Submission to Senate Standing Committee on Community Affairs

National Disability Insurance Scheme Bill 2012

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A. Introduction

DANA welcomes this opportunity to respond to the draft National Disability Insurance Scheme (NDIS) Bill. The significance of the NDIS cannot be overstated. It has the potential to be the most important change to the provision of support for people with disability to occur in any nation, at any time. The scale of the proposed Scheme, together with the time scale chosen for its full implementation, suggests that the legislative framework for the NDIS will not be complete with the passage of this first NDIS Bill: it will necessarily emerge over a number of years in response to learnings gained in the launch sites and other transition processes. Nevertheless, it is important that prospective NDIS participants and their families be provided with as much certainty as possible in regard to the shape and character of the Scheme. In that context, it is important that this initial legislation offers the closest possible representation of what the Scheme will be and do.

This submission provides, in Section J below, a detailed response to specific clauses in the draft NDIS Bill. The earlier sections of the submission attempt to group the main issues identified by DANA around a series of policy principles that we believe the draft legislation should adhere to. We argue that important elements of the draft legislation fail to give expression to these policy principles, and we offer suggestions about changes that would contribute to remedying these departures. Inevitably, some of the concerns identified by DANA involve legislative elements that appear to be in conflict with more than one of these nominated policy principles. In such cases, we have attempted to highlight the most important of these conflicts.

B. About Disability Advocacy Network Australia

Disability Advocacy Network Australia (DANA) is a company limited by guarantee, established in October 2008 and incorporated in May 2009 to strengthen and support disability advocacy organisations across Australia. DANA's purposes include to promote the role and value of independent advocacy and to provide a collective voice for members. The DANA membership includes disability advocacy organisations from each of the States and Territories of Australia.

DANA works to a vision of a nation that includes and values persons with disabilities and respects human rights for all.

DANA has a membership of almost 70 agencies whose primary purpose is to provide independent advocacy support to people with disabilities. These agencies receive their core recurrent funding from State and/or Commonwealth Government advocacy programs targeted at people with disabilities, frail older people and people with mental health issues. Some agencies receive only a single source of funding for a specific target group while others receive multiple sources of funding for different target sectors (disability, mental health, aged care, alcohol and drug).

Independent advocacy agencies address the advocacy needs of those most marginalised and disadvantaged people with disabilities who are more likely to have experienced abuse, neglect and/or breaches of their fundamental human rights. They do this through a variety of delivery models that include systemic advocacy, legal advocacy, individual advocacy support by paid advocates, citizen advocacy using volunteer advocates, self-advocacy development and family advocacy development and support. Some agencies focus wholly on the provision of independent human rights focused information for people with disabilities.

C. FRAMING THE DRAFT NDIS BILL: SIX KEY POLICY PRINCIPLES

What should we look for in a legislative instrument as important as the NDIS Bill? DANA has attempted to frame an assessment of the draft legislation in terms of the ways in which the Bill does, and does not, adhere to a set of policy principles that we contend have broad acceptance within government and the wider Australian community.

- **Policy coherence:** Legislation should accurately reflect the intent of stated government policies
- **Natural justice:** All legislative instruments should contribute to, not impede, provision of natural justice to citizens
- **Global citizenship:** Commonwealth legislation should have regard to obligations arising from international agreements
- **Cooperative federalism:** Legislation impacting on areas of activity where jurisdictional responsibilities are shared between Commonwealth and States should transparently and comprehensively address the reallocation of those responsibilities and map the transition processes involved
- **Whole-of-government policy instruments:** Whole-of-government approaches to public policy and public provision of services are preferred to agency-specific approaches and, where an attempt is made to utilise an agency-specific approach, all possible impacts on other areas of government should be acknowledged and provided for in the appropriate legislative instruments
- **Contemporary governance of agencies:** Legislation that creates or gives authority to a government agency should ensure that governance arrangements are transparent, accountable to stakeholders, and structured in such a way as to maximise the effectiveness of the agency

We find that there are important instances where the draft legislation, viewed through the lenses offered by these policy principles, requires amendment. The following sections examine each of these policy principles in turn.

D. *POLICY COHERENCE*: LEGISLATION SHOULD ACCURATELY REFLECT THE INTENT OF STATED GOVERNMENT POLICIES

While the draft NDIS Bill is clearly an Australian Government legislative instrument, it seeks to give expression to a determination shared by all Commonwealth and State jurisdictions. That shared determination is outlined – in its more recent and comprehensive form – in the COAG High-level Principles for a National Disability Insurance Scheme.[1] This document outlines the specific support for the major recommendations provided in the final report arising from the Productivity Commission inquiry into Disability Care and Support. We acknowledge that while the COAG document states that "consideration of the Productivity Commission's recommendations provides a good starting point", this does not imply wholesale acceptance of all of the Commission's recommendations.

DANA contends that the draft Bill fails to fully reflect a number of the COAG Principles. We highlight the following areas of concern:

[1] Council of Australian Governments (2012) *High-level Principles for a National Disability Insurance Scheme*, April 2012, Canberra.

NDIS as insurance scheme

The second listed High-level Principle states that:

> "This reform should take a social insurance approach that would share the costs of disability services and supports across the community. In addition, the reform should adopt insurance principles that estimate the cost of reasonable and necessary supports, promote an efficient allocation of resources based on managing the long-term costs of supporting people with disabilities and their carers while maximising the economic and social benefits." [2]

While the draft Bill in S3(2) restates the intention of the Australian Government to use an insurance approach, nothing in the body of the Bill provides guidance as to how the funding model will actually vary from existing approaches. DANA acknowledges that funding arrangements are typically detailed in separate appropriation bills, but contends that the draft NDIS Bill is an important opportunity to indicate the ways in which actual and prospective NDIS participants could have confidence that their lifetime needs can be appropriately addressed.

We note that there is a recurring theme emerging in Australian Government and COAG documents relating to NDIS wherein "social insurance" appears to be seen as synonymous with whatever delivers consistency and efficiencies. For example, in Principle 3(a), we find a commitment that governance arrangements should

> "Establish a National Disability Insurance Scheme that is administered in a way that manages life time costs of care and support through insurance principles, such as consistent application of eligibility criteria and timely and efficient delivery of reasonable and necessary supports, including early intervention, to ensure the ongoing financial sustainability of the scheme;" [3]

While DANA enthusiastically supports consistency, efficiency, early intervention and financial sustainability, we question whether these can be understood as "insurance principles" that would give NDIS a character different from other well-designed and well-managed programs. Consideration should be given to amending the Bill so that the actual distinguishing features of an insurance scheme are evident.

