

National Disability Insurance Scheme Rules Consultation Paper

Introduction

What is the National Disability Insurance Scheme?

The National Disability Insurance Scheme (NDIS) will transform the way disability services are provided in Australia.

The NDIS will provide eligible people with disability with the reasonable and necessary support that they need. It will give all Australians the peace of mind to know that if they have or acquire a disability that means they need care and support in everyday life, or if they would benefit from early intervention support or therapies, they will receive that assistance.

The NDIS will start in launch locations before being rolled out more broadly. The first stage of an NDIS will commence from July 2013 in launch sites in South Australia, Tasmania, the Hunter launch area in NSW and the Barwon area of Victoria. The Australian Capital Territory will commence in July 2014. This approach will ensure that the implementation of the scheme is informed by feedback from people with disability, their families and carers, and service providers and community organisations and by the lessons of launch.

The National Disability Insurance Scheme Launch Transition Agency (the Agency) will be established by the National Disability Insurance Scheme Bill (the Bill) to deliver the first stage of the scheme. The Agency will also carry out a range of functions including developing the community sector, building disability awareness, and undertaking research.

The NDIS Bill

The National Disability Insurance Scheme Bill 2012 (the Bill) was introduced into the Australian Parliament in November 2012.

The legislation sets up the legal framework for the establishment and operation of the NDIS and the Agency. When passed by the Parliament, the Bill will enable the scheme to be launched in five sites from July 2013.

Key matters covered by the Bill include:

- the establishment of the Agency to administer the NDIS launch, including a Board and Advisory Council;
- the principles and objects on which the scheme is based;
- how people can become participants;

- the personal planning process that enables people to identify what they need and to choose the type of supports and services they use, who provides them, and how they are designed and provided;
- arrangements to enable people to purchase their own supports if they wish;
- circumstances and processes to support or substitute decision making where needed;
- registration of providers of services;
- treatment of compensation payments;
- the provision and protection of personal information; and
- a process to review decisions.

The Senate Committee on Community Affairs is currently inquiring into the Bill, and Commonwealth, State and Territory Governments are continuing to work through the detail of the Bill. Amendments could be introduced to the Bill before it is voted on by the Australian Parliament.

Copies of the legislation and the explanatory memorandum are available at the [Australian Parliament House website](http://www.aph.gov.au) at www.aph.gov.au. An easy English version of an overview of the Bill is also available on the [NDIS website](http://www.ndis.gov.au) at: www.ndis.gov.au.

About this paper

The NDIS Bill sets up the framework for the scheme. Further detail on the way the scheme operates will be set out in legislative instruments known as the NDIS Rules.

The purpose of this paper is to explain what is intended to be covered in the NDIS rules and to give people an opportunity to provide feedback. Details on how to provide feedback on the paper are set out in the last section of the paper.

The principles of the NDIS

The objects and principles explain what the legislation is intended to achieve and how it is to be achieved.

The NDIS rules must also reflect these objects and principles.

The objectives of the NDIS as outlined in the Bill (Clause 3)

The objects of this Act are to:

- (a) provide for the National Disability Insurance Scheme in Australia; and
- (b) support the independence and social and economic participation of people with disability; and
- (c) provide reasonable and necessary supports, including early intervention supports, for participants in the National Disability Insurance Scheme launch; and
- (d) enable people with disability to exercise choice and control in the pursuit of their goals and the planning and delivery of their supports; and
- (e) facilitate the development of a nationally consistent approach to the access to, and the planning and funding of, supports for people with disability; and
- (f) promote the provision of high quality and innovative supports to people with disability; and
- (g) raise community awareness of the issues that affect the social and economic participation of people with disability, and facilitate greater community inclusion of people with disability; and
- (h) give effect to certain obligations that Australia has as a party to the Convention on the Rights of Persons with Disabilities.

(2) These objects are to be achieved by:

- (a) providing the foundation for governments to work together to develop and implement the National Disability Insurance Scheme launch; and
- (b) adopting an insurance-based approach, informed by actuarial analysis, to the provision and funding of supports for people with disability.

(3) In giving effect to the objects of the Act, regard is to be had to:

- (a) the progressive implementation of the National Disability Insurance Scheme; and
- (b) the need to ensure the financial sustainability of the National Disability Insurance Scheme.

Choice and control for people with disability is central to the NDIS. This means that in the NDIS, people with disability have the right to make their own decisions about things like:

- the type of supports and services they use;

- who provides them;
- how they are designed and provided; and
- how supports are able to be managed; and
- how their funding is managed.

