Proposed National Disability Insurance Scheme

Human Rights Analysis

April 2011

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Proposed National Disability Insurance Scheme: Human Rights Analysis. April 2011.

Disclaimer: This analysis provides a thematic interpretation of international human rights obligations with respect to the National Disability Insurance Scheme, as proposed in Productivity Commission 2011, *Disability Care and Support*, Draft Inquiry Report, Canberra. The information provided is intended to promote debate and discussion only. This analysis is not, and does not, represent itself to be legal advice in any way; nor should it be used for any other purpose than that of informed discussion and research.

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1. Executive Summary

The National Disability Insurance Scheme, as proposed by the Productivity Commission (PC) in their 2011 *Disability Care and Support* Draft Report, provides an unprecedented opportunity to realign support arrangements for people with disability in order to achieve full inclusion and participation. The PC has proposed a number of enhancements to the present system, including opening up a range of information and support services to the whole community (and not just people with disability), shifting the platform for the delivery of disability supports to an entitlement basis, and endorsing a person centered approach to support that will improve the capacity of individuals to exercise choice, be included in communities, and participate on an equal basis in civil, political, economic, social and cultural fields.

Australia's Human Rights Obligations

Australia has enjoyed a surge in community support for human rights approaches to assessing the value of its public policy positions. At the same time, in the last two decades, Australia has embraced human rights principles through its ratification and endorsement of key international treaties and declarations, and through numerous public engagements with human rights principles. Recently, following a national consultation, Australia has released a National Human Rights Framework which commits to promoting human rights education and developing a human rights action plan. Australia has also endorsed a mechanism for parliamentary scrutiny of new bills and legislative instruments. Given the strong community expectation that the proposed NDIS will meet human rights obligations, and the international and domestic obligations that are in place to ensure compliance, alignment of the proposed scheme with international human rights principles will be a requirement.

A Human Rights Analysis of the Proposed NDIS

This report provides an analysis of the recommendations contained in the Productivity Commission *Disability Care and Support* Draft Report and key human rights principles that may arise with respect to:

- The Convention on the Rights of Persons with Disabilities (CRPD)
- The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)
- The United Nations Declaration on the Rights of Indigenous People (UN DRIP)
- The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)
- The Convention on the Rights of the Child (CROC)

Where they arise, the report also discusses specific obligations as they relate to the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Covenant on Civil and Political Rights (ICCPR), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and the Convention and Protocol Relating to the Status of Refugees (CRSR). In addition to reporting against the recommendations in the PC proposal, this report examines obligations that might relate to women, people from non English Speaking Backgrounds (NESB), Aboriginal and Torres Strait Islander people and children. The report also specifically examines advocacy, chronic health conditions, psychosocial disability[1] and legal capacity and restrictive practices.

The intention of the report is to promote debate and consideration in relation to human rights principles, including taking account of the aspirations towards equality, full legal capacity recognition, non discrimination, freedom from violence, inclusion and participation contained in international treaties. The aim of this report is to ensure that the NDIS will be fully compliant with international obligations when it is implemented.

This Human Rights Analysis makes a number of broad findings with respect to the NDIS as proposed by the PC Draft Report. These findings are documented below.

Rights Realisation

A number of key human rights relevant to people with disability are immediately realisable under international law. This includes, for example, the independent living and inclusion requirements of Article 19 CRPD, as well as other rights relevant to the proposed NDIS, such as a right to legal capacity, and freedom from abuse, violence and torture. These rights are “immediately applicable under international law” as per Article 4.2 CRPD. CRPD also specifies that a State party must take “measures to the maximum of its available resources and, where needed, within the framework of international cooperation, with a view to achieving progressively the full realisation” of economic, social and cultural rights. This means the proposed NDIS must be fully compliant with immediately realisable civil and political rights, and make provision for progressive realisation of economic, social and cultural rights to the maximum of available resources.

Eligibility

The proposed NDIS does not adequately capture all those who could benefit from long term support. Eligibility is not in line with the broad social model understanding of people with disability as "those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others" (as per Article 1 CRPD). The NDIS should broaden eligibility to support the “equal right of all persons with disabilities to live in the community, with choices equal to others” and “take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community” as per Article 19 CRPD.

Scope

The PC has limited the scope of potential services to those currently provided by the disability support system. Arguably the current support system is at odds with the broad obligations imposed by Article 19 and Article 26 CRPD with respect to independent living and habilitation / rehabilitation. The current system also has significant problems in

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[1] This report uses the term “psychosocial disability.” It is acknowledged that while CRPD uses the term “mental” disability (see Article 1), the international community is increasingly favouring the term “psychosocial disability.” See for example United Nations Enable. “Mental Health and Development.” At http://www.un.org/disabilities/default.asp?id=1545

relation to access for particular groups of people with disability, including women, Aboriginal and Torres Strait Islander people and people from Non English Speaking Backgrounds. A more comprehensive review is required of existing disability support arrangements, as well as other 'mainstream' supports and services available to people with disability, with an aim of ensuring compliance with CRPD obligations.

Assessment

Assessment tools must engage with the social model of disability and aim towards ensuring access to supports for people with disability who face barriers to full inclusion and participation (as per Article 19 CRPD). People with disability have a right to exert control in “decision-making processes concerning issues relating to persons with disabilities” (Article 4.3). Use of self assessment would more strongly satisfy the requirements imposed by CRPD, ensuring that the needs and aspirations of people with disability are fully met. The use of the 'reasonable and necessary' test is not in keeping with the obligations under CRPD, which stress the need for 'reasonable accommodation' (Article 2) and for States parties to work towards progressive realisation of economic, social and cultural rights within available resources (Article 4.2). The best interests of the child (as per Article 3 CROC) create an obligation to ensuring that the assessment process provides adequate support arrangements for children with disability as a 'primary consideration.'

Decision Making

NDIS self-directed funding arrangements must be easy to navigate, and facilitate meaningful individual decision making for all participants. Article 19 CRPD stresses the “equal right of all persons with disabilities to live in the community, with choices equal to others.” In order to realise this equal right, a stronger emphasis on giving individuals the tools to control their own support arrangements, on an equal basis with others, is essential. This implies a stronger role for advocacy in supporting individuals. This also necessitates supported decision making that can fully recognise the legal capacity of people with disability, as per Article 12 CRPD. A blanket exclusion of resident family members from providing paid support to people with disability through the NDIS is potentially discriminatory: both to capable and willing family members and to people with disability.

Governance and Complaints

The PC recommendation for a board governing the NDIS does not "actively involve persons with disabilities, including children with disabilities, through their representative organisations" as per Article 4.3 CRPD. Amending the composition of the board to also include people with disability would better meet the obligations in CRPD. The PC proposal to limit appeals to matters of law rather than merit is problematic given the potentially broad nature of the proposed scheme and the important role the scheme will play in the lives of eligible participants. It also appears at odds with the provisions of Article 12 CRPD which specify that people with disability should “enjoy legal capacity on an equal basis with others in all aspects of life.”

Delivery of Disability Services

CRPD provides guidance in relation to data collection and privacy rights that should inform the design of information sharing systems for services. Quality management systems must ensure that the NDIS is compliant with CRPD and other rights obligations, and ensure that full inclusion goals are progressively realised by all people with disability, including women, Aboriginal and Torres Strait Islander people and people from NESB.

Data

There needs to be a strong commitment for disaggregated data collection through the NDIS to report on progress with respect to meeting Convention obligations and fulfilling rights for people with disability, including women, children, Aboriginal and Torres Strait Islander people and people from NESB as per Articles 6, 7, 30.4 and 31.2 CRPD.

Early Intervention

The PC proposal for early intervention services to be funded on the basis of their 'cost effectiveness' is potentially at odds with the CRPD obligation for States parties to 'reasonably accommodate' supports that will enable full inclusion and participation for people with disability on an equal basis with others. Early intervention supports must be provided where it will promote full inclusion and participation in line with the needs and aspirations of people with disability. Where supports towards full inclusion and participation cannot be reasonably accommodated, then there remains an obligation to progressively realise these rights. The best interests of the child (as per Article 3 CROC) must be satisfied with respect to the delivery of ‘early in life’ early intervention services to children with disability.

National Injury Insurance Scheme

As with the NDIS, the proposed NIIS should meet all international human rights obligations, including CRPD obligations,to support full inclusion and participation for people with disability.

Equity Considerations

Women with Disability

The proposed NDIS does not substantively address issues relevant to women with disability, including the poor participation rates within the current services system, the poor outcomes experienced by women with disability with respect to social and economic inclusion, or the need to broaden the scope of existing services in order to recognise a right to full inclusion and participation, including in areas such as reproductive rights. Assumptions within the PC Report on the 'natural supports' provided by carers are potentially discriminatory towards women (including women with disability) who make up a significant proportion of carers. These assumptions appear at odds with Article 6 CRPD and the obligations in Article 11 CEDAW. In so far as the experience of exploitation, violence and abuse disproportionately affects women, including domestic and family violence, Articles 15, 16, 17, and 18 CRPD, as well as the equality before the law provisions in Article 15 CEDAW, are relevant to the design of the proposed NDIS.

Aboriginal and Torres Strait Islander People with Disability

The PC has included a chapter addressing the need to systemically improve the delivery of supports to Aboriginal and Torres Strait Islander people with disability. While the recommendations for improving the responsiveness of services are welcome, they fall short of UN DRIP specification in relation to providing Aboriginal and Torres Strait Islander communities control of the planning, delivery and administration of services to their own communities. The proposed PC Report lacks detail on how key aspects of the existing service system will be improved, including on the provision of interpreters to Aboriginal and Torres Strait Islander people who do not speak English as their first language.

People from NESB with Disability

Despite poor utilisation of the existing service system, no proposal has been made with the PC Report for improving equity for culturally diverse people with disability, including through culturally competent services. Of particular concern, the PC Report provides no detail on access to interpreters and translated material, which is a specific obligation under Article 30.4 CRPD and is supported by ICERD. A commitment to provision of interpreter and translation support is also crucial to fully meeting the sign language and Braille needs as well and the language needs of Aboriginal and Torres Strait Islander people who do not speak English as their first language. The blanket exclusion of non residents from eligibility to NDIS is at odds with international obligations, including the Refugee Convention.

Children with Disability

In addition to broad CRPD obligations, Article 3 CROC relating to the need to respond to the 'best interests of the child' is relevant to the provision of supports to children. Because the best interests of the child will be a 'primary consideration' (as per the international obligation) there will be an overriding responsibility within the NDIS to ensure that children have the supports they need for full inclusion and participation. There is a need for further detail in the report with respect to how the proposed system will respond to the needs and interests of children with disability, including, for example, protection from violence, abuse, neglect and exploitation.

Other Considerations

Disabled Peoples Organisations (DPOs)

CRPD places strong obligations on States parties to ensure the involvement of people with disability in decision making and control in relation to decisions that effect people with disability, as outlined in the Preamble and in Article 4. A role for Disabled Peoples Organisations (that is, organisations run and controlled by a majority of persons with disabilities) is also specified in Articles 32 and Article 33 CRPD in relation to international and regional partnerships and rights monitoring. This implies a need to support and resource DPOs to represent people with disability, enable effective consultation with people with disability, promote international and regional partnerships, and support ongoing implementation and monitoring of human rights for people with disability.

Advocacy

The role of advocacy is poorly defined within the proposed NDIS. Given the strong emphasis on facilitating informed choice, and the need for individuals and families to be aware of entitlements; deal with service brokers; navigate complex self directed funding arrangements; be cognizant of available supports and engage with complaint mechanisms; a role for advocacy would be in line with the obligations imposed by CRPD, particularly at Article 21. There is a need for systemic advocacy, not only in relation to ensuring that people with disability are represented and have a voice (as per Article 4.3 CRPD) but also to ensure effective monitoring of progress against convention obligations (as per Article 33.3 CRPD). Advocacy support should be available to people with disabilities when confronting issues negatively impacting on their enjoyment of human rights and fundamental freedoms wherever they occur across the spectrum of civil, political, economic, social and cultural spheres.

People with Chronic health conditions and Psychosocial Disability

A blanket exclusion of people with chronic and episodic health conditions and people with psychosocial disability from the proposed NDIS, appears at odds with the CRPD understanding of disability, which includes those "who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others." Existing health providers offer health related services but do not offer adjustments that would enable full inclusion and participation for people with chronic and episodic health conditions and people with psychosocial disability. The proposed NDIS would be best placed to provide these supports to these people with disability.

Legal capacity

CRPD places the onus on States parties to "provide access by persons with disabilities to the support they may require in exercising their legal capacity" and to “take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity” (Article 12). Current policy and practice in Australia is at odds with the requirements of Article 12 and perpetuates a number of human rights violations against people with disability. In order to fully satisfy the obligations imposed by Article 12 CRPD, the proposed NDIS must recognise that all people with disability have legal capacity, and take “all appropriate measures” to support people with disability to exercise their legal capacity, including through supported decision making.

Restrictive practices

The Commission has proposed the use of restrictive practices within the context of service provision, subject to approval by the NDIA. The use of the proposed restrictive practices – such as physical and medical restraints, and isolation – violates a number of key human rights obligations, including Articles 14, 15, 16 and 17 CRPD, as well as other international instruments, including the Convention against Torture. Substantial policy, legal, and administrative reforms are necessary to ensure that Australia complies with the obligations imposed by CRPD and other international instruments with respect to restrictive practices.

2. International Human Rights Instruments

Australia has supported and ratified a number of international treaties, with flow on effects for rights obligations that apply to public policy in Australia. This chapter provides a brief overview of the key international treaties and declarations that will be focused on in this report.

Convention on the Rights of Persons with Disabilities (CRPD)

The Convention on the Rights of Persons with Disabilities (CRPD) is regarded as a landmark document within the global disability rights movement. Indeed as some have noted, the speed by which the Convention was negotiated and adopted, the strong involvement by disabled peoples organisations in developing the text, and the robust international commitment to the document from States parties, indicates that perhaps the document signifies a new era in rights for people with disability (see Kayess and French, 2008). Australia ratified CRPD on the 17th July 2008.

CRPD is a contemporary convention, merging civil and political rights with economic social and cultural obligations, and providing additional detail on how rights obligations may relate to specific areas relevant to people with disability, such as in areas of access and mobility. CRPD openly endorses a 'social model' of disability, and this is evident in the language of Article 1, which understands people with disability as potentially including "those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others."

Broadly speaking, Article 1 is of relevance to the proposed NDIS, in setting the scope for the Scheme; as is Article 2, which provides key definitions, including of 'reasonable accommodation' and 'discrimination.' Article 3, sets general principles including "respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons," while the obligations at Article 4 set the general framework for the convention rights, with equality and non discrimination provisions defined at Article 5.

Article 19 is of particular relevance to the proposed NDIS, in that it obligates States parties to ensure "the equal right of all persons with disabilities to live in the community, with choices equal to others, and shall take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community." Article 19 also contains a specific requirement that people with disability "have access to a range of in-home, residential and other community support services, including personal assistance necessary to support living and inclusion in the community, and to prevent isolation or segregation from the community." Article 26, dealing with habilitation and rehabilitation, is also strongly relevant to the proposed NDIS. It obligates States parties to "take effective and appropriate measures, including through peer support, to enable persons with disabilities to attain and maintain maximum independence, full physical, mental, social and vocational ability, and full inclusion and participation in all aspects of life." Article 26 further specifies that "States Parties shall organize, strengthen and extend comprehensive habilitation and rehabilitation services and programmes particularly in the areas of health, employment, education and social services." Article 28, Adequate standard of living and social protection is also relevant here, particularly as it applies "to equal access by appropriate and affordable, services, devices and other assistance for disability-related needs." In so far as CRPD deals with a range of obligations and measures to facilitate a right to full inclusion, participation, non discrimination and choice, a large number of Articles in the Convention are directly relevant to the proposed NDIS. The Australian Human Rights Commission (AHRC) in their 2010 submission to the NDIS has reported directly to potential obligations that may arise from each Article of the Convention. It is notable that the AHRC has provided detail at 34 out of the 50 Articles of CRPD, on potential roles for the proposed NDIS.

Australia also ratified the CRPD Optional Protocol on the 21st August 2008. The ratification enables individuals or groups to make complaints to the United Nations Committee on the Rights of Persons with Disabilities in relation to rights guaranteed under the Convention, provided that all domestic remedies have been exhausted. The Committee has investigative powers, however the Committee recommendations in relation to a potential breach are not binding.

As per other international human rights instruments, CRPD provides for rights which must be immediately realisable and those which may be progressively realised within maximum available resources. The general obligations in Article 4.2 state that "with regard to economic, social and cultural rights, each State Party undertakes to take measures to the maximum of its available resources and, where needed, within the framework of international cooperation, with a view to achieving progressively the full realisation of these rights, without prejudice to those obligations contained in the present Convention that are immediately applicable according to international law." Articles 10-23, and Article 29 CRPD are based upon civil and political rights, while Articles 24-28 and Article 30 CRPD are based on economic, social and cultural rights (Kayess and French, 2008).

This would imply that many rights relevant to the proposed NDIS, including the right to legal capacity and freedom from torture, violence, deprivation of liberty, and right to physical integrity, are immediately realisable; as are the living independently and being included in the community obligations imposed by Article 19 CRPD, which as discussed above are strongly relevant to the proposed Scheme.

International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)

The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) entered into force on the 4th January 1969. The convention had a strong sculpting effect on Australian policy in the 1970s, with the introduction of the *Racial Discrimination Act 1975* immediately preceding Australia's ratification of ICERD on 30th September 1975. The period is marked by a number of significant public policy changes in Australia, including the end of the 'White Australia Policy' and the emergence of a government endorsed policy of multiculturalism.

ICERD creates strong obligations for States Parties to "condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races" (Article 2.1). The Convention further creates an obligation to "take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists" (Article 2.1 (b)). ICERD also supports special measures to accelerate equality for "certain racial or ethnic groups" at Article 1.4 and Article 2.2.

The requirement that government policy and programs do not create or perpetuate racial discrimination is relevant to the proposed NDIS. Article 5 (e) calls on States parties to ensure equal enjoyment of "economic, social and cultural rights," while Article 5 (e) (iv) specifies that this enjoyment extends to a "right to public health, medical care, social security and social services". The rights to participation in cultural activities, right to education, right to housing and right to employment specified in Article 5 ICERD are also directly relevant to the proposed NDIS.

UN Declaration on the Rights of Indigenous People (UN DRIP)

The United Nations Declaration on the Rights of Indigenous People (UN DRIP) was adopted by the United Nations General Assembly on the 13th September 2007. Australia was one of four nations which initially opposed the Declaration in 2007; however Australia officially changed its position to support the Declaration on the 3rd April 2009. The articles of a Declaration do not have the same binding force as a Convention, unless they reflect international customary law (this is the reason that the Universal Declaration on Human Rights is seen as a binding instrument). There is suggestion, however, that some Articles in UN DRIP reflect international customary law, and hence have legally binding effect (see Davis 2007).

UN DRIP was a contentious agreement to negotiate as the rights described in relation to Indigenous peoples, particularly the right of self determination, are potentially at odds with respect to the self determination rights of States Parties themselves (as described in the Charter of the United Nations). UN DRIP has strong relevance for nations that have a record of colonization and dispossession of Indigenous peoples, with potentially sweeping requirements in relation to recognizing self determination rights for these groups. It is notable that Article 4 UN DRIP stresses that "Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions," while Article 5 states that "Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State."

The self determination Articles of UN DRIP imply a right for Aboriginal and Torres Strait Islander people to exert autonomy and control with respect to the delivery, planning and administration of NDIS services. Article 23 states that:

> Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining

> health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.

In addition UN DRIP contains a number of articles directly relevant to people with disability, including Article 21.2 which urges States to “take effective measures and, where appropriate, special measures to ensure continuing improvement of their economic and social condition,” specifying that “particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities.”

There is a strong emphasis on the right of Aboriginal and Torres Strait Islander people to maintain language, culture and heritage. Rights to culture and language are supported in UN DRIP at Articles 3, 5, 8, 11, 12, 13, 14, 21, 23, 31, 33 and 34. This includes a right to interpreters and translations at Article 13.2, which requires that “indigenous peoples can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means.”

Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) came into force in 1981. Australia was an early signatory on 17 July 1980 (although ratification was delayed until 28 July 1983, with accession to the Optional Protocol occurring in March 2009). The *Sex Discrimination Act 1984* seeks to implement Australia’s obligations under CEDAW, restricted by the reservations that Australia put forward at the time to paid maternity leave and allowing women to serve in combat roles in the armed forces.

CEDAW is a distinctly activist document, which sets an “agenda for equality” and seeks to make significant and progressive changes in attitudes, structures and outcomes for women, committing States parties to “condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women” (Article 2). Of particular relevance to the proposed NDIS, Article 2 CEDAW creates obligations for equality and non discrimination towards women, Article 3 commits States Parties to the advancement of women towards full and equal rights, and Articles 10-14 detail economic social and cultural rights, including equal rights to education, employment, health and rights for rural women.

In addition to the requirements in CEDAW, Article 6 CRPD reinforces the rights that relate to women and girls with disability. The Article calls for States parties to recognise “that women and girls with disabilities are subject to multiple discrimination, and in this regard shall take measures to ensure the full and equal enjoyment by them of all human rights and fundamental freedoms,” Article 6 CRPD further obligates States parties to “take all appropriate measures to ensure the full development, advancement and empowerment of women, for the purpose of guaranteeing them the exercise and enjoyment of the human rights and fundamental freedoms set out in the present Convention.”

Convention on the Rights of the Child (CROC)

The Convention on the Rights of the Child (CROC) came into force on the 2nd September 1990. Australia ratified the Convention on the 17th December 1990.

CROC is a comprehensive document, which places a range of obligations on States parties. The convention is notable for the key obligation it places on States Parties that “in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration” (Article 3). The Convention contains a number of specific obligations, including a right to family and contact with parents (Article 9), a right to free expression (Articles 12 and 13), a right to education (Article 28), a right to health (Article 24), freedom from abuse and exploitation (Articles 19, 32, 33, 34, 35, and 36) and specific rights with respect to the criminal justice system (Article 40).

The principle of achieving the best interests of the child (Article 3.3 CROC) has a potentially powerful shaping effect on the proposed NDIS, and should work in concert with the full inclusion and participation requirements of CRPD. Article 23 CROC provides specific obligations with respect to children with disability, including at Article 23.2 calling on States Parties to “recognize the right of the disabled child to special care” and “encourage and ensure the extension, subject to available resources, to the eligible child and those responsible for his or her care, of assistance for which application is made and which is appropriate to the child's condition and to the circumstances of the parents or others caring for the child.” Article 25 obligates states parties to “recognize the right of a child who has been placed by the competent authorities for the purposes of care, protection or treatment of his or her physical or mental health, to a periodic review of the treatment provided to the child and all other circumstances relevant to his or her placement.”

