Submission to the Senate Community Affairs Legislation Committee inquiry into the *National Disability Insurance Scheme Bill 2012*

Medical practitioners are strong supporters of social justice and equity, and believe that people with a disability and their families have a right to participate in the community and to be supported to do so. A national long term care and support scheme that provides fairness, equity, and a better quality of life for Australians with serious or profound disability and their families will ensure this right is realised.

The AMA supports the establishment of a national disability insurance scheme (the NDIS) to provide comprehensive and appropriate support to people with serious disabilities. This is landmark social policy for all Australians for which the AMA has been advocating for years.

The AMA understands that the NDIS must be sustainable over the long term to support people through their lives. The NDIS must be implemented carefully in stages to ensure that the current relationships between the health, disability, injury insurance, and aged care systems are settled properly, and that those parts of the disability support system that are currently working well are not adversely affected. The tangled funding streams for other areas of the health and welfare sectors (and the consequent cost and responsibility shifting that plague them) must be avoided for the NDIS and its participants.

The AMA generally supports the framework for the NDIS outlined in the *National Disability Insurance Scheme Bill 2012* (the Bill).

However, one fundamental issue that is not guaranteed by the Bill is the general principle of certainty of access to appropriate supports (subclause 4(3)). Under clause 104 of the Bill, the Chief Executive Officer (CEO) of the National Disability Insurance Scheme Launch Agency (the Agency) can require a participant or a prospective participant to take action to claim or obtain compensation. The effect of clause 105 is that the participant will not receive support under the NDIS if he or she does not take the required action.

Together, clauses 104 and 105 work against generating a cultural shift that Australians with disabilities and their families do not need to pursue compensation for the costs of support. Under a truly ‘no fault’ scheme, disabled Australians should not have to take action – or be required by the CEO of the Agency to take action – against medical practitioners for the costs of lifetime care and support. The Bill should be amended to ensure the NDIS is truly an insurance-based approach (as per subclause 3(2)(b)) to provide and fund support for Australians with disabilities and their families.
The CEO should not be able to require a participant or prospective participant to pursue compensation. However, the right to pursue compensation for support costs should be retained – with Chapter 5, Part 2 of the Bill providing the mechanism for the Agency to recover any NDIS amounts paid prior to judgements awarding compensation for support costs that are covered by the NDIS. This would mean that disabled people (who meet the overarching criteria for the NDIS) can immediately access support and have the option to choose at their own discretion to pursue compensation for supports costs and/or economic loss and pain and suffering.

In addition, significant details about the NDIS (what supports will be funded; how the NDIS will operate) will be contained in the rules which are not available. The Bill confers significant discretionary powers on the CEO and the Agency through ‘may’ clauses – the uses of which may be better explained in the rules. As such, the medical profession and the disability community are limited in being able to determine the extent to which the Bill meets their expectations of the NDIS. Consequently, it is vital that there is extensive community consultation on the proposed rules.

As it currently stands, the Bill makes it possible for the Government to implement either of two very different schemes:

1. a safety net only for people who do not have alternative avenues for lifetime care and support – by turning away people who might be able to seek compensation elsewhere (clause 105) and funding and providing only those supports that other systems do not cover (subclause 34(f)) – the scope of which expands and contracts for individual participants according to what resources happen to be available at a particular point in time (subclause 4(15)(b)); or

2. a comprehensive, person-centric, ‘no fault’ scheme that upholds the dignity of people with disability and provides certainty that the care and support they need will be provided over their lifetime (clause 4), supports them to navigate the new and existing support systems (subclauses 4(15) and 6(1)), and facilitates prompt access to interventions which could prevent further reduction in their functionality (clause 25).

It would be very disappointing for the medical profession and the disability community if incremental implementation meant that the former is how the NDIS will operate in the first instance.

The AMA provides the following comments in respect of the three specific reasons for referral to the Committee from the Selection of Bills Committee.
The goal based planning process and support for NDIS participants to manage their individual plans and funding

Health and medical circumstances
The principles in clause 31 promote the philosophy of the person-centred approach to the NDIS, guiding the CEO to approve plans that support the dignity and autonomy of people with disabilities. Given that many people with disabilities have attendant medical conditions, the principles should be amended to include consideration of the health and medical circumstances of the participant.

