

**TO:**           **The Secretary**  
**Senate Community Affairs References Committee**  
**PO Box 6100, Parliament House, Canberra ACT 2600**  
**Email: community.affairs.sen@aph.gov.au**

**FROM:**       **Val Pawagi**

**RE:**           **Inquiry into the Funding and Operation of the CSTDA – Interstate Portability Protocol**

Please refer to the attached letter that I wrote to Minister Mike Reynolds, the Chair of the Community and Disability Services Ministers' Conference, on 7 May 2006. In that letter I talk about my concerns with the National Disability Administrators' (NDA) handling of long-standing issues with the Interstate Portability Protocol under the Commonwealth State Territory Disability Agreement (CSTDA). My letter to Minister Reynolds was written after exhausting all other avenues.

The design of the policy underpinning the Protocol is fundamentally flawed. As I state in my letter to Minister Reynolds, the main issue is that ongoing care for people in receipt of Individual Support Packages (Accommodation Support) is *not* guaranteed in another State. They are compelled to reapply and retest their eligibility all over again for this care. These administrative arrangements defy logic and reasonableness.

The impact of this policy position is anxiety provoking to say the least, with the threat of withdrawal of much needed care hindering the person's "right to freedom of movement and choice of residence", a right protected in domestic and international law. For these reasons, I say to Minister Reynolds that the Protocol *must* be held invalid.

My experience of the NDA is that it is *not* open to changing the Protocol in any major way. The States actions I have found to be irresponsible and dangerous. Indeed, some States (e.g. Qld and the ACT) have not held "funding rounds" so that people in receipt of Individual Support Package can retest their eligibility for ongoing care in their new State. I too find it baffling that the States fail to absorb into their disability services' systems the small number of people seeking assistance under the Protocol. This was less than 50 people nationally across all CSTDA funded services in the 2004-05 year.

The Commonwealth's actions, while sympathetic, have been weak, owing to its view that the interstate portability of Individual Support Packages is primarily a State responsibility. Moreover, the Commonwealth's approach "has certainly been urging state and territory governments to do more and to become more flexible ... but it is primarily an issue between state and territory governments."<sup>1</sup>

The Commonwealth's actions I consider to be at odds with Clause 6(6) of the CSTDA, which states that a key responsibility of the NDA is to provide "a forum for the discussion and resolution of issues requiring cross-jurisdictional management, including the implementation of the agreed national portability protocols and, as a priority, improving the interface between specialist disability employment services and State/Territory administered specialist disability services."

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<sup>1</sup> Hansard, Community Affairs Legislative Committee Estimates (Additional Budget Estimates), Wednesday 15 February 2006, CA 83.

Note that a working group of the NDA was established in November 2004 to examine the issues surrounding the portability of disability services funded under the CSTDA. I am not aware of any positive developments coming from the work of this group.

A factor contributing to the apparent “circular approach” of the NDA working group is the Commonwealth’s position on interstate portability matters. The Commonwealth’s shying away from any significant involvement undermines those very elements that characterise successful intergovernmental relations, that of working together, cooperation, negotiation and agreement.

Another factor impacting adversely upon the progress of the NDA working group is the Agreement itself. The CSTDA contains no information or guidance on *how* the NDA is to make decisions. And, while the CSTDA outlines the roles and responsibilities of the Commonwealth and the States, it creates considerable uncertainty for both the parties to the Agreement and people with disabilities. This is because the CSTDA for instance contains *no* concrete objective (has an abstract objective),<sup>2</sup> *no* guiding principles, and *no* targets or benchmarks. Without these essential features, people with disabilities will continue to be disadvantaged under the present CSTDA.

*(Electronically signed)*

***Val Pawagi***

Friday 30 June 2006

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<sup>2</sup> The Commonwealth and the States/Territories strive to enhance the quality of life experienced by people with disabilities through assisting them to live as valued and participating members of the community (Clause 4(1) of the CSTDA).

**TO:** Minister Mike Reynolds  
Chair, Community and Disability Services Ministers' Conference  
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Email: [childsafety@ministerial.qld.gov.au](mailto:childsafety@ministerial.qld.gov.au)

**FROM:** Val Pawagi

**DATE:** Sunday 7 May 2006

**RE:** **INTERSTATE PORTABILITY PROTOCOL UNDER THE CSTDA**

I am writing to you in your capacity as Chair of the Community and Disability Services Ministers' Conference. I am writing to you about concerns I have with the National Disability Administrators' (NDA) management of issues associated with the Interstate Portability Protocol under the Commonwealth State Territory Disability Agreement (CSTDA).