Also of relevance to the proposed NDIS is Article 18 which obligates States parties to “render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities” and “ensure the development of institutions, facilities and services for the care of children”; Article 19 which compels states parties to take all “appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse.” Finally, of direct relevance to the proposed NDIS, Article 26.1 obligates States parties to “recognize for every child the right to benefit from social security, including social insurance, and shall take the necessary measures to achieve the full realisation of this right in accordance with their national law.”

Other International Instruments

In addition to the above key Conventions and Declarations, this report refers to the following additional international instruments, that are equally binding on States parties with respect to the rights of people with disability:

- International Covenant on Economic, Social and Cultural Rights (ICESCR)
- International Covenant on Civil and Political Rights (ICCPR)
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)
- Convention and Protocol Relating to the Status of Refugees (CRSR)

3. Eligibility

The PC has made a number of recommendations with respect to eligibility for the proposed NDIS. This chapter deals with the question of eligibility.

Recommendation 3.1

The National Disability Insurance Scheme (NDIS) should have three main functions:

- *to cost-effectively minimise the impacts of disability, maximise the social and economic participation of people with a disability, and create community awareness of the issues that affect people with disabilities. These measures should be targeted at all Australians*
- *to provide information and referral services, which should be targeted at people with, or affected by, a disability*
- *to provide individually tailored, taxpayer-funded support, which should be targeted at the subset of people with disabilities who are assessed as needing such support.*

HR Analysis Comment

The potentially broad scope of the proposed NDIS is in line with CRPD emphasis on recognising the interconnectedness of human rights as per Preamble (c). The commitment for the scheme to contribute to awareness raising and provide information to people with disability conforms to Article 8 and Article 21 of CRPD. The commitment to individually tailored support is in line with independent living obligations imposed by Article 19 CRPD.

A commitment to maximizing social and economic participation is welcome; however this may fall short of the CRPD obligations in relation to full inclusion and participation.

Article 19 CRPD provides strong guidance to States parties to support the “equal right of all persons with disabilities to live in the community, with choices equal to others” and “take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community.” CRPD also provides guidance on the potential scope and targeting of the scheme, in relation to “the subset of people with disabilities who are assessed as needing support.” Potentially the scheme should seek to support individuals “who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others” as per the guidance of Article 1 CRPD. Full inclusion – civil, political, social, economic and cultural – requires the ability of support services to enable participation of people in various domains of life and community.

Full inclusion *does not* imply a narrow definition that, for example, would be constrained to employment or educational inclusion, but calls on States parties to facilitate inclusion for people with disability in broader fields of participation as well. In this regard, the broad definition of discrimination in Article 2 CRPD ("any distinction, exclusion or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field") is a relevant guide for how full inclusion should be considered. Amending the eligibility for the NDIS to take into account the meaning and wording of the full inclusion and participation requirement of Article 19, would bring the scheme into stronger conformity with CRPD obligations. Article 19 is regarded as a civil and political right, and as such the right of persons with disability to live in and be part of a community is immediately (rather than progressively) realisable.

The proposed scheme must recognise current inequities in access and outcomes for different people with disability, including population group differences that effect equity outcomes for women with disability, people from NESB with disability, and Aboriginal and Torres Strait Islander people with disability. There are other international obligations that set the context for the design of the proposed NDIS and its relationship with particular groups of people with disability, including CEDAW, UN DRIP and ICERD.

In so far as the proposed NDIS will be targeted at children with disability, the best interests of the child obligations that are outlined in Article 7 CRPD and Article 3 CROC take precedence as a "primary consideration." This could mean that children may be entitled to a range of targeted adjustments, regardless of other factors, where these services are in the child's best interest. This may potentially affect the functions of the NDIS and should be taken into consideration.

CRPD ➲ Preamble (c), Article 1, Article 7, Article 8, Article 19, Article 21
CROC➲ Article 3
CEDAW
UN DRIP
ICERD

Recommendation 3.2

Individuals receiving individually tailored, funded supports should be Australian residents, have a permanent disability, (or if not a permanent disability, be expected to require very costly disability supports) and would meet one of the following conditions:

- *have significant difficulties with mobility, self-care and/or communication*
- *have an intellectual disability*
- *be in an early intervention group, comprising:*
    - *those for whom there was a reasonable potential for cost-effective early therapeutic interventions (as in autism and acquired brain injury)*
    - *those with newly diagnosed degenerative diseases for whom early preparation would enhance their lives (as in multiple sclerosis)*

- *have large identifiable benefits from support that would otherwise not be realised, and that are not covered by the groups above. Guidelines should be developed to inform the scope of this criterion.*

HR Analysis Comment

The restriction of NDIS availability to Australian residents is at odds with the obligations of CRPD, which do not specify residency as grounds for discrimination with regard to States parties responsibilities to support the “equal right of all persons with disabilities to live in the community, with choices equal to others” and “take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community” (as per Article 19 CRPD). Restrictions of support services to non residents who have been granted refugee status would be contrary to the obligations of Article 24 of CRSR. There is also a lack of clarity with respect to whether support would be provided to non resident children with disability. Failure to provide these supports would arguably be at odds with international obligations, since the “primary consideration” for the design of this policy must be the best interests of the child as outlined in Article 7 CRPD and Article 3 CROC. Finally, the broad provisions of Article 3 and Article 9 of ICESCR apply to all persons with respect to the universal right to social security and social insurance, with explicit guidance offered to developed nations at Article 2.2 that the rights in the Covenant are to be “exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

Recommendation 3.2 sets partially diagnostic criteria for eligibility to the NDIS. This appears out of step with the CRPD obligations. CRPD stresses reliance on the social model of disability (Preamble (e) and Article 1) which means that people with disability are understood as including “those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others” (Article 1).

The restrictive definition used within Recommendation 3.2 potentially excludes some people with disability who face barriers to full inclusion and effective participation and would benefit from adjustments through the proposed scheme. For example, it is not clear how long term chronic and episodic health conditions and people with psychosocial disability may fit with the scheme criteria. Further, ‘duration’ of disability is more strictly defined by the PC than it is defined in CRPD. A “permanent disability” (as specified by the PC) suggests that an impairment is potentially life long; it also, notably, excludes consideration of the interaction of impairment with attitudinal and environmental barriers, as per the social model of disability. On the other hand, the CRPD understanding – “long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others” – is potentially broader in scope, and has the capacity to capture individuals who have an impairment that is “long term” but not permanent (such as some people with chronic or episodic illness), as well as individuals who experience evolving circumstances as a result of a changing relationship between impairments and broader attitudinal and environmental factors (for example people with a ‘permanent impairment’ who experience reduced barriers as a result of increased accessibility within the community). Stronger utilisation of the social model framing would ensure that the NDIS targeting complies in a more robust fashion with CRPD obligations.

Recommendation 3.2 also includes indicators of cost (eg “require very costly disability supports” and “cost effective”) as a determinate of support that are not necessarily consistent with the requirements imposed by CRPD. The independent living obligations under Article 19, the habilitation and rehabilitation obligations at Article 26, and the social protection obligations at Article 28, all of which are directly relevant to the proposed NDIS, do not embed principles of cost effectiveness, nor specify that adjustments should only be available to persons with potentially costly support needs. For example, targeting early intervention programs *only* on the basis of a cost utility (such as saving on future cost expenditure through early provision of support) is against the grain of the obligations of Article 26 (a), which only specify that habilitation and rehabilitation should “begin at the earliest possible stage, and are based on the multidisciplinary assessment of individual needs and strengths.” The Article does not specify that the utility of expenditure on these supports should be a consideration. Again, the emphasis, as per Article 19, is for States to enable full inclusion and participation for *all* people with disability. There is a role for consideration of the cost of adjustments within the ‘reasonable accommodation’ principle defined at Article 2 CRPD as “necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.”

The obligations that are outlined in Article 7 CRPD and Article 3 CROC stress the need for States parties to meet the best interests of children as a “primary consideration.” This places obligations on the proposed NDIS to ensure that it meets the best interests of children with disability. Exclusions of some children with disability from support, such as early intervention programs, solely on the basis of poor cost effectiveness, would be counter to the obligations imposed by Article 7 CRPD and Article 3 CROC, as it may mean that services delivered in the best interests of children with disability are not provided because of a perceived lack of ‘cost effectiveness.’

There is scope for equity provisions to enhance full inclusion outcomes for some people with disability who face significant barriers to participation. In this regard, Article 5 CRPD stresses that “specific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination under the terms of the present Convention.” The proposed NDIS contains specific principles in Recommendation 9.1 aimed at accelerating full inclusion for Aboriginal and Torres Strait Islander people with disability (which shall be examined below in “Equity Considerations”). As discussed at Recommendation 4.1 below, the Productivity Commission *Report on Government Services 2011* finds significant underutilization of key support types for women and for people born in non English speaking countries, indicating that the status quo arrangements do not meet full participation requirements for these particular population groups. Specific provisions to accelerate full inclusion goals for women with disability would be in agreement with Article 4 CEDAW; while measures aimed at facilitating full inclusion for cultural and linguistic minorities would be consistent with Article 1.4 ICERD.

CRPD ➲ Article 1, Article 5, Article 7, Article 19, Article 26

ICESCR ➲ Article 2.2, Article 3, Article 9
CRSR ➲ Article 24
CEDAW ➲ Article 4
CROC ➲ Article 3
ICERD ➲ Article 1.4

Recommendation 3.3

The NDIS should provide advice to people about those instances where support would be more appropriately provided through non-NDIS services. Support should be provided outside the NDIS for people whose:

- *disability arose from a workplace accident or catastrophic injury covered by insurance premiums*
- *support needs would be more appropriately met by the health and/or palliative care systems, comprising:*
  - *those who would benefit from largely medically oriented interventions (including less restrictive musculoskeletal and affective disorders, and many chronic conditions)*
  - *many people with terminal illnesses*
- *support needs would be more appropriately met by the aged care system*
- *needs were only in relation to mainstream employment, public housing or educational assistance.*

HR Analysis Comment

There is significant scope to improve the responsiveness of mainstream services to people with disability. The NDIS should not “fill in the gaps” when other arms of government fail to fulfill their responsibility to make their services accessible and appropriate to the needs of people with disability. Article 19 (c) obligates States parties to ensure that “Community services and facilities for the general population are available on an equal basis to persons with disabilities and are responsive to their needs.” This is reinforced by the provisions in Article 24 (right to education), Article 25 (right to health), Article 26 (right to habilitation and rehabilitation), Article 27 (right to work and employment) and Article 28 (right to adequate standard of living and social protection). “Mainstream” providers still have a strong obligation to provide support to people with disability on an equal basis with others.

There is a role for the NDIS in raising awareness with other arms of government about their CRPD responsibilities. Article 8 CRPD places an obligation on States parties to adopt “immediate, effective and appropriate measures” to raise awareness in relation to the rights of people with disability. Of particular relevance to the proposed NDIS is the Article 8.1 (a) obligation to “raise awareness throughout society, including at the family level, regarding persons with disabilities, and to foster respect for the rights and dignity of persons with disabilities” and “to combat stereotypes, prejudices and harmful practices relating to persons with disabilities, including those based on sex and age, in all areas of life" (Article 8.1 (b)). Article 8.2 requires specific actions, including public awareness campaigns; fostering awareness and respect for rights through the education system; improving media portrayal of people with disability in line with CRPD objectives; and finally developing "awareness-training programmes regarding persons with disabilities and the rights of persons with disabilities."

As discussed below at Recommendation 4.5, it is not true that people with disability enjoy adequate support through existing mainstream programs. Assuming that there was a large range of other support programs aimed at enabling full participation for all people with disability on an equal basis, then it would be reasonable for the scope of the NDIS to be limited to a small number of individuals. However this is not the case; and with the exception of the PC analysis of catastrophic injury schemes and its proposal for a NIIS, the PC Report does not include a broader survey of the adequacy of alternative forms of adjustment that would enable full participation and equal enjoyment of rights for all people with disability.

As per discussion above at Recommendation 3.1, Article 19 CRPD obligates States parties to ensure the "equal right of all persons with disabilities to live in the community, with choices equal to others" and "take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community." This means that any assessment of the suitability of diverting people with disability from a support scheme such as the NDIS – which aims at maximizing inclusion and participation – must ensure that alternative support systems meet the same goals and are equally effective. This would require a more comprehensive review of the adequacy of alternative support arrangements with respect to their ability to promote full inclusion and participation for people with disability. Certainly, it would be reasonable to question whether "largely medical oriented interventions" are capable of producing full inclusion and participation outcomes. Similarly existing aged care arrangements, particularly the use of large scale residential institutional care in some settings, may be at odds with expectations that flow from CRPD.

CRPD ➲ Article 1, Article 19, Article 24, Article 25, Article 26, Article 27, Article 28.

Recommendation 3.4

The NDIS should put in place memoranda of understanding with the health, mental health, aged and palliative care sectors to ensure that individuals do not fall between the cracks of the respective schemes and have effective protocols for timely and smooth referrals.

HR Analysis Comment

No Comment.

Recommendation 3.5

Whatever the actual funding divisions between the NDIS and aged care that are put in place, people should have the option of migrating to the support system that best meets their needs, carrying with them their funding entitlement.

Upon reaching the pension age (and at any time thereafter), the person with the disability should be given the option of continuing to use NDIS-provided and managed supports or moving to the aged care system. If a person chose to:

- *move to the aged care system, then they should be governed by all of the support arrangements of that system, including its processes (such as assessment and case management approaches)*
- *stay with NDIS care arrangements, their support arrangements should continue as before, including any arrangements with disability support organisations, their group accommodation, their case manager or their use of self-directed funding.*

Either way, after the pension age, the person with a disability should be subject to the co-contribution arrangements set out by the Commission in its parallel inquiry into aged care.

If a person over the pension age required long-term aged residential care then they should move into the aged care system to receive that support.

In implementing this recommendation, a younger age threshold than the pension age should apply to Indigenous people given their lower life expectancy, as is recognised under existing aged care arrangements.

HR Analysis Comment

CRPD places obligations on States parties with respect to rights and inclusion for all people with disability, including older people. While independent living options are being increasingly endorsed in Australia for support to older people (for example Community Aged Care Packages and the Home and Community Care program), large scale residential care options are still utilized in the care and support of older people. Article 19 CRPD makes it clear that institutional accommodation and support services for people with disability are an explicit violation of human rights, and they should be immediately prevented and remedied. This appears to be untested with respect to current support arrangements for older people with disability.

The PC has argued for co-contribution arrangements to apply for older people with disability:

> after the pension age, the person with a disability would be subject to the co-contribution arrangements set out by the Commission in its parallel inquiry into aged care. In most instances, the caps and means tests applying to

> those co-contributions would mean people who acquired a disability early in their life would not have to pay anything (PC 2011, chapter 6 and appendix D).

Even taking into consideration caps and means tests, the rationale for across the board age discrimination with respect to co-payments seems questionable here, and potentially introduces equity concerns in relation to the equal participation and inclusion of older people with disability. Article 28 (b) CRPD obligates States parties to "ensure access by persons with disabilities, in particular women and girls with disabilities and older persons with disabilities, to social protection programmes and poverty reduction programmes". This would imply that the application of co-payments on the basis of age, , would be at odds with the equal access provisions of Article 28(b) CRPD.

CRPD ➲ Article 19, Article 28(b), Article 28 (e)

Recommendation 3.6

Following the transition spelt out in draft recommendation 17.1, the NDIS should fund all people who meet the criteria for individually tailored supports, and not just people who acquire a disability after the introduction of the scheme

HR Analysis Comment

No Comment.

Recommendation 3.7

The supports to which an individual would be entitled should be determined by an independent, forward-looking assessment process, rather than people's current service use.

HR Analysis Comment

Recommendation 3.7 is broadly in keeping with the obligation in CRPD to treat disability as an evolving concept (as per Preamble (e)) and to recognise the potentially broad scope of supports (beyond the present service system) that might enable "full and equal enjoyment of all human rights and fundamental freedoms" (CRPD Article 1). Further, Recommendation 3.7 has the capacity to recognise the potential of support systems to progressively realise full inclusion and participation, even if there are short term limits to available resources (as described in Article 4.2 CRPD). As per comments at Recommendation 3.1 above, Article 19 CRPD provides strong guidance to States parties in relation to building a 'forward looking assessment process" by ensuring that supports enable the "equal right of all persons with disabilities to live in the community, with choices equal to others" and "take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community." In addition, Article 26(a), stresses a need for assessment “based on the multidisciplinary assessment of individual needs and strengths.”

Article 4.3 CRPD stresses that “in the development and implementation of legislation and policies to implement the present Convention, and in other decision-making processes concerning issues relating to persons with disabilities, States Parties shall closely consult with and actively involve persons with disabilities, including children with disabilities, through their representative organisations.” This places an obligation on States parties for ensure that people with disability fully participate in decision making that effects their lives. The implication for assessment processes is that people with disability must actively be involved in shaping assessment outcomes. The use of self assessment processes would more closely satisfy the obligations at Article 4.3.

CRPD ➲ Article 1, Article 4.2, Article 4.3, Article 19, Article 26(a)

4. Scope

The Productivity Commission has made a number of recommendations with respect to the proposed scope for the NDIS. This chapter deals with the recommendations for the scope of the NDIS.

Recommendation 4.1

The NDIS should cover the current full range of disability supports. The supports would need to be 'reasonable and necessary'. The NDIS should also support the development by the market of innovative support measures (using the approaches set out in draft recommendation 8.3).

HR Analysis Comment

The proposal that the NDIS should cover "the current full range of disability supports" assumes that the current support arrangements are compliant with the requirements imposed by international obligations, including CRPD. The relevant obligations imposed by CRPD that relate in a direct way to the design of a support system include the general principles of Article 1 "to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity"; the independent living provisions of Article 19, which promotes the "equal right of all persons with disabilities to live in the community, with choices equal to others, and shall take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community"; and the habilitation and rehabilitation obligations placed upon States parties in Article 26 with respect to taking "effective and appropriate measures, including through peer support, to enable persons with disabilities to attain and maintain maximum independence, full physical, mental, social and vocational ability, and full inclusion and participation in all aspects of life."

Of particular note, the obligations above are non restrictive in relation to the kind of civil, political, social, economic or cultural participation that might constitute "full inclusion." For example, employment participation is not valued above other forms of participation, (such as participating in cultural events) and Articles 19 and 26 do not specify restrictive criteria in relation to what supports would enable full participation. It is also worth emphasizing that Article 19 obligations, in so far as they relate to civil and political rights, are immediately realisable.

The current support system has numerous flaws, many of which have been identified within the public record. For example the 2009 report *Shut Out: the Experience of People with Disabilities and the Families in Australia* observes that

> Services were characterised as unavailable or unaffordable or of such poor quality as to be of little benefit…the system is characterised by a 'one-size-fits-all' approach in which there is very little choice or flexibility. Programs and services are built around organisational and system needs rather than the needs of clients (2.3.1)

In addition, current arrangements in relation to legal capacity and restrictive practices do not meet human rights obligations. The protections in Article 12 CRPD stress the fact that States parties must recognise that all people with disability have legal capacity, and must maximally support people with disability to realise this right. In so far as Australian jurisdictions support traditional guardianship and legal capacity models based upon substitute decision making, current practice in Australia is at odds with the requirements of Article 12 and perpetuates a number of human rights violations against people with disability. In order to fully satisfy the obligations imposed by Article 12 CRPD, Australia must take ‘all appropriate measures’ to support people with disability to exercise their legal capacity, including through supported decision making.

Similarly, the use of restrictive practices, for example against people with “challenging behaviors,” is at odds with international human rights requirements. The use of negative and punitive restrictive practices are a deprivation of liberty, and as such violate Article 14 CRPD, which stresses that people with disability have a “right to liberty and security of person” (Article 14.1 (a)) and that “the existence of a disability shall in no case justify a deprivation of liberty” (Article 14.1 (b)). This is reinforced by Article 9 ICCPR. Further, the use of solitary confinement, chemical restraint, mechanical restraint and physical restraint are at odds with Article 15 CRPD that provides that people with disability shall not be “subjected to torture or to cruel, inhuman or degrading treatment or punishment” and imposes on States parties an obligation to take all effective legislative, administrative, judicial or other measures to prevent persons with disabilities, on an equal basis with others, from being subjected to torture or cruel, inhuman or degrading treatment or punishment (Article 15.2). Freedom from torture is a right guaranteed to all in Article 7 ICCPR and by the obligations in UN CAT. Articles 16 and 17 CRPD, which relate to freedom from violence and abuse, and the right to physical and mental integrity also challenge the current use of restrictive practices. Substantial policy, legal, and administrative reforms are necessary to ensure that Australia complies with the obligations imposed by CRPD and other international instruments with respect to restrictive practices.

Given the acknowledged problems with the present support system for people with disability, it is difficult to see how reform of the service system can meaningfully occur without a significant review of the compliance of the existing “current full range of disability supports” with respect to full inclusion and participation goals for people with disability. It is worth noting that this is in line with the aspirations of the *Shut Out* report, which calls for “both fundamental systemic reform and greater resourcing… to achieve lasting change” (2.3.1).

A broad scope for defining necessary supports would also assist to enable participation for people with disability who are currently poorly served, or unable to gain services to support full participation. For example, the Productivity Commission *Report on Government Services 2011* finds significant underutilization of key support types for women and for people born in non English speaking countries. Increasing participation in existing service types is an important goal; however in order to fulfill Article 19 CRPD obligations for equal rights “of all persons with disabilities to live in the community, with choices equal to others” and “full inclusion and participation in the community,” service types must be of an adequate scope and diversity to support different forms of inclusion, such as the enjoyment of reproductive rights, or participation in faith, cultural and linguistic communities. In line with these expectations, Article 6 CRPD stresses full development, advancement and empowerment rights for women with disability; these rights are supported by the equal economic, social and cultural participation rights imposed by Articles 10-14 of CEDAW. Rights for cultural and linguistic minority groups are outlined in Article 30.4 CRPD, and supported by the rights to culture and language in UN DRIP (Articles 3, 5, 8, 11, 12, 13, 14, 21, 23, 31, 33 and 34) and by the equality provisions in ICERD (particularly Articles 1 and 5), including the right to equal participation in cultural activities at Article 5 (e) (vi) ICERD.

Assessments that meet the ‘best interests of the child’ are a requirement of Article 7 CRPD, also expressed in Article 3 of CROC. The best interests of the child imposes different obligations on States parties to ensure that all policies and services support the full development, participation and rights of children, as per Article 3.1 of CROC: “In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.” This means that the scope of NDIS arrangements with respect to children must be guided by a principle of consideration of best interest.

