- (2) The requests the CEO may make are as follows:
 - (a) that the participant, or another person, provide information that is reasonably necessary for the purposes of reviewing the participant's plan; or
 - (b) that the participant do either or both of the following:
 - (i) undergo an assessment and provide to the CEO the report, in the approved form, of the person who conducts the assessment;
 - (ii) undergo a **medical**, psychiatric or psychological examination (whether or not at a particular place), and provide to the CEO the report, in the approved form, of the person who conducts the examination.
- (3) The CEO may review a participant's plan before all the information and reports requested under subsection (2) are received by the CEO, but must give the participant a reasonable opportunity to provide them.

Note: If information or reports are provided after the plan is reviewed, the plan can be reviewed again and if necessary replaced.

Comment [DR17]:

BIA COMMENT: See comment in relation to subsection 26(b)(ii) on p. 21.

Chapter 4—Administration

Part 1—General matters

Division 1—Participants and prospective participants

51 Requirement to notify change of circumstances

- (1) A participant or a prospective participant must notify the CEO if:
 - (a) an event or change of circumstances happens that affects, or might affect, his or her access request, status as a participant or plan; or
 - (b) the participant or prospective participant becomes aware that such an event or change of circumstances is likely to happen.
- (2) The participant or prospective participant must notify the CEO:
 - (a) in the manner set out in a written notice given to him or her under section 52; and
 - (b) as soon as reasonably practicable after he or she becomes aware that the event or change of circumstances has happened or is likely to happen.

52 Requirements relating to notices

- (1) The CEO must approve a manner of notification that a participant or prospective participant is to use when notifying the CEO in relation to an event or change of circumstances under section 51.
- (2) The CEO must, by written notice, notify the participant or prospective participant of the approved manner of notification.

53 Power to obtain information from participants and prospective participants to ensure the integrity of the National Disability Insurance Scheme

- (1) If the CEO has reasonable grounds to believe that a participant or a prospective participant has information, or has custody or control of a document, that may be relevant to one or more of the matters mentioned in subsection (2), the CEO may require the participant or prospective participant to give the information, or produce the document, to the Agency.
- (2) The matters are as follows:
 - (a) the monitoring of supports funded for, or provided to, a participant;
 - (b) whether NDIS amounts paid to the participant or to another person have been spent in accordance with the participant's plan;
 - (c) determining whether the participant was not entitled to be paid NDIS amounts because of the misleading statements or fraud of any person;
 - (d) whether the participant or other person has complied with section 46;

- (e) whether the participant or prospective participant receives:
 - (i) supports or funding through a statutory compensation scheme or a statutory care or support scheme; or
 - (ii) any other disability or early intervention supports.

54 Written notice of requirement

- (1) A requirement under section 53 must be made by written notice given to the person of whom the requirement is made.
- (2) The notice must specify:
 - (a) the nature of the information or document that is required to be given or produced; and
 - (b) how the person is to give the information or produce the document; and
 - (c) the period within which the person is to give the information or produce the document to the Agency; and
 - (d) the officer to whom the information is to be given or the document is to be produced; and
 - (e) that the notice is given under this section.
- (3) The period specified under paragraph (2)(c) must be at least 14 days beginning on the day on which the notice is given.

Comment [DR18]:

BIA COMMENT: Rhe period be extended to 21 days to accommodate the likelihood of delays that are outside the control of participants who reside in remote and rural areas.

Division 2—Other persons

55 Power to obtain information from other persons to ensure the integrity of the National Disability Insurance Scheme

- (1) If the CEO has reasonable grounds to believe that a person other than a participant or a prospective participant has information, or has custody or control of a document, that may be relevant to one or more of the matters mentioned in subsection (2), the CEO may require the person to give the information, or produce the document, to the Agency.
- (2) The matters are as follows:
 - (a) whether a prospective participant meets the access criteria;
 - (b) whether a participant continues to meet the access criteria;
 - (c) whether a person purporting to act on a person's behalf for the purposes of this Act has the authority to do so;
 - (d) the preparation or review of a participant's plan;
 - (e) the monitoring of supports funded for, or provided to, a participant;
 - (f) whether NDIS amounts paid to the participant or to another person have been spent in accordance with the participant's plan;
 - (g) whether a participant or other person has complied with section 46;
 - (h) whether a participant receives:
 - (i) supports or funding through a statutory compensation scheme or a statutory care or support scheme; or
 - (ii) any other disability support;
 - (i) whether an applicant for approval as a registered provider of supports meets the criteria for approval;
 - (j) whether a registered provider of supports continues to meet the criteria for approval;
 - (k) the functions of the Agency.

56 Written notice of requirement

- (1) A requirement under section 55 must be made by written notice given to the person of whom the requirement is made.
- (2) The notice must specify:
 - (a) the nature of the information or document that is required to be given or produced; and

- (b) how the person is to give the information or produce the document; and
 - (c) the period within which the person is to give the information or produce the document to the Agency; and
 - (d) the officer to whom the information is to be given or the document is to be produced; and
 - (e) that the notice is given under this section.
- (3) The period specified under paragraph (2)(c) must be at least 14 days beginning on the day on which the notice is given.
- (4) The notice may require the person to give the information by appearing before a specified officer to answer questions.
- (5) If the notice requires the person to appear before an officer, the notice must specify a time and place at which the person is to appear. The time must be at least 14 days after the notice is given.

Comment [DR19]:

BIA COMMENT: Either the Bill or the Rules should stipulate that, before 'requiring an appearance' the Agency should take account of a person's mobility, ability to plan ahead, transport issues, and so on. And any associated costs should be met by the Agency.

57 Offence—refusal or failure to comply with requirement

- (1) A person must not refuse or fail to comply with a requirement under section 55 to give information or produce a document.

Penalty: 30 penalty units.

Note: If a body corporate is convicted of an offence against this subsection, subsection 4B(3) of the *Crimes Act 1914* allows a court to impose a fine of up to 5 times the penalty stated above.

- (2) Subsection (1) does not apply if the person has a reasonable excuse.

Note: A defendant bears an evidential burden in relation to the matter in this subsection: see subsection 13.3(3) of the *Criminal Code*.

Comment [DR20]:

BIA COMMENT: Either the Bill or the Rules should stipulate that the Agency should specify a time and place that takes account of (a) the transport and support needs of the participant (e.g. not requiring someone residing in a rural area or with severe mobility issues to arrive at city office first thing in the morning); and (b) problems around planning and episodic crisis situations that can occur for people with ABI.

Division 3—Interaction with other laws

58 Obligations not affected by State or Territory laws

- (1) Subject to subsection (2), nothing in a law of a State or a Territory prevents a person from:
- (a) giving information; or
 - (b) producing a document; or
 - (c) giving evidence;
- that the person is required to give or produce to the Agency or an officer for the purposes of this Act.
- (2) Despite subsection (1), a person is not required to give information, produce a document or give evidence to the Agency or an officer for the purposes of this Act if:
- (a) the person would, apart from subsection (1), be prevented from doing so under a law of a State or Territory; and
 - (b) the law of the State or Territory is prescribed by the National Disability Insurance Scheme rules for the purposes of this paragraph.

59 Interaction with Commonwealth laws

This Part does not require a person to give information or produce a document to the extent that in doing so the person would contravene a law of the Commonwealth.

Part 2—Privacy

60 Protection of information held by the Agency etc.

- (1) A person may obtain protected information for the purposes of this Act.
- (2) A person may:
- (a) make a record of protected information; or
 - (b) disclose such information to any person; or
 - (c) otherwise use such information;
- if:
- (d) the making of the record, or the disclosure or use of the information, by the person is made:
 - (i) for the purposes of this Act; or
 - (ii) for the purpose for which the information was disclosed to the person under section 66; or
 - (iii) with the express or implied authorisation of the person to whom the information relates; or
 - (e) the person believes on reasonable grounds that the making of the record, or the disclosure or use of the information, by the person is necessary to prevent or lessen a serious threat to an individual's life, health or safety.
- (3) Without limiting subsections (1) and (2), the obtaining, recording, disclosure or use of information by a person is taken to be for the purposes of this Act if the CEO believes, on reasonable grounds, that it is reasonably necessary for one or more of the following purposes:
- (a) research into matters relevant to the National Disability Insurance Scheme;
 - (b) actuarial analysis of matters relevant to the National Disability Insurance Scheme;
 - (c) policy development.

Comment [DR21]:

BIA COMMENT: The Bill should provide that to the extent a statement is made or information provided to the Agency, it cannot be used against the participant in any legal proceedings. Otherwise, participants may be forced to seek legal advice when seeking access to the scheme and dealing with the Agency in order to ensure that no admissions are made against interest. This would make the NDIS inaccessible to many prospective participants.

61 Offence—unauthorised access to protected information

A person commits an offence if:

- (a) the person obtains information; and
- (b) the person is not authorised or required by or under this Act to obtain the information; and
- (c) the information is protected information.

Penalty: Imprisonment for 2 years or 120 penalty units, or both.

Note: If a body corporate is convicted of an offence against this section, subsection 4B(3) of the *Crimes Act 1914* allows a court to impose a fine of up to 5 times the pecuniary penalty stated above.

62 Offence—unauthorised use or disclosure of protected information

A person commits an offence if:

- (a) the person:
 - (i) makes a record of information; or
 - (ii) discloses information to any other person; or
 - (iii) otherwise makes use of information; and
- (b) the person is not authorised or required by or under this Act to make the record, disclosure or use of the information that is made by the person; and
- (c) the information is protected information.

Penalty: Imprisonment for 2 years or 120 penalty units, or both.

Note: If a body corporate is convicted of an offence against this section, subsection 4B(3) of the *Crimes Act 1914* allows a court to impose a fine of up to 5 times the pecuniary penalty stated above.

63 Offence—soliciting disclosure of protected information

A person (the *first person*) commits an offence if:

- (a) the first person solicits the disclosure of information from an officer or another person, whether or not any protected information is actually disclosed; and
- (b) the disclosure would be in contravention of this Part; and
- (c) the information is protected information.

Penalty: Imprisonment for 2 years or 120 penalty units, or both.

Note: If a body corporate is convicted of an offence against this section, subsection 4B(3) of the *Crimes Act 1914* allows a court to impose a fine of up to 5 times the pecuniary penalty stated above.

64 Offence—offering to supply protected information

(1) A person commits an offence if:

- (a) the person offers to supply (whether to a particular person or otherwise) information about another person; and
- (b) the person knows the information is protected information.

Penalty: Imprisonment for 2 years or 120 penalty units, or both.

Note: If a body corporate is convicted of an offence against this subsection, subsection 4B(3) of the *Crimes Act 1914* allows a court to impose a fine of up to 5 times the pecuniary penalty stated above.

Comment [DR22]:

BIA COMMENT: Will FOI be covered by a consequential amendment of the schedule of the FOI Act (which lists all the agencies within scope/have to comply)?

- (2) A person commits an offence if:
- (a) the person holds himself or herself out as being able to supply (whether to a particular person or otherwise) information about another person; and
 - (b) the person knows the information is protected information.

Penalty: Imprisonment for 2 years or 120 penalty units, or both.

Note: If a body corporate is convicted of an offence against this subsection, subsection 4B(3) of the *Crimes Act 1914* allows a court to impose a fine of up to 5 times the pecuniary penalty stated above.

- (3) Subsections (1) and (2) do not apply to an officer acting in the performance or exercise of his or her duties, functions or powers under this Act.

65 Protection of certain documents etc. from production to court etc.

A person must not, except for the purposes of this Act, be required:

- (a) to produce any document in his or her possession because of the performance or exercise of his or her duties, functions or powers under this Act; or
- (b) to disclose any matter or thing of which he or she had notice because of the performance or exercise of such duties, functions or powers;

to a court, tribunal, authority or person that has power to require the production of documents or the answering of questions.

66 Disclosure of information by CEO

- (1) Despite sections 62 and 65, the CEO may:
- (a) if the CEO certifies that it is necessary in the public interest to do so in a particular case or class of cases—disclose information acquired by a person in the performance of his or her functions or duties or in the exercise of his or her powers under this Act to such persons and for such purposes as the CEO determines; or
 - (b) disclose any such information:
 - (i) to the Secretary of a Department of State of the Commonwealth, or to the head of an authority of the Commonwealth, for the purposes of that Department or authority; or
 - (ii) to a person who is expressly or impliedly authorised by the person to whom the information relates to obtain it; or
 - (iii) to the Chief Executive Centrelink for the purposes of a centrelink program; or
 - (iv) to the Chief Executive Medicare for the purposes of a medicare program; or

- (v) to the chief executive (however described) of a Department of State of a State or Territory, or to the head of an authority of a State or Territory, for the purposes of that Department or authority.
- (2) In certifying for the purposes of paragraph (1)(a) or disclosing information for the purposes of subparagraph (1)(b)(i) or (v), the CEO must act in accordance with any National Disability Insurance Scheme rules made for the purposes of section 67.
- (3) Despite any other provision of this Part, the CEO may disclose protected information to a participant's nominee if the protected information:
 - (a) relates to the participant; and
 - (b) is or was held in the records of the Agency.

67 National Disability Insurance Scheme rules for exercise of CEO's disclosure powers

The National Disability Insurance Scheme rules may make provision for and in relation to the exercise of either or both of the following:

- (a) the CEO's power to certify for the purposes of paragraph 66(1)(a);
- (b) the CEO's power under subparagraph 66(1)(b)(i) or (v) to disclose information to a person.

68 Part does not affect the operation of the *Freedom of Information Act 1982*

The provisions of this Part that relate to the disclosure of information do not affect the operation of the *Freedom of Information Act 1982*.

Comment [DR23]:

BIA COMMENT: Should not this Act override the FOI Act to the extent of the suggested amendments to section 60 above?

Part 3—Registered providers of supports

69 Application to be a registered provider of supports

(1) A person or entity may apply in writing to the CEO to be a registered provider of supports in relation to either or both of the following:

- (a) managing the funding for supports under plans;
- (b) the provision of supports.

Note 1: If the funding for supports under a plan is managed by the Agency, supports are to be provided only by a registered provider of supports (see subsection 33(6)).

Note 2: A registered plan management provider of supports may in certain circumstances manage the funding for supports under a plan (see subsection 42(2)).

(2) The application must:

- (a) be in the form (if any) approved by the CEO; and
- (b) include any information, and be accompanied by any documents, required by the CEO.

Note: The CEO is not required to make a decision on the application if this subsection is not complied with (see section 197).

70 Registered providers of supports

(1) The CEO must approve a person or entity as a registered provider of supports in relation to either or both of the following:

- (a) managing the funding for supports under plans;
- (b) the provision of supports;

if:

- (c) the person or entity (the **applicant**) makes an application under section 69; and
- (d) the CEO is satisfied that the applicant meets the criteria prescribed by the National Disability Insurance Scheme rules.

(2) An approval of a person or entity as a registered provider of supports must be by written instrument.

(3) The instrument may specify that the person or entity is a registered provider of supports in respect of:

- (a) a class of supports specified in the instrument; or
- (b) a class of person specified in the instrument.

(4) The instrument may specify that it ceases to be in effect on a specified day.

Comment [DR24]:

BIA COMMENT: Two problems here.

1. Shouldn't this read: 'A registered provider of supports'?

2. The relevance of subsection 42(2) to Note 2 is not clear. For example, it does not state either (a) that a provider of supports can also be a plan management provider or (b) the circumstances under which a provider of supports can also be a plan management provider (a situation, as mentioned above, which surely demands clarification either in the Bill or the Rules to avoid conflict of interest).

