



## Premier of Victoria

1 Treasury Place  
Melbourne Victoria 3002  
GPO Box 4912  
Melbourne Victoria 3001  
Telephone: (03) 9651 5000  
Facsimile: (03) 9651 5054  
Email: premier@dpc.vic.gov.au  
DX210753

D13/2308

Senator Claire Moore  
Chair  
Senate Standing Committee on Community Affairs - Legislation Committee  
PO Box 6100  
PARLIAMENT HOUSE  
CANBERRA ACT 2600

Dear Senator

Thank you for your letter inviting the Victorian Government to make a submission to the Inquiry into the *National Disability Insurance Scheme Bill 2012* (NDIS Bill).

The Victorian Government is strongly committed to the implementation of the National Disability Insurance Scheme.

As you would be aware, our Government has reached agreement with the Commonwealth to host an NDIS launch site in Victoria's Barwon area, commencing in July 2013. Mindful of the importance of a sound legislative framework for launch being finalised within the next six months, our Government appreciates the opportunity to make a written submission to the Committee's Inquiry into the NDIS Bill.

As you will note from the submission attached for the Committee's consideration, the Victorian Government has identified a number of outstanding issues in the NDIS Bill. We are confident that these issues are capable of resolution prior to the Bill's passage and the commencement of the NDIS launch.

~~Regards~~

**Ted Baillieu MLA**  
Premier



# ***Victorian Government submission to the Senate Community Affairs Committee Inquiry into the National Disability Insurance Scheme Bill 2012***

## **Introduction**

The Victorian Coalition Government welcomes the introduction of the *National Disability Insurance Scheme Bill 2012* (Cth) (the Bill) into the Commonwealth Parliament. The Victorian Government is strongly committed to improving support for people with a disability, their families and carers, and has championed the National Disability Insurance Scheme (NDIS) since coming to office.

The Victorian Government recognises the importance of a robust legislative framework to underpin the launch of the NDIS, commencing in July 2013. **While the Bill addresses many of the concerns raised by Victoria during the drafting process, the Victorian Government has identified a number of outstanding issues in the NDIS Bill requiring the Committee's attention.**

These issues include:

- the Bill should include an explicit presumption that people with disability have the capacity to make their own decisions, and make clear that a person should be provided with any necessary support to make their own decisions;
- to give effect to the COAG Principle of continuity of support for existing service users, the CEO of the National Launch Transition Agency (the Agency) should be able to deem some people to be participants in the scheme to avoid stress and delay for current clients and reduce the administrative burden on the Agency;
- clauses 104 and 105, which empower the CEO of the Agency to compel an individual to seek compensation (potentially through litigation), should be replaced with an alternative mechanism or mechanisms to enable the Agency to recover costs from other parties;
- the hierarchy of NDIS rules in clause 209 should be amended to require the agreement of all host jurisdictions to rules that relate to scheme policy, represent a risk to participant rights or outcomes or a fiscal risk to governments, or have implications for existing State laws, services or schemes;
- the Bill should include a flexible mechanism to allow any unintended consequences arising from the interaction between the Bill and State laws during NDIS launch to be addressed as they are identified, in order to minimise any adverse impacts on individuals and/or organisations, without amending the legislation; and
- protocols should be developed between the Agency and existing compensation schemes to ensure effective interaction between the schemes.

Further detail on these issues is set out below. A table setting out a range of other, more detailed, technical and/or drafting issues, is at **Appendix A**.

## **Provisions for decision-making by participants need to be strengthened**

Victoria is pleased that the Bill contains a number of positive provisions in relation to decision-making by or on behalf of NDIS participants. These include the general principles (clause 5) and the inclusion of a duty of a nominee to a participant (clause 80(1)).

However, Victoria considers that the decision-making provisions require strengthening, to ensure that they promote genuine choice and control by participants and are consistent with contemporary international best practice.

In particular, Victoria considers that the Bill should clearly articulate the presumption of a person's capacity to make decisions as the starting point for all decision-making (clause 5).

Where a person is unable to make a decision without assistance, the duty of a nominee to a participant should include a requirement for the nominee to support the participant to make their own decision, prior to a substitute decision being made by the nominee (clauses 5, 78(5)). It should also be explicit that a nominee may only be appointed on the initiative of the CEO of the Agency where a participant is unable to request a nominee (clauses 86, 87).

While the Bill requires the CEO to have regard to existing guardianship arrangements (clause 88(4)), this provision should be expanded to recognise all State and Territory-based substitute decision-making arrangements, including administration appointments and appointments made under enduring powers of attorney. The Bill or the rules will also need to clarify the intersection between the duties of a nominee and substitute decision-makers under State law, as these duties may overlap or conflict.

