

22 January 2013

Senate Standing Committees on Community Affairs  
PO Box 6100  
Parliament House  
Canberra ACT 2600

Dear Senator Moore and Committee members,

**Submission to Senate Committee Inquiry on National Disability Insurance Scheme Bill 2012**

Thank you for the opportunity to provide comment on the National Disability Insurance Scheme (NDIS) Bill.

We believe our privileged position as an independent statutory authority for the resolution of complaints about disability services in Victoria provides a valuable insight into the necessary safeguards required for a national scheme.

Our commitment and investment in sector education and analysis of complaints also provides an objective understanding of systemic issues which will be necessary to consider in the implementation of a national framework that seeks to uphold and promote human rights, choice and control.

Please find attached a copy of our submission.

Kind Regards

Laurie Harkin  
**Disability Services Commissioner**

**National Disability Insurance Scheme Bill 2012 – Submission 01/2013**

**SUBMISSION – 22 January 2013**

**Attention: Senate Standing Committee on Community Affairs**

Email: [community.affairs.sen@aph.gov.au](mailto:community.affairs.sen@aph.gov.au)

Mail: PO Box 6100  
Parliament House  
Canberra ACT 2600

**Disability Services Commissioner Victoria**

Level 30 / 570 Bourke Street

Melbourne VIC 3000

Email: [contact@odsc.vic.gov.au](mailto:contact@odsc.vic.gov.au)

Phone: 1300 728 187

Fax: (03) 8608-5785

Mr Laurie Harkin  
Disability Services Commissioner

## **Victorian Disability Services Commissioner – 22 January 2013**

### **1. Background**

The Victorian Disability Services Commissioner (DSC) commenced on 1 July 2007 under the *Disability Act 2006* (Victorian Disability Act) to improve services for people with a disability in Victoria.

This independent statutory office works with people with a disability and disability service providers in Victoria to resolve complaints.

Our complaints resolution process is free, confidential and supportive and we encourage and assist the resolution of complaints in a variety of ways including informal approaches to resolution, assessment conferences, conciliation processes, or under certain circumstances through investigations.

We research ways to improve outcomes for people with a disability and improve disability services' complaints systems. We also provide capacity development activities for people with a disability, their families and disability services through a variety of education and information. Our approach to our work reflects the objectives of the Victorian *Disability Act 2006* and our values and principles that are aligned to the *United Nations Convention on the Rights of Persons with Disabilities*.

Since the establishment of this office some five and a half years ago we are able to provide comments and proposals based on the evidence and knowledge we have gained in responding to over 3,000 matters to date. Victorian disability service providers also readily contribute to our growing body of knowledge by (as provided for in the Victorian Disability Act) reporting each year on the number and types of complaints they received and how they were resolved. This information is used to identify systemic issues and inform the ongoing development of the disability service system.

The comments and proposals outlined in this submission have been informed by our experience in applying the Victorian Disability Act, and the learnings from complaints which we have identified from service provider's data and our own data and experience in resolving complaints. We provide these for the consideration by the Senate Standing Committee on Community Affairs in order to achieve the best possible outcomes for people with a disability and participants of the National Disability Insurance Scheme.

## 2. Summary of key areas addressed by this submission

The Disability Services Commissioner welcomes many positive features of the proposed National Disability Insurance Scheme Bill 2012 (hereafter referred to as the Bill) including the general principles which set out key rights of participants under the scheme, the provisions for changing participant's statements and requesting reviews of plans at any time, the inclusion of timeframes and participants' request for review to Administrative Appeals Tribunal.

We acknowledge that more detailed information to support the legislative framework will be contained in the Rules and we have taken the opportunity to identify areas in this Bill that we believe require enhancement through this approach.

It is our experience that enabling genuine choice and control in the provision of care and support to people with a disability requires clear and consultative communication practices, and a culture that encourages people to *speak up* to affect improvement in service provision and individual outcomes.

We believe it is necessary to establish in the framework concepts which are central to the scheme and mechanisms to ensure a quality rights-based approach to service delivery. As such, the following should be clearly stated in the Bill:

- The criteria and what constitutes 'reasonable and necessary supports'
- Inclusion of a requirement for the Agency to have a complaints process that relates to the agency and provision of the NDIS as a whole.
- An independent complaints process for participants of the scheme in respect of services and supports received from both the Agency and from approved service providers
- A definition of 'safeguards' which includes safeguards around abuse, complaints, restrictive interventions and critical incidents.