Transparency of supports provided under the NDIS
It is important that the NDIS does not deteriorate into a lottery where particular supports are only available to those lucky few make ambit claims and are tacitly unavailable to those who conclude that those supports are not available through the NDIS. To facilitate equitable allocation of support between participants and increase the ability of participants to exercise choice and independence in an informed way, there must be greater transparency of the supports actually provided under the NDIS to other (unnamed) participants. The principles relating to plans (clause 31) could be improved by including the provision of information to participants about the supports that the NDIS provides to other participants. Alternatively, the supports provided could be regularly published. The Bill should be amended to oblige the CEO to ensure participants are in a position to make an informed decision about the design of their plan.

Certainty for individuals versus sustainability of the NDIS
A tension arises between the role of the Agency to support participants to exercise choice and control in the pursuit of their goals and the planning and delivery of their supports (subclause 4(4)), and the role of the Agency to manage and ensure the financial sustainability of the NDIS (subclauses 4(15)(b) and 118(1)(b)). The Agency has an obligation both to the participant and to the Treasury, and it is unclear which obligation would prevail if they conflict. As already noted, coverage and entitlements under the NDIS may expand or contract from time to time depending on anticipated demand on the NDIS and assessments of available finances. Over time the result could be inequitable allocation of support for participants.

While the Bill provides for review of plans to ensure the supports continue to be needed by the participant, the Bill does not guarantee that supports will continue to be provided to participants for as long as they are needed. The Bill is currently silent on the ability of the CEO to contract the supports provided in plans on the basis of maintaining the sustainability of the NDIS. However, it follows that, in the event of policy decisions to contract the NDIS because its sustainability is threatened, it is conceivable the CEO will act to withdraw supports for participants. This can be remedied by the addition of a provision in subclause 4(15) that the need to ensure the financial sustainability of the NDIS will not affect existing plans for participants.
The process and mechanisms for reviewing decisions of the NDIS Launch Transition Agency

*Reasons for decisions*
Transparency is the most important requirement to assist participants and prospective participants to seek meaningful review of the decisions of the Agency. Unless participants and prospective participants are given full explanations (reasons) for decisions, they will not be empowered to seek review of these decisions. Wherever the Bill confers a discretionary power on the CEO or the Agency, the Bill should also state that reasons for the decision will be provided to the participant. The Agency should always be transparent with participants and prospective participants, and the participant and prospective participants should always have a complete record of their engagement with the Agency. The Bill should be amended to reflect this.

*Decisions to recover NDIS amounts from judgements and settlements*
Under Chapter 5, Part 3, the CEO can decide to recover from compensation payers and insurers the costs of providing care and support to particular participants. Clause 99 suggests that a person directly affected by clause 111 may seek a review of the CEO’s decision to issue a notice to recover, but not of the amount to be recovered by the CEO. The Bill does not require the CEO to provide a copy of the notice to the participant. Nor does the Bill require the CEO to explain to the participant why the decision to recover costs has been made, which NDIS amounts will be recovered from the compensation or settlement, or an itemised list of the NDIS amounts to be recovered.

The Bill should be amended to require that the CEO provide a copy of the recovery notice to the participant or prospective participant with an itemised list of the NDIS amounts being recovered from the compensation payment or settlement. Further, clause 99 should be amended to explicitly provide the right for review of decisions made under Chapter 5, Parts 2 and 3 – to recover NDIS amounts from a compensation claim or settlement (past or future), and the amount to be recovered.

