Chapter 4
Becoming a participant

4.1 The NDIS is a scheme designed around individuals with disability, and clauses 18 to 30 set out the process by which someone enters (and leaves) the scheme. These clauses include the eligibility requirements, which were the subject of much of the discussion among stakeholders.

4.2 Clauses 18, 19 and 20 establish a system for people to request to participate in the NDIS. Clause 20 sets a deadline of 21 days for the CEO of the agency to, at a minimum, take some key steps in the process of determining whether the applicant meets the eligibility criteria.

4.3 Clause 21 establishes the framework under which a person's eligibility to be a participant in the NDIS is assessed. It has three elements. The first subclause defines a set of conditions governing access to the NDIS. If someone meets those criteria, then the person has the right to be part of the NDIS. The second subclause is intended to ensure that some people already receiving disability supports under existing programs will be able to access the NDIS, even though they might not meet some of the criteria (for example if they are over 65 but already receiving support). The third subclause states that, if the CEO fails to act within the 21 days set out in clause 20, then the applicant is determined to not have met the access criteria. This particular subclause caused some disquiet amongst stakeholders.

4.4 An overarching concern of advocacy organisations and people with disability was that the bill would not create an entitlement for those meeting certain criteria. As such, it would not be consistent with the rights-based approach endorsed by the government, and agreed with by this committee (see chapter 2 of this report).

4.5 DANA for example argued that:

> At no stage in the draft Bill is there the legislative formulation that we have come to expect with genuine entitlements. In other entitlement-based legislation (e.g., Social Security Act 1991) we see the consistent use of "A person is qualified for [pension, benefit] if the person has [description of eligibility criteria].[1]

4.6 An example of the construction of eligibility in the *Social Security Act 1991* is for the age pension:

> (1) A person is qualified for an age pension if the person has reached pension age and any of the following applies:
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> (a) the person has 10 years qualifying Australian residence;
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> (b) the person has a qualifying residence exemption for an age pension;

1 DANA, *Submission 516*, p. 5.

(c) the person was receiving a widow B pension, a widow allowance, a mature age allowance or a partner allowance, immediately before reaching that age;

(d) if the person reached pension age before 20 March 1997—the person was receiving a widow B pension, a widow allowance or a partner allowance, immediately before 20 March 1997.[2]

4.7 A related suggestion made by Developmental Disability Council of WA and People with Disabilities WA was that the legislation should 'have a notion of manifest eligibility, such as exists for the Disability Support Pension'.[3]

4.8 The committee agrees that the construction of eligibility used in the bill is slightly different to that in some other legislation such as the Social Security Act. Determining whether someone has a disability that is causing a significant impairment, or whether they would benefit from early intervention, is not always as straightforward as determining a person's birthdate. However, the committee nevertheless believes that the bill does create a right of access to the NDIS for those who meet the criteria. Specifically:

- Clause 18 gives anyone the right to make an access request;
- Clause 20 gives the CEO no discretion about whether to consider a request: all requests must be responded to;
- Clause 21 states that a person meets the access criteria provided that they satisfy certain eligibility requirements; and
- Clause 28 states that a person becomes a participant once the CEO is satisfied that a person meets the requirements: there is no discretion for the CEO to decline access, if the criteria are met.

4.9 In other words, the agency's only role in these clauses is to determine whether the person meets the access criteria: they are not rationing places in a capped program, and they have no discretion about the decision whether a person can participate.

4.10 While this creates a rights-based framework for access, the appropriateness of that framework hinges on the application of the access requirements set out in clauses 22 to 25, and some of the methods for determining eligibility set out in clauses 26 and 27. The remainder of this chapter examines these issues.

The effect of deeming a decision to have been made

4.11 In describing the bill above, the committee noted the process under subclause 21(3), whereby if the CEO does not take action on an access request within 21 days, the prospective participant is deemed to not meet the access criteria.

4.12 This clause caused some concern. The department gave a valuable explanation of why this clause would be of benefit of prospective participants:

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2 *Social Security Act 1991*, s. 43.

3 Developmental Disability Council of WA and People with Disabilities WA, *Submission 642*, p. 8.

> This is actually protection for participants. I know it does not feel like that when you read it. What it means is that, if the CEO fails to make a decision in 21 days, if there were not this provision, it would put a person into limbo and they would not have a decision to appeal against. This clarifies that, if the CEO does not get his or her act together and make a decision, the person is not in limbo. They are protected by the fact that they act says a decision has in fact been made and they have something to appeal against. If you did not have this one in place, you would be putting participants at risk. I know it does not feel like that when you read it cold, but this is a really important protection to make sure people are not in a black space where the CEO has not made a decision, they do not know what is happening and they have nothing that they can take to review court to appeal against. So this actually helps people. We have debated internally a number of times to see if we really need this, and each time we look at it we think it is better and a much stronger protection for participants than the alternative.[4]

4.13 To fully understand how clause 21(3) will work, it needs to be read in the context of clause 100(5). That later clause automatically triggers a process of formal review of the decision (or in this case, the failure to make a decision within the timeframe). Thus, if the assessment of someone's application to enter the scheme has not commenced within 21 days, they get an automatic review of the situation by someone other than the CEO.