A scope that would better meet the obligations imposed by CRPD in relation to the long term care and support program might specify that:

a) NDIS should cover supports that enable the “equal right of all persons with disabilities to live in the community, with choices equal to others, and shall take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community” (CRPD Article 19).
b) NDIS should cover gender specific measures and supports that “ensure the full and equal enjoyment” by women and girls with disability “of all human rights and fundamental freedoms” (CRPD Article 6)
c) Access to these supports is subject to “reasonable accommodation” (as defined in CRPD Article 2).
d) However any limitation as a result of an inability of NDIS to immediately accommodate adjustments does not preclude long range commitments to progressive realisation of economic, social and cultural rights to inclusion and participation (as outlined in Article 4.2 CRPD).
e) The best interests of the child shall be a primary consideration in the design and scope of services with respect to children with disability (Article 7 CRPD).

This approach to specifying the scope of the NDIS interacts withRecommendations 4.4 and 4.5.

CRPD ➲ Article 2, Article 4.2, Article 6, Article 7, Article 12, Article 14, Article 15, Article 16, Article 17, Article 19, Article 26, Article 30.4
ICCPR ➲ Article 7, Article 9
CEDAW ➲ Article 10, Article 11, Article 12, Article 13, Article 14
CROC ➲ Article 3
UN DRIP ➲ Article 3, Article 5, Article 8, Article 11, Article 12, Article 13, Article14, Article 21, Article 23, Article 31, Article 33 and Article 34
ICERD ➲ Article 1, Article 5
UN CAT ➲ Article 1, Article 2, Article 4

Recommendation 4.2

There should be no income or asset tests for obtaining funded NDIS services.

HR Analysis Comment

Recommendation 4.2 conforms with the requirements of Article 28.2 (a) CRPD, which obligates States parties to "ensure access to appropriate and affordable services, devices and other assistance for disability-related needs." The Article further has a specific poverty alleviation requirement, obligating States parties to "ensure access by persons with disabilities and their families living in situations of poverty to assistance from the State with disability-related expenses, including adequate training, counseling, financial assistance and respite care" at Article 28.2 (c). CRPD also recognises that there are gender related barriers preventing equal access to services, providing a specific obligation at Article 28.2 (b) to "ensure access by persons with disabilities, in particular women and girls with disabilities and older persons with disabilities, to social protection programmes and poverty reduction programmes."

Recommendation 4.3

There should sometimes be a requirement to pay a modest fixed upfront contribution to the NDIS, with free access to services after that point. The NDIS should waive the amount where families have already contributed significantly towards the costs of support through unpaid care.

HR Analysis Comment

Recommendation 4.3 proposes a co-contribution for some services, with an equity measure to wave co-contributions for families who provide a significant amount of unpaid care to a person with disability.

The PC proposal would provide a concessionary arrangement to people with disability who can demonstrate that their families provide a large amount of unpaid care. This appears to arbitrarily discriminate against individuals who don't have access to unpaid support, an unreasonable ground for discrimination, given that people with disability cannot control the availability, appropriateness or willingness of their family members to provide unpaid support. Further, the PC makes no mention of financial capacity to pay, or general cost of disability, which may mean, for example, that high disposable income individuals who happen to be supported by a strong family network of unpaid carers will attract a waiver for co-contributions, while a low disposable income individual with no family support networks would be liable for fees that potentially may prevent access to support services that would enable independence and full participation.
Recommendation 4.3 would appear to be at odds with the obligation to an "equal right of

all persons with disabilities to live in the community, with choices equal to others" as per Article 19 CRPD.

Co-payments – in so far as they create a barrier to access to support services – are potentially discriminatory to people who cannot afford to pay. Article 28.2 (a) CRPD obligates States parties to "ensure access to appropriate and affordable services, devices and other assistance for disability-related needs." This implies that available services must be affordable and accessible to all people with disability. Given the strong correlation between disability and poverty, as noted in Preamble (t) CRPD, application of co-payments would potentially affect access to "appropriate and affordable services," against the requirements of Article 28, and also at odds with broad equality and non discrimination obligations of CRPD, including under Article 19, which stresses with respect to independent living that States parties must ensure "the equal right of all persons with disabilities to live in the community, with choices equal to others." As discussed above, Article 28.2 (c) has a specific poverty alleviation requirement, obligating States parties to "ensure access by persons with disabilities and their families living in situations of poverty to assistance from the State with disability-related expenses, including adequate training, counselling, financial assistance and respite care." Given the low capacity of a significant number of people with disability to meet additional costs, co-payments are not justifiable.

CRPD ➲ Article 19, Article 28.2 (a)

Recommendation 4.4

People should pay the full costs of services (primarily therapies) for which clinical evidence of benefits are insufficient or inconclusive if they wish to consume those services.

HR Analysis Comment

As per comments above at Recommendation 4.1, CRPD promotes a broad conceptualization of full inclusion, while the independent living provisions of Article 19 stress the obligation of State parties to ensure the "equal right of all persons with disabilities to live in the community, with choices equal to others" and "take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community." This broad conceptualization of community inclusion means that support services that enable participation in civil, political, economic, social and cultural fields should be available.

Recommendation 4.4 appears focused upon services that have a 'therapeutic' benefit (and hence can be evaluated within a clinical trial) rather than services that facilitate full inclusion, and therefore must be assessed in relation to how effectively they enable an individual to participate on an equal basis with others in the community. If clinical evidence were required for all services provided under the NDIS, this would potentially place a limit on the range of support services, and endorse a model of supports that would appear to correlate with the 'medical' rather than 'social' model of disability (as outlined in Preamble (e) and Article 1 CRPD). More clarity is required from the

Commission on exactly what therapies will be subject to clinical trial, and the availability of other adjustments on a less than full cost basis, since presumably not all support services will be classed as ‘therapies’.

Regardless of the Commission’s intention with Recommendation 4.4, and assuming that the recommendation is aimed at medical / health related treatments and rehabilitation that might fall under the NDIS, it is worth noting that the application of restrictive criteria may have adverse consequences for some population groups, particularly where some therapies have not been subject to clinical trial, or where people with particular health conditions or impairments have chosen not to use these treatments. For example, Aboriginal and Torres Strait Islander people with disability may request traditional forms of rehabilitation therapy, yet may be refused on the grounds that Western medical research has not yet validated its use. The latter position would be against the requirements imposed by Article 24 UN DRIP, which states that Aboriginal and Torres Strait Islander peoples have the right to their traditional medicines and to maintain their health practices.

Similarly, a lack of clinical research may prevent women with disability seeking some alternative therapies to support their reproductive rights, even if provision of this therapy would promote full inclusion and participation as outlined in CRPD, and also satisfy other international obligations, such as Article 16 (e) of CEDAW, which stresses the right of women “to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights.” Another example might be a person who chooses gym membership or Tai Chi classes over physiotherapy; or someone who chooses counseling and a meditation class over medication. There are additional implications for people with chronic health conditions or psychosocial disability, who may have chosen other alternative therapies or treatments as opposed to taking medication with adverse side-effects. Article 3 (a) CRPD stresses as a general principle that States parties are obliged to have “respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons,” while Article 4.3 CRPD stresses the right of people with disability to exert control in “decision-making processes concerning issues relating to persons with disabilities.”

CRPD ➲ Preamble (e), Article 1, Article 3(a), Article 4.3, Article 19
UN DRIP ➲ Article 24
CEDAW ➲ Article 16 (e)

Recommendation 4.5

Services that meet the needs of much wider populations, including people with disabilities not covered by the NDIS, should lie outside the scheme:

- *health, public housing, public transport and mainstream education and employment services, should remain outside the NDIS, with the NDIS providing referrals to them*
  - *but specialised employment services, disability-specific school to work programs, taxi subsidies, and specialised accommodation services should be funded and overseen by the NDIS.*

HR Analysis Comment

As discussed at Recommendation 4.1, it is not clear that the current range of supports is an adequate benchmark for the range of services that might aim at ensuring “the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities” (Article 1 CRPD). It also does not follow that people with disability enjoy adequate support through existing ‘mainstream’ programs. Public housing and emergency supported accommodation programs are examples where lack of supply, restrictive eligibility criteria, and poor accessibility of accommodation stock have been some of the factors which have prevented equal participation for people with disability. This does not imply that the proposed NDIS should provide all services to people with disability, or “fill in the gaps” where mainstream providers do not respond adequately to the needs of people with disability. Rather it provides an example of a situation in which the failure by a mainstream service to properly provide for the participation and inclusion of people with disabilities might lead to people with disabilities requiring a greater level of support to live in less suitable accommodation. As discussed above, if there were a range of mainstream programs that existed to enable full participation for all people with disability on an equal basis, then it would be reasonable for the scope of the NDIS to be limited to a small number of supports. However this is not the case; and the PC Report does not include a broader survey of the adequacy of existing alternative forms of adjustment that would enable this full participation and equal enjoyment of rights for all people with disability.

These factors are compounded by the inadequacies of the existing ‘disability’ support arrangements. As discussed at Recommendation 4.1 above, the Productivity Commission *Report on Government Services 2011* finds significant underutilization of key support types for women and for people born in non English speaking countries, indicating that the status quo arrangements do not meet full participation requirements for particular population groups. It would be reasonable to question why it is that particular service types are included or not included in the proposed NDIS scope. It is not clear, for example, why taxi services are given precedence over other transport services; Article 19 (c) obligates States parties to ensure that “community services and facilities for the general population are available on an equal basis to persons with disabilities and are responsive to their needs.” Meeting CRPD obligations will require a review of existing support types, and an evaluation of their adequacy in relation to supporting the “equal right of all persons with disabilities to live in the community, with choices equal to others” and “the full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community” as per Article 19 CRPD.

As discussed above, this does not mean the NDIS should fill in the gaps when other arms of government fail to fulfill their responsibility to make their services accessible and appropriate to the needs of people with disability. Article 19 (c) obligates States parties to ensure that “Community services and facilities for the general population are available on an equal basis to persons with disabilities and are responsive to their needs.” This is reinforced by the provisions in Article 24 (right to education), Article 25 (right to health), Article 26 (right to habilitation and rehabilitation), Article 27 (right to work and employment) and Article 28 (right to adequate standard of living and social protection). “Mainstream” providers still have a strong obligation to provide support to people with disability on an equal basis with others.

The broad obligations in Article 8 CRPD, and particularly those contained in Article 8.2 (d) – which require “awareness-training programmes regarding persons with disabilities and the rights of persons with disabilities” – .suggest that awareness raising and promotion to improve access to mainstream services would be a key role for the NDIS.

CRPD ➲ Article 1, Article 8, Article 19, Article 24, Article 25, Article 26, Article 27, Article 28

Recommendation 4.5

The Disability Support Pension (DSP) should not be funded or overseen by the NDIS. The Australian Government should reform the DSP to ensure that it does not undermine the NDIS goals of better economic, employment and independence outcomes for people with disabilities. Reforms should aim to:

- *encourage the view that the norm should not be life long use of the DSP, among:*
  - *people with non-permanent conditions*
  - *people with permanent conditions who could have much higher hopes for employment participation*
- *provide incentives for people to work (even if only for a few hours per week) and for targeted rehabilitation for those with reasonable prospects of employment.*

These reforms should not be limited to new entrants into the DSP.

HR Analysis Comment

It is agreed that the NDIS should not fund the Disability Support Pension (DSP).

However concern is expressed in relation to tying income support arrangements with work participation. Article 28.2 CRPD stresses the obligation on States parties to “recognize the right of persons with disabilities to social protection and to the enjoyment of that right without discrimination on the basis of disability, and shall take appropriate steps to safeguard and promote the realisation of this right.” In relation to work and employment, Article 27, obliges States parties to “recognize the right of persons with disabilities to work, on an equal basis with others; this includes the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities.” The two obligations are independent and stand in their own right; they are not co-dependent, or tradeable against each other. In other words, it would appear problematic, from the perspective of the obligations under CRPD, to make the right to an adequate standard of living and social protection precarious in order to encourage workforce participation, even if this might, at least partially, meet the obligations on States to create employment opportunity for people with disability. Further, the obligations in Article 27 also stress the importance of the right of persons with disability “to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to persons with disabilities.” This would suggest that a punitive welfare system that compelled people with disability to work because of a loss of social security would be against the spirit of the obligations in Article 27 CRPD.

Recommendation 4.5 appears to recommend a strict ‘diagnostic’ test for eligibility to DSP. This appears in line with present policy in relation to the DSP (although as discussed below, this is not necessarily in line with obligations under CRPD). Current eligibility for the DSP is restricted to people with a physical, intellectual or psychiatric impairment, with a rating provided by an assessor to determine eligibility for the DSP. Disability pension recipients must demonstrate a “continuing inability to work” (again determined by an assessor) and must also meet residency criteria (as discussed below). The “continuing inability to work” refers to an inability to work for more than 15 hours per week and that this inability is likely to continue for at least 2 years.

CRPD stresses reliance on the social model of disability (Preamble (e) and Article 1) which means that people with disability are understood to include “those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others” (Article 1). This suggests that assessment should be based upon a range of factors, including the interaction between impairment and economic, social and cultural barriers, rather than purely an assessment of ‘permanency’ of impairment or ‘ability to work’. This assessment might also take into account other factors which prevent full participation, and are as important as employment participation. For example some people with disability may have caring responsibilities that make employment participation undesirable or non feasible, particularly given the poor recognition within existing income support systems of the additional costs that may be incurred in child care, transport, energy and adjustment for parents with disability. The interaction of the DSP with other social security transfers is relevant, particularly where other government benefits preclude eligibility for DSP. For example there is an interaction between single parent payments and the DSP, with effects for women with disability, which interconnect with other obligations, such as under Article 11 CEDAW. There are other problems with DSP eligibility, including the ten year eligibility period for migrants that pose challenges to CRPD obligations in terms of equal social and economic security for people with disability.

CRPD ➲ Preamble (e), Article 1, Article 27 Article 28.
CEDAW ➲ Article 11

5. Assessment

The PC has made a number of recommendations with respect to assessment processes for the proposed NDIS. This chapter deals with the question of assessment.

Recommendation 5.1

Working within the International Classification of Functioning, Disability and Health (ICF), the assessment process should identify the supports required to address an individual's reasonable and necessary care and support needs across a broad range of life activities, and should take account of an individual's aspirations and the outcomes they want to achieve

HR Analysis Comment

A support scheme that aims to enable full inclusion and participation in the community for people with disability (as per Article 19 CRPD) must include an assessment process that is able to allow access to services that meet these broad goals. Article 26 CRPD (which deals with questions of habilitation and rehabilitation) stresses the need for a "multidisciplinary assessment of individual needs and strengths." CRPD also emphasises the diversity of people with disability (Article 3 d). A "one size fits all" test is unlikely to be appropriate; there is a need for rights recognition and full participation for *all* people with disability.

Use of a framework such as the International Classification of Functioning, Disability and Health (ICF) to assess eligibility for support services would be appropriate where it works in concert with the broad goals of full inclusion and participation. The ICF tool includes a range of broader measures of functioning and participation, including the relationship of people with disability to social and civic life, and the availability of technology. It would be at odds with Article 19 CRPD for a tool such as ICF to be utilised selectively to target only specific areas of concern within assessment (such as the ability for a person with disability to participate in employment or education). Assessment must allow people with disability to participate fully in *all* aspects of life, including caring roles, family life, recreational participation, cultural and faith participation, and civic and political duties, and not be limited to prioritizing functional assessment for particular social and economic roles. Selective interpretations of social and economic participation (rather than a model of full participation in line with an individual's needs and aspirations) also risks imposing gender bias (such as assuming that caring roles are not an important need or aspiration) and cultural bias (for example by devaluing cultural and faith participation). Article 6 CRPD stresses full development, advancement and empowerment rights for women with disability; these rights are supported by the equal economic, social and cultural participation rights imposed by Articles 10-14 of CEDAW. Rights for cultural and linguistic minority groups are outlined in Article 30.4 CRPD, and supported by the rights to culture and language in UN DRIP (Articles 3, 5, 8, 11, 12, 13, 14, 21, 23, 31, 33 and 34) and by the equality obligations in ICERD (particularly Articles 1 and 5). Assessments that meet the best interests of the child are obligations as per Article 7 CRPD, also expressed in Article 3 of CROC.

People with disability must have control within the proposed assessment process of decision making that affects them. Article 3 (a) CRPD stresses as a general principle that States parties are obliged to have “respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons.” Article 4.3 CRPD stresses the right of people with disability to exert control in “decision-making processes concerning issues relating to persons with disabilities.” While the PC proposes an assessment system that takes “account of an individual’s aspirations and the outcomes they want to achieve,” there needs to be a stronger commitment to providing individual control.

The PC has ruled out self assessment, questioning the benefits of this approach, and arguing that it “has identified a number of more effective ways of ensuring that people have greater power over how their needs are met, including the adoption of self-directed funding” (p5.20). Providing people with disability control of their service choices and delivery *after* assessment is not a substitute for ensuring that people with disability have control within the assessment processes. Again, CRPD stresses at Article 4.3 that people with disability have a right to be involved in *all* decision making that relates to them. Use of self assessment would more strongly satisfy the requirements imposed by CRPD.

The application of ‘reasonable and necessary” tests prescribed by Recommendation 5.2 appear at odds with the obligations under CRPD. Supports should aim to support the “equal right of all persons with disabilities to live in the community, with choices equal to others, and shall take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community” (CRPD Article 19 a and b). Limitations on access to these necessary supports might be acceptable where accommodation would be ‘unreasonable’ (ie as per the concept of “reasonable accommodation” as defined in Article 2 CRPD). However any limitation as a result of an inability to immediately accommodate full realisation of rights does not preclude long range commitments to progressive realisation, as outlined in Article 4.2 CRPD.

CRPD ➲ Article 3, Article 4, Article 6, Article 19 (a) and (b), Article 26, Article 30.4
CEDAW ➲ Article 10, Article 11, Article 12, Article 13, Article 14
CROC ➲ Article 3
UN DRIP ➲ Article 3, Article 5, Article 8, Article 11, Article 12, Article 13, Article14, Article 21, Article 23, Article 31, Article 33 and Article 34
ICERD ➲ Article 1, Article 5

Recommendation 5.2

The assessment process should be a valuable intervention in its own right, rather than just an entry point to supports. The process should:

- *draw on multiple sources of information, including:*
  - *information provided by the individual with a disability, including their aspirations and requirements for supports*
  - *information provided by unpaid carers*

    - *current medical information on the person with a disability*
- *assess the nature, frequency and intensity of an individual's support needs. The process should be person-centred and forward looking and consider the supports that would allow a person to achieve their potential in social and economic participation, rather than only respond to what an individual cannot do*
- *determine what supports outside the NDIS people should be referred to, including referrals to Job Network providers and mental health services*
- *consider what reasonably and willingly could be provided by unpaid family carers and the community ('natural supports')*
- *translate the reasonable needs determined by the assessment process into a person's individualised support package funded by the NDIS, after taking account of natural supports*
- *provide efficiently collected data for program planning, high level reporting, monitoring and judging the efficacy of interventions.*

HR Analysis Comment

CRPD stresses reliance on the social model of disability (Preamble (e) and Article 1) which means that people with disability are understood to include "those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others" (Article 1). Because Recommendation 5.2 includes a medical assessment, it potentially risks assessing eligibility / entitlement on the basis of a diagnostic test, rather than through an understanding of the interaction of impairments with social barriers, and as such would be at odds with the social model of disability outlined in CRPD.

The concept of 'natural supports' is potentially problematic, as it assumes that there is a prescribed 'natural role' for carers with respect to people with disability (and vice versa). A 2010 New Zealand High Court decision has tested this, rejecting the suggestion that there is a "social contract under which it is accepted that family members provide support for disabled persons through the lifetime of those persons" (MOH v Atkinson and Others, [94]). In so far as an assumption of 'natural supports' may compromise the ability of a person with disability to exercise choice in relation to the level of services and support available, including a choice to live independently, there is also a potential tension with the obligations under Article 19 (a) and (b) CRPD with respect to the right of persons with disability to "choose their place of residence and where and with whom they live on an equal basis with others and are not obliged to live in a particular living arrangement." Because it can be accepted that not all family carers are willing or able to provide high quality care, an assumption of 'natural supports' as part of the assessment process for NDIS would work against obligations in CRPD relating to the best interests of children with disability (Article 7), also expressed in Article 3 of CROC. Conversely reliance on natural supports can lead to situations of exploitation for the person with disabilities, especially where it compromises choice about support options.

Given the high proportion of carers who are women, applying a concept of ‘natural supports’ would be potentially discriminatory towards women, and at odds with Australia’s obligations under Article 11.2c of CEDAW which stresses the need for States Parties to “encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life.” Assumptions about ‘natural supports’ could also discriminate against cultural and linguistic minority groups, particularly those with large and diverse family structures and different expectations in relation to care roles: Article 30.4 CRPD stresses cultural rights for people with disability, while Article 35 of UN DRIP explicitly specifies that “Indigenous peoples have the right to determine the responsibilities of individuals to their communities.” Finally, people with disability have a right to family, with an obligation on States parties in Preamble (x) CRPD for “people with disabilities and their family members” to receive the “necessary protection and assistance to enable families to contribute towards the full and equal enjoyment of the rights of persons with disabilities.” Assumptions in relation to natural supports should not prevent people with disability and their families from receiving the support required to maintain family life.

As discussed at Recommendation 5.1 above, people with disability must have control within the proposed assessment process. Article 4.3 CRPD stresses the right of people with disability to exert control in “decision-making processes concerning issues relating to persons with disabilities.” Use of self assessment would more strongly satisfy the requirements imposed by CRPD.

The application of ‘reasonable needs’ tests prescribed by Recommendations 5.1 and 5.2 appear at odds with the obligations under CRPD. As discussed above, services should aim to support “equal right of all persons with disabilities to live in the community, with choices equal to others, and shall take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community” (CRPD Article 19 a and b). Limitations on access to these necessary supports might be acceptable where accommodation would be ‘unreasonable’ (ie as per the concept of “reasonable accommodation” as defined in Article 2 CRPD). However any limitation as a result of an inability to accommodate full realisation of economic, social and cultural rights does not preclude long range commitments to progressive realisation as outlined in Article 4.2 CRPD.

Article 31 CRPD provides guidance on the collection and use of statistics and data. Article 31.2 in particular highlights that information shall be “disaggregated, as appropriate, and used to help assess the implementation of States Parties' obligations under the present Convention and to identify and address the barriers faced by persons with disabilities in exercising their rights.”

CRPD ➲ Preamble; Article 1; Article 4; Article 7; Article 19; Article 30.4, Article 31
CEDAW ➲ Article 11.2c
CROC ➲ Article 3
UN DRIP ➲ Article 35

Recommendation 5.3

Any tools employed by the scheme should exhibit validity and reliability when used for assessing the support needs of potential NDIS users. The preferred assessment tools should be relatively easy to administer and exhibit low susceptibility to gaming. The toolbox should be employed nationally to ensure equitable access to nationally funded support services (and allow portability of funding across state and territory borders when people move).