General principles of the NDIS as outlined in the Bill (Clause 4)

- 1) People with disability have the same right as other members of Australian society to realise their potential for physical, social, emotional and intellectual development.
- 2) People with disability should be supported to participate in and contribute to social and economic life to the extent of their ability.
- 3) People with disability and their families and carers should have certainty that people with disability will receive the care and support they need over their lifetime.
- 4) People with disability should be enabled to exercise choice and control over the purpose, planning and delivery of their supports.
- 5) People with disability should be enabled to obtain access to reasonable and necessary supports, including early intervention.
- 6) People with disability have the same right as other members of Australian society to respect for their worth and dignity and to live free from abuse, neglect or exploitation.
- 7) People with disability have the same right as other members of Australian society to pursue any grievance.
- 8) People with disability should be able to determine their own best interests, exercise informed choice and engage as equal partners in decisions that will affect their lives, to the fullest extent of their capacity.
- 9) People with disability should be supported in all their dealings and communications with the Agency so that their capacity to exercise control and choice is maximised in a way that is appropriate to their circumstances.
- 10) People with disability should have their privacy and dignity respected.
- 11) Reasonable and necessary supports for people with disability should:
 - (a) address the effect of an impairment or impairments on their capacity to undertake everyday activities, including by enabling them to participate in and contribute to social and economic life to the extent of their ability; and

(b) allow them to achieve their goals, objectives and aspirations, to the extent possible.

12) The vital role of families, carers and other significant persons in the lives of people with disability is to be acknowledged and valued.

13) Access for people with disability to supports outside the NDIS, and assistance in the integration of such supports with the supports provided under the NDIS, should be facilitated.

14) Innovation, quality, continuous improvement and effectiveness in the provision of supports to people with disability are to be promoted.

15) It is the intention of the Parliament that the Ministerial Council, the Minister, the Board, the CEO and any other person or body is to perform functions and exercise powers under this Bill in accordance with these principles, having regard to:

(a) the progressive implementation of the launch of the NDIS; and

(b) the need to ensure the financial sustainability of the NDIS.

The different functions of the NDIS

The NDIS will provide eligible people with significant and permanent disability with the care and support they need in everyday life.

The NDIS will also perform other important functions. For some people with disability, the Agency will provide assistance by referring them to community based and mainstream organisations that can best support their needs.

The NDIS will provide all people with disability, their families and carers with information and referrals, raise community awareness of the issues that affect people with disability, and facilitate greater community inclusion of people with disability.

These roles mean that the Agency will be active in local communities. The Agency will actively foster community based supports for people with disability, and help them access and engage with mainstream and local services. It will do this through local area coordination, which could include providing some funding to community based organisations which provide support that people with disability can access as they need it .

Another role for the Agency will be to ensure that people with support needs which are more appropriately met by other systems, are connected with those systems, such as the health, palliative care, aged care, employment, public housing or education systems.

Referrals between systems will seek to support people in transition, maximise outcomes for people and be as seamless as possible.

The rules to be developed for this part of the Bill will guide the Agency's activities in local engagement, including what sort of information it will need to make available to people and how it does this, as well as more technical issues such as the conditions under which an organisation is funded to provide a service for people with disability.

Rule

1. The rule may prescribe matters for and in relation to this chapter (relating to the types of assistance for people with disability provided by the Agency). (Clause 17)

Questions

What sorts of general information and referral services should the Agency provide for people with disability who approach the NDIS?

What guidance should the rules provide the Agency about how to support people in referring them to community or mainstream supports, or to other support systems?

What guidance should the rules provide the Agency about funding of persons or organisations so that those persons or organisations may assist people with disability to realise their potential, and participate in, all areas of life

Becoming a participant

The legislation sets out the criteria which will be used to decide who will be eligible to receive support from the NDIS and become a *participant* of the scheme. This is to assist the community to understand what will or will not be covered by the NDIS, and why, and to ensure that the Agency's decision-making processes are equitable, transparent and rigorous.

Age requirements

Age is important in determining who will become a participant because the NDIS is not intended to duplicate other service systems such as the aged care system. Therefore people who need disability support for the first time after the age of 65 would have their needs met through the aged care system. However, people who receive support under the NDIS and turn 65 can choose to remain in the NDIS or move to the aged care system.

In addition to being under 65 when a request for support is made, there may be specific age requirements that must be met in some of the first launch sites that are targeted at particular age groups. For example, in South Australia, the scheme will target children, and in Tasmania, the scheme will work with young people between the ages of 15 and 24.

The rules for this section will need to set out the age requirements for participants in different launch sites.

Rule

2. Age requirements for specific locations within Australia during launch. Clause 22(1)(2)

Question

Should the rule also set out the types of information the Agency will need to establish that a person meets the age requirements?

Residence requirements

Australian citizens or permanent residents in Australia will be able to receive support from the NDIS. Once the scheme is fully implemented across the country, NDIS services will be fully portable within Australia.

During the first stage of implementing the scheme, participants will need to be living in the specific launch sites, such as in the Hunter area of New South Wales, or the Barwon area of Victoria, or South Australia. The Agency will need a simple way to confirm that a person who is applying to enter the scheme is a resident of one of these locations at launch. The rules will set out the length of time that a person needs to have lived in a particular place to meet this requirement and clearly define the boundaries of each launch site.

