



THIRTY-NINTH PARLIAMENT

REPORT 86

**STANDING COMMITTEE ON UNIFORM
LEGISLATION AND STATUTES REVIEW**

DISABILITY SERVICES AMENDMENT BILL 2014

Presented by Hon Kate Doust MLC (Chair)

May 2014

STANDING COMMITTEE ON UNIFORM LEGISLATION AND STATUTES REVIEW

Date first appointed:

17 August 2005

Terms of Reference:

The following is an extract from Schedule 1 of the Legislative Council Standing Orders:

“6. Uniform Legislation and Statutes Review Committee

6.1 *A Uniform Legislation and Statutes Review Committee is established.*

6.2 The Committee consists of 4 Members.

6.3 The functions of the Committee are –

- (a) to consider and report on Bills referred under Standing Order 126;
- (b) on reference from the Council, to consider or review the development and formulation of any proposal or agreement whose implementation would require the enactment of legislation made subject to Standing Order 126;
- (c) to examine the provisions of any treaty that the Commonwealth has entered into or presented to the Commonwealth Parliament, and determine whether the treaty may impact upon the sovereignty and law-making powers of the Parliament of Western Australia;
- (d) to review the form and content of the statute book; and
- (e) to consider and report on any matter referred by the Council.

6.4 In relation to function 6.3(a) and (b), the Committee is to confine any inquiry and report to an investigation as to whether a Bill or proposal may impact upon the sovereignty and law-making powers of the Parliament of Western Australia.”

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GLOSSARY

Agreements	A set of agreements signed between the Commonwealth Government and the State of Western Australia for the implementation of the National Disability Insurance Scheme and the <i>My Way</i> trial in Western Australia.
Bill	Disability Services Amendment Bill 2013 (WA)
COAG	Council of Australia Governments
Commission	Disability Services Commission (WA)
DSC	Government of Western Australia Disability Services Commission
IGA	<i>Intergovernmental Agreement for the National Disability Insurance Scheme Launch</i> signed in December 2012 between the Commonwealth and some States.
<i>My Way</i>	WA model also known as WA NDIS <i>My Way</i>
<i>NDIA NDIS</i>	National Disability Insurance Agency (of the) National Disability Insurance Scheme. Previously known as <i>DisabilityCare Australia</i> .
NDIS	National Disability Insurance Scheme
NDIS Act	<i>National Disability Insurance Scheme Act 2013</i> (Cth)
NDIS Rules	Means the rules mentioned at Section 209 of the NDIS Act 2013
NHRA	National Health Reform Agreement
NIIS	National Injury Insurance Scheme
PC	Australian Government Productivity Commission
Second Agreement	<i>Agreement between the Commonwealth and the Western Australia Governments for disability reform in Western Australia</i> signed in August 2013.

Schedule G	<i>Bilateral Agreement for the NDIS Trial Between the Commonwealth and Western Australia. (Appendix to IGA).</i>
Third Agreement	<i>National Partnership Agreement on Trial of My Way Sites – Intergovernmental Agreement on Federal Financial Relations signed on 31 March 2014 between the Commonwealth and the State of Western Australia.</i>
UNCRPD	United Nations Convention on the Rights of Persons with Disabilities.
<i>WA NDIS My Way</i>	The Western Australian model developed by the Disability Services Commission Western Australia for the trial evaluation.

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EXECUTIVE SUMMARY, FINDINGS AND RECOMMENDATIONS

EXECUTIVE SUMMARY

- 1 The Disability Services Amendment Bill 2013 (**Bill**) was referred to the Legislative Council's Standing Committee on Uniform Legislation and Statutes Review on 9 April 2014 under Standing Order 126.
- 2 The Bill comprises 6 clauses to amend the principal Act, the *Disability Services Act 1993* (**Act**) to facilitate the trial of the Disability Services Commission (**DSC**) of the WA National Disability Insurance Scheme (**NDIS**) *My Way* (**My Way**) trial. The locations, operation or end date of the trial period will be prescribed in the Regulations. The *My Way* trial and the Commonwealth's National Disability Insurance Agency (**NDIA**) (that implements the National Disability Insurance Scheme (**NDIS**) model) will be overseen by a Joint Steering Committee (of departmental staff) in addition to the Ministerial Council that is enacted under the NDIS Act comprising State and Commonwealth Ministers. The Commonwealth model is called the **NDIA NDIS**.
- 3 The provision of disability services in Australia is a joint responsibility of the Commonwealth, States and Territories. The NDIS is a new scheme that funds disability services using an actuarial model framework. The principles and objects of the NDIS support self-determination, autonomy and participation of people with a disability in the planning for, and individualised funding of support services. The NDIS Act together with its Rules provides the principles, objects, eligibility, governance, operational framework and direction to the trial model NDIA NDIS that will operate in the Perth Hills area. The Bill's purpose is to facilitate the *My Way* model (by the Disability Services Commission) that has been underway for the past two years.
- 4 The Bill proposes amendments to the Act which provide for corresponding terms between the Act and the NDIS Act in the consideration of whether a criterion or requirement of the NDIS Act (such eligibility requirements, disability requirements (including early intervention) has been met in the State trial. The Bill gives effect to the Council of Australian Governments (**COAG**) Intergovernmental Agreements (**IGA**) between the Commonwealth and the State. Eligible participants in the selected *My Way* trial areas will be able to access support to help them develop self-directed and individualised plans. The agencies overseeing the Commonwealth and State trials will assist participants receive *reasonable and necessary support* services to provide for their care. The *My Way* trial will operate in the South West region (2014-2016) and the Kwinana Cockburn area (2015-2016). State specific guidelines will apply to the *My Way* trial. The Joint Steering Committee comprising departmental staff of the

- DSC and Commonwealth agencies will oversee the *My Way* trial and NDIA NDIS trial. The *My Way* trial will share information with relevant Commonwealth agencies. The Joint Steering Committee may report to the Commonwealth and State Parliaments. The *My Way* and NDIA NDIS trials will be evaluated independently.
- 5 The Committee was informed that amendments to the Act were necessary to enable information sharing with the Commonwealth. The Committee does not agree with this contention as the principal Act does not create a statutory prohibition on information sharing between the State and Commonwealth and the three intergovernmental agreements authorise information sharing between signatories.
- 6 The State of Western Australia signed three intergovernmental agreements (**Agreements**) for the NDIS to be introduced in WA. A number of schedules and appendices to the Agreements detail funding and governance arrangements. The three intergovernmental agreements (with schedules) are read together. The Committee finds that the Agreements appear to facilitate the operation of the *My Way* trial without the requirement for statutory amendments to the principal Act.
- 7 The Agreements provide for the establishment of a Ministerial Council as a forum for agreement on policy settings with oversight of the NDIS launch. The NDIS Act was enacted by the Commonwealth Parliament pursuant to the Agreements. Section 12 of the NDIS Act creates a Ministerial Council comprising State and Commonwealth Ministers that has been operational since 2013. A constitutional issue arises from section 12 of the NDIS Act. The section appears to reformulate the Ministerial Council under the Agreements as a Commonwealth statutory entity with functions and powers under the NDIS Act. Arguably, such a provision makes the State Minister for Disability Services, acting in the capacity of a Minister of the Crown in right of the State directly accountable to the Commonwealth Minister (when exercising these functions and powers). Additionally, while the NDIS Act appears to grant ‘COAG’ the power to designate which Ministerial Council constitutes this statutory entity, COAG itself is not a separate constitutional entity; rather COAG is a self-defining political forum.
- 8 The Committee has not been able to identify:
1. A head of power in the Constitution; or
 2. A referral of power by the Parliament of Western Australia under section 51(xxxvii) of the Constitution that establishes a legal basis for the appointment of the State Minister to the Ministerial Council (as defined for the purposes of the NDIS Act) in the NDIS legislation.
- 9 Although not mentioned directly in the Bill, this issue is central to concepts of State parliamentary sovereignty and Westminster notions of Ministerial accountability. Further it is a matter that may give rise to a future constitutional challenge to the validity of the NDIS legislation.

- 10 The State Minister is currently reviewing eleven NDIS Rules for matters that may be prescribed into Regulations. The Committee finds that the Western Australian Parliament's Joint Standing Committee on Delegated Legislation will scrutinise and may recommend the disallowance of State Regulations that incorporate the text of Commonwealth NDIS Rules. Any recommendation must fall within the relatively technical and narrow scope of that Committee's terms of reference before it can be effectively scrutinised by that Committee. Those recommendations that do not fall within those terms of reference may not, therefore, be adequately scrutinised by the Parliament of this State before passing into law.
- 11 The Committee considered the operation of Clauses 4, 5 and 6 on the law making powers and sovereignty of the Parliament of Western Australia. It observed that the Bill does not have a review provision that requires the Minister to table a report of the review for Parliamentary scrutiny at the conclusion of the two year trial.
- 12 The Committee is unconvinced that the Bill is necessary as the current Act is not an impediment to facilitate the operation of a trial. The Committee notes that the model has been operating in Western Australia since 2012 and that Agreements have been implemented effectively using existing administrative arrangements without the need for amending the legislation.
- 13 If the House determines that the Bill is necessary, the Committee recommends amendments to strengthen accountability to, and the scrutiny by the Western Australian Parliament. The proposed amendments are listed below in the Committee's findings and recommendations.

FINDINGS AND RECOMMENDATIONS

- 1 Recommendations are grouped as they appear in the text at the page number indicated:

Page 22

Finding 1: The Committee finds that the Ministerial Council as established at section 12 of the *National Disability Insurance Scheme Act 2013* has the effect of requiring the State Minister to advise the Commonwealth Minister on the National Disability Insurance Scheme, and clothes the State Minister with statutory functions and powers under a Commonwealth Act. The operation of the section may give rise to a future constitutional challenge to the National Disability Insurance Scheme legislation.

Page 22

Recommendation 1: The Committee recommends that, during consideration of the Disability Services Amendment Bill 2014, the Minister advise the Legislative Council as to whether the appointment of a State Minister to a Commonwealth statutory body under section 12 of the *National Disability Insurance Scheme Act 2013* can be validly made in the absence of either;

- A head of power under the Commonwealth Constitution; or,
- The State of Western Australia referring powers to the Commonwealth under section 51(xxxvii) of the Commonwealth Constitution by means of appropriate referring legislation.

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Finding 2: The Committee finds that three Intergovernmental Agreements (*Agreements*) provide for the participation of the State of Western Australia in the National Disability Insurance Scheme, the operation of the Commonwealth National Disability Insurance Agency in Western Australia, and facilitates the implementation of the Disability Services Commission *My Way* Model in specified sites in Western Australia.

Page 28

Finding 3: The Committee finds that the Second and Third Agreements for the trials in Western Australia were signed by the State of Western Australia and reflect the clauses of the Intergovernmental Agreement and provide for the operation and funding arrangements of the *My Way* trial.

Page 28

Finding 4: The Committee finds that the Intergovernmental Agreement is reflected in the *National Disability Insurance Scheme Act 2013* for the operation of the National Disability Insurance Agency.

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Recommendation 2: The Committee recommends that during the debate on the Bill the Minister advise the Legislative Council why the Bill is necessary when the *My Way model* is already underway with the relevant administrative arrangements in place.

Page 33

Finding 5: The Committee finds that the Agreements and the operation of section 52 of the *Disability Services Act 1993* do not impede arrangements for the sharing of information. Rather, such matters could be prescribed by regulations under existing s52(1)(e) of the *Disability Services Act 1993*.

Page 33

Finding 6: The Committee finds that Clause 4 (section 26E) headed *Terms Used* does not include a definition for *NDIS Rules*.

Page 35

Recommendation 3: The Committee recommends that the term *NDIS Rules* be defined in Clause 4 of the Disability Services Amendment Bill 2014 (new section 26E) as follows:

Clause 4

Page 3, after line 3 — To insert —

NDIS Rules means the rules mentioned in section 209 of the *National Disability Insurance Scheme Act 2013*;

Recommendation 4: The Committee recommends that the eleven NDIS Rules are cited in the Bill as Clause 4 Section 26F in the Table as follows:

Page 3, line 12, within the Table (left column last line) insert

NDIS Rules:

- *National Disability Insurance Scheme (Becoming a Participant) Rules 2013*
- *National Disability Insurance Scheme (Timeframes for Decision Making) Rules 2013*
- *National Disability Insurance Scheme (Supports for Participants) Rules 2013*
- *National Disability Insurance Scheme (Children) Rules 2013*
- *National Disability Insurance Scheme (Nominees) Rules 2013*
- *National Disability Insurance Scheme (Registered Providers of Supports) Rules 2013*
- *National Disability Insurance Scheme (Plan Management) Rules 2013*
- *National Disability Insurance Scheme (Protection and Disclosure of Information) Rules 2013*
- *National Disability Insurance Scheme – Rules for the Scheme Actuary 2013*
- *National Disability Insurance Scheme - Risk Management Rules 2013*
- *National Disability Insurance Scheme (Supports for Participants - Accounting for Compensation) Rules 2013*

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Finding 7: The Committee finds that COAG High Level Principles appended to the Agreements are aspirational and do not confer legally enforceable rights. These principles provide a framework for policy and are not a legal undertaking.

Page 40

Finding 8: The Committee finds that Clause 26G of the *Disability Services Amendment Bill 2014* does not impact the sovereignty or law making powers of the Western Australian Parliament.

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Finding 9: The Committee finds that Clause 4 proposes a new subsection under section 26H (1)(d) that creates an opportunity for the State Minister to prescribe regulations that may widen or limit the eligibility requirements for participants of the trial. These regulations would be open to scrutiny by the Joint Standing Committee on Delegated Legislation subject to the Committee’s terms of reference, depending on the extent to which the content of the regulations fall within the terms of reference of that Committee.

Page 45

Recommendation 5: The Committee recommends that during the debate on the Disability Services Amendment Bill 2014, the Minister should advise the Legislative Council on the mechanism by which parliamentary scrutiny will occur for the type of new amendments proposed under Clause 4 (proposed section 26H (1)(d)).

Page 50

Recommendation 6: The Committee further to paragraphs 3.72 and 3.73 of this Report recommends that clause 5 of the Bill (new section 56(2) Act) be amended as follows:

Clause 5

Page 5, line 28 — To delete “provide” and insert —

prescribe

Recommendation 7: The Committee recommends the following amendments to Clause 6 with the following:

Clause 6

Page 6, lines 4 to 23 — To delete the lines and insert —

57A. Notification, tabling and disallowance

- (1) This section applies to the —
 - (a) NDIS Rules (Commonwealth);
 - (b) changes to the NDIS Rules (Commonwealth);
 - (c) NDIS Act 2013 (Commonwealth);
 - (d) Australian Standards and Codes.
- (2) Where any document to which this section applies is made publicly available in accordance with section 57A, the Director General must, within 10 business days after the day on which the document is first made publicly available, cause to be published in the *Gazette* notice of —
 - (a) the making of the document; and
 - (b) where the document is publicly available.
- (3) If notification of the making of a document to which this section applies is not published in the *Gazette* in accordance with subsection (2), the document ceases to have effect on the expiry of the 10th business day after the day on which the document was first made publicly available, but without affecting the validity or anything done, or of the omission of anything in the meantime.
- (4) A copy of the document to which this section applies must be laid before each House of Parliament within 6 sitting days following notification of the making of the document in the *Gazette* in accordance with subsection(2).
- (5) If notification of the making of a document to which this section applies is published in the *Gazette*, the *Interpretation Act 1984*, section 42 applies as if the document were a regulation published in the *Gazette*.

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Recommendation 8: The Committee recommends that the Bill be amended to include a new provision under Clause 4 of the Bill as follows:

Clause 4

Page 5, after line 18 — To insert —

26J. Review of Part

- (1) The Minister must cause a review of the operations and effectiveness of this part to be carried out as soon as is practicable after the second anniversary of the day on which Part 4B of this Act comes into operation.
- (2) The Minister must cause a copy of the report to be laid before each House of Parliament by no later than 30 August 2016.