The integrity of the scheme would be enhanced where definitional and quality of service delivery disputes can be facilitated through an independent complaints process.

A national scheme would benefit from outcomes based resolution methods that are proven to change cultural perception of complaints mechanisms to one which achieves service improvement for individuals and organisations, and establishes an evidence base for improvement across the broader disability service system.

### 3. Proposed inclusions and amendment to the Bill based on enquiries and complaints specific to this submission

#### Chapter 1- Introduction

##### Chapter 1 Part 2: Objects of the Act, Section 3(1)

**Proposal:** Include purpose of the Act which relate to people's rights - such as promoting and protecting the rights of people with a disability in relation to the scheme or in relation to services funded or provided under the scheme.

The Objects of the Act section should include references to people's citizenship and human rights, and the objective of supporting people to achieve their goals, aspirations and quality of life.

The Objects of the Act would also be further enhanced if specificity was given to sub-section 3(1)(h), outlining which obligations from the Convention on the Rights of Persons with Disabilities were to be given effect to.

**Explanation:** Legislation would be strengthened by explicit reference to rights of people with a disability in the Objects of the Act section.

Without Objectives of the Act which set out people's citizenship and human rights, and the objective of supporting people to achieve their goals, aspirations and quality of life, then the interpretation of 'reasonable and necessary supports' will be capable of being narrowly construed, particularly for people with an intellectual disability, cognitive impairments and autism.

##### Chapter 1 Part 2: General Principles, Section 4

**Proposal:** Include as additional principles:

- *People with a disability have the right to access information and communicate in a manner appropriate to their communication and cultural needs*
- *People with a disability have the right to access supports and services which support their quality of life.*
- *People with a disability have the right for their supports to be managed and provided in a way that maximises their exercise of choice and control, and which is the least restrictive of the person as is possible in the circumstances.*
- *The Agency and registered providers of supports should have regard for any potential increased disadvantage which may be experienced by persons with a disability as a result of their gender, language, cultural or indigenous background or location.*
- *The Agency and registered providers of supports should be accountable for the quality of those supports and for the extent to which the rights of persons with a disability are promoted and protected in the provision of those supports.*

**Explanation:** The proposed general principles are a positive feature of the Act, and mirror many of the principles of the Victorian Disability Act. The addition of the above principles ensures:

- people's rights to access meaningful information

- people are not to be disadvantaged by virtue of their circumstances, background or location
- quality and accountability in the nature of services and supports provided under the Scheme

Section 4 does not contain any explicit references to people's right to a degree of risk and the least restrictive options if rights or opportunities are restricted. Given that the Bill deals with considerations of 'unreasonable risk' in relation to the management of participant's plans in Section 44, it would be important to include a principle about the dignity of risk and people's right to the least restrictive option.

**Proposal:** Strengthen the following proposed provisions:

Section 4 (7) provides that 'People with a disability have the same right as other members of Australian society to pursue any grievance'.

- Amend to include: *"and that they and any person who raises a complaint or seeks review of a decision on their behalf should not be disadvantaged as a result of exercising this right."*

Section 4 (11) provides that 'Reasonable and necessary supports for people with disability should:

- (a) support people with disability to pursue their goals and maximise their independence; and
- (b) support the capacity of people with disability to undertake activities that enable them to participate in the community and in employment.'

- Amend to 4(11)(a) to include: *"support people with a disability to pursue their goals and maximise their independence and quality of life."*

**Explanation:** Service quality and personal safeguards should include protections against disadvantage if a person exercises their right to complain or seek review of a decision. The inclusion of such protections in the Victorian Disability Act has proven to be critical in addressing the fear and reluctance of many people with a disability and their families to raise complaints about services received, particularly when people are dependent on such services for their day to day functioning and living circumstances.

The meaning of reasonable and necessary supports would benefit from explicit reference to enabling people to have 'a good life' or quality of life outcomes in order to avoid a potential narrow interpretation which focuses only on community and employment participation.