Rules

3. What alternative or additional criteria may be used to determine that someone is resident in a launch site. Clause 23(1)(c).
4. On what date or date in a time period should a person need to be living in a launch location to be considered a resident Clause 23(3)(a)
5. How long a person may need to have lived in a particular location to be considered a resident. Clause (23) (3)(b)
6. Whether a person needs to continue to live in a launch site to be considered a resident. Clause 23(3)(c)

Questions

What factors should be taken in to account in deciding whether a person meets the residence requirements? What types of evidence are appropriate to determine if a person meets the residence requirements?

What boundary issues between launch and non launch locations are likely to arise and how could these be resolved in developing the rules?

Continuity of support

In the transition to the new scheme, the legislation provides arrangements to ensure continuity of support for people currently receiving disability support in the launch sites. People who may not meet the NDIS eligibility requirements but are currently receiving regular disability support in launch sites will continue to receive support consistent with their currently agreed arrangements if the funding for this support is transferred – or phased out and funding redirected – to the NDIS in a launch site . This is so that the transition to the NDIS from existing disability service systems does not disadvantage people.

The NDIS rules will set out the specific programs where support will need to continue to be provided and how long a person will need to have been receiving that support to be eligible to become a participant in the NDIS. For example, each State or Territory with a launch site already provides specialist disability support to residents in that location. In some cases there might be people who have been receiving support through these programs who would not ordinarily meet the disability, residence or age requirements of the NDIS. If support is no longer available to a person because funding for a program is transferred to the NDIS, then the NDIS will continue to support that person.

Rule

7. The time period during which the previously existing supports need to have been received, and the programs under which the previously existing supports need to

have been delivered, for a person to meet the access criteria and be eligible for the NDIS. Clause 21(2)(b)

Question

What factors should be considered in deciding whether the NDIS should provide continuity of support to someone who has been receiving assistance under other programs, but who would not otherwise be eligible for NDIS support?

Disability requirements

The NDIS is designed as a scheme to support people whose disability or impairment is or is likely to be permanent, and results in substantially reduced capacity to undertake day-to-day functioning including communication, social interaction, learning, mobility, self-care or self-management , or who will benefit from an early intervention approach (see Section 4.3) The NDIS Bill outlines a number of factors to be taken into account in determining whether a person meets the disability requirements to be eligible to access individually funded supports.

The disability requirements in the Bill (Clause 24)

- (a) The person has a disability that is attributable to one or more intellectual, cognitive, neurological, sensory or physical impairments or to one or more impairments attributable to a psychiatric condition; and
- (b) the impairment or impairments are, or are likely to be, permanent; and
- (c) the impairment or impairments result in substantially reduced functional capacity to undertake, or psychosocial functioning in undertaking, one or more of the following activities:
 - (i) communication;
 - (ii) social interaction;
 - (iii) learning;
 - (iv) mobility;
 - (v) self care;
 - (vi) self management; and
- (d) the impairment or impairments affect the person’s capacity for social and economic participation; and
- (e) the person’s support needs in relation to his or her impairment or impairments are likely to continue for the person’s lifetime.

This means that the rules must set out how the Agency will determine the factors or circumstances where impairments may be considered permanent, whether impairments result in substantially reduced functional capacity or psychosocial functioning, and the criteria to determine or circumstances where impairments may affect a person's social and economic participation. The criteria set out in the rules will be based on the World Health Organisation's International Classification of Functioning, Disability and Health (ICF). As well, the rules may set out whether an individual who has an existing assessment relating to these disability requirements can use that assessment.

Rules

8. The criteria to be used to determine that the impairment or impairments are permanent or likely to be permanent. Clause 27(1)(a)
9. The criteria to be applied to determine that one or more impairments substantially reduce a person's functional capacity, or their psychosocial functioning, in relation to one or more activities such as communication, mobility, or self-care. Clause 27(1)(b)
10. The criteria to be considered in assessing whether and to what extent social and economic participation has been affected. Clause 27(1)(c)

Questions

What criteria/factors should be taken into account in determining whether a person meets the disability requirements?

Should there be any guidelines on people being able to provide existing assessments to meet the disability requirements?

What should be considered in developing a rule on the types of persons who should conduct assessments?

What should be considered in developing a rule on the kinds of assessments that could be provided or undertaken as part of meeting the disability requirements?

How can we make sure the rules determine disability on the basis of a functional assessment of what a person can or aspires to do, rather than on the basis of diagnosis?

Early intervention requirements

The legislation sets out the early intervention requirements that a person may satisfy as an alternative to satisfying the disability requirements described in Section 4.4. A person may not meet the disability requirements, but may still need support to help minimise the impact of a disability from its earliest manifestation. Through early intervention, the scheme is able to fund supports that help minimise the impact of a person's disability, help

to improve their functioning or prevent the deterioration of their functional capacity over their lifetime, reduce the need for future support and build the sustainability of each individual's support network, particularly that of their immediate family.