NDIS as source of entitlement for eligible participants

The COAG High-Level Principles clearly signal that NDIS will represent a fundamental shift from a budget-capped approach to disability support on a needs-based, entitlement approach:

> "A National Disability Insurance Scheme should be needs based and provide people with disability access to individualised care and support."

and

> "People with disability and their carers will have certainty that people with disability will receive the individualised care and support they need over their lifetime;" [4]

The language of the draft NDIS Bill, however, is aspirational rather than definitive about these matters. The objects of the legislation consistently state that Australians with disability "should" be supported in various ways, "should" have the same rights as other Australians,

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[2] Ibid, p1
[3] Ibid, p3
[4] Ibid, p1

and so on. At no stage in the draft Bill is there the legislative formulation that we have come to expect with genuine entitlements. In other entitlement-based legislation (e.g., Social Security Act 1991) we see the consistent use of "A person is qualified for [pension, benefit] if the person has [description of eligibility criteria]. [5]

We note that S21 offers the heading "When a person meets the access criteria", giving the impression that the relationship between eligibility and entitlement will be clarified. Instead, this section merely outlines the criteria. No link is made in the legislation between eligibility and entrance to the Scheme (i.e., being accepted by the CEO as a participant), nor between entrance and the provision of funding for supports. That is, eligibility does not create an entitlement to participation and participation does not create any entitlement to support.

Additionally, the draft Bill fails to clarify whether participants will, now or in the future, be expected to make co-contributions to the fund that pays for their supports. The Productivity Commission was clear in its urging that NDIS supports be provided without cost to the participant. The COAG High-level Principles document fails to formally embrace this position. As in the draft Bill itself, the focus in the COAG document shifts to notions of financial sustainability without clarifying whether NDIS participants will play a role in meeting costs. In the draft Bill, the legislative principle that

> "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." [6]

can be interpreted as positioning the NDIS as a program to augment existing supports, not to fund a comprehensive array of supports indicated in the participant's agreed support plan. At issue here, is whether participants will be obliged to maximise that 'independence' – i.e., whether income/asset testing will be a feature of the Scheme. DANA opposes the use of means testing and recommends that the draft legislation be tightened to eliminate any scope for such testing or the imposition of participant co-payments.

Making entitlement real for those in need of advocacy support and representation

Missing from the stated objects of the draft Bill, as well as from substantive clauses, is any recognition that an entitlement to funded supports will necessarily entail a guarantee that independent disability advocacy is available to those who need it. The COAG High-Level Principles reflected the clear recommendation of the Productivity Commission to:

> "Provide people with disability with better information and support to enable them to make informed choices and exercise control and choice over their care and support;" [7]

and in so doing echoed the recognition in the COAG National Disability Advocacy Framework that

> "Disability advocacy enables people with disability to participate in the decision making processes that safeguard and advance their human rights." [8]

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[5] See, for example, Social Security Act 1991, S43 (Eligibility for Age Pension).

[6] Draft NDIS Bill, S5(13)

[7] Council of Australian Governments (2012) *High-level Principles for a National Disability Insurance Scheme*, April 2012, Canberra, p2

[8] Council of Australian Governments (2012) *National Disability Advocacy Framework*, p2

If NDIS is to be effective in targeting those most in need of supports, it must acknowledge that the funding of independent disability advocacy agencies (and the encouragement of family, friend and other informal modes of support) will be a necessary design feature of the Scheme. DANA urges the explicit provision, in the NDIS Bill, for the use of NDIS pool funds for this purpose. Those funds should not be administered directly by the proposed National Disability Scheme Agency (NDIA), but channelled to a suitable government agency to permit the expansion of existing disability advocacy programs.

In Section J below, we offer recommended changes that (a) articulate, in the objects of the Bill, that applicants and participants shall have guaranteed access to independent disability advocacy support and (b) specifically authorise the use of NDIS pool funds for the funding (through a suitable alternative government agency) of independent disability advocacy agencies.

Participant self-determination

DANA is concerned that the concept of participant self-determination has not been appropriately translated into legislative form in the draft Bill.

Within the components of the COAG High-Level Principles are two elements that often live side by side in a state of tension. Principle 2 insists that the NDIS build on best practices in a way that will:

> "Promote innovation in services and the services system;"

and

> "Provide appropriate safeguards to support and protect people with disability;" [9]

The draft legislation, however, appears to encourage a 'business-as-usual' approach to this tension, privileging safeguards over innovation even where that innovation may be a key element of participant self-determination. This is evident in S43, where only registered plan managers can be nominated by the participant to support this crucially important function. This provision should be amended to provide for greater flexibility such that participants may nominate a family member, friend or mainstream business or community organisation to manage their support plan. It is difficult to see how such an approach is consistent with the further requirement that the Scheme "Not create any disincentives for carers and family members to provide support"[10].

Similarly, there appears to be a continuation of all-too-familiar external determination, not self-determination, in the links between plans and personal budgets – in particular with respect to processes governing the development and variation of plans. The Productivity Commission explicitly recommended that there be a separation of planning functions from the provision of supports. The COAG High-level Principles were silent on this matter, preferring the safer ground of support for transparency: "Ensure transparency of eligibility, assessment and resource allocation" [11] The draft Bill ignores this issue altogether, situating the whole planning process as an essentially bureaucratic one to be handled directly by the National Disability Insurance Agency (NDIA). Part 2 of the legislation should be amended to ensure that authorship and ownership of a participant's plan remains with the participant and

[9] Council of Australian Governments (2012) *High-level Principles for a National Disability Insurance Scheme*, April 2012, Canberra,, p3

[10] Ibid, p3

[11] Ibid, p4

that the NDIA role is that of funder of supports that are consistent with Act objectives and principles.

E. *NATURAL JUSTICE*: ALL LEGISLATIVE INSTRUMENTS SHOULD CONTRIBUTE TO, NOT IMPEDE, PROVISION OF NATURAL JUSTICE TO CITIZENS

DANA contends that a number of the Bill's provisions are at odds with commonly accepted standards of natural justice. For example, the draft legislation appears to be remarkably sanguine about the need to provide reasons when decisions unfavourable to a participant (actual or prospective) are made. This is evident in S19 – where an application for access to the Scheme can be rejected without reasons being supplied – and in S99 where "reviewable decisions" are dealt with. It is difficult to reconcile this approach with the broader objects of the NDIS: the failure to provide appropriate explanations of decisions can only undermine the level of control that Australians with disabilities have over their lives.

Similarly, S30 provides for the Agency to revoke an individual's participant status without giving notice of intent to do so. We note that in S72, a different approach will occur with respect to revocation of service providers' status.

Of particular concern is the existence of the provision, in S26, for applicants to be denied access where a third party has failed to provide information required by the Agency. We argue that natural justice would require the Agency to accept an application by an individual if that individual has done everything within their own power to furnish required information.

Chapter 4, Part 6 of the draft Bill outlines the processes to be used in relation to reviewable decisions. DANA is concerned – and frankly surprised – that no provision has been made for a specialist review mechanism (such as the Social Security Appeals Tribunal or Veterans Review Board), instead requiring applicants/participants to use the Administrative Appeals Tribunal. This is a very poor outcome all round: the AAT will struggle to come to terms with the specifics of the NDIS process and the applicants/participants will struggle with the requirements of the legalistic and formal AAT process.

