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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

NATIONAL DISABILITY INSURANCE SCHEME BILL 2012

EXPLANATORY MEMORANDUM

(Circulated by the authority of the
Minister for Families, Community Services and Indigenous Affairs,
Minister for Disability Reform, the Hon Jenny Macklin MP)

NATIONAL DISABILITY INSURANCE SCHEME BILL 2012

OUTLINE

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

The first stage of the scheme will benefit more than 20,000 people with disability, their families and their carers living in South Australia, Tasmania, the Australian Capital Territory, the Hunter in New South Wales, and the Barwon area of Victoria.

The Bill sets out the objects and principles under which a National Disability Insurance Scheme will operate, including giving people with disability choice and control over the care and support they receive, and giving effect in part to the United Nations *Convention on the Rights of Persons with Disabilities*.

The Bill sets out the process for a person becoming a participant in the scheme, how participants develop a personal, goal-based plan with the Agency, and how reasonable and necessary supports will be assured to participants. People will be able to decide for themselves how to manage their care and support, and choose how they want to manage their supports. They will be able to access assistance from local coordinators should they wish.

The Bill also provides that the Agency will be responsible for the provision of support to people with disability, their families and carers. This could include providing funding to individuals and organisations to help people with disability participate more fully in economic and social life.

An independent review of the new Act commencing after two years of operation will be legislated through this Bill.

Financial impact statement

The first stage of the National Disability Insurance Scheme will have a cost to the Commonwealth of $1 billion over four years from 2012-13.

REGULATION IMPACT STATEMENT

The implications for businesses and the not-for-profit sector of future legislation and regulations will be addressed through a regulation impact statement process as the details of the policy development of the NDIS are considered by the Council of Australian Governments.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

The statement of compatibility with human rights appears at the end of this explanatory memorandum.

NATIONAL DISABILITY INSURANCE SCHEME BILL 2012

NOTES ON CLAUSES

Abbreviations used in this explanatory memorandum

- **COAG** means the Council of Australian Governments
- **NDIS** means the National Disability Insurance Scheme
- **Productivity Commission report** means the Productivity Commission Inquiry Report, *Disability Care and Support*, released on 10 August 2011

Background

In August 2011, the Prime Minister released the Productivity Commission Inquiry Report, *Disability Care and Support*, which identified that disability care and support in Australia was 'underfunded, unfair, fragmented and inefficient', and that major reform was needed.

Since the release of this report, the Commonwealth and all state and territory governments have agreed on the need for major reform in the form of a National Disability Insurance Scheme, which:

- will take an insurance approach that shares the costs of disability services and supports across the community;
- will fund reasonable and necessary services and supports directly related to an eligible person's individual ongoing disability support needs; and
- will enable people with disability to exercise more choice and control in their lives, through a person-centred, self-directed approach, with individualised funding.

The Bill establishes a scheme that gives effect to these critical principles, and gives effect in part to Australia's obligations under the United Nations *Convention on the Rights of Persons with Disabilities*.

The Bill reflects extensive work undertaken with states and territories, and with people with disability, their families and carers, disability care workers, service providers and advocates on the design, funding and governance of an NDIS.

The engagement process has included detailed consultation with the NDIS Advisory Group, NDIS expert groups and public engagement undertaken around the country by the National Disability and Carer Alliance.

Chapter 1 – Introduction

Summary

Chapter 1 contains the formal matters in relation to the National Disability Insurance Scheme Bill 2012.

Explanation of the clauses

Part 1 – Preliminary

Clause 1 sets out how the new Act is to be cited, that is, as the *National Disability Insurance Scheme Act 2012.*

Clause 2 provides for the commencement of each provision in the Bill, as set out in the table.

- Clauses 1 and 2 commence on the day the Act receives the Royal Assent.
- Clauses 3 to 12 will commence on the day after the Act receives the Royal Assent.
- Chapters 2 and 3 will commence on a day or days to be fixed by Proclamation.
- Chapter 4, Part 1, Division 1 will commence on a day or days to be fixed by Proclamation.
- Chapter 4, Part 1, Divisions 2 and 3 will commence on the day after the Act receives the Royal Assent.
- Chapter 4, Parts 2 and 3 will commence on the day after the Act receives the Royal Assent.
- Chapter 4, Parts 4, 5 and 6 will commence on a day or days to be fixed by Proclamation.
- Chapter 5 will commence on a day or days to be fixed by Proclamation.
- Chapters 6 and 7 will commence on the day after the Act receives the Royal Assent.

Commencement of relevant provisions on the day after the Act receives the Royal Assent will allow the ***NDIS rules*** to be made under the new Act, which are essential for its operation.

The term ***NDIS rules*** is defined in clause 9. The NDIS rules are legislative instruments which provide further detail on the operation of the scheme – for example, specifying the methods for applying the access criteria under Chapter 3. See clause 210 for further detail.

If no earlier Proclamation is made, then the provisions of the Act that are to commence on a day or days fixed by Proclamation will commence six months and one day after the Royal Assent. This is to ensure that all provisions of the Act are operational to facilitate the commencement of the NDIS launch by July 2013.

Part 2 – Objects and principles

Clause 3 outlines that the objects of the Act are to provide for the National Disability Insurance Scheme in Australia, to support the independence and social and economic participation of people with disability during the NDIS launch, and to ensure people with disability have their reasonable and necessary support needs met and are able to exercise choice and control over the planning and delivery of their supports.

The objects of the Act also include facilitating the development of a nationally-consistent approach to the provision and funding of supports for people with disability, promoting innovation in the provision of supports, raising community awareness around disability and facilitating greater community inclusion of people with disability.

The Act also gives effect to certain obligations that Australia has as a party to the ***Convention on the Rights of Persons with Disabilities*****.** The Convention on the Rights of Persons with Disabilities is defined in clause 9 to mean the Convention done at New York on 30 March 2007 and set out in Australian Treaty Series 2008 No.12 [2008] ATS 12.

Subclause 3(2) recognises that responsibility for the implementation of the NDIS launch is shared across governments, and will require a shared and coordinated effort. It provides the foundation for the launch of the NDIS in each launch site, to be implemented through arrangements funded and governed jointly by the Commonwealth and ***host jurisdictions*** (defined in clause 10, see below). These arrangements will be set out in inter-governmental agreements between the Commonwealth and host jurisdictions.

In addition, this subclause provides that the objects are to be achieved by adopting an insurance approach to the provision and funding of supports for people with disability. This is to ensure there is investment in the needs of people with disability, their families and carers, and that they are supported to meet their goals, objectives, and aspirations over their lifetime.

Subclause 3(3) provides that, in giving effect to the objects of the Act, regard is also to be had to the progressive implementation of the NDIS. To underpin the insurance rationale for the NDIS, regard must also be had to the financial sustainability of the NDIS when giving effect to the objects of the Act.

Clause 4 sets out a list of general principles underpinning the Act, which focus on the rights of people with disability. These principles are informed by the High-level Principles for a National Disability Insurance Scheme agreed by COAG in April 2012.

In particular, **subclause 4(15)** makes explicit that it is Parliament's intention that any person performing functions and exercising powers under the Act (including the Ministerial Council, the Minister, the Board and Chief Executive Officer of the NDIS Launch Transition Agency) does so in accordance with these principles. Regard must also be had to the progressive implementation and financial sustainability of the NDIS.

Clause 5 provides general principles to guide the actions of people who may do acts or things on behalf of people with disability under the Act, including nominees, people with parental responsibility for children, and the Chief Executive Officer and other staff of the Agency. The provision requires such a person to do things in accordance with the principles set out in clause 4, so far as practicable, as well as the principles that:

(a) the person with disability should be involved in decision-making that affects them, including making decisions for themselves, to the extent possible;

(b) the person 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 the person with disability should be taken into account; and

(e) the supportive relationships, friendships and connections of others to the person with disability should be recognised.

Clause 6 recognises that participants and prospective participants may require or want assistance and support in doing things or meeting obligations under the Act, and that the Agency is able to provide that support and assistance (including financial assistance).

Examples of how the Agency might provide assistance include the Agency paying for transport costs in relation to attendance at appointments or medical examinations that are necessary to meet obligations under the Act, or the Agency providing a prospective participant with access to a computer in order to make an access request. However, the Agency cannot fund legal assistance for review of decisions under the Act.

Clause 7 requires that any notices, approved forms or information given to a person with disability under the Act must be explained in a manner which that person is most likely to understand. This reflects the objective of the Act to enable people with disability to exercise choice and control of the planning and delivery of their supports. If reasonably practicable, explanations should be given both orally and in writing.

Part 3 – Simplified outline

Clause 8 provides a simplified outline of the Act to assist the reader.

Part 4 – Definitions

Clause 9 defines certain terms that are used in the Act. In this explanatory memorandum, the defined terms will be addressed in the context in which they appear.

Clause 10 defines ***host jurisdiction*** to be a state or territory that the Minister has, by legislative instrument, specified as a host jurisdiction. The particular state or territory that is specified as a host jurisdiction must also agree to being specified.

A note to the section explains that subsection 44(1) of the *Legislative Instruments Act 2003* provides that disallowance (section 42 of that Act) does not apply to the instrument. This is because the establishment of a host jurisdiction is the result of an agreement between the Commonwealth and the relevant state or territory.

Clause 11 defines the term ***compensation*** for the purposes of the Act and the related concept of an insurer.

Part 5 – Ministerial Council

Ministerial Council is defined in clause 9 to be a body that consists of Ministers of the Commonwealth, states and territories that has been designated by COAG as having responsibilities in relation to the NDIS launch. It is anticipated that a Standing Council of COAG will be formed to have primary responsibility for the NDIS.

Clause 12 recognises the role of the inter-jurisdictional Ministerial Council in the NDIS launch, including considering and advising the Commonwealth Minister on policy matters, and making recommendations to COAG about such matters. This is consistent with the principle that the NDIS is the shared responsibility of all Australian Governments.

Subclause 12(2) provides that the advice and recommendations given by the Ministerial Council must not relate to a particular individual. This means, for example, that the Ministerial Council cannot interfere with the way in which a particular person with disability's supports are assessed, or how their plan is developed. However, it is not intended to prevent the Ministerial Council considering, advising, and making recommendations about broader policy matters in relation to the NDIS, which may be highlighted by an individual's experience with the NDIS.

In recognition of the shared responsibility for the NDIS, the Commonwealth Minister must consult the Ministerial Council about policy matters that relate to the NDIS or arise under the Act.

Chapter 2 – Assistance for people with disability and others

Summary

Chapter 2 sets out the general supports and assistance, including funding, that the Agency can provide to all people with disability and other individuals and organisations to enable them to support people with disability.

Explanation of the clauses

Clause 13 enables the Agency to provide ***general supports*** to people with disability. The term, general supports, is defined in subclause 12(2) to include coordination, strategic and referral services and activities. This will ensure that there is 'no wrong door', and that people with disability are not passed from one service to another. The Agency will be able to help people with disability access mainstream services, such as in the health, education and transport systems, and by non-government organisations.

Clause 14 provides that the Agency may provide funding to individuals and organisations to help people with disability participate in economic and social life. For example, the Agency could provide funding to an organisation to provide a service to a cohort of people with disability, such as counselling for young adults with disability on the transition from school to work or university.

Clause 15 makes clear that the Agency may provide information to all members of the public about matters relevant to the NDIS and the functions of the Agency.

Clause 16 ensures that the Agency will be able to provide support and assistance to people to achieve things the Agency can do under this Chapter.

Clause 17 provides that NDIS rules may prescribe matters for and in relation to this Chapter. This could include prescribing matters around how the Agency provides coordination, strategic and referral services to people with disability.

Chapter 3 – Participants and their plans

Summary

Chapter 3 sets out how people with disability will become participants in the launch of the NDIS, and the subsequent process for developing personal, goal-based plans with the Agency and receiving individualised supports, which could include funded supports.

The Bill provides that any person may make an access request to become a participant in the NDIS launch. To become a participant, a prospective participant must meet a number of requirements in relation to age, place of residence, and either disability or early intervention. A participant in the NDIS launch is entitled to funding for reasonable and necessary supports under a plan, which could include personal care and support, aid and equipment or other supports. The ***National Disability Insurance Scheme launch*** is defined in clause 9 (an explanation follows below).

Once a person becomes a participant in the NDIS, the ***CEO*** must facilitate the preparation of a ***participant's plan***. A participant's plan will comprise two parts – the ***participant's statement of goals and aspirations***, which is prepared by the participant and specifies the goals, objectives, aspirations and circumstances of the participant, and the ***statement of participant supports***, which is prepared with the participant (and approved by the CEO) and which sets out, among other matters, the reasonable and necessary supports which will be provided or funded by the NDIS.

CEO is defined to mean the Chief Executive Officer of the Agency in clause 9.

Chapter 3 details how a participant's plan is developed and comes into effect, how the plan may be managed and how a plan may be reviewed. It also sets out how payments may be made and how funding needs to be acquitted where the participant or a plan management service provider is managing a plan.

Background

The Productivity Commission report concluded that people with disability currently do not have control and choice over the care and supports they receive. It also identified that the current system is difficult to navigate, and that people are required to 'fit into' existing programs, rather than being able to access supports that meet their individual needs. This often means that people with disability are substantially hindered from participating in economic and social life, with some people with disability 'falling through the cracks' and experiencing significant disadvantage. The report also identified that the current provision of support is fragmented and inconsistent across Australia.

The NDIS – and, in particular, the participant pathway outlined in Chapter 3 – has been developed to provide an equitable, consistent and person-centred approach to the provision of supports to people with disability, which ensures that people with disability have choice and control over the care and support they receive.

Under the arrangements set out in this Bill, supports for participants will be provided as part of an individual goal-based plan.

Each participant will work with local Agency support to identify their goals and aspirations and their individual circumstances, including living arrangements, informal care and environmental and personal factors. This will help guide the development of their individually-funded support package. If required, part of this process may include working with the participant to help build capacity to design the supports that meet their preferences and to self-manage their package.

Consideration of the participants' living arrangements and informal supports will reflect discussions with the participants and their carers, and will take account of the carers' circumstances, capacity and future plans relevant to their caring roles, and the sustainability of informal caring arrangements. The NDIS 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 care into the future.

Each participant's plan will be in two parts. The first, developed by the participant, will set out the goals, aspirations and individual circumstances, and the second part, developed jointly by the participant and the Agency, will set out the funded supports and assistance to be provided by the NDIS. The plan will be formally approved by the Agency, and include details on how the participant has decided to manage their plan and when it will be reviewed. The plan may contain items necessary for the participant to achieve their goals, build their capacity and maximise their economic and social participation.

Explanation of the clauses

Part 1 – Becoming a participant

Clause 18 provides that a person may make an ***access request*** to become a ***participant*** in the National Disability Insurance Scheme launch.

The ***National Disability Insurance Scheme launch*** is defined in clause 9 to mean:

- the arrangements set out in Chapter 2, relating to the provision of general supports (discussed above); and

- the arrangements set out in Chapter 3 around the development of plans and funded supports in relation to people who meet the residence requirements because they reside in a specific area and meet the prescribed age requirements.

The Minister may prescribe in the NDIS rules that people must reside within a specific area, or be of a prescribed age within a specific area, to meet the access requirements. This enables the Minister to allow people with disability to access the NDIS in the launch sites, as agreed with the host jurisdictions. The launch sites can be the whole or part of a state, and may also include limitations based on age. For example, the launch of the NDIS in South Australia will begin with young children.

Clause 19 provides that an access request must be in the form (if any) approved by the CEO, include any information required by the CEO, and certify that it includes the information required by the CEO in the possession or control of the person.

Subclause 19(2) provides that a person may make more than one access request if they are deemed not to meet the access criteria under subclause 21(3), unless a decision has not yet been made on a review.

Note that a decision under subclause 21(3) that a person does not meet the access criteria is a reviewable decision under paragraph 99(a), and the decision will be automatically reviewed under paragraph 100(5)(b).

Note that the CEO is also not required, under clause 197, to make a decision on any access request that does not comply with clause 19.

Clause 20 provides that the CEO must consider access requests and decide whether or not a person meets the prescribed criteria for becoming a participant in the NDIS launch (see below), or make a request under subclause 26(1) within 21 days of receiving the request.

Note that subclause 205(1) provides that the NDIS rules may prescribe a longer period that is not more than double the length of the specified period where a provision of the Act requires the CEO to do something within a specified period.

Clause 21 sets out the requirements for when the CEO must decide that a person ***meets the access criteria***, which are that the person ***meets the age requirements*** (clause 22), ***meets the residence requirements*** (clause 23), and that the person either ***meets the disability requirements*** (clause 24) or ***meets the early intervention requirements*** (clause 25).

The purpose of having prescribed access criteria is to do the following:

- to ensure that reasonable and necessary supports are provided to people with significant and permanent care and support needs;

- to ensure the financial sustainability of the scheme; and
- to identify which people with disability come within the sphere of the launch sites, including residing in a state which has agreed to become a host jurisdiction.

Subclause 21(2) provides arrangements to ensure continuity of outcomes for people who meet the residence requirements in subclause 23(1), but who do not meet the other access criteria and are otherwise not entitled to supports. The person will be considered to meet the access criteria if:

- they were receiving supports at the time the CEO is considering the request (or at another time prescribed by the NDIS rules);
- those supports were received during the period prescribed by the NDIS rules (if any); and
- they received the supports under a program prescribed by the NDIS rules.

Subclause 21(3) provides that the CEO is deemed to make a decision that the person does not meet the access criteria if the CEO has not made a decision on the access request, or has not made a request under subclause 26(1), within 21 days. This decision is a reviewable decision under paragraph 99(a), and will be automatically reviewed under subclause 100(5).

Clause 22 sets out the age requirements a person must satisfy in order to become a participant in the NDIS launch. The first age requirement is that a person is under the age of 65 on the date the access request is made (**subclause 22(1)**). This applies in the context of the NDIS launch across all jurisdictions. This requirement implements part of recommendation 3.6 of the Productivity Commission report, and reflects that the NDIS is one part of a broader system of support in Australia with people over the age of 65 able to access the aged care system. Those people who are receiving support under the NDIS and turn 65 can choose either to remain in the NDIS or to move to the aged care system.

Furthermore, 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. Accordingly, **subclauses 22(1) and 22(2)** allow the NDIS rules to prescribe additional age requirements, including that a person must be a specified age on a particular date in a particular prescribed area of Australia.

Clause 23 sets out the residence requirements a person must satisfy in order to become a participant in the NDIS launch.

Under **subclause 23(1)**, a person ***meets the residence requirements*** if they:

(a) reside in Australia; and

(b) are one of the following – an Australian citizen, the holder of a permanent visa, or a special category visa holder who is a protected SCV holder (special category visas are temporary visas issued to New Zealand citizens on entry to Australia, subject to health and character considerations); and

(c) satisfy any other requirements in relation to residence prescribed in the NDIS rules.

Subclause 23(2) sets out a list of considerations that must be had regard to when determining whether or not a person resides in Australia. This list is designed to assist decision-makers in determining the nature, extent and permanence of a person's connection to Australia.

Subclause 23(3) allows for NDIS rules to be made to require a person to meet the following criteria in order to meet the residence requirements:

- reside in a prescribed area of Australian on a prescribed date or period;
- have resided in that area for a prescribed length of time; and
- continue to reside in that area.

This will enable the Minister to make rules that prescribe residence requirements for people to become participants in the NDIS launch, where agreement to do so has been reached with host jurisdictions.

Clause 24 sets out the disability requirements a person must satisfy in order to become a participant in the NDIS launch. The disability requirements are designed to assess whether a prospective participant has a current need for support under the scheme, based on one or more permanent impairments that have consequences for the person's daily living and social and economic participation on an ongoing basis. This clause also implements recommendation 3.2 of the Productivity Commission report.

Under **subclause 24(1),** a person ***meets the disability requirements*** if:

- they have a disability attributable to one or more intellectual, cognitive, neurological, sensory or physical impairments, or psychiatric condition; and
- the impairment/s are, or are likely to be, permanent (this includes impairments that are chronic or episodic in nature, and where the person's support needs may be likely to continue for the person's lifetime (**subclause 24(2)**); and

- the impairment/s result in substantially reduced functional capacity, including psychosocial functioning, of the person to undertake, or in undertaking, one or more of the activities of communication, social interaction, learning, mobility, self-care or self-management; and
- the impairment/s affect the person's capacity for social and economic participation; and
- their support needs are likely to continue for the person's lifetime.