Comment [DR25]:

BIA COMMENT: It may be more cumbersome in the Bill but would it not be a good deal clearer to make a terminological distinction between 'registered plan management providers' and 'registered providers of support' (as the PC does by distinguishing between DSOs and DSPs? (cf. "[DSOs] are intended to provide support to people in using services — brokering, managing administration, mentoring and planning — and the term 'support' provides a useful way of distinguishing their role from that of traditional service providers." (p. 101))

For instance, the term 'supports', as used in the Bill, does not appear to include (i.e. as an instance of one such 'support') the 'management of a participant's funding'. But in that case, if a person or entity is ONLY 'a plan management provider' then they/it will not be a 'provider of supports'.

Another reason for keeping the two distinct is that DSPs are not likely to be the best or most appropriate entities to manage the funding of participants — due to (a) conflict of interest issues, and (b) the need to ensure that the system does not revert to a DSP-centered model (i.e. 'block-funding' by another name/method). Keeping the terms distinct will help to ensure that there is no presumption in the NDIS that DSPs will (or should) become PMPs.

71 When a person or entity ceases to be a registered provider of supports

A person or entity ceases to be a registered provider of supports on the earlier of the following days:

- (a) if the instrument approving the person or entity as a registered provider of supports is revoked under section 72—the day on which the revocation takes effect;
- (b) if the instrument specifies that it ceases to be in effect on a specified day—that day.

72 Revocation of approval as a registered provider of supports

- (1) The CEO must revoke an instrument approving a person or entity as a registered provider of supports if the CEO is satisfied that:
 - (a) the person or entity no longer meets the criteria prescribed by the National Disability Insurance Scheme rules for the purposes of paragraph 70(1)(d); or
 - (b) the application by the person or entity for approval contained information that was false or misleading in a material particular.
- (2) Before deciding to revoke the instrument, the CEO must notify the person or entity that revocation is being considered. The notice must be in writing and must:
 - (a) include the CEO's reasons for considering the revocation; and
 - (b) invite the person or entity to make submissions, in writing, to the CEO within 28 days after receiving the notice; and
 - (c) inform the person or entity that if no submissions are made within that period, any revocation may take effect as early as 7 days after the end of the period referred to in paragraph (b).
- (3) In deciding whether to revoke the instrument, the CEO must consider any submissions given to the CEO within the period referred to in paragraph (2)(b).
- (4) The CEO must notify the person or entity, in writing, of the decision.
- (5) The notice under subsection (4) must be given within 28 days after the end of the period for making submissions. If the notice is not given within this period, the CEO is taken to have decided not to revoke the instrument.

73 National Disability Insurance Scheme rules for registered providers of supports

- (1) The National Disability Insurance Scheme rules may make provision in connection with the approval of persons or entities as registered providers of supports, including by prescribing criteria relating to:
 - (a) compliance with prescribed safeguards; and
 - (b) compliance with prescribed quality assurance standards and procedures; and

- (c) qualifications of persons or entities or employees of persons or entities.
- (2) The National Disability Insurance Scheme rules may make provision in connection with registered providers of supports, including by prescribing:
 - (a) the consequences of registered providers of supports failing to comply with this Act, the regulations or the National Disability Insurance Scheme rules; and
 - (b) requirements with which registered providers of supports must comply, including in relation to the following:
 - (i) governance;
 - (ii) business practice;
 - (iii) accounting practice; and
 - (c) the obligations of registered providers of supports in relation to the monitoring of compliance; and
 - (d) the process for handling complaints involving registered providers of supports; and
 - (e) auditing requirements in relation to registered providers of supports.

Part 4—Children

74 Children

- (1) If this Act requires or permits a thing to be done by or in relation to a child, the thing is to be done by or in relation to:
 - (a) the person who has, or the persons who jointly have, parental responsibility for the child; or
 - (b) if the CEO is satisfied that this is not appropriate—a person determined in writing by the CEO.
- (2) If a person mentioned in subsection (1) makes a plan management request for a participant who is a child, the person may request:
 - (a) that the person manage the plan wholly or to the extent specified in the request; or
 - (b) that the plan be managed wholly, or to the extent specified in the request, by a registered plan management provider nominated by the person to manage the plan; or
 - (c) that the plan be managed wholly, or to the extent specified in the request, by the Agency or a person specified by the Agency.
- (3) The statement of participant supports in the plan must give effect to the plan management request, except as mentioned in subsections (4) and (5).
- (4) The statement of participant supports in a participant's plan must not provide that the person referred to in paragraph (2)(a) is to manage the funding for supports under the participant's plan:
 - (a) to any extent, if the person is an insolvent under administration; or
 - (b) to a particular extent, if the CEO is satisfied that management of the plan to that extent would:
 - (i) present an unreasonable risk to the participant; or
 - (ii) permit the person to manage matters that are prescribed by the National Disability Insurance Scheme rules as being matters that must not be managed by the person.
- (5) Subsections (1) and (2) of this section do not have effect in relation to a participant who is a child if:
 - (a) the CEO is satisfied that the child is capable of making decisions for himself or herself; and
 - (b) the CEO is satisfied that it is appropriate in the circumstances for those subsections not to apply to the child; and

- (c) the CEO makes a determination that those subsections do not apply to the child.
- (6) The National Disability Insurance Scheme rules may prescribe criteria to which the CEO is to have regard in deciding the following:
 - (a) whether to make a determination under paragraph (1)(b);
 - (b) whether a person managing the funding for supports under a participant's plan would present an unreasonable risk to the participant as mentioned in paragraph (4)(b);
 - (c) whether a child is capable of making decisions for himself or herself as mentioned in paragraph (5)(a);
 - (d) whether it is appropriate for subsections (1) and (2) not to apply to a child as mentioned in paragraph (5)(b).
- (7) A determination made under paragraph (5)(c) is not a legislative instrument.

75 Definition of *parental responsibility*

- (1) For the purposes of this Act, a person has ***parental responsibility*** for a child if:
 - (a) the person is the child's parent and has not ceased to have parental responsibility for the child because of an order made under the *Family Law Act 1975* or a law of a State or Territory; or
 - (b) under a parenting order (within the meaning of the *Family Law Act 1975*):
 - (i) the child is to live with the person; or
 - (ii) the child is to spend time with the person; or
 - (iii) the person is responsible for the child's long-term or day-to-day care, welfare and development.
- (2) Despite subsection (1), if, under a law of the Commonwealth, a State or a Territory, a person has guardianship of a child, that person has ***parental responsibility*** for the child, unless the CEO determines that one or more of the persons referred to in subsection (1) instead have parental responsibility for the child.
- (3) If subsection (1) would result in more than one person having parental responsibility for a child, the CEO may determine that one or more of those persons have parental responsibility for the child for the purposes of this Act.
- (4) The National Disability Insurance Scheme rules may prescribe criteria to which the CEO is to have regard in deciding whether to make a determination under subsection (2) or (3).
- (5) A determination under subsection (2) or (3) must be in writing.
- (6) A determination under subsection (2) or (3) is not a legislative instrument.

76 Duty to children

- (1) It is the duty of a person who may do a thing because of section 74 to ascertain the wishes of the child concerned and to act in a manner that promotes the personal and social wellbeing of that child.
- (2) A person does not breach the duty imposed by subsection (1) by doing a thing if, when the thing is done, the person reasonably believes that:
 - (a) he or she has ascertained the wishes of the child in relation to the thing; and
 - (b) the doing of the thing promotes the personal and social wellbeing of the child.
- (3) A person does not breach the duty imposed by subsection (1) by refraining from doing a thing if, at the relevant time, the person reasonably believes that:
 - (a) he or she has ascertained the wishes of the child in relation to the thing; and
 - (b) not doing the thing promotes the personal and social wellbeing of the child.
- (4) The National Disability Insurance Scheme rules may prescribe other duties of a person who may do a thing in relation to a child because of section 74, including duties requiring the person:
 - (a) to support decision-making by the child personally; or
 - (b) to have regard to, and give appropriate weight to, the views of the child.

77 Revocation of determinations under section 74

- (1) The CEO may, by written instrument, revoke a determination that is in effect under paragraph 74(1)(b) in relation to a person if:
 - (a) the person requests the CEO in writing to do so; or
 - (b) the CEO is satisfied that it is no longer appropriate for the determination to remain in effect.
- (2) The CEO must give the person a copy of the instrument.

Part 5—Nominees

Division 1—Functions and responsibilities of nominees

78 Actions of plan nominee on behalf of participant

(1) Any act that may be done by a participant under, or for the purposes of, this Act that relates to:

- (a) the preparation, review or replacement of the participant's plan; or
- (b) the management of the funding for supports under the participant's plan;

may be done by the participant's plan nominee, other than to the extent specified in the instrument of appointment of the plan nominee.

Note 1: For the appointment of plan nominees, see section 86.

Note 2: This subsection is subject to section 85 (which deals with the right of the nominee to attend with a participant) and subsection (4) of this section.

(2) Without limiting subsection (1), a request that may be made under this Act by a participant may be made by the participant's plan nominee on behalf of the participant.

(3) An act done by a participant's plan nominee because of this section has effect, for the purposes of this Act (other than this Part), as if it had been done by the participant.

(4) If, under this Act, the CEO gives a notice to a participant who has a plan nominee, subsection (1) does not extend to an act that is required by the notice to be done by the participant personally.

(5) If the participant's plan nominee was appointed on the initiative of the CEO, the plan nominee may only do an act in relation to:

- (a) the preparation, review or replacement of the participant's plan; or
- (b) the management of the funding for supports under the participant's plan;

if the nominee considers that the participant is not capable of doing the act.

79 Actions of correspondence nominee on behalf of participant

(1) Any act that may be done by a participant under, or for the purposes of, this Act may be done by the participant's correspondence nominee, other than an act that relates to:

- (a) the preparation, review or replacement of the participant's plan; or
- (b) the management of the funding for supports under the participant's plan.

Note 1: For the appointment of correspondence nominees, see section 87.

Comment [DR26]:

BIA COMMENT: Will this be monitored to ensure that the nominee's 'considerations' are checked and accountable? Could the 'considers' at least be replaced by "reasonably believes"? Cf. subsection 80(2) below. Will the nominee be trained to determine when the participant is "not capable"?

Note 2: This subsection is subject to section 85 (which deals with the right of the nominee to attend with a participant) and subsection (4) of this section.

- (2) Without limiting subsection (1), a request that may be made under this Act by a participant may be made by the participant's correspondence nominee on behalf of the participant.
- (3) An act done by a participant's correspondence nominee because of this section has effect, for the purposes of this Act (other than this Part), as if it had been done by the participant.
- (4) If, under this Act, the CEO gives a notice to a participant who has a correspondence nominee, subsection (1) does not extend to an act that is required by the notice to be done by the participant personally.

80 Duty of nominee to participant

- (1) It is the duty of a nominee of a participant to ascertain the wishes of the participant and to act in a manner that promotes the personal and social wellbeing of the participant.
- (2) A nominee does not breach the duty imposed by subsection (1) by doing an act if, when the act is done, the nominee reasonably believes that:
 - (a) he or she has ascertained the wishes of the participant in relation to the act; and
 - (b) the doing of the act promotes the personal and social wellbeing of the participant.
- (3) A nominee does not breach the duty imposed by subsection (1) by refraining from doing an act if, at the relevant time, the nominee reasonably believes that:
 - (a) he or she has ascertained the wishes of the participant in relation to the act; and
 - (b) not doing the act promotes the personal and social wellbeing of the participant.
- (4) The National Disability Insurance Scheme rules may prescribe other duties of a nominee, including duties requiring the nominee:
 - (a) to support decision-making by the participant personally; or
 - (b) to have regard to, and give appropriate weight to, the views of the participant.

81 Giving of notices to correspondence nominee

- (1) Any notice that the CEO is authorised or required by this Act to give to a participant must be given by the CEO to the participant's correspondence nominee.
- (2) The notice:
 - (a) must, in every respect, be in the same form, and in the same terms, as if it were being given to the participant; and

- (b) may be given to the correspondence nominee personally, by post or by any other means approved by the CEO.

(3) If:

- (a) under subsection (1), the CEO gives a notice (the **nominee notice**) to a participant's correspondence nominee; and
- (b) the CEO has already given, or afterwards gives, the participant a notice that:
 - (i) is expressed to be given under the same provision of this Act as the nominee notice; and
 - (ii) makes the same requirement of the participant as the nominee notice;

section 82 ceases to have effect, or does not come into effect, as the case requires, in relation to the nominee notice.

82 Compliance by correspondence nominee

- (1) If, under section 81, a notice is given to a participant's correspondence nominee, the following paragraphs have effect:
 - (a) for the purposes of this Act, other than this Part, the notice is taken:
 - (i) to have been given to the participant; and
 - (ii) to have been so given on the day the notice was given to the correspondence nominee;
 - (b) any requirement made of the participant to:
 - (i) inform the CEO of a matter; or
 - (ii) give information, or produce a document, to an officer;may be satisfied by the correspondence nominee;
 - (c) any act done by the correspondence nominee for the purposes of satisfying such a requirement has effect, for the purposes of this Act, as if it had been done by the participant;
 - (d) if the correspondence nominee fails to satisfy such a requirement, the participant is taken, for the purposes of this Act, to have failed to comply with the requirement.
- (2) To avoid doubt, for the purposes of this Act, the participant is taken to have complied with a requirement if:
 - (a) the requirement imposes an obligation on the participant to inform the CEO of a matter, or give information or produce a document, within a specified period; and
 - (b) the correspondence nominee does so within that period.

- (3) To avoid doubt, for the purposes of this Act, **the participant is taken not to have** complied with a requirement if:
- (a) the requirement imposes an obligation on the participant to inform the CEO of a matter, or give information or produce a document, within a specified period; and
 - (b) the correspondence nominee does not do so within that period.

83 Nominee to inform Agency of matters affecting ability to act as nominee

- (1) The CEO may give a nominee of a participant a written notice that requires the nominee to inform the Agency if:
- (a) either:
 - (i) an event or change of circumstances happens; or
 - (ii) the nominee becomes aware that an event or change of circumstances is likely to happen; and
 - (b) the event or change of circumstances is likely to affect:
 - (i) the ability of the nominee to act as the plan nominee or correspondence nominee of the participant (as the case may be); or
 - (ii) the ability of the CEO to give notices to the nominee under this Act; or
 - (iii) the ability of the nominee to comply with notices given to the nominee by the CEO under this Act.
- (2) A notice under subsection (1) must specify:
- (a) how the nominee is to inform the Agency; and
 - (b) the period within which the nominee is to inform the Agency, which must be a period of at least 14 days beginning on whichever of the following days is applicable:
 - (i) the day on which the event or change of circumstances happens;
 - (ii) the day on which the nominee becomes aware that the event or change of circumstances is likely to happen.
- (3) A notice under subsection (1) is not ineffective only because it does not comply with paragraph (2)(a).
- (4) This section extends to:
- (a) acts, omissions, matters and things outside Australia, whether or not in a foreign country; and
 - (b) all persons, irrespective of their nationality or citizenship.

Comment [DR27]:

BIA COMMENT: If (b) occurs (i.e. the correspondence nominee does not inform the CEO as required in (a)), then the Agency cannot assume that the participant has not complied — since there is another far more plausible explanation: namely, that the nominee does not have the ability to comply with notices given to the nominee by the CEO under this Act. In other words, the STARTING assumption should be that there is a problem with the nominee, not the participant — and that this problem requires investigation BEFORE a decision is made as to whether or not the participant has complied with a requirement.

