



**Victorian Equal Opportunity
& Human Rights Commission**

Disability Care and Support

Submission to the Productivity Commission

April 2011

Introduction

The Victorian Equal Opportunity and Human Rights Commission (the Commission) welcomes the opportunity to make a submission to the Productivity Commission in response to the draft report: *Disability Care and Support*.

The Commission is an independent statutory body that has functions under the *Equal Opportunity Act 1995* (Vic), the *Racial and Religious Tolerance Act 2001* (Vic) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic). Our functions include dispute resolution, providing education about human rights and equality of opportunity, undertaking projects and activities aimed at eliminating discrimination and promoting human rights, conducting research, and providing legal and policy advice. In addition, the Commission has a role in reporting to the Victorian Attorney-General on the operation of the Charter and, at the request of public authorities, conducting compliance reviews.

Summary

The Commission supports the comments and recommendations contained in the submission of the Australian Human Rights Commission.

The Commission welcomes the central recommendations of the draft report, specifically the establishment of a National Disability Insurance Scheme (NDIS) to commence in 2014.

We further welcome the establishment of a parallel National Injury Insurance Scheme, noting that this would build on existing Workcover and Transport Accident Commission schemes currently operating in Victoria.

We consider that the establishment of the NDIS as a once in a lifetime opportunity to shift from a welfare to a rights based model of disability services. So that people are seen as having rights first, disability second and where systemic obstacles are overcome.

We welcome the Productivity Commission's recognition and use of a social model of disability and value the positioning of the proposed NDIS as a means to promote access and participation in all aspects of social, economic and community life. This is consistent with Australia's international human rights obligations, including but not limited to rights contained in the *Convention on the Rights of Persons with Disability* (the Convention).¹

We submit that in order to be rights consistent and person-centred, the design of eligibility criteria and assessment tools and the implementation of processes for assessment must reflect this social model of disability. In particular:

- definitions of disability for eligibility should avoid outdated, rights limiting, medical model language and criteria
- eligibility criteria should reflect the complexity of disability
- eligibility criteria should specifically include mental illness as a disability

¹ *International Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 611 UNTS, entered into force 3 May 2008.

- eligibility criteria should take into account that the effects of disability are not linear, and can be experienced as chronic conditions with episodic variances²
- assessment tools, including common assessment tools should take into account the impact of the disability upon the person, and the collateral impact of disability upon their family, so that the scheme can effectively support people with disability. 'Family' should be defined broadly to reflect the diversity of Australian families
- the first principle of assessment should be that priority is given to self assessment- in recognition that people with disability understand their disability best³
- assessment processes should reflect the diversity of disability and ensure that practitioners have expert knowledge in the field, thereby avoiding problems with other programs where, for example, health professionals such as speech therapists assess people with mental illness or a intellectual disability for job readiness
- assessment tools and processes must be culturally robust, noting the cultural rights of Indigenous Australians and people with disability from culturally and linguistically diverse backgrounds.

The Commission welcomes the establishment of national standards for disability services that will accompany the proposed scheme, noting however that such standards (for service quality, police checks etc) will not apply to private arrangements. This risks a two-track system where some participants are protected by standards and others are not. It further risks an absence of independent oversight, and legal protections for both parties, for example under Equal Opportunity legislation. While the private nature of such arrangements needs to be respected, we would encourage further consideration of how the rights of all parties can be best protected.

Further, while we welcome the consistency and portability that a national system will bring, we are concerned that in achieving that consistency there may be an incentive to go for the lowest common denominator in order to achieve consensus amongst states and territories.

The Commission is particularly concerned that in moving into a national scheme that existing legal rights enjoyed by Victorians are not lost. The most striking example of which is that Victorians currently enjoy domestic human rights protection under the *Charter of Human Rights and Responsibilities Act 2006*.

This legislation requires all Victorian public authorities, including non-government disability services act in a way that is compatible with human rights at all times.⁴ This impacts directly upon the policies and practices of services every day.⁵ If a person considers that this duty has not been met, they may seek relief or a remedy on the basis of the Charter, as long as this is sought as part of existing legal proceedings⁶ Further, they may make a complaint to the Ombudsman.

We submit that in designing the eligibility criteria, assessment tools and processes, complaints system, oversight arrangements, and service standards for the proposed NDIS,

² For example, mental illness.

³ See for example self-assessment methods in the United Kingdom.

⁴ *Charter of Human Rights and Responsibilities Act 2006* s 38.

⁵ For example, service standards in Victoria (Disability Services Quality Framework) are framed within the context of the Charter.

⁶ The Charter does not contain an independent cause of action. *Charter of Human Rights and Responsibilities Act 2006* s 39.

this Charter test must be met in order to ensure that Victorian's existing rights are not diluted.

We note also that collateral benefits and services such as taxi concessions, utility concessions, home modification programs which are state based and may be absorbed into the national scheme should reflect the highest standards and not be reduced to accommodate current restrictions on eligibility in some state programs. Consistency in guardianship and administration, specifically the operations of state trustees is another area where a stronger, nationally consistent focus on human rights is required.

The Commission welcomes the congruence between the proposed schemes and the National Disability Strategy, which itself takes a human rights approach, and is heavily informed by the Convention.

