

## **National Disability Insurance Scheme Bill 2012**

*Introduced into the House of Representatives on 29 November 2012; passed both Houses on 21 March 2013*

*Portfolio: Families, Housing, Community Services and Indigenous Affairs*

*PJCHR comments: [Report 1/13](#), tabled on 6 February 2013*

*Response received: 19 March 2013*

### **Summary of committee view**

3.1 The committee thanks the Minister for her response. The committee welcomes the amendments made to the bill and has no further comments on the bill.

### **Background**

3.2 This bill establishes the framework for the National Disability Insurance Scheme to enable the scheme to be launched in five sites across Australia from July 2013.

3.3 The committee sought further information from the Minister for Families, Housing, Community Services and Indigenous Affairs on various issues to assist its consideration of the human rights compatibility of the bill.

3.4 The Minister's response is attached.

### **Committee response**

*Relationship between the definition of disability in the bill and that contained in the Convention on the Rights of Persons with Disabilities*

3.5 The committee sought clarification as to whether the concept of disability used for the purposes of the NDIS was as broad as that contained in the Convention on the Rights of Persons with Disabilities (CRPD). The Minister notes the CRPD definition was taken into account in the formulation of the scheme and that the definition of the term '[a person] meets the disability requirements' in clause 24 of the bill is not a general definition of disability, though it is consistent with the CRPD definition.

3.6 The committee notes the Minister's response, but points out that the definition in subclause 24(1)(e) of the bill provides that a person with an impairment will only meet the eligibility requirements if 'the person's support needs in relation to his or her impairment or impairments are likely to continue for the person's

lifetime.’ Article 1 of the CRPD provides in part that ‘[p]ersons with disabilities include those who have *long-term* physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.’

*Exclusion of persons with disability who are over 65 from the NDIS*

3.7 The committee expressed its concern that the exclusion of persons with disabilities who are 65 or over might raise concerns about equality and non-discrimination. The committee noted that the aged care system might not be designed with the same comprehensive and holistic approach to disability that would underpin the NDIS.

3.8 The committee notes the Minister’s response which draws attention to proposed changes to the aged care system which would allow older Australians ‘more choice and control over the services they receive, including better access to care at home and that this would:

... allow aged care consumers with a disability greater choice and flexibility over the services they receive to enable them to tailor their care to meet their needs, and allow the aged care system to better meet the needs of individual consumers, including needs that relate to a person’s disability.<sup>1</sup>

*Right not to incriminate oneself*

3.9 The committee sought clarification from the Minister whether clauses 53 and 55 of the bill would compel a person to provide information or produce a document even where the provision of the information or the production of the document may incriminate the person. If this was the case, the committee requested a justification for the limitation on the right of persons not to incriminate themselves guaranteed by article 14(3)(g) of the International Covenant on Civil and Political Rights (ICCPR) or, if this was not the intended effect of the legislation, whether it would be appropriate to clarify this in the legislation.

3.10 In her response the Minister states that the offence under clause 55 was subject to a defence of reasonable excuse and that ‘it is intended that a tendency to

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1 Letter of 18 March 2013 from the Minister for Families, Housing, Community Services and Indigenous Affairs, the Hon Jenny Macklin MP, to Mr Harry Jenkins MP, Chair of the PJCHR, p 2.

incriminate the individual or to expose them to a penalty would amount to a reasonable excuse for the purposes of clauses 55 and 57'.<sup>2</sup>

3.11 The Minister noted that 'in addition to the above, and in light of the Committee's comments' that she had moved, and the House of Representatives had passed amendments to clauses 57, 84 and 189 'to expressly provide that the right to avoid self-incrimination is available in respect of offences within the bill with a reasonable excuse defence (see new sub-clauses 57(3), 84(7A) and 189(3)'.<sup>3</sup>

3.12 The Minister further noted that the bill as amended is currently before the Senate and is accompanied by additional explanatory material. The amended bill has since been passed by the Senate.

3.13 The committee notes that the provisions have been amended to include a provision along the lines of the new clause 57(3):

It is a reasonable excuse for an individual to refuse or fail to give information or produce a document on the ground that to do so might tend to incriminate the individual or expose the individual to a penalty.