Page 55

Recommendation 9: The Committee recommends that provision should be made in the enabling legislation for the *My Way* trial for it to expire at the conclusion of this trial period and the finalisation of the *My Way* trial findings. The Committee further recommends should the NDIS scheme be rolled out in a substantial way throughout the State that new amendments, taking into account any findings flowing from the *My Way* trial, be re-introduced for consideration by the Parliament.

CHAPTER 1

INQUIRY PROCEDURE

REFERENCE

1.1 On 9 April 2014, the Legislative Council referred the Disability Services Amendment Bill 2014 (Bill) to the Standing Committee on Uniform Legislation and Statutes Review (**Committee**).

1.2 The Committee's function is to consider and report on Bills referred under Standing Order 126. For the purposes of the Standing Orders,

a Uniform Legislation Bill is a Bill that

ratifies or gives effect to a bilateral or multi lateral intergovernmental agreement to which the Government of the State is a party ; or

by reason of its subject matter, introduces a uniform scheme or uniform law throughout the Commonwealth.

1.3 The Minister for Disability Services, Hon Helen Morton MLC, described the Bill in the Second Reading Speech as following:

The WA NDIS My Way model will adopt the eligibility provisions approved by the Commonwealth in the National Disability Insurance Scheme Act 2013. WA is keen to trial a model that has minimal bureaucracy and that maintains some of the key features of WA services for people with disability who participate in the State's WA NDIS My Way trial. To enable implementation of the State's WA NDIS My Way trial, amendments to the Disability Services Act are required.¹

1.4 The Committee considered the statutory amendments to the Act to enable implementation and evaluation of the *My Way* model with the Commonwealth trial model NDIA NDIS.

INQUIRY PROCEDURE

1.5 The Minister for Disability Services, Hon Helen Morton MLC provided the following information:

- Briefing note on the Bill by the Disability Services Commission,

¹ Western Australia Parliament, Legislative Council. Hon Helen Morton, Minister for Disability Services, Second Reading Speech, Disability Services Amendment Bill 2013, p2.

- The Intergovernmental Agreement,
- The Agreement between the Commonwealth and the Western Australian Governments for disability reform and,
- The Disability Services Amendment Bill 2014, Explanatory Memorandum.

1.6 The Committee acknowledges the urgent nature of the referral and has endeavoured to report back to the Legislative Council earlier than its reporting date on 10 June 2014.

1.7 When the Bill was introduced in the House on 9 April 2014, the Committee received the Second Reading Speech, the Explanatory Memorandum and the Bill. In addition to this material, the Committee considered the following information:

- National Disability Insurance Scheme Act 2013 (Cth) (**NDIS Act**).
- *National Injury Insurance Scheme 2013* (Cth) (**NIIS**).
- *Carer Recognition Act 2010* (Cth).
- *National Disability Strategy 2010-2020*.
- The Productivity Commission Report, *Disability Care and Support* (released July 2011).
- The Intergovernmental Agreement entitled *Intergovernmental Agreement for the National Disability Insurance Scheme (NDIS) Launch* signed by the Commonwealth and all States on 7 December 2012 (**IGA**).
- Agreement between the Commonwealth and Western Australian Governments for disability reform in Western Australia signed on 5 August 2013 (**Second Agreement**).
- National Partnership Agreement on Disability Reform in Western Australia (31 March 2014) (**Third Agreement**).
- Schedule G: Bilateral Agreement for the NDIS Trial between the Commonwealth and Western Australia (**Schedule G**).
- National Disability Insurance Scheme Rules.
- Council of Australian Governments (COAG) High level principles for a National Disability Insurance Scheme.

-
- Commonwealth of Australia, Parliamentary Joint Committee on Human Rights, Examination of legislation in accordance with the Human Rights (Parliamentary Scrutiny) Act 2011.²
- 1.8 The Committee invited submissions from the Commonwealth Minister for Social Services, State and National disability service agencies and placed advertisements in the West Australian newspaper on 12 April 2014 and 19 April 2014 with a closing date of 2 May 2014.
- 1.9 The submission from the Commonwealth Assistant Minister for Social Services, Senator, Hon Mitch Fifield is at **Appendix 1**. The Committee received an enquiry from an individual consumer and submissions from the following agencies: the Disability Services Commission, Communication Rights Australia and the Disability Discrimination Legal Service Inc, Richmond Fellowship Western Australia, Community Employers WA, WA Association for Mental Health and the Emmanuel Centre. Whilst the focus of submissions fell outside the scope of the Committee's terms of reference the Committee appreciates the time and effort taken by agencies to contribute to the inquiry.
- 1.10 The Committee approached the Inquiry into the Bill by examining:
- the relevant Intergovernmental Agreements (Agreements),
 - whether the clauses of the Agreements are reflected in the Commonwealth legislation (NDIS Act and Rules) and whether it is necessary to amend the *Disability Services Act 1993 (Act)* to facilitate the trial,
 - the nature of the Bill; and,
 - whether the six clauses of the Bill have an impact on the law making powers and sovereignty of the Western Australian Parliament.
- 1.11 The Disability Services Commission advised of the change of the previous name for the Commonwealth Model cited in the Agreements:

The name DisabilityCare Australia is no longer used by the Commonwealth. The name reverted to the National Disability Insurance Scheme (NDIS) in September 2013. The Agency is known as the National Disability Insurance Agency (NDIA). In addition, the Western Australian State model is referred to as WA NDIS My Way.³

² This Committee considered Bills introduced between 11-27 February 2014 including a number of NDIS Rules.

³ Western Australian Government Disability Services Commission, submission dated 28 April 2014, p2.

Background to the Bill - National Disability Insurance Scheme

- 1.12 The provision of disability services in Australia is a joint responsibility of the Commonwealth and the States and Territories. The NDIS is a new scheme endorsed by the COAG in 2012 to provide disability services using an actuarial model framework. The Australian Constitution empowers the Commonwealth to make laws in relation to invalid pensions and allowances for people with disabilities or impairments (s51(xxiii) and s51(xxiiiA)). The Commonwealth government in the exercise of its general executive power signed the United Nations Convention on the Rights of Persons with Disabilities (**UNCRPD**)⁴ on 17 July 2008 and the Optional Protocol to the United Nations Convention on the Rights of Person with Disabilities in 2009⁵. The Commonwealth's exercise of the external affairs powers (s51(xxix)) led to the enactment of the *National Disability Insurance Scheme Act 2013* (Cth) to give effect to a number of international conventions. The Commonwealth has an active program of policy review and legislative reform of disability services⁶.
- 1.13 The principles and objects of the NDIS support self-determination, autonomy and participation of people with a disability in the planning for, and individualised funding of their support services. The NDIS Act together with its Rules provides the principles, objects, eligibility, governance and operational framework and direction to the trial model NDIA NDIS that will operate in the Perth Hills area. The principles and objects appended to the Agreements are available at **Appendix 2**.
- 1.14 Western Australia is a host jurisdiction under the Clauses of the Intergovernmental Agreement and also at section 10 of the NDIS Act⁷. The NDIA NDIS trial will be overseen by the Commonwealth and the States at the Ministerial Council by joint steering committees reporting to the Council.
- 1.15 The State Minister for Disability Services proposes a Bill to amend the *Disability Services Act 1993* to facilitate the *My Way* trial for a 'genuine comparison'⁸ with the NDIA NDIS trial.

⁴ This Convention led to the development of National Disability Policy. The Australian Law Reform Commission is also conducting a current inquiry into Equality, Capacity and Disability in Commonwealth Laws to be finalised in August 2014.

⁵ Australian Government Attorney General's Department, <http://www.ag.gov.au/RightsAndProtections/HumanRights/Pages/UnitedNationsConventionontherightsofpersonswithdisabilities.aspx> (viewed on 9 May 2014).

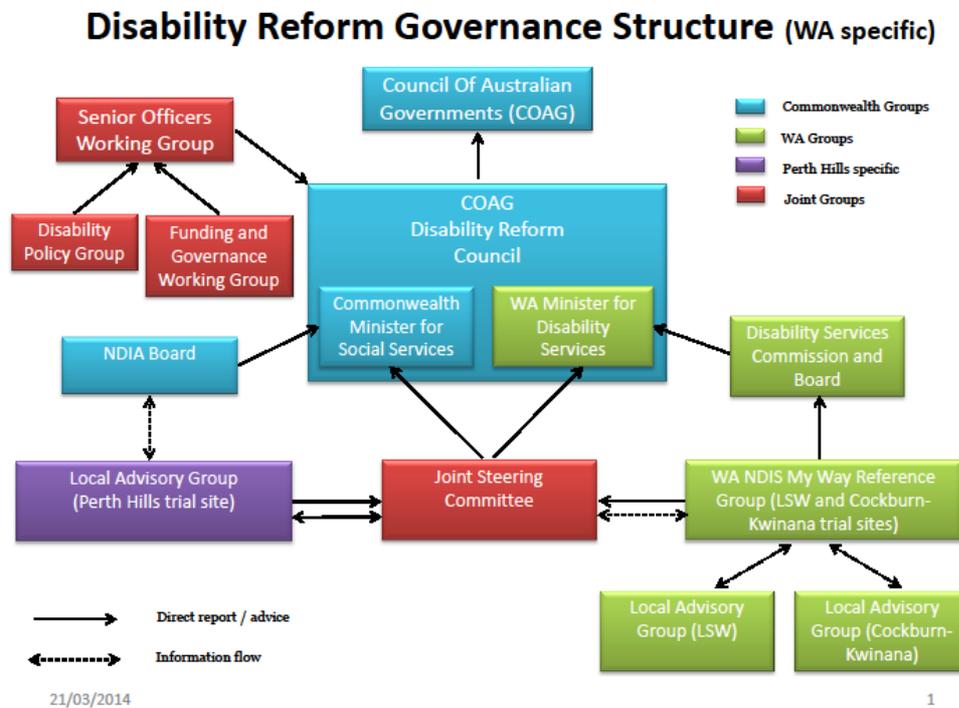
⁶ The Commonwealth of Australia, Parliamentary Joint Committee on Human Rights, in March 2014 examined 3 NDIS Rules and amendments to the NDIS Legislation Amendment Bill 2013.

⁷ Section 10 of the NDIS Act provides: 'The Minister may, by legislative instrument, specify that a State or Territory is a host jurisdiction, with the agreement of that State or Territory.'

⁸ Clause 4 of the Agreement between the Commonwealth and the Western Australian Governments for disability reform in Western Australia referred to in this report as the Second Agreement.

1.16 The Bill proposes amendments to the Act to facilitate the trial that covers the eligibility requirements, residence requirements, disability requirements, early intervention requirements and performance benchmarks of the NDIS Act. Eligible participants in the selected *My Way* trial areas will be able to access support to help them develop individualised and self-directed plans. The agencies overseeing the Commonwealth and State trials will assist participants receive *reasonable and necessary support* services to provide for their care. The *My Way* model will be operational in the South West region (2014-2016) and the Kwinana Cockburn area (2015-2016). State specific operational guidelines will apply to the *My Way* trial.

1.17 A diagrammatic representation of the governance arrangements in Western Australia follows:⁹



Model of Uniform Legislation

1.18 The State of Western Australia commits to ensuring the applicability of appropriate legislation with regard to the adoption of consistent terms (for eligibility requirements, disability requirements, residence requirements and benchmarks for performance) to facilitate the *My Way* trial.

1.19 The Committee notes that Clause 3 of the IGA states:

⁹ Government of Western Australia, Disability Services Commission website, <http://www.disability.wa.gov.au/Global/Publications/Reform/NDIS/WA%20Disability%20Reform%20Governance%20Structure-5.03.14.pdf> (viewed on 23 April 2014).

*The lessons learned in implementing the first state will inform governments about when and how to proceed to a full scheme. All Parties agree that the arrangements for launch sites do not set a precedent for design, funding, governance or operational arrangements for a full scheme.*¹⁰

- 1.20 The Committee notes that the State Minister has signed a set of Agreements that provide for at least two of the 11 Commonwealth NDIS Rules to be mirrored in the State Regulations. For example, Clause 31 (Third Agreement) reads as follows: *‘Both Parties agree that the arrangements for the Scheme Actuary in the Act will mirror the arrangements in the National Disability Insurance Scheme - Rules for the Scheme Actuary 2013 dated 25 June 2013’*. Clause 32 (Third Agreement) reads as follows: *‘Both Parties also agree that the DSC will mirror the risk management arrangements outlined in the National Disability Insurance Scheme- Risk Management Rules 2013 dated 25 June 2013 for the My Way sites covered by this Agreement’*.
- 1.21 The question before the Committee is – is the Bill necessary in order to facilitate the My Way trial?

¹⁰ Council of Australian Governments, Intergovernmental Agreement for the National Disability Insurance Scheme (NDIS) Launch. 7 December 2012.

CHAPTER 2

INTERGOVERNMENTAL AGREEMENTS

Overview

- 2.1 On the constitutional source of power underpinning an intergovernmental agreement, Professor Cheryl Saunders identified:¹¹

in principle, the activity of participating in an intergovernmental agreement, like any other activity undertaken by the Commonwealth, must have a constitutional source, whether expressed or implied, and must be consistent with other constitutional rules capable of applying to it. The concern is not purely academic: it is possible to conceive of circumstances in which the validity of an intergovernmental agreement becomes relevant in the course of litigation, even in the absence of implementing legislation.

One general issue for decision, then, is the scope of constitutional authority for the Commonwealth to participate in such agreements. Section 61 undoubtedly is the principal source of power. There is, however, uncertainty about its application to agreements on subjects beyond those for which the Commonwealth has a head of substantive legislative power, which parallels the more familiar problems of the extent to which the Commonwealth can engage in executive schemes and enter into government contracts.

A second set of issues arises if legislative action is required on the part of the Commonwealth to implement the terms of an agreement. If what is required falls with a substantive head of legislative power, implementation is relatively straightforward, subject to the rest of the Constitution.

- 2.2 As both the Commonwealth and State share responsibility for the provision of disability services, the Committee seeks to establish whether there is a requirement for the referral of any State powers to the Commonwealth to facilitate the trial.

¹¹ C. Saunders, 'Intergovernmental Agreements and the Executive Power', *Parliamentary Law Review*, 16, 2005, p301.

2.3 The Disability Services Commission advised:¹²

Should the Bill not be passed, the State will not be meeting the terms of the Agreements and there is a risk that the Commonwealth may consider withholding the additional funding provided for the disability services outlined in the Agreements.

2.4 The Committee examined the provisions of the IGA (Agreements) below to facilitate the funding, governance and administration of the *My Way* trial and the requirement for statutory amendments (if any) to the Act (discussed at Chapter 3).

2.5 The Commonwealth and State have signed three agreements, a Schedule and appended documents (collectively referred to in this report as the **Agreements**) that are relevant to the examination of the Bill.

2.6 The first is the COAG agreement entitled the *Intergovernmental Agreement for the National Disability Insurance Scheme (NDIS) Launch (IGA)*. The IGA comprises 13 Parts and 134 Clauses. The IGA was signed by the Premier of the State of Western Australia on 7 December 2012.

2.7 The Disability Services Commission's submission advised:¹³

The Western Australian government was however committed to a federated model with responsibility for administering disability services being retained in this State. This position is about continuing and building on the strong foundations of the existing system and ensuring that participation in the trial did not disadvantage Western Australian with disability. It also ensures that operational oversight is maintained in Western Australia.