The intersection of NDIS and the proposed NIIS, glossed over in both the COAG High-level Principles and the draft NDIS legislation, will be difficult terrain for prospective participants. In S104, the draft legislation indicates that applicants may be denied access to the Scheme if they do not take all possible steps to pursue potential compensation payments relevant to their disability. This is extraordinarily harsh, given the financial, emotional and logistic demands that often arise in pursuit of compensation settlements, particularly in the absence of any certainty of outcome.

F. *GLOBAL CITIZENSHIP*: COMMONWEALTH LEGISLATION SHOULD HAVE REGARD TO OBLIGATIONS ARISING FROM INTERNATIONAL AGREEMENTS

NDIS draft legislation currently fails to adequately identify itself as a key contributor to Australia's implementation of United Nations Human Rights Conventions. DANA recommends that the NDIS Bill replace objective S3(h) with objective S3(1)(b) of the Human Rights and Anti-Discrimination Bill 2012 Exposure Draft, which says

"3(1)(b) in conjunction with other laws , to give effect to Australia's obligations under human rights instruments ….."

"3(2) The ***human rights instruments*** are the following, as amended and in force for Australia from time to time:

(a) the International Convention on the Elimination of All Forms of Racial Discrimination done at New York on 21 December 1965 ([1975] ATS 40);

(b) the International Covenant on Economic, Social and Cultural Rights done at New York on 16 December 1966 ([1976] ATS 5);

(c) the International Covenant on Civil and Political Rights done at New York on 16 December 1966 ([1980] ATS 23);

(d) the Convention on the Elimination of All Forms of Discrimination Against Women done at New York on 18 December 1979 ([1983] ATS 9);

(e) the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment done at New York on 10 December 1984 ([1989] ATS 21);

(f) the Convention on the Rights of the Child done at New York on 20 November 1989 ([1991] ATS 4);

(g) the Convention on the Rights of Persons with Disabilities done at New York on 13 December 2006 ([2008] ATS 12)."[12]

We note in particular the need for further consideration of the Convention on the Rights of the Child in relation to Chapter 4, Part 4 of the draft Bill. It will be important that the legislation ensure the intent of these subsections is only to protect the child (rather than remove the power and or legal rights of the person responsible) in a case where a question arises to suggest that a parent responsible or guardian may not be acting in the best interests of their child. These contexts provide a further example of the need to guarantee the involvement of independent advocacy support and representation – in this case the presence of an independent children's advocate.

A further concern relates to the way that the draft Bill would exclude from access all non-residents who are legally present in Australia. This would include a range of individuals seeking asylum but would also impact on many New Zealand nationals. This approach appears to be at variance with the more inclusive measures included in, say, the Social Security Act. There, New Zealand citizens who have resided in Australia since 2001 are eligible for income support, as are asylum seekers without permanent residence status. The NDIS should be seen as a major plank in this nation's attempts to give expression to the concept of social inclusion. It is inappropriate that a specific form of *exclusion* is proposed to be adopted in this legislation.

G. *Cooperative Federalism*: Legislation impacting on areas of activity where jurisdictional responsibilities are shared between Commonwealth and States should transparently and

[12] Human Rights and Anti-Discrimination Bill 2012 Exposure Draft, pp3-4

COMPREHENSIVELY ADDRESS THE REALLOCATION OF THOSE RESPONSIBILITIES AND MAP THE TRANSITION PROCESSES INVOLVED

The COAG High-level Principles, and the draft legislation itself, acknowledge that the disability service system in Australia is currently and prospectively a shared responsibility across Commonwealth and State/Territory jurisdictions. DANA is concerned that the draft NDIS legislation fails to acknowledge the complexity of jurisdictional coverage of key aspects of the proposed Scheme. Examples of this complexity (further developed in Section J below) include:

Supported and Substitute Decision Making

All States have in place legislative structures and administrative mechanisms designed to provide alternative decision making options for citizens who are assessed as being unable to take full responsibility for their own decisions. These range from child protection structures through to a range of guardianship/administration mechanisms for adults. The draft NDIS Bill (Chapter 4, Part 5) gives the impression that it will somehow be within the gift of the NDIA to determine who shall act as "nominee" to take decisions with, or for, a NDIS participant. This approach fails to appreciate the determination that State governments have, and will continue to have, to maintain existing supported/substitute decision making processes. The final NDIS legislation should clearly acknowledge this by recognising the status of State-appointed "nominees". This would not prevent the NDIA – like any other party – from challenging that status if it was felt that a State-appointed nominee was inappropriate. However such a challenge would need to occur within the context of State legislation and the court/tribunal processes provided for in that legislation. What must be avoided at all costs is any attempt to partition decisions such that decisions relating to disability support are taken in isolation from other aspects of the individual's life. For a great many individuals, NDIS will be a crucially important element in their existences. It will not, however, be the centre of their universes, and the NDIS legislation should acknowledge the need for the disability support system to augment, even wrap around, existing decision making processes, not supplant them.

A related question arises with respect to these jurisdictional overlaps: will NDIS provide funds to meet the reasonable costs borne by State-based public trustees/guardians for the plan management roles they undoubtedly play? Will funds flow to State-based child protection authorities for similar roles with respect to children in care? DANA acknowledges that it may not be possible for the NDIS legislation to anticipate and address all of these possible permutations in the jurisdictional boundary dilemma. We accept that the draft legislation identifies a role for a Ministerial Council that is tasked with the provision of advice to the Commonwealth Minister and to COAG. DANA also acknowledges that the substitute decision-making mechanisms operating in some jurisdictions are inadequate, often failing to comply with our national obligations under Article 12 (Equal Recognition before the Law) of the United Nations Convention on the Rights of People with Disabilities. We encourage continued efforts through COAG to ensure that improved, nationally-consistent legislation is in place. In the meantime, greater clarity is required on the actual mechanisms that will be deployed in addressing these boundary issues.

Complaints handling

While in some respects the draft NDIS legislation over-reaches with respect to the imposition of Commonwealth powers over State jurisdictional responsibilities, there is one

important area where the draft legislation has erred in the other direction. Chapter 4, Part 6 of the draft Bill addresses reviewable decisions and the processes expected to relate to reviews and appeals. Earlier in this submission, we addressed the natural justice implications of these provisions with respect to the potential difficulties faced by participants in negotiating the review process. Missed entirely in the draft legislation is the whole range of contexts in which participants wish to complain about (a) the supports they are receiving; (b) the organisations/individuals who are tasked to provide those supports; or (c) the NDIA itself as a support manager or provider. Whereas other national service systems have associated complaints handling schemes, the draft NDIS Bill is silent on the issue. The Australian Government will be aware of the deficiencies that exist in many existing State-based complaints mechanisms that apply to disability service provision. It should also be recognised that in some States, the legislation governing the State-based systems relates only to services directly funded by State government agencies. It is unlikely that coverage would apply to NDIA-funded supports without further legislative change at State level.