4.14 The committee agrees that, despite the counterintuitive wording in the bill, this is a significant positive protection for people seeking access to the scheme, imposing a very strong incentive on the agency to act swiftly on access requests.

Aged care or disability insurance: the age requirements

4.15 Any disability care system will need to sit alongside other care and support policies, and there needs to be rules and policies to guide how they interact. Foremost among these is the aged care system. Under clause 22 of the bill, a person would only be able to access the NDIS if they made an access request before they turned 65. At age 65 or above, people would be required to seek support through the aged care system.

4.16 The bill contains two qualifiers to this age cut-off. The first is that there may be additional age restrictions made under the NDIS Rules: the EM states that these reflect the fact that 'the Commonwealth has agreed with some host jurisdictions that the NDIS will be initially implemented in that launch site in relation to certain age cohorts only'.[5] Examples include SA, where the scheme will commence with the age 0–5 cohort, and Tasmania, where it will commence by covering those aged 15–24.[6] Thus, during the launch phase, age restrictions may be tighter than just being under 65.

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4 Dr Hartland, FaHCSIA, *Proof Committee Hansard*, 5 March 2013, p. 54.

5 *Explanatory Memorandum*, p. 11.

6 See chapter 1 of this report for more detail.

4.17 The second qualifier arises from subclause 21(2), outlined above. If a person is 65 or over and is already receiving supports under a pre-existing program recognised under the NDIS Rules, then their age will not preclude them transferring across to the NDIS.[7]

4.18 The committee notes that participants do not have to exit the NDIS when they reach 65. Once they are participants in the scheme, they may remain within it.[8] However, they cannot enter the disability support system for the first time above that age.

4.19 The committee received extensive comments on the restriction of eligibility to those who make an application below the age of 65.

4.20 Some submitters questioned whether the age cut-off was consistent with the objectives of the scheme, and in particular with supporting the rights of people with disabilities on a non-discriminatory basis. The submission of Futures Alliance typified this concern, saying:

> We believe that the scheme would be more equitable, create greater equality, and be more in line with Australia's human rights obligations if the age requirements were removed or extended significantly so as to broaden the concept of disability and enable those who are ageing with a disability (rather than experiencing age-related diminishment of capacity) to receive the sufficient support for a full life. This would apply to both those people who have a disability before the age of 65, and to those who acquire a non-aged related disability after the age of 65.[9]

4.21 People With Disabilities Australia likewise raised the issue in the context of an appropriate protection of rights:

> Access to the NDIS must be available to anyone who legally resides in Australia, regardless of their age or nationality. The Scheme is premised on the recognition that all people with disability are inherently valued and respected members of society, and are entitled to supports in order to enjoy their rights on an equal basis as others. It is a violation of the international human rights instruments to which Australia is a party to discriminate on the basis of age and/or nationality…
>
> There are many people older than 65 years who have had a disability their whole life, and many who will acquire one through causes unrelated to ageing (for examples, motor neurone disease or multiple sclerosis). The aged care system in its current form cannot provide the highly specialist disability supports required by many of those people. Moreover, the age cut off implies that older people should not be provided with the opportunities to exercise choice and control over their lives like their younger

7 *Explanatory Memorandum*, p. 11.

8 Except if they have entered residential aged care or are being provided with community aged care (clause 29(1) of the bill). This was a source of concern for National Seniors Australia, *Submission 616*, p. 8.

9 Futures Alliance, *Submission 671*, p. 4.

> counterparts, and that they deserve only generic rather than reasonable and necessary supports to meet their needs.[10]

4.22 These concerns based on principle were complemented by other concerns based on practice. Most were centred on the lack of suitable services in the aged care sector for people with various medical conditions and disabilities.

