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11 February 2013

Senator Claire Moore
Senate Standing Committee on Community Affairs
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Senator Moore

Re: Senate Committee on Community Affairs inquiry into the National Disability Insurance Scheme Bill 2012

Please find attached a submission from the National Welfare Rights Network (NWRN) in relation to the above Bill.

The National Welfare Rights Network (NWRN) welcomes the opportunity to provide a submission on this important and welcome scheme and I apologise for the lateness of our submission.

The NWRN is a national peak body. Our member services are located across Australia and specialise in, amongst other things, social security law and its administration by Centrelink. Based on the experience of the clients of member services, the NWRN also undertakes research and analysis, develops policies and position papers, and advocates for reforms to law, policy and administrative practice.

NWRN member services provide advice, assistance and representation to thousands of clients across Australia each year. Our clients are people living on low incomes many of whom are totally reliant on income support.
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The attached submission is based on our casework experience with clients. The NWRN supports the introduction of the NDIS and congratulates all those who have worked to see its introduction and ongoing implementation.

Our submission draws attention to the critical importance of the Disability Support Pension as income support as distinct from the purpose of the NDIS provision. We reject the Productivity Commission's explicit proposal for a "transitional disability benefit" and any implicit notion that Federal Budget savings can be made at the expense of current or future DSP recipients. While these matters are not included in the current Bill,

we are concerned that the Productivity Commission Report may in the future attract the attention of government.

We also outline some proposals to strengthen the transparency and procedural fairness of the appeals process for NDIS applicants.

We also take this opportunity to endorse and adopt the submission of the Welfare Rights Centre Queensland.

Yours sincerely

Maree O'Halloran AM
President
National Welfare Rights Network

Att:1

2013

Senate Committee on Community Affairs inquiry into National Disability Insurance Scheme Bill 2012

The National Welfare Rights Network (NWRN) has been a long-standing advocate for a fairer deal for people with disabilities. The National Disability Insurance Scheme (NDIS) will improve the lives of people with disabilities, their families and carers.

National Welfare Rights Network
2/11/2013

Introduction

The National Welfare Rights Network (NWRN) has been a long-standing advocate for a fairer deal for people with disabilities. The National Disability Insurance Scheme (NDIS) will improve the lives of people with disabilities, their families and carers.

The current approach to providing support for people with disabilities and their families is ad-hoc, poorly coordinated and massively under-resourced.

The NWRN congratulates people with disabilities, carers, their families and the Federal Parliament for their successes in moving the debate forward and bring the promise of the NDIS closer to reality.

There have been concerns about how to fund such a scheme, but the reality is that we simply cannot afford as a nation to fail to implement a NDIS.

The current Bill and the rollout of the trial sites across Australia represent a turning point in the way that Australia supports people with disability. This scheme also addresses our obligations under international conventions for people with disabilities.

Many of the important details about how the scheme will operate are unclear at this stage. These details will not become clear until the drafting of various Disallowable Instruments. It will be important for stakeholders to be consulted on the Disallowable Instruments and for formal processes to be established so that they are developed in a transparent way with relevant organisations.

NWRN expects the Government to allocate sufficient funding for the tasks ahead and for further capacity building amongst people with disability to ensure that more people are involved in setting the foundations for an effective scheme.

We urge all political parties to support the NDIS with a funding commitment. The needs of people with a disability, their families and carers and have been overlooked by successive governments.

NWRN's area of expertise and interest relates to the income support system. As a consequence the focus of our submission relates to the interaction between income support arrangements and the NDIS as well as the system for review, appeals and complaints.

Cutting the DSP to pay for the NDIS?

The introduction of the NDIS marks a further, welcome shift from a medical model to a social model for dealing with people with disabilities, with its emphasis on the benefit of social participation and work to the lives of people with disabilities. There are major benefits for individuals, families, carers, and the entire community that are predicted to flow from the establishment of the NDIS.

However, NWRN is concerned that these transformational reforms may provide the impetus in some quarters for a concerted push for further restrictions to eligibility for the DSP, the removal of the 2006 'grandfathering' rules or a corresponding reduction to the rate of financial benefits payable to DSP recipients on the grounds that they are now able to access an increased array of community services under the NDIS.

