A Submission Paper

Senate Community Affairs Legislation Committee Inquiry into the National Disability Scheme Bill 2012

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Critical Comment

The National Disability Insurance Scheme Bill 2012 (the Bill) presents as a document which lacks the consistency, coherency and conceptual clarity necessary for sound legislation. While the authors of this submission understand the desire of the government to pursue the introduction of such a scheme without delay, nonetheless elements of the content and tenor of the Bill seem to reflect a politically expedient time commitment to launch the trial of a new system as opposed to "getting it right".

The titling of the Bill is both misleading and wrong. In the first instance the title suggests that the Bill is an insurance scheme. Yet, there is nothing in the Bill that demonstrates that it is in fact an actual insurance scheme and will operate as such. The basis of this contention is that there is nothing in the legislation that ties the funding for the scheme to an insurance model of premiums. Instead the scheme will be funded from general revenue allocations by the Commonwealth, State and Territory governments.

Conceptually the Bill also devalues its intent, and the subsequent authority arising as a result of the legislation, by containing generalised statements. Examples of this include statements which although advising intent to "ensure" particular actions and outcomes, address matters which do not come within the authority of the Commonwealth and are not exclusive to the disability sector.

In part, the evidence of political expediency is exposed by the frequent referral within the Bill to "rules"; noting these that are yet to be published. This approach must be criticised on the basis that it means the Bill lacks transparency in that essential detail is not yet available. The failure to include within the Bill threshold matters, such as assessment criteria, highlights how the Bill is in effect subservient to "rule making". It is reasonable to assume that those responsible for developing the Bill have at this stage little idea as to what the rules will be. Or alternatively, they anticipate that the rules may well be unpalatable if exposed to the same level of scrutiny as the Bill is getting.

For the Australian people, and in particular persons with disability and their families as well as other people directly associated with the disability sector, the concept of a disability insurance scheme and legislation to make the scheme a reality has created an unprecedented level of hope. However, the incomplete nature of the Bill, the inconsistency of its contents, the lack of particular critical detail, the rush to push it through and the intent to review it after two years, which suggests uncertainty as to the efficacy of the legislation, all point to the potential for unnecessary confusion and disappointment.

The Bill in its current form will fail to meet the legitimate expectations of the people it is intended to support. If not amended, the Bill will not fix the broken system.

Overview

The Focus

The approach taken in this submission is in the first instance to provide what are described as over-arching comments in relation to the Bill. The submission then addresses the objects and principles as described in Chapter 1, Part 2 of the Bill, then further comments on specific matters as detailed in its other sections. The submission raises issues which are of most concern to the writers.

The submission seeks to draw attention to what the writers submit are deficits or matters requiring a greater degree of clarification or definition. They argue that unless the Bill proceeds on the basis of minimising uncertainty and incongruity, then it will fail to achieve what has been promoted as the intention to overcome the deficits of the current system of funding disability supports.

The writers emphasise that the heralding of a National Disability Insurance Scheme (NDIS) has filled people with disabilities and their families with unprecedented hope. If the Bill does not convey certainty, but instead conveys mixed messages that may eventually lead to a denial of the hope invested by such people in the NDIS, it must then be judged to have failed the opportunity of a century.

The writers are well reminded of the many idealistic and often politically driven statements, the plethora of policies and colourful documents that have littered the field of disability since the 1970s. All these have emphasised the importance of services and supports provided to persons with disabilities being based on individual needs. The writers are also aware of the increasing emphasis that has been given to promoting community inclusion and the part that generic services must play in meeting the support needs of persons with disabilities.

Recent years have also seen greater emphasis given to the concepts of "person-centred", "self-direction" and "choice". However, it is unfortunate but true, that no matter how much we as a community, or successive governments at all levels, and the myriad of latter day academics and bureaucrats, peddle the story of person-centeredness, self-direction and choice, the reality is many persons with disabilities are still dependent on their families for the vast majority of their support, not the least being for their housing.

Given the cursory attention historically paid to addressing the totality of the supports necessary to meet individual needs, it is therefore important to examine how, if at all, the Bill acknowledges and actually addresses the role of families as a separate group in the context of self-direction and choice as applying to individuals with disability.

The writers are also concerned to examine how, if at all, the Bill addresses the matter of the composite of disability legislation across the various jurisdictions. Arguing, that as a national scheme this matter must be addressed in the Bill if it to truly apply as a cross-boundary instrument and not be compromised by parallel legislation.

The authors

The writers bring to their submission a combined 70 years direct experience in the disability sector. This combined experience has been established through a range of functions including special education teaching, senior administration, professional consultancy, delivery of education and training, family consultancy and advocacy, direct family support as a relative of a person with a disability, research and public policy, public presentations, submissions and representation to members of parliament.

Involvement in the sector has encompassed changes that commenced in the 1960s with the focus on rights and advocacy; the 1970s with the development of the deinstitutionalisation movement; the establishment of disability specific legislation and the separation of intellectual disability and mental illness in the 1980s; through to the more recent promotion of individual funding and supports, and the increasing emphasis on community inclusion and access.

Given their experience, the writers therefore submit that they are well-placed to make critical comment on both the content and intent of the Bill. Further, they also submit that their knowledge of disability in the context of its impact on families and the realities that face people with disabilities and their families is a key consideration in assessing the likely impacts of the Bill's intent within the context of the real world of disability.

In other words, while the writers do not disagree with the new horizons being established for disability, they are concerned to ensure that the language that goes with these new horizons is not seen as being the reality, simply because it is said to be so. As an example, words such as "choice" "independence" "community" and "control" do not happen because they are applied as a generic description applying for persons with disabilities. They can only and must be considered in the context of the individual's ability and personal circumstances. Not to do so will simply consign the new horizons for disability to perpetuating the failings of the current system as described by the Productivity Commission, albeit in a different form. Essentially, the core of this comment is that fancy words and good intentions, even when backed by legislation, do not provide the foundation for an efficient and effective support model operating to benefit people with disabilities and their families.

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The Submission

The following provides what might be described as general comment in relation to broader matters as relating to the Bill.

Title

The title of the Bill – National Disability Insurance Scheme Bill 2012 – is a significant concern.

