



Office of the Public Advocate

Submission on the National Disability Insurance Scheme Bill 2012

December 2012

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1. Introduction

1.1 The Victorian Office of the Public Advocate (OPA) is pleased to have the opportunity to comment on the National Disability Insurance Scheme (NDIS) Bill that is currently before federal parliament. In addition to making the recommendations contained in this submission, OPA would be pleased to have the opportunity to discuss our concerns about the legislation in person with the Senate Standing Committee on Community Affairs during any hearings the Committee may undertake.

2. Recommendations

2.1 OPA makes the following recommendations.

Recommendation 1. That the NDIS legislation more fully adopt the principles articulated in the *Convention on the Rights of Persons with Disabilities* by:

- a. Incorporating a presumption that participants have decision-making capacity;
- b. Enabling participants to appoint their own nominees (rather than just request their appointment);
- c. Permitting the CEO only to appoint nominees in situations where participants are themselves unable to make appointments;
- d. Requiring, in situations where a participant has a decision-making impairment that inhibits his or her ability to appoint a nominee, that any preferred nominee of a participant should still occupy that role, unless such an appointment would be deleterious to the participant's personal and social wellbeing.

Recommendation 2. That the NDIS legislation provide greater clarification about the role of plan nominees by detailing, for instance, the principles governing their operation.

Recommendation 3. That the NDIS legislation establish a process by which the appointment of nominees can be challenged by interested parties when concerns exist about the personal and social wellbeing of participants.



Recommendation 4. That the NDIS legislation provide explicit recognition of state and territory-based substitute decision-making arrangements. This includes the appointment of administrators as well as guardians, and relevant personal appointments of substitute decision makers under enduring powers of attorney.

Recommendation 5. That a monitoring scheme for the NDIS be established, preferably by statute, and that the monitoring scheme incorporate a role for volunteer Community Visitors (as envisaged by the Productivity Commission).

Recommendation 6. That any monitoring of the NDIS pilot launch schemes by the NDIS Launch Transition Agency incorporate a role for volunteer Community Visitors programs in jurisdictions, such as Victoria, where such programs are already in operation.

3. About OPA

3.1 OPA is an independent statutory body working to protect and promote the rights, interests and dignity of people with cognitive impairments and mental ill health. OPA provides a number of services in pursuit of these goals, some of which are legislatively required under the *Guardianship and Administration Act 1986* (Victoria). These services offer us unique insight into the difficulties faced by people with cognitive impairments and mental illness when it comes to significant decision-making, and when such people and their families and carers seek to access support services. OPA's roles include the following:

- **Guardian of last resort:** OPA's Advocate Guardian program provides statutory guardianship, investigation and advocacy for Victorians who cannot make decisions for themselves. The program also offers support to private guardians. The program was involved in 1,708 guardianship matters, 531 investigations and 378 cases requiring advocacy in the last financial year.
- **Community Visitors Program:** This program is staffed by volunteers who work with OPA to help protect and advocate for the rights of people with



disabilities. The volunteers visit Victorian accommodation facilities for people with cognitive disability (including mental illness). Last financial year the program consisted of 360 volunteers who conducted 5,104 site visits.

- **Independent Third Person (ITP) Program:** This program sees volunteers assist people with apparent cognitive impairments during police interviews or when making formal statements to Victoria Police. ITPs attended 2,237 interviews in the last financial year.
- **Corrections Independent Support Officers:** These individuals assist prisoners with an intellectual disability in disciplinary hearings in prisons. Like ITPs, their role is to facilitate communication with the prisoner.
- **Disability Act Officer:** This officer mainly advocates in relation to people with cognitive disability subject to detention.
- **OPA Duty Officer:** This officer is an on-site, on-duty advocate at the Victorian Civil and Administrative Tribunal (VCAT). The advocate is available to people who are the subject of guardianship applications, and to VCAT, to assist it in solving problems and avoiding the appointment of guardians and administrators where other solutions are available.
- **Advice Service:** This service provides advice and information to people enquiring about matters including powers of attorney, guardianship, VCAT applications, and consent to medical or dental treatment. Where necessary, the service provides referrals to appropriate complaints bodies and legal services. Last financial year the advice service handled 13,398 inquiries.
- **Community Education:** OPA provides over 180 community education sessions each year, most of which concern the topics of guardianship and administration, enduring powers of attorney, and medical consent for people with cognitive impairments.