HR Analysis Comment

Article 26 CRPD provides some guidance on assessment tools (with respect to habilitation and rehabilitation services) stating that assessment should be "based on the multidisciplinary assessment of individual needs and strengths." One concern area is that the tools must be broad enough to capture needs for full and effective participation as per Article 1 CRPD. This would include ensuring that the 'toolbox' is culturally competent to enable people from ethnic minorities and Aboriginal and Torres Strait Islander people to participate on an equal basis with others, including ensuring that these groups are able to gain support for inclusion that maintains a right to preservation and development of their cultural and linguistic identities and communities. Rights for cultural and linguistic minority groups are outlined in Article 30.4 CRPD, and supported by the rights to culture and language in UN DRIP (Articles 3, 5, 8, 11, 12, 13, 14, 21, 23, 31, 33 and 34) and by the equality obligations in ICERD (particularly Articles 1 and 5). The toolbox must also recognise gender differences and the right of women with disability to achieve full participation in all areas of civil, political, social, economic and cultural life (as per Article 6 CRPD), including, for example, reproductive rights, employment rights, rights to security of person and rights to be supported in a range of social roles, including as carers.

The validity and reliability of assessment tools must be contextualized within the obligations imposed by CRPD, particularly with respect to the Article 1 aims of full and equal participation and inclusion. Regulating criteria to prevent 'gaming' should not arbitrarily prevent people with disability from accessing services that would enable full social, economic and cultural participation.

As discussed at Recommendation 5.1 above, people with disability must have control within the proposed assessment process. Article 4.3 CRPD stresses the right of people with disability to exert control in "decision-making processes concerning issues relating to persons with disabilities." Use of self assessment would more strongly satisfy the requirements imposed by CRPD.

CRPD ➲ Article 1, Article 4.3, Article 6, Article 26, Article 30.4
UN DRIP ➲ Article 3, Article 5, Article 8, Article 11, Article 12, Article 13, Article14, Article 21, Article 23, Article 31, Article 33 and Article 34
ICERD ➲ Article 1, Article 5

Recommendation 5.4

Trained assessors should undertake assessments. To promote independent outcomes, assessors should not have a longstanding connection to the person. Assessors' performance should be continually monitored and assessed to ensure comparability of outcomes and to avoid 'sympathetic bracket creep'.

HR Analysis Comment

There is a potential conflict between the need for 'independence' of assessors and the need to provide assessment "based on the multidisciplinary assessment of individual needs and strengths" as per Article 26(a). Assessments that meet the Article 26(a) CRPD conditions may require in depth awareness and understanding of the individual, including longstanding connection to the person in order to provide most effective assessment. A system where individuals receive a periodic assessment from a single assessment agency (ie the NDIA), by someone they have no connection to, with limited means of appeal or 'second opinion,' might lead to unfair outcomes, particularly if individuals are poorly assessed by the assigned officer, who may be unable to take into account "individual needs and strengths."

As discussed at Recommendation 5.1 above, use of self assessment would more strongly satisfy the requirements imposed by CRPD. Taken together, Article 19 and Article 26 (a) CRPD suggest that assessment must adequately take into account the needs and strengths of people with disability in a complete way in order to identify what adjustment that individual may require to realise rights and full participation. Given the breadth of this task, self assessment is justified where this might provide the most accurate information on individual's needs, strengths and aspirations. As discussed above, Article 3 (a) CRPD stresses as a general principle that States parties are obliged to have "respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons." Article 4.3 CRPD stresses the right of people with disability to exert control in "decision-making processes concerning issues relating to persons with disabilities." It is worth noting that self assessment processes more fully satisfy other international obligations; for example the right of Aboriginal and Torres Strait Islander people to "participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions" as per Article 18 UN DRIP.

Some individuals – for example members of linguistic or cultural minorities – may only be able to access assessment by individuals known to them. For example there might be only a limited number of culturally competent assessors available to conduct an assessment for people with disability from some recently arrived migrant or refugee groups or for some Aboriginal and Torres Strait Islander people with disability. Similarly, people with disability in rural and remote areas may not be able to access assessment that does not?involve an assessor who has a 'longstanding connection.'

CRPD ➲ Article 3, ,Article 4.3, Article 19, Article 26 (a)
DRIP ➲ Article 18

Recommendation 5.5

The NDIS should periodically reassess people's need for funded support, with a focus on key transition points in their lives.

HR Analysis Comment

Note comments in relation to Recommendation 5.4

Recommendation 5.6

Where an informal carer provides a substantial share of the care package, they should receive their own assessment. This should seek to identify their views on the sustainability of arrangements and the ways in which they could be supported in their role, including through the initiatives recommended in draft recommendation 13.3.

HR Analysis Comment

The focus of Recommendation 5.6 is upon the sustainability of support arrangements from the perspective of informal carers. It is not clear from Recommendation 5.6 whether people with disability who are being provided support by an informal carer will be given the same opportunity to discuss adequacy of care arrangements as their carers. Taken together with the assumptions around 'natural supports' in Recommendation 5.2, a failure to take into account the 'needs and strengths' of people with disability in their living and support arrangements would be at odds with the obligations in CRPD. In particular Article 19a CRPD stresses the right of people with disability to have "the opportunity to choose their place of residence and where and with whom they live on an equal basis with others and are not obliged to live in a particular living arrangement."

CRPD ➲ ,Article 19a

Recommendation 5.7

The NDIS should establish a coherent package of tools (a 'toolbox'), which assessors would employ across a range of disabilities and support needs (attendant care, aids and equipment, home modifications).

HR Analysis Comment

A broad range of assessment tools would be consistent with the scope of potential services that facilitate full inclusion for people with disability as per Article 19 CRPD, and provide assessment "based on the multidisciplinary assessment of individual needs and strengths" as per Article 26(a).

Equality and non discrimination principles outlined in Article 5 CRPD need to apply fully to remove formal and informal discrimination in the application of assessment tools, particularly in ensuring that the 'toolbox' meets the needs of different people with disability, including recognising the diverse needs of different population groups. International instruments provide guidance on the principles of equality and non discrimination for relevant population groups, including women (Articles 2 and 10-14 CEDAW), Aboriginal and Torres Strait Islander people with disability (Articles 2, 20, 21, 23 and 24; Articles 1 and 5 ICERD; Article 30 CROC), people from NESB with disability(Articles 1 and 5 ICERD, Article 30 CROC) and children with disability (Articles 23, 24, 26, 27, 28, 29).

As discussed at Recommendation 5.1 above, people with disability must have control within the proposed assessment process. Use of self assessment would more strongly satisfy the requirements imposed by CRPD, particularly the requirements of Article 4.3, with the design of assessment tools aiming to ensure that the needs and aspirations of people with disability are fully met.

CRPD ➲ Article 4.3, Article 5
CEDAW ➲ Article 2, Article 10, Article 11, Article 12, Article 13, Article 14
CROC ➲ Article 30
UN DRIP ➲ Article 2, Article 20, Article 21, Article 23, Article 24
ICERD ➲ Article 1, Article 5

Recommendation 5.8

The assessment tools should be subject to ongoing monitoring, as well as a regular cycle of evaluation against best practices, including the ICF framework, and, if necessary, recalibration. The scheme should have systematic internal mechanisms to ensure that anomalies can be analysed and addressed.

HR Analysis Comment

The evolution of assessment tools should occur to ensure their effectiveness and accuracy in enabling people with disability to access appropriate supports and services that realise rights and full participation (in line with provisions in Articles 1, 19 and 26 CRPD). As such, in addition to reference to established tools such as ICF, assessment tools must be shaped in accordance with international obligations, including CRPD. The evolution of tools should focus on how impairment interacts with external barriers as per the social model described in Preamble (e) and Article 1 CRPD. Evolution of assessment tools purely as a mechanism to ration the provision of services would be at odds with the provisions of CRPD.

Continuing evolution of assessment tools will potentially create consistency problems over time, with some people excluded or included depending on what tools are used. This is a challenge to equality provisions of CRPD (Article 5), and can be addressed by providing guarantees of continuing support (so called ‘grandparent’ clauses) and offering individuals adequate avenues for review and reassessment.

CRPD ➲ Preamble (e), Article 1, Article 5, Article 19, Article 26.

Recommendation 5.9

The NDIS should use the best available tools in its initial implementation phase, with the on-going development of best-practice tools.

HR Analysis Comment

Note as described in relation to Recommendations 5.1-5.9, CRPD principles (and other relevant international obligations) provide a strong basis to guide evolution of assessment tools. Note also, as discussed at Recommendation 5.1 above, people with disability must have control within the proposed assessment process, and that use of self assessment would more strongly satisfy the requirements imposed by CRPD, with the design of assessment tools aiming to ensure that the needs and aspirations of people with disability are fully met.

6. Decision making

This chapter deals with the decision making with respect to the proposed NDIS, and the potential human rights implications.

Recommendation 6.1

Governments should give people with disabilities eligible for benefits under the NDIS, or their nominated proxies, various options for exercising choice, including the power to:

- *choose directly the service provider/s that best meet their needs*
- *choose disability support organisations that would act as intermediaries on their behalf when obtaining services from service providers, and/or*
- *'cash out' all or some of their individual budgets if they wish, with the NDIA making direct payments to their bank accounts, and allowing people to purchase directly the detailed package of supports that best meets their preferences ('self-directed funding'), subject to the constraints set out in draft recommendations 6.2, 6.7 and 6.8.*
    - *The specific arrangements for self-directed funding should be underpinned by the principle that, subject to the assessed individual budget and appropriate accountability requirements, the arrangements should maximise the capacity for a person to choose the services that meet their needs best and that promote their participation in the community and in employment.*

HR Analysis Comment

Article 19 CRPD places a strong obligation to ensure the "equal right of all persons with disabilities to live in the community, with choices equal to others, and shall take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community." Facilitating effective choice and enabling a diverse number of supports towards full inclusion are goals in line with CRPD obligations. As per Article 19, the support model for the NDIS must also ensure that choice, full inclusion and participation in the community are available to all people with disability on an equal basis with others. This would mean that only offering choice and independent living to *some* people with disability, rather than *all* people with disability, would be at odds with CRPD. Article 19 (a) also provides a right to people with disability "to choose their place of residence and where and with whom they live on an equal basis with others and are not obliged to live in a particular living arrangement." Choice of living arrangements must be available on an equal basis with others.

Broadly speaking, Recommendation 6.1 is in line with the obligations in Article 19, in particular in the strong statement that "arrangements should maximise the capacity for a person to choose the services that meet their needs best and that promote their participation in the community and in employment." There will remain challenges to enabling consumers to maximize their capacity to make choices towards full inclusion. One area that is not discussed by the Commission within the "Decision Making" recommendations is the availability of interpreter and translator support for people from diverse cultural and linguistic backgrounds, including people who use sign languages. Article 21 and Article 30.4 CRPD provide explicit guidance in relation to the need to provide information in accessible formats, including Braille and sign language. Article 13.2 of UN DRIP obligates States parties to ensure that "indigenous peoples can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means." Article 5 (e) (iv) ICERD obligates States parties to ensure non discrimination on the basis of race, colour, or national or ethnic origin in relation to "the right to public health, medical care, social security and social services."

Recommendation 6.1 creates different options for exercising choice for people with disability. In order to enable all people with disability to enjoy choices equal to others, the system must as far as possible enable people with disability to utilise the self directed funding model of *their* choice. For example, it would be at odds with Article 19 CRPD, as discussed below at Recommendation 6.7, for the ability to 'cash out' budgets to be only offered to those who had the ability to navigate the accountability guidelines set down by the NDIA. In order to be compliant with the CRPD obligation the NDIA must facilitate as best as possible the right of all people with disability to 'cash out' their budgets if they desire, and to provide the supports of their choice that will enable them to navigate the accountability guidelines. Further, in order to satisfy the requirements of Article 12 CRPD, the NDIS must recognise the legal capacity of all people with disability, and the right to be supported to exercise legal capacity.

It is not clear if Recommendation 6.1 imagines a system where individuals, who use intermediaries in order to support individual choice, will need to fund this from their own allocated budget. If the cost of intermediaries – ie disability support organisations – is met through individual budgets without any additional funding to cover these costs, then this appears discriminatory as these individuals will not have access to the same level of supports, and is at odds with the obligation imposed by Article 19 for an "equal right of all persons with disabilities to live in the community, with choices equal to others." Similarly individuals who 'cash out' their eligible budget should not be disadvantaged by not being able to enjoy the same level of support that they would have been eligible to if they had chosen a different individual support model..

The PC uses the term 'disability support organisations' to describe intermediary organisations which might have different roles, including service brokerage and case management. There appears to be some confusion in the use of 'disability support organisations,' particularly with respect to how these organisations might relate to Disabled Persons Organisations (DPOs) and advocacy. A role for DPOs (that is, organisations that are run and controlled by a majority of persons with disabilities) is given in Article 4.3 CRPD, which creates an obligation requiring that "in the development and implementation of legislation and policies to implement the present Convention, and in other decision-making processes concerning issues relating to persons with disabilities, States Parties shall closely consult with and actively involve persons with disabilities, including children with disabilities, through their representative organisations.” A role for DPOs is also specified in Articles 32 and Article 33 CRPD, relating to international and regional cooperation and partnership, and in implementation and monitoring of Convention obligations. Resourcing for DPOs must be an element in fully realizing rights and participation.

The role of advocacy remains undefined within the proposed NDIS. In order to give full effect to the Article 19 CRPD obligations for equal choice, full inclusion and participation, independent representation and advice must be an element within the system, with individual models of advocacy available to support decision making ‘on the ground’ and systemic advocacy to engage in change and monitoring. Given the prominence given to person centred decision making in the proposed NDIS, there may also be a role for self advocacy models, and there is a very clear role for advocates in providing information. It is notable that the 2010 Australian Human Rights Commission submission to the PC review recommended a commitment to funding advocacy, and noted that Article 4 (General Obligations), Article 12 (equal recognition before the law), Article 13 (Access to justice), Article 16 (freedom from abuse), Article 21 (freedom of expression and information), Article 24 (education), Article 25 (health) Article 27 (employment) and Article 33 (implementation and monitoring) all potentially provided a role for independent advocacy.

CRPD ➲ Article 4, Article 12, Article 13, Article 16, Article 19, Article 21, Article 24, Article 25, Article 27, Article 30.4, Article 32, Article 33
UN DRIP ➲ Article 13.2
ICERD ➲ Article 5 (e) (iv)

Recommendation 6.2

Self-directed funding should include the following key stages.

- *It would be informed by any prior planning and aspirations expressed by the person during the assessment phase (draft recommendation 5.2).*
- *The individual budget for self-directed funding would be based on the formal individual assessment of the person’s needs and would include the cashed out value of all goods and services covered by the NDIS, except those where specialist knowledge is required for informed choices.*
- *The person with a disability — and/or their support network or chosen disability support organisation — would create a personal plan and a concrete funding proposal to the NDIA that outlines the person’s goals and the type of support that is necessary and reasonable to achieve these within the allocated budget.*
- *The resulting funding proposal would require approval by the National Disability Insurance Agency (NDIA).*

There should be a capacity for a person to:

- *obtain quick approvals for changes to a funding proposal*
- *add their own private funds to a funding proposal*
- *allocate the individual budget to any mix of preferred specialist and mainstream goods and services, subject to the requirements that:*
  - *the person spend the budget in areas related to his or her disability needs and consistent with the funding proposal*
  - *the scope to cash out funds set aside for large non-recurrent spending items should be limited to the (rare) circumstances where the NDIA has approved this as an appropriate decision.*

HR Analysis Comment

Comments in relation to assessment processes are provided above at Recommendations 5.1-5.9. This includes commentary on Article 19 and Article 26 CRPD obligations that relate to assessment, including the requirement for ‘multidisciplinary assessment of individual needs and strengths.’ As discussed above, the” necessary and reasonable” test for available support is not in line with CRPD obligations, which obligate States to provide services to enable “full inclusion and participation in the community” with limitations only on the basis of reasonable accommodation, with appropriate commitment to progressive realisation of social, economic and cultural rights.

The flexibilities detailed at Recommendation 6.2 are welcome and in line with the obligations in CRPD for individual choice on an equal basis with others. The capacity for individuals to use private funds should not affect the equal right of all persons with disability to enjoy full participation. For example it would be at odds with the obligations in Article 19 for the arrangements in the system to mean that only high income people with disability are able to adequately realise full inclusion and participation, through the provision of their own private funds.

As per Recommendation 6.1, there must be adequate provision to ensure all people are able to exercise equal choice, including through ensuring the availability of interpreter and translator support for people from diverse cultural and linguistic backgrounds, including people who use sign languages (as per Article 30.4 CRPD).

As discussed above at Recommendation 4.1, the protections in Article 12 CRPD stress the fact that States parties must recognise that all people with disability have legal capacity, and must maximally support people with disability to realise this right. In order to fully satisfy the obligations imposed by Article 12 CRPD, the NDIS must take ‘all appropriate measures’ to support people with disability to exercise their legal capacity, including through supported decision making.

CRPD ➲ Article 12, Article 19, Article 26 Article 30.4

Recommendation 6.3

The NDIA should pay annual allocations of self-directed funding in monthly instalments paid in advance, with the capacity for the person to 'bank' up to 10 per cent of the annual allocation to the subsequent year.

HR Analysis Comment

Allowing flexibility in the expenditure of funds could reasonably allow individuals to respond as necessary to additional, evolving and unplanned for needs, and give meaning to the Article 19 CRPD obligation for the "equal right of all persons with disabilities to live in the community, with choices equal to others."

There is a potential equity issue in relation to Recommendation 6.3. Presumably the capability to generate a surplus in order to 'bank' for future needs is dependent upon either the capacity of individuals to defer expenditure on particular assessed needs (which may not be possible for some individuals), or is based upon an inaccurate assessment that has enabled a budget for an individual larger than immediate need. In other words, the capacity of individuals to set aside a surplus may be out of their control, and therefore be an arbitrary aspect of system design, rather than a result of informed choice. If NDIS participants, as a result of system design rather than individual choice, are consistently unable to raise a surplus in order to 'bank' a portion of their allocation (thereby comprising their ability to respond flexibly to evolving needs over time), then this would be at odds with Article 19 CRPD and the broad equality and non discrimination principles of Article 5.

A more equitable solution – that would better meet the requirement at Article 19 - would be for NDIA to guarantee a 10% per year allocation above assessed needs that individuals could choose to 'bank.'

CRPD ➲ Article 19

Recommendation 6.4

There should be a capacity for people to recruit and employ their own support workers, subject to the proviso that these should not be close family members, other than when:

- *care is intermittent and provided by a non-resident family member*
- *exceptional circumstances are present and after approval by the NDIA*
- *the person is in the family employment trial spelt out in draft recommendation 6.5.*

HR Analysis Comment

There are a range of possible considerations at Recommendation 6.4 with respect to ensuring that CRPD obligations are met. Article 19 (a) places strong requirements on States Parties to ensure that “persons with disabilities have the opportunity to choose their place of residence and where and with whom they live on an equal basis with others and are not obliged to live in a particular living arrangement.” With respect to the NDIS, this poses the challenge of enabling people with disability to choose the living arrangement that suits them, including a choice between a resident family carer as the preferred arrangement, or an external service provider, or a mix of both.

A restriction placed on resident family carers being recipients of paid care appears arbitrary. On December 17 2010, the New Zealand High Court handed down its judgment in relation to the Ministry of Health (MOH) policy of excluding family members from being contracted to provide care to persons with disability (Ministry of Health V Peter Atkinson on behalf of the estate of Susan Atkinson & Eight Others, 2010). The judgment was based on an appeal by the MOH against a decision by the Human Rights Review Tribunal that the policy of excluding family members was contrary to the *New Zealand Bill of Rights Act 1990*. The High Court dismissed the MOH appeal. The New Zealand High Court decision found that a policy of excluding family members from being able to provide paid care and support was discriminatory, *both* to family members *and* to people with disability. In relation to family members, the High Court found that the policy of excluding family members, simply because they were family members, was discriminatory, particularly where it could be shown that they were the most skilled, willing and appropriate providers of care. The policy of excluding family members from receiving payments for care and support was also found to be discriminatory to people with disability, because it arbitrarily limits choice.

The restriction also has implications for children with disability who are eligible for services under the proposed NDIS. Broadly speaking, support arrangements must conform with the ‘best interests of the child’ obligations in Article 7 CRPD and Article 3 CROC, which imply that the NDIS must ensure provision for paid support by a resident family carer, where it is shown that this would be the most appropriate source of support in order to satisfy the best interests of the child with disability. Article 23 CRPD expresses the right to family for people with disability, including an obligation at Article 23.3 for States parties to “ensure that children with disabilities have equal rights with respect to family life. With a view to realizing these rights, and to prevent concealment, abandonment, neglect and segregation of children with disabilities, States Parties shall undertake to provide early and comprehensive information, services and support to children with disabilities and their families.”

Women make up a significant proportion of unpaid carers in Australia. A blanket exclusion of otherwise appropriate and willing female family members from paid care work would appear at odds with obligations under Article 11 CEDAW, including provisions for ‘the right to the same employment opportunities, including the application of the same criteria for selection in matters of employment” at Article 11(b) and “the right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value” at Article 11 (d). In so far as women with disability may also be carers of people with disability, an exclusion of family carers from paid support work under the proposed NDIS would be at odds with the general obligations at Article 6 CRPD relating to women with disability, as well as the specific provisions in Article 26 (b) to protect “the rights of persons with disabilities, on an equal basis with others, to just and favourable conditions of work, including equal opportunities and equal remuneration for work of equal value."

An exclusion of resident family members from receiving payments for care and support has potentially discriminatory implications for households with large families, including for people from NESB with disability or Aboriginal and Torres Strait Islander people where large co-resident families, strong non anglo-celtic family structure, and robust family involvement is a cultural right, particularly in maintaining cultural and linguistic identity (as per Article 30 CRPD; Articles 11, 12, 13, 15 and 16 UN DRIP; and Article 5 ICERD). Article 19 contains an obligation to recognise that people with disability "have the opportunity to choose their place of residence and where and with whom they live on an equal basis with others and are not obliged to live in a particular living arrangement." It would be at odds with the obligations imposed by Article 19 for a blanket exclusion of resident family carers to prevent some people with disability, including those with large resident families, from appropriate care and support, or force people with disability in these situations to make less than preferred arrangements in order to secure care and support (such as the use of culturally inappropriate support, or the separation of families in order to gain eligibility for NDIS support).