The writers argue that there is nothing in the contents of the Bill to suggest that it is, or indeed will operate as, an actual insurance scheme. Section 3(2)(b) may well state that the objects of the Act are to be achieved by "adopting an insurance-based approach, informed by actuarial analysis, to the provision and funding of supports", but premiums are not paid or collected in any form specifically to create what is being called an insurance scheme. Instead, general tax revenue from Federal and State and Territory governments will be used to fund the scheme.

Further, on the matter of the contention that the scheme has been and will continue to be informed by actuarial information, the writers challenge the ability of any actuarial information to be able to provide the necessary financial information associated with both the general supports and the reasonable and necessary supports as well as other activities identified in the Bill.

If, as the Bill requires, funding to individuals is to be based on individual plans which are to identify a composite of an individual's aspirations and goals, then the question arises as to how actuarial analysis can ever ascertain an as yet unidentified set of desires and the funding associated with those in order to meet the reasonable and necessary supports for the individuals. Additionally, given that the scheme is also to fund general supports, and innovation is to be encouraged, this adds further to what the writer argues is an impossible task in establishing true actuarial evidence. They argue that the best that can be done, as is often the case in terms of determining future budgets, is to consider past expenditure and establish such budgets on the basis of a percentage increase or decrease.

Given the above, the writers therefore argue that the reference to actuarial analysis is overstated and as such misleading.

Despite section 3(3)(b) of the Bill stating that regard is to be had to "the need to ensure the financial sustainability of the National Disability Insurance Scheme" – the fact is that the funding does not arise from a premium-based insurance scheme (such as, for example, Victoria's WorkCover and the Transport Accident Commission insurance schemes) but is instead reliant on the budgets defined by the governments of the day. As such, the concept of ensuring "financial sustainability" is subject to the vagaries of government budget setting.

Additional to the above, if the intent of the Bill is to establish a National Disability Insurance Scheme, then this should be the sole

focus of the Bill. To say that it is "A Bill for an Act to Establish the National Disability Insurance Scheme" and then have the additional wording "and for Related Purposes" creates two significant distractions. The first being that as an "add on" this addition distracts from the intent of the Bill as directly inferred by its title.

Secondly, and associated with this, in promoting the creation of a National Disability Insurance Scheme there is little doubt that the community, and in particular persons with disabilities and their families, has had its focus directed to what is generally understood to be an insurance scheme. As such, the additional words suggest that there is more to the insurance scheme, as designated by the words "related purposes" than simply the scheme itself. The writers argue this creates unnecessary confusion in terms of what are the related purposes and how they differ from the insurance scheme itself.

Thirdly, also by the inclusion of "related purposes" the writers contend that the Bill is going the way of previous disability legislation which has been created across various jurisdictions. That is, that while such legislation has been well-intentioned and has set out to address matters related to persons with disabilities, it has in some ways become side-tracked by seeing the need to becoming unnecessarily expansive in addressing matters not core to the original intent of the particular legislation. In a sense, it is reasonable to conclude that the writers of disability legislation – and this Bill is no different – consider that the product of their deliberations must encapsulate the broadest range of elements associated with disability.

Given the above, the writers therefore submit that the Bill should be re-titled as – National Disability Support Scheme Bill 2012 – and the consequent Short title would be - National Disability Support Scheme Act 2012.

Rules

Various sections of the Bill make reference to the establishment of rules which will be used to facilitate various actions identified in the Bill. While the writers acknowledge there is a place for rules and regulations to be established outside of the actual legislation, they challenge the efficacy of not providing critical definitive statements within the Bill. They argue that the significant references to rules within the Bill create the potential for an "open-ended approach" to be taken when the rules are finally developed. As such they therefore submit that while it may not be feasible or indeed desirable to attempt to include the full detail of each and every set of rules in the Bill, nonetheless definitive statements concerning each of the rules must be included in the Bill. Not to do so sets a dangerous precedent. Further, the non-inclusion of definitive statements fails to provide potential participants and their families with a firm foundation on which to base their decision-making.

Additionally, the writers also submit that given the important part the rules will play in making determinations about persons with disability, it is essential that they be tabled to be read concurrently with the Bill. By doing so, this provides those people making

submissions to also make comment on the rules in the context of the Bill.

Definitions

Apart from comments which are made further below in the submission in relation to specific definitions and also to the absence of specific definitions, the writers consider it important to also make a more general comment regarding this particular area of the Bill. They express concern as to what they argue are four particular deficits relating to the section.

The first concerns simply detailing a particular definition as having a meaning as supposedly defined elsewhere in the Bill or the yet to be published rules. An example of this is in the very first definition, "access request", where the reader is then referred to section 18 of the Bill to find out what "access request" means. Section 18 simply states that "A person may make a request (an access request) to the Agency to become a participant in the National Disability Insurance Scheme launch". Early intervention supports are defined by reference to the rules.

While the writers do understand that some definitions can be quite complex and expansive, nonetheless they also argue that it ought to be possible to provide a singular statement defining the particular concept. Surely it seems reasonable to expect that a definitions section in a legislative document will in fact provide the definition within that section, and not simply refer to other parts of the Bill or Act.

The second concern relates to what the writers describe as a 'referral definition', whereby the definition is described as being that which applies in some other piece of legislation or document. An example of this is "permanent visa", which is defined as "having the same meaning as in the Migration Act 1958." The writers argue that this particular concern presents as being greater than the first, in that while in the first the reader can at least go to the Bill itself, by referral to other legislation it is necessary for the reader to seek to access such legislation. This is considered to be clumsy and generally inappropriate.

The third concern relates to an absence of any definition. This is despite particular key concepts being mentioned in the body of the Bill, and being neither defined within the body of the Bill nor within the Definitions' section. An example of this is "early intervention". The writers contend that it is essential that all key concepts used within the Bill are defined.

The fourth concern relates to where the word is used to define itself. An example of this is the Definition for Principal Member as applying to the Advisory Council. While "Principal Member" is used in the body of the Bill, when one goes to the Definitions section to ascertain what or whom constitutes the Principal Member, the definition simply states "Principal Member means the Principal Member of the Advisory Council".

The writers submit that the Definitions section must be forensically reviewed to alleviate these concerns.

Etc. The writers submit that the use of "etc." as identified on more than one occasion in the Bill indicates a deficit in conceptual clarity. Consequently, the Bill must be reviewed in order to delete the use of the word "etc." and where appropriate spell-out what was intended by inserting it in the first place.