Some examples of early intervention strategies include therapy to slow or delay the impact of degenerative conditions, investment in environmental supports that would allow a person to remain in their own home rather than be forced to move to a residential facility, or early childhood early intervention programs to address developmental delay.

The timing and duration of early intervention and the nature of interventions will be informed by the available evidence and depend on a range of factors including the individual's goals, the particular disability, the type of intervention and the individual's particular circumstances. The scheme will also be able to support innovative approaches which do not yet have a clear evidence-base, and which can be tested within the NDIS.

The rules will set out how the Agency to determine whether an early intervention, or a particular type of intervention is likely to be beneficial for an individual. The rules could set out, for example, that where there is evidence that if people can get help in the early stages of particular degenerative conditions to manage the impact of, say, a loss of function, then the NDIS would provide that support.

Rules

11. Criteria for determining if early intervention supports are likely to reduce a person's future need for supports in relation to disability. Clause 27(1)(d)
12. The criteria to be considered in assessing whether a support is likely to mitigate, alleviate or prevent of an individual's function capacity to undertake communication, social interaction, learning, mobility, self-care or self-management. Clause (27(1)(e)
13. Criteria for determining if early intervention supports are likely to strengthen the sustainability of the informal supports available to the participant, including through building the capacity of a carer. Clause 27(1)(f)

Questions

What criteria would be useful for considering the benefits of early intervention for mitigating or preventing deterioration in a person's functional capacity to undertake activities such as mobility, self-care or self-management?

How can the support provided by families and other carers be made more sustainable by early intervention?

How should the rules support innovative approaches to early intervention and balance this with the need to get the best outcomes for people with disability and for the scheme to be accountable and sustainable?

What criteria should be included in the rules to assist determining if an intervention strengthens the sustainability of informal support?

What criteria should be applied to determine 'evidence-based' assessment of the benefits of early intervention?

Participants' Plans

Once a person has met the age, residence, and disability or early intervention requirements, they become a participant in the NDIS. At the centre of the NDIS is an individual plan for each participant. This plan sets out a participant's support needs, as worked out through a planning process with the Agency. The plan will have two parts:

- the statement of goals and aspirations, which will be developed by each participant to set out their goals and objectives and personal circumstances; and
- the statement of supports, setting out any supports provided or funded by the Scheme, as well as any relevant informal or mainstream supports.

The legislation details how individuals will be able to develop their plans with the Agency, how the plans come into effect and how the plans are managed and reviewed. It also details how payments may be made and acquitted.

Importantly, the legislation works to make sure that the support for each person is designed specifically for them and that they have full opportunity to choose their supports and control their provision. The development of plans will be guided by the following principles:

Principles in the Bill (Clause 31) relating to participant plans

The preparation, review and replacement of a participant's plan, and the management of the funding for supports under a participant's plan, should so far as reasonably practicable:

- (a) be individualised; and
- (b) be directed by the participant; and
- (c) where relevant, consider and respect the role of family, carers and other persons who are significant in the life of the participant; and
- (d) where possible, strengthen and build capacity of families and carers to support participants who are children; and
- (e) consider the availability to the participant of informal support and other support services generally available to any person in the community; and
- (f) support communities to respond to the individual goals and needs of participants; and
- (g) be underpinned by the right of the participant to exercise control over his or her own life; and
- (h) advance the inclusion and participation in the community of the participant with the aim of achieving his or her individual aspirations; and

- (i) maximise the choice and independence of the participant; and
- (j) facilitate tailored and flexible responses to the individual goals and needs of the participant; and
- (k) provide the context for the provision of disability services to the participant and, where appropriate, coordinate the delivery of disability services where there is more than one disability service provider.

The planning process will acknowledge the circumstances and goals of each individual with a disability. The process recognises that some people will approach the Agency with clear goals for their social and working life while other people may not have thought about their future in this way before. All participants will be able to ask for assistance from the Agency with the planning process. The Agency can also work with the participant to help build their capacity to design the supports that meet their preferences and to self-manage their package.

As part of the planning process, the NDIS will assess a person's support needs. These assessments will use a consistent set of tools for identifying a person's needs and any potential risk or need for safeguards. Where people already have existing assessments, including people who are already receiving disability supports under other systems, they may wish to provide those assessments to the Agency. Some people may not have relevant existing or previous assessments or may wish to test whether they should receive additional support.

Consideration of the participant's living arrangements and informal supports will reflect discussions with both the participant and their carers, and will take account of the carers' circumstances, capacity and plans relevant to their caring role, and the sustainability of informal caring arrangements. The Agency will work to make informal caring arrangements sustainable, and provide certainty to informal carers that the person they are caring for will get reasonable and necessary supports into the future. However, the NDIS will not replace all informal care.