Clause 25 sets out the early intervention requirements a person must satisfy, as an alternative to satisfying the disability requirements, in order to become a participant in the NDIS launch. This clause recognises that a person may need support to help minimise the impact of a disability from its earliest appearance, and that the provision of support may improve the person's functioning or prevent the progression of their disability over their lifetime.

A person ***meets the early intervention requirements*** if:

- the person either:
  - (i) has a disability attributable to one or more intellectual, cognitive, neurological, sensory or physical impairments, or a psychiatric condition; or
  - (ii) is a child who has ***developmental delay***; and
- the CEO is satisfied that the provision of early intervention supports for the person is likely to reduce the person's future needs for supports in relation to disability and either:
  - (i) mitigate, alleviate or prevent the deterioration of the functional capacity of the person to undertake one or more of the activities referred to in paragraph 24(1)(c); or
  - (ii) strengthen the sustainability of the informal supports available to the person, including through building the capacity of the person's ***carer***.

Carer is defined in clause 9 to mean an individual who provides personal care, support and assistance to a person with disability. It does not include individuals who provide care, support and assistance under contracts for service, through voluntary work, or as part of the requirements of a course of education or training.

Developmental delay is defined in clause 9 and means a delay in the development of a child under six years of age that:

- is attributable to either, or both, a mental or physical impairment; and

- results in substantial reduction in functional capacity in one or more of self-care, receptive and expressive language, cognitive development, and motor development; and
- results in the need for a combination and sequence of special interdisciplinary or generic care, treatment or other services that are of extended duration and are individually planned and coordinated.

Clause 26 allows the CEO to make requests in connection with determining whether a person meets the access criteria, including requiring a prospective participant to provide information reasonably necessary for deciding whether a person meets the access criteria. The CEO may also request the prospective participant to undergo an assessment or a medical, psychiatric or psychological examination (**subclause 26(1)**).

Subclause 26(2) provides that, if a request is made under subclause 26(1), and the information or report of the assessment or examination is received within 28 days (or longer period if specified in the request) after the request, the CEO must then decide whether the prospective participant meets the access criteria, or make a further request under subclause 26(1) within 14 days of receipt of the information or report. This decision is a reviewable decision under paragraph 99(a).

Subclause 26(3) provides that, if the information or report requested under subclause 26(1) is not received within the relevant timeframe, the participant is taken to have withdrawn the access request, unless the CEO is satisfied that it was reasonable for the prospective participant not to have complied with the request within the timeframe.

For example, the prospective participant may not have been able to make the necessary medical appointment, attend, and have the report provided to the CEO, because of availability of relevant medical professionals.

Clause 27 allows for NDIS rules to be made prescribing further detail about the criteria to be applied, and the circumstances in which criteria are to be applied, in assessing specific elements of the disability and early intervention requirements.

For example, NDIS rules may prescribe criteria to identify whether a particular impairment is, or is likely to become, permanent and whether the provision of early intervention supports is likely to reduce a person's future needs for supports (see **subclause 27(1)** for the full list of matters).

The NDIS rules may also provide further detail in relation to who may conduct assessments, and the kinds of assessments that may be conducted, for the purposes of deciding whether a person meets the disability or early intervention requirements (**subclause 27(2)**).

Clause 28 provides that a person becomes a participant in the NDIS launch on the day the CEO decides that person meets the access criteria (**subclause 28(1)**), and that the CEO must give written notice of the decision to the participant stating the date on which the person became a participant (**subclause 28(2**)).

Clause 29 provides that a person ceases to be a participant in the NDIS launch when:

- they die; or
- they turn at least 65 years old and have entered a ***residential care service*** or are being provided with ***community care*** on a permanent basis; or
- their status is revoked under clause 30 (**subclause 29(1**)).

A person may also notify the CEO in writing that they no longer wish to be a participant.

Subclause 29(2) provides that when a person ceases to be a participant, they are no longer entitled to be paid the ***NDIS amount*** that relates to supports that would otherwise be funded.

Residential care service and ***community care*** have the same meanings as in the *Aged Care Act 1997*.

NDIS amount is defined in clause 9 to mean an amount paid under the NDIS in respect of supports funded to a participant (see also clause 45, which provides for the payment of NDIS amounts).

Clause 30 provides for the revocation of participant status. The CEO may revoke a person's status as a participant in the NDIS if:

- the CEO is satisfied that the person does not meet the residence requirements; or
- the CEO is satisfied that the person does not meet either the disability requirements or the early intervention requirements (**subclause 30(1)**).

The participant must receive written notice of the revocation, stating the date on which the revocation takes effect (**subclause 30(2)**).

A decision by the CEO under clause 30 to revoke a person's status as a participant is reviewable under paragraph 99(c).

Part 2 – Participants' plans

Division 1 – Principles relating to plans

Clause 31 provides a number of principles that should, so far as reasonably practicable, be taken into account in the preparation, review and replacement of a participant's plan. These principles underpin the core features of the NDIS being about individualised support for people with disability, and their exercise of choice and control over the provision of the supports.

Division 2 – Preparing participants' plans

Clause 32 requires the CEO, within 14 days after a person becomes a participant, to commence preparation of a participant's plan.

Clause 33 provides the matters that must be included in the participant's plan.

Under **subclause 33(1)**, a participant's plan must include a statement, prepared by the participant that specifies:

- the goals, objectives and aspirations of the participant;
- the environmental and personal context of the participant's living, including the participant's:
  - (i) living arrangements; and
  - (ii) informal and other community supports; and
  - (iii) social and economic participation.

This statement is referred to in the Act as the ***participant's statement of goals and aspirations***.

Under **subclause 33(2)**, a participant's plan must include a statement prepared with the participant and approved by the CEO, that specifies:

- the general supports (if any) that will be provided under the NDIS; and
- the reasonable and necessary supports (if any) that will be funded under the NDIS; and
- the date by which the Agency must review the plan under Division 4; and
- how the funding for supports under the plan is to be managed (also see Division 3); and
- the management of other aspects of the plan.

This statement is referred to in the Act as the ***statement of participant supports***.

The reasonable and necessary supports that will be funded or provided under the NDIS may be identified in the plan specifically or generally, according to **subclause 33(3)**. For example, one person's plan might state that funding will be provided for the purchase of a particular model of wheelchair, while another person's plan might state that funding is to be provided for the purpose of purchasing items to assist with mobility.

Subclause 33(4) requires the CEO to decide whether to approve the statement of participant supports as soon as reasonably practicable, including what is reasonably practicable having regard to clause 36 – that is, the information and reports that the CEO may request the participant to provide.

Subclause 33(5) sets out what the CEO must have regard to when deciding whether or not to approve the statement of participant supports. These matters are:

- the participant's statement of goals and aspirations; and
- whether the supports are reasonable and necessary supports (in accordance with clause 34); and
- relevant assessments conducted in relation to the participant; and
- any methods or criteria specified in the rules for deciding the manner in which, and by whom, the reasonable and necessary supports will be funded or provided; and
- the principle that it is desirable for a participant to manage their plan to the extent that they wish to do so; and
- the operation and effectiveness of any previous plans of the participant.

In addition, the CEO must also be satisfied in relation to the reasonable and necessary supports that will be funded and the general supports that will be provided as mentioned in clause 34.

Where the Agency has been nominated to manage part or all of the plan, the relevant supports can only be provided by a registered provider of supports (**subclause 33(6)**). The plan may include additional matters as prescribed in the NDIS rules (**subclause 33(7)**), and the participant's statement of goals and aspirations must be in writing, or recorded by the Agency in writing (**subclause 33(8)**).

Clause 34 sets out the criteria of which the CEO must be satisfied in relation to the funding or provision of each support provided to the participant, to ensure that they are 'reasonable and necessary'. This is to be considered when the statement of participant supports is being developed.

Consistent with the recommendations of the Productivity Commission, the criteria to determine 'reasonable and necessary supports' will ensure the community can understand what to expect from the NDIS, and that decisions by the Agency are equitable, transparent and rigorous.

The criteria listed in clause 34 balances what support is 'necessary' to assist the participant to pursue their goals (in accordance with the participant's statement of goals and aspirations) and to facilitate their social and economic participation, with what is 'reasonable', including whether the cost of the support represents value for money and is reasonable, the efficacy of the support, whether it is not reasonable to expect families and carers to provide the support, and whether the support would be more appropriately provided by other mainstream services.

Clause 35 allows NDIS rules to be made about the content of the participant's statement of supports.

Subclause 35(1) provides that the NDIS rules may prescribe:

- a method for assessing, or criteria for deciding, the reasonable and necessary supports or general supports that will be funded or provided under the NDIS;
- reasonable and necessary or general supports that will not be funded or provided under the NDIS;
- reasonable and necessary supports or general supports that will or will not be funded or provided under the NDIS for specified participants.

Under **subclauses 35(2) and 35(3)**, the rules may also prescribe methods for assessing or criteria for deciding the manner in which, and by whom, reasonable and necessary supports and general supports will be funded or provided.

Subclause 35(4) provides for rules to be made to deal with compensation payments when determining what reasonable and necessary supports will be funded or provided, and specifically how to take into account:

- lump sum compensation payments that specifically include an amount for the cost of supports;
- lump sum compensation payments that do not specifically include an amount for the cost of supports; and
- periodic compensation payments that the CEO is satisfied include an amount for the cost of supports.

The rules may also provide methods or criteria for how to take 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, according to **subclause 35(5)**.

Clause 36 sets out the circumstances in which the CEO may make a request for information and reports for the purposes of preparing and approving a statement of participant supports.

Under **subclause 36(2)** the CEO may request:

- that the participant or another person provide information that is reasonably necessary for the purposes of preparing, or deciding whether to approve the statement of participant supports;

- that the participant undergo an assessment and/or a medical, psychiatric or psychological examination, and provide a report to the CEO.

Subclause 36(3) enables the CEO to prepare, or decide whether to approve, the statement of participant supports before all of the information and reports requested under subclause 36(2) are received, but must give the participant a reasonable opportunity to provide them.

Clause 37 provides that a plan comes into effect when the CEO has received the participant's statement of goals and aspirations and approved the statement of participant supports.

Subclause 37(2) provides that a plan cannot be varied after it comes into effect, but can be replaced in accordance with Division 4. This means that, when a plan is reviewed and revised under Division 4, a new plan is created each time, rather than there being a variation of the original plan. This is intended to be a flexible process to take account of the changes to a participant's circumstances.

A plan ceases to be in effect either when it is replaced by another plan under Division 4 or when the participant ceases to be a participant (see clause 29), whichever happens first, according to **subclause 37(3)**.

Clause 38 provides that the CEO must give the participant a copy of their plan within seven days after the plan comes into effect.

Clause 39 requires the Agency to comply with the statement of participant supports in a participant's plan.

Clause 40 provides for what happens when a participant is temporarily absent from Australia.

Under **subclause 40(1)** a participant may be temporarily absent from Australia for the ***grace period*** without affecting the participant's plan.

The ***grace period*** is defined in **subclause 40(2)** as either six weeks beginning when the participant leaves Australia, or if the CEO is satisfied that it is appropriate for the grace period to be longer than six weeks, then such longer period as the CEO decides, having regard to any criteria in the NDIS rules.

The plan of a participant who is temporarily absent from Australia is suspended from the end of the grace period until the participant returns to Australia, according to **subclause 40(3)**.

For the purposes of this provision, a person's absence from Australia is temporary if, throughout the absence, the person does not cease to reside in Australia (within the meaning of paragraph 23(1)(a)) under **subclause 40(4)**.

Clause 41 provides for the suspension of a participant's plan. Under **subclause 41(1)**, the statement of participant supports in a participant's plan is suspended:

- as mentioned in subclause 40(1) (which deals with temporary absence from Australia); and

- as mentioned in subclause 105(2) (which deals with obtaining compensation).

When the statement of participant supports in a participant's plan is suspended, the plan remains in effect, but, during the period of suspension:

- the person is not entitled to be paid NDIS amounts, so far as the amounts relate to supports that would otherwise have been funded in respect of that period;

- the CEO is not required to provide or fund other supports under the plan but is not prevented from doing so if they consider it appropriate; and

- the participant is not entitled to request a review of the plan under subsection 48(1).

Division 3 – Managing the funding for supports under participants' plans

Clause 42 explains what ***managing the funding for supports*** under a participant's plan means for the purposes of the Act, namely:

- purchasing the supports identified in the plan (including paying any applicable indirect costs, such as taxes, associated with the supports);

- receiving and managing any funding provided by the Agency; and

- acquitting any funding provided by the Agency.

Under **subclause 42(2)**, the statement of participant supports in a participant's plan must specify that the plan is to be managed either wholly, or to a specific extent, by the participant, a registered plan management provider, the Agency, or the plan nominee.

Clause 43 allows the participant to choose how their plan is to be managed. The NDIS is designed to give people with disability control over the management of their support package. Accordingly, a participant can make a ***plan management request*** that:

- they manage the plan wholly or to the extent specified in the request;
- the plan be managed wholly, or to the extent specified in the request, by a registered plan management provider they nominate; or
- the plan be managed wholly, or to the extent specified in the request, by a person specified by the Agency (**subclause 43(1)**).

Under **subclause 43(2)**, the plan must give effect to the plan management request, except where:

- the participant is prevented from managing the plan to any extent by clause 44 – the statement of participant supports must provide that the plan is to be managed in accordance with the plan management request to the extent that the participant is not prevented from managing it, and the remainder of the plan is to be managed by a registered plan management provider or the Agency (**subclause 43(3)**); or
- if the participant has a plan nominee – the statement of participant supports must provide that the plan is to be managed by the nominee.

If a participant does not make a plan management request, the statement of participant supports must specify that the plan is to be managed by a registered plan management provider or the Agency, according to **subclause 43(4)**.

When determining who is to manage the plan, the CEO must, as far as reasonably practicable, have regard to the wishes of the participant (**subclause 43(5)**).

Clause 44 provides the circumstances under which a participant must not manage their own plan. These are:

- if the participant is an insolvent under administration;
- if the CEO is satisfied that management of the plan would present an unreasonable risk to the participant; or

- if the CEO is satisfied that management of the plan would permit the participant to manage matters that are prescribed by the rules as being matters that must not be managed by a participant.

Subclause 44(3) provides that the rules may prescribe criteria to which the CEO is to have regard in considering whether the management of a plan by a participant would present an unreasonable risk to the participant.

Clause 45 provides for payment of NDIS amounts. **Subclause 45(1)** specifies that an NDIS amount that is payable to a participant, or a person managing a plan, is to be paid at the time or times determined by the CEO in accordance with the rules, and in the manner set out in this section.

Subclause 45(2) provides that, without limiting what the NDIS rules may provide for, if rules are made under subclause 45(1), the NDIS amount is to be paid to the bank account nominated and maintained by the person to whom it is to be paid. An NDIS amount is not payable until the person nominates an account or the CEO gives a direction.

Clause 46 provides for the acquittal of NDIS amounts. **Subclause 46(1)** specifies that a participant or a person managing a participant's plan who receives an NDIS amount must:

- spend the money in accordance with the plan; and

- retain records of each NDIS amount paid to the participant or to someone on the participant's behalf of a type prescribed by the NDIS rules, and for a period of time as may be prescribed by the rules.

Division 4 – Reviewing and replacing participants' plans

Subclause 47 allows a participant to change the participant's statement of goals and aspirations at any time.

After the participant provides the CEO with a revised statement, the plan will be replaced by a new plan comprising the revised participant's statement of goals and aspirations and the statement of participant supports in the existing plan (**subclause 47(2)**).

The Agency must provide the participant with a copy of the new plan within seven days of receiving the revised statement of goals and aspirations (**subclause 47(3)**).

Clause 48 allows for a review of a plan to be done at any time – either at the request of a participant or on the initiative of the Agency.

A participant may request a review of their plan at any time under **subclause 48(1)**. That request is made to the CEO, and the CEO must decide, within 14 days, whether or not to conduct the review. If the decision whether to review is not made within that time, the CEO is deemed to have made a decision not to conduct the review (**subclause 48(2)**).

The decision not to review a plan is a reviewable decision under paragraph 99(f), and it will be automatically reviewed under subclause 100(5).

Subclause 48(3) requires the CEO to commence to facilitate the review within 14 days after deciding to conduct the review, and to complete the review as soon as reasonably practicable.

Subclause 48(4) provides that the CEO may conduct a review on their initiative at any time, but must conduct a review of the plan before the plan's review date and in the circumstances, if any, specified in the plan (**subclause 48(5)**).

Subclause 48(6) requires the CEO to review a participant's plan in the circumstances, if any, prescribed in the NDIS rules.

Clause 49 requires the CEO to facilitate the preparation of a new plan with the participant (in accordance with Division 2) if the CEO conducts a review of the plan under section 48.

Clause 50 provides that the CEO may request information or that the participant undergo an assessment or a medical, psychiatric or psychological examination for the purposes of reviewing a plan under clause 48. This provision reflects the request power in clause 26 of the Act.

Chapter 4 – Administration

Summary

Chapter 4 of the Bill sets out the administrative structure for the NDIS, including comprehensive rules to protect personal information, the process for registering providers of supports, and rights to review of decisions. It also sets out the process by which a person can make decisions for children with disabilities, or a nominee can be appointed to make decisions on behalf of a participant, while ensuring that the rights and dignity of children and people with disability are maintained.

Explanation of the clauses

Part 1 – General matters

Division 1 – Participants and prospective participants

Clause 51 identifies circumstances where a participant or prospective participant must notify the CEO of a change in their circumstances. These are where:

- an event or change of circumstances happens that affects, or might affect, their access request, status as a participant or their plan; or

- they become aware that such an event or change of circumstances is likely to happen (**subclause 51(1)**).

The participant or prospective participant must notify the CEO in writing, consistent with clause 52, and as soon as reasonably practicable, according to **subclause 51(2)**.

Clause 52 provides that the CEO must approve the manner of notification under clause 51, and must notify the participant or prospective participant in writing of the approved manner of notification.

Clause 53 provides for the circumstances in which the CEO may obtain information from participants and prospective participants to ensure the integrity of the NDIS, the protection of participants and prospective participants, and to guard against fraud.

Subclause 53(1) provides that the CEO may require the participant or prospective participant to provide information or a document, of which they have custody or control, if the CEO has reasonable grounds to believe that the information or document may be relevant to a matter set out in a list in **subclause 53(2)**.

Clause 54 provides for how a notice must be given under clause 53. It must be in writing (**subclause 54(1)**) and must specify a number of matters listed in **subclause 54(2)**. A person must be given at least 14 days from the date the notice is given to provide the information or produce the document (subclause 43(3)).

Division 2 – Other persons

Clause 55 empowers the CEO to require a person (other than a participant or prospective participant) to give information or produce a document to the Agency if the CEO has reasonable grounds to believe that the information or document may be relevant to one of the matters specified in **subclause 55(2)**.

In addition to ensuring the integrity and operation of the scheme and the protection of people with disability, and guarding against fraud, the purpose of this clause is to enable the Agency to collect and obtain the information it requires in order to perform its functions – in particular, collecting, analysing and exchanging data about disability and undertaking research in relation to disability. The collection and exchange of data is also important to ensuring the financial sustainability of the scheme.

Clause 56 provides that a notice given under clause 55 must be in writing, and must specify certain information, which reflects the requirements in clause 54 (see above).

In addition, **subclause 56(4)** provides that a notice may require the person to give the information requested by appearing before a specified officer to answer questions. If the notice includes a requirement to appear before an officer and to answer questions, then it must also state the time and place where the person must appear, and the time must be at least 14 days after the notice is given (**subclause 56(5)**).

Clause 57 provides for a criminal offence for the failure of a person (other than a participant or prospective participant) to comply with a requirement under clause 55, unless they have a reasonable excuse. The penalty is a maximum of 30 penalty units. A penalty unit is prescribed for the purposes of the *Crimes Act 1914*. That Act also provides that, if a body corporate is convicted of an offence, a fine of up to five times the penalty stated can be imposed.

The burden of proving whether a person has a reasonable excuse is on the defendant, by virtue of subsection 13.3(3) of the *Criminal Code*. This provision in the *Criminal Code* provides that a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification provided by the law creating an offence bears an evidential burden in relation to that matter.

