

Inquiry into the National Disability Insurance Scheme Bill 2012

Legal Aid NSW Submission

to the

Australian Senate Standing Committee on Community Affairs

January 2013

About Legal Aid NSW

The Legal Aid Commission of New South Wales (Legal Aid NSW) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW) to provide legal assistance, with a particular focus on the needs of people who are economically or socially disadvantaged.

Legal Aid NSW provides information, community legal education, advice, minor assistance and representation, through a large in-house legal practice and private practitioners. Legal Aid NSW also funds a number of services provided by non-government organisations, including 36 community legal centres and 28 Women's Domestic Violence Court Advocacy Services.

The Civil Law practice provides legal advice, minor assistance, duty representation and casework services to people throughout Sydney and in 13 regional offices. It has unique experience in delivering services to disadvantaged communities in a broad range of general law areas including Administrative Law.

Legal Aid NSW welcomes the opportunity to make this submission to the Inquiry into the National Disability Insurance Scheme Bill 2012. If you would like to discuss its content further, please contact Erin Gough, Manager Legal Policy on (02) 9219 5778 or at Erin.Gough@legalaid.nsw.gov.au.

Submission

1. Review rights – Chapter 4, Part 6

Chapter 4, Part 6 of the *National Disability Insurance Scheme Bill 2012* creates review rights for participants, prospective participants, registered providers of support and prospective registered providers of support of the Scheme.

Clause 99 of the Bill specifies which decisions of the CEO of the National Disability Insurance Scheme Launch Transition Agency ("NDIS Agency") are reviewable decisions. A number of decisions of the CEO are not listed at cl 99.

Review processes allow proper oversight of decisions and foster good administrative and decision-making practices, which will be especially important with a new Scheme such as the NDIS. Legal Aid NSW submits that review processes, and in particular external review processes, are important to ensure robust and transparent decision-making at the departmental level and to guard against perceived or actual bias or jurisdictional error. This is particularly apposite for the NDIS scheme, in light of the potential consequences of decisions relating to people with serious and permanent disabilities.

It is submitted that the following decisions of the CEO should be added to the list of reviewable decisions.

- Clauses 26, 36 and 50

These sections give the CEO the power to require a participant (and in the case of cl 26 a prospective participant) to provide information; undergo an assessment and obtain a report; or undergo a medical, psychiatric or psychological examination and obtain a report. It is submitted that clauses 26(1), 36(2) and 50(2) should be included as reviewable decisions in cl 99. If a person fails to meet the CEO's requirements under these provisions they may be prevented from participating in the Scheme or not be provided with appropriate support and funding. As these provisions go to the heart of whether or how a person participates in the Scheme, it is imperative that such decisions are subject to robust scrutiny.

- Clause 44

In pursuit of the goals and principles of the Scheme and Act, cl 43 provides that a participant can request that they be allowed to manage the funding provided to them under the Scheme. In some cases it would not be appropriate to agree to that request, and cl 44 outlines in what circumstances the CEO should not permit the person to manage their funding. However, Legal Aid NSW submits that a decision not to agree to a person managing their funding should be a reviewable one. One of the fundamental tenets of the Scheme is to "enable people with disability to exercise choice and control" (cl 3(1)(d)), and a lack of review right to cl 44 appears contrary to this object.

- Chapter 7, Part 1 – Debt recovery

Chapter 7, Part 1 of the Bill relates to debt recovery under the Scheme. This part provides for repayments of debts and a limited number of grounds for non-recovery of debts. The majority of these provisions mirror those in the *Social Security Act 1991* and are well established. However, unlike in the social security jurisdiction, the Bill does not provide participants any rights to challenge decisions made in relation to repayments of debts and recovery or non-recovery of debts.

Legal Aid NSW submits that this omission is inconsistent with rights given under equivalent Commonwealth benefits, for example veterans and social security. We can see no basis to exclude the provisions governing debt recovery from the review system. Therefore cl 99 should be amended to include decisions made under Chapter 7, Part 1.

2. Participants and their plans – Chapter 3

(i) Clause 19

Clause 19 of the Bill sets out the requirements for a person requesting to be a participant in the Scheme, including that they must make a request in the approved form and include all information and documents required by the CEO. Clause 197 states that if the application is not in the approved form or the required information or documents are not provided, then the CEO is not required to make a decision.

Legal Aid NSW submits that cl 197 (and the note at cl 19) should be amended such that so long as the person completes the approved form, the CEO is required to make a decision about their application/request. Many people applying for participation in the Scheme will have difficulties with obtaining supporting documents, for reason of access or cost or lack of understanding of the Scheme. If the CEO rejects a request because of lack of supporting information or documents, this should be treated as a "decision", and one that a person must be given notice of and have review rights in relation to.

(ii) Clause 23

The effect of cl 23(1)(b)(iii) is to prevent New Zealand citizens who commenced residing in Australia after 21 February 2001 from participating in and obtaining the benefits of the Scheme.

Legal Aid NSW can see no justification for preventing access to this scheme to these residents of Australia. Whilst the *Social Security Act 1991* limits access to many social security payments for these residents of Australia, there is still a safety net for a person who finds themselves unable to work due to a disability. Under the international social security agreement with New Zealand, Disability Support Pension can be paid to a New Zealand citizen residing permanently in Australia who meets the qualification criteria.

(iii) Clause 26

Under cl 26 of the Bill the CEO can ask a prospective participant to provide information, undergo an assessment and provide the report to the CEO, and undergo a medical, psychiatric or psychological examination and the provide the report to the CEO. The effect of s26(3) is that if the information or reports are not provided then the prospective participant is taken to have withdrawn their request to be in the Scheme, unless the CEO believes it was reasonable for the person not to have complied.

