Submission to the Standing Committee on Community Affairs Legislation Committee inquiry into the National Disability insurance Scheme Bill 2012

Introduction

South Australia endorses the establishment of a National Disability Insurance Scheme (NDIS) based on the *High Level Principles for a NDIS*, agreed by the Council of Australian Governments (COAG) at its April 2012 meeting, and reaffirmed in the *Intergovernmental Agreement for the NDIS Launch* signed at the December 2012 COAG meeting. These principles are reflected in the NDIS Bill 2012 (NDIS Bill) under clause 4. The NDIS principles are representative of the intent and spirit of the NDIS first stage (launch) and are an important reference in setting the policy parameters on the design and administration of the NDIS including the NDIS legislation.

South Australia is a host jurisdiction and joint investor in the NDIS launch. As such, South Australia has a clear interest in ensuring the launch is successful and provides the best possible platform to transition into a full national scheme. Having already commenced disability reforms to implement individualised funding and personal budgets and person-centred approaches, South Australia is committed to ensuring this philosophy is fully embedded in the NDIS.

The NDIS Bill is multi faceted. In addition to providing the legal basis for the operation of the NDIS, it sets the structures that will heavily influence the experience by participants and the probability of successful outcomes. South Australia notes that the NDIS Bill's primary purpose is to provide for the operation of the first stage of the NDIS. However, the NDIS Bill does demand consideration in context of the intention to transition to full scheme at a point in time[1].

To maximise the probability of a successful first stage and transition to full scheme the NDIS Bill must:

- properly reflect the *High Level Principles for a NDIS* agreed by COAG in April 2012 and reaffirmed in the *Intergovernmental Agreement for the NDIS Launch*
- be evidence based, particularly in regard to the findings of the Productivity Commission report *Disability Care and Support* July 2011
- enable adequate information and data reporting so as to facilitate performance review and evaluation of the scheme
- provide the flexibility to facilitate and apply continuous learning (such as about personal support plan development and flexible use of plans, or about how to support the engagement of children in decision making to the extent of their capacity)
- provide an administrative and operational framework to enable smooth transition into full scheme – particularly in relation to NDIS first stage participants.

The South Australian Launch

The South Australian launch will invest in the lives of approximately 5000 children with disability (from birth to 14 years) and their families and carers across the state.

During the first year, starting on 1 July 2013, existing disability support clients and newly eligible children from birth to five years across South Australia will be able to access

[1] COAG Communiqué 13 April 2012

support services through the NDIS launch. This will be extended to existing and newly eligible children aged from birth to 13 years in the second year and existing and newly eligible children from birth to 14 years in the third year.

The focus on children is part of the South Australian Government's efforts to provide 'every chance for every child'. This strategic priority aims to give children the best possible start in life, and to assist families to provide the best possible support for their children.

Children represent approximately 30% of all disability services clients. For the NDIS, children's services are a critical service area to 'test' in the first stage as the needs of children are unique and often require specialist services. Good service delivery in the early years will be influential in promoting a positive and productive life course for these young people. As with the principle of early intervention (which applies to all age groups) good services for children will reduce the demand on the NDIS in future years by building independence, skills and supporting long-term life plans.

The South Australian Government maintains that the impact of the broad NDIS eligibility definition as it relates to children will need close attention and monitoring during the launch phase. Eligibility for the scheme includes children from birth to six years with developmental delay who would benefit from early intervention (cl.9 definitions and cl.25(a)(ii)). This may extend the scope of the NDIS to cover some children who are unlikely to have a long-term disability and brings these children into a disability scheme for a short period of time. The potential impact in terms of scheme numbers has not been able to be quantified but is likely to lead to increased numbers of children coming within the scope of the NDIS and subsequently increase the overall scheme costs.

The South Australian and the Australian Governments signed the bilateral agreement for the NDIS first stage in December 2012 confirming the arrangements and initiation of the South Australian children's launch in July 2013.

Specific Commentary on the NDIS Bill

South Australia has three principal outstanding concerns with the NDIS Bill 2012 in its current form.