4.23 Combined Pensioners and Superannuants Association of NSW pointed out that there are 'differences in the types of assistance required by older people and people with disabilities' and that 'aged care services…may be inappropriate for [disabled people's] needs or simply not meet them'.[11] David Heckendorf argued that with the average age of entry to aged care being 84, younger entrants 'will not socially fit within the aged care system. Nor will the aged care system be equipped to provide the particular types of services required by this group'.[12] Polio Australia stated that 'there are no specialist Late Effects of Polio services in the aged care sector for polio survivors aged 65 and over'.[13]

4.24 BCA argued that evidence showed the aged care system was not adequate to the task, despite various reforms:

> We are well aware that the Productivity Commission did a parallel inquiry into aged care, and we are well aware that there is some significant reform happening in that area, but what we would argue is that that reform is looking at frail aged, at ageing in place and at respite and other supports, but it is not looking at the specialist needs of people with disability. That is not just people who are blind; that is people with a whole host of disabilities.
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> I would like to quote something one of our members said to me in one of the consultations that I ran around Australia:
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> When the nursing homes for the blind closed down, it was said that all other nursing homes would cater for the blind and vision impaired people. We have come to realise that the promises made by these nursing homes in the end did not meet all the requirements of the blind and vision impaired
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> Likewise, our members are concerned that there is this coverall that the aged-care sector will just meet their needs, but often there is not that comprehensive understanding by aged-care providers of what it means to be blind, what the capacity of people who are blind is and the fact that people can be very independent with some aids, equipment, orientation and mobility. So what we want to see is a system that a person can access.[14]

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10 People With Disabilities Australia, *Submission 557*, p. 9.

11 Combined Pensioners and Superannuants Association of NSW Inc. *Submission 606*, p. 3.

12 Mr Heckendorf, *Submission 634*, p. 6.

13 Polio Australia, *Submission 637*, p. 5.

14 Ms Jessica Zammit, Blind Citizens Australia, *Proof Committee Hansard*, 21 February 2013, p. 3.

4.25 Other practical questions were raised, such as about the interaction of the 65 year age cut-off with other age-related provisions. It was pointed out that the age at which a person will become eligible for the aged pension is set to rise to 67 by 2023.[15] The Productivity Commission report itself refers to the 'Aged Pension age' rather than to the age of 65.[16] Several groups including the Physical Disability Council of New South Wales, queried how the age cut-off would interact with provisions in other legislation regarding Indigenous Australians, who gain access to some pension supports at 50 rather than 65.[17] Others argued that there are existing programs or policy guidelines relating to aged care that do not use the age of 65 as the key criterion but other, later, ages. These include, for example, national benchmarks and policies relating to residential aged care.[18]

4.26 Not all inquiry participants argued against the age criterion. The Tasmanian Government argued in favour of the age cut-off as ensuring clarity of the boundaries between service systems. It also took the view that it was important not to undermine the financial sustainability of the scheme.[19] This concern is shared by the Commonwealth.[20] The National People With Disabilities and Carer Council (NPWDCC) took the view that there should definitely be a cut-off, though it did argue that there may be a way to address possible service gaps through recognition of diagnoses, or a similar mechanisms.

4.27 Several organisations, including the AFDO and BCA, recommended removal altogether of any age restriction.[21] More frequent were recommendations that there be some revision to the NDIS eligibility criteria. National Seniors Australia recommended that the NDIS be extended 'to include older Australians aged 65 and older with no significant age-related conditions'. Polio Australia suggested that 'the NDIS age limit be considered selectively for people whose disabilities result from various causes', such as polio.[22]

4.28 The Australian Rehabilitation and Assistive Technology Association (ARATA) proposed that the CEO have the ability to allow entry to those over 65 'who acquire a disability best served by the systems and services of the NDIS'. ARATA considered that those with spinal cord or other traumatic injuries would be likely to fit

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15 *Social Security Act 1991*, s.23.

16 For example, Productivity Commission, *Disability Care and Support*, 2011, Vol. 1., pp. 179-182.

17 Physical Disability Council of NSW, *Submission 597*, p. 4.

18 Aged and Community Services Australia, Fact Sheet 2: Residential Aged Care, May 2011, http://www.agedcare.org.au/publications/resources/fact-sheets/acsa-fact-sheet-2-2008-residential-aged-care.pdf (accessed 6 March 2013)

19 Mr Evans, Tasmanian Government, *Proof Committee Hansard*, 22 February 2013.

20 *Explanatory Memorandum*, p. 11.

