



Australian Federation of AIDS Organisations (AFAO)

**National Disability Insurance Scheme
Bill 2012**

**Submission to the Senate Legal and
Constitutional Affairs Committee**

25 January 2013

About AFAO

The Australian Federation of AIDS Organisations (AFAO) is the national federation for the HIV community response. AFAO's members are the AIDS Councils in each state and territory; the National Association of People with HIV Australia (NAPWHA); the Australian Injecting & Illicit Drug Users League (AIVL); the Anwernekenhe Aboriginal and Torres Strait Islander HIV/AIDS Alliance; and Scarlet Alliance, Australian Sex Workers Association. AFAO advocates for its member organisations, promotes medical and social research into HIV and its effects, develops and formulates policy on HIV issues, and provides HIV policy advice to the Commonwealth, state and territory governments.

Our perspective on this Inquiry

AFAO welcomes the opportunity to comment on the *National Disability Insurance Scheme Bill 2012* (the Bill). While we have some concerns regarding equity and implementation, we strongly support the NDIS and are keen to see the Bill pass in the next session of Parliament.

We welcome the Prime Minister's statement to "undertake public consultation on the legislative instruments that will be developed in conjunction with the bill."¹ The National Disability Insurance Scheme (NDIS) implementation, potential debt accumulation and other matters practical matters are key to the effectiveness and equity of the scheme, and thus, the legislative instruments to be developed in conjunction must be thoroughly scrutinised through robust public consultation. AFAO is pleased that PWD has been engaged by the National Disability and Carers Alliance to undertake consultations with community organisations for the development of these rules, policies and processes. We will continue to actively engage with community consultations on the administration of the legislation – particularly regarding the rules and eligibility assessment policies but also the complaints, review and appeals processes and the debt provisions.

These community consultations need to be properly funded and should continue at least for the first two years of the Scheme – to inform the two-year review required under the Bill. Ongoing consultations must involve the engagement and input of a diverse range of organisations beyond the disability sector, so that regard is had to the psycho-social issues that can be associated with particular conditions and/or particular affected communities, as is the case for many people with HIV.

Comments on specific provisions

Clause 29: When a person ceases to be a participant

- Under Clause 29, it would seem that the only people who may opt to continue to participate in the NDIS after turning 65 would be people who applied for access to the Scheme before turning 65, whether they were granted before turning 65 or after. Under proposed s29(1), people over 65 cease to be eligible for the NDIS if they move into residential care or receive community care on a permanent basis, within the meaning of the Aged Care Act 1997.

¹ House of Representatives, Official Hansard, No. 17, s2012, Thursday, 29 November 2012

- AFAO is concerned that the age requirement provisions of the NDIS will entrench current differences and inequities in the level and nature of supports provided to people with severe impairments once they turn 65, compared to those available for people under 65. Whilst we appreciate that the Bill represents the first stage of the NDIS and that the Commonwealth and State/Territory governments will engage in further negotiations toward infrastructural reform aimed at removing these disparities, it is unfortunate that the NDIS Bill preserves this dichotomy.

Recommendation 1:

AFAO proposes that ongoing community consultations on roll-out of the NDIS should focus on identifying and addressing gaps and inequities in the provision of disability support based on age; and this feedback should inform the review of the NDIS to be undertaken two years after its introduction.

Clause 23: Residence requirements

- We note that these provisions are very similar if not identical to residence requirements under the *Social Security Act 1991*, as administered by Centrelink.
- Given this similarity, it would be reasonable to include a provision that a person who has been assessed as meeting the equivalent residential eligibility criteria under the *Social Security Act*, for say Disability Support Pension², is deemed to satisfy the NDIS residence requirements. This would limit duplicated effort by the NDIS Agency and Centrelink for people with severe disability and their carers, and minimise the potential for conflicting assessments being made by different delegates in the two agencies. It may also be sensible if Centrelink were contracted to undertake such eligibility assessments, especially for people receiving Social Security payments.

Recommendation 2:

AFAO proposes that consideration be given to including a provision that a person who has been assessed as meeting the equivalent residential eligibility criteria under the *Social Security Act*, for say Disability Support Pension³, is deemed to satisfy the NDIS residence requirements.