We note that in order for the policy aims of both the National Disability Strategy and the proposed NDIS to be realised, the delivery of mainstream services must improve. Clearly the NDIS risks becoming just another residual 'service system' in the absence of a shared effort around these basic entitlements and substantial improvements in housing, education, health and transport outcomes for people with disability. While these will remain state responsibilities, we consider this an opportune time for a renewed focus by the Council of Australian Governments (COAG), backed by the necessary resources to improve the accessibility and delivery of these services so that people with disability can enjoy the foundations on a good life in common with other Australians.

The Commission further notes that in order for the proposed schemes to deliver intended policy aims, they rely on a sustained resource base. We welcome the emphasis in the proposed model that the schemes are properly funded to address additional costs related to disability so that people with disability will be better able to have full enjoyment of their human rights and to live in dignity.

While the Commission makes no comment on which model of taxation should be used to ensure this base, we welcome the Productivity Commission's recognition that the proposed schemes will deliver long-term economic benefits that will exceed costs, by facilitating greater economic and social participation by people with disability, families and carers. Further, the NDIS will contain a strong incentive to invest in early intervention, delivering a cost reduction benefit and promoting improved life outcomes for people with disability.

The Commission values the principle of self-determination that underpins the individualised funding aspects of the scheme. Obviously, implementation of such arrangements will rely on the groundwork that has already been made on individualised funding in states such as Victoria.

We further note that for individualised funding to meet its policy objective of consumer control, a diverse, robust and rights based disability sector is a necessary feature. The Commission notes the current geographic inequities in service provision, with significant barriers faced by people with disability in rural, regional and outer metropolitan areas. The Commission is concerned that current service gaps are dealt with in the development of the NDIS. This includes responding to issues of distance, transport, workforce issues and cost variations currently associated with service delivery in rural and regional areas. After all, in the absence of services to purchase, or inequitable access to services, the principle of self determination through consumer choice cannot be realised.

The Commission further considers that for the schemes to be effective they must take into account the impact of gender, Indigenous background, cultural diversity, sexuality and the specific needs of children.

The Commission welcomes that the new scheme is entitlement based and universal. This is a significant and long overdue reform. However, we note that unlike comparable universal schemes, provision is not made for people with disability who are not Australian permanent residents. This would potentially exclude a number of people from receipt of services, including asylum seekers and people with accepted refugee status including children. It would also exclude certain visa holders and their children. We consider that everybody resident in the country should be able to access the scheme for the duration of his or her stay irrespective of his or her visa status/nationality.

While we appreciate that current disability legislation contains a similar exclusion, arguably this may be inconsistent with the non-discrimination provisions of the Convention and the Convention on the Rights of the Child.⁷ We also understand that some non-residents can access Medicare in certain circumstances. Arguably, the two schemes are similar and we would encourage the Productivity Committee to consider this issue.

Effective governance will be central to the success of the schemes. We note the proposal that the National Disability Insurance Scheme be run to insurance principles by a commercial board, and that an advisory group of people with disability, carers and providers support the board. In considering such arrangements, the Commission submits that the schemes must be based on self-determination and the right to participate as protected by the Convention.⁸ This goes to all aspects of operations, including governance structures.

We consider that effective governance would be enhanced by having people with disability themselves be involved in key steps toward implementation including having specified membership positions on the Board.

We submit that continued attention to human rights implications of the schemes, beyond specific disability issues will be required, so that these reforms deliver the promise of promoting access and participation for people with disability, rather than another 'systems reform'.

Recommendations

We support the recommendations of the Australian Human Rights Commission, specifically that:

1. Further and more detailed attention be given by the Productivity Commission, and by government in considering responses to the Productivity Commission's Inquiry, to the implications of the Convention on the Rights of Persons with Disabilities for the administration of the proposed schemes, including:

⁷ *International Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 611 UNTS, entered into force 3 May 2008, Arts 3, 5(1); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 3 UNTS 1577, entered into force 2 September 1990, Art 2.

⁸ *International Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 611 UNTS, entered into force 3 May 2008, Art 3.

- ensuring that the proposed National Disability Insurance Authority has functions and powers which are appropriately broad, including having capacities (as indicated in the Australian Human Rights Commission's initial submission) to apply scheme funds as appropriate to address barriers in any area of life
- ensuring that scheme administration and decision making is undertaken having regard to the Convention
- ensuring appropriate availability of individual and systemic advocacy and representation for people with disability.

We also make the following additional recommendations:

2. That eligibility criteria, assessment tools and processes for assessment:

- utilise the social model definition of disability and avoid medical model language and criteria
- reflect the complexity and diversity of disability, including that the effects of disability are not linear, and can be experienced as chronic conditions with episodic variances
- take into account the impact of the disability upon the person, and the collateral impact of disability upon their family
- apply self-assessment as the first principle
- ensure that practitioners undertaking assessment have expert knowledge in the specific disability
- be culturally robust, noting the cultural rights of Indigenous Australians and people with disability from culturally and linguistically diverse backgrounds
- meet international human rights obligations, specifically that access to services is not denied on the basis of nationality.

3. That the new national scheme of disability services, including the NDIS, NIIS and collateral state based programs reflect the highest standards and not be reduced to accommodate current restrictions on eligibility in some state and territory programs.