21 AFDO, *Submission514*, p. 13; Blind Citizens Australia, *Submission 594*, p. 5.

22 Polio Australia, *Submission 637*, p. 6.

this category.[23] Other conditions that it was suggested might benefit from some form of discretionary rule include motor neurone disease and multiple sclerosis.[24] Another suggestion was to extend the 'grandfathering' provision in paragraph 21(2)(b) to include not only those already receiving supports but those who had already received a relevant diagnosis, but who may not yet have accessed supports.[25]

4.29 One of the difficulties with creating exceptions to the age cut-off is that it will inevitably be difficult to equitably and objectively determine to whom the exception should apply. Some impairments are age-related and some are not; even some diagnoses can be age related in some cases and not others. Discussing vision loss, COTA explored some of these issues:

> We agree that there is a correlation between vision loss and ageing so it could be seen as a part of the ageing process. However not all vision loss is ageing related and vision rehabilitation is a specialist service that is not included in the current suite of aged care services but sits in the disability service sector. If people over 65 are to be directed to the aged care sector for assistance with vision then the services needed to be adequately resourced to provide that service.[26]

4.30 The committee received little evidence on the cost or other implications of extending eligibility beyond age 65. Brain Link Services drew attention to evidence from Victorian . In Victoria, the committee was told, the system had been reformed in 2006, so that people over 65 could access disability services. The result was:

> Victoria has not had a swathe of people over the age of 65 swamping the disability sector. If we go back to what Dr Dyson said: evidence. If you look at what has happened at [Department of Human Services in Victoria], the people who are accessing disability services who acquire a disability over the age of 65, or are over 65 when they first need a disability service, are the same groups who are getting it under 65. It is not Alzheimer's. It is not people who are experiencing the natural effects of ageing that complicate with disability. It is virtually the same groups.[27]

Committee view

4.31 The difficulty involved in resolving concern about the age criterion is reflected in the diversity of recommendations that stakeholders made to address it. It has been suggested that the Productivity Commission report proposed a scheme for those aged under 65. The Commission's position was:

> A reformed aged care system, such as that proposed recently by the Commission in its parallel inquiry into aged care, would be a more

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23 ARATA, *Submission 596*, p. 1.

24 Dr Baker, National Disability Services, *Proof Committee Hansard*, 4 March 2013.

25 Mr Ah Tong, Vision 2020 Australia, *Proof Committee Hansard*, 21 February 2013.

26 COTA, *Submission 617*, p. 5.

27 Mr Harris, Brain Link Services, *Proof Committee Hansard*, 21 February 2013, p. 59.

> appropriate system for addressing disability resulting from the natural process of ageing.[28]

4.32 It can be seen therefore that the Commission itself highlighted that not all disability in older people is a result of 'the natural process of ageing'. The Commission did not take a clear position on how assistance should be provided to older Australians experiencing disability that was not age-related.

4.33 Dr Galbally of the NPWDCC pointed out that when one policy area is reformed, as is currently proposed for disability services, it highlights any shortcomings in other policy areas, such as aged care. NPWDCC proposed a working group be established immediately to examine the relevant issues:

> Now with the NDIS on the horizon the real deficiencies in the age care provision have been highlighted. Our recommendation is that first there be an immediate working group—or whatever government considers appropriate—to look at disability and ageing, and particularly to look at areas like assisted technology…The community focus of the NDIS, where the aim really is to participate in community, ought to be the same for ageing. Let ageing start that reform process. Indeed, the council will be recommending that as a separate issue—that the age care system sets up a review of its relationship to disability as a matter of urgency.[29]

4.34 The committee notes the NPWDCC's recommendation that:

> Section 22 should be revised to allow enough flexibility to enable the NDIS to support those people over 65 with severe and profound disability whose disability care and support needs cannot be met by the aged care system and/or other community service systems.[30]

4.35 The department agreed that this is a difficult area, and discussions remain ongoing.[31] It pointed out that the early intervention criteria under clause 25 would capture some of the situations that were being raised by witnesses. Mr Hartland also pointed out that the interventions don't have to be therapeutic in nature for the person to be eligible under clause 25.[32] The committee recognises that there are a number of significant causes of disability, including multiple sclerosis and post-polio syndrome, for which the application of clause 25 would be relevant. However, these people would need to engage with the NDIS (or its predecessor schemes) for the first time prior to turning 65.

4.36 The committee also noted the suggestion made by National Seniors Australia and others, that a launch site be established that includes no age restriction, to determine whether this would be an appropriate approach. The committee can see the

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28 Productivity Commission, *Disability Care and Support*, 2011, Vol. 1., p. 179.

29 Ms Galbally, National People with Disabilities and Carer Council, *Proof Committee Hansard*, 4 March 2013, pp. 26–27.

30 National People with Disabilities and Carer Council, *Submission 612*, p. [12].

31 FaHCSIA, *Proof Committee Hansard*, 5 March 2013, pp 36, 57.

32 Mr Hartland, FaHCSIA, *Proof Committee Hansard*, 5 March 2013, p. 57.

attraction of this option. However it notes that the NDIS sites are 'launch sites' from which the scheme is going to be expanded, not 'trial sites', which implies they may or may not continue. The committee is concerned that establishing an experimental launch site of this sort would present risks to equity across the scheme in the medium term, and could undermine the coherence of the NDIS. It would also require renegotiation of agreement between the Commonwealth, states and territories, potentially disrupting implementation.