The NWRN believes that there is a clear distinction between income support and the provision of services for people with disabilities in the community. People who obtain essential supports, aids and equipment and services under the NDIS will continue to require the level of income support provided by the DSP, while people whose disability is such that they do not require aids o personal care, for example, will still require the financial support of the Disability Support Pension.

While the Productivity Commission's final report on the NDIS, *Disability Care and Support*, recommended that there be a separation between the NDIS and the DSP, it also proposed a radical overhaul of the pension and eligibility criteria. If its proposals were adopted the lives of many hundreds of thousands of people with significant disabilities would be affected – many negatively.

Since the release of Productivity Commission report other stakeholders have urged tightening of the criteria for the DSP, and stripping the payment from those with 'treatable' or 'less serious' disabilities. The tightening of eligibility for the DSP is proposed as a means of producing savings and finding some of the revenue to fund the NDIS.[1]

The Productivity Commission calls for the Government to hold a public inquiry to "redefine the DSP as a transitional benefit", not as a pension", arguing that "the reforms should not be limited to new entrants", and that "all people with disabilities should face the same eligibility requirements".

While arguing for the removal of the existing 2006 "grandfathering" provisions, the Commission proposes a new set of grandfathering provisions that would apply to the 12,190 permanently blind Disability Support Pensioners. However, no new grants to permanently blind pensioners would be made.

Our submission explores these issues and argues that people in receipt of the DSP who do not need the support provided under the NDIS should not be made to pay the price for the introduction of the national insurance scheme.

The Productivity Commission and the Disability Support Pension

Chapter 6 of the Productivity Commission's report, *Disability Care and Support* offers a summary of the Commission's view on the Disability Support Pension (DSP). It is followed by a set of recommendations for reform of the DSP. Given the significance of the payment for people with disabilities and their families, it is important that there is greater community awareness of the implications of any changes to the existing DSP arrangements. The key proposals from the Commission are listed below.

[1] In a 2012 speech to the Queensland Chamber of Commerce and Industry the Coalition proposes creating a two-tier system of disability support payments: "With just over 1 per cent of disability pensioners moving back into the workforce every year, and with nearly 60 per cent of recipients having potentially treatable mental health or muscular-skeletal conditions, a reform of this (British) type should be considered here," says the Leader of the Opposition. "The next Coalition government will tighten access to the disability pension and consider a different benefit for people whose disabilities need not be lasting. The Hon. Tony Abbott, *The Coalition's Plan For Stronger* Communities, Address to the Pratt Foundation, 8 June 2012.

The Disability Support Pension (DSP) should not be funded or overseen by the NDIS. The Australian Government should reform the DSP to ensure that it does not undermine the NDIS goals of better economic, employment and independence outcomes for people with disabilities.

Reforms to the DSP should aim to:

- *encourage the view that the norm should not be lifelong use of the DSP, among:*
  - *people with non-permanent conditions*
  - *people with permanent conditions who could have much higher hopes for employment participation*
- *redefine the DSP as a transitional disability benefit, not as a pension, for those with some employment prospects, while retaining the pension for those with low employment prospects*
- *reduce the disincentives to work while on the benefit by reducing benefit taper rates, permanently relaxing or removing the work test for people already receiving disability benefits, and trialing 'sign-on' bonuses for those on DSP who gain paid work*
- *provide greater support to employers to encourage employment of people with disabilities, including greater wage subsidies*
- *tap private innovative arrangements for greater economic and social participation of people on the DSP through social bonds*
- *improving data collection and analysis for monitoring outcomes for people on the DSP and the interventions that produce the largest impacts.*

The above reforms should not be limited to new entrants into the DSP.[2]

Recent changes to the DSP

A decade of changes and reforms to DSP policy has been in part a response to simplistic and misleading claims about "burgeoning" numbers and an "inexorable rise" in DSP grants. The increase in numbers needs to be viewed in the context of an overall decline in the proportion of working-age people receiving income support.