*Automatic reviews*
The AMA understands but has concerns about the provisions for automatic review of decisions deemed to have been made as a result of the CEO not making a decision within a specified time (subclauses 21(3) and 48(2)). As we understand it, the prospective applicant will be sent a letter informing them of an unfavourable decision and informing them that a review of the decision is being made ‘as soon as reasonably practicable’. As the application process concerns the people in society least empowered to navigate the complexities of bureaucratic processes, the AMA believes that the Bill should motivate the Agency to reduce delays in the application process. Requiring the Agency to regularly publish decision-making times would allow participants to be better informed about expected timeframes and hold the Agency accountable to the community on performance.
The interface between the NDIS and other service systems, and support for people in transitioning between service systems

Compulsion to seek compensation
This submission has already addressed the objectionable interface provided for in clauses 104 and 105 of the Bill between the NDIS and legal systems where fault can be attributed. Not only do these clauses reduce the NDIS to a safety net for people who have been or would be unsuccessful in compensation claims, but may also frustrate access to support where earlier access would decrease the final burden of disability.

Involvement in litigation is known to result in worse outcomes for people with injuries and subsequent disabilities, which is contrary to the objectives of the NDIS. Further, the compulsion to litigate exposes participants and prospective participants to litigation costs if the claim is unsuccessful – and the Bill is silent on the CEO’s responsibility for these costs.

Finally, if the power in clauses 104 and 105 remains, it is likely that medical indemnity and other insurers will have to reserve actuarially against possible claims, which will increase insurance premiums.

The interaction of the NDIS with the civil litigation process should ensure that both operate effectively together to enable early therapeutic interventions (where possible) and that this interaction does not create any perverse incentives or unintended flow on costs and consequences.

Giving up rights to compensation
The capacity for individuals to pursue compensation for economic loss and pain and suffering, and other potential heads of damage should be maintained. For this reason, the definition of \textit{enters into an agreement to give up his or her right to compensation} in clause 9 requires amendment to be specific only to compensation for the costs of care and support (as the NDIS should not be concerned with compensation received under other heads of damage, as suggested by clause 11).

There are concerns about the effect of the inclusion of this definition in the Bill. It is not made clear in the Bill to what sort of agreements this definition refers and with whom the agreement is entered. Clause 35(5) says the rules for assessing or deciding the reasonable and necessary supports may include methods or criteria relating to how to take into account amounts that a participant or prospective participant did not receive because they entered into an agreement to give up his or her right to compensation. It is not clear why the rules would need to consider this hypothetical scenario when determining what care and support is necessary and reasonable.

The National Injury Insurance Scheme
The Productivity Commission proposed a National Injury Insurance Scheme (NIIS) to cover people with catastrophic injuries, including those acquired through medical accidents. Without the details of that scheme being available, it is very difficult to assess the interface between the NDIS and the NIIS, and how clauses 104 and 105 would operate in that context.
**Other systems of support**

Complete transparency about the interface between the NDIS and other services systems and support will require complete lists of the available supports. The extent to which there is clarity about what will not be available under the NDIS, and therefore the interface between other systems, will only be apparent when the rules are made available. Extensive community consultation will be needed to ensure these rules facilitate seamless interface between the NDIS and other services systems.

The NDIS should not provide scope for severely disabled Australians to become stuck in the trenches between service delivery systems. Subclause 34(f) states the CEO must be satisfied that it ‘is not more appropriate for a support to be funded or provided through other general systems of service delivery or support services offered’. It appears that there is no requirement that the CEO establish that the general system of service delivery or support services actually funds or provides the reasonable and necessary support. This provision should be amended to make it clear that there is no possibility of potential participants being redirected to schemes which could, but do not, provide the reasonable and necessary support.

At the same time, the NDIS should not be designed merely to plug the gaps in the current infrastructure. There might be situations where a necessary and reasonable support is funded or provided through another scheme, but it is more appropriate for the individual participant that the NDIS to cover it. An example might be if the support is funded through a scheme which is burdensome to people with severe disabilities to access.

**People over 65**

By excluding people over the age of 65 from becoming participants (clause 22), and automatically ceasing the participation of a person over 65 who, on a permanent basis, enters a residential aged care service or is provided with community care (clause 29), the Bill adopts the rationale that the current aged care system can provide appropriate support to people with disabilities after this age. While there are disability support services in the Australian aged care system, there are often service delivery limitations and problems of quality. It is unlikely that the quality of disability-specific support and care provided in that system would be comparable to the level that would be expected of the NDIS. It is also unlikely that disability support under the aged care system would reflect the focus on independence, participation, and individual decision-making that the NDIS is intended to do. Therefore, the Bill should provide for NDIS supports to continue to be provided to people who enter the aged care system where there is a continued need for a support and it is not funded or provided by the aged care sector.