Division 3 – Interaction with other laws

Clause 58 clarifies that the obligation to give information, produce a document or give evidence to the Agency or an officer for the purposes of this Act, is not affected by state or territory laws (**subclause 58(1)**). However, under **subclause 58(2)**, a person is not required to give information or documents if the person would be prevented from doing so under a law of a state or territory and that law has been prescribed by the NDIS rules.

Clause 59 clarifies that a person is not required to give information or produce a document when doing so would contravene a law of the Commonwealth.

Part 2 – Confidentiality

Clause 60 sets out the measures that must be taken for the protection of personal information that the Agency may obtain in the course of performing its functions. A large amount of personal information will likely be acquired by the Agency through the operation of the scheme, and the protection of that information and a person's right to privacy is considered paramount.

The meaning of ***protected information*** for the purposes of the Act is included in clause 9, and is information about a person that is or was held in the records of the Agency, or information to the effect that the Agency holds no information about a person.

A person may only obtain protected information for the purposes of the Act (**subclause 60(1)**).

A person may only make a record, disclose or otherwise use protected information in the following circumstances:

- for the purposes of the Act;
- with the expressed or implied authorisation of the person to whom the information relates; or
- if the person believes on reasonable grounds that doing so is necessary to prevent or lessen a serious threat to an individual's life, health or safety (**subclause 60(2)**).

The obtaining, recording, disclosure or use of information is taken 'to be for the purposes of the Act' only if the CEO reasonably believes that it is reasonably necessary for one or more of the following:

- research matters relevant to the NDIS;
- actuarial analysis of matters relevant to the NDIS; or
- policy development (subsection 60(3)).

Clause 61 creates an offence of unauthorised access to protected information. The rationale for this offence (and the other offences from clause 62 to clause 64 in relation to protected information) is that the injury caused by unauthorised access to protected information to an individual can be severe. The penalty is a maximum of two years' imprisonment, or 120 penalty units, or both. If a body corporate is convicted of an offence under this provision, a fine may be imposed of up to five times the amount specified (up to 600 penalty units).

Clause 62 creates an offence of unauthorised use of protected information. The rationale for this offence is that the injury caused by unauthorised access use of protected information to an individual can be severe. A person commits an offence if they make a record of information, disclose information to any other person, or otherwise make use of information (and are not otherwise authorised to so under the Act). The penalty is a maximum of two years' imprisonment or 120 penalty units. As above, a body corporate can be fined an amount of up to five times the specified penalty.

Clause 63 creates an offence of soliciting disclosure of protected information. A person commits an offence if they solicit the disclosure of protected information from an officer or another person (whether or not any protected information is actually disclosed), the disclosure would contravene this Division, and the information is protected information. The penalty is two years' imprisonment or 120 penalty units (or up to five times for a body corporate).

Clause 64 creates an offence of supplying protected information. **Subclause 64(1)** provides that a person commits an offence if they offer to supply (whether to a particular person or otherwise) information about another person and they know it is protected information. The penalty is two years' imprisonment or 120 penalty units (or up to five times for a body corporate).

Subclause 64(2) provides that a person also commits an offence if they hold themselves out as being able to supply (whether to a particular person or otherwise) information about another person, and they know it is protected information.

Subclause 64(3) clarifies that subclauses 64(1) and 64(2) do not apply to an officer acting in the performance or exercise of their duties, functions or powers under this Act.

Clause 65 provides that an officer must not, except for the purposes of this Act, be required to produce any document in their possession or disclose any matter or thing they had or knew because of their performance, exercise of their duties, functions or powers under the Act to a court, tribunal, authority or person who has the power to require the production of documents or the answering of questions.

Clause 66 gives the CEO the power to disclose protected information in strictly limited circumstances. This includes the power to disclose protected information if it is necessary in the public interest to do so – for example, if it is necessary for the investigation of a criminal offence.

In addition, the CEO may disclose protected information to the head of a Department of State or authority of the Commonwealth (including Centrelink and Medicare), a state or territory for the purposes of that Department or authority. Information may also be disclosed to persons expressly or impliedly authorised by the person to whom the information relates.

Subclause 66(2) provides that, if the CEO certifies that protected information may be disclosed in the public interest, or to the head of a Department of State of the Commonwealth, a state or territory, then the CEO must act in accordance with any NDIS rules made for the purposes of clause 67.

Subclause 66(3) clarifies that the CEO may give protected information to a participant's nominee if it relates to the participant and the information is or was held in the records of the Agency.

Clause 67 provides that NDIS rules may be made relating to:

- the CEO's power to certify the disclosure of protected information in the public interests (paragraph 66(1)(a)); or
- the CEO's power to disclose information to the heads of Commonwealth, state or territory departments or authorities (subparagraph 66(1)(b)(i) or (v)).

Clause 68 clarifies that nothing in this Part relating to the disclosure of information affects the operation of the *Freedom of Information Act 1982*.

Part 3 – Registered providers of supports

Clause 69 allows a person or entity to apply to become a registered provider of supports. The consequence of becoming a registered provider of supports is that the person or entity will be able, either or both, to manage the funding for participant's supports under plans, and/or provide supports to participants (**subclause 69(1)**).

Subclause 69(2) clarifies that the application to become a registered provider of supports must be in a form approved by the CEO (if there is one), and include any information and be accompanied by any documents required by the CEO.

Clause 70 sets out how a person or entity becomes a registered provider of supports. The CEO must approve a person or organisation if they make an application under clause 69 and the CEO is satisfied that the applicant meets any criteria prescribed by the NDIS rules (**subclause 70(1)**).

If the CEO approves an applicant as a registered service provider, the CEO must then make a written instrument to reflect this (**subclause 70(2)**). The instrument may specify that the person or entity is a provider of supports for a class of supports or a class of persons with disability (**subclause 70(3)**). The CEO may also specify in the instrument that the approval ceases on a specified day (**subclause 70(4)**).

Clause 71 provides that approval as a registered provider of supports ceases on either the day on which revocation of approval under clause 72 takes effect, or the day that the CEO specifies in the written instrument that the approval ceases to be in effect – whichever is earlier.

Clause 72 sets out the circumstances in which the CEO must revoke approval as a registered provider of supports. This includes:

- if the CEO is satisfied that the person/entity no longer meets the criteria specified in the NDIS rules; or

- the application for approval included false or misleading information (**subclause 71(1)**).

The CEO must notify the person/entity before revoking approval. The notification must state the reasons for considering revocation and invite the person/entity to make submissions to the CEO within 28 days of receiving the notice. It must also inform the person that, if no submissions are made, revocation may take effect seven days from the end of the 28-day period (**subclause 72(2)**).

Before making a final decision, the CEO must consider any submissions made (**subclause 72(3)**). **Subclauses 72(4) and 72(5)** require the CEO to notify the person in writing of their decision within 28 days after the end of the period for making submissions. Failure to notify of the decision means the CEO is deemed to have decided not to revoke the approval.

Clause 73 allows NDIS rules to be made in relation to the approval of registered providers of supports. This may include criteria relating to compliance with specified safeguards, quality assurance requirements, and qualifications of the person, or employees of the entity. The rules can also include details of the consequences of failure to comply with the Act, regulations or rules, and other requirements with which providers must comply; including governance, business and accounting practice, obligations for monitoring compliance, complaints handling, and auditing requirements.

Part 4 – Children

Clause 74 applies to ***children*** who are participants in the NDIS. It addresses who may make decisions or do things on behalf of children under the Act, and provides processes around how this will occur.

In the first instance, the person who can do things for a child under the Act would be the person who has, or persons who jointly have, ***parental responsibility*** for the child. However, if the CEO is satisfied this is not appropriate, the CEO may appoint a person to do things for the child under the Act (**subclause 74(1)**).

Child is defined in clause 9 to mean a person who is under 18 years of age.

Parental responsibility is defined in clause 75 (see below).

A person identified in **subclause 74(1)** may make a plan management request for a participant who is a child, similar to the process provided for adult participants under clause 43 (**subclause 74(2)**. The statement of participant supports in the plan must give effect to this plan management request (**subclause 74(3)**).

However, the above provisions will not have effect in relation to a participant who is a child if:

(a) the CEO is satisfied that the child is capable of making decisions for himself or herself; and

(b) the CEO makes a determination that it is not appropriate for these provisions to apply to the participant (**subclause 74(4)**).

This is to maximise the choice and control a child with disability has over the provision of their supports.

Subclause 74(6) provides that such a determination is not a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*. This is to assist the reader and is merely declaratory of the law.

Subclause 74(5) provides that the NDIS rules may prescribe criteria to which the CEO must have regard in deciding whether to make a determination, whether a child is capable of making decisions and whether it appropriate for these provisions to not apply to a child.

Clause 75 defines ***parental responsibility*** for the purposes of the Act. A person has parental responsibility for a child if:

- they are the child’s parent and have not ceased to have parental responsibility under Family Court orders or orders made under a law of a State or Territory; or

- under a Family Court parenting order, the child is to live with the person, spend time with the person, or the person has responsibility for the child’s long-term or day-to-day care, welfare and development (**subclause 75(1)**).

Subclause 75(2) provides a presumption that a person has parental responsibility for a child if they do so under a law of the Commonwealth, a state or territory. However, the CEO may determine that one or more persons referred to in subclause 75(1) may have parental responsibility instead.

Subclause 75(3) provides that the CEO may determine that one or more persons may have parental responsibility for a child for the purposes of the Act, if there is more than one person who could have parental responsibility for the child under subclause 75(1).

Subclause 75(4) provides that the rules may prescribe criteria for the CEO to take into account in making a determination under the provision.

A determination made by the CEO for the purposes of the provision must be in writing, and is not a legislative instrument within the meaning of section 5 of the *Legislative Instrument Acts 2003*. This is to assist the reader and is merely declaratory of the law (see **subclauses 75(5)** and **75(6)**).

Clause 76 sets out the duties of a person who may act on behalf of a child under clause 74.

Under **subclause 76(1)**, the person has a duty to ascertain the wishes of the child participant and act in a manner that promotes the personal and social wellbeing of the child. This is consistent with other Australian law as it deals with children, and ensuring that people act in the best interests of the child.

This duty will not be breached if the person reasonably believes that they have ascertained the child's wishes, and that they have done a thing, or not done a thing, to promote the personal and social wellbeing of the child, either at the time when the thing is done, or at the relevant time where something was not done, under **subclauses 76(2)** and **76(3)**.

Subclause 76(4) provides that NDIS rules may be made to prescribe other duties of a person acting on behalf of a child, including supporting decision-making by the child, or how the views of the child may be taken into account.

Clause 77 provides that determinations made by the CEO about who may act on behalf of a child can be revoked by the CEO. The CEO may revoke the determination if requested by the person, or if the CEO is satisfied that there has been a change of circumstances that means it is no longer appropriate for that person to continue to act for the child. The instrument must be in writing, and must be given to the person.

Part 5 – Nominees

Division 1 – Functions and responsibilities of nominees

Clause 78 provides for what a ***plan nominee*** may do on behalf of a participant. A plan nominee may do things that can be done by a participant under the Act relating to the preparation, review or replacement of their plan, or the management of funding for supports under their plan. The instrument of appointment of the plan nominee may limit the extent to which a plan nominee can do things on behalf of a participant (see subclause 86(3)), in which case the plan nominee may only do things to the extent specified in the instrument (**subclause 78(1)**).

Without limiting subclause 78(1), a plan nominee can make a request under the Act that can be made by the participant (**subclause 78(2)**).

Anything done by the plan nominee under the provision has effect as if it had been done by the participant (**subclause 78(3)**).

However, if the CEO gives a notice to the participant under the Act, a plan nominee cannot do something if it is required to be done by the participant (**subclause 78(4)**).

If a plan nominee is appointed on the initiative of the CEO, the plan nominee may only do something relating to the preparation, review or replacement of a participant's plan, or the management of the funding for supports under the plan if the nominee considers that the participant is not capable of doing the thing themself (**subclause 78(5)**).

Clause 79 provides for what a ***correspondence nominee*** may do on behalf of a participant. **Subclause 79(1)** provides that any act that may be done under or for the purposes this Act may be done by a person's correspondence nominee, other than an act which relates to the preparation, management or review of a plan, or the management of funding for supports under a plan.

A request under the Act that may be made by a participant may be made by a person's correspondence nominee (**subclause 79(2)**), and an act done by a person's correspondence nominee is taken to have been done by the person (**subclause 79(3)**). Subclause 79(1) does not, however, apply to an act required by the CEO under a notice (**subclause 79(4)**).

Clause 80 sets out what the duties of a nominee are to the participant.

Subclause 80(1) states that it is the duty of a nominee to ascertain the wishes of the participant and to act in a way that promotes the personal and social wellbeing of the participant.

However, a nominee does not breach this duty by doing an act if, when the act is done, the nominee reasonably believes they have ascertained the wishes of the participant in relation the act and the act promotes the personal and social wellbeing of the participant (**subclause 80(2)**).

A nominee also does not breach this duty by not doing an act if, at the relevant time, the nominee reasonably believes that they have ascertained the wishes of the participant in relation to the act and, by not doing the act, have promoted the personal and social wellbeing of the participant (**subclause 80(3)**).

Subclause 80(4) provides that the NDIS rules may prescribe other duties of a nominee, including duties requiring them to support the participant to make their own decisions, or to the consideration of the wishes of the participant.

Clause 81 sets out how notices are to be provided to correspondence nominees. **Subclause 81(1)** provides that any notice the CEO is authorised or required to give under the Act to a participant may be given to the correspondence nominee. The notice must be in the same form and terms as if it were being given to the participant, and may be given to the correspondence nominee personally, by post, or by any other means approved by the CEO, according to **subclause 81(2)**.

If the CEO gives notice to the correspondence nominee of something in relation to which the CEO has already given notice, or afterwards gives notice to the participant, that is expressed in the same way and makes the same requirement, then section 82 ceases or does not come into effect under **subclause 81(3)**.

Clause 82 sets out the effect of notice given to a correspondence nominee.

Subclause 82(1) provides that, if a notice is given to a participant's correspondence nominee, then the notice is taken to have been given to the participant on the day the notice was given to the correspondence nominee. Any requirement made of the participant to inform the CEO of a matter or give information or documents to an officer can be satisfied by the correspondence nominee, and any act done by the correspondence nominee to satisfy such a requirement is taken to be done as if it was done by the participant. Equally, if the correspondence nominee fails to satisfy a requirement, then the participant is taken to have failed to satisfy the requirement.

To avoid doubt, the participant is taken to have complied with a requirement if, within the specified period, the correspondence nominee complies with a requirement. Also to avoid doubt, if the correspondence nominee fails to comply with a requirement within a specified period, the participant is taken to have not complied (**subclauses 82(2)** and **82(3)**).

Clause 83 sets out the circumstances where a nominee must inform the Agency of matters affecting their ability to act as a nominee. **Subclause 83(1)** provides that the CEO may give a nominee written notice that they are required to inform the Agency of events or changes of circumstances (or where such an event or change is likely to happen) if it is likely to affect:

- the ability of the nominee to act as the plan or correspondence nominee;
- the ability of the CEO to give notices to the nominee; or
- the ability of the nominee to comply with notices given to the nominee by the CEO under this Act.

Subclause 83(2) sets out what the notice must specify:

- how the nominee is to inform the Agency; and
- the period within which the nominee must inform the Agency, which must be at least 14 days from the day on which the event or change of circumstances happens, or the day on which the nominee becomes aware that the event or change of circumstances is likely to happen.

A notice will not be ineffective if it only fails to include information on how the nominee is to inform the Agency (**subclause 83(3)**).

The provision is expressed to apply to acts, omissions, matters and things outside Australia, whether in a foreign country or not, and all persons irrespective of their nationality or citizenship (**subclause 83(4)**).

Clause 84 sets out the process for the Agency giving a plan nominee a notice that they are required to provide a statement about matters relating to the disposal of money. The CEO may give the plan nominee notice to provide such a statement with which they are required to comply (**subclause 84(1)**). The notice and statement requirements are set out in **subclauses 84(2), 84(3), 84(4) and 84(5)**. The notice must specify how the plan nominee is to provide the statement, and how long the plan nominee has to provide it (which must not be less than 14 days from the day the notice is given), and the statement must be in the form approved by the CEO.

Subclause 84(6) creates an offence if a person is a plan nominee and the person refuses or fails to comply with a notice under subsection 84(1). The penalty for the offence is 30 penalty units and it is a strict liability offence (**subclause 84(8)**). The rationale for this being a strict liability offence is that it does not involve dishonesty or other serious imputation affecting the person's reputation – rather, the offence is for a failure to comply. **Subclause 84(7)** clarifies, however, that subclause 84(6) does not apply if the person has a reasonable excuse. **Subclause 84(9)** provides that this section extends to acts, omissions, matters and things outside Australia and all persons irrespective of nationality or citizenship.

Clause 85 provides for the right of the nominee to attend assessments and medical, psychiatric or psychological examinations with the participant. The nominee may only accompany the participant if the participant so wishes, and to the extent that the person conducting the assessment or examination consents (**subclause 85(1)**).

If the correspondence nominee is a body corporate, then the reference in subclause 85(1) refer to an officer or employee of the nominee (**subclause 85(2)**).

Division 2 – Appointment and cancellation or suspension of appointment

Clause 86 allows for the appointment of plan nominees. **Subclause 86(1)** provides that the CEO may appoint (in writing) a person to be the ***plan nominee*** of a participant. The appointment may be made at the request of the participant or on the initiative of the CEO (**subclause 86(2)**).

Clause 87 allows for the appointment of correspondence nominees. **Subclause 87(1)** provides that the CEO may appoint (in writing) a person to be the ***correspondence nominee*** of a participant. The appointment may be made at the request of the participant or on the initiative of the CEO (**subclause 87(2)**).

Clause 88 sets out the requirements in relation to appointments of nominees. **Subclause 88(1)** allows a person to be a plan nominee and a correspondence nominee of the same participant. **Subclause 88(2)** specifies that the CEO must not appoint a nominee of a participant under section 86 or 87 except:

- with the written consent of the person to be appointed; and
- after taking into consideration the wishes (if any) of the participant regarding the making of such an appointment.

Subclause 88(3) requires the CEO to consider whether the person is able to comply with clause 80 (duties of the nominee) before appointing someone as a nominee.

Subclause 88(4) requires the CEO to have regard to whether a person has guardianship of a participant under a law of the Commonwealth, a state or territory before appointing a nominee.

Subclause 88(5) requires the CEO to give a copy of a section 86 or section 87 appointment to the nominee and the participant.

The rules may prescribe certain persons who must not be appointed as nominees, and criteria to which the CEO must have regard in considering the appointment of a nominee (**subclause 88(6)**).

Clause 89 provides the circumstances in which the CEO must cancel the appointment of nominees.

If a nominee has been appointed at the request of the participant, and the participant requests the CEO to cancel the appointment, the CEO must cancel the appointment by written instrument as soon as practicable (**subclause 89(1)**). The request need not be in writing, but, if not, then the CEO must make a written record of the request (**subclause 89(2)**).

If a nominee notifies the CEO in writing that they no longer wish to be a nominee, the CEO must cancel the appointment as soon as practicable (**subclause 89(3)**).

The instrument of cancellation must be given to the person whose appointment is cancelled, and the participant (**subclause 89(4)**).

Clause 90 provides for the general circumstances in which the CEO may suspend or cancel nominee appointments.

If a person has been appointed as a nominee at the initiative of the CEO, and the participant requests the appointment to be cancelled, the CEO may cancel the appointment ((**subclause 90(1)**). The request need not be in writing, but if not, then the CEO must make a written record of the request (**subclause 90(2)**).

Subclause 90(3) requires the CEO to decide whether to cancel the appointment within 14 days after receiving the request, and, if the CEO decides not to cancel the appointment, written notice of the CEO’s decision must be given to the nominee and the participant.

The CEO may also suspend or cancel one or more nominee appointments, by written instrument, if the CEO gives the nominee a notice under section 83 and the nominee informs the Agency that an event or change of circumstances has happened or is likely to happen and is likely to have an effect referred to in paragraph 83(1)(b), according to **subclause 90(4)**.

The CEO may also suspend or cancel one or more nominee appointments, by written instrument, if the CEO gives a nominee a notice under section 83 or 84 and the nominee does not comply with the requirements of the notice, according to **subclause 90(5)**.

Both the nominee and the principal must be given a copy of an instrument cancelling or suspending an appointment under this section (**subclause 90(6)**).