CRPD ➲ Article 7, Article 19(a), Article 23, Article 26 Article 30
CEDAW ➲ Article 11 (b) and (d)
UN DRIP ➲ Article 11, Article 12, Article 13, Article 15, Article 16
CROC ➲ Article 3
ICERD ➲ Article 5

Recommendation 6.5

There should be a trial of the employment of family members under self-directed funding to assess its risks, advantages, disadvantages and optimal design, with its wider adoption if the evaluation proves positive. The trial should use an appropriately rigorous scientific approach, drawing on the evaluations used in the United States 'Cash and Counseling' programs. For the trial:

- *the NDIA should determine that there are few risks from hiring relatives for each family in the trial*
- *the individual budget should be discounted by 20 per cent*
- *support should be initially limited in duration to six months, with continuation of any arrangement for a given family based on the benefits and costs to that family*
- *risks should be carefully managed to ensure appropriate use of funds and to safeguard people with disabilities and carers (draft recommendation 6.8).*

HR Analysis Comment

Substantive comment on the context for the trial is provided at Recommendation 6.4. A trial of suitable arrangements for payments to resident family members is reasonable; however as per above, the NDIA must make a substantive commitment to making this option available to all people with disability to avoid potential discrimination against both people with disability and family members.

The rationale for a reduction in individual budget by 20% to resident family members is not justified. As stated above, there are a significant proportion of female family members who could be eligible for the proposed trial. CEDAW stresses “the right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value” at Article 11 (d). In so far as women with disability may also be carers of people with disability, the obligations at Article 26 (b) to protect “the rights of persons with disabilities, on an equal basis with others, to just and favorable conditions of work, including equal opportunities and equal remuneration for work of equal value” are relevant.

Assessment of the suitability of payment models to resident family carers must also include analysis of outcomes for people with disability in relation to Article 19 obligations to ensure the “equal right of all persons with disabilities to live in the community.” The assessment of options should also incorporate assessment of outcomes for children in terms of ensuring that the best interests of the child are met as per Article 7 CRPD and Article 3 CROC.

CRPD ➲ Article 7, Article 19, Article 26
CEDAW ➲ Article 11 (d)
CROC ➲ Article 3

Recommendation 6.6

The NDIA should:

- *inform people with disabilities and their proxies of the various options for self-directed funding*
- *provide support for people using self-directed funding, including easy-to-understand guidance about the practical use of self-directed funding, including standard simple-to-follow forms for funding proposals, hiring employees and for acquittal of funds*
- *promote the use of self-directed funding, with examples of innovative arrangements*
- *provide training to local case managers and front-line staff about self-directed funding*
- *encourage the formation of disability support organisations to support people in the practical use of self-directed funding.*

HR Analysis Comment

The provision of information in a range of formats and utilizing a range of channels is broadly within the scope of obligations imposed at Article 19 CRPD. In addition, Article 21 CRPD provides strong obligations on States parties to ensure access to information, including at Article 21 (c) “accepting and facilitating the use of sign languages, Braille, augmentative and alternative communication, and all other accessible means, modes and formats of communication of their choice by persons with disabilities in official interactions” and at Article 21 (d) “urging private entities that provide services to the general public, including through the Internet, to provide information and services in accessible and usable formats for persons with disabilities.” Finally, there is an obligation at Article 26.3 CRPD for States parties to “promote the availability, knowledge and use of assistive devices and technologies, designed for persons with disabilities, as they relate to habilitation and rehabilitation.”

There is a strong need for the NDIS to incorporate supported decision making in order to recognise the legal capacity of people with disability. The protections in Article 12 CRPD stress the fact that States parties must recognise that all people with disability have legal capacity, and must maximally support people with disability to realise this right. In so far as Australian jurisdictions support traditional guardianship and legal capacity models based upon substitute decision making, current practice in Australia is at odds with the requirements of Article 12 and perpetuates a number of human rights violations against people with disability. In order to fully satisfy the obligations imposed by Article 12 CRPD, Australia must take ‘all appropriate measures’ to support people with disability to exercise their legal capacity, including through supported decision making.

As outlined above at Recommendation 6.5, there is a requirement for the NDIA to enable the availability of interpreter and translator support for people from diverse cultural and linguistic backgrounds, including people who use sign languages. Article 21 and Article 30.4 CRPD provide explicit guidance in relation to the need to provide information in accessible formats, including Braille and sign language. Article 13.2 of UN DRIP obligates States parties to ensure that “Indigenous peoples can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means.” Article 5 (e) (iv) ICERD obligates states parties to ensure non discrimination on the basis of race, colour, or national or ethnic origin in relation to “the right to public health, medical care, social security and social services.”

The role of advocacy remains undefined within Recommendation 6.6. In order to give full effect to the Article 19 CRPD obligations for equal choice, full inclusion and participation, independent representation and advice would need to be an element within the system. While ‘disability support organisations have an advocacy function there is a substantial lack of recognition here of the potentially contradictory roles that may be involved: for example the potential conflict of interest between an advocacy provider and a service broker. Providing for independent advocacy will be an essential aspect of a reformed services system. Resourcing for advocacy was supported by the 2010 Australian Human Rights Commission submission to the PC review.

CRPD ➲ Article 12, Article 19, Article 21 (c) and (d), Article 26.3, Article 30.4
UN DRIP ➲ Article 13.2

ICERD ➲ Article 5 (e) (iv)

Recommendation 6.7

Before offering self-directed funding to a person, the NDIA should:

- *meet with the person with a disability and their carers, and take account of their experience and skill sets*
- *use that and any information provided during the assessment phase to determine whether the person and/or their support network are likely to be able to:*
  - *make reasonably informed choices of services*
  - *manage the administrative and financial aspects of funding if they wish to oversee these aspects by themselves.*

HR Analysis Comment

There is a significant lack of detail at Recommendation 6.7 on how, and by what authority, NDIA assessors will assess capacity of individuals to be entitled to self directed funding. It is not clear how the NDIS will take into account the "experience and skill sets" of people with disability or their carers, and there appears here to be significant scope for arbitrary factors to effect an offer of self directed funding, compromising the ability of the proposed scheme to provide equal choice to all people with disability, as per Article 19, CRPD.

The wording of Recommendation 6.7, which states that the assessment phase will be used to determine if the person with disability or carer can "make reasonably informed choices of services" and "manage the administrative and financial aspects of funding if they wish to oversee these aspects by themselves" appears particularly open to discriminatory processes, with potentially arbitrary factors affecting the decisions made by NDIA assessors. In addition it does not acknowledge Article 12 of the CRPD and its reference to supported decision making. Article 12 recognises that people with disability have legal capacity on an equal basis with others, and are therefore entitled to the support they require to exercise this capacity. The emphasis for the NDIA should be on ensuring that support to exercise legal capacity is identified in the assessment process and provided through funding. It's not their role to determine who has and doesn't have capacity. For example given past experiences of discrimination, there appears to be a risk that particular groups of people with disability – eg women, NESB and Aboriginal and Torres Strait Islander – may be refused the right to direct their own care because of a perceived lack of capacity. The equality and non discrimination obligations at Article 2 CEDAW, Article 2 ICERD and Article 2 UN DRIP, provide guidance in relation to ensuring that an assessment process does not produce adverse effects for women, people from NESB and Aboriginal and Torres Strait Islander people participating in the NDIS.

There is a broader question in relation to the interaction of the ‘capacity’ of persons with disability to make decisions and the design of administrative systems and choice arrangements to facilitate active decision making. The wording of Recommendation 6.7 places the onus on people with disability and carers to demonstrate their capacity to navigate the NDIA endorsed system arrangements. This means that the NDIA could propose a complex set of arrangements for self directed funding, including difficult to navigate administrative and financial accountability procedures, which would exclude most people with disability. This would be against the general equality and non discrimination obligations imposed by Article 5 .2, and would not meet the requirement at Article 19 for an “equal right of all persons with disabilities to live in the community, with choices equal to others.” It would also be at odds with the requirements of Article 12.3 CRPD for States parties to “take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.”

In order to be more fully compliant with the obligations under CRPD, the NDIS needs to more strongly provide tools and supports to individuals to enable them to participate in self directed funding. A stronger wording of the recommendation, for example obliging the NDIA to *offer self directed funding arrangements to all*, and provide support and information to make this an effective choice, would better meet the requirements of CRPD.

As stated above, the role of advocacy remains undefined within the proposed NDIS. In order to give full effect to the Article 19 CRPD obligations for equal choice, full inclusion and participation, independent representation and advice would presumably be an element within the system. The involvement of advocacy would be vital to support decision making and choice.

CRPD ➲ Article 5.2, Article 12, Article 19
UN DRIP ➲ Article 2
CEDAW ➲ Article 2
ICERD ➲ Article 2

Recommendation 6.8

In offering self-directed funding, the NDIA should ensure that:

- *it reduces the risks of neglect or mistreatment of people with a disability by support workers or other service providers hired by users in the informal sector, by:*
  - *ensuring easy and cheap access to police checks*
  - *giving users the capacity to complain to the NDIA about inappropriate behaviour of providers, and to have these investigated*
  - *monitoring by local case managers*

- *it reduces the risks to support workers employed under self-directed funding by requiring that they are covered by workers' compensation arrangements and have an avenue for lodging complaints*
- *it adopts a risk-management approach for receipting and other accountability requirements, which:*
  - *requires less accountability for people with low risks or who have demonstrated a capacity to manage their funds well*
  - *takes into account the compliance costs of excessive accountability measures*
  - *allows a small component of the individual budget to be free of any receipting requirements.*

HR Analysis Comment

High rates of violence and abuse for people with disability within the disability support system and in institutional care have been documented in Australia and elsewhere (see for example French, Dardel & Price-Kelly 2010). There are also gaps in the provision of legal rights to people with disability in a family setting, some of whom may experience violence, abuse and neglect from informal carers and paid support workers, often with disproportionate effects for women and children with disability. Article 12 CRPD stresses equal recognition before the law, including the obligation of States parties to provide support to people with disability to exercise their legal capacity (as per Article 12.2). Article 12.3 obligates States Parties to "ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law." An independent complaint, monitoring and review body would provide a more effective check against complaints, and ensure that the law, including criminal law in relation to abuse and neglect occurrences within the NDIS applies as they would for other persons.

Advocacy is a vital element within an environment that seeks to secure people from violence, abuse, neglect and exploitation. Article 16.2 CRPD obligates States parties to provide "appropriate forms of gender- and age-sensitive assistance and support for persons with disabilities and their families and caregivers, including through the provision of information and education on how to avoid, recognize and report instances of exploitation, violence and abuse." There also needs to be a stronger recognition of the role of existing criminal law in preventing abuse and neglect, for example in combating theft from people with disability. Resourcing for advocacy is one way to achieve this goal; the Australian Human Rights Commission submission to the PC Inquiry noted that "funding for systemic and individual advocacy should be considered as an essential part of monitoring arrangements under an NDIS."

As discussed above at Recommendation 6.7, in order to satisfy the non discrimination rights of all people with disability to access services on an equal basis with others, accountability arrangements for self directed funding must be simplified to ensure that people are not excluded as a result of unnecessary system complexity. In order to be more fully compliant with the obligations under CRPD, the NDIS needs to more strongly provide tools to individuals to enable them to participate in self directed funding. This may mean that there is an obligation for the NDIS to offer self directed funding arrangements to all, and provide support and information to make this an effective choice, rather than selectively offer individuals this choice. Providing support to people with disability to make decisions is in line with the requirements of Article 12.3 CRPD for States parties to "take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity."

CRPD ➲ Article 12, Article 19

Recommendation 6.9

The NDIA should undertake ongoing monitoring of self-directed funding arrangements, with a quarterly report to the board of the NDIA on issues arising from self-directed funding. There should be a full evaluation three years after their commencement to assess any desired changes in their design.

HR Analysis Comment

Monitoring should incorporate continuing compliance against key international human rights obligations. Article 33 CRPD outlines obligations in relation to national monitoring initiatives, including specifying the role for representatives of people with disability to "be involved and participate fully in the monitoring process" (Article 33.3). Article 4.3 CRPD also emphasizes that reports, monitoring and evaluation must include close consultation and active involvement of people with disability. This would also imply a role for systemic advocacy.

As discussed at Recommendation 4.1 above, the Productivity Commission *Report on Government Services 2011* finds significant underutilization of key support types for women and for people born in non English speaking countries, indicating that the status quo arrangements do not meet full participation requirements for these particular population groups. Monitoring of arrangements would assist to improve equitable outcomes for these groups. In addition, monitoring of outcomes for children and Aboriginal and Torres Strait Islander people with disability would be important to ensure these groups are enjoying an equal right to full inclusion and participation as per Article 19 CRPD.

CRPD ➲ Article 4.3, Article 19, Article 33

Recommendation 6.10

The Australian Government should amend the Income Tax Assessment Act 1936 and the Social Security Act 1991 so that the following are not treated as income for assessment of taxes or eligibility for income support or other welfare benefits:

- *self-directed funding paid by the NDIA and, in the interim, by state and territory governments*
- *early compassionate release of eligible superannuation amounts for disability expenditures which meet the criteria set down by the Superannuation Industry (Supervision) Act 1993.*

HR Analysis Comment

This recommendation would broadly comply with the requirements in Article 28 CRPD regarding poverty alleviation.

CRPD ➲ Article 28

7. Governance including complaints and dispute resolution

The Productivity Commission has made a number of recommendations with respect to governance, including complaints processes for the proposed NDIS. This chapter deals with the question of governance.

Recommendation 7.1

The Australian Government should establish a new independent Commonwealth statutory authority, the National Disability Insurance Agency (NDIA), to administer the National Disability Insurance Scheme. The NDIA should be subject to the requirements of the Commonwealth Authorities and Companies Act 1997 (CAC Act), not the Financial Management and Accountability Act 1997

HR Analysis Comment

No Comment.

Recommendation 7.2

An independent board should oversee the NDIA. The board should comprise people chosen for their commercial and strategic skills and expertise in insurance, finance and management.

- *As specified in the CAC Act, the board should not be constituted to be representative of particular interest groups, including governments, disability client or service provider groups.*

The Australian Government and the state and territory governments should together establish an appointment panel comprising people with skills and experience in these areas, including people with a clear interest in disability policy issues.

- *The panel should nominate candidates for each board vacancy against tightly specified selection criteria set down in the Act governing the NDIA. Appointments should be based on the majority decision of governments.*

The Australian Government, with the agreement of the majority of state and territory governments, should have the power to remove the chair or dissolve the board as a whole.

The board would have the sole power to appoint the CEO and to sack him or her if necessary, without authorisation from governments.

HR Analysis Comment

Recommendation 7.2 proposes the establishment of a board governing the NDIA. The recommendation also proposes the creation of a panel and selection criteria to select people to sit on this proposed board. Beyond specifying that the proposed selection panel should contain “people with a clear interest in disability policy issues,” there is no commitment to include people with disability, or organisations representing people with disability, in either the selection panel or the board itself.

Article 4.3 CRPD obligates States parties to ensure that “in the development and implementation of legislation and policies to implement the present Convention, and in other decision-making processes concerning issues relating to persons with disabilities, States Parties shall closely consult with and actively involve persons with disabilities, including children with disabilities, through their representative organisations.” This would imply that people with disability and representative organisations would need to be actively involved in the governance and decision making where that decision making impacts upon the lives of people with disability. As such this Recommendation does not reflect the requirements under Article 4.3 CRPD. These requirements are reinforced by the consideration at (o) in the Preamble to CRPD, which says that “persons with disabilities should have the opportunity to be actively involved in decision-making processes about policies and programmes, including those directly concerning them.”

An expert advisory board that governs a national scheme delivering life long care and support services to people with disability requires expertise in relation to the needs, delivery of supports and aspirations of people with disability in order to fulfill both the objectives of the scheme, and convention obligations. While other expertise may be required to meet legislative requirements for the NDIA, this does not preclude that this expertise may not be held by people with disability, or that the specific expertise of people with disability (as articulated in the sentence above) is not critical. The membership terms of the NDIA board should include a majority of people with disability in order to satisfy the obligations in Article 4.3 CRPD.

CRPD ➲ Article 4.3

Recommendation 7.3

The Australian Government, together with state and territory governments, should establish an advisory council. The council should provide the board of the NDIA with ongoing advice on its activities and effectiveness in meeting its objectives, from the perspectives of people with disabilities, carers, suppliers of equipment and services and state and territory service providers and administrators.

- *The council should comprise representatives of each of these groups.*

HR Analysis Comment

Recommendation 7.3 proposes an advisory body comprising a range of stakeholders, including people with disability, carers, services and suppliers. The proposed advisory council does not have formal decision making powers with respect to the NDIA board.

In order to meaningfully comply with the obligations imposed by Article 4.3 CRPD, the advisory council must comprise involvement from “persons with disabilities, including children with disabilities, through their representative organisations.” As discussed above, this is reinforced by the consideration at (o) in the Preamble to CRPD, which says that “persons with disabilities should have the opportunity to be actively involved in decision-making processes about policies and programmes, including those directly concerning them.”

This would imply that there is significant, rather than tokenistic, involvement by people with disability and representative organisations, and this involvement should be 'active' – that is informed and have a meaningful impact on decision making. It is not clear that the proposed advisory body meets these requirements. Article 4.3 would require more significant involvement in governance and decision-making by people with disability.

CRPD ➲ Article 4.3

Recommendation 7.4

The arrangements between the NDIA and governments should be at arm’s length, and subject to strict transparency arrangements.

The federal Treasurer should have responsibility for the NDIA.

HR Analysis Comment

No Comment.

Recommendation 7.5

The Australian Government, with the agreement of state and territory governments, should provide the NDIA with its own legislation that specifies its objectives and functions, and its governance arrangements.

- *Financial sustainability should be a specific obligation of the board, the management and the minister, and this obligation should be enshrined in legislation. It should specifically guide any external review body (draft recommendation 7.8).*

- *An entitlement to reasonable support should be enshrined in legislation, together with details about people's eligibility for services and the range of services to be offered.*

Future changes to the legislative framework should be undertaken only by explicit changes to the Act itself, made transparently, and subject to the usual processes of community and Parliamentary scrutiny, and in consultation with all state and territory governments.

- *Such proposed legislative changes should be accompanied by an independent assessment of the impact of the changes on the sustainability of the scheme.*

HR Analysis Comment

Recommendation 7.4 proposes legislation enshrining the proposed NDIA, specifying the obligation on the NDIA board to financial sustainability and the proposed entitlement to 'reasonable support.'

Legislation should reflect CRPD requirements in relation to States parties obligations to support the “equal right of all persons with disabilities to live in the community, with choices equal to others” and “take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community.”

Recommendation 7.4 proposes enshrining in legislation the principle of ‘reasonable support’. As discussed at Recommendation 4.1, CRPD provides a framework for consideration of the capacity of States Parties (and other organisations) to provide adjustments to people with disability through the concept of ‘reasonable accommodation.’ This principle should be reflected in the NDIA / NDIS legislation.

Further, the legislation must recognise where economic, social and cultural rights to full inclusion and participation are progressively realisable. Many CRPD rights are “immediately applicable under international law” as per Article 4.2 CRPD.. This includes, for example, the independent living and inclusion requirements of Article 19 CRPD, as well as other rights relevant to the proposed NDIS, such as a right to legal capacity and support to exercise legal capacity. CRPD also specifies that a State party must take “measures to the maximum of its available resources and, where needed, within the framework of international cooperation, with a view to achieving progressively the full realisation” of economic, social and cultural rights. This means the proposed NDIS must be fully compliant with civil and political rights, and make provision for progressive realisation of economic, social and cultural rights to the maximum of available resources. Recognising immediately realisable rights in legislation, and building in long term commitments to progressive realisation of full inclusion rights for people with disability should be part of the legislative framework.

The capacity for reform of legislation in future years is important. Independent assessment must also evaluate the effectiveness of the scheme for people with disability, including active consultation with children and adults with disability (as per Article 4.3).

CRPD ➲ Article 4, Article 19

Recommendation 7.6

An independent actuarial report on the NDIA's management of the NDIS should be prepared quarterly and annually, and provided to the board, the regulator, the federal Treasurer, and to all state and territory governments. It should assess risks, particularly in regards to the capacity of the expected funding stream to meet expected liabilities within its funding framework, the source of the risks and the adequacy of strategies to address those risks.

HR Analysis Comment

No Comment at this stage.

Recommendation 7.7

A specialist unit should be established within the federal Treasury to monitor the performance of the NDIA against a range of cost and performance indicators, and report its findings annually to its minister, state and territory governments and the public.

HR Analysis Comment

Recommendation 7.7 recommends forming a unit within Treasury to monitor the performance of the NDIA, not only in relation to financial sustainability but against 'performance indicators.' Independent monitoring must also assess the effectiveness of the scheme for people with disability, including active consultation with people with disability and children with disability (as per Article 4.3). Article 33 CRPD obligates states parties to monitor progress against Convention goals and the realisation of rights. As the NDIS will be a cornerstone towards achieving full participation and rights for many people with disability, performance measurement would ideally work towards fulfilling CRPD monitoring obligations.

Monitoring arrangements must also be supported by systemic advocacy from people with disability and organisations representing people with disability. Article 33 CRPD notes that "civil society, in particular persons with disabilities and their representative organisations, shall be involved and participate fully in the monitoring process." In line with this expectation, the Australian Human Rights Commission, in their 2010 submission to the PC review, has explicitly urged that "consideration should also be given to the possible role of an NDIS in providing a sustainable and adequate funding base for representative organisations to enable them to engage in systemic advocacy in support of identification and elimination of barriers in Australian society and monitoring of progress in implementation."

As discussed above, there is a need to adequately resource Disabled Peoples Organisations (DPOs). Article 4.3 CRPD creates an obligation requiring that "in the development and implementation of legislation and policies to implement the present Convention, and in other decision-making processes concerning issues relating to persons with disabilities, States Parties shall closely consult with and actively involve persons with disabilities, including children with disabilities, through their representative organisations." A role for DPOs is also specified in Articles 32 and Article 33 CRPD, relating to international and regional cooperation and partnership, and in implementation and monitoring of Convention obligations. Resourcing for DPOs must be an element in fully realizing rights and participation.

CRPD ➲ Article 4.3, Article 32, Article 33

Recommendation 7.8

The NDIA should be independently reviewed, initially after its first three years of operation, and every five years thereafter, with the outcomes publicly and promptly released.

HR Analysis Comment

Recommendation 7.8 proposes public periodic review of the NDIA. Independent periodic reviews must also assess the effectiveness of the scheme for people with disability, including through active consultation with people with disability and children with disability (as per Article 4.3). Periodic review must also assess the effectiveness of the NDIS in satisfying ongoing obligations under CRPD; Article 33 CRPD also stresses that "civil society, in particular persons with disabilities and their representative organisations, shall be involved and participate fully in the monitoring process."