4. Supported decision making

- 4.1 The most significant development in the rights of people with disabilities has been the adoption of the United Nations *Convention on the Rights of Persons with Disabilities*, which Australia signed in 2007 and ratified in 2008. One of the key principles underpinning the Convention concerns supported decision making, which can be defined as the requirement that people with disabilities be supported to play as great a role as possible in making and implementing the decisions that affect them.
- 4.2 The NDIS is designed on a market-purchaser or ‘individual choice’ model, in which people with disabilities to a large extent will determine how funds available to purchase supports and services are spent. While making decisions about which services and supports to utilise will present few challenges or problems to many people with disabilities, there are a significant number of people with cognitive impairments and profound mental ill health who will require either significant support in making such decisions, or may require others to make such decisions on their behalf.
- 4.3 OPA is pleased to see reference in the NDIS Bill to supported decision making (clause 80(4)), and OPA also notes the existence of the occasional clause which may have the effect of permitting participants to act in their own regard to the maximum extent possible (e.g. clause 86(3)).
- 4.4 However, many aspects of the Bill are not consistent with a supported decision-making approach.
- 4.5 The NDIS Bill makes provision for the appointment of ‘plan nominees’ and ‘correspondence nominees’, who will have most relevance for participants with significant cognitive impairments or mental ill health. The nominee provisions in the NDIS Bill mirror in some ways the provisions concerning ‘payment nominees’ and ‘correspondence nominees’ in the *Social Security (Administration) Act 1999*.
- 4.6 While participants are able to request the appointment of nominees, the sum effect of clauses 86, 87 and 88 is that the CEO may appoint plan nominees and correspondence nominees for participants so long as the written consent of the people being appointed has been provided, and so long as the CEO has taken into account the ‘wishes’ of the relevant participant.



4.7 The NDIS legislation is an opportunity for our national parliament to adopt contemporary understandings of the position of people with disabilities, and the need to allow people to make their own decisions (with support, when this is needed), as required by the *Convention on the Rights of Persons with Disabilities*. In line with this, OPA makes the following recommendation.

Recommendation 1. That the NDIS legislation more fully adopt the principles articulated in the *Convention on the Rights of Persons with Disabilities* by:

- a. Incorporating a presumption that participants have decision-making capacity;
- b. Enabling participants to appoint their own nominees (rather than just request their appointment);
- c. Permitting the CEO only to appoint nominees in situations where participants are themselves unable to make appointments;
- d. Requiring, in situations where a participant has a decision-making impairment that inhibits his or her ability to appoint a nominee, that any preferred nominee of a participant should still occupy that role, unless such an appointment would be deleterious to the participant's personal and social wellbeing.

5. Role of Nominees

5.1 As already mentioned, the NDIS Bill provides for the appointment of 'plan nominees' and 'correspondence nominees' to assist people in obtaining information, in planning, and in making decisions under the scheme.

5.2 In OPA's view, the role of 'plan nominees' is somewhat unclear. According to the Bill (clause 78), 'plan nominees' will be able to undertake 'preparation' and 'review' of participants' plans, and 'management of the funding for supports'. While the government's aim may be to provide greater clarification about the role of plan nominees in subsequent regulations, the NDIS legislation could usefully contain more detail than currently it does in this regard.

5.3 OPA is pleased to see that nominees are required by the NDIS Bill (clause 80 (1)) to 'act in a manner that promotes the personal and social wellbeing' of the



person in question (this phrase also appears in relation to children at clause 76 (1)). This phrase, which OPA has championed in preference to the now outdated phrase ‘best interests’, has also won the support of the Victorian Law Reform Commission (*Guardianship Final Report*, 2012, recommendations 284, 285 and throughout) and the Victorian Parliament Law Reform Committee (*Inquiry into Powers of Attorney*, 2010, recommendation 49).

5.4 While the inclusion of this phrase is a progressive step, OPA would like to see more extensively articulated ‘principles’ that would govern the operation of nominees.

Recommendation 2. That the NDIS legislation provide greater clarification about the role of plan nominees by detailing, for instance, the principles governing their operation.

5.5 The NDIS Bill’s provisions relating to suspension and cancellation of nominee appointments (clauses 89 to 93) are in need of improvement. These provisions permit suspension and cancellation by request of the nominee, and through the notice provisions in clauses 83 and 84. The CEO also has the ability (clause 91(1)) to suspend a nominee where ‘the CEO has reasonable grounds to believe that the person has caused, or is likely to cause, severe physical, mental or financial harm to the participant’. OPA would like there to be a clear process by which the appointment of nominees can be challenged by an interested party (such as a family member) where there are concerns for the personal and social wellbeing of a person with a disability.

Recommendation 3. That the NDIS legislation establish a process by which the appointment of nominees can be challenged by interested parties when concerns exist about the personal and social wellbeing of participants.