84 Statement by plan nominee regarding disposal of money

- (1) The CEO may give the plan nominee of a participant a notice that requires the nominee to give the Agency a statement about a matter relating to the disposal by the nominee of an NDIS amount paid to the nominee on behalf of the participant.
- (2) A notice under subsection (1):
 - (a) must specify how the plan nominee is to give the statement to the Agency; and
 - (b) must specify the period within which the plan nominee is to give the statement to the Agency.
- (3) A notice under subsection (1) is not ineffective only because it does not comply with paragraph (2)(a).
- (4) The period specified under paragraph (2)(b) must not end earlier than 14 days after the day the notice is given.
- (5) A statement given in response to a notice under subsection (1) must be in accordance with a form approved by the CEO.
- (6) A person commits an offence if:
 - (a) the person is a plan nominee; and
 - (b) the person refuses or fails to comply with a notice under subsection (1).Penalty: 30 penalty units.
- (7) Subsection (6) does not apply if the person has a reasonable excuse.

Note: A defendant bears an evidential burden in relation to the matter in this subsection (see subsection 13.3(3) of the *Criminal Code*).
- (8) An offence against subsection (6) is an offence of strict liability.

Note: For strict liability, see section 6.1 of the *Criminal Code*.
- (9) This section extends to:
 - (a) acts, omissions, matters and things outside Australia, whether or not in a foreign country; and
 - (b) all persons, irrespective of their nationality or citizenship.

85 Right of nominee to attend with participant

- (1) If:
 - (a) under this Act, the CEO makes a request of a participant who has a nominee; and
 - (b) the request is that the participant undergo an assessment or a **medical**, psychiatric or psychological examination;

Comment [DR28]:

BIA COMMENT: See comment in relation to subsection 26(b)(ii) on p. 21.

the nominee may accompany the participant while the assessment or examination is being conducted:

- (c) if the participant so wishes; and
 - (d) to the extent that the person conducting the assessment or examination consents.
- (2) If a participant's nominee is a body corporate, the last reference in subsection (1) to the nominee is to be read as a reference to an officer or employee of the nominee.

Comment [DR29]:

BIA COMMENT: The text should include wording that allows this 'consent' to be over-ridden, i.e. where there is evidence that the person's withdrawal of consent is unreasonable or unjustified for the purposes of conducting an accurate and fair assessment or examination.

Division 2—Appointment and cancellation or suspension of appointment

86 Appointment of plan nominee

- (1) The CEO may, in writing, appoint a person to be the *plan nominee* of a participant for the purposes of this Act.

Note: The CEO must make the appointment in accordance with section 88.

- (2) An appointment may be made:
 - (a) at the request of the participant; or
 - (b) on the initiative of the CEO.
- (3) An appointment may limit the matters in relation to which the person is the plan nominee of the participant.

87 Appointment of correspondence nominee

- (1) The CEO may, in writing, appoint a person to be the *correspondence nominee* of a participant for the purposes of this Act.

Note: The CEO must make the appointment in accordance with section 88.

- (2) An appointment may be made:
 - (a) at the request of the participant; or
 - (b) on the initiative of the CEO.

88 Provisions relating to appointments

- (1) A person may be appointed as the plan nominee and the correspondence nominee of the same participant.
- (2) The CEO must not appoint a person as a nominee of a participant under section 86 or 87 except:
 - (a) with the written consent of the person to be appointed; and
 - (b) after taking into consideration the wishes (if any) of the participant regarding the making of the appointment.
- (3) In appointing a person as a nominee of a participant under section 86 or 87, the CEO must consider whether the person is able to comply with section 80.
- (4) In appointing a nominee of a participant under section 86 or 87, the CEO must have regard to whether a person has guardianship of the participant under a law of the Commonwealth, a State or a Territory.
- (5) The CEO must cause a copy of an appointment under section 86 or 87 to be given to:

Comment [DR30]:

BIA COMMENT: If a person has guardianship of the participant under a law, then they make all legal decision about the participant. So rather than use the words 'have regard to', it might be better to make explicit the fact that, in appointing a nominee, the CEO's appointment *must have the agreement* of any such guardian.

- (a) the nominee; and
 - (b) the participant.
- (6) The National Disability Insurance Scheme rules may prescribe:
- (a) persons who must not be appointed as nominees; and
 - (b) criteria to which the CEO is to have regard in considering the appointment of a nominee.

89 Circumstances in which the CEO must cancel appointment of nominees

At the request of a participant

- (1) If:
- (a) a person is appointed as a nominee of a participant under section 86 or 87 at the request of the participant; and
 - (b) the participant requests the CEO to cancel the appointment;
- the CEO must, as soon as practicable, cancel the appointment by written instrument.
- (2) A request under paragraph (1)(b) need not be made in writing. If the request is not made in writing, the CEO must make a written record of the request.

Nominee no longer wishes to be a nominee

- (3) If:
- (a) a person is appointed as a nominee of a participant under section 86 or 87; and
 - (b) the person informs the CEO in writing that the person no longer wishes to be a nominee under that appointment;
- the CEO must, as soon as practicable, cancel the appointment by written instrument.

Copy of instrument of cancellation to be given

- (4) If the appointment of a person as a nominee of a participant is cancelled under this section, the CEO must give the person and participant a copy of the instrument of cancellation.

90 General circumstances in which CEO may cancel or suspend appointment of nominees

At the request of a participant

- (1) If:
- (a) a person is appointed as a nominee of a participant under section 86 or 87 on the initiative of the CEO; and

Comment [DR31]:

NOTE: Subsections 89(1)-(2) should somehow protect participants who — because of an ABI or a psychiatric disorder — request the cancellation of an appointment (e.g. due to impulsivity issues) against their best interests or without due consultation with the nominee or their informal support persons.

Possible provisions: (a) a 'cooling off period' (i.e. a right to reinstate the nominee within a specified time frame), (b) the CEO ensuring that the request was (i) the wish of the participant and (ii) in their best interests.

- (b) the participant requests the CEO to cancel the appointment;
the CEO may, by written instrument, cancel the appointment.
- (2) A request under paragraph (1)(b) need not be made in writing. If the request is not made in writing, the CEO must make a written record of the request.
- (3) If a request is made under paragraph (1)(b):
 - (a) the CEO must decide whether to cancel the appointment within 14 days after receiving the request; and
 - (b) if the CEO decides not to cancel the appointment—the CEO must give the person and participant written notice of the CEO's decision.

Ability to act as a nominee affected

- (4) The CEO may, by written instrument, suspend or cancel one or more of a nominee's appointments if:
 - (a) the CEO gives the nominee a notice under section 83; and
 - (b) the nominee informs the Agency that an event or change of circumstances has happened or is likely to happen and is likely to have an effect referred to in paragraph 83(1)(b).

Failure to comply with a notice under section 83 or 84

- (5) The CEO may, by written instrument, suspend or cancel one or more of a nominee's appointments if:
 - (a) the CEO gives the nominee a notice under section 83 or 84; and
 - (b) the nominee does not comply with a requirement specified in the notice.

Copy of instrument of cancellation or suspension to be given

- (6) If the appointment of a person as a nominee of a participant is cancelled or suspended under this section, the CEO must give the person and participant a copy of the instrument of cancellation or suspension.

91 Suspension etc. of appointment of nominees in cases of severe physical, mental or financial harm

Suspension of appointment

- (1) The CEO may, by written instrument, suspend the appointment of a person as a nominee of a participant if the CEO has reasonable grounds to believe that the person has caused, or is likely to cause, severe physical, mental or financial harm to the participant.
- (2) If the person's appointment is suspended under subsection (1), the CEO must:
 - (a) give the person and participant a copy of the instrument of suspension; and

- (b) by written notice given to the person, request the person to give the CEO, within 28 days after the notice is given, a statement setting out reasons why the person's appointment should not be cancelled by the CEO under this section.

Cancellation of appointment following suspension

- (3) If the person gives the CEO the statement within the 28-day period, the CEO may, by written instrument, cancel the person's appointment.
- (4) The CEO must decide whether to cancel the person's appointment under subsection (3) as soon as practicable after receiving the statement.
- (5) If the CEO decides not to cancel the person's appointment under subsection (3):
 - (a) the suspension of the person's appointment ends; and
 - (b) the CEO must give the person and participant written notice of the CEO's decision.
- (6) If the person does not give the CEO the statement within the 28-day period, the CEO must, by written instrument, cancel the person's appointment as soon as practicable after that period ends.

Copy of instrument of cancellation to be given

- (7) If the person's appointment is cancelled under this section, the CEO must give the person and participant a copy of the instrument of cancellation.

92 Other matters relating to cancellation or suspension of appointment

Cancellation of appointment

- (1) If:
 - (a) the National Disability Insurance Scheme rules made for the purposes of subsection 46(2) apply in relation to a person who is a nominee; and
 - (b) the appointment of the person as a nominee is cancelled under section 89, 90 or 91;

those rules continue to apply in relation to the person as if the appointment had not been cancelled.

Suspension of appointment

- (2) While a person's appointment as a nominee is suspended, the appointment has no effect for the purposes of this Act.
- (3) If a person's appointment as a nominee of a participant is suspended under section 90 or 91, the CEO may appoint another person under section 86 or 87 to be the nominee of the participant for a period specified in the instrument of appointment.

93 National Disability Insurance Scheme rules may prescribe requirements etc.

The National Disability Insurance Scheme rules may prescribe:

- (a) requirements with which the CEO must comply relating to the appointment of nominees or the cancellation or suspension of the appointment of nominees;
and
- (b) matters to which the CEO is to have regard in appointing nominees or cancelling or suspending the appointment of nominees.

94 CEO's powers of revocation

Nothing in this Part is an expression of a contrary intention for the purposes of subsection 33(3) of the *Acts Interpretation Act 1901*.

Division 3—Other matters relating to nominees

95 CEO's powers to give notices to participant

Nothing in this Part is intended in any way to affect the CEO's powers under other provisions of this Act to give notices to, or make requirements of, a participant who has a nominee.

96 Notification of nominee where notice is given to participant

- (1) If, under this Act (other than this Part), the CEO gives a notice to a participant who has a correspondence nominee, the CEO may inform the correspondence nominee of the giving of the notice and of the terms of the notice.
- (2) If, under this Act (other than this Part):
 - (a) the CEO gives a notice to a participant who has a plan nominee; and
 - (b) the notice relates to the preparation, management or review of the participant's plan;

the CEO must inform the plan nominee of the giving of the notice and of the terms of the notice.

97 Protection of participant against liability for actions of nominee

Nothing in this Part renders a participant guilty of an offence against this Act in relation to any act or omission of the participant's nominee.

98 Protection of nominee against criminal liability

- (1) A nominee of a participant is not subject to any criminal liability under this Act in relation to:
 - (a) any act or omission of the participant; or
 - (b) anything done, in good faith, by the nominee in his or her capacity as nominee.
- (2) This section has effect subject to section 84 (which deals with a statement by a plan nominee regarding the disposal of money).

Part 6—Review of decisions

99 Reviewable decisions

Each of the following decisions of the CEO is a **reviewable decision**:

- (a) a decision under paragraph 20(a), subsection 21(3) or paragraph 26(2)(c) that a person does not meet the access criteria;
- (b) a decision under paragraph 26(2)(b) not to specify a period;
- (c) a decision under section 30 to revoke a person's status as a participant;
- (d) a decision under subsection 33(2) to approve the statement of participant supports in a participant's plan;
- (e) a decision under paragraph 40(2)(b) not to extend a grace period;
- (f) a decision under subsection 48(2) not to review a participant's plan;
- (g) a decision under section 70 to refuse to approve a person or entity as a registered provider of supports;
- (h) a decision under section 72 to revoke an instrument approving a person or entity as a registered provider of supports;
- (i) a decision under paragraph 74(1)(b) to make, or not to make, a determination in relation to a person;
- (j) a decision under paragraph 74(4)(c) not to make a determination that subsections 74(1) and (2) do not apply to a child;
- (k) a decision under subsection 75(2) or (3) to make, or not to make, a determination that a person has parental responsibility for a child;
- (l) a decision under section 86 to appoint a plan nominee;
- (m) a decision under section 87 to appoint a correspondence nominee;
- (n) a decision under section 89, 90 or 91 to cancel or suspend, or not to cancel or suspend, the appointment of a nominee;
- (o) a decision under section 104 to give a notice to require a person to take reasonable action to claim or obtain compensation;
- (p) a decision under section 111 to give a notice that the CEO proposes to recover an amount;
- (q) a decision under section 116 not to treat the whole or part of a compensation payment as not having been fixed by a judgement or settlement.

100 Review of reviewable decisions

- (1) The CEO must give written notice of a reviewable decision to each person directly affected by the reviewable decision. The notice must include a statement:
- (a) that:
 - (i) the person may request the CEO to review the reviewable decision; or
 - (ii) if the CEO is taken to have made the reviewable decision because of subsection 21(3) or 48(2)—the decision will be reviewed automatically; and
 - (b) that the person may seek further review under section 103.
- (2) A person who is directly affected by a reviewable decision may request the CEO to review the reviewable decision. If the person is given a notice under subsection (1) the person must make the request within 3 months after receiving the notice.
- (3) A request may be made by:
- (a) sending or delivering a written request to the CEO; or
 - (b) making an oral request, in person or by telephone or other means, to the CEO.
- (4) If a person makes an oral request in accordance with paragraph (3)(b), the person receiving the oral request must:
- (a) make a written record of the details of the request; and
 - (b) note on the record the day the request is made.
- (5) If:
- (a) the CEO receives a request for review of a reviewable decision; or
 - (b) the CEO is taken to have made a reviewable decision because of subsection 21(3) or 48(2);
- the CEO must cause the reviewable decision to be reviewed by a person (the **reviewer**):
- (c) to whom the CEO's powers and functions under this section are delegated; and
 - (d) who was not involved in making the reviewable decision.
- (6) The reviewer must, as soon as reasonably practicable, make a decision:
- (a) confirming the reviewable decision; or
 - (b) varying the reviewable decision; or
 - (c) setting aside the reviewable decision and substituting a new decision.

Comment [DR32]:

BIA COMMENT: The Bill should also specify that the reviewer must:

1. not be someone who is also involved in the day-to-day making of reviewable decisions of the kind under review,
2. act fairly and impartially,
3. base decisions on the available evidence,
4. not be directed in his or her decision-making,
5. have the power to undertake investigations,
6. be transparent, that is, by making his or her decisions and the reasons for those decisions available to the participant, Parliament and the Agency's board (Cf. PC, p. 42)

- (7) A request for review of a reviewable decision, or a requirement to review a reviewable decision that the CEO is taken to have made, does not affect the operation of the decision or prevent the taking of action to implement the decision.
- (8) A failure of the CEO to comply with subsection (1) does not affect the validity of the reviewable decision or the right of a person directly affected to request review of the decision.
- (9) To the extent that this provision relates to a decision referred to in paragraph 99(g) or (h), a reference in this section to a person includes a reference to an entity.

101 Variation of reviewable decision before review completed

If:

- (a) a request is made for review of a reviewable decision; and
 - (b) before a decision on the review is made, the reviewable decision is varied;
- the request for review is taken to be for review of the reviewable decision as varied.