2.8 The *Agreement between the Commonwealth and the Western Australia Governments for disability reform in Western Australia*¹⁴ (**Second Agreement**) comprises 17 clauses and was signed in December 2013 by the Prime Minister and the Premier of Western Australia. The Disability Services Commission stated:¹⁵

The State was able to successfully negotiate an agreement to contrast two approaches for the delivery of disability services in Western

¹² Submission from the Disability Services Commission, 30 April 2014, pp9-10.

¹³ *Ibid*, p1.

¹⁴ Government of Western Australia Disability Services Commission website, Head of Agreement located at http://www.disability.wa.gov.au/Global/Publications/Reform/NDIS/wa_ndis_agreement.pdf (viewed on 29 April 2014).

¹⁵ Submission from the Disability Services Commission, 30 April 2014, p1.

Australia – the Commonwealth’s NDIA NDIS model and the State’s WA NDIS My Way Model.

...

The Disability Services Amendment Bill 2014 facilitates the trial in Western Australia of the State’s WA NDIS My Way model as part of a broader series of national trials in WA.

- 2.9 The third agreement (**Third Agreement**) is the *National Partnership Agreement on Trial of My Way Sites – Intergovernmental Agreement on Federal Financial Relations*. There are 63 clauses to the Third Agreement including the terms of reference for the Joint Steering Committee on Disability Reform in Western Australian (Schedule A).
- 2.10 Schedule G is the Bilateral Agreement for NDIS Trial between the Commonwealth and Western Australia and forms an attachment to the IGA.
- 2.11 The Agreements are considered in detail below.

Intergovernmental Agreement for the NDIS Scheme (IGA)

- 2.12 The IGA¹⁶ sets the foundation for subsequent agreements for the three year launch period. It is a significant document that covers the operation of the Commonwealth NDIA NDIS in Western Australia and other States. The IGA comprises 13 Parts covering 134 clauses:

- Part 1 Preliminaries
- Part 2 Parties and Operation of the Agreement
- Part 3 Objectives
- Part 4 National Disability Insurance Scheme
- Part 5 First stage of an NDIS
- Part 6 Funding Arrangements
- Part 7 Ministerial Council
- Part 8 Accountability, Reporting, Evaluation and Data

¹⁶ Council of Australian Governments, Intergovernmental Agreement for the National Disability Insurance Scheme (NDIS) Launch (signed PDF) located at <https://www.coag.gov.au/node/485> (viewed on 5 May 2014).

- Part 9 Changes to Launch Legislation
 - Part 10 Communications and Stakeholder
 - Part 11 Relationship to National Injury Insurance Scheme
 - Part 12 Relationship to the National Disability Agreement
 - Part 13 Governance Arrangements
 - Annex A COAG High Level Principles for a NDIS, Annex B Multilateral funding Arrangements – Scenario Analysis.
- 2.13 The Part 1 (Preliminaries) of the IGA state the commitment of Commonwealth, State and Territories to the NDIS and disability services being a shared responsibility (Clause 1).¹⁷
- 2.14 Part 1, Clause 3 of the IGA provides:¹⁸
- The lessons learned in implementing the first stage will inform governments about when and how to proceed to a full scheme. All Parties agree that the arrangements for launch sites do not set a precedent for design, funding, governance or operational arrangements for a full scheme.*
- 2.15 Under the IGA, Clause 8 (Interoperability with other instruments), Clause 9 (Interoperability with bilateral agreements and implementation plans) and Clause 10 this IGA is to be read in conjunction with the following:
- NDIS Act,
 - Relevant Commonwealth and State Legislation,
 - Special arrangements in the Schedules A-E (bilateral agreements between the Commonwealth and New South Wales, Victoria, South Australia, Tasmania, Australian Capital Territory),
 - Implementation plans of the NDIS Launch Transition Agency; and,
 - Schedule F¹⁹ of the National Health Reform Agreement (aged care and disability) see point below.

¹⁷ Emphasis added.

¹⁸ Intergovernmental Agreement for the National Disability Insurance Scheme Launch (IGA), 7 December 2012, p1.

2.16 Schedule F of the National Health Reform Agreement reads as follows:²⁰

Until otherwise agreed, the changes outlined below to roles and responsibilities for basic community care, aged care and disability services and the reconciliation arrangements referred to in clause F21 do not apply to Victoria and Western Australia. In these States, basic community care services will continue to be delivered under HACC as a joint Commonwealth-State funded program. The Commonwealth and these States will maintain bilateral agreements for that purpose. The review to be conducted in 2012 under existing agreements will deal only with business processes.

2.17 Schedule G Bilateral Agreement for NDIS Trial between the Commonwealth and Western Australia (**Schedule G**) covers the governance and funding arrangements for the *My Way* and NDIA trials. Schedule G was later attached to the IGA.²¹

2.18 Clause 11 of the IGA sets out the shared roles and responsibilities of the Commonwealth and the State to work together to implement the first stage of the NDIS. Clause 11(b) establishes arrangements for the Ministerial Council ‘*responsible for formulating advice and agreeing policy on matters arising from the launch, and related to the transition to a full scheme*’.²² Clause 11(c) deals with establishing ‘*arrangements for the review and evaluation of the first stage which will inform the transition to a full scheme.*’

2.19 The Principles for an NDIS (Clause 12 of the IGA) were agreed by COAG (**Appendix 2**).

2.20 Clause 13 of the IGA refers to the objects of the NDIS that are reproduced in the (proposed) NDIS Bill.

2.21 Clause 14 of the IGA provides for the objects of the NDIS to be enacted in legislation and for the first stage of the NDIS to test the scheme, the effectiveness of the legislative framework and governance arrangements.

¹⁹ Clause 17 of the IGA requires the States to fulfil their obligations – this means that WA continues its responsibility in the HACC program.

²⁰ The National Health Reform Agreement is another Intergovernmental Agreement http://www.federalfinancialrelations.gov.au/content/npa/health_reform/national-agreement.pdf (viewed 9 April 2014).

²¹ A copy of Schedule G is available on the Committee’s website of the Parliament of Western Australia, Legislative Council:
<http://www.parliament.wa.gov.au/Parliament/commit.nsf/WCurrentNameNew/BF7B2C9193BDF5BE48257831003B03AB?OpenDocument>.

²² Intergovernmental Agreement for the National Disability Insurance Scheme Launch, 7 December 2012, p2.

2.22 Clause 15 (a)-(k) of the IGA specifies the shared roles and responsibilities of the States and the Commonwealth. Clause 15(g) states that Commonwealth and States:²³

Identify and report issues to the Agency or the Ministerial Council or responsible government, as appropriate, in a timely manner where launch arrangements are having unintended impacts on:

(i) people with disability, their family and carers;

(ii) providers of disability supports and services; and

(iii) mainstream services, supports or organisations.

2.23 Clause 15(h) of the IGA requires the State's participation in the Ministerial Council. The Committee discusses the implications of this arrangement at paragraph 2.67.

2.24 Clause 15(i) of the IGA ensures there are '*opportunities for people with disability, their families and carers to have input into the design of a full scheme.*'

2.25 Under Clause 15(j) of the IGA, the Parties are '*to pursue reforms to disability systems to support a full scheme.*'

2.26 Clause 15(k) of the IGA refers to '*funding, governance scheme management and any other policy for a full scheme.*'

2.27 Clause 16 of the IGA provides that the '*Commonwealth and States may establish, accelerate and/or trial elements of an NDIS, or the design and delivery of services and supports which align to the broad policy intent of an NDIS, for groups and locations outside formal launch sites.*'

2.28 Clause 18(a)-(g) of the IGA provides for the roles and responsibilities of the Commonwealth. The Commonwealth is to introduce National legislation (NDIS Act) and (Clause 18(a)), follow funding responsibilities in the Schedules A-E (Clause 18(b)(i)-(iii)).

2.29 At Clause 18(b)(i) of the IGA, the Commonwealth must jointly fund NDIS support for launch participants (in the Schedules A-E) and at Clause 18(b)(ii) '*fund the establishment, administrative system support costs of the launch, including the costs of the Agency and sector and workforce development.*'

²³ Intergovernmental Agreement for the National Disability Insurance Scheme Launch, 7 December 2012, p4.

2.30 At Clause 18(b)(iii) of the IGA the Commonwealth will:²⁴

Meet 100 per cent of the risk of cost overrun through increased client numbers or higher average NDIS funded support costs, 100 per cent of the Agency's cash flow risk, and any other risk sharing arrangements identified in Schedules A-E during the launch and transition to a full scheme (noting arrangements for the full scheme will be agreed as per paragraph 7 of this agreement).

2.31 The Commonwealth will 'chair and provide secretariat support to the Ministerial Council' (Clause 18(c)), 'work together with host jurisdictions to finalise the balance of cash and in-kind contributions' (Clause 18(d)), and 'support and facilitate local implementation consistent with the implementation plan' (Clause 18(e)).

2.32 At Clause 18(f) of the IGA, the Commonwealth 'will support the Agency to coordinate and promote links between the NDIS and mainstream Commonwealth Government services and non-government and community based supports' (Clause 18(f)). It will also fund the evaluation of launch sites (Clause 18(g)).

2.33 Under Clause 19 of the IGA (section 10 of the NDIS Act), Western Australia as a host jurisdiction shall hold a number of responsibilities as set out in the Schedules (A-E).²⁵

2.34 Western Australia's funding responsibilities are the same as the Commonwealth (Clause 18) in that it is required to: 'jointly fund NDIS support for launch participants' during the launch as set out in the Schedule, 'work together with the Commonwealth to finalise the balance of cash and in kind contributions, support and facilitate local implementation of launch arrangements, including supporting transition arrangements for existing State providers, consistent with the detailed implementation plan agreed with the Agency' (Clause 19(c)).

2.35 Western Australia is required to 'support the Agency to coordinate and promote links between the NDIS, mainstream State Government services and non-government and community based supports to support the objectives of the launch' (Clause 19(d)).

2.36 Clauses 20-24 of the IGA provide for the portability of supports for participants in the NDIA NDIS trial. Clause 20 refers to eligibility definitions in the NDIS Bill (before enactment). 'People who are not a resident in the launch site on the date of the launch will not be automatically entitled to supports (with the exception of children born during the launch).'

²⁴ Intergovernmental Agreement for the National Disability Insurance Scheme Launch, 7 December 2012, p5. Paragraph 7 (Clause 7) states 'This agreement is to be read in conjunction with the National Disability Insurance Scheme Bill 2012, as enacted in legislation, and other relevant Commonwealth and State legislation.'

²⁵ Schedule G: Bilateral Agreement for NDIS Trial between the Commonwealth and Western Australia supplements this Clause. Schedule G forms an attachment to the IGA.

- 2.37 Clause 21 of the IGA states that the NDIS will ‘*generally only cover people with a disability who live in areas where the scheme is operating.*’
- 2.38 Clause 22 of the IGA provides the Agency with ‘*limited discretionary capacity regarding people who move into or out of launch sites.*’
- 2.39 Clause 23 of the IGA states that: ‘*All Parties will continue to undertake work on the arrangements for portability of supports, including any associated cost implications, by mid-February 2013, with the details to be attached as an appendix to this Agreement and reflected in the NDIS Rules.*’
- 2.40 Clause 24, of the IGA states that once fully implemented as a national scheme, the NDIS supports ‘*will be fully portable across Australia.*’
- 2.41 Clause 25 of the IGA states the responsibility of the NDIS launch agency for delivery and management of the NDIS (provided in the NDIS Bill 2012) as enacted in legislation and in compliance with the *Commonwealth Authorities and Companies Act 1997*.
- 2.42 Clauses 26-30 of the IGA cover Funding Arrangements.
- 2.43 The Commonwealth and host jurisdictions make ‘*financial contributions to the cost of care and support for participants*’ (Clause 26).
- 2.44 Clause 27 of the IGA states that the Commonwealth ‘*will be responsible for all establishment, administrative and system support costs unless otherwise agreed to in Schedules A-E.*’²⁶
- 2.45 Clause 28 of the IGA deals with ‘*managing unexpected costs in a critical issue.*’ The Commonwealth will fund any costs associated with higher population numbers (higher per person care and support costs), 100 per cent of the Agency’s cash flow risk and any other risk sharing arrangement during the launch to full scheme.
- 2.46 Clause 29 of the IGA states that contributions from host jurisdictions (Western Australia) and the Commonwealth will be in the form of cash paid to the Agency and in-kind support to individuals on behalf of the Agency through existing government programs:

While the total contribution will not change, each party may revise their own estimated mix of cash and in-kind support at any time, and must provide at least one month’s notice to the Agency of such change.

²⁶ Western Australia’s funding arrangements are covered in the Second and Third Agreements and Schedule G.

- 2.47 Clause 30 of the IGA is a review clause for the Schedules (A-E). The Schedules will be reviewed and updated by the Treasurers in consultation with the Disability Ministers. The Committee notes the Western Australian Treasurer and the State Minister for Disability Services attend meetings of the Ministerial Council (NDIS Act).
- 2.48 Clause 31 of the IGA deals with GST – ‘*All jurisdictions agree that the additional Commonwealth funding contribution for the first stage of an NDIS will not impact State GST shares.*’²⁷
- 2.49 Clauses 32 to 39 of the IGA deal with Financial Contributions. These clauses specify the payments for care and supports for participants into a national pool managed by the Agency. A first cash payment will occur on commencement (Clause 33) for a quarter of the total cash contribution of funding for the first year. After that initial payment, all funding transfer will be made monthly in advance (Clause 34) and monthly payments for the second month and thereafter will be for one twelfth of the amount (Clause 35).
- 2.50 Clause 36 of the IGA states that the Agency’s cash flow projections will be reviewed after 3, 6 and 9 months. This Clause allows the parties to develop an ‘*appropriate joint response strategy*’ in the event there is ‘*insufficient cash*’.
- 2.51 The Committee notes that the COAG Reform Council is under review as a result of Commonwealth Budget 2014-2015 and queries the impact on the NDIS if any changes are made to the COAG Reform Council.
- 2.52 Clause 37 of the IGA deals with scheduled payment days.
- 2.53 Clause 38 of the IGA states that the NDIA NDIS will provide advice to host jurisdictions and the Commonwealth on each payment being made. Such advice will include monthly summary payments, date of payment, summary of monthly payments and the summary of year to date payments and summary of cash flow. Issues that could inhibit funding of care and support will be included in the advice given to host jurisdictions and the Commonwealth.
- 2.54 Clause 39 of the IGA provides for timing and amount of payments may be varied (in writing).
- 2.55 Clauses 40-47 of the IGA detail the contribution from existing funding arrangements. These Clauses reflect a commitment to:
- transitioning to cash contributions (Clause 40).

²⁷ Intergovernmental Agreement for the National Disability Insurance Scheme Launch, 7 December 2012, p7.

- agreed NDIS principles as a separate attachment to the IGA (Clause 41).
 - the jurisdiction's total contribution to be listed in the Schedules (Clause 42).
 - mechanism for accounting for existing services with the Agency responsible for implementing the first state of the NDIS (Clause 43) and this mechanism will recognise the service provider (service to client) (Clause 44).
 - host jurisdictions will make '*available the level of existing disability services*' in the Schedules (Clause 45). Clause 45(c) requires the Agency to identify those existing services that are necessary and not necessary for participants (and therefore not utilised), as well as payment of additional cash or in kind contributions where necessary.²⁸
- 2.56 Where there is an underspend, the jurisdiction will not be required to make an additional payment (Clause 46 of the IGA).
- 2.57 Under Clause 48 of the IGA, the Commonwealth will meet 100 per cent of any costs associated with higher population numbers and higher per person NDIS funded support costs.
- 2.58 Each jurisdiction will be managed separately (Clause 49) with underspends retained by the Agency (Clause 50) and considered in the next financial year and the circumstances in which the funds are returned are in the Annex B of the IGA (Clause 51).
- 2.59 Clauses 51-54 of the IGA specify the treatment of '*overspends*' and '*underspends*'. Clause 51 deals with matters regarding return of funds to the Commonwealth. (The Committee notes that under Clause 6 of the Second Agreement '*that the Western Australian Government will fund the equivalent of 60 per cent of package costs and the Commonwealth will fund 40 per cent of package costs and any additional administration costs*' involved with the *My Way* sites. In the Second Agreement, Western Australia will cover 100 per cent of the risk of costs overruns in the launch sites).
- 2.60 Clauses 55 of the IGA provides that if the Agreement is replaced within the time frames in the Schedules, and if there is a requirement for the Agency to return funds, this arrangement will be negotiated as part of the new transition Agreement on the basis of relative contributions to and expenditure by the Agency.
- 2.61 Clauses 56 to 59 of the IGA cover specific purpose payments. These clauses refer to the Commonwealth funding on aged care, and disability services and HACC.