#### **Current and scheduled administrative action by the NDA and CDSMC**

Coinciding with a media story presented on A Current Affair,<sup>3</sup> the NDA agreed in November 2004 to establish a working group to examine the issues surrounding the portability of specialist disability services funded under the CSTDA. I understand that the matter will be discussed at the 22-23 May 2006 meeting of the NDA, who in turn will report on the matter at the Community and Disability Services Ministers' Conference to be held in July 2006. Note that this matter dates back to July 2000, when a resolution was made by the then Disability Ministers that, "State and Territory governments will work together to remove current barriers in order to assist people with disabilities to continue to receive support services when they move interstate."<sup>4</sup>

#### **My personal circumstances**

My personal background is that, because of my significant physical disability, I receive an Individual Support Package (ISP), an Accommodation Support service, dating back to 1989 in Queensland. I moved to Canberra for work in 1993 and returned to Queensland in July 2004 also for work. Under the Protocol, Disability ACT has had full responsibility for my ISP since July 2004. Disability ACT's responsibility for my ISP was due to cease on 31 December 2005 but has now been extended until 1 August 2006. This extension was granted as Disability Services Queensland (DSQ) had failed to respond to my need for ongoing support. Based on DSQ's efforts to date, I cannot see them providing me with support from 1 August 2006. Disability ACT has made it clear

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<sup>3</sup> The *A Current Affair* story was about a mother with a disability (Belinda) who had moved from Tasmania to Queensland to live and the difficulties she faced with transferring her Individual Support Package between these

two jurisdictions. Disability Services Queensland was unprepared to accept responsibility for providing her with ongoing support after the expiry of the 12-month portability period in Queensland funded by Tasmania's Disability Services under the existing Interstate Portability Protocol.

<sup>4</sup> See <http://www.facs.gov.au/internet/Minister2.nsf/content/510mforummetdisneeds.htm>

that their support will cease on 1 August 2006. In a letter I received from Disability ACT dated 27 April 2006 it stated, "ACT funding will not be available to you in Queensland from 1 August 2006. ... I understand the uncertainty about future funding must be difficult for you and regret that Disability ACT is unable to be of further assistance."

### **Issues with the Interstate Portability Protocol**

As you may have gathered from my present circumstances, at the heart of the issue is that ongoing support is not guaranteed in another State. I will now attempt to explain why I consider this to be both unsound and unfair.

#### ***Policy framework is unfair***

The policy framework underpinning the existing Interstate Portability Protocol makes it abundantly clear that there is no guarantee that ISP recipients will continue to receive support upon arrival in another State. It provides for ongoing support in another State for a 12-month period funded by the State of origin only in *certain* circumstances. At the end of the portability period, there too is no guarantee that the new State will provide ongoing support. Instead, the ISP recipient is required to reapply and retest their eligibility for ongoing support. To ensure against the uncertainty the policy framework creates, ISP recipients either have to stay put within their current State or take their concerns to politicians or the media in the hope their move interstate can be realised.

This is a significant weakness of the Protocol; the policy framework must detail how people with a disability can transfer their ISPs seamlessly between jurisdictions. Without a fair *transferability policy*, the present *portability policy* is an empty chalice.

It is nonsensical and most unfair to impose, *yet again*, this process on ISP recipients who move interstate. Such support is critical to the person's health, well being and participation in community life, and for some, their very life. They have not only met the eligibility criteria (has a profound or severe core activity limitation) but also have met the priority of access criteria (relative priority of need criteria) to continue to qualify for Accommodation Support in another State. Funding too has been made available to pay for their ongoing support and this funding has been allocated against their name, thereby meeting the availability of resources criteria.

#### ***Policy framework contravenes international and domestic law***

The policy framework is also contrary to international and domestic law. A fundamental right guaranteed by international law is the freedom of movement. Enunciated in Article 12 of the *International Covenant on Civil and Political Rights*, people are entitled to move from one place to another and to establish themselves in a place of their choice.

This right relates to the whole territory of a State, including all parts of federal States. The enjoyment of this right must not be made dependent on any particular purpose or reason for the person wanting to move. Paragraph 4 of the *Declaration on the Rights of Disabled Persons* affirms this right. Both these international human rights instruments are scheduled to the *Human Rights and Equal Opportunity Act 1986* (Cth) (HREOC Act), Schedule 2 and 5 respectively.

Domestic law clearly recognises a right to freedom of movement throughout Australia. Notwithstanding that this right is defined as a human right under the HREOC Act, the

relevance of the CSTDA, too, is substantial. In establishing the national framework for the provision, funding and development of specialist disability services, the Preamble to the CSTDA recognises that the Commonwealth and the States have a pivotal role in promoting and upholding the rights of people with a disability, according them the same rights as other Australians and enabling them to exercise these rights. The Preamble also states that the Commonwealth and the States are committed to upholding the intentions of international and national conventions and standards in respect of supporting equal rights and opportunities to all individuals throughout their life. The rights of people with a disability under the *Declaration of Rights of Disabled Persons* are reaffirmed under the Preamble.

The approach of the High Court of Australia reflects the position in international law. In *Cole v Whitfield* (1988), the High Court declared that section 92 of the Australian Constitution guarantees the freedom of movement between the States “without burden, hindrance or restriction.” The Commonwealth and the States are bound by section 92; any law which is inconsistent with this provision must be held to be ineffectual and inoperative.