CRPD ➲ Article 4.3, Article 33

Recommendation 7.9

The NDIA should be subject to benchmarking with other comparable corporate entities to assess its relative efficiency in its various functions, with the federal Treasury initiating benchmarking studies.

HR Analysis Comment

Efficiency measures must include assessment of the ongoing effectiveness of the NDIS in promoting full inclusion and participation for all people with disability (as per Article 19 CRPD). As per discussion above, assessment cannot be constrained to measuring 'cost effectiveness' but must primarily focus on allowing people with disability to realise their rights, and building long range commitments to progressive realisation of economic, social and cultural rights, as outlined in Article 4.2 CRPD.

CRPD ➲ Article 4.2, Article 19

Recommendation 7.10

The NDIA should establish two service charters that specify respectively the appropriate conduct of the (i) NDIA and (ii) specialist service providers and disability support organisations.

HR Analysis Comment

Recommendation 7.10 proposes the development of service charters to regulate the conduct of the NDIA and support services and organisations. These documents must be designed with respect to rights and obligations outlined in international agreements, including CRPD. Service charters should be developed through active consultation with people with disability, including children with disability (as per Article 4.3).

CRPD ➲ Article 4.3

Recommendation 7.11

The wording of the NDIA Act should limit the capacity of merits review processes to widen eligibility or entitlement. It should require that any claims by NDIA clients would need to:

- *meet a 'reasonable person' test*
- *balance the benefits to the person with a disability against the costs to the scheme, including any adverse implications for the long run sustainability of the scheme from the review outcome*
- *take into account the obligation of people with disabilities or their families to avoid decisions that unreasonably impose costs on the scheme.*

HR Analysis Comment

As discussed above, CRPD provides explicit guidance on how eligibility should be balanced against what might be reasonably accommodated. Eligibility criteria should reflect the aims of NDIS to provide support to enable the "equal right of all persons with disabilities to live in the community, with choices equal to others, and shall take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community." Long term financial sustainability can be balanced by an assessment of 'reasonable accommodation.' This test is arguably conducted not within the existing financial constraints of the program, but through an assessment of what is affordable for the community as a whole. Limits to reasonable accommodation in the short term do not challenge a long term obligation of

States parties to progressively realise full participation for people with disability – the NDIA legislation should reflect progressive realisation targets.

As per Recommendation 4.1, the following framework scope would better meet the obligations imposed by CRPD:

a) NDIS should cover supports that enable the “equal right of all persons with disabilities to live in the community, with choices equal to others, and shall take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community” (CRPD Article 19).
b) Access to these supports is subject to “reasonable accommodation” (as defined in CRPD Article 2).
c) NDIS should cover gender specific supports that “ensure the full and equal enjoyment” by women and girls with disability “of all human rights and fundamental freedoms” (CRPD Article 6)
d) However any limitation as a result of an inability of NDIS to immediately accommodate adjustments does not preclude long range commitments to progressive realisation of economic, social and cultural rights to inclusion and participation (as outlined in Article 4.2 CRPD).
e) The best interests of the child shall be a primary consideration in the design and scope of services with respect to children with disability (Article 7 CRPD).

CRPD ➲ Article 2, Article 4.2, Article 6, Article 7, Article 19.

Recommendation 7.12

The NDIA should include an internal complaints office that would:

- *be separate from the other parts of the NDIA dealing with clients and service providers*
- *hear complaints about breaches of the service charters (draft recommendation 7.10)*
- *reassess contested NDIA decisions on a merit basis.*

The office would be headed by an independent statutory officer who would review appeals made by people with disabilities and support providers against the decisions of the NDIA.

- *The NDIA legislation should create this role and specify that the officer would be independent, would act fairly and impartially, basing their decisions on the available evidence, and could not be directed in their decision-making.*
- *A person or support provider should only be able to appeal the decisions of the office on matters of law, rather than on merit, to the courts.*

The NDIA should publish the number, types and outcomes of complaints and appeals (subject to privacy protections).

HR Analysis Comment

Recommendation 7.12 proposes creating an internal review mechanism for complaints by clients and service providers to reassess decisions made by the NDIA on a merit basis and hear complaints in relation to a service charter. It is proposed that there be a right of appeal, however appeals would be only in relation to matters of law, rather than merit. Effectively this means that there would be no means to externally review a merit based decision made by the NDIA.

Article 12.1 CRPD stresses that “persons with disabilities have the right to recognition everywhere as persons before the law.” Article 12.2 calls on States parties to recognise “that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.” This would mean that individuals should enjoy the same right as others, on an equal basis, and have the right to have decisions reviewed in an independent manner, including a right to appeal decisions in the same manner as other individuals might in other spheres of social life. An inability to challenge decisions imposes a challenge to equal recognition before the law.

As discussed above, the role of the NDIA is potentially broad in seeking to support individuals towards full inclusion and participation, as per Article 19 CRPD. There are likely to be many grey areas in the scheme, including in assessment and in the scope of potential supports. An external review mechanism would be an appropriate means to test the capacity of the scheme to reasonably accommodate a broad range of adjustments for individuals.

There is scope for more detailed examination of best practice in relation to complaints processes, particularly to empower individuals to make complaints in order to both resolve breaches of service obligations, and to assist with improvements to the system. One consideration is ensuring that the system is adequately able to respond to serious complaints, including in relation to exploitation, violence and abuse. Article 16.3 CRPD stresses that “in order to prevent the occurrence of all forms of exploitation, violence and abuse, States Parties shall ensure that all facilities and programmes designed to serve persons with disabilities are effectively monitored by independent authorities.” Article 16.5 CRPD obligates States parties to “put in place effective legislation and policies, including women- and child-focused legislation and policies, to ensure that instances of exploitation, violence and abuse against persons with disabilities are identified, investigated and, where appropriate, prosecuted.” In so far as the experience of exploitation, violence and abuse disproportionately affects women and children, the equality before the law provisions in Article 15 CEDAW and the protection for exploitation and deprivation of liberty clauses of Article 36 and Article 37 CROC are relevant.

Recommendation 7.13 – the proposal to support merit review through the Administrative Appeals Tribunal below - *and* a proposal to establish an independent complaints, monitoring and review body for the NDIS, with powers to conduct own motion investigation and systemic review, would more strongly meet the obligations at Article 12 CRPD.

Again, it is worth noting that the Productivity Commission’s NDIS proposal has not defined a role for systemic and individual advocacy. Empowering individuals to speak, and to claim their rights and entitlements must be a core goal with respect to achieving full inclusion and participation. In line with Article 12, 16, 21, 24, 25 and 27 CRPD, effective advocacy will play a role in drawing attention to poor and inappropriate practice and assisting individuals to gain appropriate entitlements. As per Articles 4.3 and Article 33, systemic advocacy has a role in monitoring and drawing attention to system wide problems, in creating effective representation and in working towards change.

CRPD ➲ Article 12.1, Article 12.2, Article 16.3, Article 16.5, Article 21, Article 19, Article 33
CEDAW ➲ Article 15
CROC ➲ Article 36, Article 37

Recommendation 7.13

If the proposal in draft recommendation 7.12 for appeal processes supported by an independent statutory officer are not adopted, then the Australian Government should create a specialist arm of the Administrative Appeals Tribunal to hear appeals on merit about the NDIA's decisions subject to the constraints of draft recommendation 7.11. The Australian Government should set aside significant additional resources to fund this specialist arm and should include a larger reserve for the NDIS, calculated to take account of the higher risks of this approach.

HR Analysis Comment

Providing a capacity for external merit review of decisions made by the NDIA would more strongly meet the obligations imposed by Article 12.1 and 12.2 CRPD. See notes at 7.12

CRPD ➲ Article 12

8. Delivery of disability services

The Productivity Commission's recommendations with respect to the delivery of disability services for the proposed NDIS largely deal with data sharing and standards. This chapter deals with the delivery of disability services.

Recommendation 8.1

The NDIA should support consumer decision-making by providing:

- *a centralised internet database of service providers that indicates the ranges of products and services, price, availability and links to measures of performance and quality*
- *well resourced and effective provision of advice and information to clients, as well as monitoring of their wellbeing. These services should be graduated in terms of the needs of the client and concentrated at key points, such as when entering the disability system or important transition periods.*

HR Analysis Comment

Recommendation 4.14 deals with the provision of information to "support consumer decision-making."

CRPD provides guidance in relation to the provision of information to people with disability. There is a general obligation in CRPD at Article 4.1(h) for States parties to "provide accessible information to persons with disabilities about mobility aids, devices and assistive technologies, including new technologies, as well as other forms of assistance, support services and facilities." The accessibility of information must recognise the need for information in numerous formats, as per Article 21 (b) , and Article 26.3, with a need for statistics and data collection to be accessible to people with disability, as per Article 31.3 CRPD.

The accessibility of information must include the provision of appropriately translated information and interpreter services, which is reinforced by obligations in CRPD at Article 30 (4) in relation to the entitlement of people with disability, "on an equal basis with others, to recognition and support of their specific cultural and linguistic identity, including sign languages and deaf culture". Article 13.2 of UN DRIP obligates States parties to ensure that "indigenous peoples can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means." Article 5 (e) (iv) ICERD obligates states parties to ensure non discrimination on the basis of race, colour, or national or ethnic origin in relation to "the right to public health, medical care, social security and social services."

Article 22.2 CRPD stresses the importance of equal privacy protections being available to people with disability with respect to collection of personal, health and rehabilitation information. Sensitive information collected about people with disability must be safeguarded in accordance with this obligation.

As discussed above, there is a strong need for the NDIS to incorporate supported decision making in order to recognise the legal capacity of people with disability, and facilitate effective consumer decision making. The protections in Article 12 CRPD stress the fact that States parties must recognise that all people with disability have legal capacity, and must maximally support people with disability to realise this right in order to fully satisfy the obligations imposed by Article 12 CRPD, Australia must take 'all appropriate measures' to support people with disability to exercise their legal capacity, including through supported decision making.

Advocacy also has an important role in supporting consumer decision making and information. In order to give full effect to the Article 19 CRPD obligations for equal choice, full inclusion and participation, independent representation and advice must be an element within the system, with individual models of advocacy available to support decision making 'on the ground' and systemic advocacy to engage in change and monitoring. Given the prominence given to person centred decision making in the proposed NDIS, there may also be a role for self advocacy models, and there is a very clear role for advocates in providing information.

CRPD ➲ Article 4.1 (h), Article 12, Article 21 (b), Article 22.2, Article 26.3, Article 31.3
UN DRIP ➲ Article 13.2
ICERD ➲ Article 5 (e) (iv)

Recommendation 8.2

The Australian Government should fund and develop a national system for a shared electronic record of the relevant details of NDIA clients, including assessed need, service entitlements, use and cost of specialist disability services, outcomes and other key data items with privacy safeguards.

HR Analysis Comment

As per Recommendation 8.1, Article 22.2 CRPD stresses the importance of equal privacy protections being available to people with disability with respect to collection of personal, health and rehabilitation information.

CRPD ➲ Article 22.2

Recommendation 8.3

The NDIA should develop and implement a quality framework for disability providers, which would include:

- *the development of complete, nationally consistent standards that would apply to all funded specialist service providers and disability support organisations. The NDIA should monitor compliance with these standards and other regulations through a range of instruments, including graduated and rolling audits of service providers, community visitors, senior practitioners, independent consumer surveys, complaints, surveillance by case managers and interrogation of the electronic disability record*
- *arrangements that encourage the diffusion of best practice throughout the disability sector*
- *providing consumers with information about the quality and performance of service providers on the national internet database of service providers*
- *establishing an innovation fund that providers would use for developing and/or trialling novel approaches to disability services.*

HR Analysis Comment

Recommendation 8.3 proposes the development of national services standards to guide monitoring of services and support organisations.

CRPD, including the general obligations at Article 4, provide strong guiding principles for how national standards should be framed. Article 19, which deals with living independently in the community, has direct relevance to the proposed NDIS, and Article 26 CRPD which deals with habilitation and rehabilitation is also directly relevant, particularly with respect to ensuring all people with disability have choice and support programs that enable full participation.

The proposed standards must ensure that there are equal outcomes for all people with disability, including measuring progress for different population groups, including women, people from NESB, and Aboriginal and Torres Strait Islander people. As discussed above at Recommendation 4.1, Article 6 CRPD stresses full development, advancement and empowerment rights for women with disability; these rights are supported by the equal economic, social and cultural participation rights imposed by Articles 10-14 of CEDAW. Rights for cultural and linguistic minority groups are outlined in Article 30.4 CRPD, and supported by the rights to culture and language in UN DRIP (Articles 3, 5, 8, 11, 12, 13, 14, 21, 23, 31, 33 and 34) and by the equality obligations in ICERD (particularly Articles 1 and 5). As the proposed NDIS will be delivering services to children with disability, the best interests of the child obligations at Article 7 CRPD and Article 3 CROC are relevant.

CRPD ➲ Article 4, Article 6, Article 7, Article 19, Article 26, Article 30.4
CEDAW ➲ Article 10, Article 11, Article 12, Article 13, Article 14
CROC ➲ Article 3
UN DRIP ➲ Article 3, Article 5, Article 8, Article 11, Article 12, Article 13, Article14, Article 21, Article 23, Article 31, Article 33 and Article 34
ICERD ➲ Article 1, Article 5

9. Data[2]

Provisions for data and research are important within the proposed NDIS. This chapter details the human rights implications in relation to data.

Recommendation 10.1

Prior to the implementation of the NDIS, the NDIA should design and establish extensive and robust data systems, underpinned by the associated information technology and administrative systems. The systems should be used to develop a central database that would:

- *guide financial management of the scheme, and in particular, to continuously manage risks to scheme sustainability and to pinpoint areas of inefficiency*
- *inform decisions about disability services and interventions*
- *enable performance monitoring of service providers*
- *monitor and evaluate outcomes*

Disability support organisations and service providers would be required to provide timely relevant data to the NDIA.

HR Analysis Comment

Article 31CRPD provides guidance in relation to the obligations of States Parties with respect to the collection of data and statistical information "to enable them to formulate and implement policies to give effect to the present Convention." The Article stresses the need for information to be collected in order to monitor the implementation of obligations under the Convention (Article 31.2), as well as the need to disseminate the information in an accessible format to people with disability (Article 31.3). Article 31.2 also obligates States parties to disaggregate the data "as appropriate" to support monitoring. This would imply that NDIS data would need to measure progress towards full inclusion and participation goals, with appropriate disaggregation to ensure equal progress for different people with disability, including women, people from NESB and Aboriginal and Torres Strait Islander people. In so far as NDIS supports will be delivered to children with disability, there is a role for appropriate data collection to measure the responsiveness of supports to meeting the best interests of children, as per Article 3 CROC.

Article 22.2 CRPD stresses the importance of equal privacy protections being available to people with disability with respect to collection of personal, health and rehabilitation information.

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[2] Comment is made on recommendation 9.1 dealing with "Disability within the Indigenous Community" in Chapter 12 on Equity Considerations

CRPD ➲ Article 22.2, Article 31
CROC ➲ Article 3

Recommendation 10.2

The NDIA should establish an independent research capacity under the NDIS. It should determine how research is undertaken and the research agenda, following public consultation.

HR Analysis Comment

As per discussion at Recommendation 10.1, Article 31 provides guidance with respect to data collection, and emphasizes the need for data to enable State's parties "to formulate and implement policies to give effect to the present Convention." A focus of research and data collection should be aimed at implementation of each element of the Convention, including benchmarking and measurement of progress over time. CRPD also stresses an ongoing role for people with disability in having control of the research agenda (Article 4.3) and in being involved in monitoring activities relating to the Convention (Article 33.3).

CRPD ➲ Article 4.3, Article 31, Article 33.3

Recommendation 10.3

The NDIA should make relevant data, research and analysis publicly available, subject to confidentiality, privacy and ethical safeguards.

HR Analysis Comment

Recommendation 10.3 proposes making relevant data, research and analysis publicly available.

Information provision must comply with obligations in CRPD at Article 4.1(h); Article 21, and Article 26.3, with a need for statistics and data collection to be accessible to people with disability, as per Article 31.3 CRPD. This includes provision of appropriately translated information and interpreter services. Article 21 and Article 30.4 CRPD provide explicit guidance in relation to the need to provide information in accessible formats, including Braille and sign language. As discussed above, Article 13.2 of UN DRIP obligates States parties to ensure that "indigenous peoples can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means." Article 5 (e) (iv) ICERD obligates states parties to ensure non discrimination on the basis of race, colour, or national or ethnic origin in relation to "the right to public health, medical care, social security and social services."

Article 22.2 CRPD stresses the importance of equal privacy protections being available to people with disability with respect to collection of personal, health and rehabilitation information.

CRPD ➲ Article 4.1 (h), Article 21, Article 22.2, Article 26.3, Article 30.4, Article 31
UN DRIP ➲ Article 13.2
ICERD ➲ Article 5 (e) (iv)

Recommendation 10.4

In implementing draft recommendation 10.1, the NDIA should determine after consultation with relevant stakeholders, including the Australian Privacy Commissioner:

- *the key actuarial information needed to underpin sound scheme management*
- *data standards, definitions, terminology and collection processes*
- *data reporting standards, taking into account the Australian Government's initiatives for standard business reporting*
- *arrangements for achieving inter-connectedness of information technology systems among the NDIA, other relevant government agencies and service providers*
- *rules for accessing data, including confidentiality and privacy safeguards*
- *arrangements for integrating data and associated information technology and administrative systems with eHealth initiatives.*

The NDIA should then establish data collection and associated IT and administrative systems that link all agencies and service providers within the disability system.

HR Analysis Comment

As discussed at Recommendation 10.1, Article 22.2 CRPD stresses the importance of equal privacy protections being available to people with disability with respect to collection of personal, health and rehabilitation information as well as the need for people with disability to be consulted in these processes, as per Article 4.3 CRPD. .

CRPD ➲ Article 4, Article 22.2

10. Early intervention

The Productivity Commission has made recommendations with respect to early intervention for the proposed NDIS. This chapter deals with the question of early intervention.

Recommendation 11.1

Early intervention approaches used by the NDIA should draw on evidence of their impacts and be based on an assessment of the likelihood of cost-effectiveness. NDIS funding for early intervention should be additional to that allocated to clients for their ongoing care and support and should not be able to be cashed out under self-directed care packages.

HR Analysis Comment

Recommendation 11.1 proposes a model for funding early intervention which would be based on 'cost effectiveness”:

> In general, the overarching objective of early intervention is to incur expenditure on a particular intervention today that, not only improves individual outcomes beyond that which would occur in the absence of the intervention but, lowers the costs and impacts associated with the disability for individuals and the wider community over the longer-term. (p11.4)

As discussed above at Recommendation 4.1, cost utility on its own is an inadequate rationale for the funding of disability supports with respect to CRPD obligations.

Article 26 CRPD for example provides extensive guidance on the need for States Parties to “take effective and appropriate measures, including through peer support, to enable persons with disabilities to attain and maintain maximum independence, full physical, mental, social and vocational ability, and full inclusion and participation in all aspects of life.” The Article does not specify that the utility of expenditure on these supports should be a consideration. There is a role for consideration of the reasonable cost of adjustments within the ‘reasonable accommodation’ principle defined at Article 2 CRPD as “necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.” However this concept of reasonable accommodation does not extend to funding services solely on the basis of a utility measure: for example it would be at odds with CRPD obligations to only provide services to people who can demonstrate future work ability; similarly there would be an inconsistency with regards to Convention obligations to only provide funding for early intervention supports that would achieve a reduction in future expenditure on supports.

In order to satisfy CRPD obligations, the rationale for funding early intervention must be to enable full inclusion and participation. Article 7 CRPD and Article 3 CROC impose further obligations with respect to the best interests of the child.

At Recommendation 4.1 the following framework for setting the scope of funded services was proposed.

a) NDIS should cover supports that enable the “equal right of all persons with disabilities to live in the community, with choices equal to others, and shall take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community” (CRPD Article 19).
b) NDIS should cover gender specific measures and supports that “ensure the full and equal enjoyment” by women and girls with disability “of all human rights and fundamental freedoms” (CRPD Article 6)
c) Access to these supports is subject to “reasonable accommodation” (as defined in CRPD Article 2).
d) However any limitation as a result of an inability of NDIS to immediately accommodate adjustments does not preclude long range commitments to progressive realisation of economic, social and cultural rights to inclusion and participation (as outlined in Article 4.2 CRPD).
e) The best interests of the child shall be a primary consideration in the design and scope of services with respect to children with disability (Article 7 CRPD).

This could similarly guide early intervention services and provide a stronger basis to meet international obligations.

CRPD ➲ Article 2, Article 6, Article 4.2 CRPD, Article 7, Article 19, Article 26
CROC ➲ Article 3

Recommendation 11.2

The NDIA should build an evidence base on early intervention. It should commence this task by identifying, in consultation with stakeholders, existing or potentially promising approaches for further research.

HR Analysis Comment

Note views as per comments at Recommendation 11.1. CRPD stresses an ongoing role for people with disability in having control of the research (Article 4.3) and in being involved in monitoring activities relating to the Convention (Article 33.3).As per Article 31.2, data should be “disaggregated, as appropriate, and used to help assess the implementation of States Parties' obligations under the present Convention and to identify and address the barriers faced by persons with disabilities in exercising their rights.”

CRPD ➲ Article 4.3, Article 31.2, Article 33.3

11. National Injury Insurance Scheme[3]

The PC has proposed the development of a companion scheme to the NDIS, dealing with catastrophic injury. This chapter focuses on the human rights implications of these recommendations.

Recommendation 16.1

State and territory governments should establish a national framework in which state and territory schemes would operate — the National Injury Insurance Scheme. The NIIS would provide fully-funded care and support for all catastrophic injuries on a no-fault basis. The scheme would cover catastrophic injuries from motor vehicle, medical, criminal and general accidents. Common law rights to sue for long-term care and support should be removed.

HR Analysis Comment

Recommendation 16.1 proposes the establishment of a National Injury Insurance Scheme, providing support for people who have experienced impairment as a result of a catastrophic injury. As with the NDIS, the proposed NIIS must comply with CRPD obligations and promote the “equal right of all persons with disabilities to live in the community, with choices equal to others” and facilitate “full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community” (CRPD Article 19). The design of the proposed scheme must include active consultation with people with disability and children with disability (as per Article 4.3).

CRPD ➲ Article 4.3, Article 19

Recommendation 16.2

State and territory governments should fund catastrophic injury schemes from a variety of sources:

- *compulsory third party premiums for transport accidents*
- *municipal rates and land tax for catastrophic injuries arising for victims of crime and from other accidents (excluding catastrophic medical accidents)*

Once the NIIS is fully established, the Australian Government should examine the scope to finance catastrophic medical accidents from re-weighting government subsidies and doctors’ premium contributions.