Clause 91 provides for the suspension of the appointment of nominees in cases of severe physical, mental or financial harm. **Subclause 91(1)** provides that the CEO may, by written instrument, suspend the appointment of a nominee if the CEO has reasonable grounds to believe that the person has caused, or is likely to cause, this kind of harm to a participant.

Subclause 91(2) requires the CEO, upon suspending a person's appointment, to give the person and the participant a copy of the instrument of suspension, and a written notice requiring the person to provide a statement of reasons as to why their appointment should not be cancelled within 28 days after the notice is given.

If the person provides the statement, the CEO may cancel the appointment by written instrument, and must make a decision as soon as practicable after receiving the statement (**subclauses 91(3) and 91(4)**). If the person does not provide the statement, the CEO must cancel the appointment by written instrument (**subclause 91(6)**).

If the CEO makes a decision to cancel the appointment, a copy of the cancellation instrument must be given to the person and the participant (**subclause 91(7)**).

Under **subclause 91(5)**, if the CEO decides not to cancel the appointment, the suspension of the appointment ends, and the CEO must give the person and the participant written notice of the decision.

Clause 92 is concerned with other matters in relation to the cancellation or suspension of appointment of nominees. **Subclause 92(1)** provides for the circumstance where the NDIS rules made for the purposes of subclause 46(2) (acquittal of funds) apply to a nominee, and the appointment of the nominee is cancelled. In that situation, the rules continue to apply to the nominee as if the appointment had not been cancelled. This means that the nominee must continue to, for example, keep the types of records for as long as they may be required to be kept under the NDIS rules.

Subclause 92(2) provides that, while a person's appointment as a nominee is suspended, they are unable to do things on behalf of a participant, because the appointment has no effect for the purposes of the Act.

Subclause 92(3) allows the CEO to appoint another person under clause 86 or 87 to be the nominee for a participant during a period when a person's appointment is suspended.

Clause 93 provides that NDIS rules may be made to set out requirements with which the CEO must comply relating to nominee appointments, cancellations or suspensions, and matters to which the CEO must have regard in appointing nominees, or cancelling or suspending appointments of nominees.

Clause 94 clarifies that nothing in this Part is to be taken to be an expression of a contrary intention for the purposes of subsection 33(3) of the *Acts Interpretation Act 1901*, which provides that a power to make an instrument is to be construed to also include a power to repeal, rescind, revoke, amend, or vary the instrument.

Division 3 – Other matters relating to nominees

Clause 95 clarifies that nothing in this Part is intended to affect the CEO's powers under other provisions of this Act to give notices to, or make requirements of, a participant who has a nominee.

Clause 96 is concerned with the provision of notification to nominees where notice is given to a participant.

Subclause 96(1) provides that, if the CEO gives a participant with a correspondence nominee a notice under a provision in the Act (other than a provision of this Part), the CEO may inform the correspondence nominee of the giving of the notice and of the terms of the notice.

Under **subclause 96(2)**, if the CEO gives a notice to a participant who has a plan nominee under this Act (other than under a provision of this Part), and the notice relates to the preparation, management or review of the participant's plan, the CEO must inform the plan nominee of the giving of the notice and the terms of the notice.

Clause 97 provides that a participant is not guilty of an offence relating to an act or omission of their nominee.

Clause 98 is concerned with the protection of nominees from criminal liability. **Subclause 98(1)** provides that a nominee is not subject to any criminal liability under this Act in relation to an act or omission of the participant or anything done, in good faith, by the nominee in their capacity as nominee.

Subclause 98(2) states that this section is subject to clause 84, which relates to when the CEO may require the nomine to give a statement about the disposal of money where it is paid to a nominee on behalf of a participant.

Part 6 – Review of decisions

Clause 99 lists the decisions of the CEO that are ***reviewable decisions***:

- a decision that a person does not meet the access criteria (paragraph 20(a), subsection 21(3) or paragraph 26(2)(c));
- a decision not to specify a period longer than 28 days for a prospective participant to comply with a request (paragraph 26(2)(b));
- a decision to revoke a person's status as a participant (section 30);
- a decision to approve the statement of participant supports in a participant's plan (subsection 33(2));
- a decision not to extend a grace period (paragraph 40(2)(b));
- a decision not to review a participant's plan (subsection 48(1) or (2));
- a decision to refuse to approve a person as a registered provider of supports (section 70);
- a decision to revoke an approval as a registered provider of supports (section 72);
- a decision to make, or not to make, a determination about who may do things on behalf of a child for the purposes of the Act (paragraph 74(1)(b));
- a decision not to make a determination that a child may make decisions on their own behalf under the Act (paragraph 74(4)(c));
- a decision to make, or not to make, a determination that a person has parental responsibility for a child (subsections 75(2) or (3));
- a decision to appoint a plan nominee (section 86);
- a decision to appoint a correspondence nominee (section 87);
- a decision to cancel or suspend, or not to cancel or suspend, the appointment of a nominee (section 89, 90, or 91);
- a decision to give a notice to require a person to take reasonable action to claim or obtain compensation (section 104);
- a decision to give a notice that the CEO proposes to recover an amount specified in the notice from an amount of compensation (section 111);

- a decision not to treat the whole or part of a compensation payment as not having been fixed by a judgement or settlement (section 116).

Clause 100 sets out the process for internal review of reviewable decisions. This is the first stage of merits review under the Act and involves internal review undertaken by another appropriately authorised person in the Agency who was not involved in making the original decision. It is also mandatory to seek internal review by the Agency before applying to the Administrative Appeals Tribunal for external merits review.

Subclause 100(1) requires the CEO to give written notice of a reviewable decision to each person directly affected by the decision. A person affected by a decision, depending on the relevant decision, may include prospective participants, participants, people with parental responsibility or nominees, people who seek to have parental responsibility or to become a nominee, persons or organisations applying to become registered service providers, registered service providers and so on.

The notice must also specify that the person may request the CEO to review the decision and that the person may seek further review under section 103.

If a deemed decision has been made that a person does not meet the access criteria (under subsection 21(3)) or that the CEO has decided not to review a participant's plan (subsection 48(2)), the notice must state that this decision will be reviewed automatically. Failure to comply with this requirement does not, however, affect the validity of the decision (**subsection 100(8)**).

A person who receives this notice may request the CEO to review the decision within three months of receiving the notice (**subclause 100(2)**). Such a request may be made to the CEO written or orally (**subclause 100(3)**), and, if it is made orally, the person receiving the oral request must record the day the request is made and the details of the request in writing (**subclause 100(4)**).

If a request is received, or the reviewable decision was one of the deemed decisions in subsection 21(3) or 48(2), the CEO must then cause the decision to be reviewed by a reviewer who has the delegation to conduct a review and who was not involved in making the original decision (**subclause 100(5)**).

Subclause 100(6) allows the reviewer to confirm, vary or set aside the original decision. If the original decision is set aside, it must be substituted for a new decision. A decision by the reviewer must be made as soon as reasonably practicable.

Subclause 100(7) clarifies that a request for review of a decision does not affect the operation of the decision or prevent actions being taken to implement the decision. This means that the Agency can continue to implement a plan, including the funding of supports under the plan, if the participant has requested a review of the CEO's decision to approve the statement of participant supports.

Subclause 100(9) clarifies that the reference in the provision also includes a reference to an entity for the purposes of decisions made to approve or revoke the approval of a registered provider of supports.

Clause 101 provides that, if a decision is varied before a review is completed, then the review is of the varied decision to ensure that the most recent decision is considered.

Clause 102 provides that a request for review of a decision may be withdrawn by the individual who made the request, orally or in writing. If it is done orally, the person receiving the oral withdrawal must record the day the withdrawal was made and the details of it in writing.

Clause 103 provides that a person may apply to the Administrative Appeals Tribunal for external review of the decision to confirm, vary or set aside the original decision arising from the internal review process (see subclause 100(6). Once this application is made, the *Administrative Appeals Tribunal Act 1975* will apply.

Chapter 5 – Compensation payments

Summary

This Chapter deals with the treatment of compensation payments, including from workers' compensation schemes or motor vehicle accident insurance schemes, under the NDIS. The CEO will be able to require a person to take reasonable action to claim or obtain compensation and the Agency to recover the costs of supports that have been funded by the NDIS prior to a compensation claim being settled or a judgement.

Background

There are currently a range of insurance and compensatory schemes for personal injury arising from motor accidents, workplace accidents, criminal injury and similar. Compensation may also be available through a common law action.

The provision of support and assistance under the NDIS is not intended to replace existing entitlements to compensation. This Chapter therefore deals with the interaction between the NDIS and compensation for personal injury (including disability). There is also capacity for the NDIS rules to consider compensation in determining reasonable and necessary supports for a person (clause 35 refers).

Explanation of the clauses

Part 1– Requirement to take action to obtain compensation

Clause 104 applies where, in the CEO's opinion, a participant or prospective participant (a person in relation to whom an access request has been made but is not yet determined) may be entitled to compensation in respect of personal injury but the person has not taken reasonable action to claim or obtain that compensation. In this situation, the CEO may, by written notice, require the person to take reasonable action to claim or obtain compensation within a specified period, which needs to be at least 28 days after the day on which the notice is given made (**subclauses 104(2) and (5)** refer).

In deciding whether it is reasonable to require the person to take an action, the CEO must have regard to certain things, as set out in **subclause 104(3)**. These are:

- the disability of the person;
- the circumstances that give rise to the entitlement or possible entitlement to compensation;
- any impediments the person may face in recovering compensation;

- any reasons why the person has not claimed or obtained the compensation;
- the financial circumstances of the person; and
- the impact of the requirement to take action on the person and their family.

In addition, **subclause 104(4)** requires the CEO to be satisfied that there are reasonable prospects of success in claiming or obtaining the compensation before the CEO can give the notice.

The concept of ***compensation*** is used in clause 104 and elsewhere in Chapter 5. The term is defined in clause 11 to mean a payment of compensation or damages in respect of personal injury, a payment in respect of personal injury under a scheme of insurance or compensation under a Commonwealth, state or territory law, or a payment in respect of personal injury in settlement of a damages claim or a claim under such a scheme, that is wholly or partly in respect of the costs of supports of the type that could be provided under the NDIS. Compensation can be a payment to the person who sustained the injury or to another person in respect of that person (for example, to a service provider who is providing supports to the person with disability). The definition covers payments made with or without admission of liability, and can be in the form of a lump sum payment or a series of periodic payments, made within or outside Australia.

Subclause 104(6) ensures that a person would not be able to avoid the requirement to take action to claim or obtain compensation by entering into an agreement to give up their right to compensation (that is, by agreeing to waive their right to compensation or to withdraw their claim for compensation as per the definition in clause 11) where the CEO is satisfied that such an agreement is void, ineffective or unenforceable. In these circumstances, it would be open to the CEO to form the opinion that the person may be entitled to compensation.

Clause 105 requires a person who has been given a notice under clause 104 to take the required action to claim or obtain compensation within the specified period and sets out the consequences of a failure to take such action.

If a person who has a plan in effect fails to take the required action, then their plan is suspended from the end of the specified period until the required action is taken. Clause 41 sets out the effect of a suspension a participant's plan.

A failure to take the required action would not affect the CEO's capacity to consider an access request or to facilitate the preparation of the participant's plan, but the plan would not come into effect until the required action was taken by the participant.

Part 2 – Agency may recover compensation fixed after NDIS amounts have been paid

In broad terms, Part 2 provides for the calculation of a recoverable amount so as to enable recovery of the costs of supports already funded under the NDIS launch where compensation is subsequently secured by settlement or judgement in respect of the person's impairment.

Clause 106 applies where an amount of compensation is fixed under a judgement that is not a consent judgement, the compensation is for personal injury which caused the participant's impairment, NDIS amounts had been paid in respect of the impairment before the day of the judgement and the judgement specifies a portion of the amount of compensation as being for the type of supports that have been funded under the NDIS.

Where clause 106 applies, an amount, referred to as the ***recoverable amount***, is payable by the participant to the Agency. This amount is calculated in accordance with **subclause 106(2)**.

As a starting point, the recoverable amount is set by reference to the NDIS amounts that have been paid in relation to the participant's impairment (the ***past NDIS amounts***). If the judgement fixes the amount of compensation on the basis that liability should be apportioned between the participant and another person such that the amount of compensation is reduced, then the sum of the past NDIS amounts are reduced in the same proportion and this becomes the recoverable amount.

However, if the recoverable amount, as calculated above, is greater than the amount specified in the judgement for supports of the kind provided or funded under the NDIS, then the recoverable amount is the amount specified in the judgement (**subclause 106(4)** refers).

Subclause 106(5) ensures that the recoverable amount cannot be more than the amount of compensation fixed under the judgement minus any amounts payable under the social security compensation provisions, under health legislation to reimburse Medicare payments and under any other Commonwealth, state or territory law prescribed by the rules.

Clause 107 applies where an amount of compensation is fixed under a consent judgement or settlement, the compensation is for personal injury which caused the participant's impairment and, before the day of the consent judgement or settlement, NDIS amounts had been paid in respect of the impairment.

Where clause 107 applies, an amount, referred to as the ***recoverable amount***, is payable by the participant to the Agency. This amount is calculated in accordance with **subclause 107(2).**

The recoverable amount is generally set by reference to the NDIS amounts that have been paid in relation to the participant's impairment (the ***past NDIS amounts***). However, if the judgement or settlement fixes the amount of compensation on the basis that liability should be apportioned between the participant and another person such that the amount of compensation is reduced, then the sum of the past NDIS amounts are reduced in the same proportion and this becomes the recoverable amount (**subclause 107(3)**).

Subclause 107(4) ensures that the recoverable amount cannot be more than the amount of compensation fixed under the judgement or settlement minus any amounts payable under the social security compensation provisions and under health legislation to reimburse Medicare payments and under any other Commonwealth, state or territory law prescribed by the rules.

The recoverable amount would then be a debt owed by the participant to the Agency under **clause 108**. This amount may be recovered directly from the compensation payer or insurer in accordance with the rules set out in Part 3 or from the participant under Chapter 7.

Part 3 – Recovery from compensation payers and insurers

If a participant or prospective participant makes a claim against another person (the ***potential compensation payer***) for compensation relating to their impairment**,** then **clause 109** allows the CEO to give a preliminary notice, in writing, to the potential compensation payer stating that the CEO may wish to recover an amount from the potential compensation payer. Similarly, a preliminary notice can be given to an insurer who may be liable to indemnify the potential compensation payer against liability arising from the claim for compensation.

The definition of compensation in clause 11 also includes a definition of an ***insurer*** for the purposes of the Act. A reference to an insurer is a person or entity that is, under a contract of insurance, liable to indemnify a compensation payer or potential compensation payer, and also includes an authority of a state or territory:

- that is liable to indemnify a compensation payer or potential compensation payer against such a liability, whether under contract, law or otherwise; or

- that determines to make an indemnity payment, whether liable to do so or not.

The notice must contain a statement about the potential compensation payer's or insurer's obligation to notify the CEO of liability and that the CEO may send a recovery notice to the compensation payer or insurer.

Under **clause 110**, it would be an offence for a potential compensation payer who has been given a preliminary notice in relation to a participant or prospective participant not to give written notice to the CEO within seven days after becoming liable to pay compensation to the participant or prospective participant or receiving the preliminary notice (whichever is later). The maximum penalty is expressed as imprisonment for 12 months, but, if the potential compensation payer was a body corporate, then the penalty would be pecuniary.

Similarly, it would be an offence for an insurer who has been given a preliminary notice not to give written notice to the CEO within seven days after becoming liable to indemnify the potential compensation payer in relation to the claim or receiving the preliminary notice (whichever is later). The same penalty applies as above.

Clause 111 provides for the CEO to be able to send a recovery notice to a compensation payer or insurer where an NDIS amount has been paid to a person under a participant's plan, and a compensation payer or insurer is liable to pay compensation to the participant in relation to their impairment. In this case, if the compensation payer is a state or territory authority, a recovery notice can be given if the authority has determined that a payment is to be made to the participant in relation to the impairment.

The compensation payer or insurer becomes liable to pay the Agency for the amount specified in the notice (**subclause 111(3**)).

Consistent with the approach taken in determining the recoverable amounts under clauses 106 and 107, the amount specified in the notice is to be the lesser of the NDIS amounts paid to the participant, or the recoverable amount in relation to the judgement, consent judgement or settlement (**subclause 111(4**)).

Offences apply to the failure to comply with a notice issued under clause 111, and the notice must include a statement to that effect (**subclause 111(5)**).

Subclause 111(6) clarifies that this provision applies to an amount payable by way of compensation in spite of any law of the Commonwealth, a state or territory under which the compensation is inalienable.

The amount specified in the notice also becomes a debt due by the person, who is given the notice, to the Agency (**subclause 111(7)**).

A compensation payer or insurer is not liable to pay the compensation or potential compensation while a notice under clause 109 or 111 is in effect under **clause 112**.

Under **clause 113** payment to the Agency of an amount that a compensation payer or insurer is liable to pay under clause 111 discharges any liability of the insurer, compensation payer or participant to pay the Agency.

Clause 114 establishes offences by potential compensation payers, or insurers for paying an amount of compensation to someone other than the Agency, including the participant or prospective participant, if a notice has been issued by the CEO under clause 109 or 111. The penalty is up to 12 months' imprisonment, although, if the offender is a body corporate, they will be liable to a pecuniary penalty under the *Crimes Act 1914*.

The offences do not apply if the CEO has given written notice that the clause 109 or 111 notice has been revoked, the amount specified in the notice has been paid to the Agency, or the CEO has given written permission for the amount to be paid.

In addition to the penalty for the commission of an offence under clause 114, **clause 115** provides that a potential compensation payer or insurer is also liable to pay to the Agency an amount determined by the CEO (if it relates to a notice under clause 109) or the amount specified in the notice (if it relates to a clause 111 notice). The amount cannot be more than the amount that would have been specified in a clause 111 notice if one had been given (**subclause 115(2)).**

Under **subclause 115(3)** the provision applies in spite of any Commonwealth, State or Territory law under which the compensation is inalienable.

Subclause 115(4) provides that the amount determined under this provision or specified in the clause 111 notice is a debt due to the Agency by the compensation payer or insurer.

Part 4 – CEO may disregard certain payments

Under **clause 116**, the CEO may treat the whole or part of a compensation payment as not having been fixed by a judgement, including a consent judgement, or settlement, if the CEO considers it appropriate to do so in the special circumstances of the case. This means that, in special circumstances, the CEO may decide not to issue a notice to recover an amount of money from an amount of compensation payable or paid to a prospective participant or participant.

Chapter 6 – National Disability Insurance Scheme Launch Transition Agency

Summary

Chapter 5 of the Bill establishes the National Disability Insurance Scheme Launch Transition Agency as a body independent from government. The Agency will deliver the scheme and perform a range of functions, including managing the financial sustainability of the scheme, building community awareness about disability and undertaking research about disability.

The legislation establishes the Agency as a body under the *Commonwealth Authorities and Companies Act 1997* (CAC Act). This was recommended by the Productivity Commission because of the importance, for an insurance approach, of administering the scheme with a corporate focus and independently of governments.

The Agency will be overseen by a Board made up of people with extensive experience in the provision or use of disability services, and in financial management, governance and the operation of insurance schemes, as well as an Advisory Council made up of people with lived experience of disability and caring.

To ensure the Board is accountable to Commonwealth, state and territory governments, a Ministerial Council will be established through COAG. All governments – state, territory and Commonwealth – will be represented on the Ministerial Council.

Explanation of the clauses

Part 1 – National Disability Insurance Scheme Launch Transition Agency

Clause 117 establishes the Agency as a statutory authority subject to the CAC Act, implementing the recommendation of the Productivity Commission, which suggested that the Agency should be subject to the requirements of the CAC Act. It also reflects the intention that the Agency will operate independently from governments, and use a corporate model of governance.

Clause 118 provides the functions of the Agency, which include:

(a) **Paragraph (1)(a)** – delivering the National Disability Insurance Scheme, which includes performing the functions conferred on the Agency under Chapters 2 and 3 of the Bill.

(b) **Paragraph (1)(b)** – managing, advising and reporting on the financial sustainability of the NDIS, including by regularly making and assessing estimates of current and future expenditure, and identifying and managing risks and issues relevant to the financial sustainability of the NDIS.