Proposed amendments to the decision-making provisions are outlined in **Appendix A**.

### **Existing service users should not be disadvantaged**

Victoria recognises that the Bill seeks to ensure continuity of support for existing users of specialist disability support services through inclusion of a ‘grandfathering’ provision for existing clients resident in launch sites (clause 21(2)), consistent with the COAG Principles for an NDIS (Principles 1(l) and 4(a)).<sup>1</sup> However, this provision requires the person to make an ‘access request’ to the Agency.

Victoria is committed to ensuring that existing service users are not disadvantaged in their transition to an NDIS. Requiring existing clients to make a formal access request will be both stressful for people with disability, their families and carers, and potentially costly for the scheme. In addition, the requirement to make an access request may delay the person’s access to NDIS support, and it is unclear how a person would continue to receive their existing disability supports in the launch areas if an access request is not made.

In order to streamline access to the scheme for existing service users, the Bill should be amended to enable the CEO of the Agency to deem existing service users to be participants. A legislative mechanism could also be included to generate a review of a person’s existing support plan, if or when required.

### **Individuals should not be compelled to seek compensation**

Victoria understands that the provisions in Chapter 5 are intended to avoid ‘double compensation’, enable the NDIS to recoup costs where another party is liable to pay for a person’s care and support, and to maintain appropriate incentives to minimise the risk of disability (by retaining the capacity to recover compensation from an at-fault party).

While these aims are important, further consideration needs to be given to the best way to achieve them. In designing an appropriate mechanism or mechanisms for cost recovery, the Bill and NDIS rules should avoid creating undue financial or personal costs on NDIS participants or prospective participants, as well as any unintended consequences for existing State-based statutory compensation schemes, such as the Transport Accident Commission (TAC) and WorkSafe Victoria (WSV), and common law insurers such as the Victorian Managed Insurance Authority (VMIA). As currently drafted, the provisions in Chapter 5 are likely to give rise to both of these problems.

Under clauses 104 and 105, the Bill gives the CEO of the Agency power to compel a person to take action to obtain compensation, without any provision being made for the person to recover costs from the Agency. This is a very onerous obligation, given the significant financial and personal costs that may be involved in any litigation, the application of the provisions to both participants and prospective participants (the latter having no certainty that they will be eligible

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<sup>1</sup> <http://www.coag.gov.au/node/315>

for NDIS support), and the serious consequences that may arise from failure to comply (including suspension of funded supports).

In addition, a number of the remaining provisions in Chapter 5 could result in existing schemes being required to pay for costs that exceed or fall outside their statutory or common law liability, and require them to act within very short timeframes or be subject to unreasonably high penalties for failure to comply.

A range of alternative mechanisms is available to replace clauses 104 and 105. These mechanisms would enable the NDIS to recoup its costs, while avoiding the imposition of onerous obligations on the individual and unintended impacts on existing schemes, and also minimising administrative costs to the NDIS. These mechanisms are set out in **Appendix A**. A suite of mechanisms is likely to be required to enable the Agency to adapt its approach to cost recovery to the relevant context.

## **Decision-making arrangements for NDIS rules require amendment**

Much of the detail relating to the key policy parameters of the NDIS will be contained in legislative instruments known as the 'NDIS rules'. Victoria is currently playing a constructive role in the development of these rules.

### **Level of agreement required for the NDIS rules**

Victoria is pleased that many of the rules that are fundamental to outcomes for participants and the operation of the scheme, including those relating to eligibility, 'reasonable and necessary' support and requirements for nominees, have been classified in clause 209 of the Bill as 'Category A', requiring the agreement of all host jurisdictions and the Commonwealth. However, Victoria considers that a number of the rules currently listed in Category B (rules requiring the agreement of a particular host jurisdiction), Category C (rules requiring the agreement of the majority of host jurisdictions) and Category D (rules requiring only consultation with all host jurisdictions) should be agreed by all host jurisdictions and therefore be reclassified as Category A rules. This would reflect the agreement between the Commonwealth and all host jurisdictions to shared governance of the NDIS launch.

In Victoria's view, all NDIS rules that relate to scheme policy, represent a risk to participant rights or outcomes or a fiscal risk to governments, or have implications for existing State laws, services or schemes should be classified as Category A, requiring the agreement of all host jurisdictions. This would enable host jurisdictions to consider the implications of the rule in the context of their jurisdiction. Specifically, Victoria considers that the rules under clauses 22(1), 70 and 73, 44, 45 and 48 should be reclassified as Category A. Further detail on the rationale for reclassifying these rules is set out in **Appendix A**.