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[3] No analysis has been put forward in this report on chapters 12-15 and 17 of the PC Draft Report.

HR Analysis Comment

No comment

Recommendation 16.3

The NIIS should be structured as a federation of separate state catastrophic injury schemes, which would include:

- *consistent eligibility criteria and assessment tools, and a minimum benchmarked level of support*
- *consistent scheme reporting, including actuarial valuations and other benchmarks of scheme performance*
- *shared data, cooperative trials and research studies*
- *elimination of any unwarranted variations in existing no-fault schemes.*

State and territory governments should agree to a small full-time secretariat to further the objectives outlined above. The NIIS and the NDIA should work closely together.

HR Analysis Comment

See discussion at Recommendation 7.2 in relation to consultation and participation obligations under CRPD with regard to governance of the NDIS. Article 4.3 CRPD provides that active input from people with disability should be an element in the administration of the NIIS, and should be reflected in the governance arrangements of the scheme.

CRPD ➲ Article 4.3

Recommendation 16.4

State and territory governments should consider transferring the care and support of catastrophic workplace claims to the NIIS through a contractual arrangement with their respective workers' compensation schemes, drawing on the successful experiences of Victoria's Worksafe arrangements with the Transport Accident Commission.

HR Analysis Comment

No comment at this stage.

Recommendation 16.5

The initial priority for the NIIS should be the creation of no-fault accident insurance schemes covering catastrophic injuries arising from motor vehicle and medical accidents in all jurisdictions, with schemes in place by 2013. Other forms of catastrophic injury should be covered by at least 2015.

An independent review in 2020 should examine the advantages and disadvantages of:

- *widening coverage to replace other heads of damage for personal injury compensation, including for pecuniary and economic loss, and general damages*
- *widening coverage to the care and support needs of non-catastrophic, but still significant, accidental injuries, except where:*
  - *the only care needed can be provided by the health sector*
  - *the injuries arose in workplaces covered by existing workplace insurance arrangements*
- *merging the NIIS and the NDIS.*

HR Analysis Comment

Arrangements must ensure consistency of entitlement to all people with disability on an equal basis with others, in line with independent living and full participation (Article 19), equality and non discrimination obligations of CRPD (Article 5).

CRPD ➲ Article 5, Article 19

12. Equity Considerations

There are a number of equity considerations that flow from the proposed NDIS, with potential implications for meeting human rights obligations. This chapter examines and summarises issues relevant to women with disability, Aboriginal and Torres Strait Islander people with disability, people from NESB with disability and children with disability.

Women with Disability

The Draft Report does not substantively focus on issues relevant to women with disability, including the challenges that may be involved with ensuring equitable outcomes for women with disability through the proposed NDIS. The PC also fails to acknowledge the inadequacies of the current support system, including the significant underutilization of key disability support types by women, as evidenced by a range of measures, including the Productivity Commission's own annual *Report on Government Services.*

Full and equal participation is a right of women. Article 6 CRPD stresses full development, advancement and empowerment rights for women with disability, and these rights are supported by the equal economic, social and cultural participation rights imposed by Articles 10-14 of CEDAW.

The problems with the current service system highlight that many supports are either inaccessible, or not relevant to women with disability. For example women with disability who might require supports to enable them to access their reproductive rights, in particular to have and raise children, and be part of families, are likely to be poorly served by the limited range of current supports. In this regard, Article 16 (e) of CEDAW is directly relevant, since it obligates States parties to recognise the right of women "to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights." There is clearly a need to review and broaden the scope of the existing disability support system to meet the diverse needs of women with disability, in order to facilitate full inclusion and participation on an equal basis. Further, existing services need to improve their responsiveness with respect to women with disability. For example it is documented that women with disability have a poor interaction with specialist employment services. A stronger focus on building equal employment outcomes for women is required to address current disparities between men and women: for example women with disability are less likely to be in the paid workforce and have lower incomes than disabled men and women in general.

In addition to providing a broader scope for potential support services, there needs to be a stronger understanding of the limitations of existing 'mainstream' services in responding to women with disability. For example in many areas, public and crisis accommodation services remain inaccessible to many women with disability. Adjustments to facilitate access to secure accommodation support may enable women with disability to more fully access rights to full inclusion and participation. The proposed NDIS has the capacity to allow individuals to respond flexibly to these needs. However a blanket exclusion on the provision of housing support through the NDIS may have the effect of excluding women with disability from accessing these rights to inclusion on an equal basis with others.

Other areas of concern are the assumptions in the PC Draft Report that are made with respect to the ‘natural supports’ that will be provided by carers. It is acknowledged that women with disability, like other women, share the burden of responsibility for unpaid work in the private and social spheres, including for example, cooking, cleaning, caring for children and relatives. Women in Australia spend almost three times as many hours per week looking after children as men; and do two thirds of the unpaid caring and domestic work in Australian households (AHRC, 2010). Given the high proportion of carers who are women, applying a concept of ‘natural supports’ would be potentially discriminatory towards women (including women with disability who are carers), and at odds with Australia’s obligations under Article 11.2c of CEDAW which stress the need for States Parties to “encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life.”

Similarly, the proposed restrictions on payments to resident family carers may be discriminatory towards women, including women with disability who are carers. A blanket exclusion of otherwise appropriate and willing female family members from paid care would appear at odds with obligations under Article 11 CEDAW, including provisions for ‘the right to the same employment opportunities, including the application of the same criteria for selection in matters of employment” at Article 11(b) and “the right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value” at Article 11 (d). In so far as women with disability may also be carers of people with disability, an exclusion of family carers from paid support work under NDIS would be at odds with the general obligations at Article 6 relating to women with disability, as well as the specific provisions in Article 26 (b) to protect “the rights of persons with disabilities, on an equal basis with others, to just and favourable conditions of work, including equal opportunities and equal remuneration for work of equal value.”

There were concerns expressed in the analysis above on the proposed application of co-payments for older people with disability who reach retirement age. The rationale for across the board age discrimination with respect to co-payments is questionable, and introduces equity concerns for many people with disability, including women. It is conceivable that people with disability who have not participated in the workforce through most of their lives, or have only been able to gain low pay employment, or have socially contributed in other ways including through the provision of care, will be in a position at old age of having limited assets to contribute to their own aged care. The Australian Human Rights Commission has also acknowledged that current average superannuation payouts for women are less than half that received by men (2010). Article 28 (b) CRPD obligates States parties to “ensure access by persons with disabilities, in particular women and girls with disabilities and older persons with disabilities, to social protection programmes and poverty reduction programmes” and “to ensure equal access by persons with disabilities to retirement benefits and programmes” (Article 28 (e)). This would imply that the arbitrary application of co-payments on the basis of age, particularly where the rationale of assumed asset accumulation is erroneous, would be at odds with the equal access provisions of Article 28(e) CRPD. However, it is acknowledged, as discussed by the Commission, that caps and means tests applying to co-contributions in the aged care system may mean that some people with disability would not need to make payments.

A further concern area is how the proposed NDIA will deal with complaints, particularly serious complaints that relate to violence, abuse and exploitation. Article 16.3 CRPD stresses that “in order to prevent the occurrence of all forms of exploitation, violence and abuse, States Parties shall ensure that all facilities and programmes designed to serve persons with disabilities are effectively monitored by independent authorities.” Article 16.5 CRPD obligates States parties to “put in place effective legislation and policies, including women- and child-focused legislation and policies, to ensure that instances of exploitation, violence and abuse against persons with disabilities are identified, investigated and, where appropriate, prosecuted.” In so far as the experience of exploitation, violence and abuse disproportionately effects women, the equality before the law provisions in Article 15 CEDAW are relevant.

The NDIS could potentially enable people with disability to exercise control over key decision-making with respect to support arrangements. As discussed above at Recommendation 6.7, it is not clear how the proposed NDIA will make decisions on who can take advantage of self-directed funding arrangements. It is certainly a concern that there is potential for discrimination in who gets a right of self control depending on how the criteria is set. It is worth noting that many women with disability are excluded from participating in decisions that affect their lives on a daily basis, with stereotypes of passivity, compliance, incompetence and irrationality being clear indicators of the attitudinal barriers faced by women with disability. These perceptions often result in women with disabilities being denied the right to participate in decision-making processes that affect their lives.

Finally, it is worth noting that the NDIS provides an opportunity to dramatically improve the responsiveness of the disability support system in relation to women. It is notable that the PC Report does not propose any specific measures or frameworks that would systematically improve rights recognition for women with disability. Use of specific measures to accelerate full realisation of rights is in agreement with Article 4 CEDAW

Aboriginal and Torres Strait Islander People with Disability

The Productivity Commission devotes a chapter of the Draft Report to examining the promoting inclusion to Aboriginal and Torres Strait Islander people with disability. Recommendation 9.1 is as follows:

> *The Australian Government and state and territory governments should consider the feasibility of overcoming the barriers to service delivery in the NDIS for Indigenous people with a disability by:*
>
> - *fostering smaller community-based operations that consult with local communities and engage local staff, with support from larger experienced service providers*
> - *employing Indigenous staff*
> - *developing the cultural competency of non-Indigenous staff.*
>
> *In its initiatives for delivering disability supports to Indigenous people, the NDIS should be mindful of the wider positive measures addressing Indigenous disadvantage being adopted throughout Australia.*

In many respects Recommendation 9.1 represents a positive step forward in acknowledging the need for a response to the issues facing Aboriginal and Torres Strait Islander people with disability, and recognising that the proposed NDIS is unlikely to meet the needs of different groups of people, without employing a range of different strategies. In this sense, Recommendation 9.1 broadly meets the goals of Article 21.2 UN DRIP, which specifies that "States shall take effective measures and, where appropriate, special measures to ensure continuing improvement of their economic and social conditions. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities."

However, Recommendation 9.1 does not correlate strongly with the self determination goals of UN DRIP. Article 3 UN DRIP specifies that "Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." The self determination requirements of UN DRIP are specified with respect to economic and social realisation at Article 23:

> Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.

While Recommendation 9.1 suggests the possibility of Aboriginal and Torres Strait Islander control of "smaller community-based operations," the recommendation does not contain any specific commitment to Aboriginal and Torres Strait Islander control of services to Aboriginal and Torres Strait Islander people, particularly in a commitment to have "the right to determine and develop priorities and strategies for exercising their right to development" as per Article 23 UN DRIP. It is worth emphasizing that Article 18 DRIP creates a template for thinking about how Aboriginal and Torres Strait Islander self determination principles might be satisfied within the NDIS, through giving Aboriginal and Torres Strait Islander people "the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions." Self determination may be realised by the use of a community development approach to supporting Aboriginal and Torres Strait Islander people with disability, through building supports within the community and networks so that the person with disability is supported in culturally appropriate ways.

It is notable that Recommendation 9.1 does not contain any particular commitment to maintain Aboriginal and Torres Strait Islander values, customs, language and culture in the context of the delivery of NDIS services. If cultural barriers are a reason for poor access to services (as discussed by the Commission at 9.12) then it can be argued that a more effective service system will need to work within the context of the culture, values and language of potential Aboriginal and Torres Strait Islander consumers, and be in control and governed by them. Article 31 UN DRIP stresses that "Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions." It is also notable that Recommendation 9.1 does not propose provision for interpreting and translating services, even though the Commission acknowledges in its Draft Report that "many Indigenous Australians, particularly in remote areas and among older people, language can be a barrier to accessing services, or can lead to misunderstandings or ineffective service provision" (p9.14). Article 13.2 UN DRIP contains a specific obligation for States parties "to ensure that indigenous peoples can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means." This is reinforced by Article 21 and Article 30.4 CRPD, which provide explicit guidance in relation to the need to provide information in accessible formats.

Throughout this report, there were a number of concerns noted for Aboriginal and Torres Strait Islander people with disability with respect to the proposed NDIS. One area that must be highlighted relates to the scope of services available to Aboriginal and Torres Strait Islander people with disability that are necessary to fulfill the full inclusion and participation obligations of Article 19 CRPD. Because Article 19 CRPD refers to inclusion across a range of spheres – economic, social and cultural – there is a strong requirement for the proposed support system to enable participation in the broadest possible sense, including, enabling Aboriginal and Torres Strait Islander people with disability to take an active role within their own linguistic and cultural communities. It also means that the proposed NDIS must avoid introducing cultural bias in the scope of services provided. For example it was argued in relation to Recommendation 4.4 that the application of restrictive criteria in relation to therapies that have not been subject to clinical trial may pose a challenge to Aboriginal and Torres Strait Islander people with disability who may request traditional forms of rehabilitation therapy. A refusal to support traditional remedies and rehabilitation practices would be against the obligations imposed by Article 24 UN DRIP, which states that Aboriginal and Torres Strait Islander peoples have the right to their traditional medicines and to maintain their health practices.

The concept of 'natural supports' used within the assessment process is potentially problematic for Aboriginal and Torres Strait Islander people with disability, particularly those with large and diverse family structures and different expectations in relation to care roles. Article 30.4 CRPD stresses cultural rights for people with disability, while Article 35 of UN DRIP explicitly specifies that "Indigenous peoples have the right to determine the responsibilities of individuals to their communities." Similarly, the proposed blanket exclusion of resident family members from being paid support workers under the NDIS could be discriminatory implications for Aboriginal and Torres Strait Islander people with disability and their carers. The exclusion has potentially discriminatory implications for households with large families, including for Aboriginal and Torres Strait Islander people where large co-resident households, strong non anglo-celtic family structure, and robust family involvement is a cultural right, particularly in maintaining cultural and linguistic identity (as per Article 30 CRPD; Articles 11, 12, 13, 15 and 16 UN DRIP; and Article 5 ICERD).

Assessment processes are another potential concern area for Aboriginal and Torres Strait Islander people with disability. The PC has proposed that the assessment phase will be used to determine if the person with disability or carer can "make reasonably informed choices of services" and "manage the administrative and financial aspects of funding if they wish to oversee these aspects by themselves." This appears particularly open to discriminatory processes, with potentially arbitrary factors affecting the decisions made by NDIA assessors. For example given past experiences of discrimination, Aboriginal and Torres Strait Islander people may be refused the right to direct their own care because of a perceived lack of capacity. The equality and non discrimination obligations Article 2 ICERD and Article 2 UN DRIP provide guidance in relation to ensuring that an assessment process does not produce adverse effects for Aboriginal and Torres Strait Islander people participating in the NDIS.

The Commission has further proposed that assessment should be conducted by an independent assessor with no “longstanding connection.” As noted above, there is a potential conflict between the need for ‘independence’ of assessors and the need to provide assessment “based on the multidisciplinary assessment of individual needs and strengths” as per Article 26(a) CRPD. In some areas, it may not be feasible for Aboriginal and Torres Strait Islander people with disability to be assessed by someone not known to them. For example there might be only a limited number of culturally competent assessors available to conduct an assessment for people with disability from some Aboriginal and Torres Strait Islander people with disability. Similarly, people with disability in rural and remote areas may not be able to access assessment that does involve an assessor who has a ‘longstanding connection.’ Self-assessment is particularly important in this context. It is also acknowledged that distrust of government officers and services compromise access to these supports for Aboriginal and Torres Strait Islander people with disability: again, self assessment could potentially offer a more culturally competent form of assessment.

People from NESB with Disability

The PC Draft Report does not substantively focus on issues relating to people from NESB with disability, including how the proposed NDIS might realise full inclusion and participation outcomes for people from diverse cultural and linguistic backgrounds. The proposed scheme must respond to current inequalities in access and outcomes for people from NESB with disability, as evidenced by a range of measures, including the Productivity Commission’s own annual *Report on Government Services.* CRPD provides guidance in relation to equality and non discrimination principles (Article 5) and in the obligation it places on States to recognise cultural rights (Article 30.4) ICERD also places obligations on States “to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law” and the “enjoyment of….economic, social and cultural rights” …in particular… “the right to public health, medical care, social security and social services” at Article 5(e) (iv).

A concern area affecting people from NESB with disability is the proposed restriction of NDIS availability to Australian residents. This is at odds with the obligations of CRPD, which do not specify residency as grounds for differential obligation with regard to States parties responsibilities to support the “equal right of all persons with disabilities to live in the community, with choices equal to others.” Exclusion on the delivery of support services to non residents who have been granted refugee status would be contrary to the obligations of Article 24 of CRSR. An exclusion of supports to non resident children with disability would be at odds with international obligations, since the “primary consideration” for the design of policies must be the best interests of the child, as outlined in Article 7 CRPD and Article 3 CROC. Finally, the broad provisions of Article 3 and Article 9 of ICESCR apply to all persons with respect to the universal right to social security and social insurance, with explicit guidance offered to developed nations at Article 2.2 that the rights in the Covenant are to be “exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

A significant omission within the PC Report is a commitment to providing non English language support to people from diverse cultural and linguistic backgrounds, including people who use sign languages. Interpreter and translator support is essential for enabling diverse people with disability to make informed choices and realise their rights to full inclusion. Article 21 and Article 30.4 CRPD provide explicit guidance in relation to the need to provide information in accessible formats, including Braille and sign language. As discussed above, Article 13.2 of UN DRIP obligates States parties to ensure that "indigenous peoples can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means." Article 5 (e) (iv) ICERD obligates states parties to ensure non discrimination on the basis of race, colour, or national or ethnic origin in relation to "the right to public health, medical care, social security and social services." It is worth noting that the Productivity Commission's parallel inquiry into aged care arrangements has recommended the delivery of interpreter and translation services to consumers from non-English speaking backgrounds (Recommendation 9.1 and 9.2, *Caring for Older Australians*).

Building the cultural competence of the disability support system is a significant challenge. While the PC recommends the use of a cultural competence approach with respect to Aboriginal and Torres Strait Islander people with disability at Recommendation 9.1, there is no commitment elsewhere in the Draft Report to ensuring cultural competence for all services delivered to people with disability. Cultural competence approaches are particularly relevant to the development of assessment tools. Equality and non discrimination principles outlined in Article 5 CRPD need to apply fully to remove formal and informal discrimination in the application of assessment tools, particularly in ensuring that the 'toolbox' meets the needs of different people with disability. Other instruments provide guidance on the principles of equality and non discrimination to people from NESB with disability including Articles 1 and 5 ICERD, and Article 30 CROC.

In addition to the concerns expressed above in relation to culturally competent assessment, another concern area for people from NESB with disability is the entitlement to participate in self directed funding on an equal basis with others. As discussed above, there is a significant lack of detail at Recommendation 6.7 on how, and by what authority, NDIA assessors will assess the capacity of individuals to be entitled to self directed funding. It is not clear how the NDIS will take into account the "experience and skill sets" of people with disability or their carers, and there appears here to be significant scope for arbitrary factors to affect an offer of self directed funding, compromising the ability of the proposed scheme to provide equal choice to all people with disability, as per Article 19, CRPD. Given past experiences of discrimination, there appears to be a risk that particular groups of people with disability – including those from NESB – may be refused the right to direct their own care because of a perceived lack of capacity. The equality and non discrimination obligations at Article 5 CRPD and Article 2 ICERD provide guidance in relation to ensuring that an assessment process does not produce adverse effects for people from NESB participating in the NDIS.

The proposed exclusion of resident family members from being paid carers under the proposed NDIS is potentially discriminatory to people from NESB with disability. An exclusion of resident family members from receiving payments for care and support has potentially discriminatory implications for households with large families, including for people from NESB with disability where strong non anglo-celtic family structure, and family involvement is a cultural right, particularly in maintaining cultural and linguistic identity (as per Article 30 CRPD; Article 30 CROC; and Article 5 ICERD). Article 19 CRPD contains a strong obligation to recognise that "people with disabilities have the opportunity to choose their place of residence and where and with whom they live on an equal basis with others and are not obliged to live in a particular living arrangement." It would be at odds with the obligations imposed by Article 19 for a blanket exclusion of resident family carers to prevent some people with disability, including those with large resident families, from appropriate care and support, or force people with disability in these situations to make less than preferred arrangements in order to secure care and support (such as the use of culturally inappropriate care, or the separation of families in order to gain eligibility for NDIS). In so far as people from NESB with disability may also be carers of people with disability, an exclusion of family carers from paid support work under NDIS would be at odds with the specific provisions in Article 26 (b) to protect "the rights of persons with disabilities, on an equal basis with others, to just and favourable conditions of work, including equal opportunities and equal remuneration for work of equal value."

Finally, there is significant scope to progressively realise full inclusion and participation for people from NESB with disability through the proposed NDIS. Article 1.4 and Article 2.2 ICERD authorise special measures to accelerate realisation of rights for ethnic minorities.

Children with Disability

One of the key challenges for the proposed NDIS is how the new system will respond to children with disability. The concept of the 'best interests of the child,' as per Article 3 CROC, imposes obligations on States parties to ensure that all policies and services support the full development, participation and rights of children. Article 3.1 obligates the proposed NDIS to ensure that "in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration." This obligation is reinforced by a specific Article in CRPD, which emphasises that "in all actions concerning children with disabilities, the best interests of the child shall be a primary consideration" (Article 7.2) and obligates States parties to "take all necessary measures to ensure the full enjoyment by children with disabilities of all human rights and fundamental freedoms on an equal basis with other children" (Article 7.1). This means that children may be entitled to a broad range of targeted adjustments, regardless of other factors, where these supports are in the child's best interest. Article 3 (h) CRPD further places an obligation on States parties to respect "the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities."

The 'best interests of the child' potentially also affects the scope and eligibility for NDIS supports in relation to children with disability. For example, the provision of supports, and specific support types, must aim to enable full participation on an equal basis with other children, and be in the best interests of the child, potentially broadening the scope of available supports through the NDIS. There are some implications for eligibility as well. The proposed blanket exclusion on non resident children from NDIS supports is at odds with international obligations, since the “primary consideration” for the eligibility policy with respect to children must be the best interests of the child as outlined in Article 7 CRPD and Article 3 CROC. It was stated above in this report at Recommendation 4.1 that the best interests of the child should be a blanket consideration in the design of the scope of NDIS services with respect to children with disability.

The NDIS proposes a concept of ‘natural supports’ – ie informal care arrangements within the home - that would be taken into account in the assessment process. This is potentially problematic for children where there is an assumption that family members will be able to provide *all* the necessary care and support adequate to meet their ‘best interests.’ It can be accepted that not all family carers are willing or able to provide all necessary care, therefore an assumption of ‘natural supports’ as part of the assessment process for NDIS would work against obligations in CRPD relating to the best interests of children with disability (Article 7), also expressed in Article 3 of CROC. Provision of supports to parents as required in order to assist them to fulfill “child rearing responsibilities” is consistent with Article 18.2 CROC.