Population growth, demographic changes as a direct result of our ageing population, and most importantly, the impact on the DSP of the phasing out of other income support payments, especially the increase in the age pension age for women all, explain this growth in DSP numbers.

Outlays on the DSP over 2012-13 are projected to be $14,846.7 million. Given the level of expenditure on the DSP, and the numbers of people currently on the payment, it is unsurprising that there would be a greater focus on this payment.

[2] Productivity Commission, Disability Care and Support, *Chapter 6, Aligning the Disability Support Pension with the goals of the NDIS*, 2011, p. 269.

When the Productivity Commission released its report on the NDIS, DSP was a controversial area of policy with the Federal Government engaged in a process of significant policy changes, resulting in two separate Senate inquiries, in June and September 2011.[3]

The Productivity Commission's report provides a history of recent policy changes to the DSP and documents many of the challenges that result from different eligibility and grandfathering provisions, problems with JCA assessment processes, payment levels, client confusion of existing incentives, 'review risk' and the provision of employment support, all of which pose serious and ongoing policy challenges for Government and for people with disabilities.

The Commission called for the introductions of a 'transitional payment' for people with disabilities. No recommendation was made on the level of payment for recipients of the proposed 'transitional payment'. Furthermore, no recommendations were made to reform the other payments that are received by a substantial number of people with disabilities; in particular, the Newstart Allowance (NSA).

Additionally no detailed recommendations were made to resolve what many believe to be one of the most significant and major problems: the long-standing exclusion of potential workers with disability from the labour market. Nor was there any discussion of the role of Government, as an employer, or as a funder of national employment assistance in increasing the participation of people with a disability in the workforce.

It is critical that we move beyond simplistic notions that improved outcomes for people with disabilities in Australia will be achieved by simply reducing the numbers of people who are claiming the DSP.

It is simplistic to characterise the 'problem' facing the social security system to be the growing reliance on the DSP. What is more, the 'solution', is not to reduce the access to that payment for people with disabilities by transferring those with a reduced work capacity onto the Newstart Allowance or some other payment, which is now more than $140 per week less than the DSP.

Characteristics of existing DSP recipients

In is important to have a clear understanding of the profile those currently receiving the Disability Support Pension, as this can assist in informed decision making.

At October 2012[4]:

- 824,868 people were receiving the Disability Support Pension;
- 54% were male (443,868);
- 46% were female (381,660);
- one in every 20 people, or 5.5% were Indigenous (45,305);
- 94.5% were non-Indigenous (779,563);
- 3.2% (26,741) were aged 16-20 years old;
- three in four, 75% (619,272) were aged over 40;
- more than one in two (53%) 441,662 were aged over 50;

[3] Senate Community Affairs Legislation Committee, NWRN Submission into Family Assistance and Other Legislation Amendment Bill 2011 [Provisions] and NWRN Submission to Senate Community Affairs Legislation Committee, Inquiry into Disability Impairment Tables : Provisions of Schedule 3 of the Social Security and Other Legislation Amendment Bill 2011.

[4] Senate Community Affairs Committee, Answers to Questions on Notice, *Families, Housing, Community Services and Indigenous Affairs, 2012-13 Supplementary Estimates Hearings, Question No.* 221.

- 43,341 (5.2%) were assessed as having a "manifest' disability.[5]
- nearly one in three (31%) people on the DSP live in NSW (253,793)
- the Northern Territory has the lowest number of residents on the DSP in any jurisdiction, at just 3,496 people (0.4%).

How are people with disabilities faring?

The Productivity Commission points out that the percentage of working age Australians in receipt of the DSP is no different to the OECD average.[6]

Australia is already recognised as a world leader in overall employment participation, having the second highest employment rate in the OECD.[7]

In contrast to this the Productivity Commission found that Australia had one of the lowest outcomes in the OECD in terms of workforce participation by Australians with a disability.

A report by Price WaterhouseCooper noted that people with disability fared poorly in Australia when their standard of living was examined – being placed 27 out of 27 in the world poverty rankings.[8]

A single Newstart Allowance recipient with no dependants receives $492 per fortnight without taking into account rent assistance or other benefits. A DSP recipient in similar circumstances receives $712 per fortnight, plus the Pension Supplement.