(c) **Paragraph (1)(c)** – developing and enhancing the disability sector, including by facilitating innovation, research and contemporary best practice in the sector.

(d) **Paragraph (1)(d)** – building community awareness of disabilities and the social contributors to disability. Social contributors to disability refer to the environmental and societal factors which contribute to a person's 'disability'. For example, inaccessible public transport systems 'disable' a person from participating economically and socially in public life. It is envisaged that the Agency will play a role in identifying, developing policy and raising public awareness around these matters in addition to disability itself.

(e) **Paragraph (1)(e)** – collect, analyse and exchange data about disabilities and the supports (including early intervention supports) for people with disability. This would include the exchange of information with state or territory bodies administering an injury insurance scheme, such as the National Injury Insurance Scheme, also a COAG initiative.

(f) **Paragraph (1)(f)** – undertake research relating to disability, the supports (including early intervention supports) needed by people with disability and the social contributors to disabilities.

(g) **Paragraph (1)(g)** – any other functions conferred on the Agency by or under this Act, regulations or instruments made under this Act.

(h) **Paragraph (1)(h)** – anything incidental or conducive to the performance of the above functions.

Subclause 118(2) clarifies that, in performing its functions, the Agency must use its best endeavours to act in accordance with relevant inter-governmental agreements and in a proper, efficient and effective manner.

Clause 119 provides the Agency with the power to do anything necessary or convenient for or in connection with the performance of its functions, including the power to enter into contracts, and to accept gifts, devices, bequests and assignments.

Clause 120 provides the Minister with the power to give directions, by legislative instrument, to the Agency about the performance of its functions. Reflecting the fact that the NDIS is a shared scheme between the Commonwealth and the states and territories, the Minister cannot issue directions unless the Commonwealth and all launch site host jurisdictions have agreed to the giving of the direction.

The Minister may not issue directions to the Agency that relate to a particular individual. This means that the Minister cannot interfere with, for example, how particular person with disability's supports are assessed or how their plan is developed. The Minister must also not issue directions that are inconsistent with the Act, a regulation or instrument made under this Act, or with the CAC Act, reinforcing the independence of the Agency. The Agency must comply with a direction given by the Minister under this clause.

A note to the section explains that subsection 44(1) of the *Legislative Instruments Act 2003* provides that disallowance (section 42 of that Act) does not apply to the instrument. This is because directions issued to the Agency require the agreement of the Commonwealth Minister and all host jurisdictions, and so are part of facilitating the operation of the NDIS as an intergovernmental scheme involving the Commonwealth and states.

Clause 121 permits the Agency to recoup costs for things done in performing its functions, and the Minister may prescribe, by legislative instrument, the types of thing that the Agency may charge for, and how much the Agency may charge. As an example, the Agency may be permitted to charge fees for training seminars it conducts in order to cover the costs of hosting the seminar. The Agency cannot, however, charge an individual participant a fee in relation to any of its functions or a prospective participant in relation to an access request.

Clause 122 clarifies that the Agency does not have the privileges and immunities of the Crown, because it is a body established independent to governments.

Part 2 – Board of the Agency

Division 1 – Establishment and functions

Clause 123 establishes the Board of the Agency, partially implementing recommendation 9.2 of the Productivity Commission Report, which states than an independent skills-based board should oversee the Agency.

Clause 124 provides the functions of the Board, including the proper, efficient and effective performance of the Agency's functions.

Clause 125 provides that the Minister, with the agreement of the Commonwealth and all launch site host jurisdictions, may issue 'statements of strategic guidance' to the Board. The purpose of this provision is to allow the Commonwealth, states and territories to communicate their expectations of the Board and the broad strategic direction they expect it to take as it performs its functions. The Board must have regard to such a statement. This ensures that the Board remains independent.

Subclause 125(5) states that the statement of strategic guidance is not a legislative instrument. This subclause is included to assist readers and is merely declaratory of the law, as the instrument is not a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*.

Division 2 – Members of the Board

Clause 126 provides that the Board will be comprised of the Chair and eight other members.

Clause 127 sets out the process for the appointment of Board members, including the Chair. This provision implements the Productivity Commission's recommendation that members of the Board should be chosen for their commercial and strategic skills and expertise in insurance, finance and management.

Under **subclause 127(2)** a person is eligible for appointment to the Board only if they have skills, experience or knowledge in at least one of the following fields:

(a) the provision or use of disability services;

(b) the operation of insurance schemes, compensation schemes or schemes with long-term liabilities;

(c) financial management;

(d) corporate governance.

Consistent with the principle that the NDIS is a shared scheme between the Commonwealth and states and territories, there are requirements for the involvement of host jurisdictions in the appointment process.

The Minister will be solely responsible for the appointment of the Chair, although must consult host jurisdictions about the appointment of the Chair (**subclause 127(3)**).

Under **subclause 127(4)** the Minister must seek the support of all host jurisdictions to the appointment of Board members other than the Chair, and be satisfied that the Commonwealth and a majority of the group consisting of the Commonwealth and host jurisdictions support the appointment. For example, if there are five host jurisdictions, the Commonwealth and three of the five host jurisdictions must agree.

Subclause 127(5) provides that a person is not eligible for appointment as a Board member if the person is:

(a) a member of a Commonwealth, state or territory parliament, or local government authority;

(b) an employee of the Commonwealth, a state or territory, or local government authority; or

(c) the holder of a full-time statutory office under a law of the Commonwealth, a state or territory.

This is to preserve the independence of the Agency and to prevent conflicts of interest arising.

Subclause 127(6) ensures the membership of the Board of the Agency will be balanced between all of the skills, experience or knowledge in the fields mentioned in subclause 127(2) by providing the Minister must take this balance into account when appointing members to the Board.

Clause 128 provides that Board members will hold office for a period of no longer than three years.

Clause 129 provides for acting arrangements for Board members, including the Chair. For the acting appointment of the Chair or other Board members during a vacancy, this must not be for longer than twelve months.

Subclause 129(2) provides for acting appointments of Board members other than the Chair during a vacancy. The Minister may appoint, by written instrument, a person to act as a Board member other than the chair for a period not more than twelve months if:

- the Minister has sought the support of all host jurisdictions for the acting appointment; and
- either the Minister is satisfied that it is not possible for a substantive appointment to be made under clause 127, because it is not possible to meet the requirement of majority approval (for example, the Minister becomes aware that a sufficient number of host jurisdictions do not agree to the appointment, and so it will not be possible to achieve majority agreement); or
- a period of 90 days has passed and it is not known whether host jurisdictions support the appointment of the Board member.

This will ensure that a Board member can be appointed, and that the Board can function properly, in the event a Board member cannot be appointed through the normal process set out in clause 127.

Subclause 129(3) provides for acting appointments during absences. The Minister may appoint, by written instrument, a person to act as a Board member during any period, or during all periods, when a Board member is absent from duty or from Australia, or is for any reason unable to perform the duties of the office. Because of the short term nature of an acting arrangement under this subclause, the Commonwealth Minister may appoint someone to act during absences without the involvement of the host jurisdictions.

Subclause 129(4) provides that a person may only be appointed to act as a Board member either during vacancies or absences if they have the skills, experience or knowledge in at least one of the fields outlined in subclause 127(2).

Subclause 129(5) provides that a person is not eligible for an acting appointment if they are a member of a Commonwealth, state or territory parliament, or local government authority, or they are a full-time office holder under Commonwealth, state or territory law. This means that it is possible that an acting Board member could be a Commonwealth, state or territory employee, which will allow acting appointments to be made from appropriately skilled government employees in the event of urgency or other short term need.

Clause 130 provides for the remuneration and allowance of Board members. Board members are to be paid the remuneration as determined by the Remuneration Tribunal. If there is no relevant Remuneration Tribunal determination, then the amount of remuneration can be set by regulations. Allowances will be provided for in regulations. This provision has effect subject to the *Remuneration Tribunal Act 1973*, which establishes the Remuneration Tribunal and sets out the rules for the making of determinations by the Tribunal.

Clause 131 provides that the Minister may grant the Chair a leave of absence. The Chair may in turn grant a leave of absence to Board members, but must notify the Minister if that absence exceeds three months. Under clause 176, the Minister must also notify the Ministerial Council of acting appointments.

Clause 132 provides that a Board member must not engage in any other paid employment which, in the Minister's opinion, conflicts with the proper performance of their duties under the Act. This reflects best government practices.

Clause 133 provides a resignation process for Board members. A resignation must take effect within 90 days from receipt of the resignation by the Minister.

Clause 134 provides for the termination of Board members, listing the circumstances in which the appointment of a Board member may be terminated by the Minister.

Subclause 134(1) provides that a Board member's appointment may be terminated for misbehaviour or if the member is incapable of performing the duties of his or her office.

Subclause 134(2) provides for a number of more specific circumstances where the member's appointment may be termination. These are:

(a) the Member becomes bankrupt, or enters into arrangements with creditors for the payment of debts;

(b) the member is absent from three consecutive Board meetings (except on leave of absence);

(c) the member engages in paid employment that, in the Minister's opinion, conflicts or may conflict with the proper performance of his or her duties (this is a usual basis for termination and takes into account that members of the Board are appointed on a part-time basis);

(d) the member fails, without reasonable excuse, to comply with an obligation imposed by section 27F or 27J of the CAC Act (obligations in relation to the disclosure by directors of interests); or

(e) the Minister is satisfied that the performance of the member has been unsatisfactory for a significant period.

To reflect the shared governance arrangements between the Commonwealth, states and territories, before the Minister terminates the Chair of the Board, **subclause 134(3)** requires the Minister to consult with the host jurisdictions.

Subclause 134(4) further requires the Minister to seek the support of all host jurisdictions to the termination of the appointment of a member of the Board other than the Chair, and be satisfied that the Commonwealth and a majority of the group consisting of the Commonwealth and host jurisdictions support the termination. For example, if there are five host jurisdictions, the Commonwealth and three of the five host jurisdictions must agree.

Clause 135 provides that a Board member holds office on the terms and conditions (if any) in relation to matters not covered by the Bill that are determined by the Minister. However, before the Minister may determine any terms and conditions, the Minister must be satisfied that the Commonwealth and a majority of host jurisdictions agree to the terms and conditions. This reflects the shared governance of the NDIS.

Division 3 – Meetings of the Board

Clause 136 provides that the Board must hold meetings that are necessary for the efficient performance of its functions, and are at the times and places that the Board determines.

Subclause 136(3) further provides that the Chair must convene at least four meetings each calendar year and must convene a meeting within 30 days of receiving a written request to do so from another Board member.

Clause 137 provides that the Chair must preside at all meetings that they attend. If the Chair is not present, another Board member nominated by the Chair or other Board members must preside.

Clause 138 provides that quorum is constituted by five Board members. There are, however, special procedures when a Board member is required, under section 27J of the CAC Act (relating to where members have disclosed a material personal interest), not to be present in deliberations or to take part in a decision. In these circumstances, if there are less than five members, the remaining members will constitute a quorum.

Clause 139 provides that a question at a meeting is to be determined by a majority of votes of the Board members present and voting. The person presiding at the meeting has a deliberative vote, and if the votes are equal, a casting vote. As per clause 137, this would usually be the Chair.

Clause 140 provides that, subject to this Division, the Board may regulate procedures at its meetings as it considers appropriate.

Clause 141 provides that the Board must keep minutes of meetings.

Clause 142 provides a procedure for decisions to be made without the Board meeting. The Board will only be able to make decisions without a meeting if it has determined that it can do so, and it has determined the method for Board members to indicate their agreement. In accordance with usual requirements, a member cannot vote on a proposed decision if they were not entitled to vote at a meeting, and the Board has to keep a record of decisions made without a meeting.

Part 3 – Independent Advisory Council

Division 1 – Establishment and function

Clause 143 establishes the Independent Advisory Council. This is consistent with Recommendation 9.3 of the Productivity Commission report, which concluded that the National Disability Insurance Scheme should include an Advisory Council to enable people with disability, the community and service providers (including non-government, state and territory or Commonwealth government providers as relevant) to provide the Agency Board with ongoing advice on its activities and effectiveness in meetings its objectives.

Given the Board's emphasis on a corporate skills mix, the establishment of an Independent Advisory Council will be an important source of independent advice to the Board by people with disability, their families and carers, disability service providers and other experts.

Clause 144 provides the functions of the Advisory Council, namely to provide advice (either following a request of the Board or by its own initiative) to the Agency Board. While members of the Advisory Council are appointed by the Minister with the agreement of host jurisdictions (clause 147), it is intended that the Advisory Council will report solely to the Board on matters relating to the performance of the Agency.

Subclause 144(1) lists the matters on which the Agency can provide advice to the Board, namely the ways in which the Agency:

(a) performs its functions relating to the NDIS;

(b) supports the independence and social and economic participation of people with disability;

(c) provides the reasonable and necessary supports for participants in the NDIS launch;

(d) enables people with disability to exercise choice and control in the achievement of their goals and the planning and delivery of their supports;

(e) facilitates the development of a nationally consistent approach to the access to, and the planning and funding of, supports for people with disability;

(f) promotes the provision of high quality and innovative supports to people with disability; and

(g) raises community awareness of the issues that affect the social and economic participation of people with disability, and facilitates greater community inclusion of people with disability.

Subclause 144(2) provides that in providing advice, the Advisory Council must have regard to the role of families, carers and other significant persons in the lives of people with disability.

Subclause 144(3) specifies that matters on which the Advisory Council cannot provide advice on, namely:

(a) a particular individual;

(b) the approval of a person or entity as a registered provider of supports or the revocation of that approval;

(c) the corporate governance of the Agency; or

(d) the money paid to, or received by, the Agency.

This list reflects the focus of the Advisory Council on whether the Agency is achieving its broad objectives from the perspective of people interacting with the NDIS, rather than advocating on behalf of particular individuals or service providers. The rationale for specifically excluding the Advisory Council from advocating on behalf of particular individuals or service providers is to reinforce the Council's independence. It is not appropriate for an independent body to influence matters such as how a particular participant's supports are assessed or whether a particular organisation should be a registered service provided. However advice provided about the broad matters listed in subclause 144(1) may be highlighted by an individual's experience with the NDIS.

Clause 145 provides that, if the Advisory Council provides advice to the Board under subclause 144(1), the Board must have regard to the advice in performing its functions and give the Ministerial Council a copy of the advice, together with a statement relating to the advice. The statement must set out what has been done, or is to be done, in response to the advice.

Division 2 – Members of the Advisory Council

Clause 146 provides that the Advisory Council is to be comprised of a Principal Member and no more than 12 other members.

Clause 147 provides the appointment process for members of the Advisory Council (including the Principal Member).

Consistent with the principle that the NDIS is a shared scheme between the Commonwealth and states and territories, there are requirements for the involvement of host jurisdictions in the appointment process.

The Minister will be solely responsible for the appointment of the Principal Member, although must consult host jurisdictions about the appointment of the Principal Member (**subclause 147(2)**).

Under **subclause 147(3)** the Minister must seek the support of all host jurisdictions to the appointment of Advisory Council members other than the Principal Member, and be satisfied that the Commonwealth and a majority of the group consisting of the Commonwealth and host jurisdictions support the appointment. For example, if there are five host jurisdictions, the Commonwealth and three of the five host jurisdictions must agree.

To ensure independence from Government, **subclause 147(4)** provides that a person is not eligible to be appointed as a member of the Advisory Council if they are a member of a Commonwealth, state or territory parliament, or local government authority. However, given the role of states, territories and local authorities in the provision of services to people with disability, employees of the Commonwealth, state or territory, or of local government, authorities are not excluded from being appointed as members.

Consistent with Recommendation 9.3 of the Productivity Commission report, the Advisory Council should include people with disability, their families and carers, providers of equipment and/or services, **subclause 147(5)** provides that:

(a) at least four members of the Advisory Council are people with disability and have skills, experience or knowledge relating to disability services;

(b) at least two members of the Advisory Council are carers of people with disability and have skills, experience or knowledge relating to disability servces;

(c) at least one member is a person with experience in the supply of equipment or provisions of services for people with disability; and

(d) any other members are people with skills, experience or knowledge that will help the Advisory Council perform its functions.

In addition, the Minister must have regard to the desirability that the membership of the Advisory Council reflects the diversity of people with disability. This is intended to ensure that the Advisory Council, and therefore the Board, is furnished with diverse advice. Family members of people with disability may also be appointed to the Advisory Council.

Clause 148 provides that the maximum period of appointment for an Advisory Council member is three years, which is consistent with the initial period of the NDIS launch.

Clause 149 provides for acting arrangements for members of the Advisory Council, including the Principal Member. For the acting appointment of the Principal Member or other members during a vacancy, this must not be for longer than twelve months.

Subclause 149(2) provides for acting appointments of Advisory Council members other than the Principal Member during a vacancy. The Minister may only appoint a person to act if:

- a proposal for the appointment of a person as an Advisory Council member has been made to host jurisdictions; and

- either the Minister is satisfied that it is not possible for a substantive appointment to be made under clause 147, because it is not possible to meet the requirement of majority approval (for example, the Minister becomes aware that a sufficient number of host jurisdictions do not agree to the appointment, and so it will not be possible to achieve majority agreement); or

- a period of 90 days has passed and it is not known whether host jurisdictions support the appointment of the Advisory Council member.

Subclause 149(3) provides for acting appointments during absences. The Minister may appoint, by written instrument, a person to act as an Advisory Council member during any period, or during all periods, when an Advisory Council member is absent from duty or from Australia, or is for any reason unable to perform the duties of the office. Because of the short term nature of an acting arrangement under this subclause, the Commonwealth Minister may appoint someone to act during absences without the involvement of the host jurisdictions.

Clause 150 provides for the remuneration and allowances for Advisory Council members. Advisory Council members are to be paid the remuneration as determined by the Remuneration Tribunal. If there is no relevant Remuneration Tribunal determination, then the amount of remuneration can be set by regulations. Allowances will be provided for in regulations. This clause has effect subject to the *Remuneration Tribunal Act 1973*, which establishes the Remuneration Tribunal and sets out the rules for the making of determinations by the Tribunal.

Clause 151 provides that the Minister may grant the Principal Member a leave of absence. The Principal Member may in turn grant a leave of absence to Advisory Council members, but must notify the Minister if that absence exceeds three months. Paragraph 176(2)(c) requires the Minister to advise the Ministerial Council of any absences that exceed three months.

Clause 152 requires Advisory Council members to provide the Minister with written notice of all interests, pecuniary or otherwise, they have or acquire that could conflict with the proper performance of their functions. This does not prevent them from becoming an Advisory Council member. However, failure to do so without reasonable excuse is a ground for termination under paragraph 155(2)(c).

Clause 153 further requires Advisory Council members to disclose any interests, pecuniary or otherwise, in a matter being considered by the Council. Such a disclosure must be made as soon as possible after the relevant facts have come to the member's knowledge and must be recorded in the minutes of the meeting. **Subclauses 153(4) to 153(6)** allow the Council to make a determination about whether or not a person with such an interest can be present during deliberations of the Council on the relevant matter or take part in decisions made by the council in relation to the relevant matter. Failure to do so without reasonable excuse is a ground for termination.

Clause 154 provides a resignation process for Advisory Council members. A resignation must take effect within 90 days from receipt of the resignation by the Minister.

Clause 155 provides for the termination of the appointment of Advisory Council members, listing the circumstances in which the appointment of an Advisory Council member may be terminated by the Minister. These circumstances include situations where:

(a) the member misbehaves;

(b) the member is incapable of performing the duties of their office;

(c) the member becomes bankrupt or enters into arrangements with creditors for the payment of debts;

(d) the member is absent from three consecutive Advisory Council meetings (except on leave of absence);

(e) the member fails, without reasonable excuse, to comply with an obligation imposed by section 152 or 153; or

(f) the Minister is satisfied that the performance of the member has been unsatisfactory for a significant period.

To reflect the shared governance arrangements between the Commonwealth, states and territories, before the Minister terminates the Principal Member of the Advisory Council, **subclause 155(3)** requires the Minister to consult with the host jurisdictions.

Subclause 155(4) further requires the Minister to seek the support of all host jurisdictions to the termination of the appointment of a member of the Advisory Council other than the Principal Member, and be satisfied that the Commonwealth and a majority of the group consisting of the Commonwealth and host jurisdictions support the termination. For example, if there are five host jurisdictions, the Commonwealth and three of the five host jurisdictions must agree.

