

**SENATE STANDING COMMITTEE FOR THE  
SCRUTINY OF BILLS**

**Alert Digest**  
**relating to the**  
**National Disability Insurance Scheme Bill 2012**

**1 February 2013**



# **National Disability Insurance Scheme Bill 2012**

Introduced into the House of Representatives on 29 November 2012

Portfolio: Families, Housing, Community Services and Indigenous Affairs

## **Background**

This bill establishes the framework for the National Disability Insurance Scheme and the National Disability Insurance Scheme Launch Transition Agency. This will enable the scheme to be launched, and the Agency to operate the launch, in five sites across Australia from July 2013.

## **Delegation of legislative power—disallowance**

### **Insufficient parliamentary scrutiny**

#### **Clause 10**

This clause provides that the Minister may, by legislative instrument, specify that a state or territory is a host jurisdiction, with the agreement of that state or territory. A *Note* to the clause indicates that section 42 of the *Legislative Instruments Act*, which provides for the disallowance of legislative instruments (by the Parliament) does not apply. The reason for this is stated to be that ‘the establishment of a host jurisdiction is the result of an agreement between the Commonwealth and the relevant state or territory’ (explanatory memorandum, p.5), which falls into a category of legislative instruments that is already excluded from disallowance by the operation of subsection 44(1) of the *Legislative Instruments Act*.

*In the circumstances, the Committee makes no further comment on this matter.*

## **Reversal of burden of proof—evidential burden**

### **Subclauses 57(2); 84(7) and 189(2)**

As a general principle the *Guide to Framing Commonwealth Offences* cautions against the use of ‘reasonable excuse’ defences, in part because it is unclear what needs to be established as the language used is ‘too open-ended’. In this bill ‘reasonable excuse’ defences are included in three clauses with no explanation provided in the explanatory memorandum:

- Subclause 57(2) provides for an offence-specific defence in relation to the offence of failing to comply with a requirement under section 55 to give information or produce a document. The defence is where the person ‘has a reasonable excuse’. As an offence-specific defence, there is an evidential burden in relation to the matters which must be established, as indicated by the *Note* to the subclause. The justification for the use of the defence is not addressed in the explanatory memorandum (the relevant section is at page 25).
- Clause 84 provides for the CEO to require information from a plan nominee in relation to the disposal of money. A person will commit an offence if they refuse to comply with a notice requiring this information (subclause 84(6)) unless the person ‘has a reasonable excuse’ (subclause 84(7)). Again, as an offence-specific defence, there is an evidential burden in relation to the matters which must be established, as indicated by the *Note* to the subclause. The justification for the use of the defence is not addressed in the explanatory memorandum (the relevant section is at page 35).
- Subclause 189(2) provides for an offence-specific defence in relation to the offence of failing to comply with a requirement under subclause 189(1) to give information or produce a document as required under Division 3. The defence is where the person ‘has a reasonable excuse’. As an offence-specific defence, there is an evidential burden in relation to the matters which must be established, as indicated by the *Note* to the subclause. The justification for the use of the defence is not addressed in the explanatory memorandum (the relevant section is at page 70).

Although it may be considered that the existence of a reasonable excuse will normally relate to matters peculiarly within the knowledge of the defendant, the Committee expects that the explanatory memorandum specifically addresses the appropriateness of imposing an evidential burden on defendants—especially where the defence relates to a reasonable excuse exception. **The committee therefore seeks the Minister’s advice as to the justification for the proposed inclusion of ‘reasonable excuse’ defences in relation to these clauses, with reference to the principles outlined in the *Guide to Framing Commonwealth Offences*.**

*Pending the Minister's reply, the Committee draws Senators' attention to the provisions, as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.*

## **Delegation of Legislative Power**

### **Insufficiently defined administrative power**

#### **Paragraph 118(2)(a)**

This clause provides that in performing its functions the Agency must use its best endeavours to 'act in accordance with any relevant intergovernmental agreements'. Two scrutiny issues arise in relation to this paragraph. First, will this requirement have the effect of modifying any other obligation placed on the Agency? If so, it appears that this may be achieved by reference to documents (intergovernmental agreements) which are not subject to parliamentary scrutiny. **The committee seeks the Minister's advice as to the expected impact of paragraph 118(2)(a). In particular, the seeks advice as to whether consideration has been given to requiring that any modifications to any Agency obligations arising from the operation of this paragraph be reflected in delegated legislation (and therefore subject to Parliamentary scrutiny, even if section 42 (disallowance) of the *Legislative Instruments Act* does not apply). If not, the committee seeks advice as to whether alternative mechanisms for ensuring parliamentary oversight of the impact of paragraph 118(2)(a) could be included in the bill.**