We restate our earlier point about the draft legislation failing to establish a true entitlement to disability support for eligible participants. The absence of a robust, accessible and nationally-consistent complaints mechanism will inevitably lead to a further erosion of that entitlement status. DANA acknowledges that the development of an independent complaints handling mechanism may require legislation separate from the NDIS Bill. Nevertheless, we contend that it would be appropriate for the NDIS Bill to make provision for NDIS pool funds being made available for the administration of complaints handling processes, in much the same way that we suggest funds be allocated for independent advocacy services.[13]

Privacy

While the broader implications for the privacy of NDIS applicants and participants is dealt with in Section H below, it is important to remember that privacy protections and remedies exist within State jurisdictional responsibilities, not just Australian Government ones. This is not simply because each State has enacted mirror privacy legislation giving expression to the nationally-agreed privacy principles. It is also the case that specific State-based legislation – including legislation addressing the provision of disability services – contains important provisions designed to protect the privacy of citizens. It is not appropriate for the NDIS legislation to seek, though blanket provisions, to over-ride the powers of State legislation in this regard. Non-government service providing organisations, in particular, will struggle to balance their obligations under State law with the information requests/requirements of the NDIA.

H. *WHOLE-OF-GOVERNMENT POLICY INSTRUMENTS*: WHOLE-OF-GOVERNMENT APPROACHES TO PUBLIC POLICY AND PUBLIC PROVISION OF SERVICES ARE PREFERRED TO AGENCY-SPECIFIC APPROACHES, AND WHERE AN ATTEMPT IS MADE TO UTILISE AN AGENCY-SPECIFIC APPROACH, ALL POSSIBLE IMPACTS ON OTHER AREAS OF GOVERNMENT SHOULD BE ACKNOWLEDGED AND PROVIDED FOR IN THE APPROPRIATE LEGISLATIVE INSTRUMENTS.

[13] While no genuinely independent national complaints-handling mechanism exists in other service sectors, much can be learned from the operation of the Aged Care Complaints Scheme, and from the recent Australian National Audit Office examination of complaints handling in the Veterans Affairs context.

Three issues illustrate the ways in which the draft legislation for this ambitious program fails to adequately acknowledge the need for coherent whole-of-government approaches.

The intersection with aged care

DANA acknowledges that the Australian Government has clearly indicated its intention to maintain two significantly separate services systems – disability and aged care. We lament the lost opportunity that was simultaneous, parallel Productivity Commission inquiries but contend that it would still be possible to create a coherent merged system and that such a system would be likely to receive a high level of public support. A coherent merged system would clearly sit better with the policy thinking behind the government's recently released Human Rights and Anti-discrimination Bill 2012. This Bill makes it unlawful to discriminate on the basis of a list of protected attributes, one of which is age, in any area of public life.

Even if the Australian Government continues in its plans to maintain separate Schemes, this does not mean that all efforts should not be made to generate consistent policy settings across the two systems. It does not mean that consumers should face too onerous a task in navigating the boundaries of these systems. Nor does it mean that the legislative framework can avert its eyes from the important system-overlaps that already exist. Among the more important of these overlaps are:

- The Home and Community Care (HACC) Program, still transitioning from its historic roots as an integrated funder of supports across age ranges;
- The YPIRAC issue – younger people in residential aged care despite Australian and State government funding initiatives designed to identify and provide appropriate supported accommodation options for younger people with disabilities;
- The large and growing number of instances where frail aged persons have a major caring responsibility for family members with a disability, as well as the reverse caring relationship;
- The "semi-formal" care sector, where non-government organisations (faith-based organisations, service organisations, etc.) seek to provide supports, often in under-serviced rural and remote communities, to people across age ranges and across disability statuses.

What does the COAG High-level Principles document say about this crucially important intersection? Remarkably, the aged care section is referred to only twice, both times as one of a number of "mainstream" service systems (along with health, housing, etc.) that NDIS participants should be assisted to access. In no other respect is the boundary between the two systems deemed worthy of a High-level Principle.

The draft NDIS Bill perpetuates this "don't mention the war!" approach to aged care. The only reference in the legislation is in relation to eligibility for access to the Scheme. Such eligibility is deemed to be withdrawn if the individual has reached the age of 65 and "has entered a residential care service, or is being provided with community care, on a permanent basis". (S29(b))

This reference provokes various questions that go to the heart of the boundary issue:

- Is the status of "permanent" determined by the NDIA, by the aged care system or by the participant? If the participant takes a different view to the Agency on this "permanence", how will this matter be resolved?

- Is this status a one-way membrane between the systems, or can an individual elect to return to the NDIS if, for example, they find that the supports offered by the aged care system have changed or have been misrepresented (or indeed that the individual's own needs and aspirations have changed)?
- How is a person to fund their disability specific supports, aids and equipment if they wish to take advantage of the services offered in the aged or community care systems at some time after they have turned 65?

Privacy

The draft NDIS Bill gives the CEO of the NDIA sweeping powers to require the provision of information deemed relevant to decisions relating to an individual's application for access to the Scheme and to the assessment of that individual's ongoing support needs. It further gives the CEO broad powers in relation to the provision of this information to others. DANAs view is that all aspects of participant and applicant information collection and distribution by the NDIA should be governed by the National Privacy Principles.

DANA notes that while the proposed NDIS has been subject to a Regulation Impact Assessment as part of COAG deliberations on the Scheme, there does not appear to be a Privacy Impact Assessment in place. The Australian Government's Office of the Australian Information Commissioner encourages all agencies (as well as private and non-government organisations) to utilise the PIA format available from that Office. That Assessment should inform decisions about the final legislative provisions relating to the privacy of applicants and participants, and should form part of the regular reporting requirements imposed on the Agency.

I. *Contemporary Governance of Agencies*: Legislation that creates or gives authority to a government agency should ensure that governance arrangements are transparent, accountable to stakeholders, and structured in such a way as to maximise the effectiveness of the agency.

The NDIS draft legislation creates Board and Advisory Council structures that potentially fail to reflect the interests of Australians with disabilities.

Specifically, the proposed Board (S127) does not have any requirement for membership of people with lived experience of disability. Even the proposed Advisory Council (S147) has inadequate provision for membership of people with lived experience of disability. DANA also contends that too little consideration has been given to potential conflicts of interest arising within Board deliberations. In particular, the *governance* roles of individuals with respect to NDIA-funded service providing organisations is just as important as their status as employees of such organisations. We recommend that S132 be broadened to embrace these wider potential conflicts of interest.

The proposed Advisory Council is currently prevented from providing advice on the performance of service providers and on the governance and finances of the Agency. DANA acknowledges that the consideration of the performance of specific service providers should not be a core function of the Advisory Council. However, it is important that the expertise of Council members be fully utilised as a source of independent advice on operational matters.

The Council, working with Minister and Board, should be able to construct its own terms of reference without the need for legislative boundaries of the sort contained in the draft Bill.

DANA contends that the annual reporting requirements contained in Sections 172-174 are currently inadequate in that they fail to include reporting on any measures of participant satisfaction, nor against the legislative objects listed in S3. Moreover, too little attention has been given to the importance of requiring public disclosure of information about the operation of the NDIS. While there is detailed coverage of the requirements for the Agency to provide information to the Minister and Ministerial Council, no provision has been made for key documents (e.g., the Corporate Plan each year) to be tabled in the Parliament or otherwise made public.