Clause 24: Disability Requirements

- As with Clause 23, these requirements include definitional terms that are similar if not identical to those under Social Security law, in respect of disability and carer income support payments and allowances. While Disability Support Pension eligibility criteria do not require the loss of functional capacity required for the NDIS, it would be reasonable to include a provision whereby a person who has been assessed as eligible for Disability Support Pension is deemed to meet Clause 24(1) (a) and (b). This would avoid potentially contradictory

² http://www.austlii.edu.au/au/legis/cth/consol_act/ssa1991186/s7.html#australian_resident

³ http://www.austlii.edu.au/au/legis/cth/consol_act/ssa1991186/s7.html#australian_resident

assessments by Centrelink and the NDIS Agency on fundamental assessments regarding impairment(s) and causality.

Recommendation 3:

That the NDIS Agency and Centrelink collaborate in the development of assessment processes for Disability Support Pensioners who apply for NDIS support; and that consideration be given to including a provision in the NDIS legislation whereby a person who has been assessed as eligible for Disability Support Pension is deemed to meet Clause 24(1) (a) and (b).

Clause 27: NDIS rules relating to disability requirements and early intervention requirements

- AFAO will be providing feedback via the ongoing community consultations, conducted by People With Disability (PWD) on behalf of the National Disability Carer Alliance (NDCA), regarding the HIV-related issues that should be addressed in development of the NDIS rules. These issues include:
 - The need for assessment processes to be flexible in assessment of impairment(s) and disability, including severe frailty associated with chronic co-morbidities experienced by people living long-term with HIV
 - Recognition of the status of HIV as a disability in and of itself
 - HIV-related stigma, both stigma due to HIV-positive status and stigma associated with sexuality, injecting drug use or ethnicity
 - HIV-related privacy issues affecting assessment processes, records management and referrals of NDIS participants to services
 - the need for people with HIV to be referred to culturally appropriate services, acknowledging access issues for people from key HIV-affected communities – primarily gay men and people who use/have used injecting drugs.

Recommendation 4:

We understand that Alzheimer’s Australia and other peak community organisations have made strong representations regarding the need to ensure that assessment processes have due regard to the needs of people with dementia and other severe cognitive impairment. While many of the issues faced by people with cognitive impairment cut across medical conditions, HIV-related stigma and the stigmatisation of communities affected by HIV needs to be taken into account in assessment of the type of supports required for HIV-positive people with severe cognitive impairment.

Clauses 33, 34, 35: Participants’ plans; Reasonable and necessary supports; NDIS rules for statement of participant supports

- We anticipate particular issues for people with cognitive impairments in meeting obligations regarding development of plans, and in formulating statements of goals and aspirations that are realistic and take into account physical and psycho-social barriers to engaging with

support providers – and to having aspirations and goals deemed relevant to their ‘environmental and personal context’ included in plans.

- Proposed s33(1) provides that plans must specify the participant’s ‘goals, and aspirations’ and their ‘living arrangements’, informal and community supports and ‘social and community participation’. For older people with cognitive impairments, especially people who are socially isolated, identifying ‘aspirations’ will be challenging if not impossible and for some, basic needs such as finding and retaining secure accommodation may dominate.
- Whether these criteria and the criteria proposed under clauses 34 and 35 for what constitutes can be fairly applied will depend on the careful development of the Rules (under proposed section 35) and policy and procedural guidelines.

Recommendation 5:

Staff involved in assisting participants with plan development should be appropriately trained, and training should include sensitivity training in cultural issues relating to disability, sexuality and gender diversity, and ethnicity.

Clauses 51 and 56: Requirement to notify change of circumstances; Written notice of requirement

- As with the residence and disability requirements, this provision is very similar to Social Security provisions regarding recipient obligations to notify Centrelink of changed circumstances that affect or potentially affect eligibility/entitlement⁴. The proposed section 51 invokes requirements to advise of an event or changed circumstances that may affect a person’s NDIS ‘access request’, status as a participant, or plan; or if a recipient or nominee ‘becomes aware that such an event or change in circumstances is likely to happen’.
- We propose that particularly for people with cognitive impairment, mental illness or intellectual disability, these notification requirements are too rigid and too difficult to understand. Given that failure to advise of changed circumstances may result in a recoverable debt, reporting obligations should be unambiguous, simple and clear – and that clarity should be enshrined in the legislation. The meaning of the legislation should be able to be expressed clearly in Agency notices required under proposed section 52.
- As the legislation is now drafted issues regarding notices and debt recovery that have been the subject of large numbers of Social Security appeal cases over the years will be carried across to the NDIS – with the added complication that all NDIS participants will necessarily be severely disabled, and many will have issues understanding and/or meeting participation/engagement and reporting obligations.