The second issue arising is uncertainty over what is intended by requiring the agency to 'use its best endeavours' to 'act in accordance' with relevant intergovernmental agreements. **As the explanatory memorandum does not indicate what level of compliance with such agreements is required or what legal consequences may follow from a failure of the Agency to use its best endeavours to achieve compliance, the Committee seeks the Minister's advice as to the intended operation of the obligation imposed by this paragraph.**

*Pending the Minister's reply, the Committee draws Senators' attention to the provisions, as they may be considered to make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, in breach of principle 1(a)(ii) of the Committee's terms of reference and they may also be considered to delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the Committee's terms of reference.*

## **Delegation of legislative power – inappropriate delegation**

### **Clause 209**

If enacted, the Bill will be supplemented by the NDIS rules, to be made as disallowable legislative instruments. A number of the envisaged rules relate to ‘significant policy matters’ (explanatory memorandum, p.75). As a general proposition, the Committee is concerned to ensure that significant questions of policy be dealt with in primary legislation. The explanatory memorandum does not explain why ‘significant policy matters’ cannot appropriately be dealt with in primary legislation.

The committee is aware that the NDIS involves a cooperative venture between the Commonwealth and State and territory governments. Nevertheless, the committee is not persuaded that this, in and of itself, is sufficient to justify the use of delegated legislation for significant policy matters. Where the use of legislative instruments to achieve important policy outcomes is proposed, the committee expects that the provisions to this effect will be accompanied by a detailed explanation to assist consideration of the appropriateness of the approach. **The committee therefore seeks the Minister’s advice as to the justification for the proposed use of delegated legislation for significant policy matters.**

*Pending the Minister’s reply, the Committee draws Senators’ attention to the provisions, as they may be considered to delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the Committee’s terms of reference.*

## **Delegation of legislative power – incorporating material by reference**

### **Insufficient parliamentary scrutiny**

### **Clause 209**

In addition to the clause 209 concern outlined above, subclause 209(2) provides that the rules may make provision for or in relation to a matter by applying, adopting or incorporating any matter contained in another instrument as in force or existing from time to time.

The committee draws attention to the incorporation of legislative provisions by reference to other documents because these provisions raise the prospect of

changes being made to the law in the absence of parliamentary scrutiny. In addition, such provisions can create uncertainty in the law and those obliged to obey the law may have inadequate access to its terms. **As there is no explanation or justification of this subclause the committee seeks the Minister's advice as to:**

- **why it is necessary to rely on material incorporated by reference to other instruments as in force from time-to-time; and**
- **if the approach is considered necessary, has consideration has been given to including a requirement that instruments incorporated by reference are made readily available to the public; and**
- **how relevant changes will be notified to affected persons.**

*Pending the Minister's reply, the Committee draws Senators' attention to the provisions, as they may be considered to delegate legislative powers inappropriately, in breach of principle 1(a)(iv) of the Committee's terms of reference and to insufficiently subject the exercise of legislative power to parliamentary scrutiny, in breach of principle 1(a)(v) of the Committee's terms of reference.*

## **Undue Trespass on personal rights and liberties—privacy**

### **Various**

The collection, use, storage and sharing of personal information pursuant to relevant provisions in the bill will engage the right to privacy (see chapter 4 of the bill). The Statement of Compatibility emphasises that the bill, if enacted, will create significant offences for unauthorised access or use, for soliciting disclosure and for offering to supply protected information. These provisions are said to apply standard penalties by Commonwealth legislation for breaches of privacy in relation to protected personal information (SOC, p.16).

It is also argued that the CEO's powers to compel the production of information from participants and other persons are designed to ensure the integrity of the NDIS and are thus 'necessary to achieve a legitimate aim, and are appropriately limited so as to ensure they are a proportionate means by which to achieve this aim' (SOC, p.16).

**However, given the nature of the sensitive medical and personal information that is in issue, the committee seeks the Minister's advice as**

to whether consideration has been given to provisions clarifying the interaction of the legislation with the *Privacy Act*, and role of the Information Commissioner in relation to the receipt and investigation of acts and practices pursuant to the *Privacy Act*. In this respect it is noted that such provisions exist in other Commonwealth legislation which deal with sensitive health information (see for example, sections 28 and 29 of the *Healthcare Identifiers Act 2010*).

*Pending the Minister's reply, the Committee draws Senators' attention to the provisions, as they may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.*

### **Note on non-discrimination**

The committee notes that the scheme will not, initially at least, have universal coverage such that all persons with a disability will be covered. It is also noted that access to the scheme will be limited based on age requirements. These matters are dealt with in the Statement of Compatibility, where it is argued that the differential treatment is aimed at achieving a legitimate purpose and the approach is reasonable and proportionate to this purpose. In light of the principle of non-discrimination under the *Convention on the Rights of Persons with Disabilities* and *International Convention on Civil and Political Rights* the committee will therefore draw this matter to the attention of the Parliamentary Joint Committee on Human Rights.