Reasonable and necessary supports

As the Agency works with people with a disability, it will have to make consistent decisions about what support people will get under the NDIS. These decisions will need to balance what support is 'necessary' to address the impact of a person's disability on their participation in the community or employment, and what is 'reasonable' taking into consideration factors such as value for money of the support, efficacy of the support and relevant community standards (such as what support it is reasonable to expect of families and carers. .

A clear statement of 'reasonable and necessary support' is included in Clause 34 of the Bill. This is to assist the community to understand the types of support the NDIS will provide and to ensure that the Agency's decision-making is equitable, transparent and rigorous.

Reasonable and necessary supports as outlined in the Bill (Clause 34)

For the purposes of specifying, in a statement of participant supports, the general supports that will be provided, and the reasonable and necessary supports that will be funded, the CEO must be satisfied of all of the following in relation to the funding or provision of each such support:

- (a) the support will assist the participant to pursue the goals, objectives and aspirations included in the participant's statement of goals and aspirations;
- (b) the support will assist the participant to undertake activities, so as to facilitate the participant's social and economic participation;
- (c) the support represents value for money in that the costs of the support are reasonable, relative to both the benefits achieved and the cost of alternative support;
- (d) the support will be, or is likely to be, effective and beneficial for the participant, having regard to current good practice;
- (e) the funding or provision of the support takes account of what it is reasonable to expect families, carers, informal networks and the community to provide;
- (f) the support is most appropriately funded or provided through the National Disability Insurance Scheme, and is not more appropriately funded or provided through other general systems of service delivery or support services offered by a person, agency or body, or systems of service delivery or support services offered:
 - (i) as part of a universal service obligation; or
 - (ii) in accordance with reasonable adjustments required under a law dealing with discrimination on the basis of disability;
- (g) the support is not prescribed by the National Disability Insurance Scheme rules as a support that will not be funded or provided under the National Disability Insurance Scheme;
- (h) the funding of the support complies with the methods or criteria (if any) prescribed by the National Disability Insurance Scheme rules for deciding the reasonable and necessary supports that will be funded under the National Disability Insurance Scheme.

The Bill sets out the criteria to determine whether a support to be provided or funded by the NDIS is reasonable and necessary. The rules will set out how these criteria are applied, the methods that will be used for determining which supports are funded or provided and

what criteria might be used to decide this. The rules will also need to set out how the Agency will take into account any lump sum or periodic compensation payments in deciding on the reasonable and necessary supports that will be provided by the NDIS. The rules will also outline how the Agency should determine whether the support provided or funded by the NDIS would be more appropriately provided by another system of support such as in a school, or by the health system.

There will also be rules that clarify supports that will not be funded or provided under the NDIS, and also there will be rules which set out the supports that will not be funded or provided for some participants. These need to be developed in a way that allows people maximum choice about the care and support they receive so that people can be innovative in how they work out the package of supports that works best for them, and provides them with the best help to achieve their goals.

Rules

14. The methods or criteria for deciding which supports will be funded or provided. Clause (35 (1)(a)
15. The supports that will not be funded or provided under the NDIS. Clause 35(1)(b)
16. The supports that will not be funded or provided under the NDIS for certain participants. Clause 35(1)(c)
17. The methods or criteria for assessing the supports that will be funded may also include methods or criteria relating to the manner in which the supports are to be funded and by whom these supports will be provided. Clause 35(2); 35(3)
18. The methods or criteria for providing supports may also include methods on how to take in to account compensation payments. Clauses 35(4); 35(5)

Questions

What methods or criteria should be used to determine those supports that would not be provided or funded by the NDIS, based on the criteria set out in clauses 34 and 35 of the Bill?

Are there any issues that are not covered by these proposed topics for determining reasonable and necessary supports that should be?

Management of Plans

The NDIS is designed to give people with disability control over the management of the funding in their support package. People can choose their own support providers and can also choose whether to self-manage their funding or ask another person or organisation (including the Agency) to manage some or all of their funding.

The process of making decisions about how a person's supports are managed is to be as inclusive and flexible as the person with a disability desires. It should be directed by the person, and include others that the person wishes to be involved (e.g. family members, friends, advocates, and support providers). It will be able to be reviewed as a person's needs change over time.

The NDIS starts with the presumption that people with disability have the ability and the right to make their own decisions and exercise choice and control over their supports. Consistent with the principles set out above, limits on choice and control will be restricted to activities or items that are illegal, significantly detrimental to health, or where activities or items are demonstrated to harm the well-being of the individual.

Some people with disability who choose to self-manage their plans will still need support to manage their plan. Others may only need assistance with some aspects, or none at all.

There are some limited circumstances set out in the legislation where self-management may not be appropriate, for example, if the participant is unable to make informed decisions on the administrative and financial aspects of spending the funding provided to purchase the supports.