There is no mystery about why someone struggling with disabilities on the Newstart Allowance would need to claim the DSP. The DSP rate, although still very low, is much higher than the Newstart Allowance. People with disabilities including chronic illnesses and mental health problems often have their conditions exacerbated by trying to live in poverty on the Newstart Allowance for extended periods of time.

In 2009 the Henry Tax Review advocated reforms to address this problem, including increasing the rate of Newstart Allowance and improving indexation arrangements. Similar proposals have been advocated by the OECD, business, unions, community organisations and politicians from all parties, who argue that this would remove a major impediment to workforce participation by people with disabilities.

A DSP recipient is allowed to earn up to $152 per week from paid employment before their pension is reduced, with additional allowances for dependent children. By contrast, a NSA recipient is only allowed to earn $62 per fortnight before their payments are reduced. [9] Furthermore, the DSP recipient enjoys more generous income taper rules for additional earnings as well as more generous training and educational allowances.

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[5] Senate Community Affairs Committee, Answers to Questions on Notice, *Families, Housing, Community Services and Indigenous Affairs, 2012-13 Supplementary Estimates Hearings, Question No. 175*. Manifest means that the person is clearly and obviously medically qualified for DSP, based on the presentation of medical evidence. For example, if a claimant has a terminal illness, permanent blindness, requires nursing home level care, or has category 4 HIV/AIDS, this would be manifest. For a manifest claim, subject to other qualification requirements being met, the DSP claim can be granted.

[6] Productivity Commission, Op Cit, Appendix K 3.

[7] Recently, employment growth has slowed, at 5.4 per cent, with a significant pool of under-employed and a growing army of 'discouraged' workers.

[8] Pwc, *Disability Expectations: Investing in a better life, a stronger future*, November 2011.

[9] Department of Human Services, *A Guide to Australian Government Payments*, January 2013.

The current rules are designed to encourage DSP recipients to find work as they are less severely penalised for their earnings than NSA recipients.

If a DSP recipient returns to work and finds they are unable to sustain employment, they can return to work after a period of two years and have their payments fully restored.

This means that a person who is unable to sustain employment has automatic re-entry to the DSP without need to go through the lengthy application process. This is particularly beneficial for people who suffer from episodic or unstable conditions, or from conditions which may deteriorate over time.

The NWRN supports these provisions for DSP recipients.

Unfortunately, few access these provisions. In fact, data from Senate Estimates indicates that there has been a decline in the numbers of people on the DSP who have sought to gain access under these provisions in recent years.

From 1 July 2012 changes were made to the "15 hour work rule" to encourage "grandfathered" DSP recipients to work more than 15 hours per week, where they were capable of doing so.

Other employment "incentives" attached to the DSP are its non-taxable status and access to a broader range of concessions linked to the Pensioner Concession Card. The 2009 removal of threats to medical re-assessments for those people who voluntarily access employment assistance was also seen as a major benefit for DSP recipients who were fearful of losing eligibility for the pension entitlement.

In January 2011 the Government amended the *Social Security Act* in relation to the DSP to significantly change the Impairment Tables which establish the criteria under which the pension is granted.

From 1 July 2012 changes were also made to the rules governing many DSP recipients under the age of 35. Those with a work capacity of between 8 and 15 hours per week have been deemed to have some capacity to work. This cohort will now need to meet new participation requirements. DSP recipients, who have a work capacity of 0-7 hours or who work in an Australian Disability Enterprise or a supported Wage System, are deemed to be manifest, and will be exempt from the requirements to attend compulsory interviews.

This was the first time since 1901 when Commonwealth support for people with disabilities began that activity and/or participation requirements have been placed upon Disability Support Pensioners. Around 90,000 people in the first two years are expected to be affected by these requirements.

At October 2012, only 11.7 per cent of DSP recipients -- 70,361 in total -- had income from employment.[10] With less than 2 per cent moving into employment each year there are ongoing challenges in encouraging people into employment.