1. Prescriptive nature of the NDIS Bill

   The NDIS Bill takes a very prescriptive approach to the development and administration of a participant's support plan that focuses on the transactions (and consequences of failure to meet transactional requirements). The result is a process that appears overly bureaucratic, is not customer focused and shifts power away from the participant.

   South Australia acknowledges that a certain level of detail is required in determining eligibility for the scheme and individual funding allocations but supports allowing the participant greater flexibility, choice and control in determining usage of the funding, once allocated.

   South Australia considers that amendment to the Bill in the manner detailed in sections 1(a) and 1(b) below is appropriate to better reflect the principles of control and choice underpinning the NDIS reform.

2. Interaction with State laws

   a. Mandatory notification of child abuse and neglect

      The South Australian Government is concerned that State Government agencies and non-government organisations and their staff who obtain 'protected

information' under the NDIS Bill are not able to disclose it to another Government agency where they would otherwise be required to by State law. The South Australian Government has a particular concern about reports of suspected child abuse and neglect under the South Australian *Children's Protection Act 1993.*

b. Parental Responsibility

The South Australian Government has concerns regarding the role of the NDIS Agency CEO in overriding and re-assigning parental responsibility and how this role potentially relates to the decision making and care of children under the Guardianship of the Minister (*Children's Protection Act 1993*).

3. NDIS Principles

South Australia considers that the principles in the NDIS Bill should better reflect the outcomes sought for participant's personal and social development, to reflect the particular outcomes desired for children.

These, and a few other minor matters, are discussed in greater depth below.

1. Prescriptive nature of the Bill

1. (a) Details and prescription in the Bill

South Australia has maintained that the NDIS Bill takes a very prescriptive approach to the development and administration of a participant's support plan that focuses on the transactions (and consequences of failure to meet transactional requirements).

Whilst the NDIS Bill includes principles, under Cl. 31, relating specifically to the participant's plan that aim to personalise the process, empower the individual and maximise outcomes, South Australia is of the view that the NDIS Bill still contains too much detail, particularly relating to the controls over the participant's plan that may restrict choice and exercise of control by the participant (see Clauses 33, 43, 46, 47 to 50).

Commonwealth officials have stated that this level of prescription is necessary in a social insurance system where determinations need to be clear and will be subject to appeals. South Australia would prefer to see the NDIS Bill take a much simpler approach to a participant's plan, with the detailed transactional elements instead being set out in legislative instruments (i.e. the NDIS Rules) that can be more easily amended. This will enable the NDIS Bill to provide and communicate clear purpose and function of the participant's plan, and provides flexibility to amend criteria through the launch period based on learning gained through the launch.

South Australia proposes that the fundamental aspects of the participant's plan – as per Clauses 31, 32, 33, 34, 35, 39, 43(1) - are retained in the NDIS Bill but that the administrative details in Clauses 36-38, 40, 41, 43(2)-(5) and 47-50 are transferred into the NDIS Rules with only a brief statement of intent in the NDIS Bill.

South Australia proposes that a distinction should to be drawn between the level of prescription required for determining eligibility for the scheme and of funding allocation, once assessed as eligible. Once a participant is approved for funded support, the same level of prescription is not needed when dealing with the way in which the allocation is spent. As currently drafted in the NDIS Bill, the micro-managing of plans is a concern. Participant's need to be given control of expenditure in accordance with the agreed personal support plan with minimal exclusions (e.g. must be legal and cannot be for gambling) but the plan can be very individualistic and flexible and does not need to be too detailed about what is purchased, when, for what purpose and from whom. This

distinction is lost in the NDIS Bill, but is central to the underpinning philosophy of the scheme.

1 (b) Requirement to undergo assessment or examination

Cl. 26 and cl. 36 specify the NDIS Agency CEO's powers to require an assessment or examination. The NDIS Bill is not clear that this should be required only when the information is not otherwise available to inform eligibility or assessment of need under the NDIS.

The absence of this clarity creates a risk that participant's will be improperly burdened to undergo previously undertaken assessments and/or examinations, requiring them to tell their story multiple times. There is also a risk that this will increase workload pressure on allied services such as health, increasing costs to the NDIS. The NDIS Bill must be clear that available information where accessible, should be used in the first instance.