4.37 The committee concludes, as have others, that the most important issue is not the eligibility criteria for the NDIS, but the adequacy and appropriateness of service provision, whatever scheme funds that service.

Recommendation 11

4.38 The committee recommends that the government, through COAG processes, identify mechanisms by which to provide adequate specialised disability support for people 65 and over who have disabilities not resulting from the natural process of ageing.

Recommendation 12

4.39 The committee recommends that, as a matter of priority, the government develop information for communication to members of relevant stakeholder groups about the scope for clause 25 (early intervention requirements) to address the needs of some people ageing with conditions that may not cause impairment until after they have turned 65.

Recommendation 13

4.40 The committee recommends that the government conduct further research into the costs and benefits of varying the NDIS age eligibility criterion.

Developmental delay

4.41 A less obvious age restriction occurs in the bill in relation to access to early intervention for children with developmental delay (subparagraph 25(a)(ii)). Under clause 9, developmental delay refers to certain circumstances in a child less than six years of age. Numerous submissions were received from families and professionals who indicated problems with obtaining clinical diagnoses or accessing services for their children, often indicating that problems were not confirmed until some years after they initially raised issues with schools or health professionals, while others expressed concern that services would cut out at an early age, regardless of whether they might have continued to benefit a child.

4.42 Several witness pointed out that developmental delay is often not detected until sometime after a child enters the school system.[33] This means it may not be identified until the child is six or seven years old. There can also be delays where the child comes from a non-English speaking background, and there can be similar issues

33 For example Disability Justice Advocacy, *Submission 431*, p. 3.

if the child comes from a humanitarian or refugee background.[34] It was suggested that the age be raised to 'under eight' rather than six, while the AFDO suggested there should be no age constraint, other than that developmental delay be diagnosed in a child.[35] Early Childhood Intervention Australia (ECIA) commented:

> The definition of developmental delay raises significant questions for ECIA regarding what happens to children once they turn six. What will the level of supports be for these children and their families once they turn six and will they have to transition out of the NDIS or reapply? ECIA is concerned about what this will mean for children and families.
>
> The diagnosis of developmental delay is very complex and children may be classified as having a developmental delay for over a decade without receiving a formal diagnosis. There are also significant grey areas when determining what is deemed to be a developmental delay. This certainly requires further research and discussion with the field by the Agency.[36]

4.43 Novita Children's Services noted the clause and believed it 'would appear to provide the suitable criteria for access as a prospective participant'.[37]

4.44 The department indicated that the age cut-off for developmental delay was based on a clear existing evidence base. It pointed out that this clause is only related to the early intervention requirements under clause 25. A child, whether under six or not, who is demonstrating functional impairment would be eligible to enter the scheme under clause 24. Clause 25 was designed to prevent any service gap emerging with young children who will benefit from support but do not meet the disability criteria of clause 24, particularly in relation to either the availability of specific diagnoses, or the permanence of any impairment.[38]

4.45 The committee was satisfied with the department's explanation. Most of the submissions from parents who expressed concern about this clause were all either accessing, or seeking access, to assist children who were presenting with symptoms, issues or diagnosed disabilities that would mean they would potentially be considered for access under clause 24. The committee notes that these issues can be tested in the launch sites, particularly in SA, where the launch is focussed on children.

Residence requirements

4.46 Under subclause 23(1) of the bill, a person must be an Australian citizen, permanent visa holder or protected special category visa holder,[39] and also be residing

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34 National Ethnic Disability Alliance, *Submission 614*, p. 5.

35 AFDO, *Submission 514*, p. 9.

36 Early Childhood Intervention Australia, *Submission 518*, p. 7.

37 Novita Children's Services, *Submission 441*, p. 3.

38 Ms Wilson and Dr Hartland, FaHCSIA, *Proof Committee Hansard*, 5 March 2013.

39 The category of 'protected special category visa holder' is complex, and relies on definitions in clause 3 of the bill and section 32 of the *Migration Act 1958*. It is not relevant to the discussion in this section of the report.

in Australia, before they can be eligible for the NDIS. Some submitters argued that this excessively restrictive, and that the residence requirements should be constructed differently. The EDAC argued:

> In terms of eligibility, we believe NDIS should be accessible for people with disabilities who have a legal right to live and work in Australia, not just those in possession of a permanent residency visa. This would include asylum seekers who have been recognised as refugees but still do not have their permanent residency.[40]