Many people with disabilities want to work, but many are unsuccessful. Australia has a low success rate in the employment of people with disabilities, ranking 21 out of 29 countries in

[10] Senate Community Affairs Committee, Family, Community Services and Indigenous Affairs Portfolio, *2012-13 Supplementary Budget Estimates Hearings, Question No. 174.*

the OECD. Australia has an employment rate of 39.8% for people with disabilities, compared with 79.4% without a disability.[11]

Despite a range of incentives to assist people with disability into employment, very few people move from DSP into employment each year. NWRN casework experience would indicate that there is little awareness by people of existing incentives.

Even with the incentives, there is still the very high risk that people with disabilities will not be able to manage both their health and their employment. This real risk engenders fear that, if employment is not successful in the long-term, the person will have to fall back on the Newstart Allowance, a much lower income support payment.

Over the past 18 months NSA recipients with a partial capacity to work have been joined by many more people with disabilities (including people with co-morbidities and serious mental illnesses) who have been deemed to not meet the new continuing inability to work test. Since 1 January 2012 new impairment tables have been in operation. Other changes introduced in September 2011 require a person with disability who does not reach twenty points on one impairment table alone (eg 15 points on one table and 5 points on another table) to have been engaged in a "program of support" for up to 18 months within the last three years and failed before they are eligible for the DSP.

Most of those affected by these reforms are receiving the lower-paying NSA.

Claimants for the DSP after May 2005 have been assessed for eligibility if they have the ability to work less than 15 hours per week. The previous Government decided against retrospective changes to social security entitlements and it "grandfathered" all of the 712,163 people who were in receipt of the DSP payment from that date.

More than six years later, by October 2012, the number of 'grandfathered' recipients had fallen to 418,077. Many of those in this group will be much older than the average DSP recipient.[12]

Since 11 May 2005, 406,791 recipients had been granted the DSP.

During the period from 1 July 2011 until 30 September 2012 a total of 2,158 claims for the DSP were rejected on the grounds that the Applicant had not actively participated in a program of support. [13] Significantly, the number of rejections on this ground increased over each of the five quarters of this period.

Since December 2011, the actual numbers of people in receipt of the DSP have fallen, according to information provided to answers on notice in Senate Estimates. Overall, the DSP numbers grew by just 1.1 per cent in the year to June 2012, while in the 2010-11 financial year DSP numbers grew by 3.3 per cent.[14]

[11] PCW. *Disability Expectations – Investing in a Better Life: A Stronger Australia*, 2011.
[12] Ibid, Question No. 221.
[13] Senate Community Affairs Committee, Answers to Estimate Questions on Notice, *FaHCSIA, 2012-13 Supplementary Estimates Hearings, Question No. 223.*
[14] Department of Families, Housing, Community Services and Indigenous Affairs, *Characteristics of Disability Support Pension Recipients*, 2010-11.

Date	Number of DSP recipients
December 2011	831,908
April 2012	828,257
June 2012	827,460
October 2012	824,868

Table 1. Decline in claims for the DSP, 2011-12

As highlighted in Table 1, above, there has been a big reduction in the numbers of new claimants successfully claiming the Disability Support Pension, compared to just a year ago.[15]

Successful claims for the DSP are at an all-time low**.** During the 2011-12 financial year there was 134,013 claims for the Disability Support Pension lodged, and 67,717 or 50.5 per cent of all claims were rejected.[16] This represents a significant increase on the previous year, 2010-11, when 41.2 per cent of claims for the DSP were rejected.[17]

The Productivity Commission recommended that the DSP be redefined as a "transitional disability benefit", not as a pension, for those with some employment prospects.

The NWRN is concerned that this would result in the rate of DSP being lowered significantly for those in receipt of the "transitional disability benefit". In effect this option would punish those who are unable to undertake paid work by lowering their income support payments. This reduction does not correspond with any cited or anticipated reduction in the needs of the individual living with disabilities.

The Commonwealth Government has recently removed the 2006 "grandfathering" provisions in relation to Parenting Payments (single) transferring approximately 84,000 recipients onto a lower rate of benefits. This change delivers $728 million to the Federal Budget bottom line over four years but results in losses of between $65 and $110 per week for single parent families affected by the change.