This section of the paper provides critical comment in relation to those elements of the Bill as listed.

CHAPTER 1

Part 2: 3 - Objects Chapter 1, Part 2 of the Bill lists the objects and principles on which the Bill is founded.

Object 3(1)(b) is to "support the independence and social and economic participation of people with disability." While the writers support the general thrust of people with disability being supported in the broad areas of social and economic participation, they challenge the inclusion of the word "independence". They argue that the word "independence" is misused in the disability sector, in that it suggests what might be described as a definitive objective. The writers suggest that "independence" is used as a form of social ideology which seeks to infer that if the right conditions exist then persons with a disability will be able to be independent.

The writers argue that the concept of independence is misleading. The writers submit that what is actually meant is that there is a lessening dependency by an individual on another person or other people. They therefore argue that the more appropriate terminology is that of 'inter-dependence' and as such this term should replace that of independence.

Apart from this more realistic interpretation, in the context of object 3(1)(b) the question must be asked as to – Of what and how will people with disability become independent, through the application of the National Disability Insurance Scheme?

As a general statement the writers express concern that the disability sector has become littered with high-sounding language where the intent is to overcome some perceived or real barrier to social and economic participation. Yet this same language when challenged and analysed in the context within which it is used carries little meaning. For example, "person-centred" has become a catchcry in terms of planning for people with disability, suggesting that everything related to the individual must be centred exclusively on that individual. Yet the reality is that none of us live in isolation from our environment, and thus each of us, no matter how much we might like to think the focus is on us, is inter-dependent.

Object 3(1)(c) is to, "provide reasonable and necessary supports, including early intervention supports …". The two words, "reasonable" and necessary", in the writers' view can be described as the lynchpin words in the entire Bill. Although the writers note

that section 34 of the Bill details the elements that must be satisfied in order to meet the reasonable and necessary criteria, the writers of the Bill have not seen fit to include reference to section 34 in the Definitions section of the Bill.

The importance of including "reasonable and necessary supports" in the Definitions section is not simply to be pedantic, but because of their importance firstly in the context of matching the level of funding granted to the individual participant. And secondly, in seeking to assess fairness in terms of comparing and contrasting the level of funds granted to one individual relative to the level of funds provided to other individual participants. Or, in other words, it is essential to be able to judge "reasonable and necessary" in the context of fairness.

The writers note that the Bill does not make any reference to the concept of fairness, albeit they argue it should. Although the writers acknowledge that neither the term natural justice nor discrimination is mentioned in the Bill, they argue that they should be. This argument is based on the fact that the principle of fairness is inherent in the concepts of natural justice and anti-discrimination. As noted further below they argue that discrimination should be included in general principle 4(6). On the matter of discrimination they note reference under clause (c) of the Convention of the Rights of Persons with Disabilities that such persons should be guaranteed full enjoyment of their human rights without discrimination. Clause (f) of the same Convention then makes reference to Equalisation of Opportunities. Given the reference in the Bill to the Convention and the significance of fairness and discrimination as relating to persons with disability, then it seems surprising that these terms have not been included in the Bill.

As such, they argue that given the Bill's acceptance of the Convention on the Rights of Persons with Disabilities as in 3(1)(h) and further given that anti-discrimination and equal opportunity are analogous to fairness as natural justice, then they submit their case linking reasonable, necessary and fairness.

Object 3(1)(d) highlights the deficit inherent in object 3(1)(c) even more starkly. Given the enabling thrust of object 3(1)(d), it seems reasonable to conclude that if a participant is to "exercise control in the pursuit of their goals and planning and delivery of their supports", then 'reasonable' and 'necessary' can very easily be taken to mean that exercising control and pursuing goals will only be possible to the degree determined by the funding. Given such funding as determined by the grantee may not be necessarily adequate to meet the participant's full range of goals, then clearly whether or not participants will be able to "exercise control in the pursuit of their goals" is entirely dependent on the funding granted.

While the writers are not naïve enough to suggest that funding is a bottomless well and thus every participant will be granted an 'open cheque', nonetheless they do submit that the wording of objects 3(1)(c) and (d) is misleading. They therefore argue that object 3(1)(b) should be re-worded to reflect a reference to what

constitutes 'reasonable' and 'necessary'. Further, objective 3(1)(d) should not use the word "enable", which infers a totality in the exercising of choice and a control, but instead use the word "assist".

Object 3(1)(e) seeks to "facilitate the development of a nationally consistent approach to access to and the planning and funding of, supports for people with disability". The writers submit that this object is also misleading in that in terms of funding the Bill only, and specifically, applies to those participants who receive funding under its jurisdiction. Therefore, post the enactment of the Bill there will be many people with a disability who will continue to access supports and participate in planning and receive funding, outside the authority of the Bill.

Thus, to suggest that the Bill will, or indeed can, facilitate a 'nationally consistent approach' infers a broader authority and reach than is the reality. The writers submit that for a 'nationally consistent approach' in terms of access, planning and funding to become a reality, the Bill would need to go beyond its current form. The use of the word "facilitate" in this context is interesting, as it implies that it is known that the scheme in its current form cannot bring about a nationally consistent approach.

Further, unless all current legislation as exists within the individual states and territories are subsumed within a single piece of Commonwealth legislation, the intent of object 3(1)(e) cannot be met even within the disability sector. On this matter the writers submit that, although outside the parameters of this submission, it is essential that the governments across all jurisdictions work to establish one all-encompassing piece of disability legislation.

Object 3(1)(f) in stating the intent to "promote the provision of high quality and innovative supports to people with disability", the question arises as to – How? The writers submit that it is reasonable to assume that given this object, the Bill would include the broad parameters through which this would be done. Nowhere in the Bill is this evident.

It might be argued that the Bill will have the potential to influence the provision of supports via Part 3, sections 69 and 70, in the sense that these sections may seek to impose particular standards and requirements on providers of supports. However, the Bill's ability to influence innovation is far less clear, and indeed innovation poses a complexity unlikely to be achieved or even influenced by the Bill.

Additional to the above limitations as imposed on object 3(1)(f), there is also of course the reality that the vast majority of supports provided to persons with disabilities are provided by families and generic services providers. These, of course, do not come within the jurisdiction of the Bill. Therefore, to suggest that the Bill will have both the ability and authority to significantly promote the provision of supports provided through families and non-registered entities stretches the credibility of this object. As such, the writers submit that if this object is to remain, not only does it require

rewording, but also it needs to be supplemented by additional comment elsewhere in the Bill. Otherwise, it should be deleted from the Bill.