²⁸ Committee emphasis added.

- 2.62 Clauses 60 to 65 of the IGA deal with continuity of care for participants. These Clauses specify that people who currently receive support (and are not eligible under the scheme) will continue to receive support.
- 2.63 Clauses 66 to 70 of the IGA deal with financial and performance reporting. The Agency will provide receipts (Clause 67) and under Clause 68 provide quarterly reports of participants and expenditure to the Ministerial Council.²⁹
- 2.64 Clause 69 of the IGA states that the Agency:
- will provide access to a nominated official in each host jurisdiction to the Agency case management and financial management system in real time on a read only basis. The official will need to abide by the Agency's confidentiality and privacy requirements.*
- 2.65 Clause 70 of the IGA deals with additional reporting requirements.
- 2.66 Clauses 71 and 72 of the IGA deal with auditing arrangements that permits Commonwealth Auditor General and host jurisdiction auditor generals to undertake audits.

Ministerial Council in the IGA

- 2.67 The arrangements for the Ministerial Council are specified under Part 7, Clauses 73-94 of the IGA inclusive. Clause 73 establishes the Standing Council on Disability Reform. COAG, under Clause 74 of the IGA, establishes the Ministerial Council operational from January 2013.
- 2.68 The Ministerial Council (under Clause 75 of the IGA) will be '*responsible for policy setting*' and the forum of the Ministerial Council (Clause 76) will consider views for the making, amendment or repeal of any proposed launch legislation (Clause 77 (a)), obtain agreement of host jurisdictions on NDIS rules outlined in categories A and C (Clause 77 (b)), and the views of all host jurisdictions on NDIS Rules outlined in category D under Clause 209 of the NDIS Act as enacted in legislation (Clause 77 (c)). Decision making by host jurisdictions and the Commonwealth will be managed through the Ministerial Council (Clause 78). The Committee notes that these Clauses of the IGA have been enacted in Commonwealth legislation.

²⁹ As per section 173 of the NDIS Act.

- 2.69 Furthermore, whilst section 207 of the NDIS Act recognises the concurrent operation of State Laws with the NDIS, the Committee is unclear of the practical impact of the operation of section 207 of the NDIS as it will operate in the Hills trial. Section 207 reads as follows:

207 Concurrent operation of State laws

(1) It is the intention of the Parliament that this Act is not to apply to the exclusion of a law of a State or Territory to the extent that that law is capable of operating concurrently with this Act.

(2) The regulations may prescribe kinds of laws of States and Territories as examples of laws to which subsection (1) applies.

Note: Before the regulations can be made, the Minister must be satisfied that the Commonwealth and all the host jurisdictions agree: see paragraph 210(2)(b).

- 2.70 Clause 79(a)-(e) of the IGA provides for the Ministerial Council to hold the Board of the NDIS launch transition agency responsible for its decision and actions. The Ministerial Council will ‘provide advice to COAG on policy issues, consider reports from the Board of the Agency required to be tabled in the Commonwealth Parliament before they are tabled.’ The Committee notes that the Western Australian Parliament will not have an opportunity to scrutinise the advice on policy issues before the Ministerial Council considers the advice or amendment.
- 2.71 Clause 80 of the IGA provides for the first stage of the NDIS and Clauses 81 and 82 of the IGA provide for transitional arrangements for the Ministerial Council (Clause 82). The Ministerial Council has oversight of the Board of the NDIS Launch transition agency.
- 2.72 Clauses 83-86 of the IGA provides for the membership and structure of the Ministerial Council and the establishment of sub-committees.
- 2.73 Decision making will be by consensus (Clause 87 of the IGA), and where the Chair is unable to obtain consensus, agreements will instead be by consensus of host jurisdictions (Clause 88 of the IGA).
- 2.74 Clause 89 of the IGA specifies a range of matters that will be enacted in the NDIS Bill relating to appointments and terminations of the chair and other members of the Board and Advisory Council, the content of legislative instruments, including Rules and Regulations any delegation by the Commonwealth Minister of the power to make legislative instruments and regulations.

- 2.75 Clause 90 of the IGA allows Parties to be given 28 days' notice of any matters to be voted on at the meeting of the Ministerial Council.
- 2.76 Clause 91 of the IGA specifies the process for out-of-session decision making, whereby the Chair will call a vote on the matters by sending a written notice to Members of the Ministerial Council.
- 2.77 In Clause 92 of the IGA, Parties will have 28 days from the date of the Chair sending the notice to vote. A Party may abstain from the vote if a Party is in caretaker mode at any time during the voting period (Clause 93).
- 2.78 Under Clause 94, depending on the nature of the decision, the Chair and Ministerial Council members may agree to shorten or lengthen the time frames.
- 2.79 Clauses 95 to 105 of the IGA deal with performance reporting requirements to the Ministerial Council to be enacted in the NDIS Act.
- 2.80 Clause 100 of the IGA provides that '*Members of Ministerial Council may choose to table the Agency's Annual Report within their Parliaments, once it has been considered by the Ministerial Council.*'

Ministerial Council (section 12 NDIS Act)

- 2.81 Further to Clauses 73-100 of the IGA that deals with the roles and responsibilities of the Ministerial Council, section 12 of the NDIS Act establishes a statutory equivalent to the Ministerial Council as established by COAG and chaired by the Commonwealth Minister. '*Ministerial Council*' is defined under section 9 of the NDIS Act as follows:

Ministerial Council means a body:

- (a) *that consists of Ministers of the Commonwealth, States and Territories; and*
- (b) *that has been designated by COAG as having responsibilities relating to the National Disability Insurance Scheme.*

- 2.82 The functions of the Ministerial Council under section 12 of the NDIS Act reads as follows:

Part 5—Ministerial Council

12 Ministerial Council functions etc.

- (1) *The Ministerial Council is to:*

(a) *consider policy matters that relate to the National Disability Insurance Scheme or arise under this Act; and*

(b) *advise the Minister about such matters; and*

(c) *make recommendations to COAG about such matters.*

(2) *The advice and recommendations must not relate to a particular individual.*

(3) *The Minister must consult the Ministerial Council about policy matters that relate to the National Disability Insurance Scheme or arise under this Act.*

2.83 The Committee notes that under the IGA (Clause 73), the State Minister is a member of the Standing Council on Disability Reform - a precursor to establishment of the Ministerial Forum and enacted as the Ministerial Council under section 12 of NDIS Act.

2.84 The Assistant Minister for Social Services (Cth) advised the Committee (**Appendix 1**) that Hon Mike Nahan MLA, Treasurer; Minister for Energy; Citizenship and Multicultural Interests; and, Hon Helen Morton MLC, Minister for Mental Health; Disability Services; Child Protection are members of the Ministerial Council.

Issues with the Ministerial Council (NDIS Act)

2.85 The Ministerial Council (as created in the NDIS Act) will provide a forum for the State and Commonwealth Ministers to consider policy and make recommendations to COAG about matters relating to the NDIS and the NDIS Act. The Commonwealth Minister must consult the Ministerial Council about policy matters under the NDIS Act. Section 209 of the NDIS Act prescribes NDIS instruments to be made for specific categories (category A-D). The Commonwealth Minister is required to consult and seek agreement from host jurisdiction on specific matters. For example, under Section 209(4), the Commonwealth Minister must not make Category A NDIS Rules unless the Commonwealth and each host jurisdiction have agreed to the making of the Rules. The Commonwealth Minister (section 209(7)) need only consult with the host jurisdictions on matters under Category D before making the Rules. Category D matters include acquittal of the NDIS amounts, recovery of past NDIS amounts arising from a judgement, debts due to the agency and waiver of the debt. Consultation and agreement on these matters will occur through the operation of the Ministerial Council created under the NDIS Act.

- 2.86 The Committee identified a number of issues with the Ministerial Council. Section 12 of the NDIS Act purports to appoint the State Minister to the Commonwealth statutory equivalent of the Ministerial Council. The statutory appointment of the State Minister to a Commonwealth statutory Ministerial Council (as defined for the purposes of the NDIS Act) has occurred without a head of power under the Constitution having been identified that enables such an appointment. Furthermore, the Committee has not been able to identify a referral of power by the Parliament of Western Australia under s51 (xxxvii) of the Constitution that establishes a legal basis for the valid appointment of the State Minister to the Ministerial Council (as defined for the purposes of the NDIS Act).
- 2.87 Section 12 of the NDIS Act appears to reformulate the Ministerial Council as a Commonwealth statutory entity with functions and powers under the NDIS Act. Arguably, such a provision makes the State Minister for Disability Services, (acting in the capacity of Minister of the Crown in right of the State) directly accountable to the Commonwealth Minister, when exercising these functions and powers. Additionally, while the NDIS Act appears to grant 'COAG' the power to designate which Ministerial Council constitutes this statutory entity, COAG itself is not a separate constitutional entity; rather COAG is a self-defining political forum.
- 2.88 Although not mentioned directly in the Bill, this issue is central to concepts of State Parliamentary sovereignty and Westminster notions of Ministerial accountability. Further it is a matter that could give rise to a future constitutional challenge to the NDIS legislation. Ministerial forums created by COAG are consultative bodies. As Professor Moens and John Trone notes:³⁰

Unlike the Loan Council, however these bodies of Ministers are merely consultative bodies. They have no power to reach binding decisions.

- 2.89 However, Ministerial Councils created by intergovernmental agreements and statute may challenge the sovereignty of the States:³¹

the concerns arise when the agreements and councils are statutory as there is a potential risk, in both manifestations of Commonwealth involvement, whereby the States could inadvertently give away their legislative power over a matter without it 'clearly being acquired' by the Commonwealth through constitutionally appropriate processes such as a referral or a referendum.

³⁰ G.A.Moens and J Trone, *The Constitution of the Commonwealth of Australia*, Butterworths, Australia, 2001, p20.

³¹ A. Jongsma, *Do Uniform Schemes Undermine State Sovereignty*, 2010-2011, p28.

2.90 As the IGA currently stands, the State may elect to terminate its participation in the Scheme and give notice of any withdrawal to COAG by the Ministerial Council (Clauses 122-126). However, should the State elect to withdraw from the Scheme, notice of the withdrawal would be communicated by the Ministerial Council to COAG of such an arrangement.

2.91 As noted above, the Committee has been unable to determine what head of power under the Constitution has been relied upon to enable the State Minister to provide advice to the Commonwealth Minister and subsequently be directly accountable to the Commonwealth Parliament. The Committee notes that the constitutional validity of section 12 of the NDIS Act is entirely uncertain.

Finding 1: The Committee finds that the Ministerial Council as established at section 12 of the *National Disability Insurance Scheme Act 2013* has the effect of requiring the State Minister to advise the Commonwealth Minister on the National Disability Insurance Scheme, and clothes the State Minister with statutory functions and powers under a Commonwealth Act. The operation of the section may give rise to a future constitutional challenge to the National Disability Insurance Scheme legislation.

2.92 The Committee makes the following recommendation:

Recommendation 1: The Committee recommends that, during consideration of the Disability Services Amendment Bill 2014, the Minister advise the Legislative Council as to whether the appointment of a State Minister to a Commonwealth statutory body under section 12 of the *National Disability Insurance Scheme Act 2013* can be validly made in the absence of either;

- **A head of power under the Commonwealth Constitution; or,**
- **The State of Western Australia referring powers to the Commonwealth under section 51(xxxvii) of the Commonwealth Constitution by means of appropriate referring legislation.**

2.93 Clauses 106 and 107 of the IGA provides for the evaluations of the trials over 4 years concluding with a review report by May 2016.

2.94 Clauses 108 to 110 of the IGA provides for any changes to the launch legislation and the process by which Commonwealth and Ministerial Council will consult on the changes.

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- 2.95 Clause 111 of the IGA deals with communication and stakeholder engagement and the development of national protocols.
- 2.96 Clause 112 to 115 of the IGA deals with the National Injury Insurance Scheme and agreement to minimum benchmarks for this scheme.
- 2.97 Clauses 116 to 120 of the IGA deals with the relationship to the National Disability Agreement.
- 2.98 Clauses 121 to 126 of the IGA provide arrangements for withdrawal from the Agreement and Clauses 127 to 130 providing for variations to the Agreement using a prescribed process (in writing). Bilateral agreements may be amended (Clause 129).
- 2.99 Dispute resolution is dealt with in Clauses 131 to 133 of the IGA.
- 2.100 Clause 134 of the IGA states that the *'parties do not intend any of the provisions of this Agreement to be legally enforceable. However, that does not lessen the Parties' commitment to this agreement.'*

Agreement between the Commonwealth and the Western Australia Governments for disability reform in Western Australia (Second Agreement)

- 2.101 The Second Agreement was signed on 5 August 2013 agrees to a two year launch of the models in Western Australia from 1 July 2014 (Clause 1). There are 16 clauses to the Second Agreement.
- 2.102 The Second Agreement specifies that a *'genuine comparison'* will be made between the NDIA NDIS model and the *My Way* model (at Clause 4).
- 2.103 Clause 5 of the Second Agreement specifies the locations of the *My Way* sites, implemented by the Disability Services Commission *'with additional Commonwealth government funding.'*
- 2.104 Clause 6 of the Second Agreement provides that the WA Government will fund the equivalent of 60 per cent of package costs and the Commonwealth will fund 40 per cent of packages costs and any additional administration costs. In this agreement, WA will cover 100 per cent of the risk of costs overruns in the launch sites. This contrasts with the IGA.
- 2.105 Clause 7 of the Second Agreement stipulates that the Commonwealth will make available necessary infrastructure and systems to ensure that the *My Way* sites are consistent with the NDIA NDIS. This Clause requires that WA will ensure consistent application of key aspects of the NDIS (approaches to eligibility, reasonable and necessary supports and agree to an actuarial modelling and assessment).

2.106 Clause 8 of the Second Agreement specifies the locations of the trials and governance arrangements for the NDIA NDIS.

2.107 Clause 9 of the Second Agreement provides for Commonwealth funding of the NDIA:

the Commonwealth will fund the equivalent of 40 per cent package costs and 100 per cent of any administration costs, with WA Government will fund the equivalent of 60 per cent of the package costs. The Commonwealth as per the IGA will cover 100 per cent of the risk of costs overruns in these launch sites between July 2014 and July 2016.

2.108 Clause 10 of the Second Agreement agrees to the establishment of a local advisory panel, for DSC staff to be seconded to the NDIA NDIS, local area coordinators (LAC) involvement in planning and discussion where they have an existing relationship with a participant and the use of the WA quality assurance system by NDIA NDIS.

2.109 Clause 11 of the Second Agreement establishes a Joint Steering Committee of the two trials.

2.110 Clause 12 of the Second Agreement provides for open and transparent information sharing about all aspects of the operation in the Western Australian *DisabilityCare Australia* site (now known as the NDIA NDIS) and the *My Way* sites. This will include sharing data to enable ongoing actuarial assessment of the operation of both launches.