In conclusion, the NWRN believes that changes or cuts to the DSP should not be viewed as a source of revenue for funding the very necessary support and assistance that will be provided to people under the NDIS.

There is little to be gained by reducing the modest incomes of those in receipt of the DSP, though there is a clear need for Government to better inform people in receipt of the DSP of the existing protections, supports and incentives that exist to encourage economic and community participation.

The NWRN looks forward to measures by business and employers (including government as an employer) aimed at addressing pervasive and far-reaching problems of age and disability discrimination. NWRN warns, however, that if policies to assist people into employment are accompanied by punishing cuts and reductions to income support, then the measures are likely to be unsuccessful.

[15] Senate Community Affairs Committee, *Estimates Answers, various questions*, 2012.
[16] Senate Community Affairs Committee, Answers to Estimate Questions on Notice FaHCSIA, *2012-13 Supplementary Estimates, Hearings, Question No. 345.*
[17] Department of Families, Housing, Community Services and Indigenous Affairs, *Characteristics of Disability Support Pension Recipients*, 2010-11.

The NDIS Review and Appeals Process

It is essential for the NDIS to provide an affordable, accessible and sustainable review and appeals process akin to the appeal process which currently exists under social security law. There also needs to be a complaints mechanism that is independent from the Agency. The CEO must not be able to deny or limit access to reasonable requests for review of decisions, whilst the appeals process itself should be simple and straight forward.

It is also important to ensure that participants in the NDIS are provided with independent advice, assistance and representation. For appeals under social security legislation this assistance is typically provided through specialist welfare rights programs, community legal services or the various community legal aid commissions. It can reasonably be anticipated that the introduction of the NDIS will create a spike in demand for existing services as participants test their right to appeal decisions under that legislation.

Recommendation 1:

That additional funding be made available either through the NDIS or other Commonwealth Government Agency to ensure that any growth in demand for advice or representation arising from the introduction of the NDIS is properly resourced.

The NWRN believes that the appeal system should be straight forward and user friendly, and readily accessible by unrepresented clients. In making this recommendation we draw on our considerable experience with the Centrelink internal and external review processes.

Part 6 of the *National Disability Insurance Scheme Bill (the Scheme)* sets out the appeal process for reviewable decisions of the CEO of the NDIS.[18]

It is envisaged that the first stage of the merits review would be to an Authorised Review Person (or ARP), which seems an equivalent role to a Centrelink Authorised Review Officer (ARO). The ARP is to provide the directly affected person (Applicant) with a written notice of decision. There is no requirement within the draft legislation that a decision maker provide reasons for their decision.

One of the fundamental roles of an administrative appeals process is to protect applicants from arbitrary decision making. Without a clear and transparent statement of reasons, there is nothing within a written notice of decision which would serve to convince an applicant that the decision maker understands their particular circumstances. Furthermore, given the build-up of expectations within the community regarding the NDIS, it is essential to ensure that its processes are transparent and fair.

Recommendation 2:

That a decision maker be required to provide written reasons for their decision and not simply a notice of decision.

No section within the draft legislation requires a decision maker to give reasons for their decision in writing. A written notice of decision which provides clear reasons should increase client and carer understanding of their circumstances. What is more, without an explanation for the decision, individuals may incorrectly believe that there is no hope of them changing the situation. A clear statement of reasons should serve to legitimise the decision at issue,

[18] National Disability Insurance Scheme Bill 2012, *Explanatory Memorandum*. p. 39.

and provide a guide for applicants seeking to appeal the decision on the grounds that the ARP made an error of facts or law.

In the long term a reasoned decision should serve to save the public purse given that applicants may not appeal a decision to a higher level if it is clear that there is no merit in their case.

Section 138 of the Social Security (Administration) Act 1999 states:

(b) a statement about the decision-maker's decision that:
(i) sets out the reasons for the decision; and
(ii) sets out the findings by the decision-maker on material questions of fact; and
(iii) refers to the evidence or other material on which those findings were based;

The NWRN believes that a section of this nature should be included in the NDIS legislation.

Recommendation 3:

That the scope of reviewable decisions be increased to cover all decisions made by an officer under the NDIS Act or any subordinate legislation.