Clause 156 provides that an Advisory Council member holds office on the terms and conditions (if any) in relation to matters not covered by the Bill that are determined by the Minister. However, before the Minister may determine any terms and conditions, the Minister must be satisfied that the Commonwealth and a majority of host jurisdictions agree to the terms and conditions. This reflects the shared governance of the NDIS.

Division 3 – Procedures of the Advisory Council

Clause 157 provides that the Advisory Council may determine its own procedures.

Part 4 – Chief Executive Officer and staff etc.

Division 1 – Chief Executive Officer

Clause 158 establishes the Chief Executive Officer (CEO) of the Agency.

Clause 159 provides for the functions of the CEO – namely, the day-to-day administration of the Agency, and all things necessary or convenient to be done for in connection with the performance of their duties.

Subclause 159(3) provides that the CEO must act in accordance with the objectives, strategies and policies determined by the Board under paragraph 124(1)(b).

Subclause 159(4) provides that the Board may give the CEO written directions about the performance of their duty, and **subclause 159(5)** provides that the CEO must comply with such a direction.

Subclause 159(6) provides that a direction made by the Board under subclause 159(4) is not a legislative instrument. This provision is included to assist readers, as the instrument is not a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003* and is merely declaratory of the law.

Clause 160 provides the appointment process for the CEO. Reflecting the independence of the Agency, the CEO is appointed by the Board, by written instrument. The CEO will be appointed on a full-time basis for a period that does not exceed three years and cannot be a Board member.

Subclause 160(6) further provides that the first CEO will be appointed by the Minister so that the CEO can be appointed and necessary work can be done by the Agency to be ready for the implementation of the launch of the NDIS in July 2013. This is because it is possible that there will not be a sufficient time for the first Board to select the first CEO.

Clause 161 provides for acting arrangements. The Board may appoint a person, other than a Board member, to act as CEO. Further rules apply to acting appointments in the *Acts Interpretation Act 1901*.

Clause 162 provides for the CEO's remuneration and allowances. The CEO is to be paid the remuneration as determined by the Remuneration Tribunal. If there is no relevant Remuneration Tribunal determination, then the amount of remuneration can be set by regulations. Allowances will be provided for in regulations. This clause has effect subject to the *Remuneration Tribunal Act 1973*, which establishes the Remuneration Tribunal and sets out the rules for the making of determinations by the Tribunal.

Clause 163 provides that the CEO has recreational leave entitlements, as determined by the Remuneration Tribunal, and that the Board may grant the CEO a leave of absence, other than recreational leave.

Clause 164 stipulates that the CEO must not engage in paid employment outside of the duties of their office without the approval of the Board. This is the usual arrangement where the CEO is appointed on a full-time basis.

Clause 165 requires the CEO to provide the Board with written notice of all interests, pecuniary or otherwise, they have or acquire that could conflict with the proper performance of their functions. The CEO can be terminated if they fail to disclose such interests without reasonable excuse (see subclause 167(2)(d)).

Clause 166 provides a resignation process for the CEO, and limits the time of effect of the resignation to 90 days from receipt of the resignation by the Board.

Clause 167 provides for the termination of the CEO, listing the circumstances in which the appointment of the CEO may be terminated by the Board. These circumstances include situations where:

(a) the CEO misbehaves;

(b) the CEO is incapable of performing the duties of their office;

(c) the CEO becomes bankrupt or enters into an arrangement with creditors for the payment of debts;

(d) the CEO is absent for 14 consecutive days or for 28 days in any 12 months (except on leave of absence provided for in clause 163);

(e) the CEO fails, without reasonable excuse, to comply with an obligation imposed by section 164 or 165; or

(f) the Board is satisfied that the performance of the CEO has been unsatisfactory for a significant period.

Under **subclause 167(3)**, if the Board terminates the appointment of the CEO, the Board must notify the Minister and under subclause 173(3), the Ministerial Council.

Clause 168 provides that the CEO holds office on the terms and conditions (if any) in relation to matters not covered by the Bill that are determined by the Board. Consistently with the independence of the Board, host jurisdictions do not have a role in agreeing any terms and conditions determined by the Board under this provision.

Division 2 – Staff etc.

Clause 169 provides that staff of the Agency must be engaged under the *Public Service Act 1999*, and that, for the purposes of that Act, the CEO and staff of the Agency together constitute a Statutory Agency and the CEO is the Head of the Statutory Agency.

Clause 170 enables the Agency to enter into secondment arrangements with Commonwealth, state or territory departments or agencies, so that it may draw on relevant skills and experience in fulfilling its role under the Act, particularly in the launch phase of the NDIS.

Clause 171 provides that the Agency may employ consultants to assist in the performance of its functions.

Part 5 – Reporting and planning

Division 1 – Reporting

Subdivision A – Reporting by Board members

Clause 172 provides for what must be included in the annual report by the Board.

Subclause 172(1) provides that the annual report on the Agency must include the things listed in subsections 9(2), 9(4) and 9(5) of the CAC Act.

In addition to that, **subclause 172(2)** requires that the following items are included for the period to which the report relates:

(a) details of any directions given under section 120;

(b) details of any statements given under section 125;

(c) information (including statistics) and analysis that relates to either or both participants and funding or provision of supports by the Agency.

To ensure the reports of the Board are detailed and relevant, the Minister may also prescribe, by legislative instrument, particular information or analysis under **paragraph 172(2)(c)** that must be included in the annual report under **subclause 172(3)**. The report must also cover the future expenditure of the NDIS (prepared by an actuary) under **subclause 172(4)**. Under **subclause 172(6)**, the Minister must not make the legislative instrument unless a majority of the members of the Ministerial Council agree to the making of the instrument. This reflects the shared responsibility of Commonwealth, state and territory governments for funding and governance, and ensures that the Ministerial Council receives reports with relevant and appropriate information.

Finally, to ensure actuarial analysis is robust, the annual report provides for the perspective of an independent actuary. The report must also include a review that:

(a) is of the actuary’s report as described in subclause 172(4); and

(b) was conducted by another actuary, who, at the time of the review, was a Fellow of The Institute of Actuaries of Australia and was not a member of the staff of the Agency; and

(c) includes a statement by the actuary who conducted the review that they are satisfied that the Agency made all arrangements necessary for them to conduct the review.

Clause 173 provides a process for giving copies of reports to the Ministerial Council.

Subclause 173(1) requires the Board members to give to the Ministerial Council a copy of reports provided to the Minister and the Finance Minister under relevant provisions of the CAC Act.

To give host jurisdictions visibility of the expenditure of money by the Agency in their respective jurisdictions, the Minister or Ministers of host jurisdictions may request information relating to a particular host jurisdiction under **clause 175** about expenditure of money received from the Commonwealth or from a host jurisdiction, or about activities of the Agency relating to a particular host jurisdiction. If this information is provided to the Minister or Ministers of host jurisdictions, the Board members must also provide it to the Ministerial Council under **subclause 173(2)**.

Subclause 173(3) requires the Board members to tell the Ministerial Council about the appointment, resignation, or termination of the CEO.

Clause 174 provides for the giving of quarterly reports to the Ministerial Council. For the purposes of the provision, **subclause 174(1)** provides that a quarter is each period of three months commencing on 1 July, 1 October, 1 January, and 1 April, to align with the financial year. The reports must be provided within one month of the end of each quarter.

Subclause 174(2) provides that the quarterly report must include information (including statistics) relating to either or both participants and funding and provision of supports by the Agency.

Subclause 174(3) enables the Minister to make a legislative instrument prescribing particular information to be included in the quarterly report. As for the annual report, a majority of the Ministerial Council must agree to the making of the instrument before the Minister can proceed to make it (**subclause 174(4)**).

Subclause 174(5) sets out specific rules for the first quarterly report. If the provision commences part way through a quarter, the Board members are not required to provide a report for that part quarter. The first report that Board members are required to provide will be after the end of the first full quarter, but will also include reporting for the initial part quarter.

Subdivision B – Reporting by the Agency

As mentioned above with respect to clause 173, **clause 175** provides for the Agency to give information requested by the Minister, or a state or territory Minister.

Subclause 175(1) enables the Minister to request information from the Agency about expenditure of money from the Commonwealth or money from a host jurisdiction relating to a particular host jurisdiction, or activities of the Agency relating to a particular host jurisdiction.

Subclause 175(2) enables Ministers of host jurisdictions, who are members of the Ministerial Council (that is, Ministers who will have responsibility within their governments for the NDIS) to request information about expenditure of money received by the Agency from that jurisdiction or from the Commonwealth in relation to that jurisdiction, or activities of the Agency relating to that jurisdiction.

Subdivision C – Reporting by the Minister

Clause 176 sets out what the Minister must give to the Ministerial Council.

Subclause 176(1) requires the Minister to give the Ministerial Council copies of any directions (clause 120) or statements of strategic guidance (clause 125) given to the Agency or the Board as soon as practicable after the giving of the direction or statement.

Under **subclause 176(2)** the Minister must also tell the Ministerial Council as soon as practicable after the event occurs, details of appointments, acting appointments, resignations, termination of appointments, and grants of leave of absence for more than three months, as they relate to Board and Advisory Council Members. In addition, because the first CEO is appointed by the Minister (see subclause 160(6)), the Ministerial Council is also to be advised of this.

Division 2 – Planning

Clause 177 provides for corporate planning. The Board is required to prepare a corporate plan for the Agency annually, which will cover a period of at least three years. In doing so, the Board must have regard to a statement given under section 125.

Without limiting what can be included in the plan, under **subclause 177(4)** the plan must include details of:

(a) the objectives, strategies and policies to be followed by the Agency (provided by the Board to the Agency under paragraph 124(1)(b));

(b) the performance indicators for the assessment of the Agency's performance of its functions;

(c) the performance of the Agency in the year before the year in which the plan is prepared as assessed against those performance indicators;

(d) the financial sustainability of the NDIS (including estimates of the current and future expenditure of the NDIS);

(e) the risks and issues relevant to the financial sustainability of the NDIS and the management of those risks and issues.

A copy of the plan must be given to the Ministerial Council, which must also be notified by the Board if they vary the plan (see **subclauses 177(5) and 177(6)**).

Part 6 – Finance

Clause 178 provides for payments to the Agency by the Commonwealth. The Commonwealth can pay the Agency such money as is appropriated by the Parliament for the purposes of the Agency. The effect of this is that the money will be appropriated annually by the Commonwealth through the budget process. The Finance Minister may give directions about the amounts in which, and the times at which, money is to be paid to the Agency.

Clause 179 provides for payments to the Agency by host jurisdictions. The Agency may receive money from host jurisdictions for the purpose of funding or providing reasonable and necessary supports under the NDIS for participants in the particular host jurisdiction. This means that money paid to the Agency by, for example, Victoria, will be spent by the Agency on supports for participants in the Victorian launch site. During the launch of the NDIS, the Commonwealth has accepted financial responsibility for the administrative costs associated with the implementation, including the administrative costs of establishing the Agency.

Clause 180 provides for application of money by the Agency. Under **subclause 180(1)**, the money of the Agency is the money the Agency receives under clause 178 from the Commonwealth, clause 179 from host jurisdictions, or any other money paid to, or received by, the Agency (for example, fees charged under clause 121 or gifts received).

The money of the Agency, as per **subclause 180(2)**, can be used to:

(a) pay or discharge any expense, charge, obligation and liability incurred or undertaken by the Agency in the performance of its functions and the exercise of its powers; and

(b) pay remuneration and allowances payable under this Act.

Money received under clause 179 can only, however, be applied for the purpose it was received by the Agency (**subclause 180(3)**). Nevertheless, **subclause 180(4)** provides that subclauses 180(2) and 180(3) do not prevent the investment of surplus money of the Agency under section 18 of the CAC Act.

Part 7 – Miscellaneous

Clause 181 provides that the Agency is not subject to taxation under any law of the Commonwealth or of a state or territory, although it is noted that the Agency may be subject to taxation under certain laws, such as goods and services tax and fringe benefits tax.

Chapter 7 – Other matters

Summary

This Chapter deals with a number of ancillary matters necessary for the operation of the scheme. Part 1 deals with debts that may arise under the scheme and how they may be recovered. Part 2 is concerned with other general matters, including how notifications are to be provided under the Act, delegation by the Minster and CEO of functions under the Act and the timeframes for decision making. Part 3 addresses constitutional matters under the Act. Part 4 makes specific provision for an independent review of the Act commencing after two years of operation. Part 5 provides for the making of the NDIS rules and other regulations.

Explanation of the clauses

Part 1 – Debt recovery

In broad terms, Part 1 sets out the circumstances in which a debt may be owed to the Agency, and the methods through which the Agency can recover a debt.

Division 1 – Debts

Clause 182 provides that payments of NDIS amounts (that is, amounts paid under the NDIS in respect of supports funded under a participant's plan, as defined in clause 9) made to persons not entitled to the NDIS amounts are debts due to the Agency. The circumstances in which a person is not entitled to an NDIS amount include where the payment is made in error, a contravention of the Act or false or misleading statements or misrepresentation, or where a participant dies before the payment is made.

A debt will also arise if a person does not comply with clause 46, which requires a person who receives a NDIS amount to spend it in accordance with the participant's plan, and also to retain records if provided for in the NDIS rules. If a person fails to spend the NDIS amount in accordance with the participant's plan the debt will be an equal amount. In relation to the keeping of records, the NDIS rules may specify that the debt will be an equal or lesser amount than the amount for which the records is to be retained (**subclauses 182(3) and (4)**).

Division 2 – Methods of recovery

Clause 183 allows the Agency to recover debts due by means of legal proceedings brought by the CEO in a court of competent jurisdiction.

Subclauses 183(2) to (5) set out the time periods within which the Agency can commence legal proceedings to recover a debt (the ***recovery period***). Generally, the recovery period will be six years form the date on which an officer becomes aware, or could reasonably be expected to have become aware, of the circumstances giving rise to the debt. However, if the person who owes the debt part pays or acknowledges that he or she owes the debt, the six-year recovery period will reset from the date of the partial payment or acknowledgement. Similarly, if prescribed activities take place within the recovery period, the recovery period will be reset to six years form the end of the activity. Prescribed activities include action being taken to make a deduction under this section or commencing legal proceedings to recover the debt, the file being reviewed in relation to recovery of the debt, and any other internal Agency activity in relation to the recovery of the debt.

Clause 184 allows the CEO to enter into an arrangement with the person owing the debt for the debt to be repaid. The arrangement will take effect either from the day specified in the arrangement as the day from when the arrangements commence, or from the day the arrangement was entered into. Such an arrangement would normally set out matters including a timetable for repayment.

The CEO may terminate an arrangement for payment of a debt at the request of the person who owes the debt, after giving 28 days' notice to the person that they propose altering or terminating the arrangement, or without notice if the CEO is satisfied the person has failed to disclose material information about their true capacity to repay the debt.

Clause 185 enables the CEO to recover debts from financial institutions in circumstances where NDIS amounts are paid to an account in error. For example, where the account holder is not the intended recipient of the money, and where a payment has been made into account where the intended recipient has died before the payment was made.

In those circumstances, the CEO can issue the financial institution with a notice requiring the institution to pay an amount of money to the Agency within a reasonable period as stated in the notice. The amount of money to be paid will be the lesser of the amount specified in the notice that is equal to the NDIS amount or sum of the NDIS amounts (if more than one amount has been paid to the account), or the amount standing to the credit of the account when the notice is received by the institution.

It is an offence to fail to comply with a notice, unless the institution proves it was incapable of complying with the notice, the penalty for which is a maximum of 300 penalty units. The amount of a penalty unit is determined under the *Crimes Act 1914*.

Subclause 185(6) clarifies that an amount recovered by the Agency from an institution under this provision reduces any debt owed to the Agency in respect of the NDIS amount or amounts.

Division 3 – Information relating to debts

Clause 186 allows the CEO to require a person who owes a debt to the Agency under the Act to give the Agency information or documents relevant to their financial situation, and also to inform the Agency of a change of address within 14 days of the change occurring.

Clause 187 allows the CEO to require a person who may have information or documents relevant to the location of a person who owes a debt to the Agency or relevant to the debtor's financial situation to give the information or documents to the Agency. The CEO must have reasonable grounds to believe that the person has the information or custody or control of the document.

Clause 188 sets out the requirements for notices issued by the CEO under this Division. The notices must be in writing and specify the nature of the information or document required, how the information or document is to be given to the Agency, how long the person has to provide the information or document, who they need to give it to, and that the notice is given under section 188 (**subclauses 188(1) and (2)**).

The person must be given at least 14 days from the day the notice is given to provide the information or document. If the person is required to give the information by attending before an officer and answering questions, the time and place for this to occur has to be specified in the notice and the time has to be at least 14 days after the notice is given (**subclauses 188(3) to (5)**).

Clause 189 creates an offence for failure to comply with a notice issued under this Division with a maximum penalty of 30 penalty units. However, a person does not commit an offence if they have a reasonable excuse.

Division 4 – Non-recovery of debts

Clause 190 provides for circumstances in which the CEO may write off debts owed to the Agency.

Subclause 190(2) provides that the CEO may only write off debts if the law makes the debt irrecoverable, if the person who owes the debt (debtor) has no capacity to repay it, if, after all efforts have been made to locate the debtor, they cannot be found, or if it is not cost effective for the Agency to take action to recover the debt.

Subclause 190(3) sets out when a debt is irrecoverable at law for the purposes of paragraph 190(2)(a). This will only apply when the six-year period provided under clause 183 has passed, the debt cannot be proved in legal proceedings, the debt was not incurred by fraud and was incurred before a debtor became bankrupt and they are discharged from bankruptcy, or the debtor has died and there is either no estate or insufficient funds in the estate to repay the debt.

A decision by the CEO to write off a debt takes effect on the day the decision is made or on the day specified in the decision (**subclause 190(4)).**

If a debt is written off by the CEO under this provision, this does not mean that action cannot be taken at any time to recover the debt.

Clause 191 provides the CEO with the power to waive all or part of a debt in the circumstances that are set out in clauses 192 to 195. Unlike the write-off of a debt, which does not prevent the CEO subsequently taking action to recover a debt, a waiver of a debt will prevent the CEO from attempting to recover a debt. If the CEO decides to waive a debt, the waiver takes effect on the day specified in the decision, or on the day the decision is made.

Clause 192 requires the CEO to waive the right to recover that part of a debt that is solely as a result of an administrative error made by the Agency. The debtor must have received the payment or payments that gave rise to the debt in good faith, and more than six weeks has passed since the later of when the first payment was made or the end of the notification period where a person has complied with a notification obligation.

Clause 193 requires the CEO to waive debts that are less than, or likely to be less than, $200, and it is not cost effective for the Agency to take action to recover the debt. This is because the cost of instituting legal proceedings, as well as any administrative costs of the Agency to issue notices, or do other things necessary, would significantly outweigh the amount of a debt of less than $200.

Clause 194 requires the CEO to waive debts where the CEO or the Agency has agreed to settle a claim against a debtor for less than the full amount of the debt.

Subclauses 194(3) to (5) require the CEO to waive debts where at least 80 per cent of the amount owing has been paid and the debtor is unable to pay any more, and where the debtor and the Agency agree for the debt to be paid by instalments and the total of the instalments is at least the current value of the amount outstanding.

Subclause 194(6) provides that the NDIS rules may prescribe a method to calculate the current value of the amount of the debt outstanding for the purposes of subclause 194(5).

Clause 195 provides an additional power to the CEO to waive debts in special circumstances. The CEO may waive the right to recover a debt where the debt did not arise as a result of the contravention of the Act, regulations or rules, or a false and misleading statement or misrepresentation. He or she must be satisfied that there are special circumstances, other than the financial hardship or disability of the person, and that a waiver is more appropriate than a write-off of the debt.

Part 2 – General matters

Clause 196 provides the method of notification by the CEO. If the CEO is required or permitted to notify a person by this Act, the regulations or the rules, then the CEO may notify the person by:

(a) sending the notice by prepaid post addressed to the person at their last known postal address;

(b) giving the notice personally; or

(c) any other way the CEO considers appropriate.

This will enable the Agency to notify a person in the most appropriate way to ensure that the person receives the notice.

Clause 197 provides that, if the Act, regulations or rules require a request to be in a form approved by the CEO, then the CEO is not required to make a decision on the request if it is not in that form.

