



Submission in response to the *Inquiry into the National Disability Insurance Scheme Bill 2012*

Contacts:

Carmel Franklin

Liisa Wallace

Director

Client Service Coordinator

carmel.franklin@carefcs.org

liisa.wallace@carefcs.org

Care Inc. Financial Counselling Service and the Consumer Law Centre of the ACT

Telephone 02-6257 1788

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About Care Inc. and the Consumer Law Centre of the ACT (Care/CLC)

Care Financial Counselling Service (Care) has been the main provider of financial counselling and related services to low to moderate income and vulnerable consumers in the ACT since 1983. Care's core service activities include the provision of information, counselling and advocacy to consumers experiencing problems with credit and debt. Care also has a Community Development and Education Program, provides policy comments on issues of importance to its client group and has operated the ACT's No Interest Loans Scheme since 1997.

In late 2002, Care was selected as the host agency for the Consumer Law Centre of the ACT (CLC). The CLC was officially opened in January 2003. The CLC offers legal assistance in the area of credit and debt, consumer protection and fair trading. In addition to casework, the CLC advocates and provides policy comment on local, territory and national issues to improve legal protection and raise awareness and understanding of consumers' rights in the ACT.

Across Care's service delivery programs, the agency responds to over 2000 new requests for assistance every year.

In addition to casework, Care/CLC advocate effectively on behalf of the ACT's consumers, provide policy comments on issues of significance to our client group, and actively seek to improve legal protection and awareness of consumers' rights in the ACT.

Care/CLC is a government funded community organisation. Funding is provided by both the Territory and Federal Governments.

Summary

If enacted, the National Disability Insurance Scheme (NDIS) will establish the benchmark for how the Australian community respects and realises the human rights of people with a disability. Having been designed to meet the requirements of the UN Convention on the Rights of Persons with Disabilities (UNCRPD), it will truly be based on a person centred framework for service funding and delivery. Care/CLC are strongly supportive of this scheme as it will enhance the quality of life of many people with a disability, promote individual human rights, reduce barriers for people with disabilities from engaging in all areas of life, and provide individuals with more freedom and choice in the services they access. Care/CLC believes there are many advantages to a system that focuses on the needs of the individual and supports empowerment and individual choice. Care/CLC, however, would like to identify a few areas of concern in the way the scheme may operate, particularly around the management of individual funds and the recovery of debts.

The *National Disability Insurance Scheme Bill 2012* (the Bill) is very comprehensive and, possibly as a result, quite complex. Many of the people who will qualify for the NDIS will be vulnerable because of their disability. Many will be on low to moderate incomes and therefore vulnerable because of their financial circumstances. One of the aims of the NDIS is to allow people with a disability to 'fulfil their potential as equal citizens'. It is therefore essential that the introduction of the NDIS does not place any additional burden on participants or create any additional financial stress in their lives.

There are several areas where the Bill is likely to have an impact on the work of financial counsellors and consumer lawyers. It is these issues that Care/CLC's submission will address. Comments will cover the following specific areas:

1. Participant Plans – Interaction of free services and NDIS
2. Chapter 3 (Part 2) – Managing the funding for supports under participants' plans
3. Chapter 4 (Part 5) – Nominees
4. Chapter 5 – Compensation Payments
5. Chapter 7 – Debt Recovery

Submissions

1. Participant Plans – Interaction of free services and NDIS

Care Inc. is part of the community sector that which provides support to people on low to moderate incomes who are experiencing financial difficulty. While Care it is not a disability specialist service, its clientele includes people in the general population with a disability. The key concerns from the perspective of our organisation are therefore ensuring that:

- free services remain accessible and are promoted to participants of the NDIS;
- funding for not for profit community services that are free to consumers is not eroded in any way by the introduction of the NDIS;
- the government properly considers the resource implications on services that may have increased demand as a result of the NDIS; and
- protections are in place to ensure participants do not pay for services where there is a free service available (in particular, this is important to address the potential that new services will emerge in the market once individuals are provided with funding to purchase those services).

In particular, we are concerned that the Bill does not contain sufficient clarity concerning how services that are free to consumers will be dealt with in the participant plans. We assume that the free financial counselling and legal services that Care/CLC provides are included in the category of '*support services generally available to any person in the community*'¹, but this is not clearly defined in the Bill and should be clarified to avoid confusion.