## **Chapter 1 Part 2: Agency may provide support and assistance, Section 6**

**Proposal:** To consider reframing as a positive obligation.

**Explanation:** This provision would be strengthened if it was reframed as a positive obligation on the Agency to provide assistance to a person with a disability where required, or alternatively as a right of a person with a

disability to receive support and assistance from the Agency in relation to doing things or meeting obligations under the Act.

#### **Part 4: Definitions, Section 7**

**Proposal:** Include definitions for the following:

- disability
- a person
- safeguards

**Explanation:** There is no definition of disability in section 7, even though developmental delay is defined. There is only the reference to disability requirements in section 24.

There is also no definition for the meaning of 'a person' under the Act, which is relevant for approval as a registered provider of supports under section 70, nor a definition of safeguards which may be prescribed under section 73.

### **Chapter 2 - Assistance for people with disability and others**

#### **Chapter 2: Agency may provide coordination, strategic and referral services etc. to people with disability, Section 13**

**Proposal:** That the Bill and the NDIS Rules (currently being developed) include provision for the Agency to have complaint processes and for (or on behalf of) participants or potential participants to have access to an independent complaint body.

Further, that the nature and types of services provided or funded by the Agency be defined, particularly in terms of advocacy and case management.

**Explanation:** This provision outlines a service provision role for the Agency in terms of provision of general supports including 'locally provided coordination, strategic or referral service or activity'. It is therefore important that the Bill and the NDIS Rules provide for accountability and independent complaint mechanisms in respect of services provided by the Agency.

It will also be important to define what is meant by 'locally provided co-ordination' and 'referral service or activity'.

We are also not clear how advocacy and case management will be funded or provided under the scheme. These services are particularly important to assist participants with complex needs to access and engage in the scheme.

#### **Chapter 2: National Disability Insurance Scheme rules, Section 17**

**Proposal:** Add, "*The National Disability Insurance Scheme will prescribe matters for and in relation to this Chapter, including measures for*

*accountability and independent complaint mechanisms in respect of services provided by the Agency."*

**Explanation:** Given the proposal to ensure an independent complaint process related to the proposed functions of Agency, it would be appropriate to specify that the Rules will prescribe measures for accountability and independent complaint mechanisms in respect of services provided by the Agency.

### **Chapter 3 - Participants and their plans**

#### **Chapter 3 Part 1: Disability requirements, Section 24**

**Proposal:** Amend the proposed provision (d) to read "the impairment or impairments affect the person's capacity for social and economic participation *and/or quality of life.*"

**Explanation:** The notion of social and economic participation in itself is capable of being narrowly defined, it is recommended that '*and/or quality of life*' is added.

#### **Chapter 3 Part 1: Disability requirements, Section 24; and Early intervention requirements, Section 25**

**Proposal:** Review sections 24(1)(a) and 25(1)(a)(i) to ensure that people with autism are included.

**Explanation:** It needs to be clear how autism will be recognised under the impairments listed – whether it is considered as a neurological impairment (as in the policy position adopted in Victoria) or as a psychiatric condition. Alternatively, the requirements could be expanded to include 'pervasive developmental disorder' to specifically cover autism and related conditions.

#### **Chapter 3 Part 2: Principles relating to plans, Section 31**

**Proposal:** To include explicit references to person centred planning, the goal of maximising the participant's quality of life, and the need for a proactive approach to planning for people with complex needs.

**Explanation:** These could be further strengthened through explicit reference to person centred planning, the goal of maximising the participant's quality of life, and a proactive approach to planning to meet the needs of people with complex needs who lack self advocacy skills, families and existing links to the disability service system.

#### **Chapter 3 Part 2: Preparing participants' plans, Section 32**

**Proposal:** To include a timeframe for completion of a participant's plan.



**Explanation:** The obligations in section 32 that the CEO *must* facilitate the preparation of the participant's plan, and the timeframe of 14 days for commencement are positive. There should however be a timeframe for completion, with provision for extension of time where circumstances require.

**Chapter 3 Part 2: Matters that must be included in a participant's plan, Section 33(4)**

**Proposal:** There should be a timeframe for the CEO's decision whether or not to approve the statement of participant supports.

**Explanation:** There is no timeframe for the CEO's decision on whether or not to approve the statement of the participant's supports. The term 'as soon as reasonably practicable' is too open to interpretation. Given the CEO has provision to request information and/or assessment (section 36) and the decision is stated to be made with regard to information and/or assessments requested under section 36, it seems sensible to set a timeframe.