4.47 FECCA argued that the most appropriate model on which to base the eligibility rules should be the country's other national insurance-based scheme, Medicare. Under the *Health Insurance Act 1973*, Medicare benefits are payable to Australian residents, including any person 'who is lawfully present in Australia and whose continued presence in Australia is not subject to any limitation as to time imposed by law'.[41] They recommended amendment of the bill as follows:

> 23(1) A person **meets the residence requirements** if the person:
>
> (a) ~~resides in Australia; and~~ is an Australian resident; and
>
> ~~(b) is one of the following:~~
>
> ~~(i) an Australian citizen;~~
>
> ~~(ii) the holder of a permanent visa;~~
>
> ~~(iii) a special category visa holder who is a protected SCV holder; and~~
>
> (~~c~~b) satisfies the other requirements in relation to residence that are prescribed by the National Disability Insurance Scheme rules.[42]

4.48 The committee asked the department why the eligibility criteria are different to those for Medicare. The department was not able to respond specifically on the Medicare criteria, but indicated that the government considered advice about a range of eligibility criteria, and concluded that:

> There ought to be a test of residency that reflects the costs and value of the scheme. It is to support over a lifetime, meeting reasonable and necessary needs and, therefore, in order to benefit from a scheme that taxpayers will be funding, people should make these residency tests.

4.49 The committee understands the government's argument, but is not sure that it clearly establishes a distinction between the policy rationale for the NDIS and for Medicare.

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40 Ms Rose, Ethnic Disability Advocacy Centre, *Proof Committee Hansard*, 18 February 2013, p. 46.

41 *Health Insurance Act 1973*, s. 3, extract from definition of 'Australian resident'.

42 See FECCA, *Submission 551*, p. 7.

Recommendation 14

4.50 The committee recommends that the government make a more detailed statement setting out the underlying rationale for the approach taken to the residency eligibility criterion.

Disability requirements

4.51 Clause 24 sets out the disability criteria for eligibility to enter the NDIS scheme. The clause has two elements. The first sets out five criteria all of which must be met:

- that there is a disability;
- that the impairment is, or is likely to be, permanent;
- that the impairment causes a reduction in function, for example in communication or mobility;
- that the impairment will 'affect the person's capacity for social and economic participation'; and
- that support needs 'are likely to continue for the person's lifetime'.

4.52 The second element of the clause recognises that, although the impairment is likely to be lifelong, it may vary in intensity.

4.53 The Law Council of Australia considered that more detail around the eligibility criteria should be in the bill. They contrasted the approach in the bill to that in the Social Security Act for the Disability Support Pension.[43] The Law Council's view did not appear to be widely shared.

4.54 Submitters appeared generally to be optimistic about the disability assessment criteria and processes for the bill, though it was often noted that their success will depend to a considerable degree on the rules and the success of the agency. BCA commended both the 'recognition around functional impairment and the fact that we are not looking at a medical model of disability; [and] the fact that there is recognition of episodic needs as opposed to episodic disability';[44] Occupational Therapy Australia (OTA) expressed similar views.[45] A number of advocacy organisations argued against there being a lot of detail in these parts of the bill; for example several major submissions, including those of the AFDO, DANA, and the NPWDCC, did not argue for more detail in the relevant provisions.[46]

4.55 A different view was presented by the Attendant Care Industry Association, which represents people who provide 'paid care or support services delivered at a

43 Law Council of Australia, *Supplementary Submission 575*.

44 Ms Zammit, Blind Citizens Australia, *Proof Committee Hansard*, 21 February 2013, p. 3.

45 Occupational Therapy Australia, *Submission 544*, p. 5.

46 Australian Federation of Disability Organisations, *Submission 514*, p. 16; Disability Advocacy Network Australia, *Submission 516*, p. 18; National People with Disabilities and Carer Council, *Submission 612*.

person's home or in their community to assist them to remain living in the community'.[47] The organisation drew attention to the ICF, and how the bill did not appear to be adopting it, despite a recommendation to that end by the Productivity Commission:

> Many submissions to the Productivity Commission identified the International Classification of Functioning Disability and Health (ICF) as an internationally accepted system of comprehensively identifying disability-related need, by addressing body functions and impairments, activities of life and participation restrictions, and the environmental factors which enhance or impinge upon people's ability to participate. The Productivity Commission itself recommended (Recommendation 7.1) that the ICF should be used to identify the supports required to address the reasonable and necessary care and support for their life activities. The legislation has, however, has adopted a very narrow, impairment-based eligibility approach, which may lead to a restriction on access to the scheme to people on the basis of diagnosis, as will the test of "permanency".[48]