Currently Clause 99 of the draft legislation outlines the specific instances where a decision is reviewable. By approaching reviews this way, the legislation is narrowly drawn and is in danger of omitting important areas of decision making that people should have the right to appeal. For example, in the current draft there is no provision to appeal debt recovery (s190 – 195). Also omitted from the list, and as identified in only an initial review of the draft legislation (this is not an exhaustive list) are sections: 13, 26(3), 30, 40(4), 44(2) and 77. Several of these sections involve discretionary powers (such as special circumstances waiver) and it is inappropriate that a single officer has the power to make such a decision which is then not appealable.

NWRN believes that this section should instead approach reviewable decisions in a similar manner to existing social security arrangements.

In Section 126 of the *Social Security (Administration) Act 1999*, it states that:

Review of decisions by Secretary
(1) The Secretary may review:
(a) subject to subsection (2), a decision of an officer under the social security law;

Within the NDIS Bill, Section 99 should be altered to read:

(1) The CEO may review:
(a) A decision of an officer under the NDIS Act and any subordinate legislation;

By allowing for all decisions to be reviewable, individuals are protected from instances of oversight where designers of the system were not able to predict all decisions that may require review. Exceptions can be outlined in this section, as they are in *Section 127 of the Social Security (Administration) Act 1999*. Framing the legislation in this manner also means that parliament is not required to amend the legislation every time an additional section is identified which should to be reviewable in the interests of fairness for an individual. As a general rule, it is more appropriate for any delays to be in adding exemptions to review powers rather than in providing review rights.

Recommendation 4:

That the circumstances in which a debt may be waived for special circumstances be amended to include the word “alone” and remove reference to disability.

Clause 195 of the draft bills allows for debts to be waived where special circumstances are found to exist within a case. Currently this this clause provides that:

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

1. (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*

2. (b) there are special circumstances (other than financial hardship or the disability of the debtor) that the CEO is satisfied make waiver appropriate; and

3. (c) the CEO is satisfied that waiver is more appropriate than writing off the debt

This section is of concern to the NWRN as it is significantly more restrictive in the granting of appeal rights than the wording of section 1237AAD of the *Social Security Act 1991*, which provides:

“there are special circumstances (other than financial hardship alone) that make it desirable to waive”

The addition of the word ‘alone’ allows for financial hardship to be a cumulative part of the applicant’s circumstances, rather than an individual one. Social security case law has clearly defined special circumstances to be those that are “unusual, uncommon or exceptional” in the circumstances of a social security recipient. For example, under the NDIS presence of a disability would not be a special circumstance; however, a disability, that causes a debt to arise, such as one which features impaired decision making could be considered as a special circumstance.

The NWRN believes that this section should be amended to include the word “alone” and remove reference to disability.

Recommendation 5:

The legislation should nominate a time-frame for Reviews.

All appeals are to be finalised within three months of the lodgement of a request for a review (subclause 100). The applicant can lodge a further request for a review with the CEO after three months have elapsed from the date upon which they received the above notice of decision.

Clause 103 of the scheme provides that the applicant can lodge an appeal with the Administrative Appeals Tribunal (AAT) if they are dissatisfied with the decision of the ARP.

Section 99(6) fails to nominate a time-frame for a review of any decisions by the Agency, but refers vaguely to 'as soon as reasonably practicable'.

Section 103 proposes a role for the Administrative Appeals Tribunal in the merits review process. However, the legislation is silent on the critical matter of the knowledge base required by Reviewers, and the level of experience that they should have. Given that this is a new and unique and complex jurisdiction for a period of at least two years after establishment, there should be multi-member panels reviewing the decision.

In addition to merits review, the Act should enshrine and establish processes for the right to complain about the process of developing, approving and implementing the plan.

A complaints or disputes resolution process should sit alongside any proposed merits review system.

Recommendation 6:

The NWRN supports the establishment of an internal review process as outlined above; however, concerns arise regarding the particulars of the recommended appeal process. Consideration should be given to embedding a parallel/optional Alternative Dispute Resolution (ADR) processes.