To support the above view the writers note that the Bill by the inclusion of principle 4(13) in effect confirms their view, in that this principle acknowledges the provision of supports provided "outside the National Disability Insurance Scheme."

Object 3(1)(g) while seeking to "raise community awareness of the issues that affect the social and economic participation of people with disability, and facilitate greater community inclusion of people", is assessed by the writers as what might be described as a well-meaning, but nonetheless somewhat meaningless statement.

While it may well be argued that since the announcement of the intention to establish a National Disability Insurance Scheme and since the tabling of the Bill there has been a flurry of interest, the fact remains that there is nothing in the Bill to demonstrate how this object can be met through the Bill itself. While the Bill gives the Agency functions (section 118) in terms of raising community awareness around disability, the writers argue that it is misleading to suggest that the Bill, of itself, will raise community awareness and facilitate greater community inclusion.

Certainly, while it may well be that some individual participants will be able to achieve greater community inclusion as a result of funds granted to them through the scheme, of itself this only comprises one part of the object. Thus, while this element may be argued to be a legitimate inclusion, the writers challenge the inclusion of the first part of the objective. They argue that to suggest that the Bill will "raise community awareness of the issues that affect social and economic participation of people with disability", is nonsense.

The writers submit that for the Bill to suggest it either has the authority or ability to exert such influence when not one section of the Bill describes the technicalities of how such an objective will be met is a misuse of legislation. Awareness and acceptance of community inclusion across the community, as is also the case for education of the public regarding disability, goes well beyond a Bill of this type. Thus, the writers contend that to seek to use the Bill to make what is in effect a generic objective is wrong.

Principles

The writers note that the Bill details two sets of principles in Chapter 1, Part 2. They also note that in Chapter 3, planning principles are also listed. Comment in relation to principles as mentioned in Chapter 3 is made in that section of the submission.

In terms of Part 2, one set of principles, under section 4, consists of 15 principles, and the second set under section 5, consists of five principles. While the writers acknowledge that section 4 is identified as "General principles guiding actions under the Act" and section 5 is identified as "General principles guiding actions of people who may do acts or things on behalf of others" the writers challenge this structure of defining principles in the Bill.

The writers contend that principles are just that, principles. As such, they therefore argue that whatever principles are applicable to the Bill should be detailed under a single heading. To suggest that there are separate principles guiding actions under the Act from those relating to actions of people who may do acts or things on behalf of others under the Act is nothing short of ludicrous. Surely principles which are deemed to guide actions under the Act do not require to be supplemented by additional principles relating to people who may do acts or things on behalf of others under the Act.

To emphasise even more the ludicrous nature of principles as currently structured into two separate groups, it must be noted that of the five principles listed under section 5, (a), (b), (d) and (e) are in essence encompassed within particular principles in section 4. In terms of 5(c), while this is not encompassed in section 4, it must nonetheless be challenged on the basis that it is a totally subjective principle based entirely on the individual judgement of individual decision makers. Given the wording of this principle, "The judgements and decisions that people with disability would have made for themselves should be taken into account", to suggest that anyone has the ability to categorically decide what judgements and decisions a person with a disability may have made for themselves defies logic.

Principles must be considered as significant statements of requirement. Therefore, the inclusion of any principle must be based on an ability to ensure that the principle can legitimately and reasonably be put into practise. The tendency to include statements under the heading of "Principles" simply because they seem to fit within a model of "niceties" is not the way principles should be developed. It is unfortunate but true that the tendency of including principles simply because they sound nice in various pieces of disability legislation and policy documents across this country is most concerning, and does not add any value to the particular piece of legislation. In fact, the writers go further and contend that the inclusion of what can only be described as superficial concessions to ideology significantly diminish whatever documents are being written, including legislation.

In assessing the principles, and in particular those as listed in section 4, the writers note that of the 15 listed (1), (6), (7), and (8) are in effect rights, and not principles. In addition to these, it is also noted that principle (10) in terms of the rights component is addressed in privacy legislation, and thus the inclusion of this particular element in principle 10 is queried.

Overall, on the matter of these principles, the writers therefore query as to why the Bill does not include a section on rights, whereby those as listed above which are currently listed as principles should be included, along with any other relevant rights. The writers submit that the non-inclusion of a rights section in what might be described as a landmark piece of legislation for the Commonwealth is a serious oversight, given that the "opening up" of disability which began in the 1960s was almost solely based on the promotion of rights.

Interestingly, while the Explanatory Memorandum for the Bill states that section 4 "focusses on the rights of people with disability", of the total of the 15 principles listed in section 4, only four are in effect rights based. Notwithstanding this, however, the writers emphasise the points made in the above paragraph, and thus again stress the need to include a Rights section in the Bill.

In terms of the general principles as listed in section 4 and any equivalent principles in section 5, the writers express concern about particular of these and make relevant comment immediately below.

4 - General principles

Principle 4(2), while accepted as a desirable inclusion, it is nonetheless the writers' view that the principle in its current form is limited. They argue it must be expanded in order to acknowledge the concept of choice.

Although the word choice is noted as being included in principle (4)(4), the inclusion of 'choice' in principle (4)(2) is still considered necessary. Indeed, it is particularly because of the emphasis placed on choice as related to individual funding that the writers submit it must therefore be included as part of this particular principle.

Principle 4(4), while the writers support the inclusion of this principle, they do nonetheless note that in effect it is equivalent to that as detailed in 5(a), and thus see no point in including 5(a).

Principle 4(5), the writers query the validity of including this principle, on the basis that access to the NDIS reasonable and necessary supports will be limited to those who meet the access criteria. This therefore means that despite a person having a disability, the principle does not necessarily apply to all persons who have a disability. As such, as a principle it is therefore seriously compromised. It is for this reason the writers question its inclusion.

Principle 4(6), while placing emphasis on a number of important concepts the principle nonetheless ignores the concept of discrimination. Given the reference above to discrimination as being included in the Convention of the Rights of Persons with Disabilities, the writers argue that this principle must make reference to persons with disabilities having the right to live free from discrimination, not just free from abuse, neglect and exploitation.