Section 117 of the Constitution supplements this right. In *Street v Queensland Bar Association* (1989), the High Court held that the provision protects a resident of a State from ‘any disability or discrimination’ in another State on the basis of residence. The term ‘disability’ here refers to an incapacity to exercise or enjoy a right. Moreover, this provision ensures equal treatment for out-of-State residents. Section 117 cannot be breached by law, executive action or judicial order.

When applying these rulings to ISP recipients wishing to move to another State, it is clear their right to freedom of movement is restricted. And despite them being in the same position as their counterparts in other States save their out-of-State residence, the policy framework compelling reassessment imposes a ‘disability or discrimination’.

### **NDA actions have been unnecessarily prolonged**

I am deeply disturbed by the fact that the NDA are taking so long to effect any positive change. As indicated in the introduction of my letter, the issue dates back some five years when a positive resolution was made by the then Disability Ministers. On the face of it, their decision supported the implementation of arrangements enabling ISP recipients to continue to receive ongoing support on arrival in another State. Despite the positive resolution, the States have continued to adopt old practices, thereby disadvantaging people with a disability who move to another State.

Regarding the progress that has been made by the NDA working group to date, in the letter I received from Disability ACT dated 27 April 2006 it also stated:

- “A national working group has been defining and quantifying the issues in relation to Portability. The information gathering phase will be completed by May 2006. At this stage there are no recommendations for change to the existing policy under consideration by the NDA.”

This tells me that the NDA working group has taken some 18 months to complete its preliminary work and that there are presently no recommendations for change under consideration by the NDA. I simply cannot comprehend this inordinate delay and policy

position. I also find it astonishing that the NDA at no point thought to implement interim policy and administrative changes to the current Interstate Portability Protocol to ensure that ISP recipients were not disadvantaged upon moving to another State. Their apparent disregard for the needs of people with a disability in these circumstances I find unforgivable in this day and age.

### **Consumer numbers seeking assistance under the Interstate Portability Protocol**

In terms of the overall number of people with a disability who might seek assistance under the Interstate Portability Protocol, I understand that the overall figure is quite small – less than 50 nationally in 2004-05. This figure covers all specialist disability services funded by the States under the CSTDA, not just ISP recipients. When the net increase of these consumers for each State is considered (i.e. newcomers – leavers), I fail to see how the States struggle to absorb the service demand of these consumers into their State's disability service system. Should funding however present as a concern for the States, I ask how is it then that the funding for unmet need carried over to the present CSTDA agreement was not requested nor allocated to address portability funding.

### **Closing remarks**

As a person with a disability disadvantaged by the current Interstate Portability Protocol (for the second time), I feel powerless to influence policy change for the better. I have not been listened to. I have formed the sad conclusion that the NDA lacks the commitment and possibly the appropriate knowledge and skills to replace the current Protocol with a new sound and fair policy framework and administrative arrangements which show a respect for the law and people with a disability in my circumstances. From my personal experience, the NDA are wedded to the existing unfair policy framework and administrative arrangements compelling reassessment and are therefore only likely to change their current position if directed to by the very forum you chair.

### **Outcomes sought**

This brings me to outlining what actions I see are necessary to remedy the issues I have raised in this letter.

- That you advise the NDA Chair of the issues in my letter to you. This would at least ensure that the NDA have been fully informed of these issues in the lead up to the preparation of their report for the July 2006 Community and Disability Services Ministers' Conference.
- That you convey to the NDA Chair that the Interstate Portability Protocol in its current form contravenes international and domestic law as well as the spirit of the CSTDA and, for this reason, the Protocol *must* be held invalid. As a consequence, that you ask the NDA Chair to take immediate action to implement interim policy and administrative arrangements to replace the current Protocol, with consideration to be given to adopting the following provisions.
- That all current ISP recipients who have moved to another State continue to receive support in their new State funded by their State of origin until such time that the NDA develop a new Interstate Portability Protocol. For those ISP recipients wishing to move interstate, that they have access to the same support.

- That the provision of ongoing support not be made dependent on any particular purpose or reason (e.g. urgent versus non-urgent move) for the ISP recipient wanting to move interstate or stay in their new State.
- That the Portability Officer in the State of origin take primary responsibility for organising the administrative transfer of the person's ISP through the Portability Officer in the receiving State in consultation with the ISP recipient (and their family, where necessary). This includes linking the ISP recipient with a suitable service provider on arrival in their new State. These arrangements ensure against the ISP recipient being left to negotiate the interstate transfer of their ISP themselves and locate and organise an appropriate service provider on arrival in their new State.

If time permits, I would welcome the opportunity to discuss the contents of my letter further with you.

**Val Pawagi**

B.Soc.Wk; M.Gov.Com.Law (Merit)

Sunday 7 May 2006