If the Act, regulations or rules requires information or documents to be provided for the purposes of, or for purposes relating to, making a decision or doing a thing under the Act, then the CEO is not required to make a decision or do that thing until the information or documents are provided.

Clause 198 provides that a child cannot be guilty of an offence under the Act in relation to any act or omission of a person who does something because they have parental responsibility for the child or has been appointed by the CEO to act on behalf of a child under clause 74.

Clause 199 also protects, from criminal liability, the person who does something because they have parental responsibility, or have been appointed by the CEO to act on behalf of a child under clause 74, in relation to an act or omission of the child, or an act or omission done in good faith.

Clause 200 clarifies the evidentiary effect of the CEO's certificate. A certificate signed by the CEO is evidence of the matters specified in the certificate, for the purposes of paragraph 21B(1)(c) of the *Crimes Act 1914*.

Such a certificate may, according to **subclause 200(2)**, specify:

(a) the person to whom, or in relation to whom, an NDIS amount has been paid because of an act or omission for which the person or another person has been convicted of an offence under Part 7.3 or 7.4 of the *Criminal Code* (which deal with certain fraudulent conduct or misleading statements); and

(b) the amount paid; and

(c) the act or omission.

Clause 201 provides that the Minister may delegate, in writing, to the CEO the Minister's powers under clause 210, which is the power to make NDIS rules. The CEO must comply with any directions given by the Minister when exercising powers under the delegation. However, under **subclause 201(3)**, the Minister must not delegate the power to the CEO unless all host jurisdictions have agreed to the delegation.

Subclause 202(1) provides that the CEO may delegate, in writing, to an officer any or all of their powers under the Act, regulations or rules. A person must comply with any directions given by the CEO when exercising those powers or functions, as per **subclause 202(3)**. This is a usual administrative provision, which will enable the Agency to practically and efficiently administer the NDIS.

Despite subclause 202(1), under **subclause 202(2)**, the CEO may delegate their powers under Chapter 4, Part 2 of the Act (confidentiality) only to an officer who is a member of staff of the Agency under section 169.

Clause 203 provides for the application of the Act to registered providers of supports or an entity that wishes to apply for approval as a registered provider of supports that are unincorporated bodies.

Subclause 203(1) provides that the body is treated as if it is a person other than an individual (such as a body corporate), but with certain changes.

Subclauses 203(2) and **192(3)** provide that an obligation imposed on, and a thing permitted to be done by, the body is imposed on, or may be done by, each partner in a partnership, or each member of the management committee of the body. Where an obligation is imposed, it may be discharged by any one of the partners or members.

In relation to the commission of offences, they are taken to have been committed by a partner or member who was knowingly concerned in, or party to, the act or omission constituting the offence, or who aided, abetted, counselled, or procured the act or omission (see **subclause 203(4)**).

Clause 204 provides a rule-making power to extend the length of time within which a person or the CEO may be required to do something under the Act, but limits the longer period that may be prescribed when the CEO may be required to do something to double the length of the time specified in the Act.

Part 3 – Constitutional matters

Clause 205 provides that the Crown is bound in each of its capacities by this Act but it does not make the Crown liable to be prosecuted for an offence.

Clause 206 provides an alternative constitutional basis for the Act.

Clause 207 clarifies that this Act is not to apply to the exclusion of a state or territory law, to the extent that that law is capable of operating concurrently with this Act.

Part 4 – Review of the Act

Clause 208 provides for the review of operation of the Act. The purpose of this review will be to consider the operation of the Act, and to inform all governments on whether changes to the legislation are needed for the national operation of the scheme.

Under **subclause 208(1)**, the Minister must cause an independent review of the operation of the Act commencing two years after Chapter 3 of the Act commences. Chapter 3 of the Act will commence on a day or days to be proclaimed by the Minister, but no later than six months and one day after the Act receives the Royal Assent (see clause 2).

The review will be undertaken by a person or persons chosen by the Minister with the agreement of the Ministerial Council, as per **subclause 209(2)**.

Under **subclause 208(3)**, the terms of reference for the review must be agreed by the Ministerial Council.

Under **subclause 208(4)**, the person or persons undertaking the review must give the Minister a written report within 12 months of commencing the review.

Upon receipt of the report the Minister must give a copy to the Ministerial Council, and ask the Ministerial Council to make recommendations in response to the report and obtain COAG's response to the report within six months of the Ministerial Council being given the report (**subclause 208(5)**).

The Minister must consider the report under **subclause 208(6)** and must cause copies of the report to be tabled in each House of Parliament within 15 sitting days of that House after receiving the report (**subclause 208(7)**). The Minister must also cause copies of COAG's response to the report to be tabled in each House of Parliament within six months of giving the report to the Ministerial Council under **subclause 208(8)**. If, however, the Minister fails to table copies of the response, the Minister must cause an explanation of the failure to be tabled in each House of Parliament within 15 sitting days of that House after the end of the six-month period (**subclause 208(9)**).

Part 4 – Legislative instruments

Clause 209 provides for the National Disability Insurance Scheme rules.

Under **subclause 209(1)**, the Minister may make the National Disability Insurance Scheme rules, prescribing matters:

(a) required or permitted by this Act to be prescribed by the National Disability Insurance Scheme rules; or

(b) necessary or convenient to be prescribed in order to carry out or give effect to this Act.

The NDIS rules are legislative instruments, and, despite section 14 of the *Legislative Instruments Act 2003*, the rules may make provision for or in relation to a matter by applying, adopting or incorporating any matter contained in an instrument or other writing as in force or existing from time to time (**subclause 209(2)**).

When making the rules, according to **subclause 209(3)**, the Minister must have regard to the need to ensure the financial sustainability of the NDIS.

Subclauses 209(4) to (7) provide for the role of host jurisdictions in the making of NDIS rules. There are four categories of rules requiring different levels of consultation or agreement with host jurisdictions before the Minister may make rules. The rules that fall into each of the categories are set out in a table under **subclause 209(8)**.

Category A rules are considered to be those that relate to significant policy matters with financial implications for the Commonwealth and host jurisdictions, or which interact closely with relevant state and territory laws, and so the agreement of all jurisdictions is required for the making of these rules.

Category B rules only require the agreement of a particular host jurisdiction as they relate to the prescription of the areas for launch sites and age cohorts within host jurisdictions, or otherwise only affect a particular jurisdiction, in the NDIS.

Category C rules require the agreement of the Commonwealth and a majority of host jurisdictions as they still relate to policy issues, but are not expected to have a financial impact.

Category D rules are considered to be more administrative than policy in character, and so the Minister need only consult host jurisdictions before making these rules.

Subclause 210(1) permits the Governor-General to make regulations prescribing matters:

(a) required or permitted by this Act to be prescribed; or

(b) necessary or convenient to be prescribed for carrying out or giving effect to this Act.

Subclause 210(2) requires the Minister to obtain the agreement of all host jurisdictions to the making of regulations before making a recommendation to the Governor-General to make regulations. However, if the regulations are made to prescribe remuneration or allowances for the members of the Board and Advisory Council, or the CEO under clauses 130, 150, or 162, the Minister only needs to consult host jurisdiction before making a recommendation to the Governor-General to make the regulations.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

NATIONAL DISABILITY INSURANCE SCHEME BILL 2012

This Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Bill

Background

In 2011, the Productivity Commission Report, *Disability Care and Support*, found that 'current disability support arrangements are inequitable, underfunded, fragmented and inefficient, and give people with a disability little choice' (Overview, p. 5), and recommended, *inter alia*, the establishment of a National Disability Insurance Scheme (NDIS).

This Bill gives effect to the commitment by the Commonwealth, state and territory governments to establish such a scheme, and for its progressive implementation from July 2013. The legislation sets out the statutory framework for the NDIS, and for a National Disability Scheme Launch Transition Agency (the Agency) to administer it. The Act will be supplemented by disallowable legislative instruments known as NDIS rules, which will address the more detailed operational aspects of the scheme.

The NDIS represents a departure from traditional arrangements for providing government-funded services in Australia. It will be a cooperative venture, with the Commonwealth, states and territories operating as partners under the umbrella of COAG, contributing jointly to policy deliberations, and, in the case of host jurisdictions, contributing jointly to funding. Although it will be established under Commonwealth legislation, the Bill makes clear the underlying collaborative intent by providing a formal avenue (the Ministerial Council) for states and territories to advise the responsible Commonwealth Minister on key matters, and by requiring the responsible Commonwealth Minister to consult or seek agreement from the Ministerial Council or host jurisdictions before taking decisions.

The NDIS will work in conjunction with existing mainstream and specialist disability services to provide support for people with disability throughout their life. Consequently, it is not designed to meet all the needs of all people with disabilities. Moreover, support will be provided at different levels, depending on assessed need.

The Bill complements existing measures to remove discrimination against people with disability in Australia, and to provide them with support and assistance, such as the *Disability Discrimination Act 1992*, the *Disability Services Act 1986*; the provision of income support through the Disability Support Pension, Carer Payment and Carer Allowance; Commonwealth, state and territory government programs, the National Disability Strategy, and the National Disability Agreement.

Under these provisions, the NDIS is to:

- adopt an insurance approach to the funding and provision of supports;
- be financially sustainable; and
- be implemented progressively.

Progressive implementation

Consistent with the recommendations of the Productivity Commission, the NDIS will be implemented progressively. Five launch sites are planned for 2013-14, in five different host jurisdictions. Launch sites and the services to be offered in each have been selected to enable evaluation of operations and subsequent fine tuning, if necessary, to ensure the robustness and integrity of the full NDIS when it is rolled out. The launch sites, and proposed coverage, are:

- Australian Capital Territory – all potential clients (estimated to be around 6,000) in the jurisdiction;
- New South Wales – all clients (estimated to be around 10,000) in the Hunter region, covering the local government areas of Newcastle, Maitland and Lake Macquarie;
- Victoria – all potential clients (estimated to be around 5,000) in the Barwon region, covering the local government areas of the City of Greater Geelong, the Colac-Otway Shire, the Borough of Queenscliff and the Surf Coast Shire;
- Tasmania – all eligible 15 – 24 year olds in the jurisdiction (estimated to be around 1,000); and
- South Australia – progress State-wide launch for a children’s cohort model, with 0 – 5 years olds in the first year, 0 – 13 year olds in the second year, and 0 – 14 year olds in the third year (around 4,800 children in total).

Consultation

The design of the NDIS has been a collaborative exercise, relying heavily on substantial contributions from stakeholders, including:

- the COAG Select Council on Disability Reform;
- joint Commonwealth/state/territory government working groups at official levels;
- extensive consultation with people with disabilities, their advocates, carers and families;
- the NDIS Advisory Group, comprising people with expertise in social insurance principles, disability policy, service provision, performance monitoring, training and curriculum development, academia and research, psychological and intellectual disability, indigenous disability services, young people and children with disability;
- four Expert Groups, comprising people with disability, their carers, advocates, service providers and other sector experts, focused on:
    - a national approach to control and choice;
    - eligibility and assessment;
    - quality, safeguards and standards; and
    - disability workforce and sector capacity; and
- the National Disability and Carer Alliance, which undertook public engagements around the country.

The National Disability Insurance Scheme Bill 2012

The Bill has seven chapters:

- Chapter 1 establishes the objects of the legislation (section 3) and general principles guiding actions taken under the legislation (sections 4 and 5) and the role of the Ministerial Council to consider and advise the Minister or make recommendations to COAG on policy matters relating to the NDIS. It requires the Minister to consult with the Council similarly. However, advice and recommendations on particular individuals is specifically precluded from the Council's remit (section 12).
- Chapter 2 sets out the role of the Agency in providing support, funding and services, including information and advice, on matters relating to the NDIS.
- Chapter 3 provides the guiding framework for participants and the development of individualised packages of support (plans).

- Chapter 4 provides general administration provisions, including a requirement that participants notify the CEO of changes, or likely changes, in their circumstances that may impact upon their status in relation to the NDIS.

- Chapter 5 enables the CEO to require a participant to take action to claim or obtain the compensation if a participant or prospective participant is, or may be, entitled to compensation for personal injury. A failure to comply may result in a plan being suspended or action to put in place a plan being deferred.

- Chapter 6 establishes the NDIS Launch Transition Agency and the Independent Advisory Council. The membership of the latter is to include at least three people with disability; at least two carers of people with disability; and at least one person who has skills, knowledge or experience in the supply of equipment, or the provision of services, to people with disability.

- Chapter 7 provides for miscellaneous matters including debt recovery and provisions for recovery arrangements. These provisions apply both to individuals who received a payment to which they were entitled, and to financial institutions.

Human rights implications

The legislation will engage the following rights:

- The rights of people with disabilities in the *Convention on the Rights of Persons with Disabilities* (CRPD), especially Articles 3, 4, 7, 8, 12, 19, 20, 21, 22, 26, 28, 30, 31;

- The rights of children in the *Convention on the Rights of the Child*, especially Articles 12 and 23;

- Article 10 of the *International Covenant on Economic, Social and Cultural Rights*; and

- Article 17 of the *International Covenant on Civil and Political Rights*.

***General principles underpinning the* CRPD**

The *Convention on the Rights of Persons with Disabilities* (CRPD) recognised the barriers that people with disability may face in realising their rights. While the rights under all human rights treaties apply to everyone, including people with disability, the CPRD applies human rights specifically to the context of people with disability.

Overall, the establishment of the NDIS will promote the rights of people with disabilities in Australia by providing access to nationally consistent funding and support to help them realise their aspirations, and to participate in the social and economic life of the community.

The preamble of the CPRD, and the General Principles set out in Articles 3 reflect the need for the respect for the inherent dignity, individual autonomy (including the freedom to make one's own choices and the independence of the person), the need for people with disability to be able to participate fully and effectively and be included in society, the need for respect for difference and acceptance of people with disability as part of human diversity and providing people with disability the opportunity to be involved actively in decision-making processes about policies and programmes, including those directly concerning them.

The general principles of the NDIS legislation in section 4 align closely with these principles. The general principles of the NDIS legislation provide, amongst other things, that:

- People with disability have the same right as other members of Australian society to realise their potential for physical, social, emotional and intellectual development.

- People with disability should be supported to participate in and contribute to social and economic life to the extent of their ability.

- People with disability should be supported to exercise choice and control in the pursuit of their goals and the planning and delivery of their supports.

- 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 and exploitation.

- People with disability should have the same right as other members of Australian society to be able to determine their own best interests, including the right to exercise informed choice and engage as equal partners in decisions that will affect their lives, to the full extent of their capacity.

The objects and the guiding principles of the Scheme also recognise the rights of people with disability to be provided with reasonable and necessary supports to engage in the life of the community, and to have certainty that they will receive the lifelong care and support they need. The role of carers, families and other significant persons is also to be acknowledged and respected. In this way, the legislation also promotes Article 10 of the *International Covenant on Economic, Social and Cultural Rights* (IESCR), which requires that the widest possible protection and assistance should be accorded to the family, especially while it is responsible for the care and education of dependent children.

Further, the objects and principles support a nationally consistent approach to the access, provision and funding of care and supports for people with disability, and promote the importance of innovation, quality, continuous improvement and effectiveness in the provision of support.

Additionally, the legislation stipulates that, if the Act requires actions or decisions on behalf of others, the following principles also apply:

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

These principles implement the obligation in Article 30(4), which recognises the importance of people with disability being entitled, on an equal basis with others, to recognition and support of their specific cultural and linguistic identity, and the commitment in the Preamble for people with disability to have opportunities to be involved in decision making.

Article 19 of the CRPD – Living independently and being included in the community, and Article 26 of the CRPD – habilitation and rehabilitation

Article 19 of the CRPD recognises the equal right of all persons with disabilities to live in the community, with choices equal to others, and requires that effective and appropriate measure be taken to facilitate full enjoyment by persons with disability of this right and their full inclusion and participation in the community.

Article 26 of the CPRD provides that nation states should take effective and appropriate measures to enable people with disability to attain and maintain maximum independence, full physical, mental, social and vocational ability, and full inclusion and participation in all aspects of life. The Article requires that parties should organise, strengthen and extend comprehensive habilitate and rehabilitation services and programmes, particularly in the areas of health, employment, education and social services. Parties should ensure that these services are available at the earliest possible stage based on a multidisciplinary assessment of an individual's needs and strengths and support participation in society; are voluntary; and are available as close as possible to people in their own communities. The NDIS will also provide opportunities for people with disability to take part in cultural life, consistent with Article 15 of the ICESCR.

Participation in the NDIS

The NDIS is designed to implement Article 26 by providing as much support to the greatest number of people with the widest range of disabilities. It does this by providing a variety of supports based on levels of assessed need, ranging from information, advice, specialist referral and linkages with mainstream services through to the provision of funding and support under a plan agreed with the participant.

Potential participants, or someone acting on their behalf, may request access to the Scheme by providing information and documentation to the CEO of the Agency, in a specified form. Eligibility and assessment of need will be based on the World Health Organisation's *International Classification of Functioning, Disability and Health* (ICF). The CEO, or a delegate, will make the decision on whether or not the person meets the access criteria. These access criteria include:

- Age requirements (section 22) – the intent is that NDIS applicants should be under the age of 65, on the basis that persons aged over 65 are eligible for long term assistance and support under the aged care system. In two launch sites (South Australia and Tasmania), access will be restricted to age specific target groups. However, these restrictions will apply only until the Scheme is extended nationally. Once a person becomes a participant in the NDIS, they continue to be so until the person dies; or turns 65 and enters permanent residential aged care or permanent community aged care; or their status as a participant is revoked; or they withdraw voluntarily (section 29).

- Residence requirements (section 23) - to be eligible to access the NDIS, a person must reside in Australia, and be either an Australian citizen, or the holder of a permanent visa, or the holder of a protected special category visa holder. During the initial implementation phase, a person seeking access to the Scheme will generally be required to reside within the catchment area specified for each launch site. Again, however, these restrictions will be lifted following rollout of the full NDIS.

- Disability requirements (section 24) – the legislation specifies the following disability requirements:

    - 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 relating to a psychiatric condition; and

    - the impairment or impairments are permanent; and

    - the impairment or impairments result in substantially reduced functional capacity of the person to undertake one or more of the following activities of daily living: communication; social interaction; learning; mobility; self-care; self-management; and

  - the impairment or impairments affect the person's capacity for social and economic participation; and
  - the person's support needs in relation to his or her impairment or impairments are likely to continue for the person's lifetime.

- Early intervention requirements (section 25) – allows for the provision of early intervention supports that are likely to mitigate, alleviate or prevent the deterioration of the functional capacity of a person to undertake one or more of the activities of daily living – communication, social interaction, learning, mobility, self-care and self-management are a key focus. These conditions will be met if:
  - 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 relating to a psychiatric condition; or
  - is a child who has developmental delay; and
  - the CEO of the Agency is satisfied that provision of early intervention supports for the person is likely to reduce the person's future needs for supports in relation to disability; and that provision of early intervention supports is likely to:
    - mitigate, alleviate or prevent the deterioration of the functional capacity of the person to undertake one or more of the activities of daily living referred to above; or
    - strengthen the sustainability of the informal supports available to the person, including through building the capacity of the person's carer.

Participant status can be revoked on the basis that the person does not meet the age or residence requirements; or does not meet one of the disability or early intervention requirements (section 30).

Participant requirements and non-discrimination

Article 3 (b) of the CRPD provides that non-discrimination is a general principle in relation to all rights in the CRPD. As noted by the Human Rights Committee in General Comment No. 18 on equivalent rights in the *International Covenant on Civil and Political Rights* (ICCPR), the rights to equality and non-discrimination in the Covenant sometimes require nation states 'to take affirmative action in order to diminish or eliminate conditions which cause or help perpetuate discrimination'. In this context, the establishment of the NDIS promotes and advances the rights of people with disability in Australia by providing support for them to exercise their social, economic and cultural rights.

Non-discrimination ensures that no one is denied their rights because of factors such as race, colour, sex, language, religion, political or other opinion, national or social origin, property or birth. In addition to those grounds, discrimination on certain other grounds may also be prohibited. These grounds include age, nationality, marital status, disability, place of residence within a country and sexual orientation.

Differential treatment will not constitute discrimination if the differences in treatment are aimed at achieving a legitimate purpose and are reasonable and proportionate to this purpose.