Principle 4(8), this section is challenged on the basis of the inclusion of the words "equal partners". There is no indication as to what this actually means and with whom the person with a disability would be an equal partner and vice versa. The writers contend that this is a particularly important consideration, in that despite the rest of the wording of the principle, the right of the individual for self-determination and the exercising of choice has the potential to be significantly compromised depending on the input of the so-called equal partner.

Further, this principle in effect contradicts object 3(1)(b) as listed in the Bill, which talks about "independence". As noted elsewhere in this submission, the writers argue that inter-dependence is a more

appropriate descriptor and thus while this suggests support for the concept of equal partners as included in principle 4(8), nonetheless the critical consideration becomes that of who determines who is to be the equal partner. The absence of any such clarification seriously brings into question the inclusion of this principle.

As already noted under principle 4(2), the writers contend that 4(8) is also equivalent to 5(a).

Principle 4(9), while the writers have no concerns with the inclusion of this principle, they do nonetheless note that in effect it addresses the considerations as noted in principle 5(d).

Principle 4(10), as already noted further above, this principle can in fact be argued to be a right.

Principle 4(11), again while the writers have no concerns with the inclusion of this principle, they note that part (b) of this principle is in effect equivalent 5(b).

Principle 4(12), while recognising "the role of families, carers and other significant persons in the lives of people with disability is to be acknowledged and respected" in the view of the writers it does not go far enough by simply stating that these people be "acknowledged and respected". As already noted above in the Overview to this paper, the reality is that families, for many persons with disabilities, are the significant people in their lives and it is families who provide the bulk of the supports.

Given this fact, the writers therefore submit that in the first instance and in order to truly recognise the significance of families, that reference to families must be listed as a separate and stand-alone principle. In doing so, this new principle must go beyond the concepts of acknowledgment and respect and be expanded to recognise the authority of the family in those circumstances where the person with disability seeks the support of his or her family over and above that of any other person.

In terms of principle 4(12) as it is currently written, the writers note that it is in effect equivalent to principle 5(e), noting that "people with disability" can be included as "other significant persons".

Principle 4(13), the writers are totally opposed to the inclusion of this principle. They argue that to suggest that the Bill, either via the NDIS or indeed outside the NDIS, should by legislation effectively impose the intent of this principle is very much what might be described as a "control principle" with the potential of bordering on social engineering.

The writers contend that the principle is in direct conflict with principle 4(8). Additionally of course, the writers ask why it has been deemed necessary to include this principle when in fact it talks about matters "outside the National Disability Insurance Scheme." If it is indeed the Commonwealth's intent to take total responsibility for disability across Australia, then this matter needs to be addressed outside the Bill. However, this principle goes beyond that, in that supports which may be received by an individual with a

disability are quite likely to be outside of any disability support model, and more likely to fit within other service systems such as education, health, transport, and housing.

If indeed the Bill is serious about ensuring that people with disability have the same rights as other members of the Australian society, then why is it that this principle is included, given that it goes beyond what other members of Australian society may well experience when they seek to access services that will facilitate their social and economic participation. Given that we do not in our society seek to direct individual members of the society as to where and how they will live, what their education will be, how they will manage their transport, and the like, then how is it that we see fit through this principle to exert control or influence that should not rightly be part of this Bill.

Principle 4(14), while the writers do not object to the intent of what is included in this principle, they do nonetheless object to it being included as a principle. They argue that while it is an action or responsibility which may be taken under the authority of the Bill, by its inclusion as a principle it in fact devalues the concept of what a principle stands for.

7 – Notice …

While the provision of notice, approved form or information under the Act is supported as far as it goes, the writers raise two concerns about the contents of this particular section. The first is, what is meant by the inclusion of "etc." in the title. As commented elsewhere in this submission, the inclusion of etc. in legislation is not only considered sloppy, it has no place.

The second concern expressed by the writers is that this section makes no reference to what action is to be taken in the provision of notices, approved form or information in the event of the person with disability not having the capacity to understand the contents of what is being delivered, no matter what language or mode of communication is used, and therefore by association not having the capacity to make any response should one be required.

The writers note the reference in chapter 4, part 5 to that of a participant's nominee. Therefore, given this, it is somewhat incongruous that there is no similar reference in section 7 as pertaining to the role of such a person in relation to the provision of notices, approved form or information for participants, potential participants or indeed people with disability or "others" as referred to in section 6.

The writers submit that the non-inclusion of any such reference not only weakens this section but potentially disadvantages the person to whom the notice, approved form or information is provided.

Part 4 – Definitions

Reasonable and necessary - As already noted further above the two critical words "reasonable" and necessary", which the writers again state are, in their view, the lynchpin words in the entire Bill have not been included in the definitions. They submit this deficit must be rectified.

Access criteria - Although Chapter 3 makes reference to "access criteria" no definition is provided as to what constitutes these criteria. Given that it is the access criteria that determine whether or not an individual becomes a participant, it seems reasonable to suggest that the Bill should provide a definition of access criteria and it is not simply left, as is the case, to be inferred under particular sections as detailed in Chapter 3.

Early intervention – Although the concept of early intervention supports is included in the definition section, the writers note that the actual words "early intervention", although used in section 25, are not included in the definitions section. They therefore submit that the words should be included in the definition section, even if only by reference to section 25.

Carer – the writers note the inconsistency between the definition given in this NDIS Bill and that contained within the Carer Recognition Act 2010 and submit this must be rectified, in that section 5(3) of the Carer Recognition Act must be included in the NDIS definition.

CHAPTER 2

The writers note in the body of the Bill when referring directly to the NDIS itself, reference to those who wish to seek support through the scheme as "potential participants", and those who are accepted into the scheme as "participants". While the use of the word participant is accepted as being appropriate as related to the scheme, it is reasonable to conclude that those who do not gain access to the scheme and are not therefore participants in it may be classified as non-participants.

It is of concern that although the Bill makes no reference to "non-participants", in Chapter 2 it make reference to "people with disability and others". The writers contend that it is reasonable to suggest therefore that Chapter 2 is in effect talking about non-participants in the scheme. This contention is further strengthened by the contents of Chapter 2, in that it makes reference to "people with disability who are not participants" but to whom the Agency may provide general support.