2.111 The Committee is satisfied that the arrangements for information sharing articulated in the Agreements are sufficient to facilitate the trial of the *My Way* model. The Committee is aware that any data collected by agencies would ordinarily seek the participant's informed consent in regard to the storage, use and disclosure of information.

2.112 Clause 13 of the Second Agreement of the Second Agreement provides for an independent evaluation of the two trials with costs equally shared by the Commonwealth and the State.

- 2.113 Clause 14 of the Second Agreement provides for another bilateral agreement³² with details of implementation arrangements and costs. An independent comparative evaluation (Clause 13) will be undertaken by Flinders University and will:³³

feed into any future disability reform in Western Australia and the legislated review of the operation of the NDIS across Australia and as set out in the Act.

- 2.114 Clause 15(e) of the Second Agreement expresses the intent of the launch of the NDIA NDIS for proper assessment and comparison of the merits of the approaches.

- 2.115 Clause 16 of the Second Agreement states that the agreement complements the agreements to launch the NDIA NDIS in all states.

- 2.116 The Disability Service Commission stated:³⁴

Outside of Western Australian, other States and Territories have negotiated varying agreements with the Commonwealth for both the trial and participation in the full NDIS.

...

Unlike Western Australian, these States and Territories will be wholly subject to Commonwealth Legislation. The successfully negotiated State based trial means that the Western Australian parliament has had the opportunity to consider enabling legislation and will review all Regulations made as a consequence of the Bill. It is for this reason that the Disability Services Commission argues that the bill does not impinge on the ordinary sovereignty or law making powers of the Western Australian Parliament.

- 2.117 The Committee questions the need for the Bill to effect a trial that has been agreed to in the IGA and where administrative arrangements have enabled the trial to proceed for the past two years.

National Partnership Agreement on Trial of My Way Sites (Third Agreement)

- 2.118 The Third Agreement³⁵ entitled: the *National Partnership Agreement on Trial of My Way Sites - Intergovernmental Agreement on Federal Financial Relations* was signed

³² The Committee notes that this Third agreement with the Commonwealth was signed in March 2014.

³³ Agreement between the Commonwealth and the Western Australian Governments for disability reform in Western Australia, August 2013.

³⁴ Submission from the Disability Services Commission, 30 April 2014, p1-2.

in March 2014 between the Commonwealth and the State of Western Australia. This agreement comprises 63 clauses that commits Western Australia to the trials, outlines the funding and governance structures of the trials, reporting, information, data collection, evaluation and formation of a joint steering committee. It includes ‘*Schedule A Joint Steering Committee on Disability Reform in Western Australia Terms of Reference*’ and the ‘*Bilateral Agreement Schedule G*’ – comprising three parts for the operation of the NDIA NDIS and appendices (signed March 2014).

2.119 Clause 3 of the Third Agreement:

This Agreement builds on the Agreement between the Commonwealth and the Western Australian Government for disability reform in Western Australia signed on 5 August 2013, which provides for two year trial of two service delivery models. It supports the trial of the My Way model implemented by the WA disability services Commission (DSC) under state legislation in two sites: the lower south west DSC region from July 2014; and the Cockburn/Kwinana DSC region from July 2015. It will operate in parallel to Schedule G of the Intergovernmental Agreement for the National Disability Insurance Scheme (NDIS) Launch (IGA NDIS) which provides for a trial of the national NDI in the Perth Hills region.

2.120 The Committee notes the Third Agreement incorporates all the clauses of the IGA and Second Agreement.

2.121 Under Clause 17 of the Third Agreement, Western Australia agrees to be accountable for the following roles and responsibilities (emphasis added):

introducing legislation or introducing amendments to existing legislation to support and enable the trial in WA with the state legislation to incorporate the agreed areas of national consistency.

2.122 WA has operated the *My Way* model for the past 2 years without legislative amendment.

2.123 The Third Agreement includes at Clause 23³⁶ a table of milestone payments for the Scheme.

2.124 Clause 25 of the Third Agreement provides for the preparation of a Memorandum of Understanding (**MOU**) between the Commonwealth on the NDIA NDIS and WA on

³⁵ Government of Western Australia, Disability Services Commission website has a copy of the agreement signed on 31 March 2014, online at: <http://www.disability.wa.gov.au/Global/Publications/WA%20NDIS%20My%20Way/National-Partnership-Agreement-on-trial-of-My-Way-sites-March-2014.pdf> (viewed on 6 May 2014).

³⁶ *Ibid.*, p6.

the use of information. Whilst the Committee has not sighted the MOU, the Committee assumes the MOU is within the powers of the Executive to negotiate the sharing of information without the need to amend the Act.

- 2.125 The Third Agreement specifies clauses in relation to the Scheme Actuary and the responsibility to provide actuarial information and advice to the Joint Standing Committee (Clause 18(c) and Clause 28).
- 2.126 As stated above, the Committee notes that two clauses provide for the State regulations to mirror the NDIS Rules on risk management and the scheme actuary. For example, Clause 31 (Third Agreement) reads as follows: *‘Both Parties agree that the arrangements for the Scheme Actuary in the Act will mirror the arrangements in the National Disability Insurance Scheme - Rules for the Scheme Actuary 2013 dated 25 June 2013’*. Clause 32 (Third Agreement) reads as follows: *‘Both Parties also agree that the DSC will mirror the risk management arrangements outlined in the National Disability Insurance Scheme - Risk Management Rules 2013 dated 25 June 2013 for the My Way sites covered by this Agreement’*.
- 2.127 Clause 35 of the Third Agreement provides for the Australian Government Actuary to provide information of the *My Way* trial to the Joint Steering Committee if there are significant concerns about the financial sustainability of the *My Way* sites.
- 2.128 The Committee finds that the extensive administrative arrangements outlined in the Agreements between the Commonwealth and the State of Western Australia facilitate the *My Way* trial.
- 2.129 The Committee notes that information sharing is provided for in the Agreements. The Committee queries why the Bill is necessary as the extensive provisions of the Agreements covers the operation of the NDIS trials in Western Australia including funding, governance, special purpose payments and other operational matters. The Agreements already appear to be operational in sites within Western Australia by means of administrative arrangements within DSC.

Finding 2: The Committee finds that three Intergovernmental Agreements (Agreements) provide for the participation of the State of Western Australia in the National Disability Insurance Scheme, the operation of the Commonwealth National Disability Insurance Agency in Western Australia, and facilitates the implementation of the Disability Services Commission *My Way* Model in specified sites in Western Australia.

Finding 3: The Committee finds that the Second and Third Agreements for the trials in Western Australia were signed by the State of Western Australia and reflect the clauses of the Intergovernmental Agreement and provide for the operation and funding arrangements of the *My Way* trial.

Finding 4: The Committee finds that the Intergovernmental Agreement is reflected in the *National Disability Insurance Scheme Act 2013* for the operation of the National Disability Insurance Agency.

CHAPTER 3

DISABILITY SERVICES AMENDMENT BILL 2014

Purpose of the Bill

- 3.1 The Disability Services Amendment Bill 2014 (Bill) proposes 6 clauses to amend the *Disability Services Act 1993* to enable a trial to proceed from July 2014. The Bill does not specify the *My Way* model.
- 3.2 Clause 1 is the short title of the proposed Act — ‘*Disability Services Amendment Act 2014*.’
- 3.3 Clause 2 of the Bill specifies the commencement of sections 1 and 2 on the day on which this Act receives the Royal Assent and the rest of the Act if the assent day is before 1 July 2014 – on 1 July 2014.
- 3.4 Clause 3 amends the *Disability Services Act 1993*.

Clause 4 Part 4B - Trial of disability services model

- 3.5 Clause 4 proposes that a new part – Part 4B be inserted after section 26C of the Act.

Clause 4 Section 26D Purpose of this Part

- 3.6 Clause 4 proposes a new section 26D and defines the purpose of the new Part:

to facilitate the trial in WA of a model for providing disability services, in order to enable the comparison of the model to the National Disability Scheme model.

- 3.7 This provision is consistent with and gives effect to Clause 17(a) of the Third Agreement that Western Australia agrees to be accountable for the following roles and responsibilities:

to introducing legislation or introducing amendments to existing legislation to support and enable the trial in WA with the state legislation to incorporate the agreed areas of national consistency.

- 3.8 As indicated earlier, the Committee queries whether the Bill is necessary as it is evident that the *My Way* model has been operational since 2012 through the current Act and the administrative arrangements outlined in the Agreements.

- 3.9 The Disability Services Commission stated that the amendments to the Act are required because:³⁷

Western Australian's agreement to participate in the trial includes a comparative assessment of the State and Commonwealth models and this requires information sharing between the Disability Services Commission and the National Disability Insurance Agency. Advice has been received that the information exchange would not necessarily be permitted by Section 52 of the Disability Services Act 1993.

Section 52(1)(e) of that Act does however allow for circumstances to be prescribed and it proposed that the National Disability Insurance Agency be listed in regulation.

- 3.10 The Committee notes the section 52 of the *Disability Services Act 1993* deals with confidentiality. Section 52 reads as follows (emphasis added):

52 Confidentiality

- (1) *A person who is or has been in a situation to which this section applies must not, whether directly or indirectly, record, disclose, or make use of any information obtained because of that situation except —*
- (a) *in the course of duty; or*
 - (b) *as required or allowed by this Act or any other law; or*
 - (ba) *in connection with the investigation of an offence to —*
 - (i) *a member of the Police Force of Western Australia or the Australian Federal Police; or*
 - (ii) *the Director of Public Prosecutions for Western Australia or the Commonwealth; or*
 - (iii) *an officer of another law enforcement agency established*

³⁷ Submission from the Disability Services Commission, 30 April 2014, p6.

under the law of a State or Territory or the Commonwealth authorised by regulation to receive confidential information under this paragraph;

or

- (bb) where it is in the public interest to protect the physical safety of an individual; or*
- (bc) for the purpose of enabling or facilitating the investigation by the CEO as defined in section 3 of the Children and Community Services Act 2004, or an officer as defined in that section, of whether or not a child is in need of protection under that Act; or*
- (bd) for the purpose of protection proceedings under the Children and Community Services Act 2004; or*
- (c) for the purpose of proceedings before the State Administrative Tribunal commenced under the Guardianship and Administration Act 1990; or*
- (d) if the information is personal information — with the consent of the person, or the person’s guardian; or*
- (e) in prescribed circumstances.*

Penalty: \$2 500.

(2) The situations to which this section applies are —

- (a) being a member of the Board;*
- (b) being a member of the personnel of the Commission;*
- (c) being a person whose services are made use of under section 10, 12A or Part 4A.*

3.11 Section 52(1) refers to the duty of persons (of a certain class specified under section 52(2) to maintain confidentiality. This means that ‘a person who is or has been in a

situation to which this section applies must not, whether directly or indirectly, record, disclose, or make use of any information obtained.’ Exceptions to the duty in section 52(1)(e) are ‘in prescribed circumstances’. The Committee notes that the Agreements provide for information sharing arrangements between the Commonwealth and the State (through the Joint Steering Committee) for the period of the trial. The Disability Services Commission stated:³⁸

Section 52(1)(e) of that Act does however allow for circumstances to be prescribed and it is proposed that the National Disability Insurance Agency be listed in the Regulations.

- 3.12 As the DSC has identified the current provisions on confidentiality in section 52 of the Act do not necessarily impede information sharing between agencies.
- 3.13 The Committee notes that ordinarily a service user of a government service or non-government service are informed of the nature of the service and arrangements and is able to give informed consent for the storage of information, use and disclosure of their personal information.
- 3.14 Eligible participants in the trial area will also have opportunity to consent to the trial evaluation. The process of seeking informed consent for an evaluation is standard ethical research practice. The trial evaluation undertaken by an independent research centre (Flinders University) must comply with Commonwealth legislation on the conduct of ethical research and must seek informed consent from participants in the trial in compliance with the National Statement on Ethical Conduct in Human Research (2007) (**National Statement 2007**). The National Statement consists of a series of Guidelines made in accordance with the *National Health and Medical Research Council Act 1992* (**NHMRC Act 1992**). The operation of Commonwealth statutory guidelines governing the ethical conduct of the trial evaluation provides another mechanism to safeguard considerations such as participant consent, privacy and disclosure of personal and identifying information.
- 3.15 The DSC is preparing a Memorandum of Understanding with relevant agencies on information sharing that will have regard to the participant’s information and how their personal information is stored, disclosed or used by agencies.
- 3.16 The Committee finds that section 52 of the Act does not act as an impediment to the *My Way* trial and that the issues surrounding section 52 can be overcome by an agreement with participants that requires their informed consent to any action by an agency that seeks to store, record or disclose their personal information to another agency.

³⁸ Submission from Disability Services Commission, 30 April 2014, p6.

3.17 The Committee makes the following recommendation:

Recommendation 2: The Committee recommends that during the debate on the Bill the Minister advise the Legislative Council why the Bill is necessary when the *My Way model* is already underway with the relevant administrative arrangements in place.

Finding 5: The Committee finds that the Agreements and the operation of section 52 of the *Disability Services Act 1993* do not impede arrangements for the sharing of information. Rather, such matters could be prescribed by regulations under existing s52(1)(e) of the *Disability Services Act 1993*.

Clause 4 Section 26E Terms Used

3.18 Clause 4 (section 26E) is headed '*Terms used*'. Four terms are defined:

National Disability Insurance Scheme has the same meaning given in the *NDIS Act* section 9

NDIS Act means the *National Disability Insurance Scheme Act 2013*

participant means participant in a trial

trial means a trial conducted by the Commission under section 26G(1)

3.19 The Explanatory Memorandum states:³⁹

This section inserts new definitions to recognise the National Disability Insurance Scheme, the National Disability Insurance Scheme Act 2013 (Commonwealth), the trial and the participants in the trial.

3.20 The Committee finds that the definition section (proposed section 26E) does not define the terms *NDIS Rules* (proposed in new section 26F). The Committee recommends for consistency that the definitions of this term be included in Clause 4 (proposed section 26E).

Finding 6: The Committee finds that Clause 4 (section 26E) headed *Terms Used* does not include a definition for *NDIS Rules*.

³⁹ Explanatory Memorandum, Disability Services Amendment Bill 2014, p1.

3.21 The Committee notes that NDIS Rules is a term that covers up to 11 different Commonwealth Rules.

3.22 The Disability Services Commission advised:⁴⁰

The Bill provides the State with power to make regulations on the same matters that the Commonwealth may make Rules under the National Disability Insurance Scheme Act 2013. The Commonwealth has made 11 relevant Rules as follows:

- *National Disability Insurance Scheme (Becoming a Participant) Rules 2013.*
- *National Disability Insurance Scheme (Timeframes for Decision Making) Rules 2013.*
- *National Disability Insurance Scheme (Supports for Participants) Rules 2013.*
- *National Disability Insurance Scheme (Children) Rules 2013.*
- *National Disability Insurance Scheme (Nominees) Rules 2013.*
- *National Disability Insurance Scheme (Registered Providers of Supports) Rules 2013.*
- *National Disability Insurance Scheme (Plan Management) Rules 2013.*
- *National Disability Insurance Scheme (Protection and Disclosure of Information) Rules 2013.*
- *National Disability Insurance Scheme – Rules for the Scheme Actuary 2013.*
- *National Disability Insurance Scheme - Risk Management Rules 2013.*
- *National Disability Insurance Scheme (Supports for Participants - Accounting for Compensation) Rules 2013.*

⁴⁰ Submission from the Disability Services Commission, 30 April 2014, p5.

The Commission is currently assessing these Rules to determine whether they are appropriate for the Western Australian context. Where it is determined that they are, the Bill provides that they may be adopted (in whole or in part) into new State legislation.