As we stated in our Introduction to this submission, the NDIS – and its authorising legislation – will undergo a series of revisions during these formative early years. The formal review processes utilised for this purpose will be fundamentally important, and DANA is disappointed that the draft legislation does not explicitly provide for broad public involvement in those review processes.

J. Detailed Comments and Recommendations

What follows is a clause by clause assessment of the draft Bill, including changes recommended by DANA.

National Disability Insurance Scheme Bill 2012
Notes by Section

Section	Comments / Recommendations
Chapter 1—Introduction	
Part 1—Preliminary	
Part 2—Objects and principles	
3 Objects of Act	Replace 3(h) with the words used in 3(1)(b) and 3(2) Human Rights and Anti-discrimination Bill 2012 to ensure that the NDIS legislation is understood and interpreted by reference to the International Human Rights Conventions including the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) to which Australia is a party. “3(1)(b) in conjunction with other laws , to give effect to Australia’s obligations under human rights instruments …..” “3(2) The ***human rights instruments*** are the following, as amended and in force for Australia from time to time: (a) the International Convention on the Elimination of All Forms of Racial Discrimination done at New York on 21 December 1965 ([1975] ATS 40); (b) the International Covenant on Economic, Social and Cultural Rights done at New York on 16 December 1966 ([1976] ATS 5); (c) the International Covenant on Civil and Political Rights done at New York on 16 December 1966 ([1980] ATS 23); (d) the Convention on the Elimination of All Forms of Discrimination Against Women done at New York on 18 December 1979 ([1983] ATS 9); (e) the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or

		Punishment done at New York on 10 December 1984 ([1989] ATS 21); (f) the Convention on the Rights of the Child done at New York on 20 November 1989 ([1991] ATS 4); (g) the Convention on the Rights of Persons with Disabilities done at New York on 13 December 2006 ([2008] ATS 12).”[14] Add a new object: “Ensure equitable access to the NDIS by people with disability who may experience additional barriers, including Aboriginal and Torres Strait Islanders and people from culturally and linguistically diverse backgrounds.”
4	General principles guiding actions under this Act	These principles should be clearly located within a human rights framework through beginning with: “People with disability have the same entitlement to realise their human rights and fundamental freedoms as other members of Australian society” and continuing “This means, among other things that ………” Include a new paragraph with a clear statement of principle, consistent with the National Disability Advocacy Framework, that establishes people’s entitlement to independent advocacy: “People with disabilities have a right to access independent disability advocacy support to promote, protect and ensure their full and equal enjoyment of all human rights enabling full community participation.” 4(2) Insert “political” recognising that this is another aspect of life for which people with disabilities should be entitled to access support for inclusion purposes. 4(8) Replace reference to “best interests” with “interests”. The general population is not ordinarily required to make decisions in their “best interests”. Neither should people with disabilities be. Principle 4(8) should also be revised so as to comply with Article 12 of the UNCRPD to confirm the right of people with disabilities to exercise choice and be the decision-maker (with support as required) in relation to their lives.

[14] Human Rights and Anti-Discrimination Bill 2012 Exposure Draft, pp3-4

	4(11)(b) Replace “employment” with “open employment” to signal a move away from supporting segregated settings.
5 General principles guiding actions of people who may do acts or things on behalf of others	Principles contained in this clause should reflect the decision-making framework laid out in Article 12 of the UNCRPD. The proposed principles should be strengthened to ensure that it is the wishes of the person with disability that are given effect and that supportive relationships, friendships and connections with others are fostered, not simply recognised.
6 Agency may provide support and assistance	6(2) Legal assistance should be available for people with disabilities to seek external review of decisions made under the Act and for matters relating to the development and implementation of their plan.
Part 3—Simplified outline	
Part 4—Definitions	
9 Definitions	Include a new definition of independent disability advocacy that is consistent with the National Disability Advocacy Framework (released in March 2012) as follows: “Independent disability advocacy” means support to people with disabilities that is independent of the broader service system which provides support to people with disabilities, and is: (a) support to exercise their rights and freedoms, being rights and freedoms recognised or declared by the United Nations Convention on the Rights of Persons with Disabilities, through: (i) one-to-one support; or (ii) supporting them to advocate for themselves, whether individually, through a third party or on a group basis; or (b) support to introduce and influence long-term changes to ensure that the rights and freedoms of persons with disabilities, being rights and freedoms recognised or declared by the United Nations Convention on the Rights of Persons with Disabilities, are attained and upheld so as to positively affect the quality of their lives.”
Part 5—Ministerial Council	

Chapter 2—Assistance for people with disability and others	
14 Agency may provide funding to persons or entities	Insert a new "(a) (iii) exercise choice and control in the planning and management of their supports and services;"
Additional Section	Insert a new Section as follows: "the Agency may provide funding to other government agencies, for the purpose of ensuring that people with disabilities have access to independent disability advocacy and information." [15] The Productivity Commission identified that advocacy would make an important contribution to the effective functioning of the NDIS and to the overall effectiveness of the NDIS in delivering on its key objectives. It said that in order to protect the independence of advocacy the funding for it should be administered by a government agency or agencies other than the NDIS. DANA contends that all areas of government activity where advocacy is required to ensure that people with disabilities have rights and opportunities equal to others should contribute to the funding pool for independent advocacy. The section proposed above makes provision for the NDIS to contribute its share. A further clause should also be included requiring the NDIA to inform all potential and actual NDIS participants of their entitlement to independent support including independent advocacy support for any dealings that they may have with or related to the NDIS. This will assist in ensuring that NDIS benefits are equitably accessed by all members of the NDIS target group including those who are most disadvantaged and marginalised.
Chapter 3—Participants and their plans	
Part 1—Becoming a participant	

[15] Note that the importance of funded advocacy agencies is formally acknowledged in the neighbouring aged care service system. We refer Committee members to Part 5.5 of the Aged Care Act 1997, where that Act authorises payments for the purposes of ensuring consumer access to independent advocacy services.