Suggestion 1: Free services, such as those provided by Care/CLC, should be clearly defined to avoid confusion, and potential fraud, in circumstances where people are asked to pay for services that should be provided for free.

Suggestion 2: The Scheme provides participants with: a list of services and activities that explains which services are free; those which are to be paid for; and the potential costs associated with each of the services.

We understand that this may be difficult to define, given that no two participant plans will be the same. Participants and agencies will therefore need access to guidelines to ensure services do not overcharge.

¹ *National Disability Insurance Scheme Bill 2012, s 31(e).*

2. Chapter 3 (Part 2) – Managing the funding for supports under participants’ plans

Providing participants with funds to purchase the supports they require (with or without the assistance of a nominee) presents possible challenges for how those funds are managed and allocated.

Our comments with respect to the management of funds relate broadly to ensuring that:

- the NDIS contains sufficient clarity concerning the rights and obligations of participants; and
- participants have access to information, training and financial counselling assistance (where required), to ensure that they are able to manage their funds and understand their obligations and rights under the NDIS.

Clarification of participant rights and obligations under the NDIS

Distinguishing between NDIS funds and participant funds: The NDIS needs to be clearer in relation to the impact that the receipt of funds will have on a participant’s financial circumstances. For example, will participants be required to keep the funds in an account with any level of interest earned? Will the funds be exempt from the Centrelink income test? Will the funds be deemed interest earning funds for Centrelink purposes? Will these funds be exempt for the purposes of government housing authorities? [What, if any, are the taxation (GST, income & employer) obligations?] These questions need to be clarified in the Bill or its related instruments to ensure that participants understand their obligations. We also note that the effect of these issues may fall to financial counsellors to assist participants to understand.

Contractual obligations: A further concern is that participants may not be able to access services as planned, due to issues such as ill-health or lack of capacity of services. Therefore, the timeframe in which a person can hold funds before those funds must be spent on a service should be clarified (in particular, the Bill should specify the point at which a debt to the Agency will arise).

Access to information, training and financial counselling assistance

Participants, who opt for direct management, will receive payments (possibly as regular payments) that they will be required to manage. As some participants will not have sufficient skills or training in money management, the government needs to implement effective ways of improving the participants’ financial skills. Financial counsellors may play a role in assisting with provision of information on budgeting and money management

A related issue is that, if payments are made to participants on a regular basis, there is a potential risk that the money will be used for everyday living expenses or other

unexpected bills (particularly for those participants who are living on a low income and are already struggling to make ends meet). Similarly some participants may borrow against the funding, thereby placing themselves in potential financial difficulty. Appropriate protections should therefore be put in place to help ensure NDIS funds are used in accordance with the Bill.

When accessing services, participants will also need to be able to articulate and negotiate the provision of services they wish to purchase prior to signing with a provider. Participants will need the skills or support to enable them to make informed decisions about how best to use their funds. For example, before entering into a contractual arrangement with a service provider, participants will need to know:

- whether they can change their mind (and what effect this will have on the financial transaction); and
- whether there is a cooling off period.

As a consequence, participants may require access to services such as financial counsellors or consumer law services (not to manage their funds, but to discuss options on getting the best value they can for their money, and assisting with a comparison of various types of services and providing information about contracts and cooling off periods).

Suggestion 3: Training in money management issues is made available to participants

Suggestion 4: Participants are provided with the opportunity to access financial counselling and consumer law services to discuss issues around the management of funds.

3. Chapter 4 (Part 5) – Nominees

The Scheme confers on nominees significant responsibilities. Nominees should therefore be required to demonstrate that they have the skills and ability to manage the financial affairs of another person. In addition, the government should consider including training and support for nominees to ensure they understand, and are capable of carrying out, their obligations under the scheme.

The Bill should also clarify the consequences of mismanagement of participants' plans by nominees. Section 91 states that a CEO may suspend and/or cancel the appointment of a person as a nominee where '*the CEO has reasonable grounds to believe that the person has caused, or is likely to cause, severe physical, mental or financial harm to the participant*'. However, the Bill should specify the consequences of a nominee mismanaging the affairs of the participant, where that mismanagement has not resulted in *severe* harm to the participant, and is therefore not covered by section 91 of the Bill.