3.14 The committee further notes that the inclusion of this provision accords with the advice contained in Drafting Direction 3.5 issued by the Commonwealth Office of Parliamentary Counsel.<sup>4</sup> The committee also notes the comments of the Senate Standing Committee for the Scrutiny of Bills on the imposition of an evidential burden as a result of the reasonable defence provisions and the Minister's response to those comments.<sup>5</sup>

3.15 The committee notes that an explanation of the amendments made by the House of Representatives has been included in a revised explanatory memorandum, which includes a revised statement of compatibility.<sup>6</sup>

**3.16 The committee thanks the Minister for the information and welcomes the amendments to the bill. It commends the practice suggested by the Office of**

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2 Ibid.

3 Ibid.

4 OPC, *Drafting Direction 3.5*, issued February 2013, paras 61-62 (this section is in the same terms as the last version issued in October 2012).

5 Both are contained in Senate Standing Committee for the Scrutiny of Bills, *Fourth Report of 2013*, pp 124-126.

6 See the revised Statement of compatibility, p 26, which appears at the end of the revised explanatory memorandum.

**Parliamentary Counsel, though without prejudice to any views the committee may take in relation to the human rights compatibility of abrogating the right not to incriminate oneself generally or in specific circumstances.**

*Other amendments made to the bill*

3.17 The committee notes that a number of amendments were introduced in response to the report of the Senate Community Affairs Legislation Committee into the provisions of the bill, tabled on 13 March 2013. In particular the committee notes:

- the insertion of a new subclause 3(1)(a) to give greater prominence in the list of the objects of the Act to the object of giving effect to Australia's obligations under the CRPD;
- the insertion of a new subclause 3(1)(i) to ensure that it is an object of the Act to give effect, in conjunction with other laws, to certain obligations that Australia has as a party to the six human treaties other than the CRPD which are listed in the *Human Rights (Parliamentary Scrutiny) Act 2011*;
- the insertion of new subclause 4(13) to provide, as a general principle, that the role of advocacy in representing the interests of people with disability is to be acknowledged and respected;
- the insertion of new subclause 147(5) to strengthen the representation of persons with disability on the Advisory Council; and
- the insertion of a new section Part 1A ('Principles') and a new clause 17A, which:
  - affirms, so far as is reasonable in the circumstances, the capacity of persons with disability to determine their own best interests and make decision that affect their own lives, and
  - that the NDIS is to 'respect the interests of people with disability in exercising choice and control about matters that affect them', to 'enable people with disability to make decisions that will affect their lives, to the extent of their capacity', and to 'support people with disability to participate in, and to contribute to, social and economic life, to the extent of their ability.'

3.18 The committee notes that an explanation of the amendments made by the House of Representatives have been included in a supplementary explanatory memorandum, which includes a supplementary statement of compatibility.



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18 MAR 2013

The Hon Harry Jenkins MP  
Chair  
Parliamentary Joint Committee on Human Rights  
PO Box 6100  
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Dear Mr Jenkins *Harry*

Thank you for your correspondence of 6 February 2013 in which the Committee seeks clarification with regard to aspects of the National Disability Insurance Scheme Bill 2012.

I appreciate the Committee's consideration of the Bill and am pleased to have the opportunity to provide clarification on the issues the Committee has raised.

Please find attached detailed responses to the specific issues the Committee has raised.

Yours sincerely

**JENNY MACKLIN MP**

**DETAILED RESPONSES TO THE SPECIFIC ISSUES RAISED BY THE COMMITTEE.**

**The Committee seeks further clarification on whether the definition of ‘disability’ in the bill is as broad as that contained in the Convention on the Rights of Persons with Disabilities, and if not why the broader definition has not been used.**

The definitions of disability contained in the Convention and the Rights of Persons with Disabilities (CRPD), and the World Health Organisation’s International Classification of Functioning, Disability and Health (ICF) were considered in developing the approach to defining eligibility (and reasonable and necessary support) for the NDIS.

Under the auspices of the Council of Australian Governments, consultations occurred in 2012, through Commonwealth and State Advisory Groups established to support government consideration of the NDIS, on the approach to defining eligibility and reasonable and necessary support under an NDIS. The consultations informed the final approach to eligibility and reasonable and necessary support agreed by COAG, as well as further work on how these definitions would work in practice, and how they would be reflected in legislation, regulations or guidelines. The purpose of Clause 24 of the Bill is to set out disability requirements for a person to become a participant in the NDIS. It is not intended to be a definition of disability or to limit who may be considered a person with disability. People who are not NDIS participants may still receive assistance from the scheme such as information and referral services.