There may also be limited circumstances where it would not be appropriate for a participant to continue to manage his or her plan without support. These circumstances could include, for example, situations where the participant experiencing difficulty with the requirements for self-management of a plan, is expending funds other than in accordance with the plan or has had a significant temporary or permanent change in their personal circumstances. In these cases there would be a meeting with the individual to review their circumstances and agree on revised management arrangements for their plan.

NDIS rules will prescribe the criteria to be taken into account when the Agency is considering whether self-managing funding would present an unreasonable risk for the participant. Also, for full transparency there will be rules that set out particular matters that must not be managed by a participant.

In recognition that people's life circumstances can change, the legislation provides that participants can initiate a review of their plan at any time. There may also be circumstances where the Agency would conduct a review of the plan. These circumstances will be set out in the rules.

Rules

19. Criteria for determining whether a participant managing a matter would present an unreasonable risk to the participant. Clause 44(3)
20. Particular matters within a participant's plan that must not be managed by the participant. Clause 44(2)(b)

21. Circumstances which would require a review of a participant's plan to be automatically triggered. Clause 48(6)

Questions

What criteria should be used by the Agency in deciding whether there is an unreasonable risk for the participant in self-managing funding?

What flexibility should a person have in making changes to their support arrangements without requiring a review of the plan?

What circumstances should trigger an automatic review of a person's plan?

What matters within a participant's plan must not be managed by the participant?

How can the concept of 'dignity in risk' inform the development of these rules?

Information sharing

The NDIS will need to collect information from participants and prospective participants that is private and confidential. The legislation sets out the circumstances in which a person may be required to give information to the scheme.

The Agency must handle all the information it collects very carefully. This is required by the legislation because the protection of personal information and a person's right to privacy is paramount. The legislation covers the collection and handling of protected information, and creates a series of offences related to unauthorised access, use or disclosure of protected information.

The legislation also includes provisions that ensure that State or Territory laws that would prevent a person from disclosing information or providing documents to the NDIS are respected, for example laws relating to whistleblowers' protection.

The legislation ensures that the Agency CEO can disclose protected information only in exceptional circumstances. The NDIS rules will provide guidance on disclosure of information by the NDIS to facilitate information sharing between the Agency and other Commonwealth agencies and State or Territory departments. The legislation also gives the CEO of the Agency powers to release information in the public interest. The rules will identify circumstances in which the CEO would exercise this power in the public interest. One example might be where it is legally required for the investigation of a criminal offence.

Rules

22. Prescribing State or Territory laws under which a person would not be required to provide information to the Agency. Clause 58(2)
23. Making provision for the Agency to disclose information in the public interest. Clause 66(2)
24. Making provision for the Agency's CEO to disclose information to the head of a Commonwealth or State or Territory authority. Clause 67

Questions

Under what circumstances would you consider it reasonable for the CEO of the Agency to disclose information to a Commonwealth or state or territory authority?

Are there any other protections for information that are not covered?

How do we strike the right balance between making sure people don't have to repeat their story and personal information, and making sure people's privacy is respected at all times?

Registered providers of support

Participants in the NDIS need to be able to choose supports that are of the standard and quality required to best support people with disability. During launch, the Agency will seek to use existing practices in states for quality control, safeguards, and qualifications of employees wherever possible.

Under the legislation, service providers will need to be registered in order to provide supports to people who have requested that the Agency manage all or some of their support. The legislation allows the Agency to register an organisation to provide supports and/or plan management. There will be rules related to the approval of registered providers of supports, including plan management.

The registration process could also include service providers showing that they have met relevant quality standards including governance, business and accounting practice, complaints handling, and auditing processes.

It is also important that the process for the registration of registered providers of supports promotes the policy objectives of the Bill to enable people with disability to exercise choice and control in the pursuit of their goals and the planning and delivery of their supports.

Rules

25. Criteria for registering or revoking the registration of a service provider to deliver supports or a class of supports, including whether compliance with safeguards or quality assurance standards and procedures or qualifications of employees is required. Clauses 70(1)(d); 72; 73(1)
26. Prescribing the consequences of registered providers failing to comply with the NDIS Act, regulations or rules. Clause 73(2)(a)
27. The requirements for registered providers including governance, business and accounting practice. Clause 73(2)(b)
28. The obligations of registered providers in relation to the monitoring of compliance, complaints handling and auditing requirements. Clauses 73(2)(c); 73(2)(d); 73(2)(e)

Questions

What would be appropriate criteria for registering a service provider to deliver different types of supports?

How can the Scheme ensure that providers don't have to go through a lot of red tape, while also ensuring that services are of a standard and quality to best support people with disability?

What registration information should the agency collect from registered providers of supports that will promote the policy objectives of the NDIS Act to enable people with disability to exercise choice and control?

What registration information should the agency collect from registered providers of supports that will build data for public evidence based decision making?