102 Withdrawal of request for review

- (1) A request for review of a reviewable decision may be withdrawn by:
 - (a) sending or delivering a written notice to the CEO; or
 - (b) contacting the CEO and withdrawing the request orally, whether in person, by telephone or by other means.
- (2) If a request is withdrawn in accordance with paragraph (1)(b), the person receiving the oral withdrawal must make a written record of the details of the withdrawal and note on the record the day the withdrawal is made.

103 Applications to the Administrative Appeals Tribunal

Applications may be made to the Administrative Appeals Tribunal for review of a decision made by a reviewer under subsection 100(6).

Note: Under the *Administrative Appeals Tribunal Act 1975*, notice must be given to persons whose interests are affected by a decision of the reviewer.

Chapter 5—Compensation payments

Part 1—Requirement to take action to obtain compensation

104 CEO may require person to take action to obtain compensation

- (1) This section applies if:
 - (a) a participant or a prospective participant is, or in the CEO's opinion may be, entitled to compensation in respect of a personal injury; and
 - (b) the participant or prospective participant:
 - (i) has taken no action to claim or obtain the compensation; or
 - (ii) has taken no reasonable action to claim or obtain the compensation.
- (2) The CEO may, by written notice, require the participant or prospective participant to take the action specified in the notice within the period specified in the notice. The action must be action that is reasonable to enable the person to claim or obtain the compensation.
- (3) In considering whether it is reasonable to require a participant or prospective participant to take an action, the CEO must have regard to the following:
 - (a) the disability of the participant or prospective participant;
 - (b) the circumstances which give rise to the entitlement or possible entitlement to compensation;
 - (c) any impediments the participant or prospective participant may face in recovering compensation;
 - (d) any reasons given by the participant or prospective participant as to why he or she has not claimed or obtained compensation;
 - (e) the financial circumstances of the participant or prospective participant;
 - (f) the impact of the requirement to take the action on the participant or prospective participant and his or her family.
- (4) The CEO must not give a notice under subsection (2) requiring a participant or prospective participant to take action to claim or obtain compensation unless the CEO is satisfied that the participant or prospective participant has reasonable prospects of success in claiming or obtaining the compensation.
- (5) The period specified by the CEO must be a period of at least 28 days after the day on which the notice is given.
- (6) Even though a participant or a prospective participant has entered into an agreement to give up his or her right to compensation, the CEO may form the opinion that the participant or prospective participant may be entitled to

Comment [DR33]:

BIA COMMENT: Period of 28 days should be extended for rural/remote participants.

compensation if the CEO is satisfied that the agreement is void, ineffective or unenforceable.

105 Consequences of failure to comply with a requirement to take action to obtain compensation

- (1) A participant or a prospective participant who is given a notice under subsection 104(2) requiring him or her to take action (the **required action**) to claim or obtain compensation within a specified period must take the required action within the period.
- (2) If a participant does not take the required action within the period:
 - (a) if a plan is in effect for the participant—the plan is suspended from the end of the specified period until the participant takes the required action; or
 - (b) if a plan is not yet in effect for the participant—the CEO must still comply with section 32 in relation to facilitating the preparation of the participant's plan, but the plan does not come into effect until the participant takes the required action.
- (3) If a prospective participant does not take the required action, the CEO is not prevented from deciding whether or not the prospective participant meets the access criteria and facilitating the preparation of the participant's plan, but the plan does not come into effect until the participant takes the required action.

Part 2—Agency may recover compensation fixed after NDIS amounts have been paid

106 Recovering past NDIS amounts from certain judgements

- (1) This section applies if:
- (a) an amount of compensation is fixed under a judgement (other than a consent judgement) given in respect of a personal injury that has caused, to any extent, a participant's impairment (whether or not the participant was a participant at the time of the injury); and
 - (b) before the day of the judgement, NDIS amounts (the ***past NDIS amounts***) had been paid in respect of supports in relation to the participant's impairment; and
 - (c) the judgement specifies a portion (the ***past NDIS support component***) of the amount of compensation to be a component for supports of a kind funded or provided under the National Disability Insurance Scheme.
- (2) An amount (the ***recoverable amount***) is payable by the participant to the Agency. The recoverable amount is an amount equal to:
- (a) unless subsection (4) or (5) applies—the sum of the past NDIS amounts, reduced as mentioned in subsection (3) (if applicable); or
 - (b) if subsection (4) or (5) applies—the amount worked out in accordance with whichever of those subsections is applicable.
- (3) If:
- (a) the judgement fixes the amount of compensation on the basis that liability for the injury should be apportioned between the participant and another person; and
 - (b) as a result, the amount of compensation is less than it would have been if liability had not been so apportioned;
- the sum of the past NDIS amounts is to be reduced by the proportion corresponding to the proportion of liability that is apportioned to the participant by the judgement.
- (4) If the recoverable amount would, apart from this subsection, exceed the past NDIS support component, the recoverable amount is taken to be the lesser of the sum of the past NDIS amounts and the past NDIS support component.
- (5) If the recoverable amount would, apart from this subsection, exceed the difference (if any) between:
- (a) the amount of compensation fixed by the judgement; and
 - (b) the sum of the amounts (if any) payable in respect of the amount of compensation under the following:

- (i) the *Health and Other Services (Compensation) Act 1995*;
- (ii) the *Health and Other Services (Compensation) Care Charges Act 1995*;
- (iii) Part 3.14 of the *Social Security Act 1991*;
- (iv) a law of the Commonwealth, a State or a Territory, prescribed by the National Disability Insurance Scheme rules;

the recoverable amount is taken to be the amount of the difference.

107 Recovering past NDIS amounts from consent judgements and settlements

- (1) This section applies if:
- (a) an amount of compensation is fixed under a consent judgement or settlement in respect of a personal injury that has caused, to any extent, a participant's impairment (whether or not the participant was a participant at the time of the injury); and
 - (b) before the day of the consent judgement or settlement, NDIS amounts (the ***past NDIS amounts***) had been paid in respect of supports in relation to the participant's impairment.
- (2) An amount (the ***recoverable amount***) is payable by the participant to the Agency. The recoverable amount is an amount equal to:
- (a) unless subsection (4) applies—the sum of the past NDIS amounts, reduced as mentioned in subsection (3) (if applicable); or
 - (b) if subsection (4) applies—the amount worked out in accordance with that subsection.
- (3) If:
- (a) the consent judgement or settlement fixes the amount of compensation on the basis that liability for the injury should be apportioned between the participant and another person; and
 - (b) as a result, the amount of compensation is less than it would have been if liability had not been so apportioned;
- the sum of the past NDIS amounts is to be reduced by the proportion corresponding to the proportion of liability that is apportioned to the participant by the consent judgement or settlement.
- (4) If the recoverable amount would, apart from this subsection, exceed the difference (if any) between:
- (a) the amount of compensation fixed under the consent judgement or settlement; and
 - (b) the sum of the amounts (if any) payable in respect of the amount of compensation under the following:

- (i) the *Health and Other Services (Compensation) Act 1995*;
- (ii) the *Health and Other Services (Compensation) Care Charges Act 1995*;
- (iii) Part 3.14 of the *Social Security Act 1991*;
- (iv) a law of the Commonwealth, a State or a Territory, prescribed by the National Disability Insurance Scheme rules;

the recoverable amount is taken to be the amount of the difference.

108 Debts resulting from section 106 or 107

An amount payable by a person under section 106 or 107 is a debt due by the person to the Agency.

Part 3—Recovery from compensation payers and insurers

109 CEO may send preliminary notice to potential compensation payer or insurer

- (1) If:
- (a) a participant or prospective participant makes a claim against another person (the **potential compensation payer**) for compensation; and
 - (b) the claim relates to the participant's or prospective participant's impairment;

the CEO may give written notice to the potential compensation payer, stating that the CEO may wish to recover an amount from the potential compensation payer.

- (2) If:
- (a) a participant or prospective participant makes a claim against another person (the **potential compensation payer**) for compensation; and
 - (b) the claim relates to the participant's or prospective participant's impairment; and
 - (c) an insurer may be liable, under a contract of insurance, to indemnify the potential compensation payer against any liability arising from the claim for compensation;

the CEO may give written notice to the insurer, stating that the CEO may wish to recover an amount from the insurer.

- (3) A notice under subsection (1) or (2) must contain:
- (a) a statement of the potential compensation payer's or insurer's obligation under subsection 110(1) or (2), as the case requires; and
 - (b) a statement of the effect of section 111 (recovery) so far as it relates to the notice.

110 Offence—potential compensation payer or insurer

- (1) A person (the **potential compensation payer**) commits an offence if:
- (a) the potential compensation payer is given a notice under subsection 109(1) in relation to a participant or prospective participant; and
 - (b) before or after receiving the notice, the potential compensation payer becomes liable to pay compensation to the participant or prospective participant; and
 - (c) the potential compensation payer does not give written notice to the CEO of the liability within 7 days after becoming liable or receiving the notice, whichever is later.

Penalty: Imprisonment for 12 months or 60 penalty units, or both.

Note: If a body corporate is convicted of an offence against this section, subsection 4B(3) of the *Crimes Act 1914* allows a court to impose a fine of up to 5 times the pecuniary penalty stated above.

- (2) An insurer commits an offence if:
- (a) the insurer is given a notice under subsection 109(2) in relation to a claim by a participant or prospective participant; and
 - (b) before or after receiving the notice, the insurer becomes liable to indemnify the potential compensation payer, either wholly or partly, in relation to the claim; and
 - (c) the insurer does not give written notice to the CEO of the liability within 7 days of becoming liable or receiving the notice, whichever is later.

Penalty: Imprisonment for 12 months or 60 penalty units, or both.

Note: If a body corporate is convicted of an offence against this section, subsection 4B(3) of the *Crimes Act 1914* allows a court to impose a fine of up to 5 times the pecuniary penalty stated above.

111 CEO may send recovery notice to compensation payer or insurer

- (1) If:
- (a) one or more NDIS amounts have been paid to a person in respect of a participant's impairment; and
 - (b) a person (the **compensation payer**):
 - (i) is liable to pay compensation to the participant in relation to the impairment; or
 - (ii) if the compensation payer is an authority of a State or Territory—has determined that a payment by way of compensation is to be made to the participant in relation to the impairment;

the CEO may give written notice to the compensation payer that the CEO proposes to recover from the compensation payer the amount specified in the notice.

- (2) If:
- (a) one or more NDIS amounts have been paid to a person in respect of a participant's impairment; and
 - (b) an insurer is liable, under a contract of insurance, to indemnify the compensation payer against any liability arising from a claim of the participant for compensation;

the CEO may give written notice to the insurer that the CEO proposes to recover from the insurer the amount specified in the notice.

- (3) If a compensation payer or insurer is given notice under subsection (1) or (2), the compensation payer or insurer is liable to pay to the Agency the amount specified in the notice.
- (4) The amount to be specified in the notice is the lesser of the following:

- (a) an amount equal to the sum of the NDIS amounts referred to in paragraph (1)(a) or (2)(a);
 - (b) an amount equal to the recoverable amount in relation to the judgement, consent judgement or settlement to which the liability relates.
- (5) A notice under this section must contain a statement of the effect of section 114 (offences) so far as it relates to such a notice.
- (6) This section applies to an amount payable by way of compensation in spite of any law of the Commonwealth, a State or Territory (however expressed) under which the compensation is inalienable.
- (7) If the CEO gives a person a notice under this section that the CEO proposes to recover a specified amount from the person, the specified amount is a debt due by the person to the Agency.

112 Preliminary notice or recovery notice suspends liability to pay compensation

- (1) If a person (the **compensation payer**) has been given a notice under subsection 109(1) or 111(1) in relation to the compensation payer's liability, or possible liability, to pay compensation, the compensation payer is not liable to pay that compensation while the notice has effect.
- (2) If an insurer has been given a notice under subsection 109(2) or 111(2) in relation to the insurer's liability, or possible liability, to indemnify a compensation payer against a liability arising from a claim for compensation:
- (a) the insurer is not liable to so indemnify the compensation payer; and
 - (b) the compensation payer is not liable to pay that compensation;
- while the notice has effect.

Comment [DR34]:

BIA COMMENT: Presumably, this means 'not liable to pay that compensation to the participant or prospective participant' — that is, they will instead be liable to pay that compensation to the Agency. If so, it would clarify things if this qualification were included in the text.

113 Compensation payer's or insurer's payment to Agency discharges liability to participant

- (1) Payment to the Agency of an amount that a compensation payer is liable to pay under section 111 in relation to a participant operates, to the extent of the payment, as a discharge of:
- (a) the compensation payer's liability to pay compensation to the participant; and
 - (b) the participant's liability to pay the Agency.
- (2) Payment to the Agency of an amount that an insurer is liable to pay under section 111 in relation to a participant operates, to the extent of the payment, as a discharge of:
- (a) the insurer's liability to the compensation payer; and
 - (b) the compensation payer's liability to pay compensation to the participant; and
 - (c) the participant's liability to pay the Agency.

114 Offence—making compensation payment after receiving preliminary notice or recovery notice

- (1) A person (the **potential compensation payer**) commits an offence if:
- (a) the potential compensation payer has been given a notice under subsection 109(1) or 111(1) in relation to the payment of compensation to a participant or prospective participant; and
 - (b) the potential compensation payer makes the compensation payment to the participant or prospective participant.

Penalty: Imprisonment for 12 months or 60 penalty units, or both.

Note: If a body corporate is convicted of an offence against this section, subsection 4B(3) of the *Crimes Act 1914* allows a court to impose a fine of up to 5 times the pecuniary penalty stated above.

- (2) Subsection (1) does not apply if:
- (a) in the case of a notice under section 109—the CEO has given the potential compensation payer written notice that the notice is revoked; or
 - (b) in the case of a notice under section 111—the potential compensation payer has paid to the Agency the amount specified in the notice; or
 - (c) the CEO has given the potential compensation payer written permission to pay the **amount**.

Comment [DR35]:

BIA COMMENT: For clarity, add after 'amount': 'to the participant or prospective participant'.

- (3) An insurer commits an offence if:
- (a) the insurer has been given a notice under subsection 109(2) or 111(2) in relation to a liability to indemnify a person; and
 - (b) the insurer makes a **payment** in relation to that liability.

Comment [DR36]:

BIA COMMENT: For clarity, add after 'payment': 'to the participant or prospective participant'.

Penalty: Imprisonment for 12 months or 60 penalty units, or both.

Note: If a body corporate is convicted of an offence against this section, subsection 4B(3) of the *Crimes Act 1914* allows a court to impose a fine of up to 5 times the pecuniary penalty stated above.

- (4) Subsection (3) does not apply if:
- (a) in the case of a notice under section 109—the CEO has given the insurer written notice that the notice is revoked; or
 - (b) in the case of a notice under section 111—the insurer has paid to the Agency the amount specified in the notice; or
 - (c) the CEO has given the insurer written permission to pay the **amount**.

Comment [DR37]:

BIA COMMENT: For clarity, add after 'amount': 'to the participant or prospective participant'.

115 Liability to pay the Agency if there is a contravention of section 114

- (1) A potential compensation payer or insurer who contravenes section 114 is, in addition to being liable under that section, liable to pay to the Agency:

- (a) if the contravention relates to a notice under section 109—an amount determined by the CEO; or
 - (b) if the contravention relates to a notice under section 111—the amount specified in the notice.
- (2) The amount determined by the CEO under paragraph (1)(a) must not be more than the amount that would have been specified in a notice under section 111 if one had been given.
- (3) This section applies in relation to a payment by way of compensation in spite of any law of the Commonwealth, a State or Territory (however expressed) under which the compensation is inalienable.
- (4) The amount determined by the CEO under paragraph (1)(a) or specified in the notice under section 111 is a debt due by the compensation payer or the insurer to the Agency.