**CRPD**

The CRPD states that ‘[p]ersons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.’ The NDIS disability access requirements are consistent with the definition of disability used in the CRPD in the types of impairments (clause 24(1)(a)), the long-term nature of the impairments (clause 24(1)(b)), and their hindrance on full and effective participation in society (clause 24(1)(d)). The NDIS disability access requirements provide more detail as the NDIS, like other insurance schemes such as existing transport accident insurance schemes, needs clear criteria about who is eligible to receive support from the scheme. This is so the community can understand what to expect from an NDIS, and so the NDIS Launch Transition Agency’s decisions on who is able to receive support from the scheme are equitable, transparent and rigorous.

**ICF**

The terminology and structure of the NDIS disability access requirements are consistent with the ICF. The ICF is a classification of health and health-related domains. These domains are classified from body, individual and societal perspectives by means of two lists: a list of body functions and structure, and a list of domains of activity and participation. Since an individual’s functioning and disability occurs in a context, the ICF also includes a list of environmental factors. In line with the ICF, the NDIS disability access requirements consider body functions (clause 24(1)(a)) and activities and participation (clauses 24(1)(c)&(d)).



**The Committee notes that excluding those aged 65 and over from this scheme raises non-discrimination issues, and seeks further clarification as to whether the aged care system delivers the same forms of assistance and support as provided under this scheme.**

The aged care system provides information, assessment and referral mechanisms, needs-based planning arrangements, support for special needs groups and for carers, a choice of service types, high quality, accessible and affordable care and a safe and secure aged care environment.

Through the aged care system, people receive support with ageing in accordance with their level of need. The aged care system provides a number of supports consistent with those that would be delivered through the NDIS. For example, personal care, home help, home modifications, transport assistance, support for carers, and some social and emotional support.

Depending on the level of package of support, a person may also be able to access allied health and clinical care in conjunction with the health system.

Last year the Government announced a ten year program of aged care reform. These reforms will create a flexible and seamless system that provides older Australians with more choice and control over the services they receive, including better access to care at home. All new Home Care Packages allocated to aged care providers must be offered to consumers on a Consumer Directed Care (CDC) basis. CDC packages will allow aged care consumers with a disability greater choice and flexibility over the services they receive to enable them to tailor their care to meet their needs, and allow the aged care system to better meet the needs of individual consumers, including needs that relate to a person's disability.

**The Committee has concerns around new powers to compel the production of information or documents and seeks further clarification on the effect on the right not to incriminate oneself. The committee also notes the importance of identifying any reserve onus offences in statements of compatibility.**

In relation to clause 53 of the Bill, the Bill creates no offence and imposes no penalty in relation to non-compliance with a requirement under that clause and hence does not compromise an individual's right not to incriminate him or herself.

In relation to clauses 55 and 57, while the Bill creates an offence for non-compliance with a requirement under clause 55, the offence does not apply if a person has a reasonable excuse. It is intended that a tendency to incriminate the individual or expose them to a penalty would amount to a reasonable excuse for the purposes of clauses 55 and 57, and hence those provisions also would not compromise an individual's right not to incriminate him or herself.

In addition to the above, and in light of the Committee's comments, I am pleased to advise the Committee that I have moved, and the House of Representatives has passed, amendments to clauses 57, 84 and 189 to expressly provide that the right to avoid self-incrimination is available in respect of offences in the Bill with a reasonable excuse defence (see new sub-clauses 57(3), 84(7A) and 189(3)). The Bill as amended is currently before the Senate, and includes some additional explanatory material. Other examples of a 'reasonable excuse' would include an emergency or unavoidable delay.



**The committee seeks clarification of the use of the phrase ‘reasonably necessary’ in the bill (as applied in clause 60) when the international standard is that a limitation on the right must be ‘necessary’ if it is to be justified.**

The phrase ‘reasonably necessary’ in sub-clause 60(3) is intended to operate as words of limitation that confine the circumstances in which protected information may be obtained, recorded, disclosed or used for the purposes of the bill. It is anticipated that in most circumstances research, actuarial analysis or policy development could be done with de-identified information, and therefore it would not be reasonably necessary in such circumstances to obtain, record, disclose or use protected information for such purposes. However, sub-clause 60(3) makes provision for the possibility that in some limited circumstances it may be reasonably necessary to obtain, record, disclose or use such information.