Recommendation 6:

We propose that the NDIS participant reporting obligations be simplified, including by removing the requirement to advise of a ‘likely change’ that ‘might affect’ a person’s status under the NDIS.

⁴ http://www.austlii.edu.au/au/legis/cth/num_act/ssa1991186/s121.html

Clauses 78 and 79: Actions of plan/correspondence nominee on behalf of participant

- These proposed sections usefully differentiate the responsibilities of plan and correspondence nominees.
- Given that a significant proportion of the people accessing the NDIS will require a nominee and that many of these people will be in receipt of Disability Support Pension and have a Centrelink nominee, NDIS and Centrelink notices issued to nominees must be clear and should be complementary.
- Provision of a support line for nominees would be useful, with staff actively liaising with Centrelink where a change of circumstances potentially affects Social Security entitlements
- Appointment and cancellation of nominees for Social Security purposes can involve contentious issues relating to intellectual capacity and whether the nominee is acting in a person's best interests – particularly where family members, partners and carers have different perspectives on the needs of a person with severe cognitive disability. This can be a particular issue for older people in same-sex relationships where the partner's status as primary carer is not recognised or endorsed by people in the immediate family of the person in question. Policies and procedures relating to the administration of these provisions should be carefully developed, in consultation with key community organisations and with Centrelink.

Recommendation 7:

That policies and procedures regarding the appointment and cancellation of nominees be developed in consultation with key community organisations and with Centrelink.

Chapter 7 – Other matters; Part 1 – Debt recovery

- As noted above regarding notices to participants and resultant notification obligations, all NDIS participants will be severely disabled, by definition. There are thus bound to be compliance issues due to failure to understand notification obligations – including for nominees - or due to oversight of obligations given the demands associated with living with disability, providing personal care and accessing supports.
- As they stand, the proposed waiver provisions, at clauses 191 to 193, would seem to be unworkable and inappropriate given the nature and timing of NDIS support payments. The provisions have been modelled on Social Security debt provisions, however, Social Security income support payments and associated notification obligations are very different. Social security debts accrue gradually as instalments and are credited to a person's bank account and accessed regularly, if not daily; NDIS payments to fund supports are very different in nature.

Clause 195 – Waiver in special circumstances

- We propose that pending a review and overhaul of the debt recovery provisions of the NDIS legislation (as part of the general review of the legislation - under clause 208 of the Bill), the proposed section 195 waiver provision should be amended such that it allows the NDIS CEO to waive recovery of any debt at his or her discretion.

Recommendation 8:

In the lead-up to the two year review of the NDIS, we propose that the NDIS Agency should review the debt provisions, in consultation with key disability community organisations and also with the National Welfare Rights Network and Centrelink, given the latter's experience regarding the mirror provisions of the Social Security Act and their application in respect of people with severe disability.

Ongoing consultations on technical issues

Continuity of service/care

Whilst we appreciate that fundamental aspects of the reformed Commonwealth/State-Territory funding landscape are still being negotiated, communities accessing disability supports under the current system will be more likely to engage with the NDIS and benefit from it if people with disability and their carers are provided with clear information outlining how things will change for people in their specific situation, and what benefits may accrue. From AFAO's perspective, a key target group would be people with HIV-related dementia. Development of information packages targeting particular groups – e.g., people with HIV-related dementia – would be helpful.

Proposal for a national LGBTI Disability Strategy

In recognition of the particular barriers faced by lesbian, gay, bisexual, transgender and intersex (LGBTI) people in accessing aged care services, the Government has consulted extensively with community organisations in developing its aged-care reform agenda. AFAO commends the Commonwealth's engagement with LGBTI community organisations, particularly the LGBTI Health Alliance, in the development of the National LGBTI Aged Care Strategy.

AFAO proposes that a National LGBTI Disability Strategy be developed. This would complement the National Disability Strategy, the National Lesbian, Gay, Bisexual, Transgender and Intersex Ageing and Aged Care Strategy and reflect the Commonwealth's commitment to ensuring that the NDIS promotes equitable access to disability supports and services across the states/territories, and enhances smooth transition from disability to aged care services. As with aged care, key to equitable access to disability services is development of initiatives to promote flexibility in service provision that responds to cultural diversity - including diverse sexuality and gender.