Age Requirements

The legislation limits access to the NDIS based on age in two ways. First, only those people aged under 65 can make an access request. This is because the NDIS is one part of a broader system of support in Australia. The intent is that people over the age of 65 should access the aged care system. Those people who are receiving support under the NDIS and turn 65 can choose either to remain in the NDIS or to move to the aged care system. This limitation is reasonable and necessary because it supports the broader intent of an integrated system of support operating nationally and providing seamless transition through different phases of life.

The second age-based restriction is a temporary one. The NDIS will be launched in five sites, each of which will test the effectiveness of processes and supports for particular sub-groups within the general population of people with disability. NDIS operations and outcomes in these sites will be evaluated and, if necessary, processes refined to ensure optimal effectiveness when the scheme is extended nationally. In two sites, South Australia and Tasmania, services will be provided only to certain age groups. In Tasmania, this will be 15 – 24 year olds, a group that is seen as particularly high risk as they make the transition from adolescence to adulthood. In South Australia, the focus will be on children: 0 – 5 years olds in the first year, 0 – 13 year olds in the second year, and 0 – 14 year olds in the third year. This group was chosen particularly to assess the effectiveness of early intervention processes, and because of the potential benefits to individual children in terms of reduced lifelong support needs. All Governments are keen to see the benefits of the NDIS to individuals maximised, and support the incremental approach recommended by the Productivity Commission. The temporary age restrictions in Tasmania and South Australia are considered reasonable and proportionate, because of the overarching aim to ensure the integrity of the NDIS when it is nationally extended.

Residence Requirements

When fully rolled out nationwide, the NDIS will be open to anyone who resides in Australia and is either an Australian citizen, or a permanent visa holder, or is the holder of a protected special category visa. These are the same requirements that apply to the broader social security system. During the launch period, however, access to the NDIS will be limited to those living within the catchment areas of designated launch sites. Again, this restriction is temporary in nature, and the intent of this provision is to ensure the integrity of the Scheme before is extended nationally. This limitation is reasonable and proportionate because it aims to ensure the integrity of the NDIS in the longer term.

Participant Plans

Consistent with the provisions of Article 26 outlined above, the legislation provides for the provision and funding of reasonable and necessary supports for participants in the NDIS if:

- the support will assist the participant to pursue the goals, objectives and aspirations included in the participant's statement of goals and aspirations;
- the support will assist the participant to undertake activities, so as to facilitate the participant's social and economic participation;
- the support represents value for money in that the costs of supports are reasonable, relative to both the benefits being achieved and the cost of alternative supports;
- the support will be, or is likely to be, effective and beneficial for the participant, having regard to current good practice;
- 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;
- the support is most appropriately provided through the National Disability Insurance Scheme, and is not more appropriately 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:
  - as part of a universal service obligation; or
  - in accordance with reasonable adjustments required under a law dealing with discrimination on the basis of disability;
- the support is not specified in the National Disability Insurance Scheme rules as a support that will not be funded or provided under the National Disability Insurance Scheme;

- the funding or provision of the support complies with the methods or criteria (if any) specified in the National Disability Insurance Scheme rules for deciding the reasonable and necessary supports that will be funded or provided under the National Disability Insurance Scheme.

Plans are to be approved by the CEO in accordance with prescribed rules (which will be disallowable instruments) and remain in effect until replaced by another plan, or they are revoked. Participants must be provided with a copy of the plan.

Participant plans

The provision and funding of support for participants will be individualised and will be articulated through participant plans. The legislation (sections 31 – 41) requires that preparation, review and replacement of plans, and management of funding and supports provided under them should:

- be individualised; and
- be directed by the participant; and
- where relevant, consider and respect the role of family, carers and other persons who are significant in the life of the participant; and
- where possible, strengthen and build capacity of families and carers to support participants who are children; and
- consider the availability to the participant of informal support and other support services generally available to any person in the community; and
- support communities to respond to the individual goals and needs of participants; and
- be underpinned by the right of the participant to exercise control over his or her own life;
- advance the inclusion and participation in the community of the participant with the aim of achieving his or her individual aspirations;
- maximise the choice and independence of the participant;
- facilitate tailored and flexible responses to the individual goals and needs of the participant;
- 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 articulation of the goals and aspirations of Scheme participants are an integral part of a formal plan to manage ongoing support (section 33). These plans will consist of two parts:

- A participant's statement of goals and aspirations – prepared by the participant and containing details of the person's goals, objectives and aspirations, and their environment and personal context, including living arrangements, informal and other community supports and social and economic participation; and

- A statement of participant supports – prepared in consultation with the participant, and approved by the CEO, and containing details of the general supports (if any) that will be provided to or in relation to the participant; the reasonable and necessary supports (if any) that will be funded under the NDIS; the review date for the Plan, the management of the funding for supports under the plan; and the management of other aspects of the Plan.

These individual plans must be approved by the CEO in accordance with prescribed rules (which will be disallowable instruments) and will remain in effect until replaced by another plan, or the plan is revoked. Participants must be provided with a copy of their plan.

Managing Plans

Funding for supports provided under plans must be managed. This means:

- purchasing the supports identified in the plan;

- receiving and managing any funding provided by the Agency; and

- acquitting any funding provided by the Agency.

Plans may be managed by the participant, by a registered plan management service provider, by the Agency, or by a plan nominee. In most cases, the plan management arrangements put in place will be those requested by the participant. However, a participant may not manage their own plan in certain circumstances:

- if the participant is an insolvent under administration; or

- if the CEO is satisfied that management of the plan would present an unreasonable risk to the participant; or permit the participant to manage matters that are prescribed by the NDIS rules as being matters that must not be managed by a participant.

Although this provision limits the general principles that plans should be directed by the participant and should be underpinned by the right of the participant to exercise control over his or her own life, it is considered reasonable because the intent is the protection of the long term sustainability and overall integrity of the Scheme.

Payments (known as NDIS amounts) will be paid either to a participant or to the person managing the participant's plan. NDIS rules will govern the timing and manner of payments. NDIS amounts must be spent in accordance with the participant's plan, and records of payments and receipts retained for a period to be specified under the NDIS rules.

There are rights for review of decisions in relation to management of plans (sections 99 – 102).

Reviews and Suspension of Plans

Consistent with the principles of choice and control in Article 3(a) of the CRPD, participants can revise their statement of goals and aspirations at any time (section 47) without the need for review of the whole plan. Participants may also request a review of the plan (inclusion provision and funding of supports) at any time (section 48). Following review, a new plan is to be prepared.

If the participant is temporarily absent from Australia for less than six weeks (the grace period), the plan is not affected. The CEO can extend the grace period if appropriate, for example, if a participant is unable to return to Australia because of the death of a family member; a participant travels overseas for medical treatment; a participant who is a student organises a student exchange or overseas travel which is directly linked to their plan. However, if the period of absence is longer, and the CEO does not extend the grace period, the plan is suspended until the participant returns to Australia.

Plans can also be suspended if a participant fails to take action to obtain compensation when required to do so by the CEO.

While a plan is suspended:

- the person is not entitled to be paid NDIS amounts, so far as the amounts relate to supports that would otherwise have been funded in respect of that period; and
- the Agency is not required to provide or fund other supports under the plan, but is not prevented from doing so if the CEO considers it appropriate; and
- the participant is not entitled to request a review of the plan.

Nominees

Although the principle of choice and control underpins the NDIS, the legislation recognises that, in certain circumstances, people with disability may not be able to manage their own affairs. In these cases, the legislation allows for the appointment of nominees, to manage either a person's plan (the plan nominee) or their correspondence (correspondence nominee). In both cases, appointment may be at the request of the person, or at the instigation of the CEO.

The plan nominee may act only in relation to:

- the preparation, review and replacement of the participant’s plan; or
- the management of the funding for supports under the participant’s plan.

A correspondence nominee may not act in relation to matters that fall within the remit of the plan nominee, but acts in relation all other correspondence. It is the responsibility of a correspondence nominee to ensure compliance with all requirements made of the participant, in writing, by the Agency.

The legislation imposes a duty upon a nominee to ascertain the wishes of the participant, and to act in a way that promotes the participant’s social and personal wellbeing. However, a nominee is not required to act on the wishes of the participant if he or she believes that it would not promote the participant’s personal and social wellbeing.

A nominee is obliged to inform the Agency of changes in circumstances that affect, or are likely to affect, his or her ability to act as nominee.

A plan nominee is required to ensure expenditure of NDIS amounts in accordance with the participant’s plan, and to provide the Agency with details of how those amounts were spent.

Nominees have the right to accompany the participant to attend an assessment or a medical, psychiatric or psychological examination if the participant wishes, and to the extent that the examiner consents.

Nominees may only be appointed with their written consent, and after the CEO has taken into consideration the wishes of the proposed participant. NDIS rules may prescribe some limitations about who can be appointed as nominees.

A participant who has requested the appointment of a nominee can also request that the appointment be cancelled, and the CEO is required to accede to that request. A nominee may also request cancellation of the appointment.

Where the CEO acts to appoint a nominee, that appointment may be cancelled or suspended at the participant’s request. The CEO may also cancel or suspend an appointment if the nominee advises of changes in circumstance that might or are likely to, impact on their ability to act as a nominee; or for failure to fulfil their obligations as nominees.

The CEO may also suspend a nominee’s appointment if there are reasonable grounds to believe that the person has caused, or is likely to cause, severe physical, mental or financial harm to the participant.

The legislation provides for protection of the principal against liability for actions of nominees, and also protection of the nominee against criminal liability if the nominee has acted in good faith.

Registered Providers of Supports

Consistent with the provision in Article 26 that "effective and appropriate measures" are taken, support providers who receive payments directly from the Agency must be registered by the CEO, in accordance with criteria to be specified under NDIS rules. These criteria go to the provision of high quality services, and with appropriate safeguards for NDIS participants. Specifically, they will relate to:

- compliance with specified safeguards, quality assurance standards and procedures;
- the qualifications of the person or employees of the person;
- the consequences of approved providers of supports failing to comply with the provisions of this Act;
- requirements with which registered providers of supports must comply, including in relation to governance, business practice and accounting practice;
- obligations in relation to monitoring of their compliance;
- the process for handling complaints involving registered providers of supports; and
- auditing requirements in relation to registered providers of supports.

Article 22 of the CPRD – respect for privacy

Article 22 of the CPRD provides that no person with disability, regardless of place of residence or living arrangements, shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence or other types of communication, or to unlawful attacks on his or her honour and reputation. It also provides that the privacy of personal, health and rehabilitation information of people with disability should be protected on an equal basis with others. This right contains similar protections to those in Article 17 of the ICCPR.

Collection, storage, use and sharing of personal information will engage Article 22 of the CPRD. Information provided under this legislation and stored in Agency records is considered to be protected information. Consistent with the provisions of Article 31 of the CRPD, relating to statistics and data collection, such information may be disclosed or used for the specific purposes provided under the legislation, or under certain other conditions decided upon by the CEO, including for the purposes of research, actuarial analysis, or policy development on matters relevant to the NDIS. The reporting of statistics and other information to Governments under the reporting provisions of the legislation under sections 172-176 will also meet the obligations in Article 31 of the CRPD.

The legislation creates offences for unauthorised access or use, for soliciting disclosure, and for offering to supply protected information. These are not strict liability offences, that is, the burden of proof rests with the prosecution. Each offence attracts a penalty of two years' imprisonment or 120 penalty units, or both. These are the standard penalties applied by the Commonwealth for breaches of privacy in relation to protected personal information, for example, under social security and families assistance laws, and in relation to veterans.

Production of information to courts, tribunals etc., except for the purposes of this legislation, is also prohibited.

The stringent conditions attached to the treatment of protected information under the legislation serve to support and protect the right to privacy under the CRPD.

To ensure that the individualised packages of support are best tailored to meet a participant's aspirations and assessed need, and to support the overall integrity of the NDIS, the CEO can also require the provision of information if he or she has reasonable grounds to believe that a participant or prospective participant has information that they have not disclosed, and that is relevant to their status as a participant in the Scheme, or to decisions about the funding of supports under the NDIS. The legislation specifies the types of matters that fall within the ambit of this provision:

- the monitoring of supports funded for, or provided to, a participant;
- whether NDIS amounts paid to the participant or to another person have been spent in accordance with the participant's plan;
- determining whether the participant was not entitled to be paid NDIS amounts because of misleading statements or fraud of any person;
- whether the participant or other person has complied with acquittal requirements;
- whether the participant or prospective participant receives:
  - supports or funding through a statutory compensation scheme or a statutory care or support scheme; or
  - any other disability or early intervention supports (section 53).

Similar powers apply to the provision of information by others in relation to a participant or prospective participant. Again, the matters that may be subject to this power are tightly specified:

- whether a prospective participant meets the access criteria;
- whether a participant continues to meet the access criteria;

- whether a person purporting to act on a person's behalf for the purposes of this Act has the authority to do so;
- the preparation or review of a participant's plan;
- the monitoring of supports funded for, or provided to, a participant;
- whether NDIS amounts paid to the participant or to another person have been spent in accordance with the participant's plan;
- whether a participant or other person has complied with section 46;
- whether a participant receives:
  - supports or funding through a statutory compensation scheme or a statutory care or support scheme; or
  - any other disability support;
- whether an applicant for approval as a registered provider of supports meets the criteria for approval;
- whether a registered provider of supports continues to meet the criteria for approval;
- the functions of the Agency (section 55).

An offence is created for failure to comply with section 55, that is, obtaining information from other persons (not under section 53, relating to participants and prospective participants). The penalty for this offence is 30 penalty points.

The intent of both section 53 and 55 is to ensure the integrity of the NDIS.

Accordingly, the powers to compel information are 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.

Article 7 of the CRPD - Respect for the rights of children

Article 7 of the CRPD requires the taking of all necessary measures to ensure the full enjoyment by children with disabilities of all human rights and fundamental freedoms on an equal basis with other children. It also requires that in all actions concerning children with disabilities, the best interests of the child shall be a primary consideration. Further, children with disabilities have the right to express their views freely on all matters affecting them, their views being given due weight in accordance with their age and maturity, on an equal basis with other children, and should be provided with disability and age-appropriate assistance to realise that right. Additionally, the Preamble notes that children with disabilities should have full enjoyment of all human rights and fundamental freedoms and recalls obligations to that end in the *Convention on the Rights of the Child*.

The legislation contains special provisions relating to the treatment of children (sections 74 – 77):

- if the legislation requires or permits a thing to be done by or in relation to a child, it is to be done by or in relation to:
  - the person who has, or people who jointly have, parental responsibility for the child; or
  - if the CEO is satisfied this is not appropriate, by a person determined by the CEO, having regard to any relevant NDIS rules;
- in relation to plan management for a child participant, the person with parental responsibility for the child may request:
  - that the person manage the plan wholly or to the extent specified in the request; or
  - that the plan be managed wholly, or to the extent specified in the request, by an approved plan management service provider nominated by the person to manage the plan; or
  - that the plan be managed wholly, or to the extent specified in the request, by the Agency or a person specified by the Agency.

These provisions do not apply if:

- the CEO is satisfied that the child is capable of making decisions for himself or herself; and
- the CEO is satisfied that it is appropriate for this section not to apply to the participant and makes a determination accordingly.

Parental responsibility is defined under the legislation as:

- the person is the child's parent and has not ceased to have parental responsibility for the child because of an order made under the *Family Law Act 1975* or a law of a State or Territory; or
- under a parenting order (within the meaning of the *Family Law Act 1975*):
  - the child is to live with the person; or
  - the child is to spend time with the person; or
  - the person is responsible for the child's long-term or day-to-day care, welfare and development.

- if, under a law of the Commonwealth, a State or a Territory, a person has guardianship of a child, that person has ***parental responsibility*** for the child, unless the CEO determines that one or more of the persons referred to above instead have parental responsibility for the child.

- if the criteria specified above would result in more than one person having parental responsibility for a child, the CEO may determine that one or more of those persons have parental responsibility for the child for the purposes of this Act.

The legislation also promotes the rights of children consistently with Articles 12 (views of the child should be "given due weight in accordance with the age and maturity of the child") and 23 (children with disabilities are to "enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community") of the *Convention on the Rights of the Child*. It imposes a duty on those acting on behalf of children to ascertain the wishes of the child concerned, and enables choice and control if the CEO is satisfied that a child in capable of making decisions himself or herself. Individualised packages of support for children under the NDIS will be required to conform with the same general principles as those applying to adult participants.

Article 12 of the CRPD - Review of Decisions

Article 12 (4) of the CRPD requires signatories to the Convention ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.

Consistent with this, the legislation provides rights and processes for review of decisions. Reviewable decisions under the legislation are:

- that a person does not meet the access criteria;
- not to specify a period;
- to revoke a person's status as a participant;
- to approve the statement of participant supports in a participant's plan;
- not to extend a grace period;
- not to review a participant's plan;

- to refuse to approve a person or entity as a registered provider of supports;
- to revoke an instrument approving a person or entity as a registered provider of supports;
- to make, or not to make, a determination in relation to a person;
- not to make a determination in relation to actions on behalf of a child;
- to make, or not to make, a determination that a person has parental responsibility for a child;
- to appoint a plan nominee;
- to appoint a correspondence nominee;
- to cancel or suspend, or not to cancel or suspend, the appointment of a nominee;
- to give a notice to require a person to take reasonable action to claim or obtain compensation;
- to give a notice that the CEO proposes to recover an amount;
- not to treat the whole or part of a compensation payment as not having been fixed by a judgement or settlement.

Written notice of their review rights must be given to participants when a reviewable decision is made, as well as details of how to request a review. The reviewer must not have been in involved in the original decision, and must confirm the original decision, vary it, or set it aside and substitute a new decision. The legislation provides a further avenue of review to the Administrative Appeals Tribunal.

Article 4(3) of the CRPD – Involvement of persons with disabilities in decision-making and Article 8 of the CRPD – Awareness-raising

Article 4 (3) of the CRPD requires that, “in the development and implementation of legislation and policies to implement the present Convention, and in other decision-making processes concerning issues relating to persons with disabilities, States Parties shall closely consult with and actively involve persons with disabilities, including children with disabilities, through their representative organizations”.

Article 8 of the CRPD provides that Parties should raise awareness throughout society regarding people with disability; to foster respect for the rights and dignity of persons with disability; and to promote awareness of the capabilities and contributions of people with disabilities.

Consistent with the provisions in Article 4 (3) of the CRPD, the legislation provides for an Independent Advisory Council to advise the Board about how the Agency:

- performs its functions relating to the National Disability Insurance Scheme launch; and
- supports the independence and social and economic participation of people with disability; and
- provides reasonable and necessary supports for participants in the National Disability Insurance Scheme launch; and
- enables people with disability to exercise choice and control in the pursuit of their goals and the planning and delivery of their supports; and
- facilitates the development of a nationally consistent approach to the access to, and the planning and funding of, supports for people with disability; and
- promotes the provision of high quality and innovative supports to people with disability; and
- raises 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.

However, the Advisory Council is precluded from providing advice on:

- a particular individual;
- the approval of a person or entity as a registered provider of supports or revocation of that approval;
- the corporate governance of the Agency; or
- the money paid to, or received by, the Agency.

The legislation requires that, in appointing members of the Council, the Minister must:

- have regard to the desirability of the membership of the Council reflecting the diversity of people with disability; and
- ensure that:
    - at least 3 of the members are people with disability; and
    - at least 2 of the members are carers of people with disability; and

  - at least one of the members is a person who has skills, knowledge or experience in the supply of equipment, or the provision of services, to people with disability.

Consistent with Article 8, the functions of the NDIS Launch Transition Agency (section 118), include:

- facilitating innovation, research and best practice in the sector;
- to build community awareness of disabilities and the social contributors to disabilities;
- to collect, analyse and exchange data about disabilities and the supports (including early intervention supports) needed by people with disability; and
- to undertake research relating to disabilities, the supports (including early intervention supports) needed by people with disability and the social contributors to disabilities.

The Agency will be a statutory authority under the *CAC Act* 1997, and will have a governing board.

Conclusion

The National Disability Insurance Scheme Bill 2012 is compatible with human rights because it advances the protection of the rights of people with disability in Australia consistent with the CRPD. It creates additional opportunities for people with disability to exercise those rights by providing support to enable participation in the social, economic and cultural life of the community. To the extent that it limits human rights in some circumstances, those limitations are reasonable, necessary and proportionate to ensure the long term integrity and sustainability of the National Disability Insurance Scheme.

The Minister for Families, Community Services and Indigenous Affairs, Minister for Disability Reform, the Hon Jenny Macklin MP