**Chapter 3 Part 2: Matters that must be included in a participant's plan, Section 33(5)(d)**

**Proposal:** The criteria of 'reasonable and necessary supports' should ideally be specified in the **Principal Act** so that legislation provides assurance as to how eligibility for the NDIS, and the funding of supports will be determined at an individual level.

**Explanation:** Leaving the criteria of 'reasonable and necessary supports' to the NDIS Rules is problematic given the centrality of this concept to the scheme as set out in the Bill.

**Chapter 3 Part 2: Matters that must be included in a participant's plan, Section 33 (5)(f)**

**Proposal:** 'Regard to the operation and effectiveness of any previous plans of the participant' should be addressed in the NDIS Rules.

**Explanation:** This requires the CEO to have regard to 'the operation and effectiveness of any previous plans of the participant'. This raises the question as to how the effectiveness of such plans are to be assessed and from whose perspective.

**Chapter 3 Part 2: Reasonable and necessary supports, Section 34 (b)**

**Proposal:** Amend the proposed provision (b) to read "the support will assist the participant to undertake activities, so as to facilitate the participant's social and economic participation; *and/or quality of life.*"

**Explanation:** the requirements for supports to assist a participant to undertake activities which will '*facilitate social and economic participation*' is limiting and doesn't reflect other support needs, goals or quality of life needs.

### **Chapter 3 Part 2: Reasonable and necessary supports, Section 34 (c)**

**Proposal:** Review the notion of 'value for money'

**Explanation:** The requirement to represent value for money is problematic due to the high degree of subjectivism. The concept does not recognise the quality of supports and a person's exercise of choice. What a person identifies as beneficial and the costs associated with meeting their support needs will differ greatly from what the Agency/CEO/staff will consider as beneficial and cost effective.

Ultimately priority should be given to a person choosing supports to meet their disability needs and it should not be necessary to include this statement given the framework provided by the guiding principles, Rules and planning process.

### **Chapter 3 Part 2: Reasonable and necessary supports, Section 34 (d)**

**Proposal:** Amend the proposed provision (d) to read "the support will be, or is likely to be, effective and beneficial for the participant, *having regard to a participant's right to exercise choice, control and trial new types of supports and activities*"

**Explanation:** The requirement to assess whether the support will be, or likely to be, '*effective and beneficial*' could be inconsistent with the objective of promoting innovation and exercise of choice and control.

If the intention of this requirement is to minimise personal risk or harm then this would more appropriately be managed in the Rules.

### **Chapter 3 Part 2: Reasonable and necessary supports, Section 34 (e)**

**Proposal:** Review the inclusion of a judgement of what 'is reasonable to expect family or informal networks or the community to provide'.

**Explanation:** The inclusion of a judgement of what is reasonable to expect from family or informal networks or the community to provide is highly problematic. Such judgements are subjective and contextual and could be open to challenge in terms of fairness and equity.

### **Chapter 3 Part 2: National Disability Insurance Scheme rules for statement of participant supports, Section 35 (1)(a)**

**Proposal:** The criteria for deciding upon supports should ideally be specified in the **Principal Act** so that legislation provides assurance as to how eligibility for the NDIS, and the funding of supports will be determined at an individual level.

**Explanation:** The first clause in this section states that the NDIS Rules may prescribe '*a method for assessing, or criteria for deciding, the reasonable and necessary supports or general supports that will be funded or provided under the National Disability Insurance Scheme*'. As raised in relation to Section 33(5), leaving the criteria of 'reasonable and necessary supports' to the Rules is problematic given the centrality of this concept to the scheme as set out in the Bill. It is also important that any criteria or methods for deciding reasonable and necessary supports can be easily reviewed on appeal by an independent decision maker and not be dependent on technical formulae and interpretation.

### **Chapter 3 Part 2: Information and reports for the purposes of preparing and approving a participant's plan, Section 36**

**Proposal:** That the Bill and NDIS Rules include provision for the Agency to have complaint processes and for, or on behalf of, participants to have access to an independent complaints body.