19 Matters relating to access requests	(2) When the CEO denies an access request, or makes any other decision unfavourable to a person with disability, reasons for the decision should be provided to the person.
22 Age requirements	The NDIS should not incorporate an age restriction. The UNCRPD does not discriminate on the basis of age. The Draft Human Rights and Anti-discrimination Bill 2012 makes it unlawful to discriminate against a person on the basis of age in any area of public life.
23 Residence requirements	NDIS supports should be available to anyone who is legally residing in Australia. Section 23 appears to be more restrictive than the similar Social Security Act restriction. Failure to provide reasonable and necessary supports is inhumane and will inhibit the capacity of the person and their family carers to contribute to Australian society. It is a restriction that is likely to cost society more in the end than it saves.
24 Disability requirements	Section 24 appears to be more restrictive than the equivalent Social Security Act provision. To be consistent with the UNCRPD, the impairment in (1)(b) should be or be likely to be "long-term" and the person's support needs in 1(e) likely to continue "long-term". Many, very significant impairments, are unknown in their duration. Many people currently in receipt of disability supports may be unable to establish permanence. The requirement in (1)(b) for the impairment to result in "substantially reduced functional capacity", may lead to people, who would previously have accessed necessary HACC services like community transport or meals on wheels, not being eligible for the NDIS and hence not be funded to access these services. It is important that those people with reduced functional capacity that is not regarded as "substantial" remain, post NDIS, in a position to access necessary services and supports that enable them to maintain their otherwise independent lifestyle and contribution to the community. If this does not occur they are likely to quickly move to a situation of "substantially reduced functional capacity".
26 Requests that the CEO may make	(1) (a) permits the CEO to request that "another person" provide information reasonably necessary for determining whether a person meets the access criteria and (3) says if that information is not forthcoming within a specified time the prospective participant is taken to have withdrawn the access request. The entitlement for a person to access the Scheme should not depend on whether someone else provides requested information. A prospective participant cannot be responsible for the actions of

		another person. Many professions and a range of State legislation control the information that third parties are legally permitted to provide to others. There are a variety of public policy reasons why people in certain professions (for example lawyers, medical practitioners, advocates, psychiatrists etc) should not be compelled to provide information about their clients to third parties. (1)(b)(ii) Provision should be made for acceptance, as far as possible of earlier medical reports rather than requiring people to undergo further unnecessary examinations. In most cases if a person's plan is to address their functional support needs, the existence of their disability has been established for some other purpose, for example the Disability Support Pension, so no additional medical assessment should be required.
27	National Disability Insurance Scheme rules relating to disability requirements and early intervention requirements	The rules must enable the unique attributes and circumstances of each person to be given due consideration in determining whether a person meets the "disability requirements".
29	When a person ceases to be a participant	(1)(b) Refer to Clause 22 comments. It is unreasonable to remove the totality of a person's reasonable and necessary supports because they choose to accept some part of these supports from the aged or community care system. A range of disability specific equipment and supports are not provided in the aged care or community care systems but a person's need for these does not cease at age 65.
30	Revocation of participant status	Before taking a decision to revoke a person's status as a participant in the NDIS the CEO should, in keeping with the principles of natural justice: • give notice of an intention to revoke and the reasons for this • offer the person the opportunity to present their case for continuation; and • give due consideration to the person's case before making any revocation decision. The removal of support funding could have serious consequences for a person, including in relation to any contractual arrangements they may have entered into in respect of the provision of services, so it is vital that if revocation is to proceed sufficient notice of revocation occurs to allow for a

	proper winding up of any support and associated employment and contractual arrangements. It is anomalous that the legislation provides for natural justice provisions to apply in relation to ceasing the registration of support providers [Section72] but not in relation to the revocation of participant status.
Part 2—Participants' plans	
Division 1—Principles relating to plans	
31 Principles relating to plans	Remove the qualifier "as far as reasonably practicable" from the section and where a qualifier is necessary insert it directly into the paragraph. Insert a new paragraph that situates the plan within a human rights framework: "respects the participant's human rights and fundamental freedoms". Insert a new paragraph that recognises the purpose of the plan is to enable the participant to live an ordinary good life: "advances the well–being and life opportunities of the participant". Insert a new paragraph that acknowledges the influence of local and regional factors on a participant's plan and the importance of the NDIA thereby having local presence, knowledge and decision-making power. NDIA respect for and ability to adopt practices suited to local conditions will be a key factor in the success and public acceptance of the Scheme. (k)This paragraph inappropriately assumes that a person's plan will involve "disability services" whereas it is likely that many people will look to other than specialist disability service providers to provide their funded supports.
Division 2—Preparing participants' plans	
32 CEO must facilitate preparation of participant's plan	Insert a new subsection acknowledging that the NDIA aspects of plan facilitation should occur within the participant's locality. Insert a new subsection allowing for "facilitation" to involve the provision of funding to the person

		with disability to enable them to purchase planning support.
33	Matters that must be included in a participant's plan	The planning provisions appear to give ownership and authorship of a person's support arrangements to the CEO. This will have the effect of removing from the person with disability, effective control and choice over key life decisions. It also has the potential to tie a person into support arrangements that are inflexible and inadequately responsive to the inevitable changes in a person's wishes and life circumstances. There is a conflict of interest for the NDIA to be involved in the plan development and at the same time to be the decision-maker in regard to plan funding. Government should seek as far as possible by its processes, to enable people with disabilities to exercise effective control over their supports through: • Providing an indicative Budget that is capable of delivering reasonable and necessary support • Providing resources, as required, to enable support planning involving people and /or agencies of the of the person's choosing • Approving a person's Budget following consideration together with the person of whether the indicative Budget is sufficient to resource their desired support arrangements • Checking in that the person's human rights are being respected and that they are living as they wish. • Avoid decision-making about those aspects of a person's life that would not ordinarily fall within the purview of government for people without disabilities. Any front line NDIA employee exercising delegated CEO power must be knowledgeable about and empowered to appropriately take account of any local or regional factors in their decision making. .
34	Reasonable and necessary supports	While it is appropriate for the Scheme to specify those things that it will not fund as part of providing reasonable and necessary support (for example it should not fund support that operates in such a way as to breach a person's human rights) it is not appropriate for it to limit innovation and creativity by determining for a person what will work best for them in their particular set of

		circumstances. Today's good practice was yesterday's innovation. Nor should the Scheme prevent people from working within a Budget to save money in one area so as to be able to afford something of particular importance to them in another area. (e) Reasonableness in this paragraph should have regard to: • what is normative support provided by family etc. to people without disabilities. • the willingness of a person's family or community to step up in this regard – adults with disabilities are not in a position to compel family or community members to provide them with support. (f) The CEO should not assume that a "universal service obligation", in relation to a person's disability support needs, is in operation in another service system without ascertaining whether this is in fact correct. The preferences of the person with disability, about who delivers their personalised disability support, should be respected and implemented in circumstances where more than one government agency has responsibility. People with disabilities should not be deprived of access to their personalised disability supports (for example aids and equipment) simply because another service system (education, health, justice etc.) has become involved in their support arrangements. The legislation needs better articulation of the relationship of the NDIA to other service systems and in particular of the NDIA role in advocating for other service systems to meet their universal service obligations.
35	National Disability Insurance Scheme rules for statement of participant supports	(5) People with disabilities should not be penalised in terms of their access to the NDIS because they choose not to seek compensation. [See: comments at Chapter 5.]
36	Information and reports for the	The NDIA should require only a level of information necessary to support the approval of a personal budget and to assure itself that the planned support arrangements respect the person's