Part 4—CEO may disregard certain payments

116 CEO may disregard certain payments

For the purposes of this Chapter, the CEO may treat the whole or part of a compensation payment as not having been fixed by a judgement (including a consent judgement) or settlement, if the CEO thinks it is appropriate to do so in the special circumstances of the case.

Comment [DR38]:

BIA COMMENT: An example would be useful here, but either the Bill or the Rules must specify the criteria for what constitutes a 'special circumstance'.

Chapter 6—National Disability Insurance Scheme Launch Transition Agency

Part 1—National Disability Insurance Scheme Launch Transition Agency

117 Establishment

- (1) The National Disability Insurance Scheme Launch Transition Agency is established by this section.
- (2) The Agency:
 - (a) is a body corporate; and
 - (b) must have a seal; and
 - (c) may acquire, hold and dispose of real and personal property; and
 - (d) may sue and be sued.

Note: The CAC Act applies to the Agency. That Act deals with matters relating to Commonwealth authorities, including reporting and accountability, banking and investment, and conduct of officers.

- (3) The seal of the Agency is to be kept in such custody as the Board directs and must not be used except as authorised by the Board.

118 Functions of the Agency

- (1) The Agency has the following functions:
 - (a) to deliver the National Disability Insurance Scheme;
 - (b) to manage, and to advise and report on, the financial sustainability of the National Disability Insurance Scheme including by:
 - (i) regularly making and assessing estimates of the current and future expenditure of the National Disability Insurance Scheme; and
 - (ii) identifying and managing risks and issues relevant to the financial sustainability of the National Disability Insurance Scheme;
 - (c) to develop and enhance the disability sector, including by facilitating innovation, research and contemporary best practice in the sector;
 - (d) to build community awareness of disabilities and the social contributors to disabilities;
 - (e) to collect, analyse and exchange data about disabilities and the supports (including early intervention supports) for people with disability;

- (f) to undertake research relating to disabilities, the supports (including early intervention supports) for people with disability and the social contributors to disabilities;
 - (g) any other functions conferred on the Agency by or under this Act, the regulations or an instrument made under this Act;
 - (h) to do anything incidental or conducive to the performance of the above functions.
- (2) In performing its functions, the Agency must use its best endeavours to:
- (a) act in accordance with any relevant intergovernmental agreements; and
 - (b) act in a proper, efficient and effective manner.

119 Powers of the Agency

- (1) The Agency has power to do all things necessary or convenient to be done for or in connection with the performance of its functions.
- (2) The Agency's powers include, but are not limited to, the following powers:
- (a) the power to enter into contracts;
 - (b) the power to accept gifts, devises, bequests and assignments.

120 Charging of fees

- (1) The Agency may charge fees in accordance with an instrument made under subsection (2).
- (2) The Minister may, by legislative instrument, prescribe:
- (a) the things that the Agency does in the performance of its functions for which it may charge fees; and
 - (b) the amount, or a method of working out the amount, of those fees.
- (3) An instrument made under subsection (2) must not allow:
- (a) a fee to be charged in relation to an access request; or
 - (b) a participant to be charged a fee.
- (4) The Minister must not make an instrument under subsection (2) unless the Commonwealth and each host jurisdiction agree to the making of the instrument.
- (5) A fee must not be such as to amount to taxation.

121 Minister may give directions to the Agency

- (1) The Minister may, by legislative instrument, give directions to the Agency about the performance of its functions.

Note: Section 42 (disallowance) and Part 6 (sunsetting) of the *Legislative Instruments Act 2003* do not apply to the directions (see sections 44 and 54 of that Act).

- (2) A direction given under subsection (1):
 - (a) must not relate to a particular individual; and
 - (b) must not be inconsistent with:
 - (i) this Act, the regulations or an instrument made under this Act; or
 - (ii) the CAC Act, or the regulations or an instrument made under that Act.
- (3) The Minister must not give a direction under subsection (1) unless the Commonwealth and each host jurisdiction agree to the giving of the direction.
- (4) The Agency must comply with a direction given under subsection (1).

122 Agency does not have privileges and immunities of the Crown

The Agency does not have privileges and immunities of the Crown in right of the Commonwealth.

Part 2—Board of the Agency

Division 1—Establishment and functions

123 Establishment

The Board of the Agency is established by this section.

124 Functions of the Board

- (1) The Board has the following functions:
 - (a) to ensure the proper, efficient and effective performance of the Agency's functions;
 - (b) to determine objectives, strategies and policies to be followed by the Agency;
 - (c) any other functions conferred on the Board by or under:
 - (i) this Act, the regulations or an instrument made under this Act; or
 - (ii) any other law of the Commonwealth.
- (2) The Board has the power to do all things necessary or convenient to be done for or in connection with the performance of its functions.
- (3) Anything done in the name of, or on behalf of, the Agency by the Board, or with the authority of the Board, is taken to have been done by the Agency.

125 Minister may give the Board a statement setting out strategic guidance for the Agency

- (1) The Minister may give the Board a written statement setting out strategic guidance for the Agency.
- (2) A statement given under subsection (1):
 - (a) must be of a general nature only; and
 - (b) must not relate to a particular individual; and
 - (c) must not be inconsistent with:
 - (i) this Act, the regulations or an instrument made under this Act; or
 - (ii) the CAC Act, or the regulations or an instrument made under that Act.
- (3) The Minister must not give a statement under subsection (1) unless the Commonwealth and each host jurisdiction agree to the giving of the statement.
- (4) In performing its functions, the Board must have regard to a statement given under subsection (1).
- (5) A statement given under subsection (1) is not a legislative instrument.

Division 2—Members of the Board

126 Membership

The Board consists of the Chair and 8 other members.

127 Appointment of Board members

- (1) The Board members are to be appointed by the Minister, by written instrument, on a part-time basis.
- (2) A person is eligible for appointment as a Board member only if the Minister is satisfied 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.

Comment [DR39]:

BIA COMMENT: The Bill should ensure that there is at least one Board member who has experience as a user of disability services.

Procedures relating to appointment

- (3) The Minister must consult the host jurisdictions about the appointment of the Chair.
- (4) Before the Minister appoints a Board member other than the Chair, the Minister must:
 - (a) seek the support of all the host jurisdictions for the appointment; and
 - (b) be satisfied that the appointment is supported by:
 - (i) the Commonwealth; and
 - (ii) a majority of the group consisting of the Commonwealth and the host jurisdictions.

Persons ineligible for appointment

- (5) Despite subsection (2), a person is not eligible for appointment as a Board member if the person is:
 - (a) a member (however described) of:
 - (i) the Parliament of the Commonwealth or a State; or
 - (ii) the legislature of a Territory; or
 - (iii) a local government authority; or

- (b) an employee of the Commonwealth, a State, a Territory or a local government authority; or
- (c) the holder of a full-time office under a law of the Commonwealth, a State or a Territory.

Balance of skills etc.

- (6) In appointing the Board members, the Minister must ensure that the Board members collectively possess an appropriate balance of skills, experience or knowledge in the fields mentioned in subsection (2).

Comment [DR40]:

BIA COMMENT: See comment above. (i.e. "The Bill should ensure that there is at least one Board member who has experience as a user of disability services.")

128 Term of appointment

A Board member holds office for the period specified in the instrument of appointment. The period must not be more than 3 years.

Note: For reappointment, see section 33AA of the *Acts Interpretation Act 1901*.

129 Acting appointments

Appointment to act during vacancy

- (1) The Minister may, by written instrument, appoint a person to act as the Chair, for a specified period of not more than 12 months, during a vacancy in the office of the Chair, whether or not an appointment has previously been made to the office.
- (2) The Minister may, by written instrument, appoint a person to act as a Board member other than the Chair, for a specified period of not more than 12 months, during a vacancy in the office of a Board member other than the Chair, whether or not an appointment has previously been made to the office, if:
 - (a) the Minister has sought the support of all the host jurisdictions for an appointment (the **proposed substantive appointment**) of a particular person to the office to be made under section 127; and
 - (b) the Minister is satisfied that either:
 - (i) it is not possible to make the proposed substantive appointment in accordance with subsection 127(4); or
 - (ii) 90 days have passed since the Minister sought the support and it is not known whether the proposed substantive appointment can be made in accordance with subsection 127(4).

Appointment to act during absence etc.

- (3) The Minister may, by written instrument, appoint a person to act as a Board member during any period, or during all periods, when a Board member:
 - (a) is absent from duty or from Australia; or
 - (b) is, for any reason, unable to perform the duties of the office.

Note: The Minister must tell the Ministerial Council as soon as practicable after the Minister appoints a person to act as the Chair or another Board member: see subsection 176(2).

Eligibility for appointment

- (4) A person is eligible for appointment under subsection (1), (2) or (3) only if the Minister is satisfied that the person has skills, experience or knowledge in at least one of the fields mentioned in subsection 127(2).
- (5) Despite subsection (4), a person is not eligible for appointment under subsection (1), (2) or (3) if the person is:
 - (a) a member (however described) of:
 - (i) the Parliament of the Commonwealth or a State; or
 - (ii) the legislature of a Territory; or
 - (iii) a local government authority; or
 - (b) the holder of a full-time office under a law of the Commonwealth, a State or a Territory.

Note: For rules that apply to acting appointments, see sections 33AB and 33A of the *Acts Interpretation Act 1901*.

130 Remuneration and allowances

- (1) A Board member is to be paid the remuneration that is determined by the Remuneration Tribunal. If no determination of that remuneration by the Tribunal is in operation, the member is to be paid the remuneration that is prescribed by the regulations.
- (2) A Board member is to be paid the allowances that are prescribed by the regulations.
- (3) This section has effect subject to the *Remuneration Tribunal Act 1973*.

131 Leave of absence

Chair

- (1) The Minister may grant leave of absence to the Chair on the terms and conditions that the Minister determines.
- (2) Before the Minister grants leave of absence to the Chair under subsection (1), the Minister must consult the host jurisdictions about the grant.

Other Board members

- (3) The Chair may grant leave of absence to another Board member on the terms and conditions that the Chair determines.
- (4) The Chair must notify the Minister if the Chair grants another Board member leave of absence for a period that exceeds 3 months.

132 Outside employment

A Board member must not engage in any paid employment that, in the Minister's opinion, conflicts or may conflict with the proper performance of the member's duties.

133 Resignation of Board members

- (1) A Board member may resign his or her appointment by giving the Minister a written resignation.
- (2) The resignation takes effect on the day it is received by the Minister or, if a later day is specified in the resignation, on that later day.
- (3) The later day specified in the resignation must not be more than 90 days after the day the resignation is received by the Minister.

134 Termination of appointment of Board members

- (1) The Minister may terminate the appointment of a Board member:
 - (a) for misbehaviour; or
 - (b) if the member is incapable of performing the duties of his or her office.
- (2) The Minister may terminate the appointment of a Board member if:
 - (a) the member:
 - (i) becomes bankrupt; or
 - (ii) applies to take the benefit of any law for the relief of bankrupt or insolvent debtors; or
 - (iii) compounds with his or her creditors; or
 - (iv) makes an assignment of his or her remuneration for the benefit of his or her creditors; or
 - (b) the member is absent, except on leave of absence, from 3 consecutive meetings of the Board; or
 - (c) the member engages in paid employment that, in the Minister's opinion, conflicts or may conflict with the proper performance of the member's duties (see section 132); or
 - (d) the member fails, without reasonable excuse, to comply with an obligation imposed on him or her by section 27F or 27J of the CAC Act; or
 - (e) the Minister is satisfied that the performance of the member has been unsatisfactory for a significant period.

Procedures relating to termination

- (3) The Minister must consult the host jurisdictions about the termination of the appointment of the Chair.

- (4) Before the Minister terminates the appointment of a Board member other than the Chair, the Minister must:
 - (a) seek the support of all the host jurisdictions for the termination; and
 - (b) be satisfied that the termination is supported by:
 - (i) the Commonwealth; and
 - (ii) a majority of the group consisting of the Commonwealth and the host jurisdictions.

135 Other terms and conditions of Board members

- (1) A Board member holds office on the terms and conditions (if any) in relation to matters not covered by this Act that are determined by the Minister.
- (2) Before the Minister determines terms and conditions on which a Board member holds office, the Minister must be satisfied that the Commonwealth and a majority of host jurisdictions agree to the terms and conditions.

Division 3—Meetings of the Board

136 Convening meetings

- (1) The Board must hold the meetings that are necessary for the efficient performance of its functions.
- (2) Meetings are to be held at the times and places that the Board determines.

Note: Section 33B of the *Acts Interpretation Act 1901* contains further information about the ways in which Board members may participate in meetings.

- (3) The Chair:
 - (a) may convene a meeting; and
 - (b) must convene at least 4 meetings each calendar year; and
 - (c) must convene a meeting within 30 days of receiving a written request to do so from another Board member.

137 Presiding at meetings

- (1) The Chair must preside at all meetings at which he or she is present.
- (2) If the Chair is not present at a meeting:
 - (a) a Board member nominated by the Chair presides; or
 - (b) if a Board member has not been nominated by the Chair to preside—the other Board members present must appoint one of themselves to preside.

138 Quorum

- (1) At a meeting of the Board, a quorum is constituted by 5 Board members.
- (2) However, if:
 - (a) a Board member is required by section 27J of the CAC Act not to be present during the deliberations, or to take part in any decision, of the Board with respect to a particular matter; and
 - (b) when the member leaves the meeting concerned there is no longer a quorum present;

the remaining members at the meeting constitute a quorum for the purpose of any deliberation or decision at that meeting with respect to that matter.

139 Voting at meetings

- (1) A question arising at a meeting is to be determined by a majority of the votes of the Board members present and voting.
- (2) The person presiding at a meeting has a deliberative vote and, if the votes are equal, a casting vote.

140 Conduct of meetings

The Board may, subject to this Division, regulate proceedings at its meetings as it considers appropriate.

141 Minutes

The Board must keep minutes of its meetings.

142 Decisions without meetings

- (1) The Board is taken to have made a decision at a meeting if:
 - (a) without meeting, a majority of the Board members entitled to vote on the proposed decision indicate agreement with the decision; and
 - (b) that agreement is indicated in accordance with the method determined by the Board under subsection (2); and
 - (c) all the Board members were informed of the proposed decision, or reasonable efforts were made to inform all the members of the proposed decision.
- (2) Subsection (1) applies only if the Board:
 - (a) has determined that it may make decisions of that kind without meeting; and
 - (b) has determined the method by which Board members are to indicate agreement with proposed decisions.
- (3) For the purposes of paragraph (1)(a), a Board member is not entitled to vote on a proposed decision if the member would not have been entitled to vote on that proposal if the matter had been considered at a meeting of the Board.
- (4) The Board must keep a record of decisions made in accordance with this section.

Part 3—Independent Advisory Council

Division 1—Establishment and function

143 Establishment

The Independent Advisory Council is established by this section.