Given the distinction that is made therefore between participants and non-participants, the writers then contend that there are two inter-related questions associated with participants, as described in the Bill, and non-participants as inferred in Chapter 2. The first question can be described as the threshold question, that is - Should this Bill be dealing with people who are non-participants? If, however, there is argument to suggest that it should, the second question then comes into play, that is - How should the Bill deal with non-participants?

In the first instance, the writers contend that given the Bill's emphasis on the National Disability Insurance Scheme, the Bill should therefore only relate to prospective participants, as applicants to the scheme, and the actual participants who have met the access criteria and are accepted into the Scheme. Therefore,

they further contend that any reference to non-participants should be deleted from the Bill.

Notwithstanding their view, however, the writers do note that the Bill does make reference, as in Chapter 2 - Assistance to people with disability and others – as providing "general supports to, or in relation to, people with disability who are not participants." Given this reference, the Bill in its current form therefore must take account of the second question as noted above, that is - How should the Bill deal with non-participants?

In considering Chapter 2, the writers challenge the open-ended nature of section 13(1) in this Chapter, whereby it states "The Agency may provide general supports to, or in relation to, people with disability who are not participants." Despite the wording in 13(2), Chapter 2 in its entirety provides no definitive clarity as to what is meant by "general supports". Further, despite the chapter heading making reference to "others" nowhere in this Chapter is there any clarification or definition as to what is meant by "others". The assumption must be, given the heading that "others" refer to people other than those with a disability.

Given that this chapter does in effect refer to people with disability and others who are non-participants in the insurance scheme, the further question arises as to - Why the "Agency may provide coordination, strategic and referral services etc. to people with a disability"?

Further, the writers are extremely critical of the use of the designation "etc.", this not only being from the perspective that there is no clarification provided in the section or indeed anywhere in Chapter 2 as to whom or what "etc." refers, but also from the use of such a designation in a piece of legislation. The writers contend that this is sloppy and unprofessional.

If this Bill is in part intended to provide a broader focus than simply that of providing funds to those who are assessed as being eligible to participate in the scheme, then clearly the Bill needs far more clarity and definition than provided in Chapter 2. The writers are concerned that by the inclusion of Chapter 2 the intent is to make the Bill a vehicle through which supports are provided beyond that of the Insurance Scheme, and as such in effect seeks to be all things to all people.

This concern is highlighted to an even greater degree when consideration is given to section 16 in Chapter 2, where it states that the "Agency may provide support and assistance to people in relation to doing things under, or for the purpose of, this chapter". While lacking in any sort of clarity, nonetheless this statement goes beyond those who are participants in the Scheme, and potentially also people who do not have a disability. Given that there is nothing in Chapter 2 to suggest how or on what basis people with a disability who are non-participants or others are assessed, the matter therefore of who potentially might be supported through the Agency is open-ended.

Further, by the inclusion of section 16, this also suggests that the Agency will not only be a Transition Agency established for the purpose of launching the NDIS as addressed in Chapter 6, but may also be a service provider, providing support and assistance.

Given that Chapter 2, section 14, provides the authority to the Agency to provide funding to persons or entities - albeit that the persons have not been deemed to be participants in the NDIS launch, and the entities may not necessarily be registered as providers under the NDIS – it seems reasonable to ask – How does a person or entity apply for funds and how might they be assessed as being eligible to receive funds?

Further, if the Agency is to have authority beyond the launch sites in the interim years of the NDIS, then it seems reasonable to suggest that the legislation which creates the NDIS and the Agency, will also identify the basis on which the Agency will exercise its authority in relation to other people and other entities which are outside the NDIS launch sites.

Given the writers' understanding that the NDIS when fully operational will provide funds for approximately 10 per cent of the population of people with disability and their primary carers (around 410,000 of the 4,800,000 people, as identified by the Productivity Commission - p 15 of the Overview and Recommendations of its Disability Care and Support report) and that only those agencies who are assessed as eligible to provide services to this 10 per cent who will of course be the participants in the NDIS, this means that 90 per cent of the population of people with disability across Australia could come within the parameters as detailed in Chapter 2. Logic suggests that no such numbers will be funded either by way of individual persons or entities under the provisions detailed in Chapter 2.

Therefore, in light of the two classes of persons and entities as described in the above paragraph, a third class then arises, that being neither those who are not assessed as eligible to be participants nor those who will be granted funds through the provision of Chapter 2. Given this three-tiered system, and noting that there is an eligibility criteria for participants to determine who can become a participant - What then is the eligibility criteria for people and entities who may apply for and receive funds under the provisions of Chapter 2, but would not be assessed as participants under Chapter 3? By extension, a further question arises as to – Why anyone who has been assessed as having a disability would not receive funding under Chapter 2 in order to, as per 14(a)(i), "realise their potential for physical, social, emotional and intellectual development" and (ii) "participate in social and economic life."

In light of the above, the writers contend in the strongest possible way that Chapter 2 in the Bill raises a significant number of very serious issues that unless addressed will create significant uncertainty and dissatisfaction. And, while the writers note the authority given to the Agency under Chapter 6, section 118(1)(g)

"for any other functions conferred on the Agency by or under this Act, the regulations or an instrument made under this Act", of itself this part of the Bill fails to address the finite detail required if Chapter 2 is to have any credibility.

CHAPTER 3

Part 1

Section 18, while making reference to a person making a request to become a participant, fails to make any reference to the option of another party making a request on behalf of a person. Notwithstanding any other reference which may be made in the Bill regarding a nominee, the writers submit that this section should include reference to the option of a third-party making a request for a person to become a participant.

Section 21(2)(a) and (b), challenge the definition of "meets the access criteria". The writers argue that the criteria should include all elements that entitle a person to be assessed as eligible to become a participant. Although section 21(2) (a) and (b) provides for a person to become eligible, this is only after the CEO has not deemed the person to be eligible in the first instance. By then determining the person as eligible, this is done so on what might be described as a second-tier access criteria. The writers see no point in having a two-tiered approach to the access criteria and therefore argue that the criteria ought to be the criteria, and if 21 (2)(a) and (b) are to be part of that criteria, then they are included as part of 21(1). The writers note and query that there is no "and" "or" between 21 (2) (a), (b) and (c).

The inclusion of 21(2)(c) is considered as a separate matter to the rest of section 21. As such, if it is to be included, it should be included as a separate section. Notwithstanding this, however, the writers query the purpose of 21(2)(c). What it seems to be saying, in its current form, is that if a person was receiving supports via the NDIS or via a program prescribed by the NDIS rules, at the time the person is accepted as a participant, then those supports must cease in order for the person to become a participant in the NDIS. The writers submit that this is a confusing section and must be reviewed.