Similarly, the proposed exclusion of family members from being paid carers has implications for children with disability who are eligible for services under the proposed NDIS. Broadly speaking, support arrangements must conform with the ‘best interests of the child’ obligations in Article 7 CRPD and Article 3 CROC, which imply that the NDIS must ensure provision for paid support by a resident family carer where it is shown that this would be the most appropriate source of support in order to satisfy the best interests of the child with disability. Article 23 CRPD expresses the right to family for people with disability, including an obligation at Article 23.3 for States Parties to “ensure that children with disabilities have equal rights with respect to family life. With a view to realizing these rights, and to prevent concealment, abandonment, neglect and segregation of children with disabilities, States Parties shall undertake to provide early and comprehensive information, services and support to children with disabilities and their families.”

There is a need for the proposed NDIS to develop strong mechanisms to protect children with disability from violence, abuse, neglect and exploitation. As discussed above, one consideration is ensuring that the system is adequately able to respond to serious complaints, including in relation to exploitation, violence and abuse. Article 16.5 CRPD obligates States parties to “put in place effective legislation and policies, including women- and child-focused legislation and policies, to ensure that instances of exploitation, violence and abuse against persons with disabilities are identified, investigated and, where appropriate, prosecuted.” In so far as the experience of exploitation, violence and abuse disproportionately affects children, the protection from exploitation and deprivation of liberty clauses of Article 36 and Article 37 CROC are relevant.

As discussed above at Recommendation 11.1, the proposal to fund early intervention services on the basis of ‘cost effectiveness’ is potentially at odds with international obligations, and relevant to children with disability, in so far as there will likely be a range of ‘early age’ targeted interventions that children are eligible for. As discussed, Article 7 CRPD and Article 3 CROC impose obligations that the best interests of the child are respected. Neither CROC nor CRPD specify that the cost utility of expenditure on supports that enable full inclusion should be a consideration. There is a role for consideration of the reasonable cost of adjustments within the ‘reasonable accommodation' principle defined at Article 2 CRPD. However this concept of reasonable accommodation does not extend to funding services solely on the basis of a utility measure: for example it would be at odds with CRPD and CROC obligations to only provide services to children who show future work ability; or only fund early intervention that would allow participation in education (without supporting inclusion in other spheres of life); similarly there would be an inconsistency with regards to Convention obligations to only provide funding for early intervention to children based on the proviso that this would achieve a reduction in future expenditure on supports. In order to satisfy CRPD and CROC obligations, the rationale for funding early intervention to children must be to enable full inclusion and participation and meet the best interests of the child.

13. Other Considerations

There were five particular concerns that required further clarification in relation to the proposed NDIS: Disabled Persons Organisations (DPOs), advocacy, people with chronic health conditions and psychosocial disability, legal capacity and restrictive practices. This chapter explores these issues with respect to rights obligations.

Disabled Peoples Organisations (DPOs)

Disabled Persons Organisations (DPOs) are organisations that are run and controlled by a majority of persons with disabilities. CRPD places strong obligations on States parties to ensure the involvement of people with disability in decision making and control in relation to decisions that effect people with disability. Preamble (o) CRPD states clearly that “persons with disabilities should have the opportunity to be actively involved in decision-making processes about policies and programmes, including those directly concerning them.” Article 3 (a) provides a general principle that requires States parties to respect the “inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons.” Article 4.3 CRPD further creates an obligation requiring that “in the development and implementation of legislation and policies to implement the present Convention, and in other decision-making processes concerning issues relating to persons with disabilities, States Parties shall closely consult with and actively involve persons with disabilities, including children with disabilities, through their representative organisations.”

A role for DPOs is also specified in Articles 32 and Article 33 CRPD. Article 32 imposes an obligation on States Parties to “recognize the importance of international cooperation and its promotion, in support of national efforts for the realisation of the purpose and objectives of the present Convention, and will undertake appropriate and effective measures in this regard, between and among States and, as appropriate, in partnership with relevant international and regional organisations and civil society, in particular organisations of persons with disabilities.” Article 33.3 specifies a role in Convention monitoring and implementation, requiring that “civil society, in particular persons with disabilities and their representative organisations, shall be involved and participate fully in the monitoring process.”

Taken together, the above obligations require support including adequate resourcing to enable DPOs to represent people with disability, facilitate effective consultation with people with disability, promote international and regional partnerships, and support ongoing implementation and monitoring of human rights for people with disability. There is a connection between resourcing for DPOs and resourcing for advocacy (discussed below), particularly in relation to implementation and monitoring obligations.

Advocacy

The role of advocacy remains undefined within the proposed NDIS. The PC Report contains no detailed discussion of advocacy arrangements under the new system, nor provides any recommendation committing to continued support and resourcing for advocacy. Similarly, there is no discussion of resourcing the obligation to consult people with disability through their representative Disabled Persons Organisations

Advocacy is mentioned at various points through the PC Report, although sometimes the messages on the role of advocacy within the NDIS appear contradictory or out of step with current understandings. Some of these different understandings include:

- Table 1 (p10) of the PC Report proposes that the proposed NDIS would support "Strong complaints, appeals and advocacy arrangements."

- The PC Report lists advocacy as a function of "disability support organisations" (p31), along with brokerage and case management. This understanding is reinforced later in the Report where the PC proposes that "an individual could also elect to have a disability support organisation assist with case management and advocacy" (box 4.1, p4.1).

- In relation to accommodation services, there is a proposal for the NDIS to offer advocacy to public housing tenants (p4.5).

- The PC Report suggests a role for advocacy and "peak bodies" in debates about the value of new therapies (p6.19)

- The PC proposes organizing disability support services into five main groups: accommodation support, community support, community access, respite and employment services, based upon the Australian Institute of Health and Welfare (AIHW) data collection categorization (p8.5) However there is no discussion of "Advocacy, information and alternative forms of communication" also listed by the PC as an AIHW service area in this section of the Report (Box 8.2, p8.6).

- The Commission acknowledges that advocacy has played a role in providing "information and advice to people with disabilities, and highlight[ing] gaps or other problems to service providers and government agencies" (p*8.12)*

- The Commission proposes a role for advocacy in promoting access to Aboriginal and Torres Strait Islander people with disability (p9.17)

- The Commission proposes a role for advocacy groups in the implementation phase of the NDIS: "Work would be needed with interested support and advocacy groups to plan how to build confidence so that people with disabilities will exercise choice in the new arrangements. People with disabilities and their carers will be looking for information and guidance about the assessment procedures, case management, self-directed funding and complaints mechanisms. Existing disability organisations and advocacy groups should play a key role in disseminating this information (p17.6)

In lieu of a more focused discussion on the role of advocacy with respect to the proposed NDIS, it is difficult to determine from the above statements exactly how advocacy will be situated. For example it is not clear whether advocacy will be funded as a key support type under the NDIS; whether it is expected that brokerage and case management providers will also provide advocacy (a position that is out of step with current understandings about independent advocacy); it is not clear whether the NDIS will fund systemic advocacy; and finally it remains unclear whether the PC only imagines a 'transitional' role for advocacy, rather than an ongoing role in supporting independence, choice and empowerment.

In order to give full effect to the Article 19 CRPD obligations for equal choice, full inclusion and participation, independent representation and advice must be a core element within the system, with individual models of advocacy available to support decision making 'on the ground' and systemic advocacy to engage in change and monitoring. There remains a continuing role for advocacy in providing information, and in promoting full inclusion in a range of civil, political, economic, social and cultural fields. It is notable that the 2010 Australian Human Rights Commission submission to the PC Commission review recommended a commitment to funding advocacy, and noted that Article 4 (general obligations), Article 12 (equal recognition before the law) , Article 13 (access to justice), Article 16 (freedom from abuse), Article 21 (freedom of expression and information), Article 24 (education), Article 25 (health), Article 27 (employment), Article 33 (implementation and monitoring) of CRPD all potentially supported a strong role for advocacy within the proposed NDIS.

One of the observations made in this report with respect to decision making is the need to facilitate more effectively choice and control by people with disability. In order to be more fully compliant with the obligations under CRPD, the NDIS needs to provide effective tools to individuals to enable them to participate in self directed funding. As discussed above at Recommendation 6.1, there is scope for more robust provisions obliging NDIA to offer self directed funding arrangements to all, and provide support and information to allow individuals to make effective and informed choices. There would be a key role for advocacy here in order to support decision making and choice.

In connection with this, a concern area is the relationship between the case management and brokerage functions of disability support organisations and the proposed role for advocacy within the NDIS. The PC appears to confuse brokerage, case management and advocacy roles (p31, p4.1). In order to give full effect to the Article 19 CRPD obligations to equal choice, full inclusion and participation, independent representation and advocacy would need to be a core element of the system. While case management and brokerage providers might conceivably have an advocacy role, there is a substantial lack of recognition here of the potentially different (and contradictory) roles that may be involved, particularly in the inability of a case management provider or a service broker to provide independent advice and representation, which would affect the quality of advocacy, including the ability to make complaints around brokerage or case management. Empowering individuals to speak independently and to claim their rights and entitlements must be a core goal with respect to achieving full inclusion and participation. In line with Articles 12, 16, 21, 24, 25 and 27 CRPD, effective advocacy will play a role in drawing attention to poor and inappropriate practice and assisting individuals to gain appropriate entitlements. As per Articles 4.3 and Article 33, systemic advocacy has a role in monitoring and drawing attention to system wide problems, in creating effective representation and in working towards change.

A key role for independent advocacy organisations is responding effectively and independently to violence, abuse, neglect and exploitation. Article 16.2 CRPD obligates States parties to provide "appropriate forms of gender- and age-sensitive assistance and support for persons with disabilities and their families and caregivers, including through the provision of information and education on how to avoid, recognize and report instances of exploitation, violence and abuse.” Resourcing for advocacy is one way to achieve this goal; the Australian Human Rights Commission submission to the PC noted in relation to Article 16 that “funding for systemic and individual advocacy should be considered as an essential part of monitoring arrangements under an NDIS.”

There is a distinct role for systemic advocacy in monitoring and implementation of progress towards full inclusion and participation. As discussed above in relation to DPOs, Article 33 CRPD notes that “civil society, in particular persons with disabilities and their representative organisations, shall be involved and participate fully in the monitoring process.” In line with this expectation, the Australian Human Rights Commission, in their submission to the PC review, had explicitly urged that “consideration should also be given to the possible role of an NDIS in providing a sustainable and adequate funding base for representative organisations to enable them to engage in systemic advocacy in support of identification and elimination of barriers in Australian society and monitoring of progress in implementation.”

The proposed NDIS also has the capacity to further develop advocacy provision to children with disability, in order to facilitate both full inclusion and participation, and recognise the best interest of children. Article 12, Article 13.1 and Article 37 of CROC provide relevant guidance on the obligations of States parties to allow children to be heard and access their rights. Article 7 CRPD expressly obligates states parties to “ensure that children with disabilities have the right to express their views freely on all matters affecting them, their views being given due weight in accordance with their age and maturity, on an equal basis with other children, and to be provided with disability and age-appropriate assistance to realise that right.”

Finally, there is scope to resource advocacy to respond to specialized needs, particularly where there is inconsistent progress for people with disability towards full inclusion and participation. Article 2.2 ICERD for example, empowers States Parties to “take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms.” This provides a basis for responding to the needs of multicultural groups through support for advocacy, or funding advocacy for Aboriginal and Torres Strait Islander people with disability (which is reinforced by article 22.2 UN DRIP). Similarly Article 4.1 CEDAW also empowers States parties to take measures to accelerate progress for recognition of rights for women; again, this provides a strong basis upon which to adequately resource advocacy to facilitate choice and rights recognition for women with disability.

People with chronic health conditions and psychosocial disability

As discussed at Recommendation 3.2, it is not clear how long term chronic and episodic health conditions and psychosocial disability may fit with the proposed NDIS. CRPD provides the following scope for understanding people with disability:

> Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.

The PC recommendation uses the term “permanent disability” which could potentially exclude some people with chronic or episodic illness and people with psychosocial disability. A “permanent disability” suggests that impairment is potentially life long; it also, notably, excludes consideration of the interaction of impairment with attitudinal and environmental barriers, as per the social model of disability. The CRPD understanding, on the other hand, is potentially broader in scope, and has the capacity to capture individuals who have impairment that is “long term” but not permanent, as well as individuals who experience evolving circumstances as a result of a changing relationship between impairments and broader attitudinal and environmental factors (for example people with ‘permanent impairment’ who experience reduced barriers as a result of increased accessibility within the community). An exclusion of chronic and episodic health conditions, or people with psychosocial disability, from the proposed NDIS is at odds with the CRPD understanding of disability provided above. Stronger utilisation of the social model framing would ensure that the NDIS targeting complies in a more robust fashion with CRPD obligations.

Recommendation 3.3 suggests that the NDIS would exclude people who have support needs that “would be more appropriately met by the health and/or palliative care systems” including “those who would benefit from largely medically oriented interventions (including less restrictive musculoskeletal and affective disorders, and many chronic conditions)” and “many people with terminal illnesses.” Article 19 CRPD obligates States parties to ensure the “equal right of all persons with disabilities to live in the community, with choices equal to others” and “take effective and appropriate measures to facilitate full enjoyment by persons with disabilities of this right and their full inclusion and participation in the community.” This means that any assessment of the suitability of diverting people with disability away from support schemes such as the NDIS, which aim at maximizing inclusion and participation, must ensure that alternative support systems meet the same goals. This would require a more comprehensive review of the adequacy of alternative support arrangements with respect to their ability to promote full inclusion and participation for people with disability. Certainly, while health treatments would still be necessary, indeed an obligation under Article 25 CRPD, it is not reasonable to argue that “largely medical oriented interventions” are capable of producing full inclusion and participation outcomes for people with chronic or episodic health conditions or psychosocial disability. .

The Commission has not clearly defined in Recommendation 3.2 and 3.3 if people with psychosocial disability would be included or excluded from the proposed Scheme, and have sought guidance on:

> where the boundaries between the mental health sector and the NDIS might lie. In particular, the Commission would appreciate feedback on which system would be best placed to meet the daily support needs (not clinical needs) of individuals with a disability arising from long lasting mental health conditions (such as schizophrenia)” (p3.29).

As discussed above, CRPD obligates states parties to enable full inclusion and participation for all people with disability, including those with psychosocial disability. Excluding people with psychosocial disability from the NDIS on the assumption that support needs will be met by the health system is problematic, given the narrow possibilities for inclusion and participation that might flow from "largely medical orientated interventions." As per above, people with psychosocial disability, like all people with disability, have a right to health (as per Article 25), *and* a right to full inclusion and participation in the community (as per Article 19).

Legal capacity

Article 12 CRPD affirms an obligation on States parties to recognise and support the equal legal capacity of all people with disability. Article 12.2 recognises the right of people with disability to "enjoy legal capacity on an equal basis with others in all aspects of life." Article 12.3 obligates States parties to "take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity." Article 12.5 extends this obligation, requiring States parties to "take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property."

The protections in Article 12 stress the fact that States parties must recognise that all people with disability have legal capacity, and must maximally support people with disability to realise this right. In so far as Australian jurisdictions support traditional guardianship and legal capacity models based upon substitute decision making, current practice in Australia is at odds with the requirements of Article 12 and perpetuates a number of human rights violations against people with disability. In order to fully satisfy the obligations imposed by Article 12 CRPD, Australia must take 'all appropriate measures' to support people with disability to exercise their legal capacity, including through supported decision making..

The Commission has endorsed the status quo service system arrangements with respect to legal capacity, without providing any commentary on its compatibility with international obligations. Thus, the PC appears to be supporting the current substitute decision making system, rather than the development of supported decision making mechanisms in their NDIS proposal. The PC states, for example, that:

> "some people with disabilities are not able to make all of their own decisions (as is the case with profound intellectual disability). In that case, decisions about their well-being will often be made jointly with or by their primary carers, who are usually familiar with the strengths, goals and other preferences of the person with a disability" (p6.11).

The Commission further states that:

> where significant intellectual or mental health disabilities are present, people with disabilities may not be able to self-direct their funding by themselves…. There

> are strong grounds for guardians (such as a parent or partner) familiar with the person with a disability to act as their proxy under self-directed funding (p6.17).

The arrangements implied above do not comply with Article 12 CRPD. A system where there is a default assumption that guardians or others would make decisions on behalf of people with “significant intellectual or mental health disabilities” would be at odds with the requirements of Article 12. This system would not satisfy the obligation to recognise that all people with disability “enjoy legal capacity on an equal basis with others in all aspects of life,” and would not satisfy the requirement to “take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.” Nor would the proposed arrangement adequately satisfy obligations in relation to the ‘safeguards’ outlined in Article 12.2.

The proposed NDIS offers an opportunity to create a new framework for the delivery of supports that recognises and facilitates the right of people with disability to make decisions about their own lives. In order to satisfy CRPD obligations, and make effective person centred choice for all people with disability, the presumption within the proposed NDIS must be that all people with disability have legal capacity, and that people with disability must be maximally supported to exercise their legal capacity. There is a strong need to reform existing legal, administrative and policy frameworks in order to satisfy the requirements of article 12. In so far as recognition of legal capacity is a civil and political right within CRPD, this right is immediately realisable by States parties.

Restrictive Practices

The Commission has proposed the use of restrictive practices, subject to approval by the NDIA:

> For people with severe intellectual disabilities who exhibit challenging behaviours (such as harming themselves or others), at times it will be in their best interest (and the interest of their carer and others around them) for restrictive practices to be used. These practices include: containment (preventing free exit from a service provider premises) seclusion (solitary physical confinement), chemical restraint (involving the prescription of a pharmaceutical for reasons other than a medical condition) mechanical restraint (any device that restricts movement) and physical restraint. While these practices may be unavoidable in certain circumstances, the recognition that, by definition, they impinge upon basic human freedoms, implies a strong need for clear guidelines and regular scrutiny and reporting (p8.30-1)

The use of the proposed restrictive practices violates a number of key human rights obligations, including those in CRPD. In so far as the authorization of restrictive practices negates legal capacity and restricts access by people with disability to justice, these practices are at odds with the equal recognition before the law and equal access to justice provisions of Article 12 and 13 CRPD. The use of negative and punitive restrictive practices are a deprivation of liberty, and as such violate Article 14 CRPD, which stresses that people with disability have a “right to liberty and security of person” (Article 14.1 (a)) and that “the existence of a disability shall in no case justify a deprivation of liberty” (Article 14.1 (b)). This is reinforced by Article 9 ICCPR.

Further, the use of solitary confinement, chemical restraint, mechanical restraint and physical restraint are at odds with Article 15 CRPD that provides that people with disability shall not be “subjected to torture or to cruel, inhuman or degrading treatment or punishment” and imposes on States parties an obligation to take all effective legislative, administrative, judicial or other measures to prevent persons with disabilities, on an equal basis with others, from being subjected to torture or cruel, inhuman or degrading treatment or punishment (Article 15.2). Freedom from torture is a right guaranteed to all in Article 7 ICCPR and also guaranteed by the obligations in UN CAT. Article 1 UN CAT defines torture as:

> any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

In so far as restrictive practices cause physical or mental pain and suffering, and are inflicted on a discriminatory basis by persons acting in official capacities, then these practices would violate Article 1 UN CAT. It is notable that torture is not tolerated under any circumstance in international law, as outlined in Article 2.2 UN CAT (“no exceptional circumstances whatsoever, whether a state of war or a threat or war, internal political instability or any other public emergency, may be invoked as a justification of torture”). UN CAT also specifies at Article 4 that “each State Party shall ensure that all acts of torture are offences under its criminal law. The same shall apply to an attempt to commit torture and to an act by any person which constitutes complicity or participation in torture.”

Use of restrictive practices is at odds with the requirements of Article 16 CRPD in relation to promoting freedom from exploitation, violence and abuse. Article 16.1 states that States parties “shall take all appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities, both within and outside the home , from all forms of exploitation, violence and abuse, including their gender-based aspects.” Article 16.5 obligates states parties to further “put in place effective legislation and policies, including women- and child-focused legislation and policies, to ensure that instances of exploitation, violence and abuse against persons with disabilities are identified, investigated and, where appropriate, prosecuted.” In so far as the proposed regime of restrictive practices perpetuates violence and abuse towards people with disability, they violate the obligations in Article 16 CRPD.

Article 17 CRPD provides an obligation on States parties to respect the physical and mental integrity of people with disability, while Article 25 (d) requires health professions to “provide care of the same quality to persons with disabilities as to others, including on the basis of free and informed consent.”

Finally, it is worth noting the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment July 2008 report to the UN General Assembly provides further reinforcement of the rights of people with disability to freedom from torture (2008). The Special Rapporteur observed that:

- "the prohibition against torture relates not only to public officials, such as law enforcement agents in the strictest sense, but may apply to doctors, health professionals and social workers, including those working in private hospitals, other institutions and detention centres" (51)
- "there can be no therapeutic justification for the prolonged use of restraints, which may amount to torture or ill-treatment" (55)
- "prolonged solitary confinement and seclusion of persons may constitute torture or ill-treatment" (56)
- "forced and non-consensual administration of psychiatric drugs, and in particular of neuroleptics, for the treatment of a mental condition needs to be closely scrutinized. Depending on the circumstances of the case, the suffering inflicted and the effects upon the individual's health may constitute a form of torture or ill-treatment" (63)
- "article 14 of CRPD prohibits unlawful or arbitrary deprivation of liberty and the existence of a disability as a justification for deprivation of liberty…in certain cases, arbitrary or unlawful deprivation of liberty based on the existence of a disability might also inflict severe pain or suffering on the individual, thus falling under the scope of the Convention against Torture" (64)

The guidance provided above by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has very specific implications for the restrictive practices proposed by the Commission, and suggests that the proposed arrangement would be in violation of several human rights obligations.

As per discussion above in relation to legal capacity, Australia's current arrangements, which allow for the use of negative and punitive restrictive practices for some people with disability, are at odds with the obligations imposed by international human rights instruments (see for example French, Dardel, & Price-Kelly. 2009). Substantial policy, legal, and administrative reforms are necessary to ensure that Australia complies with the obligations imposed by CRPD and other international instruments with respect to restrictive practices.

14. Conclusion

The proposed NDIS has created the opportunity for a radical rethink of not only how disability supports are delivered in Australia, but how people with disability might be empowered to enjoy full inclusion and participation. There appears to be a real opportunity to make a number of important conceptual shifts here: from welfare to rights; from a lack of control to autonomy and choice; from institutional segregation to inclusion; from abuse and neglect to respect and dignity, from arbitrary exclusion to full entitlement.

Human rights obligations create a platform for aspirational claims that seek to make a more equal, more inclusive, less violent society. This report has aimed at sculpting the best possible support system for people with disability, within the context of a broad commitment to ending exclusion and stigma, and working towards inclusion and participation in line with Australia's human rights obligations. Setting a strong footing for the NDIS within a rights landscape is a certain way to accelerate Australia towards a goal of a more just, equitable and inclusive society.

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