144 Function of the Advisory Council

- (1) The Advisory Council's function is to provide, on its own initiative or at the written request of the Board, advice to the Board about the way in which the Agency:
 - (a) performs its functions relating to the National Disability Insurance Scheme; and
 - (b) supports the independence and social and economic participation of people with disability; and
 - (c) provides reasonable and necessary supports, including early intervention supports, for participants in the National Disability Insurance Scheme launch; and
 - (d) enables people with disability to exercise choice and control in the pursuit of their goals and the planning and delivery of their supports; and
 - (e) facilitates the development of a nationally consistent approach to the access to, and the planning and funding of, supports for people with disability; and
 - (f) promotes the provision of high quality and innovative supports to people with disability; and
 - (g) raises community awareness of the issues that affect the social and economic participation of people with disability, and facilitates greater community inclusion of people with disability.
- (2) In providing advice, the Advisory Council must have regard to the role of families, carers and other significant persons in the lives of people with disability.
- (3) Advice provided by the Advisory Council must not relate to:
 - (a) a particular individual; or
 - (b) the approval of a person or entity as a registered provider of supports or the revocation of that approval; or
 - (c) the corporate governance of the Agency; or
 - (d) the money paid to, or received by, the Agency.
- (4) The Advisory Council has power to do all things necessary or convenient to be done for or in connection with the performance of its function.

145 Advice of the Advisory Council

If the Advisory Council provides advice to the Board under subsection 144(1), the Board must:

- (a) have regard to the advice in performing its functions; and
- (b) give the Ministerial Council a copy of the advice and a statement setting out what has been done, or is to be done, in response to the advice.

Division 2—Members of the Advisory Council

146 Membership

The Advisory Council is to consist of the following members:

- (a) the Principal Member of the Council;
- (b) not more than 12 other members.

147 Appointment of members of the Advisory Council

- (1) The members of the Advisory Council are to be appointed by the Minister, by written instrument, on a part-time basis.

Procedures relating to appointment

- (2) The Minister must consult the host jurisdictions about the appointment of the Principal Member.
- (3) Before the Minister appoints a member of the Advisory Council other than the Principal Member, the Minister must:
 - (a) seek the support of all the host jurisdictions for the appointment; and
 - (b) be satisfied that the appointment is supported by:
 - (i) the Commonwealth; and
 - (ii) a majority of the group consisting of the Commonwealth and the host jurisdictions.

Persons ineligible for appointment

- (4) A person is not eligible for appointment as a member of the Advisory Council if the person is a member (however described) of:
 - (a) the Parliament of the Commonwealth or a State; or
 - (b) the legislature of a Territory; or
 - (c) a local government authority.

Membership requirements

- (5) In appointing the members of the Advisory Council, the Minister must:
 - (a) have regard to the desirability of the membership of the Advisory Council reflecting the diversity of people with disability; and
 - (b) ensure that:
 - (i) at least 4 of the members are people with disability who have skills, experience or knowledge relating to disability services; and

Comment [DR41]:

NOTE: In the first draft, the number of members was 3 (in subparagraph 147(1)(b)(i)).

- (ii) at least 2 of the members are carers of people with disability and have skills, experience or knowledge relating to disability services; and
- (iii) at least one of the members is a person who has skills, experience or knowledge in the supply of equipment, or the provision of services, to people with disability; and
- (iv) any other members are persons with skills, experience or knowledge that will help the Advisory Council perform its function.

148 Term of appointment

A member of the Advisory Council holds office for the period specified in the instrument of appointment. The period must not exceed 3 years.

Note: For reappointment, see section 33AA of the *Acts Interpretation Act 1901*.

149 Acting appointments

Appointment to act during vacancy

- (1) The Minister may, by written instrument, appoint a person to act as the Principal Member, for a specified period of not more than 12 months, during a vacancy in the office of the Principal Member, whether or not an appointment has previously been made to the office.
- (2) The Minister may, by written instrument, appoint a person to act as a member of the Advisory Council other than the Principal Member, for a specified period of not more than 12 months, during a vacancy in the office of a member of the Advisory Council other than the Principal Member, whether or not an appointment has previously been made to the office, if:
 - (a) the Minister has sought the support of all the host jurisdictions for an appointment (the **proposed substantive appointment**) of a particular person to the office to be made under section 147; and
 - (b) the Minister is satisfied that either:
 - (i) it is not possible to make the proposed substantive appointment in accordance with subsection 147(3); or
 - (ii) 90 days have passed since the Minister sought the support and it is not known whether the proposed substantive appointment can be made in accordance with subsection 147(3).

Appointment to act during absence etc.

- (3) The Minister may, by written instrument, appoint a person to act as a member of the Advisory Council during any period, or during all periods, when a member of the Advisory Council:
 - (a) is absent from duty or from Australia; or
 - (b) is, for any reason, unable to perform the duties of the office.

Note 1: The Minister must tell the Ministerial Council as soon as practicable after the Minister appoints a person to act as the Principal Member or another member of the Advisory Council: see subsection 176(2).

Note 2: For rules that apply to acting appointments, see sections 33AB and 33A of the *Acts Interpretation Act 1901*.

150 Remuneration and allowances

- (1) A member of the Advisory Council is to be paid the remuneration that is determined by the Remuneration Tribunal. If no determination of that remuneration by the Tribunal is in operation, the member is to be paid the remuneration that is prescribed by the regulations.
- (2) A member of the Advisory Council is to be paid the allowances that are prescribed by the regulations.
- (3) This section has effect subject to the *Remuneration Tribunal Act 1973*.

151 Leave of absence

Principal Member

- (1) The Minister may grant leave of absence to the Principal Member on the terms and conditions that the Minister determines.
- (2) Before the Minister grants leave of absence to the Principal Member under subsection (1), the Minister must consult the host jurisdictions about the grant.

Other members

- (3) The Principal Member may grant leave of absence to another member of the Advisory Council on the terms and conditions that the Principal Member determines.
- (4) The Principal Member must notify the Minister if the Principal Member grants another member of the Advisory Council leave of absence for a period that exceeds 3 months.

152 Disclosure of interests to the Minister

A member of the Advisory Council must give written notice to the Minister of all interests, pecuniary or otherwise, that the member has or acquires and that conflict or could conflict with the proper performance of the member's functions.

153 Disclosure of interests to the Advisory Council

- (1) A member of the Advisory Council who has an interest, pecuniary or otherwise, in a matter being considered or about to be considered by the Council must disclose the nature of the interest to a meeting of the Council.
- (2) The disclosure must be made as soon as possible after the relevant facts have come to the member's knowledge.
- (3) The disclosure must be recorded in the minutes of the meeting.
- (4) Unless the Advisory Council otherwise determines, the member:

- (a) must not be present during any deliberation by the Council on the matter; and
 - (b) must not take part in any decision of the Council with respect to the matter.
- (5) For the purposes of making a determination under subsection (4), the member:
- (a) must not be present during any deliberation of the Council for the purpose of making the determination; and
 - (b) must not take part in making the determination.
- (6) A determination under subsection (4) must be recorded in the minutes of the meeting of the Council.

154 Resignation of members of the Advisory Council

- (1) A member of the Advisory Council may resign his or her appointment by giving the Minister a written resignation.
- (2) The resignation takes effect on the day it is received by the Minister or, if a later day is specified in the resignation, on that later day.
- (3) The later day specified in the resignation must not be more than 90 days after the day the resignation is received by the Minister.

155 Termination of appointment of members of the Advisory Council

- (1) The Minister may terminate the appointment of a member of the Advisory Council:
 - (a) for misbehaviour; or
 - (b) if the member is incapable of performing the duties of his or her office.
- (2) The Minister may terminate the appointment of a member of the Advisory Council if:
 - (a) the member:
 - (i) becomes bankrupt; or
 - (ii) applies to take the benefit of any law for the relief of bankrupt or insolvent debtors; or
 - (iii) compounds with his or her creditors; or
 - (iv) makes an assignment of his or her remuneration for the benefit of his or her creditors; or
 - (b) the member is absent, except on leave of absence, from 3 consecutive meetings of the Council; or
 - (c) the member fails, without reasonable excuse, to comply with section 152 or 153 (which deal with the disclosure of interests); or
 - (d) the Minister is satisfied that the performance of the member has been unsatisfactory for a significant period.

Procedures relating to termination

- (3) The Minister must consult the host jurisdictions about the termination of the appointment of the Principal Member.
- (4) Before the Minister terminates the appointment of a member of the Advisory Council other than the Principal Member, the Minister must:
 - (a) seek the support of all the host jurisdictions for the termination; and
 - (b) be satisfied that the termination is supported by:
 - (i) the Commonwealth; and
 - (ii) a majority of the group consisting of the Commonwealth and the host jurisdictions.

156 Other terms and conditions of members of the Advisory Council

- (1) A member of the Advisory Council holds office on the terms and conditions (if any) in relation to matters not covered by this Act that are determined by the Minister.
- (2) Before the Minister determines terms and conditions on which a member of the Advisory Council holds office, the Minister must be satisfied that the Commonwealth and a majority of host jurisdictions agree to the terms and conditions.

Division 3—Procedures of the Advisory Council

157 Procedures of the Advisory Council

The Advisory Council may determine its own procedures.

Part 4—Chief Executive Officer and staff etc.

Division 1—Chief Executive Officer

158 Establishment

There is to be a Chief Executive Officer of the Agency.

159 Functions of the CEO

- (1) The CEO is responsible for the day-to-day administration of the Agency.
- (2) The CEO has power to do all things necessary or convenient to be done for or in connection with the performance of his or her duties.
- (3) The CEO is to act in accordance with the objectives, strategies and policies determined by the Board under paragraph 124(1)(b).
- (4) The Board may give written directions to the CEO about the performance of the CEO's duties.
- (5) The CEO must comply with a direction under subsection (4).
- (6) A direction under subsection (4) is not a legislative instrument.

160 Appointment of the CEO

- (1) The CEO is to be appointed by the Board.
- (2) The appointment is to be made by written instrument.
- (3) The CEO holds office on a full-time basis.
- (4) The CEO holds office for the period specified in the instrument of appointment. The period must not exceed 3 years.

Note: For reappointment, see section 33AA of the *Acts Interpretation Act 1901*.

- (5) The CEO must not be a member of the Board.
- (6) Despite subsection (1), the first CEO is to be appointed by the Minister.
- (7) Before the Minister makes an appointment under subsection (6), the Minister must consult the host jurisdictions about the appointment.
- (8) This Part (other than subsection (1)) applies to the CEO appointed under subsection (6) as if the CEO had been appointed under subsection (1).

161 Acting appointments

The Board may, by written instrument, appoint a person (other than a Board member) to act as the CEO:

- (a) during a vacancy in the office of the CEO, whether or not an appointment has previously been made to the office; or
- (b) during any period, or during all periods, when the CEO:
 - (i) is absent from duty or from Australia; or
 - (ii) is, for any reason, unable to perform the duties of the office.

Note: For rules that apply to acting appointments, see sections 33AB and 33A of the *Acts Interpretation Act 1901*.

162 Remuneration and allowances

- (1) The CEO is to be paid the remuneration that is determined by the Remuneration Tribunal. If no determination of that remuneration by the Tribunal is in operation, the CEO is to be paid the remuneration that is prescribed by the regulations.
- (2) The CEO is to be paid the allowances that are prescribed by the regulations.
- (3) This section has effect subject to the *Remuneration Tribunal Act 1973*.

163 Leave of absence

- (1) The CEO has the recreation leave entitlements that are determined by the Remuneration Tribunal.
- (2) The Board may grant the CEO leave of absence, other than recreation leave, on the terms and conditions as to remuneration or otherwise that the Board determines.

164 Outside employment

The CEO must not engage in paid employment outside the duties of his or her office without the Board's approval.

165 Disclosure of interests

The CEO must give written notice to the Board of all interests, pecuniary or otherwise, that the CEO has or acquires and that conflict or could conflict with the proper performance of the CEO's duties.

166 Resignation of the CEO

- (1) The CEO may resign his or her appointment by giving the Board a written resignation.
- (2) The resignation takes effect on the day it is received by the Board or, if a later day is specified in the resignation, on that later day.
- (3) The later day specified in the resignation must not be more than 90 days after the day the resignation is received by the Board.

167 Termination of appointment of the CEO

- (1) The Board may terminate the appointment of the CEO:

- (a) for misbehaviour; or
 - (b) if the CEO is incapable of performing the duties of his or her office.
- (2) The Board may terminate the appointment of the CEO if:
- (a) the CEO:
 - (i) becomes bankrupt; or
 - (ii) applies to take the benefit of any law for the relief of bankrupt or insolvent debtors; or
 - (iii) compounds with his or her creditors; or
 - (iv) makes an assignment of his or her remuneration for the benefit of his or her creditors; or
 - (b) the CEO is absent, except on leave of absence, for 14 consecutive days or for 28 days in any 12 months; or
 - (c) the CEO engages, except with the Board's approval, in paid employment outside the duties of his or her office (see section 164); or
 - (d) the CEO fails, without reasonable excuse, to comply with section 165 (which is about the disclosure of interests); or
 - (e) the Board is satisfied that the performance of the CEO has been unsatisfactory for a significant period.
- (3) If the Board terminates the appointment of the CEO, the Board must notify the Minister of the termination.

168 Other terms and conditions of the CEO

The CEO holds office on the terms and conditions (if any) in relation to matters not covered by this Act that are determined by the Board.

Division 2—Staff etc.

169 Staff

- (1) The staff of the Agency must be persons engaged under the *Public Service Act 1999*.
- (2) For the purposes of that Act:
 - (a) the CEO and the staff of the Agency together constitute a Statutory Agency; and
 - (b) the CEO is the Head of that Statutory Agency.

170 Services of other persons to be made available to the Agency

- (1) The Agency may arrange with:
 - (a) an Agency Head (within the meaning of the *Public Service Act 1999*) of an Agency (within the meaning of that Act); or
 - (b) a body established for a public purpose by or under a law of the Commonwealth;for the services of officers or employees of the Agency referred to in paragraph (a) or body to be made available to assist the Agency in the performance of its functions.
- (2) The Agency may arrange with the appropriate authority of a State or Territory for the services of officers or employees of the following to be made available to assist the Agency in the performance of its functions:
 - (a) the Public Service of the State or Territory;
 - (b) a body established for a public purpose by or under a law of the State or Territory.

171 Consultants

The Agency may engage consultants to assist in the performance of its functions.

Part 5—Reporting and planning

Division 1—Reporting

Subdivision A—Reporting by Board members

172 Annual report

- (1) The Board members must include in each annual report on the Agency under section 9 of the CAC Act the things described in subsections (2), (4) and (5).
- (2) The annual report must include the following for the period to which the report relates:
 - (a) details of any directions given under section 121 in the period;
 - (b) details of any statements given under section 125 in the period;
 - (c) information (including statistics) and analysis that relates to either or both of the following in the period:
 - (i) participants;
 - (ii) funding or provision of supports by the Agency.
- (3) The Minister may, by legislative instrument, prescribe particular information, or analysis, described in paragraph (2)(c) that must be included in the annual report.
- (4) The annual report must include a report on the estimated future expenditure of the National Disability Insurance Scheme that was prepared by an actuary at or after the end of the period to which the annual report relates.
- (5) The annual report must include a review that:
 - (a) is of the actuary's report described in subsection (4); and
 - (b) was conducted by another actuary, who, when he or she conducted the review:
 - (i) was a Fellow of The Institute of Actuaries of Australia; and
 - (ii) was not a member of the staff of the Agency under section 169; and
 - (c) includes a statement by the actuary who conducted the review that he or she is satisfied that the Agency made all arrangements necessary for him or her to conduct the review.