4.56 In response to questions the agency confirmed that the assessment tools they would be utilising are part of an ICF framework and therefore 'in accordance with the recommendation of the Productivity Commission.'[49] However they emphasised that care must be taken not to think that this was the only assessment that would be considered as it will be used alongside a number of other methods:

> We have an assessment tool and we have a self-reporting tool at the front—both under development. The assessment tool for needs assessment has been developed in cooperation or with the great assistance of the expert working group and significant input from the states and territories.
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> **Senator BOYCE:** Can we have those tools provided to us, please, on notice?
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> **Mr Bowen:** Yes, we can provide that to you. I would put a caveat on it that, as a stand-alone document, it can be misread because it looks like a functional impairment assessment. It is critical to understand that that is not the starting or the end point; it is a tool that operates as a decision tree used by the planner and in that overall context of a planning conversation. This is a scheme that uses that as part of goal based planning. It is not a functional impairment assessment scheme. But, necessarily, we do have to assess the need for support. It is in the ICF framework, which is in accordance with the recommendation of the Productivity Commission. As an 80-page document, it is very deceptive to look at that and say, 'There's the agency's assessment tool.'[50]

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47 Attendant Care Industry Association, *Submission 505*, p. 3.

48 Attendant Care Industry Association, *Submission 505*, p. 7.

49 Mr Bowen, NDIS Launch Transition Agency, *Proof Committee Hansard,* Tuesday 5 March 2013, p. 49.

50 Mr Bowen, NDIS Launch Transition Agency, *Proof Committee Hansard,* Tuesday 5 March 2013, p. 49.

'Permanent'

4.57 One aspect of clause 24 where the committee is concerned about the message sent by the bill's language is the requirement that 'the impairment or impairments are, or are likely to be, permanent'. Several individuals and organisations expressed concern about this language, particularly in relation to psychiatric conditions. In mental health care generally there is a strong 'recovery focus', and it also well known that some serious mental illnesses can be highly episodic in nature. The committee notes that the bill, in clause 24(2), recognises that impairments may vary over time.

4.58 The ACT Human Rights Commission (ACTHRC) queried whether there should be a focus on support that is long-term in nature, rather than in relation to an impairment that is 'permanent'.[51] DANA had a similar concern.[52] People With Disability Australia (PWDA) drew attention to this issue in the context of their belief that the bill more broadly should be modelled more closely on UN Convention principles:

> The convention overall talks about disability in ways that could be quite useful for the NDIS. For instance, it uses the term 'long-term disability' rather than 'permanent', which actually reflects the way that disability is experienced in people's lives in a social rather than a medical context.[53]

4.59 The NSW Mental Health Commission thought it was important that recovery principles are part of the way the scheme operates. The Commissioner Mr Fenely stated that he:

> …will particularly be interested to monitor, firstly, how the scheme embodies the principles of recovery and autonomy, to normalise the expectation of recovery from mental health illness in the community—the goal being not to simply maintain a person's existing circumstances but to support their interest in returning to work, to family and to social life…[54]

Committee view

4.60 The committee accepts that there was general support for the overall approach taken to the disability eligibility criterion, noting caveats about the importance of the rules in this context. The committee noted the issue raised about the opportunity presented by the NDIS to adopt an internationally-agreed standard such as the ICF, and will be interested to see how the suite of assessment tools and strategies used by the Agency, including those that are considered part of the ICF framework, will work in practice.

4.61 The committee agrees that it would be desirable that the design of the NDIS not work against the recovery focus that is central to mental health objectives, nor

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51 ACT Human Rights Commission, *Submission 640*, pp. 4–5.

52 Disability Advocacy Network Australia, *Submission 516*, p. 18.

53 Mr Wallace, People With Disability Australia, *Proof Committee Hansard*, 4 March 2013, p. 57.

54 Mr Feneley, NSW Mental Health Commissioner, *Proof Committee Hansard*, 4 March 2013, pp. 67–68.

against recovery and rehabilitation options that may open up in the future through research and innovation.

Recommendation 15

4.62 The committee recommends that the government consult further with mental health organisations including statutory bodies about whether clause 24 of the bill, and related NDIS Rules, sufficiently take into account recovery approaches and the distinction between disability support and mental health services, to ensure the focus of the NDIS is on people with disabilities who have long-term consequences of their impairment (which may vary in intensity).

Other eligibility criteria

People with disabilities held in custody

4.63 The committee holds a longstanding and serious concern about detention and management in prisons of persons with cognitive impairments, whether with or without a current conviction. It has previously met with representatives of the Aboriginal Disability Justice Campaign (ADJC) on this subject, and the organisation provided evidence to the current inquiry. The cases of people with cognitive impairments who are held indefinitely in prisons represent a disturbing and difficult challenge for both disability and justice systems. The ADJC believes that the majority of such people are Indigenous Australians.