**Explanation:** Section 36(2)(a) provides for the CEO to request information from a participant '*that is reasonably necessary for the purposes of preparing the statement of the participant supports, or deciding whether to approve the statement of participant supports*', and section 36(2)(b) provides for the CEO to request a participant to undergo assessments or medical, psychiatric or psychological examinations. (Similar requirements are also set out in section 50 in relation to reviewing a participant's plan.) These are areas where there may be disputes about the necessity of information or the nature of assessments requested, and are further examples of the need for the Agency to have complaint processes and for, or on behalf of, participants to have access to an independent complaint body to resolve any potential issues.

### **Chapter 3 Part 2: Agency must comply with the statement of participant supports, Section 39**

**Proposal:** Include in the Bill or the NDIS Rules a provision that ensures participants are provided with service agreements with registered service providers that contain the conditions on which supports are delivered

**Explanation:** The provision of a service agreement, as is required under the Victorian Disability Act for residential services, ensures clarity of expectations and obligations of both the service provider and service user. This should be broader to encompass all registered service providers. Consideration could be given about the type of service and level of funding.

### **Chapter 3 Part 2: Choice for the participant in relation to plan management, Section 43**

**Proposal:** That the Bill and NDIS Rules include provision for Agency and registered plan management providers to have complaint processes and for, or on behalf of, participants to have access to an independent complaint body.

**Explanation:** Section 43(1)(b) provides for the option of funding for supports under a plan to be managed by a '*registered plan management provider*' nominated by the participant and s43(1)(c) provides for the funding to be managed by a person specified by the Agency. Section 43(4) provides for the funding for supports under a plan to be managed by a '*registered plan management provider specified by the Agency*' or the Agency.

As the choice of plan management and the way in which funds are managed are likely subjects of complaints and disputes, the Act and the NDIS Rules should require that the Agency and registered plan management providers have complaint processes and that participants, or persons on behalf of participants, have access to an independent complaint body to resolve any potential issues.

### **Chapter 3 Part 2: Circumstances in which participant must not manage plan to specified extent, Section 44**

**Proposal:** That criteria and decisions on any restrictions to the management of participants' plans are based on the principles proposed for section 4 of the Act in relation to people's right to a degree of risk and the least restrictive alternative.

That the Bill and NDIS Rules include provision for the Agency to have complaint processes and for participants, or persons on behalf of participants, to have access to an independent complaints body.

That decisions made under section 44 are included in as Reviewable Decisions under Part 6, section 99.

**Explanation:** Section 44 sets out circumstances in which a participant must not manage their plan 'to a specified extent', and provides for the CEO to effectively make a decision that the person's management of their plan would '*(a) present an unreasonable risk to the participant; or (b) permit the participant to manage matters that are prescribed by the National Disability Insurance Scheme Rules as being matters that must not be managed by a participant*'. Section 44(3) provides for the NDIS Rules to prescribe criteria in relation to considerations of what would present 'an unreasonable risk'. As outlined above in relation to section 4, it will be important for such criteria and decisions to be based on the principle of people's right to a degree of risk and the least restrictive alternative. The Rules should also be informed by contemporary approaches to capacity and supported decision-making.

The decisions made by the Agency in regard to what presents 'an unreasonable risk', and any associated restrictions on the management of a participant's plan, are likely to give rise to complaints and disputes. This is a

further example of the need for the Agency to have a complaint process and that participants, or persons on behalf of participants, have access to an independent complaints body to resolve any potential issues.

Decisions made under section 44 are not included in the list of reviewable decisions in Part 6, section 99. Whilst such a decision would be part of a decision under subsection 33(2) on the statement of participant supports in a participant's plan, it would be preferable if the specific decision made under s44 in relation to 'unreasonable risk' was a clearly reviewable decision.

### **Chapter 3 Part 2: Reviewing and changing participants' plans, Division 4, Section 47 and 48**

The provisions for changing participant's statements and requesting reviews of plans at any time, and inclusion of timeframes are positive features.

## **Chapter 4 - Administration**

### **Chapter 4 Part 1: Requirement to notify change of circumstances Section 51**

**Proposal:** For the NDIS Rules to address how participants can be supported to identify and notify of relevant changes in circumstances.

**Explanation:** Section 51 sets out requirements for participants to notify change of circumstances. There is however no provision for circumstances where a person doesn't realize that there has been a relevant change in circumstances or doesn't have capacity to identify such changes.