Section 21(3), when this section is read in conjunction with section 20(a) and (b) it highlights the potential of the CEO simply being able to deny a person's eligibility to become a participant by doing nothing in the first 21 days of the person's application. The writers therefore challenge the inclusion of 21(3). They argue that either the CEO makes a decision within 21 days as to whether a person is or is not eligible to become a participant, and therefore communicates his decision; or, if further information is required, as allowed for under 20(b), then this action must be taken and advised to the applicant, rather than allow the application to lapse as allowed for under 21(3), simply by the CEO not taking any action to request or obtain additional information.

Given the above analysis, the writers therefore submit in the strongest possible way that section 21(3) must be deleted from the Bill. Further, despite section 20 imposing a "must" action on the

CEO, section 21(3) creates incongruity in that it permits the CEO to do nothing, thus negating the "must" of section 20.

Section 22(2), apart from the fact that this section is in total contradiction with section 22(1), it goes beyond this in that it establishes a basis for discrimination to be made in terms of determining who may access or who may be denied access on the basis of age and geography. As such the writers submit this section must be deleted from the Bill. This being particularly so, given that its inclusion contradicts the recognition that the current disability support arrangements are inequitable and fragmented.

Section 23(1)(c), is open-ended, and in the absence of provision of the rules is argued to be unsatisfactory.

Section 23(3), can have many interpretations placed on it in its current wording. In particular, the writers question as to the basis for the inclusion of this section. If on the one hand it has been included in order to control those who may seek to abuse the scheme, then it could be argued that the section has legitimacy. However, if the section has been inserted specifically to inhibit a person's movement into a designated launch site in order to seek funding under the scheme, then the writers argue that this is discriminatory. Again, this highlights the unsatisfactory absence of the rules.

Section 25(a)(ii), introduces another cohort of persons into the legislation, this being a child who has developmental delay. Developmental delay is defined in Definitions and relates to a child less than 6 years of age. The writers question the need to have this specific cohort, given the definition under 25(a)(i) relating to a disability attributable to a range of impairments. It is worthwhile noting that this definition of developmental delay first appeared in Victoria's legislation in the 1986 Intellectually Disabled Persons Services Act, tied to a definition of intellectual disability for persons aged 6 and over. The intention was to ensure that children who might eventually be assessed as having an intellectual disability did not "miss out" in their early years on services and supports to assist their development to their full potential.

The inclusion of "developmental delay" in this Bill infers that this group are not assessed as being people with disability. It also infers that once a child with developmental delay reaches the age of six, another assessment must be done as to their meeting the criteria for being a participant. The writers submit that developmental delay should be omitted from the Bill on the basis that a person with a disability is a person with a disability, regardless of age.

Section 27, is considered a significant section in terms of its relationship to assessment and eligibility**.** As such, by indicating its reliance on the rules and yet the rules not being provided in order for submission writers to be able to make informed comment in relation to this section, the writers again highlight the importance of the rules being developed and provided in conjunction with the Bill.

Section 28(1), by the inclusion of the word "launch" suggests that this Bill is exclusively for the launch sites only, and not, as the writers have assumed, a Bill for the application of the scheme beyond the launch sites. As such, they submit that the word "launch" should be omitted from section 28(1).

Sections 29(1) and 30(1), are argued to be flawed on the same basis as 28(1) and therefore it is also submitted that "launch" should be omitted from section 29(1) and section 30(1).

Part 2

Section 31, Principles relating to plans, is considered to be unnecessary and indeed can be considered confusing, bearing in mind the principles in sections 4 and 5. It is interesting to note that section 31 is a 'cut and paste' of section 52(2) of the Victorian Disability Services Act 2006. However, the Victorian Act's contents regarding planning are virtually only the principles, it does not have detail such as that in the Bill, regarding, for example, supports and matters to be included in a participant's plan. The writers submit that these principles relating to plans should be omitted on the basis that they are unnecessary as they are in effect inherent in the principles as detailed in sections 4 and 5.

Notwithstanding the above, however, the writers challenge 31(a) on the basis that the plans must be individualised and not, as suggested in the preliminary sentence, "so far as reasonably practicable". They also express concern regarding 31(c) which tends to consign the role of families to that of "carers and other persons" and further question the use of the words "where relevant". The wording of 31(c) is considered significant in the context of previous comments made concerning the role of families.

Section 33(1) raises a significant concern relating to how persons with a disability who are participants under the scheme are required to provide a detailed statement concerning their goals and aspirations as well as personal details regarding such things as their living arrangements, their informal supports and their social and economic participation. The writers argue this imposes on these persons with a disability a greater level of imposition than might be expected of anyone else in the community who is considered eligible to receive government funds through any other scheme. Surely the purpose of an individual's plan is to identify what their needs are and how the money that they seek will be used to support those needs. The writers therefore argue that this section can be viewed as being discriminatory and unnecessary and should be omitted from the Bill.

Section 33(2)(4), the use of the words "reasonably practicable" provides the CEO with what is in effect an open-ended timeline in which to make his decision as to whether or not to approve a participant's statement. The writers argue that this section must provide a definitive period.

Section 33(2)(6), imposes on those participants who will have their funding managed by the Agency a different requirement than those who choose to manage the funds in some other way. The writers argue that to require participants who have their funds

managed by the Agency to be only able to access their supports through a registered provider of supports is both discriminatory and restrictive. They see no reason why this limitation should be imposed on participants and argue that to do so contradicts the notion of choice. As such they argue that this section should be deleted from the Bill.

Section 34(d) requires supports to have "regard to current good practice". The writers challenge this requirement on the basis that it raises the question of who determines what is "current good practice" noting that over time practices and philosophies change. They also challenge the section on the basis that it potentially denies a participant their choice. Further, they challenge it on the basis that it contradicts the concept of innovation, which of course if promoted in other parts of the Bill. As such they submit that this section must be deleted.

Section 35, while the writers note that this section relates specifically to participant supports, they further note that when compared and contrasted to Chapter 2 as relating to persons who are not participants but who may nonetheless receive funding and support through the scheme, there is no assessment criteria detailed for those persons as referenced in Chapter 2. The writers argue that if an assessment process is to be applied in relation to the scheme, then it should apply to anyone who receives any funding and support through the scheme, regardless of their status, and not to do so sets up a dual system.