The concerns of Legal Aid NSW are firstly, who is expected to pay for the reports, assessments and examinations. Medical assessments and examinations can be extremely expensive and the cost will be prohibitive to many people with disabilities.

Secondly, the CEO's decision to require reports and information should be a reviewable decision. In its current form cl 26 decision of the CEO is not listed as a reviewable decision under cl 99 (this is also raised above).

Thirdly, the effect of cl 26(3) being that the person is deemed to have withdrawn their request to participate in the Scheme if they fail to provide the information or reports, means that the person will not receive a decision of their 'rejection' from the Scheme and don't have any review rights.

Legal Aid NSW submits that a cl 26(1) decision should be included as a reviewable decision under cl 99 of the Bill. Further, that cl 26(1) should be amended to clearly state that person will not required to undergo an assessment or examination and provide a report if the costs are prohibitive, or it is difficult for the person to access doctors etc. The same amendments are required in clauses 36(2) and 50(2). Finally, it is submitted that cl 26(3) should be amended such that if the information or records are not provided then the request to be included as a participant is rejected. This would provide the applicant with a notice of the decision, reasons for the decision and review rights.

(iv) Clause 35

Legal Aid NSW is concerned with the wording of cl 35(4) of the Bill. This provision relates to the impact of the receipt of compensation on the amount of funding a person receives under the Scheme. It is very broad and vague with no clear guidance on how it will be interpreted. The details will be contained in the rules and therefore not subject to Parliamentary scrutiny. Further, Legal Aid NSW is concerned about the possible adverse intersection with social security compensation recovery rules.

Legal Aid NSW has similar concerns about s35(5). It is unclear what is meant by a person entering into an agreement "to give up his or her right to compensation". It is possibly unnecessary as there are provisions later in the Bill, at clauses 104 and 105 that give the CEO the power to require a person to claim compensation, as in s1166 of the *Social Security Act 1991*.

(v) Legal Aid NSW notes that s99(j) should refer to s74(5) not s74(4)(c) (which does not exist).

3. Appeals provisions

The Bill lists a number of reviewable decisions and provides for internal review and then external merits review by the Administrative Appeals Tribunal (AAT).

Legal Aid NSW generally supports the framework for administrative review contained in the Bill, which has some aspects in common with the social security jurisdiction.

However unlike in the social security jurisdiction, which provides for review by the Social Security Appeals Tribunal (SSAT), there is no extra tier of review between internal review and the AAT. Legal Aid NSW submits that the SSAT provides for lower cost, quicker and more efficient review than the AAT. As there is no equivalent forum available for reviews of NDIS decisions, this might potentially lead to a large volume of requests to review decisions at the AAT.

Legal Aid NSW submits based on the experience of providing assistance to social security recipients and veterans seeking benefits or pensions, the availability of assistance to resolve disputes at the internal review stage will be required in order to limit the number of appeals to the AAT.

Legal Aid NSW provides an outreach advice service at the Administrative Appeals Tribunal (AAT) for social security recipients appealing against from the Social Security appeals Tribunal (SSAT). Legal Aid NSW also provide grants of aid to assist in appeals at this level. In the experience of Legal Aid NSW many matters could have been resolved at an earlier point (at less cost) if the client had been able to access legal services at the internal review stage.

The experience of Legal Aid NSW based on its work with social security recipients and veterans is that many clients are distressed by the appeal process itself and anxiety and stress conditions are often worsened. Legal assistance at an early stage, optimally at the time the application is refused, often leads to a much quicker (and cheaper) resolution.

Assistance at this early stage does not necessarily need to be provided by solicitors on every occasion. For example, Legal Aid NSW operates a Veteran's Advocacy Service which provides assistance to veterans through the use of advocates who have specialist knowledge of this area.

Legal Aid NSW submits that participants should have the right to access assistance through advocates (or in some cases lawyers), to ensure the efficient and early resolution of disputes.

The role of legal assistance services

Legal Aid NSW provides a range of legal services to people living with disabilities and is ideally placed to assist some participants under the NDIS Scheme through a range of legal assistance and education services. This includes advice, minor assistance and legal representation especially in relation to the internal review stage or external reviews at the AAT. Legal education to assist people understand the nature and workings of the Scheme can also assist in the efficient operation of the Scheme and in some cases prevent disputes arising over claims.

Solicitors at Legal Aid NSW have expertise working effectively with people who have a range of complex or multiple needs and disabilities, including working with other support agencies involved in a person's care. Solicitors currently provide a range of assistance to claimants of social security (including veterans), through similar administrative schemes as the one proposed for the NDIS.

However the demand for legal services from participants under the NDIS scheme cannot be met by Legal Aid NSW within existing resources. The allocation of resources across Legal Aid NSW is fully committed and cannot accommodate requests for advice, minor assistance or legal representation from people seeking to participate in the NDIS Scheme.

These requests will most certainly arise in the context of reviewable decisions. Legal Aid NSW cannot be expected to meet this need without additional resources to do so.

Further, there are parts of NSW where Legal Aid NSW is not able to provide any legal service due to current funding constraints. It is submitted that the demand for assistance from participants under the NDIS Scheme will need to be met by a range of legal services across NSW (including community legal centres and the private profession) but this will require additional funding.

Conclusion

Legal Aid NSW generally supports the proposed NDIS Scheme but has identified important aspects of the Scheme that require further consideration.

Legal Aid NSW also supports a robust review framework of administrative decisions made under the NDIS Scheme to ensure a fair and transparent system for all participants. However the effective operation of the review framework will require participants to have access to legal assistance and in some cases advocacy. Legal Aid NSW will not be in the position to provide these services without additional resources.