The explanatory memorandum states that ‘people who are receiving support under the NDIS and turn 65 can choose to either remain in the NDIS or to move to the aged care system’. Clause 29 does not appear to provide that choice. Further, subclause 34(f) confers the power on the CEO to determine that support should be sought through a different service system, so in practice the choice to remain an NDIS participant may not be available to the participant.
There has also been insufficient consideration given to the reverse transition during the Launch. There are people with disabilities in the aged care system who are under the age of 65 and who would not require community care or a residential aged care place if the NDIS funded or provided supports. It is unclear how these people will be supported in the transition from the aged care sector to the NDIS or if the CEO would routinely invoke subclause 34(f) for these people.

Finally, it is unclear whether an NDIS participant who is contemplating moving to the aged care system would be required to undergo the usual eligibility requirement, i.e. an assessment by an Aged Care Assessment Team. Given that the participant would have already undergone an assessment of their functional capacity in order to become participants of the NDIS, it seems superfluous that they undergo the ACAT in order to enter the aged care system.

Other issues

The AMA takes this opportunity to highlight particular issues that require consideration at this stage of the implementation of the NDIS and that should be addressed in the Bill.

Health and medical supports

As the Bill does not clearly state the range of care and support services to be funded under the NDIS, it is unclear if it will support people to have a choice of health and medical services not currently covered by Medicare. This will be an important feature of the NDIS, particularly for people with severe and enduring mental illness. Entitlements under the NDIS should include financial support or a medical allowance specifically to be used for private sector medical services, or medical aids and appliances that may not be adequately provided for under existing health service and funding arrangements.

Remuneration for medical assessments

The NDIS assessment and plan review processes will give rise to extra demands on medical practitioners (clauses 26, 36, 50). Medical practitioner assessments and the provision of medical opinion and advice, as part of the assessment process, should be appropriately remunerated. If medical assessments and reviews are to be remunerated under MBS arrangements, then relevant MBS items must be realistic to the number of health assessments and the appropriate level of medical practitioner contribution to the health care planning and coordination for participants and development of their plan.

The Bill should explicitly preserve the right of participants and prospective participants to choose their medical practitioner for the coordination of their assessment and review.

Clinical Advisory Group

The membership of the Independent Advisory Council does not provide for adequate clinical input to the incremental development of the NDIS and its support for disabled people.

The Bill should include the establishment of an independent clinical advisory group to provide clinical advice to the Agency and the Board about the support provided by the NDIS, identify areas for clinical research and the evidence base for the clinical efficacy of particular supports to be covered by the NDIS.
Greater transparency of governance
Transparency is also required in the governance framework of the NDIS, the Agency, the Board and the Independent Advisory Council. Decisions made by the Board of the Agency and advice given by the Independent Advisory Council will impact on individual participants and prospective participants. Minutes of the Board should be published on the website within a specified time, as should records of decisions made by the Board out of session. The advice given by the Independent Advisory Council should also be publicly available through the website. The Bill should be amended to compel this transparency. Annual reporting will be insufficient in this regard.

Transparency managing the costs of the NDIS
The extant level of disability support expertise and capacity in the system is currently low. The NDIS will heighten demand for services and very likely increase their price. If the pace of implementation overtakes the prevailing workforce and infrastructure capacity, this will produce potential ‘inflationary’ effects where there is very high demand and purchasing power for a low supply of services (for which inappropriately high prices may be charged).

The Bill confers very liberal powers to set rules through legislative instruments to manage the NDIS as well as the responsibility to manage the financial sustainability of the NDIS. This gives rise to the question of how such rules would be used to reduce the costs of the NDIS as a result of its inflationary impact on costs in the disability sector. For example, could the rules attempt to limit demand by encumbering funding with private contribution requirements, such as co-payments or contributions to enhance services? Comprehensive and high quality care and support services should be available under the NDIS at no cost to participants.