In addition, the Bill does not specify whether the nominee is required to compensate or reimburse the participant as a result of physical, mental or financial harm. It should be clarified whether any such loss is intended to be covered only by the common law.

It will also be important to understand how the Bill will interact with the Disability Trust provision of the Social Security Act. For example; could a participant's family/ friends establish a disability trust and use the trust as a vehicle to administer the participant's NDIS allocation?

4. Chapter 5 – Compensation Payments

Compensation is a very complex area. Compensation disputes often continue for years and involve protracted negotiations between solicitors and insurance companies. As a result, claimants are often required to pay for services related to their accident or injury, and may need to borrow money in order to pay those costs (in anticipation of future compensation payments, which will allow them to repay the borrowed money).

It is extremely important that the obligations under the Scheme relating to the recovery of compensation not place participants (in particular vulnerable participants) in financial hardship. We therefore recommend that the scheme take a more flexible approach to the recovery of compensation payments.

5. Chapter 7 – Debt Recovery

There is potential under the NDIS for participants to incur a debt to the Agency, either because they were unable to access the support services they planned or did not fully understand their obligations. This is an area in which financial counsellors may be called upon to provide support or information to participants (similar to the assistance that financial counsellors provide to people who have incurred Centrelink debts).

We have provided several comments below concerning debt recovery with respect to:

- *the role of financial counselling services and consumer laws centres;*
- *potential resource implications of increased demand on financial counselling and consumer law centre services;*
- *the need to clarify who is responsible for a debt when a nominee incurs a debt on behalf of a participant; and*
- *debt recovery procedure.*

Role of financial counselling services and consumer laws centres

Financial counselling services and consumer law centres play an important role in assisting and supporting people to negotiate debt arrangements, understand their rights and obligations, deal with any legal issues around the debt and to access dispute resolution processes. Under the NDIS, such services may include assisting participants where:

- their nominee has incurred a debt in their name for which they are not responsible;
- assisting participants where they are responsible for a debt to the Agency but cannot afford the repayments; and
- the debt has been raised in error (in our experience, it is not uncommon for clients to access Care's services believing that they are responsible for a debt when in fact they are not).

In particular, sections 183 to 192 of the Bill are extremely complex. Some participants will find it difficult to negotiate these debts on their own, and may require assistance from financial counselling or consumer law centre services.

Suggestion 5: A further practical way in which financial counsellors could assist in this area would be to prepare a budget (income & expenses statement) with a participant so that they know how much they can afford to repay, without placing themselves into financial difficulty. Involving financial counsellors early in the process may prevent participants from experiencing difficulties later on.

Resource Implications

As a result of debts incurred through the establishment of the NDIS, there may be increased demand on financial counselling and consumer law centre services. The government therefore needs to consider the resource implications of this increased demand, and ensure that services like Care Inc. are adequately funded to provide these services.

Responsibility for Debts

It is not clear under the Bill whether, in circumstances where a debt to the Agency has resulted as a consequence of the nominee's act or omission, the nominee or the participant is required to repay the debt.

The Bill should therefore specify:

- what redress a participant has if a nominee incurs a debt on his or her behalf; and

- who is responsible for debts incurred by the nominee on behalf of the participant.

Debt Recovery Procedure

Section 183 allows the Agency to recover debts by means of court proceedings. We strongly suggest that other informal options be pursued in the first instance, with legal action being commenced only where it is not possible to continue informal negotiations (for example, where the Agency has lost contact with the participant or the participant refuses to engage in resolution attempts).

Any repayment arrangements need to be flexible enough to meet the circumstances of the individual participant and must not place them in financial hardship or restrict their future access to services.

We also consider that it is essential that participants have access to both internal and external dispute resolution processes when a debt is incurred. Certain schemes (such as Centrelink) provide protections for consumers who have a debt raised against them unfairly or incorrectly. It may be possible to institute a system similar to that used by Centrelink (such as the Social Security Appeals Tribunal (SSAT) for internal complaints, and the Administrative Appeals Tribunal (AAT) for external complaints).