### **Chapter 4 Part 2: Protection of information held by the Agency etc., Section 60**

**Proposal:** Greater specificity where it is referred to as the "Agency etc".

For the NDIS Rules to:

- o be explicit about the nature of requesting and providing information in the event of concern about an agency staff member, and
- o identify objective methods of worker checking as part of the registration requirements for service providers.

Include a systemic approach to minimise risk to participants from agency staff as part of the proposed review of the Act in 2 years time.

**Explanation:** This section should explicitly refer to the Agency and registered service providers.

A framework for systemic protection against staff who may pose a risk to people with a disability has not been addressed in this Bill to facilitate the launch of the NDIS. The proposed Bill provides mechanism for disclosure of protected information for the purposes of the 'Act' or for the purposes of a

participants plan. The Rules, for the purpose of the launch, should provide clarity that upholding the integrity of the Act includes disclosure of information where there are concerns about the risk an agency staff member may pose to participants, or potential participants. Further registration requirements as stated in the Rules should include appropriate staff, or potential staff, checking and screening methods.

An objective approach to the checking and tracking of staff is required to minimise the risk to people with a disability and uphold the standards of the disability workforce more broadly. Whilst we recognise that this is not practicable to implement this in the launch legislation, a national registration scheme for staff should be considered and protections enacted following the proposed 2-year legislative review. Of reference is the Australian Capital Territory *Working with Vulnerable People (Background Checking) Act 2011*, where the definition of vulnerable extends beyond all children to adults who are accessing prescribed services.

#### **Chapter 4 Part 2: Disclosure of information by CEO, Section 66**

**Proposal:** To include a requirement for the CEO to notify a person (or entity) of the intention to disclose information and give them the opportunity to consent to the disclosure, with the provision that such a requirement would not prohibit disclosure if it was assessed as being necessary in the public interest.

**Explanation:** Section 66 provides for the disclosure of information about a particular case or class of cases where the CEO certifies that it is necessary in the public interest. There are however no provisions for the CEO to be required to notify person or give them the opportunity to consent, and thus does not have equivalent protections to the secrecy provisions of section 128 of the Victorian Disability Act.

#### **Chapter 4 Part 3: Application to be a registered provider of supports, Section 69**

**Proposal:** That the criteria for registered providers of supports are equivalent to the existing requirements and safeguards which apply to registered providers under the Victorian Disability Act.

Include a definition of 'a person' for the purposes of approval as a registered provider of supports.

**Explanation:** Section 69 provides for a person or entity to apply to the CEO to be a registered provider of supports in relation to either or both '(a) *managing the funding for supports under plans*; (b) *the provision of supports*'. Section 70 refers to the need for the applicant to meet the criteria prescribed under the NDIS Rules. It will be important that the criteria are equivalent to the requirements for registered providers under the Victorian Disability Act.

The Rules should be explicit that registered providers are required to meet the National Standards and associated quality framework.

Section 69 provides that a person can apply to become a registered provider of supports, but there is no definition of 'a person' in the Act, in contrast to the Victorian Disability Act.

### **Chapter 4 Part 3: National Disability Insurance Scheme rules for registered providers of supports, Section 73**

**Proposal:** Amend the wording in 73(1) and 73(2) to state "The National Disability Insurance Scheme rules *must* make provision...", and to include a definition of 'safeguards' in section 7, which includes safeguards around abuse, complaints, restrictive interventions and critical incidents.

The criteria in the NDIS Rules in relation to safeguards, quality assurance standards and procedures and qualifications of staff, and associated compliance requirements should also explicitly apply to the Agency in respect to any services or supports provided.

That the NDIS Rules prescribe the requirement for registered providers to provide information to participants on internal and external complaint mechanisms, and to provide annual reports on the numbers, types and outcomes of complaints.

**Explanation:** Section 73(1) states that the NDIS *may* prescribe criteria relating to '(a) compliance with prescribed safeguards; and (b) compliance with prescribed quality assurance standards and procedures; and (c) qualifications of persons or entities or employees of persons or entities'.