- 3.23 The NDIS Rules are comprehensive and substantial. Where the Minister is considering adoption of the text of the NDIS Rules in part or in full, it is necessary that such documents are defined and identified in the Act.⁴¹
- 3.24 The Committee recommends the following recommendation:

Recommendation 3: The Committee recommends that the term *NDIS Rules* be defined in Clause 4 of the Disability Services Amendment Bill 2014 (new section 26E) as follows:

Clause 4

Page 3, after line 3 — To insert —

NDIS Rules means the rules mentioned in section 209 of the *National Disability Insurance Scheme Act 2013*;

Clause 4 Section 26F Effect of certain terms in the NDIS Act

- 3.25 Clause 4 (new section 26F) is headed *Effect of certain terms in the NDIS Act*. This Clause includes a Table citing those terms under the *National Disability Insurance Scheme Act 2013* to those corresponding terms under the Act.
- 3.26 The terms are: CEO (Chief Executive Officer) with Commission, *National Disability Insurance Scheme* with ‘*this Act*’ (that is *Disability Services Act 1993*), and National Disability Insurance Scheme Rules with regulations made under the *Disability Services Act 1993*.
- 3.27 As stated at earlier, the NDIS Rules are not defined under proposed section 26E ‘**Terms used**’ but are referred to in Clause 4 (new section 26F) in the Bill.

⁴¹ For example, Clause 31 (Third Agreement) reads as follows: ‘*Both Parties agree that the arrangements for the Scheme Actuary in the Act will mirror the arrangements in the National Disability Insurance Scheme - Rules for the Scheme Actuary 2013 dated 25 June 1993*’. Clause 32 (Third Agreement) reads as follows: ‘*Both Parties also agree that the DSC will mirror the risk management arrangements outlined in the National Disability Insurance Scheme- Risk Management Rules 2013 dated 25 June 2013 for the My Way sites covered by this Agreement*’.

- 3.28 The Committee notes the Second Reading Speech by the Minister for Disability Services Hon Helen Morton is silent on all matters to be prescribed in the Regulations. The Parliamentary Secretary Ms Mitchell MLA in her Second Reading speech in the Legislative Assembly stated:

*This Bill represents minimal change to the Disability Services Act 1993 and does not alter or weaken the current principles and safeguards of the Act. Amendments to the regulations will commence once the draft amendments are complete. These include the inclusion of the national standards for disability services, specification of the geographic areas for the trial sites, and adoption of appropriate NDIS Rules or amendment to the Rules as appropriate in the WA context.*⁴²

- 3.29 The Committee notes that whilst the Western Australia cannot disallow Commonwealth NDIS Rules, the Western Australian Parliament through the Joint Standing Committee on Delegated Legislation (subject to its terms of reference) will scrutinise, and may recommend the disallowance of, State regulations that incorporate the text of Commonwealth NDIS Rules.
- 3.30 As stated earlier, the Agreements state the Regulations will mirror specific Commonwealth NDIS Rules. It is unclear if the text will be adopted in full or in part for inclusion in the State Regulations.
- 3.31 To enhance parliamentary scrutiny, the Committee recommends that the 11 NDIS Rules be cited in this section of the Bill.
- 3.32 The Committee makes the following recommendation:

⁴² Ms A.R. Mitchell, Parliamentary Secretary, Western Australia, Legislative Assembly, *Parliamentary Debates (Hansard)*, 13 March 2014, p1206a-1207a.

Recommendation 4: The Committee recommends that the eleven NDIS Rules are cited in the Bill as Clause 4 Section 26F in the Table as follows:

Page 3, line 12, within the Table (left column last line) insert

NDIS Rules:

- *National Disability Insurance Scheme (Becoming a Participant) Rules 2013*
- *National Disability Insurance Scheme (Timeframes for Decision Making) Rules 2013*
- *National Disability Insurance Scheme (Supports for Participants) Rules 2013*
- *National Disability Insurance Scheme (Children) Rules 2013*
- *National Disability Insurance Scheme (Nominees) Rules 2013*
- *National Disability Insurance Scheme (Registered Providers of Supports) Rules 2013*
- *National Disability Insurance Scheme (Plan Management) Rules 2013*
- *National Disability Insurance Scheme (Protection and Disclosure of Information) Rules 2013*
- *National Disability Insurance Scheme – Rules for the Scheme Actuary 2013*
- *National Disability Insurance Scheme - Risk Management Rules 2013*
- *National Disability Insurance Scheme (Supports for Participants - Accounting for Compensation) Rules 2013*

Clause 4 Section 26G Trial of disability services model

3.33 Clause 4 (new section 26G) is headed *Trial of disability services model*. Clause 4 (section 26G(1)) reads as follows:

26G Trial of disability services model

(1) *The Commission may, in one or more areas prescribed by the regulations, conduct a trial of a model for providing disability services that meets the objectives set out in subsection (2).*

3.34 The Explanatory Memorandum states: *'this section provides for the prescription of trial areas and the time period or periods during the trial may operate along with objectives for the trial model.'*⁴³

3.35 Furthermore, as the model is being evaluated as a trial for which the administrative arrangements are fully considered in the Agreements, the Committee once again questions why such a provision is necessary if the *My Way* model has been operational since 2012 under the Agreements.

3.36 Clause 4 (section 26G(2)) is read as follows:

- (2) *The objectives of the model include –*
- (a) *providing people with disability with reasonable and necessary supports; and*
 - (b) *enabling people with disability to exercise choice and control in the pursuit of their goals and the planning and delivery of their supports.*

3.37 The Agreements propose consistency in relation to eligibility requirements, principles and objects. By way of contrast, the Committee notes that objectives (for the *My Way* trial) provided for in Clause 4 (new section 26G(2)) differ from that in section 3(1)(d) of the NDIS Act and Clause 2 of the IGA COAG High Level Principles.⁴⁴ Early intervention supports are cited in the objects and principles in section 3(1)(d) of the NDIS Act as follows (emphasis added):

(d) *provide reasonable and necessary supports, including early intervention supports, for participants in the National Disability Insurance Scheme launch; and*

⁴³ Explanatory Memorandum, Disability Services Amendment Bill 2014, p1.

⁴⁴ Refer to Clause 2 of the IGA COAG High Level Principles for a NDIS.

(e) enable people with disability to exercise choice and control in the pursuit of their goals and the planning and delivery of their supports; and...

3.38 Early intervention supports, whilst not mentioned in Clause 4 (new section 26G(2)(a) or (b)) are referred to in Clause 4 at the new section 26H(c)(ii).

3.39 Both the NDIS Act and the Bill leave out a requirement cited in the COAG High Level Principles to provide 'timely and efficient delivery of reasonable and necessary supports'.

3.40 The COAG document entitled '*High Level Principles for a National Disability Insurance Scheme*' (appended to the IGA) is a published document. It states (emphasis added):⁴⁵

2. *This reform should take a social insurance approach that would share the costs of disability services and supports across the community. In addition, the reform should adopt insurance principles that estimate the costs of reasonable and necessary supports, promote and efficient allocation of resource based on managing the long term costs of supporting people with disabilities and their carers while maximising the economic and social benefits. This would involve consistent application of eligibility criteria, and the timely and efficient delivery of reasonable and necessary supports, including early intervention. Actuarial modelling will be used to estimate and manage the costs of care and supports across the life course of individuals and monitor, evaluate and report on the overall performance of the National Disability Insurance Scheme.*

3.41 The Disability Services Commission submission also states:⁴⁶

Both models ensure that participation will receive timely decision and have committed to maximum time frames for decision making.

3.42 Despite these terms appearing in published documents and the DSC submission to the Committee, neither the NDIS Act nor the Bill include a specific section or clause for the timely and efficient delivery of reasonable and necessary supports as listed in the – '*COAG High Level Principles for a National Disability Insurance Scheme*' (appended to the IGA).

⁴⁵ Council of Australian Governments, *High-level Principles for a National Disability Insurance Scheme*, p1.

⁴⁶ Submission from the Disability Services Commission, 30 April 2014, p3.

- 3.43 The Committee also notes that the COAG High level Principles do not confer a legally enforceable right and are best described as aspirational.

Finding 7: The Committee finds that COAG High Level Principles appended to the Agreements are aspirational and do not confer legally enforceable rights. These principles provide a framework for policy and are not a legal undertaking.

- 3.44 For this reason, the Committee finds that the adoption of the varying principles and objects cited in the Agreement, the NDIS Act and the Bill do not impact the sovereignty or law making powers of the Western Australian Parliament. The principles and objects are directive and do not confer a legally enforceable right.

Finding 8: The Committee finds that Clause 26G of the *Disability Services Amendment Bill 2014* does not impact the sovereignty or law making powers of the Western Australian Parliament.

Clause 4 26H Trial Participants

- 3.45 The Explanatory Memorandum for Clause 4 (section 26H) states:⁴⁷

This section provides the criteria which must be met, to the satisfaction of the Disability Services Commission, before a person can participate in the trial.

- 3.46 As stated earlier at paragraph 3.37, under the Agreements, both the Commonwealth NDIA NDIS trial and the *My Way* trial propose to apply consistency in relation to the eligibility requirements, principles and objects of the NDIS.

- 3.47 The Act provides or funds services to people with a defined disability as prescribed in the Act. The Commonwealth NDIS Act and the current State Act use different terminology and definitions for disability. For example, the *Disability Services Act 1993* (WA) defines disability as:

Disability means a disability-

(a) which is attributable to an intellectual, psychiatric, cognitive, neurological, sensory, or physical impairment or a combination of impairments; and

⁴⁷ Explanatory Memorandum Disability Services Amendment Bill 2014, p1.

(b) which is permanent or likely to be permanent; and

(c) which may or may not be of a chronic or episodic nature; and which results in –

(i) a substantially reduced capacity of the person for communication, social interaction, learning or mobility; and

(ii) a need for continuing support services.

3.48 By contrast, the NDIS Act does not define the term ‘*disability*’ but refers to and defines the term ‘*disability requirements*’. Section 24 of the NDIS Act reads as follows:

24 Disability requirements

(1) A person meets the disability requirements if:

(a) the person has a disability that is attributable to one or more intellectual, cognitive, neurological, sensory or physical impairments or to one or more impairments attributable to a psychiatric condition; and

(b) the impairment or impairments are, or are likely to be, permanent; and

(c) the impairment or impairments result in substantially reduced functional capacity to undertake, or psychosocial functioning in undertaking, one or more of the following activities:

(i) communication;

(ii) social interaction;

(iii) learning;

(iv) mobility;

(v) self-care;

(vi) self-management; and

(d) the impairment or impairments affect the person’s capacity for social and economic participation; and

(e) the person is likely to require support under the National Disability Insurance Scheme for the person's lifetime.

(2) For the purposes of subsection (1), an impairment or impairments that vary in intensity may be permanent, and the person is likely to require support under the National Disability Insurance Scheme for the person's lifetime, despite the variation.

3.49 The NDIS Act extends the definition of *disability* listed in the *Disability Services Act 1993* to include the impact of the impairment on psycho-social functioning when undertaking prescribed activities under the Act. The definition of *disability requirement* in the NDIS Act considers the result of impairment in substantially reducing the person's functional capacity for social and economic participation. The Act does not include the impact of the impairment on the person's psychosocial functioning. The Committee notes the comments of Richmond Fellowship in relation to the DSC's limited experience in supporting people with mental illness⁴⁸, however these policy considerations falls outside the scope of the Committee's terms of reference.

3.50 Clause 4 (new section 26H) of the Bill provides for the trial participants. Clause 4 reads as follows (emphasis added):

26H Trial participants

(1) The Commission must ensure that a person does not participate in a trial unless the Commission is satisfied that at the time the person becomes a participant –

(a) either-

(i) the person has not reached 65 years of age; or

(ii) the person belongs to a class of persons approved by the Commission for the purposes of this paragraph;

and

(b) the person meets the residence requirements in the NDIS Act section 23 (1)(a) and (b); and

⁴⁸ Submission from Richmond Fellowship, 2 May 2014, p3.

(c) *either –*

(i) *the person meets the disability requirements in the NDIS Act section 24; or*

(ii) *the person meets the early intervention requirements in the NDIS Act section 25;*

and

(d) *the person meets any other requirement prescribed by the regulations.*

(2) *For the purposes of subsection (1)(b), in deciding whether or not a person meets the residence requirement in the NDIS Act section 23(1)(a), the Commission must have regard to the matters set out in the NDIS Act section 23(2).*

3.51 This means a person becomes a participant of the trial conditional upon meeting the age requirements (new section 26H(I)), the residence requirements (with regard to section 23(1)(a) and (b) of the NDIS Act), and the disability requirements (with regard to section 24 of the NDIS Act) or the early intervention requirements (with regard to section 25 NDIS Act) and the person meets any other requirements prescribed by the State regulations (new section 26H(1)(d)).

3.52 The residence requirements of section 23 of the NDIS Act reads as follows (emphasis added):

23 *Residence requirements*

*(1) A person **meets the residence requirements** if the person:*

(a) resides in Australia; and

(b) is one of the following:

(i) an Australian citizen;

(ii) the holder of a permanent visa;

(iii) a special category visa holder who is a protected SCV holder; and

(c) satisfies the other requirements in relation to residence that are prescribed by the National Disability Insurance Scheme rules.

- (2) *In deciding whether or not a person resides in Australia, regard must be had to:*
- (a) *the nature of the accommodation used by the person in Australia; and*
 - (b) *the nature and extent of the family relationships the person has in Australia; and*
 - (c) *the nature and extent of the person's employment, business or financial ties with Australia; and*
 - (d) *the nature and extent of the person's assets located in Australia; and*
 - (e) *the frequency and duration of the person's travel outside Australia; and*
 - (f) *any other matter relevant to determining whether the person intends to remain permanently in Australia.*
- (3) ***Without limiting paragraph (1)(c), National Disability Insurance Scheme rules made for the purposes of that paragraph:***
- (a) ***may require that a person reside in a prescribed area of Australia on a prescribed date or a date in a prescribed period in order to meet the residence requirements; and***
 - (b) ***may require that a person has resided in a prescribed area for a prescribed period in order to meet the residence requirements; and***
 - (c) ***may require that a person continue to reside in a prescribed area of Australia in order to meet the residence requirements.***

3.53 The equivalent provisions of the Bill do not incorporate the subsections of the NDIS Act emphasised above in bold. The text of section 23(1)(c) and section 23(3)(a)(b) and (c) of the NDIS Act do not apply. The Committee notes that under Clause 4 (new section 26H), the Commission has a positive duty (that is, it must ensure) that a person does not participate if they do not meet the legislated requirements of the Act.

3.54 The Committee finds that the Bill includes an additional subclause (new section 26H(1)(d) that states:

(d) *the person meets any other requirement prescribed by the regulations.*

3.55 This means that in addition to eligibility requirements cited in the provision; there are *other requirements* (not stated) that a person must meet in order to participate in the trial. However, the '*other requirements*' are not identified in the Explanatory Memorandum or Second Reading Speech.

Finding 9: The Committee finds that Clause 4 proposes a new subsection under section 26H (1)(d) that creates an opportunity for the State Minister to prescribe regulations that may widen or limit the eligibility requirements for participants of the trial. These regulations would be open to scrutiny by the Joint Standing Committee on Delegated Legislation subject to the Committee's terms of reference, depending on the extent to which the content of the regulations fall within the terms of reference of that Committee.

3.56 The Committee has formed the view that the Minister should advise the Legislative Council during debate that in passing this Clause of the Bill, to what extent the Western Australian Parliament will be able to scrutinise the new amendments or '*other requirements*' developed by the State Minister.

3.57 The Committee makes the following recommendation:

Recommendation 5: The Committee recommends that during the debate on the Disability Services Amendment Bill 2014, the Minister should advise the Legislative Council on the mechanism by which parliamentary scrutiny will occur for the type of new amendments proposed under Clause 4 (proposed section 26H (1)(d)).