The Key Performance Indicator (KPI) for the finalisation of decision by a Centrelink ARO is 35 days from date of receipt of an appeal. We would submit that a three-month KPI might create a backlog of expectation and only serve to increase the uncertainty of participants within the NDIS. We recommend that the date for publication for a written decision be reduced. Whilst a 35-day KPI may be too ambitious in terms of cost, three months seems an inordinate delay for the finalisation of the first stage of an administrative appeal.

The 2011-12 Annual Reports of the Social Security Appeals Tribunal (SSAT) and Administrative Appeals Tribunal (AAT) are instructive in terms of the cost and timeliness of finalising an appeal.

The average cost of finalising a matter at the SSAT is $2,318 per case, and on average it takes Centrelink 8.2 weeks to finalise a Centrelink appeal.[19]

In contrast the cost of finalising a case at the AAT which does not proceed to hearing is $4,190, and $19,111 to finalise a case which proceeds to a full hearing.[20]

Whilst the AAT Annual Report does not distinguish between its various jurisdictions, 61 per cent of those cases that proceeded to hearing had their hearing finalised within 40 weeks from the date of lodgement of the appeal.[21] The time taken for finalisation of an appeal before the AAT is significantly longer.

The costs noted previously represent the respective cost of operating each Tribunal but they do not reflect the whole cost to Government. The Department of Human Services (DHS) is either represented by a Legal Officer or private practitioner, when a case is set down before the AAT. In practice Centrelink does not appear before the SSAT. Whilst the majority of private applicants to the AAT in its DHS Division are not represented, grants of legal aid are

[19] Social Security Appeals Tribunal, *Annual Report 2011-12*.
[20] Administrative Appeals Tribunal, *Annual Report 2011-12*, p. 27.
[21] Ibid, p. 27.

available for private applicants. Based on this information it is clear that the cost to Government of conducting a hearing at the AAT is far greater than the raw figures suggest.

Over the three years from 1 July 2010 to 30 June 2012 the SSAT finalised 31,246 Applications.[22] By contrast, the AAT finalised 5,586 Centrelink Applications over the same period.[23] Almost one in five decisions of the SSAT within its Centrelink jurisdiction was appealed to the AAT. Given the cost of running a case in each jurisdiction it can be argued that the SSAT serves as a significant cost saving to Government and provides the taxpayers better value for money.

If the SSAT did not exist, then there would be a significant increase in the number of cases heard by the AAT, potentially creating an expensive backlog in the process of administrative law.

Recommendation 7:
That the SSAT should be vested with jurisdiction to hear appeals against the decision of an ARP, and that the appeal process mirror that of the SSAT in its Centrelink jurisdiction.

The NWRN believes that the SSAT is a cost-effective and economical decision maker. Furthermore, the overwhelming majority of its decisions are not subject to appeal. The NWRN recommends that the NDIS does not appear at the SSAT. Instead its case should proceed on the papers in an identical manner to the way in which Centrelink cases proceed before that Tribunal. The SSAT is experienced in dealing with unrepresented clients and is structurally well suited to this task.

The NDIS is a new scheme and there is considerable expectation within the community about what the scheme may deliver. Whilst it is hard to estimate the number of appeals which this scheme will generate, it is likely that the number of appeals will be highest in the early years of the scheme as parties and disability advocacy services test the rules for determining client entitlement to service.

The SSAT has shown versatility in recent years by taking on Child Support and Paid Parental Leave appeals.[24] The Tribunal has medical members and is familiar with making decisions based on medical evidence such as when determining an Applicant's eligibility for the Disability Support Pension. The SSAT employs many members on a sessional basis, which means that fluctuations within Tribunal case load are readily accommodated.

For these reasons the NWRN strongly recommends that the Appeal from the decision of an ARP be to the SSAT and not directly to the AAT.

[22] Op cit, Social Security Appeals Tribunal, p. 11.
[23] Op cit, Administrative Appeals Tribunal, p. 34.
[24] These changes have also required savings to be made, through measures such as instituting single member panels in many cases, and changing the way that documents are prepared for hearings. It should be noted that Welfare Rights have expressed concerns with some of the new arrangements.