	purposes of preparing and approving a participant's plan	human rights, have the potential to deliver on the person's goals and aspirations and do not involve the funding being used for prohibited purposes or activities. [See comments at 26(1)(b)(ii).]
37	When plan is in effect	(2) Participants should be able to flexibly use their personal Budget to respond to their needs, with a requirement to inform the NDIA ahead of time only in specified circumstances.
40	Effect of temporary absence on plans	NDIS supports should continue to be available, without CEO involvement, to people travelling overseas when they are undertaking a normative activity that does not affect their residency. For example young people commonly travel overseas for lengthy periods at the conclusion of their schooling; retirees commonly take lengthy overseas holidays and workers commonly take overseas posting for extended periods.
Division 3—Managing the funding for supports under participants' plans		
43	Choice for the participant in relation to plan management	(1) People should be able to decide that their support funding will be managed by a non-registered person, for example a family member, friend or mainstream business or community service. (3) If the participant is prevented from managing their funding by the operation of section 44 they should still be permitted to specify someone else (not caught by section 44) do to it for them.
46	Acquittal of NDIS amounts	(1) Acquittal of NDIS amounts should involve showing that the money was spent on reasonable and necessary support in line with the plan as varied from time to time by the participant.
Division 4—Reviewing and changing participants' plans		
47	Participant may change participant's statement of goals and aspirations at any time	The participant should be at liberty to change their plan at any time, notifying the NDIA ahead of time only in specified circumstances or when a Budgetary change is required.
48	Review of	The NDIA and the participant should be able to initiate a review of a participant's personal budget.

	participant's plan	No review should take place however without the involvement of the participant.
50	Information and reports for the purposes of reviewing a participant's plan	The NDIA should also be able to request information from the participant necessary to assure itself of the matters detailed in section 36.
Chapter	**4—Administration**	
Part 1—General matters		
Division 1—Participants	**and prospective participants**	
51	Requirement to notify change of circumstances	(1) (a) "plan" should change to "personal budget"
53	Power to obtain information from participants and prospective participants to ensure the integrity of the National Disability Insurance Scheme	53(2)(b) "in accordance with the participant's plan" should be replaced with "on reasonable and necessary support"
Division 2—Other	**persons**	
55	Power to obtain information from other persons to ensure the integrity of the National	UNCRPD Article 22 details the rights of a person with disability in regard to the privacy of their personal information. The information collection practices of the NDIA should comply with this Article, with relevant State and Territory legislation, with the National Privacy Principles. They should also be respectful of the privacy requirements applying to the professional practice of law, medicine, psychiatry, advocacy etc.

Disability Insurance Scheme	
57 Offence—refusal or failure to comply with requirement	See above
Division 3—Interaction with other laws	
58 Obligations not affected by State or Territory laws	State and Territory laws with respect to privacy matters and human rights should not be overridden by the NDIS legislation.
Part 2—Privacy	
60 Protection of information held by the Agency etc.	(2) (d)(i) "for the purposes of this Act" is too broad, given the wide purview of the Act objectives. The phrase should be replaced with a listing of the purposes which might be considered necessary over and above those covered in (ii) and (iii). All purposes specified must additionally be consistent with the purposes of the Act. (3) If protected information is to be released to others for the purposes specified in this paragraph it should be de-identified unless the participant has otherwise given their permission.
66 Disclosure of information by CEO	This provision gives the CEO unusually wide disclosure powers in relation to the personal information of participants. Consideration should be given to whether this is in contravention of Article 22 UNCRPD and/or could be regarded as indirect discrimination on the basis that this kind of information is not ordinarily obtainable by government, without the person's permission, about people other than those with a disability. It potentially puts people with a disability in the position of having very large numbers of government officials and others know very personal details about their lives. A Privacy Impact Assessment should be carried out on the NDIS legislation with a view to ensuring that it complies with the National Privacy Principles, the Australian Privacy Principles and UNCRPD Article 22.
Part 3—Registered providers of supports	
69 Application to be a	The degree of complexity of the registration process imposed on the provider should be

registered provider of supports	commensurate with the level of risk posed by the service to the other human rights of the particular person. It should not operate so as to unnecessarily limit the person's choices about who delivers their services.
70 Registered providers of supports	Allowing a funding manager to also provide planned supports creates a conflict of interest that has strong potential to limit the choices and control of the person with disability. It was for this reason not approved by the Productivity Commission and should not be permitted.
Part 4—Children	
74 Children	(1)(b) and (5) The removal of parental authority should not take place outside existing State and Territory processes. Where the removal of parental authority is being considered, the child should be provided with independent advocacy support and representation. (2) The "person" should be able to choose a non-registered plan manager.
76 Duty to children	This section needs to give effect to the United Nations Convention on the Rights of the Child
Part 5—Nominees	
Division 1—Functions and responsibilities of nominees	
78 Actions of plan nominee on behalf of participant	(5) This provision inappropriately makes the plan nominee (if appointed by the CEO) the person who decides on the level of involvement a person with disability has in the determination and management of their plan. It gives the plan nominee power and control over a person's life without an independent consideration having taken place by a properly constituted Tribunal of all the relevant factors.
Division 2—Appointment and cancellation or suspension of appointment	
86 Appointment of plan nominee	The NDIS legislation should not seek to create an additional regime for removing the decision-making power of people with disabilities over and above the existing State and Territory guardianship frameworks. These frameworks, while not perfect, and in need of modification to fully implement Article 12 of the UNCRPD, provide a far more rigorous, independent and rights- based

	process for determining how decision-making will be handled in the life of a person with limited decision-making capacity.
Division 3—Other matters relating to nominees	
96 Notification of nominee where notice is given to participant	(1) It is not clear why the CEO is permitted to choose not to give the correspondence nominee a notice that is provided to a participant – particularly in circumstances where the correspondence nominee is appointed at the participant's request.
Part 6—Review of decisions	
99 Reviewable decisions	All decisions of the CEO affecting the rights or interests of a person with disability should be subject to merits review, not simply those listed in this section. Each decision has the potential to dramatically influence the life opportunities and choices available to the person with disability. All CEO decisions unfavourable to the person with disability should have reasons provided with the decision.
100 Review of reviewable decisions	The Act should permit a broader group of people to request the review of a reviewable decision including those representing the interests of a person with disability and those representing the interests of a class of affected or potentially affected people with disability.
103 Applications to the Administrative Appeals Tribunal	Prior to any formal Tribunal process people with disabilities (and their representatives) should have the opportunity to request that an independently facilitated mediation process occur. The initial reviewing Tribunal should be some variation on the SSAT or Veterans Review Board. The Tribunal decision-makers should include people with relevant disability knowledge and experience. The AAT involves a very formal legalistic process not well suited to people with disabilities or their usual financial circumstances.
Chapter 5—Compensation payments	

Part 1—Requirement to take action to obtain compensation		
104	CEO may require person to take action to obtain compensation	A person should not be obliged to take action to obtain compensation in order to access NDIS supports. Compensation actions are commonly all-consuming and life altering, draining of the emotional, financial and other personal resources of the person and their loved ones. They can require the person to emphasis their disability, downplay their capacities and continually relive traumatic events in ways that negatively impact on their capacity to rebuild their life with disability. Additionally such actions require the attribution of blame. An intention of the Scheme was to disconnect any considerations of fault from the entitlement to support. To take legal action is to incur significant costs, some of which must be paid at the time they are incurred and some at the conclusion. Costs incurred include costs associated with investigation for probity, legal representation, medical reports, information technology support, application fees, hearing fees, barristers' fees, and accountants fees for economic loss assessment. When a person takes legal action they also run the risk of receiving an order to pay the costs of the other party. It is unclear whether legal action to obtain compensation in respect of support costs may also trigger activity on the part of other agencies like Medicare and the Taxation Office and hence require action to be taken to cover a wide variety of potential claim elements. Most people with disabilities, eligible for the NDIS, will have limited financial resources with which to pay the ongoing costs of legal action and may be unwilling to risk the loss of any existing assets to cover cost orders. This means that action, in many cases, would only be possible if Community Legal Centres were to provide the necessary legal representation. At present, given the level of demand on their services, this is not likely without these agencies receiving dedicated funding for this purpose. Query: What is the relationship between this provision and the NIIS? Does the existence of insurance coverage or the success of an insurance claim situate the person within the NIIS rather than the NDIS?