Given the critical importance of safeguarding people's rights under the scheme and the omission of detail on such safeguards in the **Principal Act**, the Act should require the Rules to prescribe such criteria and also provide a definition of safeguards under section 7 so that it is clear what safeguards need to be addressed and that these are not narrowly interpreted. It would be preferable that such matters were set out in the **Principal Act**. It is also important that safeguards include protections, approvals and monitoring regarding the use of any restrictive interventions, as well as reporting and responding to critical incidents.

The Rules governing safeguards should also be consistent with section 91 which includes suspension of appointment for a nominated person in cases of 'severe physical, mental or financial harm'; these definitions and the option of suspension as a consequence should be included in the NDIS Rules.

Section 73(2) states that the NDIS '*may*' prescribe consequences, requirements and obligations of registered providers in relation to compliance with the Act and the NDIS Rules, and '*the process for handling complaints involving registered providers of supports*'. It would be preferable for such matters to be set out in the **Principal Act**, or at least require the NDIS Rules to prescribe such matters.

The NDIS Rules should prescribe not only the requirement for registered providers to have a process for handling complaints, but also requirements to provide information to participants on internal and external complaint mechanisms, and to provide annual reports on the numbers, types and outcomes of complaints, as set out in the Victorian Disability Act. This feature of the Victorian legislation has played a key role in establishing complaints as a core feature for quality and systemic improvement in the disability sector.

The above inclusions should also be specifically stated in the Rules as part of Section 70 (1)(d) which sets the criteria for registration, and revocation of registration, as a provider of support.

#### **Chapter 4 Part 5: Duty of nominee to participant, Section 80**

**Proposal:** To include the following requirement for nominees – *“A nominee is required to support decision making by the participant personally and have regard to and give appropriate weight to the views of the participant at all times.”*

**Explanation:** The roles of these nominees are not clear in terms of how they relate to other roles that a person may play in supporting or acting on behalf of a person. It would be useful if the definition of nominee in section 7 provided more detail to explain how this role may relate to other roles such as next of kin/family member, person responsible, administrator, guardian, power of attorney, administrator, representative, advocate etc. Alternatively, it would be useful if the NDIS Rules addressed the role and responsibilities of nominees in more detail.

Section 80(4) states that the NDIS Rules may make reference to supported decision making and having regard to and giving appropriate weight to the views of the participant. As supported decision making is a fundamental requirement and is set out in the UN Convention on the Rights of Persons with Disabilities, this should be set in the **Principal Act**, such as *“A nominee is required to support decision making by the participant personally and have regard to and give appropriate weight to the views of the participant at all times.”*

#### **Chapter 4 Part 6: Reviewable decisions, Section 99**

**Proposal:** The provision for another person to request a review on a person’s behalf should be explicitly included (in the same way a request for access does).

There should be a timeframe for an Agency’s response to a request for internal review of a decision

The **Principal Act** should provide for right the to complain about process of developing or approving a plan and the option of dispute resolution in addition or as an alternative to merits review.



It should be clear that all aspects of decisions in section 33(2) are subject to review- not just the approval, and there should be provision for some of the aspects to be addressed through a complaints/dispute resolution process with a complaints body that has expertise in these issues.

**Explanation:** Section 99(2) provides for a person to request a review, but does not appear to provide for applications to be made on a person's behalf. Section 99(6) does not include any timeframes for a review of a decision by the Agency and 'as soon as reasonably practicable' is too open to interpretation.

The Bill provides as section 99(d) for review of a decision under subsection 33(2) about the statement of participant supports in a participant's plan but does not explicitly provide for the right to complain about the process of developing or approving a plan, nor the option of dispute resolution in addition or as an alternative to review.

There are a number of key decisions in section 33(2) relating to the reasonable and necessary supports to be funded or provided by the NDIS, the management of the plan, and assessment of risks that prevent a person managing their own plan.

#### **Chapter 4 Part 6: Applications to the Administrative Appeals Tribunal, Section 103**

**Proposal:** Provision for multi-member panels would assist to ensuring the necessary breadth of knowledge and expertise required when dealing with matters of this nature.

**Explanation:** Section 103 provides for a request for review to Administrative Appeals Tribunal, which is a positive feature. It will however be critical that the members determining such matters have the appropriate knowledge and expertise of what will be a new and unique jurisdiction. Provision for multi-member panels would assist in ensuring the necessary breadth of knowledge and expertise.