South Australia proposes that cl.26(1) and cl.36(1) be amended to lead with:

> *Cl.26(1) When existing reports or assessment information is not otherwise available or deemed insufficient by the CEO, the requests the CEO may make under this subsection….*
>
> *Cl 36(1) When existing reports or assessment information is not otherwise available or deemed insufficient by the CEO for the purposes of preparing a statement…*

2. Interaction with State Laws

2 (a) Mandatory notification of child abuse and neglect

Disclosure of Information (cl. 60, 62, 66 and associated parts) have been discussed extensively with Australian Government officials in drafting the NDIS Bill. South Australia is of the strong view that the NDIS Bill should not operate to prohibit or impede existing safeguarding measures that are designed to prevent harm.

South Australia remains concerned that the authority to use protected information for the purposes of protecting the safety or wellbeing of children is not adequately addressed in the NDIS Bill. There is significant risk that the NDIS Bill will impact upon reporting to statutory child protection authorities in South Australia of suspicion on reasonable grounds of abuse and neglect of children under the *Children's Protection Act 1993.*

Clause 66 of the NDIS Bill allows the CEO of the NDIS Agency to disclose information about an NDIS participant to a State Government agency or a non-government organisation (NGO) for the purposes of the NDIS.

Clause 62 of the NDIS Bill makes the further disclosure of that information by the State agency or the NGO an offence, unless the disclosure is covered by cl.60. Relevantly, if the disclosure is necessary to prevent or lessen a threat to an individual's life, health or safety or if the disclosure is for the same purpose for which the NDIS Agency originally disclosed it to the State agency or NGO then no offence will be committed.

A hypothetical scenario sets out South Australia's concerns:

The State disability agency has a client who is a child with a disability. The disability agency has had past involvement with the family and with the separate State child protection agency in relation to the child given a history of very serious abuse by a particular family member. However, there are no current concerns about ongoing abuse as the perpetrator no longer resides in the family home and has since moved elsewhere in the state.

The child is now a participant in the NDIS. The NDIS Agency CEO discloses NDIS protected information about the child and his or her family to the State disability agency in the course of administering the NDIS - for the purposes of the State agency performing its functions relating to that child's disability or the family's housing etc. Nothing in the NDIS protected information on its own creates a suspicion that the child is at risk of abuse or neglect, so no one in the NDIS Agency has made a child protection notification. However, with the benefit of additional detailed background information that the State disability agency has about the child/family, a reasonable suspicion of abuse or neglect is formed. For instance, the NDIS protected information shows clearly that the former abuser is again living in the same house as the child.

In this scenario, the NDIS Agency CEO disclosed the information to the disability agency for the purposes of the State agency's provision of disability services, not for the purposes of child protection. As such, it would be an offence under the NDIS Bill for the State disability agency to provide this information as part of the mandatory notification process.

Australian Government officials have suggested that a disclosure to a State agency "for the purposes of that agency" pursuant to cl.66(1)(b)(v) would arguably include the purpose of making child protection notifications, as that is part of the ordinary purposes of an agency such as the State disability services/agency (although plainly not its primary purpose). However, that interpretation is not clear from the NDIS Bill and creates a risk for South Australian agencies, particularly given that such a disclosure would otherwise be an offence (cl.62). The lack of certainty creates a risk of harm to vulnerable children as staff may be discouraged from making a notification.

Australian Government officials have proposed that a resolution to the problem can be achieved under the provisions of the NDIS Bill by the CEO certifying that every disclosure of NDIS protected information to a State agency is for child protection purposes as well as being for the primary purpose. The CEO would either make that certification before each disclosure or would make a "class certification" to say that all disclosures to State agencies will be for this additional purpose. This certification by the Agency CEO would apply to disclosures under cl.66(1)(a) and cl.66(1)(b)(v).

However, South Australia remains concerned that:

- this approach is artificial, and not clearly authorised by the provisions of the NDIS Bill
- the proposal would not protect staff of NGOs when making child protection notifications
- the lack of an explicit exception for child protection notifications to the offence of disclosing protected information potentially creates uncertainty and therefore a disincentive for staff to make child protection notifications
- the threshold for a disclosure that is "necessary to prevent or lessen a serious threat to an individual's life, health or safety" (cl.60(2)(e)) is unclear and is higher than the trigger for a notification for suspected child abuse or neglect in State law (which is based on a reasonable suspicion)

South Australia submits that the NDIS Bill should be amended to ensure that State agencies and non-government organisations are **clearly** able to make necessary disclosures under State legislation.