Note: The implications for businesses and the not-for-profit sector of the NDIS legislation and regulations will also be addressed through a regulation impact statement process as the Council of Australian Governments considers the details of the policy development of the NDIS.

Children

The scheme's lifelong approach and capacity to provide early intervention supports are designed to improve life outcomes for children, and to ease pressures on their families. The priority will be on assisting families to care for children with disability in a way that is sustainable for the family in the long term. Reasonable and necessary supports will be provided in the context of each child's family circumstances. In developing a child's plan, the NDIS will take account of what is reasonable to expect from parents and families in the care for children.

The legislation sets out the arrangements for children in a number of areas of the scheme. Children will be a focus for early intervention and the criteria used to define the early intervention requirements will need to reflect this.

The legislation provides for children to be represented by parents, guardians or other appropriate people in all aspects of the scheme's operations. As far as possible the duties and responsibilities of parents acting on behalf of a child who is a participant in the scheme are the same as for parents generally. However in line with best practice in relation to decision making for all children, parents of a child with disability will be expected to promote the best interests of the child.

The NDIS rules will set out the criteria for decisions relating to the appointment of a person other than a parent to make decisions relating to care and support for a child, for determining when a child is capable of making their own decisions, and other situations which may arise.

Rules

29. Criteria for appointing someone other than the person with parental responsibility to act on behalf of a child. Clause 74(6)(a)
30. Criteria for deciding whether a person managing the funding for supports would present an unreasonable risk to the participant (child). Clause 74(6)(b)
31. Criteria to use when making a determination as to whether a child is capable of making decisions. Clause 74(6)(c)
32. Criteria for determining who has parental responsibility when there is more than one potential person. Clause 75(4)
33. Prescribe other duties to support decision-making by the child or give appropriate weight to the views of the child. Clauses 76(4)(a); 76(4)(b)

Questions

What criteria would a decision-maker need to take into account to appoint someone other than a parent to act on behalf of a child or young person?

What criteria should be considered in deciding to exclude a child or young person under the age of 18 from being involved in decisions about the support they receive?

What additional supports should be given to a decision-maker to ensure that a child or young person under the age of 18 is involved in decisions about the support they receive?

What additional supports should be given to a child or young person under the age of 18 to ensure that they are involved in decisions about the support they receive?

What additional supports should be given to a parent or guardian to ensure that a child or young person under the age of 18 is involved in decisions about the support they receive?

How can we best reflect the fact that as children and young people with disability get older, like all children and young people, they may want to have more say in what they do, and the care and support they receive?

What is the best way for children and young people to be encouraged to express their views about the support that they receive?

How can we best ensure that the views of children and young people under the age under 18 are regularly reviewed without being obtrusive?

Supporting decision-making

In the NDIS people with a disability are presumed to be able to exercise choice and control over the care and support they receive.

In any individual's life there may be a range of family, carers and other significant persons who provide support, advice and assistance in decision making. In some circumstances, people with disability may need to be more formally supported in their decision making by a family member, someone else with a close relationship to the person with disability, or a nominee. While there will be some situations in which people with disability are unable to make decisions even with supports in place, in all circumstances the Agency will seek to put people with disability at the centre of decision making, and to involve family members and carers where that is appropriate.

In circumstances where a person is unable to make decisions, options include:

- in the first instance, a nominee (substitute decision-maker) arrangement initiated by the person and accepted by the Agency/CEO or, if necessary, a nominee arrangement initiated by the Agency/CEO, taking into account the person's wishes;
- recognition of formal legal arrangements that are in place for people without legal capacity such as the Public Trustee and guardianship arrangements;
- in strictly limited circumstances, the Agency/CEO making a decision to assign an appropriate person to act as the person's representative when the person with disability is unable to be supported in their decision making and unable to consent to a nominee (without the need for that person to apply for formal guardianship); and
- consistent with other areas of law and administration, parents will be legally responsible for children under the age of eighteen in an NDIS.

Supported or substituted decision-making in the NDIS must be handled with great care to protect the right of people with disability to exercise choice and control over those decisions that impact on their lives. A set of principles has been included in the legislation to guide the operation of the scheme.

General principles guiding actions of people who may do acts or things on behalf of others, as set out in the Bill (Clause 5)

It is the intention of the Parliament that, if this Bill requires or permits an act or thing to be done by or in relation to a person with disability by another person, the act or thing is to be done, so far as practicable, in accordance with both the general principles set out in clause 4 and the following principles:

- (a) people with disability should be involved in decision making processes that affect them, and where possible make decisions for themselves;
- (b) people with disability should be encouraged to engage in the life of the community;
- (c) the judgements and decisions that people with disability would have made for themselves should be taken into account;
- (d) the cultural and linguistic circumstances of people with disability should be taken into account;
- (e) the supportive relationships, friendships and connections with others of people with disability should be recognised.