Suggestion 6: The circumstances in which debts can be ‘written off’ or ‘waived’ (sections 190 to 195) should be expanded. In particular, in addition to circumstances where the debtor has no capacity to repay the debt, the CEO should also be permitted (although not necessarily required) to waive the debt where the debtor is experiencing financial hardship (such as where they are unable to make any repayments and their circumstances are unlikely to change).

Annexure 1 – Summary of Relevant Provisions

Participant Plans – Interaction of free services and NDIS

Section 31(e):

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

- ...
- (e) *consider the availability to the participant of informal support **and other support services generally available to any person in the community**,*

Section 33(2) (Matters that must be included in a participant’s plan):

A participant’s plan must include a statement (the statement of participant supports), prepared with the participant and approved by the CEO, that specifies:

- (a) *the general supports (if any) that will be provided to, or in relation to, the participant; and*
- (b) *the reasonable and necessary supports (if any) that will be funded under the National Disability Insurance Scheme; and*

...

‘General support’ is defined in section 13(2) of the Bill as:

- (a) *a service provided by the Agency to a person; or*
 - (b) *an activity engaged in by the Agency in relation to a person;*
- that is in the nature of a coordination, strategic or referral service or activity, including a locally provided coordination, strategic or referral service or activity.*

Chapter 3 (Part 2) – Managing the funding for supports under participants’ plans

Section 42 (Meaning of managing the funding for supports under a participant’s plan):

- (1) *For the purposes of this Act, managing the funding for supports under a participant’s plan means:*
 - (a) *purchasing the supports identified in the plan (including paying any applicable indirect costs, such as taxes, associated with the supports); and*
 - (b) *receiving and managing any funding provided by the Agency; and*
 - (c) *acquitting any funding provided by the Agency.*

- (2) *For the purposes of the statement of participant supports in a participant's plan, in specifying the management of the funding for supports under the plan as mentioned in paragraph 33(2)(d), the plan must specify that such funding is to be managed wholly, or to a specified extent, by:*
- (a) *the participant; or*
 - (b) *a registered plan management provider; or*
 - (c) *the Agency; or*
 - (d) *the plan nominee.*

Section 43(1) (Choice for the participant in relation to plan management):

- (1) *A participant for whom a plan is in effect or is being prepared may make a request (a plan management request):*
- (a) *that he or she manage the funding for supports under the plan wholly or to the extent specified in the request; or*
 - (b) *that the funding for supports under the plan be managed wholly, or to the extent specified in the request, by a registered plan management provider he or she nominates; or*
 - (c) *that the funding for supports under the plan be managed wholly, or to the extent specified in the request, by a person specified by the Agency.*

Chapter 4 (Part 5) – Nominees

Summary of Relevant Provisions

Section 91(1) (Suspension etc. of appointment of nominees in cases of severe physical, mental or financial harm):

- (1) *The CEO may, by written instrument, suspend the appointment of a person as a nominee of a participant if the CEO has reasonable grounds to believe that the person has caused, or is likely to cause, severe physical, mental or financial harm to the participant.*

Chapter 5 – Compensation Payments

104 (CEO may require person to take action to obtain compensation):

- (1) *This section applies if:*
- (a) *a participant or a prospective participant is, or in the CEO's opinion may be, entitled to compensation in respect of a personal injury; and*
 - (b) *the participant or prospective participant:*
 - (i) *has taken no action to claim or obtain the compensation; or*
 - (ii) *has taken no reasonable action to claim or obtain the compensation.*
- (2) *The CEO may, by written notice, require the participant or prospective participant to take the action specified in the notice within the period*

specified in the notice. The action must be action that is reasonable to enable the person to claim or obtain the compensation.

...

Chapter 7 – Debt Recovery

Section 182(3) (Debts due to the Agency):

- (3) *If a person does not comply with subsection 46(1) in relation to an NDIS amount, an equal amount is a debt due to the Agency by the person.*

Section 46(1) (Acquittal of NDIS amounts):

- (1) *A participant who receives an NDIS amount, or a person who receives an NDIS amount on behalf of a participant, must spend the money in accordance with the participant's plan.*

183(1) (Legal proceedings):

- (1) *A debt under this Act is recoverable by the Agency by means of legal proceedings brought by the CEO on behalf of the Agency in a court of competent jurisdiction.*