Prerequisite to making instrument under subsection (3)

- (6) The Minister must not make an instrument under subsection (3) unless a majority of the members of the Ministerial Council agree to the making of the instrument.

173 Giving certain information to the Ministerial Council

- (1) The Board members must give the Ministerial Council a copy of each of the following when, or as soon as practicable after, the Board members give it to the Minister or the Finance Minister:
 - (a) an annual report given to the Minister under section 9 of the CAC Act;
 - (b) an interim report given to the Minister under section 13 of the CAC Act;
 - (c) particulars of a proposal given to the Minister under section 15 of the CAC Act;
 - (d) information, a report or a document given to the Minister or the Finance Minister under section 16 of the CAC Act.
- (2) The Board members must cause a copy of information the Agency gives the Minister or a Minister of a host jurisdiction under section 175 to be given to the Ministerial Council as soon as practicable after the Agency gives the information to that Minister.
- (3) As soon as practicable after any of the following events happens to a person, the Board members must tell the Ministerial Council that the event has happened to the person:
 - (a) appointment of the person as the CEO by the Board;
 - (b) resignation of the person as the CEO;
 - (c) termination of the person's appointment as the CEO.

174 Quarterly report to the Ministerial Council

- (1) The Board members must:
 - (a) prepare a report on the operations of the Agency for each period of 3 months starting on 1 July, 1 October, 1 January or 1 April; and
 - (b) give the report to the Ministerial Council within 1 month after the end of the period to which the report relates.
- (2) The report must include information (including statistics) that relates to either or both of the following in the period to which the report relates:
 - (a) participants in each host jurisdiction;
 - (b) funding or provision of supports by the Agency in relation to each host jurisdiction.
- (3) The Minister may, by legislative instrument, prescribe particular information described in subsection (2) that must be included in the report.

Prerequisite to making instrument under subsection (3)

- (4) The Minister must not make an instrument under subsection (3) unless a majority of the members of the Ministerial Council agree to the making of the instrument.

First report

- (5) If this section commences on a day other than a day (a **quarter start day**) mentioned in paragraph (1)(a):
- (a) the Board members are not required to prepare a report for the period ending immediately before the next quarter start day; and
 - (b) the first report under this section must be for the period:
 - (i) starting on the day this section commences; and
 - (ii) ending immediately before the second quarter start day after the day this section commences.

Subdivision B—Reporting by the Agency

175 Giving information requested by Commonwealth, State or Territory Ministers

- (1) The Agency must give the Minister information requested by the Minister about:
- (a) expenditure, relating to a particular host jurisdiction, of money received by the Agency from the Commonwealth or that host jurisdiction; or
 - (b) activities of the Agency relating to a particular host jurisdiction.
- (2) The Agency must give a Minister of a host jurisdiction who is a member of the Ministerial Council information requested by that Minister about:
- (a) expenditure of money received by the Agency from that jurisdiction; or
 - (b) expenditure, relating to that jurisdiction, of money received by the Agency from the Commonwealth; or
 - (c) activities of the Agency relating to that jurisdiction.

Subdivision C—Reporting by the Minister

176 Giving certain information to the Ministerial Council

- (1) As soon as practicable after giving a direction to the Agency under section 121 or a statement to the Board under section 125, the Minister must give a copy of the direction or statement to the Ministerial Council.
- (2) As soon as practicable after any of the following events happens to a person, the Minister must tell the Ministerial Council that the event has happened to the person:
- (a) appointment of the person as:
 - (i) the Chair or another member of the Board; or
 - (ii) the Principal Member or another member of the Advisory Council; or
 - (iii) the first CEO;

- (b) appointment of the person to act as:
 - (i) the Chair or another member of the Board; or
 - (ii) the Principal Member or another member of the Advisory Council;
- (c) grant of leave of absence for the person for a period that exceeds 3 months under section 131 or 151;
- (d) resignation of the person as a Board member or a member of the Advisory Council;
- (e) termination of the person's appointment as a Board member or a member of the Advisory Council.

Division 2—Planning

177 Corporate plan

- (1) The Board must prepare a corporate plan for the Agency at least once a year.
- (2) The plan must cover a period of at least 3 years.
- (3) In preparing the plan, the Board must have regard to a statement given under section 125.

Content of the corporate plan

- (4) Without limiting subsection (1), the plan must include details of the following matters:
 - (a) the objectives, strategies and policies to be followed by the Agency;
 - (b) the performance indicators for the assessment of the Agency's performance of its functions;
 - (c) the performance of the Agency in the year before the year in which the plan is prepared as assessed against those performance indicators;
 - (d) the financial sustainability of the National Disability Insurance Scheme (including estimates of the current and future expenditure of the National Disability Insurance Scheme);
 - (e) the risks and issues relevant to the financial sustainability of the National Disability Insurance Scheme and the management of those risks and issues.

Copy to be given to the Ministerial Council etc.

- (5) The Board must give a copy of the plan to the Ministerial Council before the start of the period covered by the plan.
- (6) If the Board varies the plan, the Board must notify the Ministerial Council of the variation.

Part 6—Finance

178 Payments to the Agency by the Commonwealth

- (1) There is payable to the Agency such money as is appropriated by the Parliament for the purposes of the Agency.
- (2) The Finance Minister may give directions about the amounts in which, and the times at which, money payable under subsection (1) is to be paid to the Agency.
- (3) If a direction under subsection (2) is given in writing, the direction is not a legislative instrument.

179 Payments to the Agency by the host jurisdictions

The Agency may receive money paid to it by a host jurisdiction for the purpose of funding reasonable and necessary supports for participants in the National Disability Insurance Scheme launch who are in the host jurisdiction.

180 Application of money by the Agency

- (1) The money of the Agency consists of:
 - (a) money paid to the Agency under section 178; and
 - (b) money received by the Agency under section 179; and
 - (c) any other money paid to, or received by, the Agency.
- (2) Subject to subsection (3), the money of the Agency is to be applied only:
 - (a) in payment or discharge of any expenses, charges and obligations incurred or undertaken by the Agency in the performance of its functions and the exercise of its powers; and
 - (b) in payment of remuneration and allowances payable under this Act.
- (3) The money of the Agency that was received by the Agency under section 179 is to be applied only for the purpose mentioned in that section.
- (4) Subsections (2) and (3) do not prevent investment of surplus money of the Agency under section 18 of the CAC Act.

Part 7—Miscellaneous

181 Taxation

The Agency is not subject to taxation under any law of the Commonwealth or of a State or Territory.

Note: However, the Agency may be subject to taxation under certain laws (see, for example, section 177-5 of the *A New Tax System (Goods and Services Tax) Act 1999* and section 66 of the *Fringe Benefits Tax Assessment Act 1986*).

Comment [DR42]:

BIA COMMENT: It would be worth mentioning that the Income Tax Assessment Act 1936 and the Social Security Act 1991 will be amended so that — as recommended by the PC — the following are not treated as income for assessment of taxes or eligibility for income support or other welfare benefits:

- self-directed funding paid by the NDIA and, in the interim, by state and territory governments
- early compassionate release of eligible superannuation amounts for disability expenditures which meet the criteria set down by the Superannuation Industry (Supervision) Act 1993.” (PC, p. 75)

Moreover, insurance proceeds should not be subject to taxation – as with comparable schemes such as Medicare.

Chapter 7—Other matters

Part 1—Debt recovery

Division 1—Debts

182 Debts due to the Agency

- (1) If:
- (a) a payment is made to a person that is, or purports to be, a payment of an NDIS amount to or in respect of a participant; and
 - (b) the person is not entitled for any reason to the payment of the NDIS amount;
- the amount of the payment is a debt due to the Agency by the person and the debt is taken to arise when the person receives the payment.
- (2) Without limiting paragraph (1)(b), a person is taken not to have been entitled to the payment of an NDIS amount if the payment should not have been made for one or more of the following reasons:
- (a) the payment was made as a result of a computer error or an administrative error;
 - (b) the payment was made as a result of:
 - (i) a contravention of this Act, the regulations or the National Disability Insurance Scheme rules; or
 - (ii) a false or misleading statement or a misrepresentation;
 - (c) the participant died before the payment was made.
- (3) If a person does not comply with subsection 46(1) in relation to an NDIS amount, an equal amount is a debt due to the Agency by the person.
- (4) The National Disability Insurance Scheme rules may provide that, if records are not retained for the period prescribed as mentioned in subsection 46(2) in relation to an NDIS amount, an equal or lesser amount is a debt due to the Agency by the person.

Division 2—Methods of recovery

183 Legal proceedings

- (1) A debt under this Act is recoverable by the Agency by means of legal proceedings brought by the CEO on behalf of the Agency in a court of competent jurisdiction.
- (2) Subject to subsections (3), (4) and (5), legal proceedings for the recovery of the debt are not to be commenced after the end of the period (the **recovery period**) of 6 years starting on the first day an officer becomes aware, or could reasonably be expected to have become aware, of the circumstances that gave rise to the debt.
- (3) If, within the recovery period, part of the debt is paid, legal proceedings for the recovery of the balance of the debt may be commenced within the period of 6 years starting on the day of payment.
- (4) If, within the recovery period, the person who owes the debt acknowledges that he or she owes it, legal proceedings for the recovery of the debt may be commenced within the period of 6 years starting on the day of acknowledgement.
- (5) If, within the recovery period, any of the following activities occurs:
 - (a) a review of a file relating to action for the recovery of the debt;
 - (b) other internal Agency activity relating to action for the recovery of the debt;action under this section for the recovery of the debt may be commenced within the period of 6 years after the end of the activity.

184 Arrangement for payment of debt

- (1) The CEO may enter into an arrangement with a person under which the person is to pay a debt, owed by the person to the Agency under this Act, or the outstanding amount of such a debt, in a way set out in the arrangement.
- (2) An arrangement entered into under subsection (1) has effect, or is taken to have had effect, on and after the day specified in the arrangement as the day the arrangement commences (whether that day is the day the arrangement is entered into or an earlier or later day).
- (3) If an arrangement entered into under subsection (1) does not specify a day as mentioned in subsection (2), it has effect on and after the day on which it is entered into.
- (4) The CEO may terminate or alter an arrangement entered into under subsection (1):
 - (a) at the debtor's request; or
 - (b) after giving 28 days' notice to the debtor of the proposed termination or alteration; or
 - (c) without notice, if the CEO is satisfied that the person has failed to disclose material information about his or her true capacity to repay the debt.

185 Recovery of amounts from financial institutions

(1) If:

- (a) an NDIS amount or NDIS amounts are paid to a financial institution for the credit of an account kept with the institution; and
- (b) the CEO is satisfied that the payment or payments were intended to be made to someone who was not the person or one of the persons in whose name or names the account was kept;

the CEO may give a written notice to the institution setting out the matters mentioned in paragraphs (a) and (b) and requiring the institution to pay to the Agency, within a reasonable period stated in the notice, the lesser of the following amounts:

- (c) an amount specified in the notice, being an amount equal to the NDIS amount or the sum of the NDIS amounts;
- (d) the amount standing to the credit of the account when the notice is received by the institution.

(2) If:

- (a) an NDIS amount or NDIS amounts that are intended to be made to or in respect of a person (the **first person**) are made to a financial institution for the credit of an account that was kept with the institution by the first person or by the first person and one or more other persons; and
- (b) the first person died before the payment or payments were made;

the CEO may give a written notice to the institution setting out the matters mentioned in paragraphs (a) and (b) and requiring the institution to pay to the Agency, within a reasonable period stated in the notice, the lesser of the following amounts:

- (c) an amount specified in the notice that is equal to the NDIS amount or the sum of the NDIS amounts;
- (d) the amount standing to the credit of the account when the notice is received by the institution.

(3) As soon as possible after issuing a notice under subsection (2), the CEO must inform the deceased estate in writing of:

- (a) the amount sought to be recovered from the deceased person's account; and
- (b) the reasons for the recovery action.

(4) A financial institution must comply with a notice given to it under subsection (1) or (2).

Penalty: 300 penalty units.

- (5) It is a defence to a prosecution of a financial institution for failing to comply with a notice given to it under subsection (1) or (2) if the financial institution proves that it was incapable of complying with the notice.
- (6) If a notice is given to a financial institution under subsection (1) (payment made to wrong account) or under subsection (2) (death of person in whose name the account was kept) in respect of an NDIS amount or NDIS amounts, any amount recovered by the Agency from the institution in respect of the debt reduces any debt owed to the Agency by any other person in respect of the NDIS amount or NDIS amounts.

Division 3—Information relating to debts

186 Power to obtain information from a person who owes a debt to the Agency

The CEO may require a person who owes a debt to the Agency under this Act to do one or more of the following:

- (a) give to the Agency information that is relevant to the person's financial situation;
- (b) produce to the Agency a document that the CEO has reasonable grounds to believe is in the person's custody, or under the person's control, and is relevant to the person's financial situation;
- (c) if the person's address changes—inform the Agency of the new address within 14 days after the change.

187 Power to obtain information about a person who owes a debt to the Agency

If the CEO has reasonable grounds to believe that a person has information, or has custody or control of a document:

- (a) that would help the Agency locate another person (the *debtor*) who owes a debt to the Agency under this Act; or
- (b) that is relevant to the debtor's financial situation;

the CEO may require the person to give the information, or produce the document, to the Agency.

188 Written notice of requirement

- (1) A requirement under this Division must be made by written notice given to the person of whom the requirement is made.
- (2) The notice must specify:
 - (a) the nature of the information or document that is required to be given or produced; and
 - (b) how the person is to give the information or produce the document; and
 - (c) the period within which the person is to give the information or produce the document to the Agency; and
 - (d) the officer to whom the information is to be given or the document is to be produced; and
 - (e) that the notice is given under this section.
- (3) The period specified under paragraph (2)(c) must be a period of at least 14 days beginning on the day on which the notice is given.

Comment [DR43]:

BIA COMMENT: Does this really apply to section 186(c)? Wouldn't the Agency need to know that someone has changed address in order to give them a written notice that the Agency must be notified about their change of address?

- (4) The notice may require the person to give the information by appearing before a specified officer to answer questions.
- (5) If the notice requires the person to appear before an officer, the notice must specify a time and place at which the person is to appear. The time must be at least 14 days after the notice is given.

189 Offence—refusal or failure to comply with requirement

- (1) A person must not refuse or fail to comply with a requirement under this Division to give information or produce a document.

Penalty: 30 penalty units.

Note: If a body corporate is convicted of an offence against this subsection, subsection 4B(3) of the *Crimes Act 1914* allows a court to impose a fine of up to 5 times the penalty stated above.

- (2) Subsection (1) does not apply if the person has a reasonable excuse.

Note: A defendant bears an evidential burden in relation to the matter in this subsection: see subsection 13.3(3) of the *Criminal Code*.