#### **Chapter 6 - National Disability Insurance Scheme Launch Transition Agency**

##### **Chapter 6 Part 1: Functions of the Agency, Section 118**

**Proposal:** Implementation of a complaint reporting mechanism as part of the scheme will enable the Agency to fulfil its functions under section 118.

**Explanation:** Section 73 identifies the function of the agency to (in summary): enhance the sector through innovation, research and contemporary models of best practice; build community awareness; and analysis and research relating to disability support.

Victoria's Annual Complaints Reporting tool, developed for the Disability Services Commissioner, has proven its ability to provide a streamline method of collection about complaints from service providers and, through analysis, to identify systemic issues that impact on outcomes for people with a disability. Use of such a tool nationally would enable a consistent method of complaints reporting but would also significantly contribute to contemporary knowledge and research to influence best practice approaches to service provision.

### **Chapter 6 Part 3: Appointment of members of the Advisory Council, Section 147**

**Proposal:** Include a membership category for people who *'have experience of and able to express the interests of people with a disability in relation to disability services and supports'*.

Extend the provision for carers to *'carers and family members of people and children with a disability'*.

Provide for at least two positions for people with *'skills and experience in supply of equipment, provision of services and the planning and management of supports'*.

**Explanation:** The proposed membership of the Independent Advisory Council set out in section 147(5) may not provide adequate representation of issues experienced by people with an intellectual disability who are currently the biggest proportion of people using disability services, unless the position for people with a disability includes a person with an intellectual disability who is linked to self advocacy organisation.

Proposed category of 'carers' at section 5(b)(ii) may not represent the issues experienced by families of children with a disability unless specified.

The provision for at least one person with *'skills and experience in supply of equipment or provision of services'* would be insufficient to provide advice on the range of issues that the Agency will deal with in relation to supports funded under the scheme. **It is concerning that the supply of equipment is put first, and that experience in planning and management of supports are not included.**

## **Chapter 7 - Other Matters**

### **Chapter 7 Part 3: Concurrent operation of State laws, Section 207**

**Proposal:** That this provision is expanded to give explicit effect to the agreement that the existing or equivalent safeguards and protections in Victoria will be upheld.

To extend section 207 to state, *"Services and supports funded or provided by the Agency under this Act may be treated as if funded or provided under State or Territory laws to allow for existing safeguards to apply."*

**Explanation:** Section 207 provides that the Bill will not apply *'to the exclusion of a law of a State or Territory to the extent that that law is capable of operating concurrently with this Act.'*

A key issue is that the Bill does not provide equivalent rights and safeguards to those provided under the Victorian Disability Act, and that it would be preferable for the Bill to clearly give effect to the operation of all existing safeguards under State or Territory laws for the launch site.

One option is to state that NDIS funded or provided services are to be treated as if funded or provided by State or Territories so as to allow for existing safeguards (such as Senior Practitioner, critical incident reporting etc) and the right to complain to existing bodies.

#### **4. Conclusion/ Recommendation(s)**

There are many encouraging features of the Bill which provides the foundational principles and framework for the launch of the National Disability Insurance Scheme.

The scheme contains a number of decision making points that will ultimately define the level of real choice, control and engagement of people with a disability. We believe it is critical that the framework establishes a high degree of flexibility for the person to enable innovative and appropriate support.

It is equally important that the framework establishes appropriate safeguards which protect individuals, addresses potential for real or perceived conflicts of interest, upholds the integrity of service provision and protects the right to individual choice.

We believe an evidenced based approach which allows dynamic reflection and improvement is required, and is achievable in a framework that includes complaints reporting.

We recommend that:

1. The Bill includes definitions of constructs that are central to the operation of the scheme including:
  - a. Disability
  - b. Reasonable and necessary
  - c. A person
  - d. Safeguards
2. The proposed amendments and additions are incorporated to strengthen the framework for choice and control by participants.
3. The Bill sets out key requirements for quality assurance and addressing issues for service efficacy which include:
  - a. a complaints process for the Agency
  - b. an independent complaints mechanism for, or on behalf of, participants
  - c. ability for States and Territories to uphold current quality assurance mechanisms
4. The benefit of an annual complaints reporting requirement is recognised, including its contribution to the body of knowledge available to inform best practice in complaint handling and quality improvements of the disability services system.