South Australia proposes that cl.62 be amended to include a provision that:

> *Nothing in subsection (1) makes it an offence for a person to make a disclosure required by a law of a State or Territory that is prescribed by the NDIS rules for the purposes of this section.*

The NDIS rules could then include the provisions of State legislation which require child protection notifications.

2 (b) Clause 75 regarding parental responsibility

Cl.75(2) assigns parental responsibility to the guardian of a child under Commonwealth or State law. However, the NDIS Agency CEO is authorised to override this and re-assign parental responsibility. This is not appropriate and may give rise to unnecessary conflict between the State (where the Minister is the guardian) and the child's family or may lead to repeated representations to the NDIS Agency by the family seeking parental responsibility under the NDIS legislation. There is also concern with regard to how the CEO would make this determination.

Reassignment of parental responsibility to a person other than the guardian may be appropriate in some cases, but this should be the decision of the legal guardian, not the NDIS Agency CEO. The legal guardian has access to the full history and relevant factual circumstances and is better placed to make a fully informed and considered decision. The NDIS Bill in its current form empowers the NDIS Agency CEO to override a court's decision to assign guardianship. This will impact on the decision making and care and protection of children under the Guardianship of the Minister.

South Australia proposes cl.75(2) be amended to read:

> *Cl.75(2) Despite subsection (1), if, under a law of the Commonwealth, State or a Territory, a person has guardianship of a child, that person has parental responsibility for the child, unless on the basis of a written recommendation of the legal guardian, the CEO determines one or more persons referred to in subsection (1) instead have parental responsibility for the child.*

3. General Principles and recognising the priority for personal and social development

Cl.4 and cl.5 set the general principles for the NDIS Act and scheme. These are acknowledged as important sections to the Act in setting out the Parliament's intent and spirit of the legislation. The principles provide a reference of interpretation and application of the Act's provisions. The principles strongly (and rightly) reflect the authority of the decision making and aspirations of people with disability. However, the principles do not adequately recognise that some people with disability may not be able to make decisions or be informed of options to make considered decisions. This particularly applies to children who most often have their decisions made on their behalf. The principles should recognise the priority of a person's personal and social development when people act on behalf of others, particularly children and young people.

The principles should also speak more directly to the outcomes sought for children. Maximising a child's development is a key intent of early intervention and responding to the disability support needs of a child. This can be captured by a principle relating to 'positive personal and social development.'

South Australia proposes that cl.5 be amended to include a principle:

> *positive personal and social development by people with disability should be a priority, particularly for children and young people.*

4. Other matters

4(a) Clause 44(1) regarding an insolvent self managing

This bars a participant from self managing funding or exercising management options if the person is an insolvent under administration. This is overly prescriptive. South Australia acknowledges that the integrity of NDIS funds must be protected, but a blanket ban on self management or other options other than prescribed under cl 33(3)(b) is not warranted.

Similar to provisions under cl.44(2), the CEO should have regard to unreasonable risk in regard to a person who is an insolvent, thereby enabling individual circumstances to be considered and risk mitigated.

4(b) NDIS Advisory Council skills and diversity

Sections 147 (5)(a) and (b) of the NDIS Bill outline the skills, experience and knowledge required for members of the NDIS Advisory Council. This section indicates that membership of the Advisory Council must reflect the diversity of people with disability to include people with disability, carers of people with disability and people with experience or knowledge of the supply of equipment or the provision of services to people with disability.

The Advisory Committee expertise and skills should reflect the diversity of people, needs and circumstances the NDIS will operate with to maximise the learning's and a successful transition to a full NDIS in the future.

South Australia proposes that cl.147(5)(b) be amended to include:

> *at least one of the members is a person who has skills, experience or knowledge with regard to the needs and service support for children and young people with disability*
>
> *at least one of the members is a person who has the skills, experience or knowledge with regard to people with disability in rural or remote communities*