Division 4—Non-recovery of debts

190 CEO may write off debt

- (1) Subject to subsection (2), the CEO may, on behalf of the Agency, decide to write off a debt, for a stated period or otherwise.
- (2) The CEO may decide to write off a debt under subsection (1) if, and only if:
 - (a) the debt is irrecoverable at law; or
 - (b) the debtor has no capacity to repay the debt; or
 - (c) the debtor's whereabouts are unknown after all reasonable efforts have been made to locate the debtor; or
 - (d) it is not cost effective for the Agency to take action to recover the debt.
- (3) For the purposes of paragraph (2)(a), a debt is irrecoverable at law if, and only if:
 - (a) the debt cannot be recovered by means of deductions, or legal proceedings, because the relevant 6 year period mentioned in section 183 has elapsed; or
 - (b) there is no proof of the debt capable of sustaining legal proceedings for its recovery; or
 - (c) the debtor is discharged from bankruptcy and the debt was incurred before the debtor became bankrupt and was not incurred by fraud; or
 - (d) the debtor has died leaving no estate or insufficient funds in the debtor's estate to repay the debt.
- (4) A decision made under subsection (1) takes effect:
 - (a) if no day is specified in the decision—on the day the decision is made; or
 - (b) if a day is specified in the decision—on the day so specified (whether that day is before, on or after the day the decision is made).
- (5) Nothing in this section prevents anything being done at any time to recover a debt that has been written off under this section.

191 Power to waive Agency's right to recover debt

- (1) On behalf of the Agency, the CEO may waive the Agency's right to recover the whole or a part of a debt from a debtor only in the circumstances described in section 192, 193, 194 or 195.
- (2) A waiver takes effect:
 - (a) on the day specified in the waiver (whether that day is before, on or after the day the decision to waive is made); or

- (b) if the waiver does not specify when it takes effect—on the day the decision to waive is made.

Note: If the CEO waives the Agency's right to recover all or part of a debt, this is a permanent bar to recovery of the debt or part of the debt and the debt or part of the debt effectively ceases to exist.

192 Waiver of debt arising from error

The CEO must waive the right to recover the proportion of a debt that is attributable solely to an administrative error made by the Agency if the debtor received in good faith the payment or payments that gave rise to that proportion of the debt and:

- (a) the debt is not raised within 6 weeks from the first payment that caused the debt; or
- (b) if the debt arose because a person has complied with a notification obligation—the debt is not raised within 6 weeks from the end of the notification period;

whichever is the later.

Note: This section does not allow waiver of a part of a debt that was caused partly by administrative error and partly by one or more other factors (such as error by the debtor).

193 Waiver of small debt

The CEO must waive the right to recover a debt if:

- (a) the debt is, or is likely to be, less than \$200; and
- (b) it is not cost effective for the Agency to take action to recover the debt.

194 Waiver in relation to settlements

- (1) If the Agency has agreed to settle a civil action against a debtor for recovery of a debt for less than the full amount of the debt, the CEO must waive the right to recover the difference between the debt and the amount that is the subject of the settlement.
- (2) If the CEO has agreed to settle proceedings before the Administrative Appeals Tribunal relating to recovery of a debt on the basis that the debtor will pay less than the full amount of the debt, the CEO must waive the right to recover the difference between the debt and the amount that is the subject of the settlement.
- (3) If:
 - (a) the Agency has recovered at least 80% of the original value of a debt from a debtor; and
 - (b) the Agency and the debtor agree that the recovery is in full satisfaction for the whole of the debt; and
 - (c) the debtor cannot repay a greater proportion of the debt;

the CEO must waive the remaining 20% or less of the value of the original debt.

- (4) If the CEO and a debtor agree that the debtor's debt will be fully satisfied if the debtor pays the Agency an agreed amount that is less than the amount of the debt outstanding at the time of the agreement (the **unpaid amount**), the CEO must waive the right to recover the difference between the unpaid amount and the agreed amount.
- (5) The CEO must not make an agreement described in subsection (4) unless the CEO is satisfied that the agreed amount is at least the present value of the unpaid amount if it is repaid in instalments of amounts, and at times, determined by the CEO.
- (6) For the purposes of subsection (5), the present value of the unpaid amount is the amount worked out in accordance with the method prescribed by the National Disability Insurance Scheme rules.

195 Waiver in special circumstances

The CEO may waive the right to recover a debt if:

- (a) the debt did not arise in whole or part as a result of:
 - (i) a contravention of this Act, the regulations or the National Disability Insurance Scheme rules; or
 - (ii) a false or misleading statement or a misrepresentation; and
- (b) there are special circumstances (other than financial hardship or the disability of the debtor) that the CEO is satisfied make waiver appropriate; and
- (c) the CEO is satisfied that waiver is more appropriate than writing off the debt.

Part 2—General matters

196 Method of notification by CEO

If this Act, the regulations or the National Disability Insurance Scheme rules require or permit the CEO to notify a person, the CEO may notify the person:

- (a) by sending the notice by prepaid post addressed to the person at his or her postal address last known to the CEO; or
- (b) by giving the notice to the person personally; or
- (c) in any other way the CEO considers appropriate.

197 CEO not required to make a decision

- (1) If this Act, the regulations or the National Disability Insurance Scheme rules require a request or application to be in a form approved by the CEO, the CEO is not required to make a decision on the request or application if it is not in that form.
- (2) If this Act, the regulations or the National Disability Insurance Scheme rules permit the CEO to require information or documents for the purposes of, or for purposes relating to, making a decision or doing a thing, the CEO is not required to make the decision or do the thing until the information or documents are provided.

198 Protection of participant against liability for actions of persons

Nothing in this Part renders a participant guilty of an offence against this Act in relation to any act or omission of a person who does a thing because of section 74.

199 Protection against criminal liability

A person who does a thing because of section 74 is not subject to any criminal liability under this Act in relation to:

- (a) any act or omission of the participant concerned; or
- (b) anything done, or omitted to be done, in good faith, because of section 74.

200 Evidentiary effect of CEO's certificate

- (1) For the purposes of paragraph 21B(1)(c) of the *Crimes Act 1914*, as it applies in relation to an offence against Part 7.3 or 7.4 of the *Criminal Code* relating to the Agency or this Act, a certificate signed by the CEO is evidence of the matters specified in the certificate.
- (2) The certificate may specify:
 - (a) the person to whom, or in relation to whom, an NDIS amount has been paid because of an act or omission for which the person or another person has been convicted of an offence against Part 7.3 or 7.4 of the *Criminal Code* relating to the Agency or this Act; and
 - (b) the amount paid; and

- (c) the act or omission.

Note: Parts 7.3 and 7.4 of the *Criminal Code* deal with certain fraudulent conduct and false or misleading statements.

201 Delegation by the Minister

- (1) The Minister may, in writing, delegate to the CEO his or her powers under section 209.
- (2) The Minister must not delegate to the CEO his or her powers under section 209 unless each host jurisdiction has agreed to the delegation.
- (3) When exercising powers under a delegation, the CEO must comply with any directions of the Minister.

202 Delegation by the CEO

- (1) The CEO may, in writing, delegate to an officer any or all of his or her powers or functions under this Act, the regulations or the National Disability Insurance Scheme rules.
- (2) Despite subsection (1), the CEO may delegate the CEO's powers under Part 2 of Chapter 4 (privacy) only to an officer who is a member of staff of the Agency under section 169.
- (3) A person exercising powers or functions under a delegation under this section must comply with any directions of the CEO.

203 Application of Act to unincorporated bodies

- (1) This Act applies to an entity that is a registered provider of supports, or an entity that wishes to apply for approval as a registered provider of supports as if it were a person, but it applies with the changes mentioned in subsections (3), (4) and (5).
- (2) In addition, Division 2 of Part 1 of Chapter 4 applies to an entity as if it were a person, but it applies with the changes mentioned in subsections (3), (4) and (5).
- (3) An obligation that would be imposed on the entity is imposed instead on:
 - (a) if the entity is a partnership—each partner; or
 - (b) in any other case—each member of the committee of management of the entity;but may be discharged by any of the partners or any of those members.
- (4) A thing that the entity would be permitted to do may instead be done by:
 - (a) if the entity is a partnership—any partner; or
 - (b) in any other case—any member of the committee of management of the entity.
- (5) An offence against this Act that would otherwise be committed by the entity is taken instead to have been committed by:

- (a) if the entity is a partnership—any partner:
 - (i) who was knowingly concerned in, or party to, the act or omission constituting the offence; or
 - (ii) who aided, abetted, counselled or procured that act or omission; or
- (b) in any other case—any member of the committee of management of the entity:
 - (i) who was knowingly concerned in, or party to, the act or omission constituting the offence; or
 - (ii) who aided, abetted, counselled or procured that act or omission.

204 Time frames for decision making

- (1) If this Act requires the CEO to make a decision or do a thing within a specified period, the National Disability Insurance Scheme rules may prescribe that the decision is to be made, or the thing done, within a longer period that is not more than double the length of the specified period.
- (2) If this Act requires or provides for a person other than the CEO to do a thing within a specified period, the National Disability Insurance Scheme rules may prescribe that the thing is to be done within a longer period.

Part 3—Constitutional matters

205 Act binds Crown

- (1) This Act binds the Crown in each of its capacities.
- (2) However, this Act does not make the Crown liable to be prosecuted for an offence.

206 Alternative constitutional basis

- (1) Without limiting its effect apart from this subsection, this Act also has the effect it would have if its operation were expressly confined to:
 - (a) the provision of pharmaceutical, sickness or hospital benefits; or
 - (b) the provision of medical services or dental services (without any form of civil conscription).
- (2) Without limiting its effect apart from this subsection, this Act also has the effect it would have if its operation were expressly confined to acts, matters or things occurring in, or in relation to, a Territory or a place acquired by the Commonwealth for a public purpose.
- (3) Without limiting its effect apart from this subsection, this Act also has the effect it would have if its operation were expressly confined to acts, matters or things in relation to trade or commerce:
 - (a) between Australia and other countries; or
 - (b) among the States; or
 - (c) between a Territory and a State or another Territory.
- (4) Without limiting its effect apart from this subsection, this Act also has the effect it would have if its operation were expressly confined to acts, matters or things in relation to communication by means of a postal, telegraphic, telephonic or other like service (within the meaning of paragraph 51(v) of the Constitution).
- (5) Without limiting its effect apart from this subsection, this Act also has the effect it would have if its operation were expressly confined to acts, matters or things in relation to census and statistics (within the meaning of paragraph 51(xi) of the Constitution).
- (6) Without limiting its effect apart from this subsection, this Act also has the effect it would have if its operation were expressly confined to acts, matters or things in relation to a corporation to which paragraph 51(xx) of the Constitution applies.
- (7) Without limiting its effect apart from this subsection, this Act also has the effect it would have if its operation were expressly confined to acts, matters or things in relation to:
 - (a) the Commonwealth; or
 - (b) an authority of the Commonwealth.

207 Concurrent operation of State laws

It is the intention of the Parliament that this Act is not to apply to the exclusion of a law of a State or Territory to the extent that that law is capable of operating concurrently with this Act.

Part 4—Review of the Act

208 Review of operation of Act

- (1) The Minister must cause an independent review of the operation of this Act to be undertaken commencing on the second anniversary of the commencement of Chapter 3.
- (2) The review is to be undertaken by a person or persons chosen by the Minister with the agreement of the Ministerial Council.
- (3) The terms of reference of the review must be agreed by the Ministerial Council.
- (4) The person or persons undertaking the review must give the Minister a written report of the review within 6 months of the commencement of the review.
- (5) Upon receiving the report, the Minister must give a copy to the Ministerial Council and ask the Ministerial Council to:
 - (a) make recommendations in response to the report; and
 - (b) obtain COAG's response to the report within the period of 6 months after giving the copy of the report to the Ministerial Council.
- (6) The Minister must consider the report.
- (7) The Minister must cause copies of the report to be tabled in each House of the Parliament within 15 sitting days of that House after receiving the report.
- (8) The Minister must cause copies of COAG's response to the report to be tabled in each House of the Parliament within 6 months of giving the copy of the report to the Ministerial Council.
- (9) If the Minister fails to cause copies of the response to be tabled in each House of the Parliament within the period referred to in subsection (8), the Minister must cause an explanation of the failure to be tabled in each House of the Parliament within 15 sitting days of that House after the end of that period.

Comment [DR44]:

BIA COMMENT: As the PC recommended, "proposed legislative changes [to the Bill] should be accompanied by an independent assessment of the impact of the changes on the sustainability of the scheme, which should be made publicly available." (PC, p. 77)

Part 5—Legislative instruments

209 The National Disability Insurance Scheme rules

- (1) The Minister may, by legislative instrument, make rules called the National Disability Insurance Scheme rules prescribing matters:
 - (a) required or permitted by this Act to be prescribed by the National Disability Insurance Scheme rules; or
 - (b) necessary or convenient to be prescribed in order to carry out or give effect to this Act.
- (2) Despite section 14 of the *Legislative Instruments Act 2003*, National Disability Insurance Scheme rules may make provision for or in relation to a matter by applying, adopting or incorporating any matter contained in an instrument or other writing as in force or existing from time to time.
- (3) When making National Disability Insurance Scheme rules, the Minister must have regard to the need to ensure the financial sustainability of the National Disability Insurance Scheme.
- (4) The Minister must not make Category A National Disability Insurance Scheme rules unless the Commonwealth and each host jurisdiction have agreed to the making of the rules.
- (5) The Minister must not make Category B National Disability Insurance Scheme rules relating to an area, law or program of a host jurisdiction unless the host jurisdiction has agreed to the making of the rules.
- (6) The Minister must not make Category C National Disability Insurance Scheme rules unless the Commonwealth and a majority of host jurisdictions have agreed to the making of the rules.
- (7) The Minister must not make Category D National Disability Insurance Scheme rules unless each host jurisdiction has been consulted in relation to the making of the rules.
- (8) The following table sets out the categories of National Disability Insurance Scheme rules for the purposes of this section.

Categories of National Disability Insurance Scheme rules

Item	Category of rules	Description
1	Category A National Disability Insurance Scheme rules	<p>Rules made for the purposes of any of the following provisions:</p> <ul style="list-style-type: none"> (a) section 17; (b) paragraph 23(1)(c), except to the extent that the rules are of a kind mentioned in subsection 23(3); (c) section 27; (d) section 33; (e) section 35; (f) section 66; (g) section 67; (h) section 74; (i) section 75; (j) section 76; (k) section 80; (l) section 88; (m) section 93. <p>All other rules, except Category B National Disability Insurance Scheme rules, Category C National Disability Insurance Scheme rules and Category D National Disability Insurance Scheme rules</p>
2	Category B National Disability Insurance Scheme rules	<p>Rules made for the purposes of any of the following provisions:</p> <ul style="list-style-type: none"> (a) paragraph 21(2)(b); (b) section 22; (c) subsection 23(3); (d) section 58.
3	Category C National Disability Insurance Scheme rules	<p>Rules made for the purposes of any of the following provisions:</p> <ul style="list-style-type: none"> (a) section 70; (b) section 73.

Item	Category of rules	Description
4	Category D National Disability Insurance Scheme rules	Rules made for the purposes of any of the following provisions: (a) section 40; (b) section 44; (c) section 45; (d) section 46; (e) section 48; (f) section 106; (g) section 107; (h) section 182; (i) section 194; (j) section 204.

210 Regulations

- (1) The Governor-General may make regulations prescribing matters:
- (a) required or permitted by this Act to be prescribed; or
 - (b) necessary or convenient to be prescribed for carrying out or giving effect to this Act.
- (2) Before the Governor-General makes regulations under subsection (1), the Minister must:
- (a) if the regulations are for the purposes of section 130, 150 or 162 (which relate to the remuneration and allowances of Board members, members of the Advisory Council and the CEO)—consult the host jurisdictions about the making of the regulations; or
 - (b) otherwise—be satisfied that the Commonwealth and each host jurisdiction have agreed to the making of the regulations.