Section 45(2)(a) limits payment to a nominated bank account. The writers argue that in this day and age this is limiting, and the option should be available to make a payment into an account with any authorised financial institution, including credit unions. The Bill should be amended to remove this limitation.

Section 48(2), while giving the CEO 14 days in which to make a decision as to whether to accept a request to have a plan reviewed, it then goes beyond these 14 days by stating that if the decision is not made within that period it should be taken that the CEO has "decided not to conduct the review". Albeit that this is a reviewable decision, the writers argue that allowing the CEO this provision is dismissive of the applicant who is seeking to have his or her plan reviewed, and allows the CEO "an out option" which should not be made available. The writers submit that the CEO must make a decision and advise the applicant within 14 days, with no other options being available. The writers note that as it stands this is a reviewable decision

CHAPTER 4

Part 4 - Children

Section 74(1)(b) in effect gives the CEO power and authority to decide who has parental responsibility for a child, defined as a person under the age of 18 years. This therefore overrides 74(1)(a) if so determined by the CEO. The writers submit that this gives the CEO significant legal power which can be used to override not just the authority invested in a person who is a parent but also a person who may have been granted plenary guardianship under

State or Territory legislation. Further, it also has the power to override any actions or determinations that may have been taken by a State authority, such as a child protection agency, and as relating to a child, that may conflict with the determination of that agency.

The writers submit that this section sets a dangerous precedent in terms of overriding the legitimate authority of parents and guardians. As such, they submit in the strongest possible terms that this section should be deleted from the Bill.

Section 74(5)(a), is considered as inappropriately all-embracing of the concept of child. The writers acknowledge that young people, for example in their mid to late teenage years, may well be capable of making their own decisions and indeed it is positive to encourage this. However, to suggest that any child, of any age, should be given the authority to make his or her own decisions simply on the basis of the CEO being satisfied as to the individual's capability, is inappropriate. As such, the writers argue that if this section is to be retained then it should be limited; to, for example, to what is generally accepted across State and Territory laws as the age of consent, that being 16 years of age.

Part 6

Section 99 is a listing of reviewable decisions. The writers submit that the significance of reviewable decisions is such that within those sections where a decision if reviewable, the fact that the decision is reviewable should be inserted into each individual section.

Sections 100 to 103, while noting these sections relate to the process for reviewing decisions and that section 100(2) imposes a 3-month timeframe on a person seeking for a decision to be reviewed, there is no time-limit identified in any of the sections 100 to 103 specifying a maximum time for the decision to be reviewed and the outcomes advised. The writers submit that this is totally unacceptable and thus a time limit for the review of decisions and the notification of the outcome must be included in the legislation.

CHAPTER 6

Part 3

Section 144 (1)(c) provides for the Advisory Council to provide the Board with advice in relation to reasonable and necessary supports for participants in the NDIS. Section 144, however, fails to make any reference to the Advisory Council providing advice in relation to "general supports" as defined in the Bill.

Given that general supports as defined in section 13(2)(a) and (b) specifically makes reference to services provided by an agency or activities engaged in by an agency, and given, that for an agency to be entitled to provide services or engage in activities to support people with disability under the NDIS, then the question arises – Why is the Advisory Council not given the function to provide advice in relation to general supports?

Although the persons referred to in Chapter 2 are "not participants", nonetheless, as outlined in Chapter 2, they are entitled to receive general supports provided for under the NDIS.

For this reason, the writers submit that Section 144 should be extended to encompass the provision of advice in relation to general supports for participants and non-participants.

Section 146(a), while identifying the Principal Member of the Council, there is no reference in the Bill as to exactly who the Principal Member may be. While the Definitions section makes reference to the Principal Member, it does so simply by using the word "Principal Member" to define Principal Member. The writers submit that a definitive statement should be made as to the definition of Principal Member. The writers query whether in fact the Principal Member is in fact the Chair of the Advisory Council, but nonetheless question as to who and how this person is nominated, selected, appointed.

Section 147(5)(b)(i), the inclusion of four people with disabilities on the Advisory Council, while accepted as positive, is nonetheless argued to be too open-ended in the context of the range of disabilities covered by the Bill. As emphasised in section 24(1)(a), these encompass intellectual, cognitive, neurological, sensory, physical, and psychiatric. Given that six disability types are listed, the writers contend that the Bill must ensure that the four appointees with disabilities to the Advisory Council represent intellectual and cognitive combined, neurological, sensory and physical combined, and psychiatric. Not to ensure representation across the range of disabilities leaves the way open for the Council, from a disability perspective, to be dominated by particular disability types.

Section 147(5)(b)(ii), the writers submit that this section should be modified to include four representatives and that the word "carer" should be deleted in favour of the word "family", and that the representation of family members must be along the same lines as those detailed in section 147(5)(b)(i) above.

Part 5 **Reporting by the Advisory Council.** The requirement for the Advisory Council to make an annual report for the public to be tabled in Parliament is noted as an absence from the Bill. The writers submit that this oversight must be rectified.

CHAPTER 7

Part 3 **Section 207** while acknowledging State and Territory laws, and making comment in relation to such laws not being excluded where they are "capable of operating concurrently with this Act", does not provide any advice where circumstances might arise where State or Territory laws do not operate concurrently with the Act. While the writers acknowledge that Commonwealth legislation takes precedence over State and Territory legislation, they have nonetheless in other parts of this submission raised concerns about the authority of the CEO, via the Act, having the potential to override legal authorities such as guardianship given to parties under State or Territory legislation.

Given the concerns already expressed in relation to this conflict of legislation, the writers therefore submit that the matter of the relationship between the Act and State and Territory legislation

must be given greater scrutiny and detail within the Bill. Further, given the broad ranging functions and authorities provided for under the Act in relation to disability funding and services, the writers contend that the continued existence of State and Territory disability legislation, operating concurrently with this Act, will lead to confusion, contradictions and conflict. As such, they argue that the Commonwealth, in conjunction with States and Territories must move in order to establish a single piece of legislation for disability across Australia.

Recommendations

It should be noted that recommendations specific to particular elements of this submission are contained within the body of the submission, and as such have not been listed as separate recommendations.

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End of Submission