6. Recognition of state and territory substitute decision-making arrangements

6.1 In addition to laws concerning the guardianship of children, each Australian state and territory has its own substitute decision-making laws, according to which individuals can be appointed to make substitute decisions for adults with cognitive impairments or mental ill health when certain criteria are met. These laws permit the appointment of guardians and administrators by state and territory tribunals and boards (in Victoria, that tribunal is VCAT), and each jurisdiction also enables the personal appointment of one or more substitute decision makers under enduring powers of attorney.

6.2 The NDIS Bill provides only for limited recognition of state and territory-based substitute decision-making arrangements. Clause 88(4) provides that:

‘In appointing a nominee of a participant under section 86 or 87, the CEO must have regard to whether a person has guardianship of the participant under a law of the Commonwealth, a State or a Territory.’

6.3 While the reference to ‘guardianship’ may be meant to include guardianship of children as well as guardianship and administration appointments in relation to adults, that provision does not appear to apply to appointments made under enduring powers of attorney. Clearly representatives appointed under appropriate enduring powers of attorney would be well placed to act as nominees for adults with decision-making impairments (having been selected by principals to play substitute decision-making roles in the event of a loss of decision-making capacity). While the intention may be that rules will be adopted (under clause 88(6)) to recognise such arrangements, this is not yet clear.

Recommendation 4. That the NDIS legislation provide explicit recognition of state and territory-based substitute decision-making arrangements. This includes the appointment of administrators as well as guardians, and relevant personal appointments of substitute decision makers under enduring powers of attorney.



7. Monitoring

- 7.1 The final topic OPA would like to address concerns monitoring of the NDIS. The Productivity Commission's *Disability Care and Support Inquiry Report* (vol. 1, pp. 81, 509) proposed that Community Visitors should be one part of the monitoring provided by the proposed National Disability Insurance Agency. The Commission called for Community Visitors schemes to be introduced in jurisdictions that don't have them, and argued that in this process 'it is desirable to replicate features of the Victorian model'.
- 7.2 OPA strongly supports the Productivity Commission's recommendations in this regard, and notes the Commission's preference for OPA's Victorian scheme. The features of our scheme that the Commission particularly liked are its use of volunteers and the fact that our Community Visitors submit an annual report to parliament. Another clear advantage in utilising a Community Visitors program such as OPA's to monitor the NDIS is the fact that this program already exists and does not have to be created.
- 7.3 Evidence of the monitoring role currently played by Community Visitors – who are the 'eyes and ears' of the community – can be found in the most recent *Community Visitors Annual Report* (2012). As the Public Advocate wrote in her introductory comments (p. 4):
- 'While many people are given caring support by dedicated staff, Community Visitors are encountering an increasing number of people who are victims of abuse, violence including sexual assault, and neglect ... Community Visitor reports of these matters have more than doubled in three years.'
- 7.4 OPA was surprised to find that the draft NDIS Bill does not incorporate a specific monitoring function for any entity, though it does establish a National Disability Insurance Scheme Launch Transition Agency (and a Board) as well as an Independent Advisory Council. The Council's functions (clause 144) encapsulate some generic monitoring functions, but specifically do not, for instance, extend to advice on individual matters.
- 7.5 OPA is unclear whether a separate Bill will be introduced to establish the monitoring mechanisms envisaged by the Productivity Commission, or whether this is something that will be covered by regulations. OPA would prefer such functions to be statutorily authorised.



7.6 Regardless of the means by which the monitoring functions are established, OPA is concerned that the proposed monitoring scheme for the NDIS should be in place – with at least a temporary governance framework in existence and monitoring functions allocated – prior to the launch of the pilot schemes in July 2013. This will enable the pilots to be as informative as possible about the benefits and shortcomings of the scheme, and will enable the full roll out of the scheme to be as beneficial to people with disabilities as possible.

Recommendation 5. That a monitoring scheme for the NDIS be established, preferably by statute, and that the monitoring scheme incorporate a role for volunteer Community Visitors (as envisaged by the Productivity Commission).

7.7 In this regard, OPA would be very pleased for our Community Visitors program to be involved in monitoring the pilot launch site in Victoria in the Barwon region, and would be very pleased to work with the Launch Transition Agency to enable this to happen.

Recommendation 6. That any monitoring of the NDIS pilot launch schemes by the NDIS Launch Transition Agency incorporate a role for volunteer Community Visitors programs in jurisdictions, such as Victoria, where such programs are already in operation.

8. Conclusion

8.1 OPA is pleased to have had this opportunity to outline its views on the NDIS legislation to the Senate Standing Committee on Community Affairs, and we would be delighted to be able to discuss these matters further in any hearings that the Committee might undertake in conducting its review.