Part 2—Agency may recover compensation fixed after NDIS amounts have been paid	
Part 3—Recovery from compensation payers and insurers	
Part 4—CEO may disregard certain payments	
Chapter 6—National Disability Insurance Scheme Launch Transition Agency	
Part 1—National Disability Insurance Scheme Launch Transition Agency	
118 Functions of the Agency	The Functions of the NDIA should include: • "to deliver on the objects of the Act as detailed in Section 3 • to report on the Agency's success in achieving the objects • advise on improvements to legislation, rules and policy which would assist in achieving the objects • to promote the National Disability Insurance Scheme to Culturally and Linguistically Diverse Communities through culturally-appropriate, targeted strategies to ensure awareness of the scheme and its benefits."
Part 2—Board of the Agency	

Division 1—Establishment and functions	
124 Functions of the Board	(1)(b) should be "to determine objectives, strategies and policies to be followed by the NDIA in implementing the objects of the Act." It is important to link the work of the NDIA at every point to the overarching objectives of the legislation.
Division 2—Members of the Board	
127 Appointment of Board members	Board membership should include a significant proportion of people with lived experience of impairment/s sufficient to trigger NDIS eligibility. Prior to appointment Board members should make full disclosure of any potential conflicts of interest in carrying out their Board work.
132 Outside employment	A Board member should not be able to hold any position (paid or unpaid) that may involve a conflict of interest in carrying out their duties as a Board member. This would capture, for example, governance roles in service-providing organisations.
Division 3—Meetings of the Board	
Part 3—Independent Advisory Council	
Division 1—Establishment and function	
144 Function of the Advisory Council	The Advisory Council's function should include providing advice to the Board about the way the NDIA meets the Section 3 objects including UNCRPD compliance. (3)(c) and (d) should be deleted because these are matters about which the Board needs sources of advice, independent of the NDIA, to allow it to manage risk and make good strategic decisions.
Division 2—Members of the Advisory	

Council	
146 Membership	
147 Appointment of members of the Advisory Council	At least half the membership of the Advisory Council should be people with lived experience of disability sufficient to trigger NDIS eligibility. Members of the Advisory Council should be appointed having regard to their capacity to represent on the Council the views and experiences of a broad constituency of people affected by the NDIS.
155 Termination of appointment of members of the Advisory Council	(2)(d)The inclusion of this provision is not supported. It gives the Minister an unreasonably wide discretion to terminate the appointment of someone to the Advisory Council. Appropriate reasons for termination are covered in other parts of the section.
Division 3—Procedures of the Advisory Council	
Part 4—Chief Executive Officer and staff etc.	
Division 1—Chief Executive Officer	
Division 2—Staff etc.	
Part 5—Reporting and planning	
Division 1—Reporting	
Subdivision A—Reporting by Board members	
172 Annual report	The NDIA should report in their Annual Report on the achievement of the Section 3 objects of the Act and on participant satisfaction with the performance of the Agency. The Annual Report should be a public document, made broadly available and in a wide variety of formats.
Subdivision B—Reporting by the Agency	
Subdivision C—Reporting by the Minister	

Division 2—Planning	
177 Corporate plan	(4) The Corporate Plan should show how it is that the objectives, strategies and policies to be followed by the NDIA and the performance indicators for the assessment of Agency performance link to the achievement of the Section 3 objectives.
Part 6—Finance	
Part 7—Miscellaneous	
Chapter 7—Other matters	
Part 1—Debt recovery	
Division 1—Debts	
182 Debts due to the Agency	A debt should be incurred to the NDIA to the extent only that a person's budget was knowingly spent on supports that could not be regarded as reasonable or necessary.
Division 2—Methods of recovery	
183 Legal proceedings	The time period in which to commence legal proceedings for debt recovery should not extend beyond 6 years after the debt was incurred. Extended time periods create long term stress that negatively impacts on a person's health and well-being.
184 Arrangement for payment of debt	Replace the existing provision with something like "A debtor should not be taken to have capacity to repay the debt if recovery would result in "financial hardship" or in an inability to access reasonable and necessary support."
Division 3—Information relating to debts	
187 Power to obtain information about a person who owes a debt to the Agency	Refer earlier comments about S55.
Division 4—Non recovery of debts	
195 Waiver in special circumstances	(b) financial hardship and the disability of the debtor should not be excluded from the special circumstances that can be considered for the purposes of waiver of a debt. These would ordinarily be the kinds of issues to be taken into account for the purposes of deciding to waive a debt and so should be available in respect of NDIS debts.
Part 2—General matters	

Part 3—Constitutional matters	
Part 4—Review of the Act	
208 Review of operation of Act	The review must involve seeking the views of NDIS participants, people with disabilities, and their consumer and advocacy organisations. The terms of reference for the review should be co-designed with consumer and advocacy organisation representatives of people with disabilities.
Part 5—Legislative instruments	
209 The National Disability Insurance Scheme rules	Include a paragraph requiring that the Rules be affirmed rather than that they be tabled as a disallowable instrument. The Rules are a very important feature of the Scheme. A requirement that they be affirmed means that greater attention will need to be paid by our elected representative to their contents. Better scrutiny is likely to lead to greater opportunity for influence by people with disabilities and their advocates.

Additional Notes	
Service Complaints	The Bill does not establish independent complaints handling mechanisms in relation to the actions of service providers. This means that participants seeking to use an independent mechanism will need to rely on existing State and Territory mechanisms which are variable in their application and efficacy. In some States there is no obvious mechanism. In others the available mechanism will only consider complaints made in relation to State funded services. State and territory mechanisms will also not be available to participants who wish to complain about the NDIA unless the NDIA agrees to submit to the jurisdiction of the State/Territory agency for this purpose. It is questionable also whether States and Territories will consider it appropriate to continue to fund the complaints mechanism for a national scheme. DANA recommends the establishment of an independent nationally consistent mechanism to respond to the complaints that people with disabilities may wish to make about their NDIS funded services and supports.
NDIS Funding	The Bill does not rule out the future use of means testing and/or co-payment mechanisms which is

	of concern in an environment of fiscal restraint.