The legislation sets out the process for appointing a plan management or correspondence nominee for a participant. This can be requested by the participant or be on the initiative of the Agency taking into account the participant's wishes. The role and responsibilities of nominees are also set out in the legislation.

The Agency will not assume that people with disability who require support in their decision-making or have substituted decision-making will always need that support. The Agency will seek to build people's skills, experience and confidence to make choices and take greater control over their support arrangements. The Agency will also recognise that the capacity of some people with disability (in particular, some people with psychiatric disability) to make decisions may vary over time.

The NDIS rules will include practical approaches to ensure that actions taken by others on behalf of participants follow the principles in the legislation. The rules will provide guidance to ensure that only appropriate people are appointed as nominees and that the decisions made on behalf of the person are, as far as possible, those decisions that the decision-maker believes the person would make if they had the capacity.

Rules

- 34. Criteria to be considered in deciding to appoint a nominee. Clause 88(6)(b)
- 35. Requirements and matters to consider in the appointment, suspension or cancellation of nominees. Clauses 93(a); 93(b)
- 36. Prescribing who must not be appointed as a nominee. Clause 88(6)(a)
- 37. Prescribing additional duties of nominees to support decision making by the participant personally or to give appropriate weight to the participant's views. Clauses 80(4)(a); 80(4)(b)

Note: The NDIS rules will need to take account of differing arrangements for assisted or substituted decision making across State and Territory jurisdictions.

Questions

What criteria should guide the decision to appoint a nominee?

What criteria should be used to select an appropriate nominee?

How can a nominee demonstrate thorough knowledge and understanding of the participant's wishes, goals and life aspirations?

How can we test that the decisions of a nominee are reasonably those the person would have made if they had the capacity to do so?

What should be in place to allow these arrangements to change?

Who should not be appointed as a nominee?

Other than duties to support decision making by the participant personally or to give appropriate weight to the participant's views, what additional duties should be prescribed to nominees?

Should the appointment of nominees be for a fixed period or should there be a regular review of the arrangements to ensure the person with disability is satisfied with their nominee arrangements?

How can we ensure that the nominee arrangements continue to build the decision making capacity of people with a disability.

Compensation

The legislation is intended to ensure that where a person receives a compensation payment which includes an amount for the future cost of care and support, this amount is taken into account by the Agency in assessing the reasonable and necessary supports that person is entitled to receive through the scheme.

The legislation proposes that the Agency has the power to require a person to try to secure compensation where it believes that person is entitled to compensation in respect of the costs of supports that may be funded by the NDIS, where it is reasonable to do so.

The provision of support and assistance under the NDIS is not intended to replace existing entitlements to compensation. The Courts will continue to determine and award compensation payments in cases where there is a legal right to compensation.

The NDIS rules will set out how the Agency will determine reasonable and necessary supports when dealing with lump sum payments and periodic compensation payments that specifically include an amount for the cost of the supports. The rules will also need to cover lump sum compensation payments that do not specifically include an amount for the cost of supports.

Rules

38. The treatment of compensation payments in determining reasonable and necessary supports provided by the NDIS. Clause 35(4)(5)
39. Criteria for taking into account other amounts that a participant (or prospective participant) did not receive by way of compensation payments because they entered into an agreement to give up their right to compensation. Clause 35(5)
40. The Commonwealth, State or Territory laws to be set out in the NDIS rules that need to be considered in determining what if any, past NDIS payments can be recovered from a compensation payment made after the NDIS amounts were paid. Clause 106(5)(b)(iv)

Question

How should compensation payments for care and support be treated in working out how much care and support should be provided by the NDIS?

Conclusion

Over the coming months, the Commonwealth Government will continue to work with States and Territories on the legislation, and consult people with disabilities, their families and carers on the Bill, before it is voted on by the Commonwealth Parliament in time for the launch of the NDIS from the middle of 2013. This includes developing the rules that underpin the legislation to be considered by Parliament.

Your input to this reform process is extremely important. We want to hear from people with disability, their families and carers so we can build a system that meets your needs.

All comments received through the NDIS consultation processes will be considered. We encourage you to contribute to this process and thank you for taking the time to consider and provide input to this important reform.

How to provide feedback

The Government is offering a number of opportunities to gather the views and insights of stakeholders on the issues set out in this paper.

Feedback

The Government welcomes direct feedback on questions in the paper which can be submitted through a dedicated link on the NDIS website www.ndis.gov.au. It will not be possible to provide individual responses to your feedback, but all responses will be read and considered in the development of the rules throughout the first quarter of 2013.

You can also email a written response to our email address at:

NDISengagement@fhcsia.gov.au or via the postal address:

ATTENTION: SECRETARIAT

NATIONAL DISABILITY INSURANCE SCHEME

PO BOX 6555

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The Government will also be conducting consultation sessions with peak stakeholder groups in the disability sector.