Clause 4 Section 26I Reasonable and necessary supports for participants

3.58 Clause 4 proposes a new section 26I(1) and (2) that reads as follows:

26I. Reasonable and necessary supports for participants

(1) *In this section —*

plan, in relation to participant, means the plan for the participant that is prepared in accordance with the Commission's requirements;

support means —

- (a) financial assistance granted under section 24; or
 - (b) a disability service provided by the Commission.
- (2) Before providing support to, or in relation to, a participant, the Commission must be satisfied that —
- (a) the support will assist the participant to pursue the goals, objectives and aspirations set out in the participant's plan; and
 - (b) the support meets the criteria set out in the NDIS Act section 34(1)(b) to (f).

3.59 Section 24 of the Act provides for grants of financial assistance and reads as follows:

24. Grants of financial assistance

- (1) The Commission may approve a grant of financial assistance, from moneys standing to the credit of the Account, to —
- (a) a person with disability; or
 - (b) a carer; or
 - (c) a service provider; or
 - (d) a service developer.
- (2) A grant of financial assistance must not be approved under subsection (1) unless the Commission is satisfied —
- (a) that the grant will further the principles in Schedule 1; and
 - (b) that any service or programme funded by the grant meets the objectives in Schedule 2.
- (3) A grant of financial assistance may be made to a public authority.
- (4) A grant of financial assistance may be paid in a lump sum or in periodic payments.

(5) Notwithstanding subsection (1), the Commission may, until 31 December 1995, approve a grant of financial assistance if satisfied the recipient will take steps before that date to ensure the principles in Schedule 1 are furthered and the objectives in Schedule 2 are met.

3.60 The Committee notes a possible inconsistency between Clause 4 (new section 26I) of the Bill and the operation of the NDIS Act. Furthermore, Clause 4 (new section 26I) appears inconsistent with section 24 and Schedule 2 of the Act. Section 24 (2) of the Act requires that financial grants of assistance must not be approved unless the Commission is satisfied that the recipient will take steps to ensure that the principles in Schedule 1 are furthered and the objectives in Schedule 2 are met. There is a positive duty on the Commission to ensure that the objectives in Schedule 2 of the Act are met.

3.61 Objective 8 of Schedule 2 of the Act specifies that:

Programmes and services are to be designed and administered so as to ensure that no single organisation shall exercise control over all or most aspects of an individual's life.

3.62 Applied to the operation of the *My Way* trial – a single agency such as the Disability Services Commission appears to exercise control over all or most aspects of an individual's life - contrary to the intent of the Agreements and the principles and objects of the NDIS and the NDIS Act.

3.63 Section 34 of the NDIS Act sets out *reasonable and necessary supports*. Section 34 reads as follows (emphasis added):⁴⁹

34. Reasonable and necessary supports

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

(a) the support will assist the participant to pursue the goals, objectives and aspirations included in the participant's statement of goals and aspirations;

⁴⁹ Sections of the NDIS Act in bold do not form part of the Bill.

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

3.64 Section 34(1)(g) and (h) in bold above do not form part of Clause 4 (new section 26I) of the Bill.

- 3.65 At section 34(1)(h) the Commission will not be required to comply with the methods or criteria prescribed by the NDIS Rules. This is a policy decision and not within the scope of the Committee's terms of reference.
- 3.66 The Committee notes that the Western Australian Parliament is exercising its law making powers. The Bill legislates for the minimum requirements (of the *My Way* trial) to cover reasonable and necessary supports.
- 3.67 The Committee remains unconvinced that the Bill is required as matters appear to be administratively dealt with or provided for in the Agreements.

Clause 5 Section 56 amended

- 3.68 Clause 5 concerns amendments to the Governor's regulatory powers in section 56 of the Act. The new section 56(1) and (2) of the Act reads as follows:

56 Regulations

(1) The Governor may make regulations prescribing all matters required or permitted by this Act to be prescribed or necessary or convenient to be prescribed for carrying out this Act.

(2) Without limiting subsection (1), regulations may provide for any matter for which rules can be made under the NDIS Act.

- 3.69 The Committee identifies concerns with the characterisation of the regulatory powers of the State and the Commonwealth. Firstly, the Explanatory Memorandum for the Bill and clauses of the Bill do not cite the 11 NDIS Rules that covers a range of matters from participant planning to actuary rules.
- 3.70 Second, as discussed above, the term '*NDIS Rules*' is not defined in the Bill at Clause 4 (new section 26E). The Committee is unclear with the operation of the Table in Clause 4 (section 26F) if the reference to the NDIS Rules automatically means all 11 Rules will be made into State Regulations or only those specified in the Agreements (Clause 31 and Clause 32 of the Third Agreement)⁵⁰ for adoption in the Regulations.
- 3.71 Third, the Western Australian Parliament cannot amend the Commonwealth NDIS Rules – only the Commonwealth Minister or the Commonwealth Parliament can do so.

⁵⁰ The National Partnership Agreement on Disability Reform in Western Australia (Third Agreement) at Clause 31 provides: '*Both Parties agree that the arrangements for the Scheme Actuary will mirror the arrangements outlined in the National Disability Insurance Scheme – Rules for the Scheme Actuary 2013 dated 25 June 2013*', and Clause 32 states: '*Both Parties also agree that the DSC will mirror the risk management arrangements outlined in the National Disability Insurance Scheme- Risk Management Rules 2013 dated 25 June 2013 for the My Way sites covered by this agreement.*'

3.72 Fourth, under the NDIS Act, the State Minister appears to have been statutorily appointed to raise matters for amendment through the body as a Ministerial Council established under section 12 of the NDIS Act - before they are able to table such amendments with the State Parliament.

3.73 The statutory construction of Clause 5 requires further comment. The Committee does not agree with the use of the word ‘provide’ in this clause. As identified by the Committee in previous reports to the Legislative Council, the word ‘provide’ is not defined in the *Interpretation Act 1984* (WA). The ordinary meaning of the word ‘provide’ suggests a wider ambit than the word ‘prescribe’. The use of the word ‘prescribe’ will usually allow for any State delegated legislation subsequently made under the provision to be a disallowable instrument and come before the Western Australian Joint Standing Committee on Delegated Legislation for scrutiny. As the Committee has observed in a previous inquiry:⁵¹

This process of scrutiny and disallowance is not triggered if the regulations are Commonwealth regulations and if there is no mechanism in the Bill to allow scrutiny of every new amendment or instrument passed by the Commonwealth.

3.74 To enable the Western Australian Parliament an opportunity to consider the Regulations, the Committee recommends amendments to the clause to make it clear that Regulations made under the clause are intended to be scrutinised under the Joint Standing Committee on Delegated Legislation.

3.75 With regard to the construction of the provision in the Bill, the Committee makes the following recommendation:

Recommendation 6: The Committee further to paragraphs 3.72 and 3.73 of this Report recommends that clause 5 of the Bill (new section 56(2) Act) be amended as follows:

Clause 5

Page 5, line 28 — To delete “provide” and insert —

prescribe

⁵¹ Western Australian Parliament, Legislative Council, Standing Committee on Uniform Legislation and Statute Review, Report 84, *Medicines, Poisons and Therapeutic Goods Bill 2013*, p50.

Clause 6 Section 57A Regulations may refer to published documents

3.76 Clause 6 proposes a new section 57A to the Act. Clause 6 reads as follows (emphasis added):

57A. Regulations may refer to published documents

- (1) *Regulations made for the purposes of this Act may adopt the text of any published document specified in the regulations –*
- (a) *as that text exists at a particular date; or*
- (b) *as that text may from time to time be amended.*
- (2) *The text may be adopted-*
- (a) *wholly or in part; or*
- (b) *as modified by the regulations.*
- (3) *The adoption may be direct (by reference made in the regulations), or indirect (by reference made in any text that is itself directly or indirectly adopted).*
- (4) *The adoption of text is of no effect unless-*
- (a) *the adopted text; and*
- (b) *if text is adopted as it may be amended from time to time, either –*
- (i) *the amendments to the text; or*
- (ii) *the text as amended,*
- can at all reasonable times be inspected or purchased by the public.*

3.77 The intent of the provision is to give effect to the purposes of the Act. Regulations are a form of delegated legislation. The Committee notes:⁵²

There are two common ways by which Parliament can control delegated legislation. It can require the delegated legislation to be laid before parliament and that it not come into effect until parliament approves it-either by an affirmative resolution, or by the lapse of a

⁵² Australian Parliamentary website http://www.aph.gov.au/About_Parliament/Senate/Research_and_Education/~/~link.aspx?id=62501A4F244B4174BBDB1BF023BE12B1&z=z, (viewed on 9 April 2014).

specific period without the legislation having been disallowed. Alternatively, the delegated legislation may come into immediate effect, but may be disallowed by the parliament within a specified time. (These two are the most common methods, but there are many variants.)

It is true that the courts have some control over improperly made delegated legislation, but their power is limited to matters such as whether the instrument is within the power delegated, whether there are inconsistencies with other acts, and whether prescribed procedures have been followed. The courts have no control over many of the potentially objectionable features of such legislation. In any case, legal remedies tend to be expensive and long delayed, and it would surely be better to ensure that the legislation is properly made in the first place.

- 3.78 The words ‘*published documents*’ are general in meaning and are not defined in the Bill or the *Interpretation Act 1984* (WA). The term may include the adoption of the text in full or in part of Standards and Codes developed under other jurisdictions. As it stands a Commonwealth Code or Standard may apply that may be inconsistent with the State (enabling) Act. It may include the adoption of documents that may alter the effect of the primary Act (Henry VIII clauses).
- 3.79 As the Bill stands, Clause 6 (proposing section 57A(1)(b) be inserted into the Act) gives power to the Executive to formulate regulations that adopt the text of any ‘*published documents as amended from time to time.*’
- 3.80 In addition to the wide scope that the term ‘*published documents*’ imposes, the reference to ‘*published documents*’ as amended from time to time diminishes the Western Australian Parliament’s law making and scrutiny powers and therefore its sovereignty. Clause 5 as currently worded removes the opportunity for parliamentary scrutiny where documents are included in regulations as published and re-published from time to time.

3.81 The Committee makes the following recommendation:

Recommendation 7: The Committee recommends the following amendments to Clause 6 with the following:

Clause 6

Page 6, lines 4 to 23 — To delete the lines and insert —

57A. Notification, tabling and disallowance

- (1) This section applies to the —
 - (a) NDIS Rules (Commonwealth);
 - (b) changes to the NDIS Rules (Commonwealth);
 - (c) NDIS Act 2013 (Commonwealth);
 - (d) Australian Standards and Codes.
- (2) Where any document to which this section applies is made publicly available in accordance with section 57A, the Director General must, within 10 business days after the day on which the document is first made publicly available, cause to be published in the *Gazette* notice of —
 - (a) the making of the document; and
 - (b) where the document is publicly available.
- (3) If notification of the making of a document to which this section applies is not published in the *Gazette* in accordance with subsection (2), the document ceases to have effect on the expiry of the 10th business day after the day on which the document was first made publicly available, but without affecting the validity or anything done, or of the omission of anything in the meantime.
- (4) A copy of the document to which this section applies must be laid before each House of Parliament within 6 sitting days following notification of the making of the document in the *Gazette* in accordance with subsection(2).
- (5) If notification of the making of a document to which this section applies is published in the *Gazette*, the *Interpretation Act 1984*, section 42 applies as if the document were a regulation published in the *Gazette*.

Sunset and Review Clauses

3.82 Review clauses and sunset clauses provide a mechanism for Ministerial accountability and oversight by the Parliament.

- 3.83 Clause 4 does not specify sunset provisions for the *My Way* trial. The Disability Services Commission stated:⁵³

The changes proposed to the Act are permanent; however, they have been made as discrete sections of the Act and function only to facilitate the trial. Following completion of the trial and the thorough independent evaluation of the models a decision will be made on Western Australia's full participation in the Scheme. This participation would require amendments to the existing legislation and it is anticipated that the clauses to be inserted by the Amendment Bill would be dealt with at this time.

- 3.84 This is an unsatisfactory approach to law making because it proposes a permanent change for a temporary arrangement. The *My Way* model is currently underway under the Act and in accordance with the Agreements. The Committee throughout its examination of the Bill questioned whether the Bill is in fact necessary.

- 3.85 The Committee notes that under the Agreements there is a requirement for the evaluation of the trials comes (Clause 54 of the Second Agreement (*National Partnership Agreement on Disability Reform in Western Australia*)). This Clause requires:

In accordance with Schedule E, clause 23 of the IGA FFR, this Agreement is time limited. An independent evaluation of the My Way Trial sites provided for under this Agreement and the NDIS trial site provided for under Schedule G of the IGA NDIS will assess the degree to which the agreed objectives and outcomes and / outputs have been achieved, and inform decisions regarding the appropriate treatment following its expiry. A comprehensive interim report will be provided six months prior to the expiry of this agreement.

- 3.86 The Western Australian Parliament should have the opportunity to consider the advice of the Steering Committee overseeing the *My Way* trial as it is required to provide quarterly reports including financial information on the progress of the two trials. The Committee holds the view that should the clause be adopted it should prescribe that the '*comprehensive interim report*' and the final review report be tabled with the Western Australian Parliament at the expiry of the trial period.

- 3.87 The Committee notes the review provision in section 208 of the NDIS Act (**Appendix 3**) for the Commonwealth Minister to table the review of the NDIS in the Commonwealth Parliament. However, this legislative provision does not include scrutiny by the Western Australian Parliament.

⁵³ Submission from the Disability Services Commission, 30 April 2014, p11.

3.88 The Committee makes the following recommendations:

Recommendation 8: The Committee recommends that the Bill be amended to include a new provision under Clause 4 of the Bill as follows:

Clause 4

Page 5, after line 18 — To insert —

26J. Review of Part

- (3) The Minister must cause a review of the operations and effectiveness of this part to be carried out as soon as is practicable after the second anniversary of the day on which Part 4B of this Act comes into operation.
- (4) The Minister must cause a copy of the report to be laid before each House of Parliament by no later than 30 August 2016.

Recommendation 9: The Committee recommends that provision should be made in the enabling legislation for the *My Way* trial for it to expire at the conclusion of this trial period and the finalisation of the *My Way* trial findings. The Committee further recommends should the NDIS scheme be rolled out in a substantial way throughout the State that new amendments, taking into account any findings flowing from the *My Way* trial, be re-introduced for consideration by the Parliament.

CHAPTER 4

CONCLUSION

- 4.1 The Western Australian Parliament is being requested to legislate for a trial of the *My Way* model that has been operating since in 2012 under the existing *Disability Services Act 1993* (WA) and the Agreements executed by the State. This raises the question as to whether the Bill is in fact necessary to facilitate the trial.
- 4.2 Western Australia developed its own trial model - the *My Way* model as a comparison to the NDIA NDIS to be evaluated by Flinders University after a two year trial.
- 4.3 Under the Agreements, Western Australia's *My Way* trial must apply consistent principles and objects, eligibility and performance benchmarks of the NDIS.
- 4.4 The Bill proposes to amend the *Disability Services Act 1993* to facilitate the trial and adopts the eligibility requirements listed in sections of the NDIS Act. The Second Reading Speech by Hon Helen Morton MLC, states:⁵⁴

The WA NDIS My Way model will adopt the eligibility provisions approved by the Commonwealth in the National Disability Insurance Scheme Act 2013. WA is keen to trial a model that has minimal bureaucracy and that maintains some of the key features of WA services for people with disability who participate in the States' WA NDIS My Way trial.