### **Review of the NDIS rules**

It is not clear when the NDIS rules will be reviewed. Given the critical importance of the rules to the operation of the primary NDIS legislation, the rules should be reviewed together with the primary legislation two years after the commencement of the legislation (see clause 208). Following this review, the rules should be periodically reviewed.

## **The Bill should include a flexible mechanism to manage conflicts with State laws**

Victoria has significant concerns about the interaction of the Bill with State laws.

While the rule-making power in clause 58 and the CEO's discretion in clause 66 are likely to mitigate the risk that clauses 58 and 65 might otherwise obstruct the administration of justice or the pursuit of integrity matters under State law, these 'exceptions' are limited to matters relating to information disclosure and protection. These provisions will not address Victoria's broader concern that other provisions in the Bill may interfere with the operation of State laws, with further amendments to the Bill later required to address them.

For example, the Bill is not clear about how a person who is both the guardian of a person under State law and the nominee of the person under the NDIS legislation is to manage any overlapping or conflicting legal obligations. Another example is where a compensation payer or insurer may be prevented by clause 112 of the Bill from making payments to a person while a notice issued by the Agency is in effect, which may place them in breach of State law, for example, where an agency such as the Transport Accident Commission has a statutory obligation to pay compensation.

While these particular instances of conflict between the Bill and State laws should be able to be addressed in the Bill prior to passage (now that they have been identified), it is very likely that other conflicts will continue to be identified in the future. Given the complex overlay of State and Commonwealth laws within the launch sites during the launch, it is difficult to predict with certainty how the provisions of the Bill will interact with important State laws.

The Bill should include a flexible mechanism to allow any unintended consequences arising from the NDIS launch to be addressed as they are identified. This will minimise the need for further legislative amendments in the future and allow any uncertainty to be addressed in a timely manner. This could be modelled on the mechanism that already exists under the corporations law regime, which is detailed further in **Appendix A**.

## **Protocols are required to manage the complex interface between the NDIS and other schemes**

The interface between the NDIS and State-based statutory compensation schemes gives rise to a number of complex issues, which are not currently addressed by the Bill.

The Bill or NDIS rules will need to ensure that a person with disability who requires funded support does not ‘fall between two stools’, for example, due to differences in eligibility requirements between schemes, or statutory limitations or exclusions. In Victoria, for example, a person’s right to compensation from the Transport Accident Commission may be extinguished under sections 42 or 68 of the *Transport Accident Act 1986 (Vic)* (TAA) where the person is already an NDIS participant (s 42), or a claim is made more than three years after the accident or manifestation of the injury (s 68).

The Agency will also need to work with other schemes to clarify responsibilities where there is dual liability (for example, where a person with disability who is accessing NDIS-funded supports is involved in a transport accident, which results in a need for additional support, or vice versa), and to minimise administrative complexity in relation to managing and accounting for ongoing or future payments between schemes. (Chapter 5 is primarily concerned with past payments.) It is likely that additional complexities arising from the interface between the NDIS and other schemes will become apparent once the NDIS is operational. This highlights the need for a flexible mechanism to manage conflicts with State laws, as outlined above.

A protocol for resolving disputes between the NDIS and State schemes should be developed, along with a mechanism to facilitate the exchange of information. This would ensure that the liabilities of the NDIS and State schemes can be determined cooperatively without the need to resort to litigation. The TAC and WSV currently have a protocol in place for negotiating disputes, and the TAC has protocols in place with interstate insurers.

Victoria will continue to work with the Commonwealth and other State and Territory governments (including statutory agencies) to address these complex issues.

## **Other issues requiring attention are outlined in Appendix A**

A range of other more detailed, technical and/or drafting issues are outlined in **Appendix A**. These include:

- strengthening the principles to protect and promote the rights of people with disability (clause 5);

- making provision for complaints processes for Agency services (e.g. Chapter 2);
- inclusion of timeframes for some Agency decisions (clauses 20, 21(c), 100);
- refinement of the definition of ‘reasonable and necessary’ supports (clause 34);
- amendments to provisions relating to management of a person’s plan to ensure they do not unnecessarily restrict choice and control (clauses 33, 99); and
- amendments to provisions relating to children (clauses 75(2), 76).

## **Conclusion**

The Victorian Government is confident that the issues raised in this submission are capable of resolution prior to the Bill’s passage, the finalisation of the NDIS Rules and the commencement of the NDIS launch.

The Victorian Government looks forward to the Committee’s report, and will continue to work with the Commonwealth and other State and Territory governments to ensure the Bill and the NDIS rules provide a solid framework for the NDIS launch, so that people with disability, their families and carers can get the support they need.