4.64 The ADJC reasoned that the NDIS could make a significant difference to these individuals—but only if they can access it:

> [Aboriginal Disability Justice Campaign] is extremely concerned about access to the NDIS for Indigenous Australians with a cognitive impairment who are assessed as mentally impaired though the criminal justice process or are detained in prisons and psychiatric units.
>
> Particularly worrying is how the NDIS proposes to ensure that Indigenous Australians who are detained in prisons and psychiatric units on either remand or under custodial supervision order will become participants. At this point in time there does not exist in courts, prisons and psychiatric units, assessment processes for cognitive impairment and referral processes into the disability services system that either divert people from prisons / psychiatric units or provide a pathway out of prisons / psychiatric units.
>
> The ADJC observes that there is no identified pathway for the 'Agency' to access people with a cognitive impairment, detained under mental impairment legislation. The outcome of this lack of identified access means that people with a cognitive impairment, particularly Indigenous Australians with a cognitive impairment, many of whom are detained in prisons outside of the major metropolitan cities will continue to be overlooked, nor provided with treatment of significant benefit, and detained in prisons and psychiatric units indefinitely.[55]

55 Aboriginal Disability Justice Campaign, *Submission 503*, p. 4.

4.65 Victorian Legal Aid noted that there is a large prison population in the Barwon region launch site. It indicated there should be consultation to ensure the delivery of the NDIS within prisons, and for transition of prisoners with a disability into the community upon release:

> VLA encourages the government to give close consideration to how the NDIS will be delivered to people serving custodial sentences and recommends that the Agency consult with the Adult Parole Board, Corrections Victoria, Forensicare and the Department of Human Services during the implementation of the NDIS to ensure an integrated approach to the provision of post-release services.[56]

4.66 The department was asked about how the NDIS scheme would apply to people in custody. Dr Hartland responded:

> Broadly, if you are in prison you may still remain a participant but we would not be expecting to provide some supports to you, such as support for accommodation, but there might be some things that the NDIS should provide that are not properly provided by the prison system.[57]

Committee view

4.67 The committee again places on record its deep concern about the treatment of people who have a disability and are being held in custodial facilities including gaols, sometimes without a charge or a conviction. Prison systems have been failing these people for a long time, and the committee sees no evidence that this situation is likely to change.

Recommendation 16

4.68 The committee recommends that the government ensure that people with disabilities who are in custody will have appropriate access to the NDIS.

Recommendation 17

4.69 The committee recommends that the Agency develop an information strategy to ensure that people with disabilities who are in custody, their carers and their advocates, are aware of the group's eligibility for services under the NDIS.

Professional examinations under clause 26

4.70 Clause 26 of the bill allows the CEO request certain information or actions for the purpose of assessing an access request. One of the things the CEO may ask for is 'a medical, psychiatric or psychological examination (whether or not at a particular place), and provide to the CEO the report, in the approved form, of the person who conducts the examination'.[58]

4.71 The scope of this authority was queried by WWDA:

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56 Victorian Legal Aid, *Submission 610*, p. 25.

57 Dr Hartland, FaHCSIA, *Proof Committee Hansard*, 5 March 2013, p. 68.

58 NDIS Bill, subparagraph 26(1)(b)(ii).

> But, regarding the CEO being able to demand that someone have an assessment by a doctor, psychiatrist or a psychologist; I am just thinking about living here in Tasmania: what happens when doctors have closed their books? What happens if you live in some sort of regional or remote location where there is only one doctor, and what if you do not like that doctor, or they do not like you? Or you do not want that doctor to be your assessment person?
>
> Ms Swift: Or you do not see your disability as something medical and would not think to go to a doctor.
>
> Ms Frohmader: Where is the provision within this for the use of allied health professionals, particularly in locations where there are not doctors, psychiatrists and psychologists? Consider the role of nurse practitioners, for example, in Indigenous communities, and things like that.[59]

4.72 Submissions from professional associations OTA and Speech Pathology Australia (SPA) did not raise concerns about the scope of this clause. Yet the committee is not sure why the only examinations that can be required are 'medical, psychiatric or psychological', given the wide range of causes of disabilities that is envisaged in clause 24(1)(a).

Recommendation 18

4.73 The committee recommends that the government revise the language of clause 26(1)(b)(ii) to ensure that examinations can be required to be conducted by a member of any appropriate profession.

59 Ms Frohmader and Ms Swift, Women With Disabilities Australia, *Proof Committee Hansard*, 22 February 2013, p. 36.