However, when it becomes clearer what the NDIS will and will not cover, the disability community may well want a conversation about the extent to which provisions for private contributions can support a scheme that provides a greater offering to participants.

Transparency of Agency finances
Clause 118 describes the functions of the Agency beyond the administration and facilitation of the NDIS, such as a research, communication, and analysis. There is an overlap with the functions in subclauses 118(c) to (h) and the performance of these functions elsewhere in the public sector. It is important to avoid duplication and the associated costs of more than one agency undertaking similar activities.

But it is more important to avoid diversion of Agency funding from supports for participants to these functions.

If these functions of the Agency are to be kept in the Bill, the Bill should be amended to require the Agency to publish before the fact what proportion of its funding will be directed to participants’ plans compared to the other functions.
Agency fees
For an informed policy debate about clause 120, there should be an explanation of the types of fees that are intended to be imposed. The explanatory memorandum only gives the example of charging fees for training seminars. The clause leaves open the option of the Agency charging registration fees to providers of supports. The Australian Government Cost Recovery Guidelines encourage agencies to consider whether charging fees is consistent with the policy goals of the program. There is a risk that demand for disability support services will outstrip supply if the NDIS is not well designed. Creating a disincentive for providers of supports to register would increase the likelihood of this risk. The Bill should state that providers of supports will not be charged application or registration fees.

Concluding summary

Although the AMA supports the establishment of the NDIS to provide comprehensive and appropriate support to people with serious disabilities, the Bill should be amended to:

- remove the power under clauses 104 and 105 for the CEO to require a person to take action to seek compensation;

- make it clear that there is no possibility of potential participants being redirected under clause 34 to schemes which could, but do not, provide the reasonable and necessary support;

- include in the principles listed under clause 31 that the health and medical circumstances of the participant will be considered, and that participants will be provided with information about the types of supports that have been provided to other participants;

- guarantee that supports will continue to be provided to participants for as long as they are needed, by adding a provision in subclause 4(15) that the need to ensure the financial sustainability of the NDIS will not affect existing plans for participants;

- preserve the right of participants and prospective participants to choose their medical practitioner for the coordination of their assessment and review;

- compel the CEO or the Agency, wherever the Bill confers a discretionary power, to provide reasons for decisions to the participant or prospective participant;

- limit the definition of ‘enters into an agreement to give up his or her right to compensation’ in clause 9 to compensation for the costs of care and support only;

- provide explicitly the right for review under clause 99 of decisions made under Chapter 5, Parts 2 and 3 to recover NDIS amounts from a compensation claim or settlement (past or future), and the amount to be recovered;

- require the CEO to provide to the participant or prospective participant a copy of the recovery notice issued under Chapter 5, Parts 2 and 3 with an itemised list of the NDIS amounts being recovered from the compensation payment or settlement;
- ensure NDIS supports continue to be provided to people who enter the aged care system, where there is a continued need for a support and it is not funded or provided by the aged care sector;

- establish an independent clinical advisory group;

- state that providers of supports will not be charged application or registration fees;

- require the Agency to publish decision-making times regularly;

- require the publishing of minutes of the Board, records of decisions made by the Board out of session, and advice given by the Independent Advisory Council; and

- require that the Agency publish before the fact what proportion of its funding will be directed to participants’ plans compared to its other functions outlined in clause 118.

There needs to be consultation regarding:

- the proposed rules;

- how the costs of the Scheme will be managed, how the Agency intends to use rules to manage the inflationary impacts on costs in the disability sector, and the extent to which provisions for private contributions could support a scheme that provides a greater offering to participants;

- how the Agency and the CEO will determine necessary and reasonable supports, and what could be included in the administrative guidelines to the CEO and Agency, such as financial supports or a medical allowances specifically for private sector medical services, or medical aids and appliances that may not be adequately provided for under existing health service and funding arrangements;

- what the CEO will consider to be an available support under clause 34 for the purpose of excluding a particular support;

- how people will transition from the NDIS to aged care and vice versa;

- how medical practitioner assessments will be remunerated; and

- the Agency’s functions under subclauses 118(c)–(h), and the Agency’s performance and financing of these functions.

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