- 4.5 The Committee notes that the principles and objects of the NDIS Act are directive principles and are not legally enforceable nor do the objects create new rights or responsibilities. These principles reflect the Australia's obligations to comply with international treaties, Commonwealth and State laws covering disability discrimination and disability service provision. The IGA creates an obligation for Western Australia to apply nationally consistent approaches.
- 4.6 The Committee notes that the statutory amendments proposed in the Bill cannot be easily characterised under the existing typology for uniform legislation schemes.
- 4.7 The Committee finds that:
- The Agreements signed by the State substantially cover the administrative arrangements for the operation, governance, eligibility requirements, principles and objects, consultation and information sharing, reporting and funding of the *My Way* trial.

⁵⁴ Western Australia Parliament, Legislative Council. Hon Helen Morton, Minister for Disability Services, Second Reading Speech, Disability Services Amendment Bill 2013, p2.

- The current Act appears to make adequate provision for information sharing with the Commonwealth and is not an impediment to the operation of the trial.
- The current Act and the administrative arrangements under the Agreements have facilitated the operation of the model for the past two years.
- The Bill proposes the detail of the trial be contained in State regulations.
- State regulations may apply the NDIS Rules and the IGA specifies that at least two NDIS Rules will be mirrored in the State regulations.
- Whilst it is unclear what Rules will form State regulations, these Regulations will be scrutinised by the Western Australian Parliament Joint Standing Committee on Delegated Legislation.
- The Bill does not have a sunset clause or a review clause for the *My Way* trial.

4.8 Two Western Australian Ministers are appointed to a Commonwealth statutory Ministerial Council with collective powers, functions and accountabilities under the Commonwealth legislation.

4.9 The Committee is concerned that this arrangement lacks:

1. An appropriate head of constitutional power, under the Commonwealth Constitution; or,
2. A referral of power by the Parliament of Western Australia under section 51(xxxvii) of the Constitution that establishes a legal basis for the appointment of the State Minister to the Ministerial Council (as defined for the purposes of the NDIS Act) in the NDIS legislation.

4.10 This raises questions about a central aspect of the NDIS and by extension, the NDIA NDIS comparative trial in Western Australia. The functions of the Commonwealth Ministerial Council maybe constitutionally invalid as the Commonwealth does not appear to have the power under the Constitution to require the State Minister to advise the Commonwealth Minister.

4.11 As stated earlier, the *My Way* model has been operating for the past 2 years. The Committee remains unconvinced that the Bill is required as matters appear to be administratively dealt with or provided for in the Agreements.

4.12 Should the House determine the Bill necessary to execute the terms of the IGA and other Agreements, the Committee recommends amendments to strengthen opportunities for the Western Australian Parliament to scrutinise Commonwealth amendments.

- 4.13 The Committee recommends that the enabling legislation for the *My Way* trial should expire at the conclusion of this trial period and the finalisation of the *My Way* trial findings.
- 4.14 The Committee further recommends should the NDIS scheme be rolled out in a substantial way throughout the State that new amendments, taking into account any findings flowing from the *My Way* trial, be re-introduced for consideration by the Parliament.
- 4.15 The Committee commends the Report to the House.



Hon Kate Doust MLC
Chair

19 May 2014

APPENDIX 1
LETTER FROM HON MITCH FIFIELD

APPENDIX 1

LETTER FROM HON MITCH FIFIELD



SENATOR THE HON MITCH FIFIELD
ASSISTANT MINISTER FOR SOCIAL SERVICES

MC14-004685

The Hon Kate Doust MLC
Chair
Standing Committee on Uniform Legislation and Status Review
18-32 Parliament Place
WEST PERTH WA 6000

Dear Ms Doust *Kate*

Thank you for your letter of 17 April 2014 to the Hon Kevin Andrews MP, Minister for Social Services, seeking additional information on the National Disability Insurance Scheme (NDIS) as part of the National Partnership Agreement on the trial of *My Way* sites. Your letter was referred to me as this matter falls within my portfolio responsibilities.

The Assessment Tool is only one element of the NDIS eligibility assessment process. It is also important to look at Part 1 of the NDIS Act 2013 and the NDIS rules at www.ndis.gov.au. In addition, the National Disability Insurance Agency's operational guidelines contain information about the processes for assessing a participant's needs and prescribes the use of the Assessment Tool, also available at www.ndis.gov.au. The Committee Secretary may like to talk to Anne Skordis at the NDIA for further detail about the use and operation of the assessment tool on 02 6146 3029.

You also ask about the Western Australian (WA) Parliament being able to scrutinise the NDIS rules. The *National Disability Insurance Scheme Act 2013* (the Act) creates the framework for the NDIS. Under the Act, *Part 5 – Legislative Instruments, clause 209* outlines the requirements for consultation with each host State or Territory around the making of the rules.

The *Intergovernmental Agreement for the National Disability Insurance Scheme (NDIS) Launch* (the IGA), signed on 7 December 2012, sets out the governance arrangements for the NDIS trial. This includes the establishment of a Ministerial Council, the Disability Reform Council, of which WA is a member. Clauses 75-80 of the IGA set out the role of the Ministerial Council, which includes its role as the forum to obtain views and/or agreement on the making of, or the amendments to, the Act and related rules. The Hon Helen Morton MLC, WA Minister for Disability Services, and the Hon Dr Mike Nahan MLA, WA Treasurer, are members of the council.

Further, you ask about the differences between the NDIS and *My Way* models. One key difference is the involvement of the Disability Service Commission in the decision-making around participant plans in the *My Way* model. *My Way* also utilises the existing approved WA Panel of Providers and contractual arrangements which include upfront payment and acquittal, whereas the NDIA participants can source supports from any NDIA registered providers and, if self-managed, can source services outside the list of registered providers.

In addition, management of cost overruns on clients is the responsibility of the Commonwealth for the NDIS and the WA Government for the *My Way* trial site. The approach to reviewing decisions also differs with the Administrative Appeals Tribunal acting as the external merits review body for the NDIS and the *My Way* model currently using state-based mechanisms.

I have enclosed for your reference a copy of the Prime Minister and Premier's media release on the WA trial sites including a copy of the bilateral agreement between the Commonwealth and WA.

Thank you again for writing.

Yours sincerely



MITCH FIFIELD
7/5/14

APPENDIX 2
COAG HIGH LEVEL PRINCIPLES OF THE NATIONAL DISABILITY
INSURANCE SCHEME

APPENDIX 2

COAG HIGH LEVEL PRINCIPLES OF THE NATIONAL DISABILITY INSURANCE SCHEME

COUNCIL OF AUSTRALIAN GOVERNMENTS

High-level Principles for a National Disability Insurance Scheme

A National Disability Insurance Scheme

1. The Council of Australian Governments (COAG) has welcomed the release of the Productivity Commission's final report on Disability Care and Support and has agreed on the need for major reform of disability services in Australia through a National Disability Insurance Scheme. All governments recognise that addressing the challenges in disability services will require shared or coordinated effort.
2. This reform should take a social insurance approach that would share the costs of disability services and supports across the community. In addition, the reform should adopt insurance principles that estimate the cost of reasonable and necessary supports, promote an efficient allocation of resources based on managing the long-term costs of supporting people with disabilities and their carers while maximising the economic and social benefits. This would involve consistent application of eligibility criteria, and the timely and efficient delivery of reasonable and necessary supports, including early intervention. Actuarial modelling will be used to estimate and manage the costs of care and support across the life-course of individuals and monitor, evaluate and report on the overall performance of the National Disability Insurance Scheme.
3. A National Disability Insurance Scheme will fund reasonable and necessary individualised services and supports directly related to an eligible person's ongoing disability support needs.
4. COAG notes that design and implementation of a National Disability Insurance Scheme is the responsibility of all governments and that consideration of the Productivity Commission's recommendations provides a good starting point. The National Disability Strategy should also inform the design and implementation of a National Disability Insurance Scheme.
5. The development and implementation of a National Disability Insurance Scheme will be a shared responsibility of the Commonwealth and States and Territories. Governments agree this is a substantial and important reform that will fundamentally change the nature of disability care and support in Australia. Work will start immediately, but fully realising a National Disability Insurance Scheme will take time and require a careful and considered approach by all levels of government. The Commonwealth and State and Territory governments will work together through the Select Council of Treasurers and Disability Service Ministers (Select Council on Disability Reform) to build a National Disability Insurance Scheme which will deliver the following outcomes to eligible people with disabilities:
 - a. People with disability will be supported to participate in and contribute to social and economic life to the extent of their abilities;
 - b. People with disability and their carers will have certainty that people with disability will receive the individualised care and support they need over their lifetime;
 - c. People with disability will be able to exercise more choice and control in their lives, through a person-centred, self-directed approach to service delivery with individualised funding;

- d. People with disability, their families and carers, service providers, the public and governments will have greater transparency and certainty of funding for disability care and support;
 - e. Disability care and support will be more accessible;
 - f. Disability care and support will meet nationally consistent standards;
 - g. Disability care and support will be sustainably resourced; and
 - h. Disability care and support will contribute to governments' commitments to closing the gap on Indigenous disadvantage.
6. The Select Council on Disability Reform will reflect and give effect to the following design principles agreed by COAG when considering the Productivity Commission's recommendations and moving towards a National Disability Insurance Scheme. These principles do not direct governments' consideration of the Productivity Commission's recommendations in relation to the National Injury Insurance Scheme, which will be subject to a separate process lead by the Commonwealth Assistant Treasurer, however it will be important that the work progressing a National Injury Insurance Scheme is aligned to the National Disability Insurance Scheme work.
7. Principle 1: A National Disability Insurance Scheme should be needs based and provide people with disability access to individualised care and support. To achieve this, a National Disability Insurance Scheme should recognise existing best practice across the states and territories and build on this best practice through foundation reforms to:
- a. Provide certainty for people with disability in accessing high quality and effective services and support when they need them;
 - b. Be simple to understand, navigate and provide portability across jurisdictions and service providers;
 - c. Provide innovative responsive and coordinated services locally;
 - d. Support access to mainstream services such as education, transport, health, housing, aged care and employment services;
 - e. Recognise the essential support provided by families and carers and support them in their roles;
 - f. Recognise and enhance the significant role of the not-for-profit and private sectors in a well functioning disability services system;
 - g. Provide people with disability with better information and support to enable them to make informed choices and exercise control and choice over their care and support;
 - h. Ensure the development of the sector is actively supported in a way that fosters continuous improvement, viability and sustainability;
 - i. Ensure equity of access by addressing the needs of people in regional and remote Australia and people from Indigenous and Culturally and Linguistically Diverse (CALD) backgrounds;

- j. Promote innovation in services and the services system;
 - k. Provide appropriate safeguards to support and protect people with disability; and
 - l. Provide continuity of support to people with disability currently receiving services to ensure that they are not disadvantaged in the transition to a National Disability Insurance Scheme.
8. Principle 2: Resourcing arrangements for a National Disability Insurance Scheme should:
- a. Provide certainty of future resourcing recognising the projected ongoing growth in demand and the need for incentives for containment;
 - b. Provide adequate funding to address assessed needs;
 - c. Be fiscally sustainable for all levels of government;
 - d. Be based on an assessment of the costs of meeting reasonable and necessary care and support needs of an individualised funding approach;
 - e. Be transparent regarding contributions from jurisdictions;
 - f. Not create any disincentives for carers and family members to provide support;
 - g. Ensure that no jurisdiction is disadvantaged by:
 - i. historically high levels of funding for disability services, recent increased investment in disability services or additional investment in the lead up to the launch of a National Disability Insurance Scheme; and
 - ii. having already undertaken foundation reforms required to implement a National Disability Insurance Scheme.
 - h. Support a social insurance approach.
9. Principle 3: Governance for a National Disability Insurance Scheme must be transparent and accountable and ensure genuine ongoing involvement of all jurisdictions in determining governance, policy setting and scheme management. Governance arrangements should:
- a. Establish a National Disability Insurance Scheme that is administered in a way that manages life time costs of care and support through insurance principles, such as consistent application of eligibility criteria and timely and efficient delivery of reasonable and necessary supports, including early intervention, to ensure the ongoing financial sustainability of the scheme;
 - b. Maximise the benefits of a market-based approach to disability support services, including consideration of a costing structure that fosters competition and choice, and supports an individualised and localised approach and takes account of legitimate cost variations for different locations and client groups;
 - c. Ensure that there are nationally consistent eligibility criteria, standardised assessment tools, quality standards and a range of services and supports;

- d. Enable localised planning and access to efficient and responsive services, and be coordinated with mainstream services such as education, transport, health, housing, aged care and employment services;
 - e. Equip and enable people with disability to the extent possible to choose and direct the services they receive and the manner in which they are provided;
 - f. Ensure transparency of eligibility, assessment and resource allocation;
 - g. Provide clarity around the roles and responsibilities of different levels of governments in the transition to and operation of a National Disability Insurance Scheme;
 - h. Engage people with disability, their families and carers in the design and delivery of services;
 - i. Facilitate national research and data collection and consolidation; and
 - j. Ensure alignment with the policies, standards and services of a National Injury Insurance Scheme.
10. Principle 4: All jurisdictions commit to accelerated progress in the delivery of foundation reforms agreed by the Select Council in the period leading up to the establishment of a National Disability Insurance Scheme, together with simultaneous progress on resolution of governance and funding issues. This will ensure an effective transition to a National Disability Insurance Scheme which will deliver immediate improvements for people with disability in the interim. The implementation of a National Disability Insurance Scheme will recognise current systems, structures and coverage and ensure appropriate transition strategies. This will require:
- a. Ensuring continuity of support to people with disability currently receiving services to ensure that they are not disadvantaged in the transition to a NDIS;
 - b. Ongoing development of the disability services sector capacity to meet the diverse and individual needs of people with disability, and to manage risk and operate effectively in a National Disability Insurance Scheme;
 - c. Continuous improvement in specialist disability specialist support services in the lead up to a National Disability Insurance Scheme, including through reforms under the National Disability Agreement;
 - d. A national workforce strategy to address qualifications, training and cross sector career mapping issues and other measures to establish the sector as an 'industry of choice' to ensure there is a skilled and responsive workforce to meet the care and support needs of people with disability, and assessment and local coordination roles under a National Disability Insurance Scheme;
 - e. Robust evidence from trialling and evaluation;
 - f. Appropriate legal and administrative reform, including data and information systems to support an insurance approach;
 - g. Detailed analysis of the existing levels of investment to inform financing arrangements for a National Disability Insurance Scheme, including state and

Commonwealth government funding, insurance based arrangements and other funding; and

- h. Detailed analysis of the cost structures underlying an individualised approach.

APPENDIX 3

Section 208 Review of operation of the NDIS Act

APPENDIX 3

Section 208 Review of operation of the NDIS Act

SECTION 208 REVIEW OF OPERATION OF THE NDIS ACT

- (1) *The Minister must cause an independent review of the operation of this Act to be undertaken commencing on the second anniversary of the commencement of Chapter 3.*
- (2) *The review is to be undertaken by a person or persons chosen by the Minister with the agreement of the Ministerial Council.*
- (3) *The terms of reference of the review must be agreed by the Ministerial Council.*
- (4) *The person or persons undertaking the review must give the Minister a written report of the review within 6 months of the commencement of the review.*
- (5) *Upon receiving the report, the Minister must give a copy to the Ministerial Council and ask the Ministerial Council to:*
 - (a) *make recommendations in response to the report; and*
 - (b) *obtain COAG's response to the report within the period of 6 months after giving the copy of the report to the Ministerial Council.*
- (6) *The Minister must consider the report.*
- (7) *The Minister must cause copies of the report to be tabled in each House of the Parliament within 15 sitting days of that House after receiving the report.*
- (8) *The Minister must cause copies of COAG's response to the report to be tabled in each House of the Parliament within 6 months of giving the copy of the report to the Ministerial Council.*
- (9) *If the Minister fails to cause copies of the response to be tabled in each House of the Parliament within the period referred to in subsection (8), the Minister must cause an explanation of the failure to be tabled in each House of the Parliament within 15 sitting days of that House after the end of that period.*