

5. The National Disability Insurance Scheme

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Summary

5.1 The National Disability Insurance Scheme (NDIS) represents a significant new area of Commonwealth responsibility and expenditure with respect to people with disability in Australia. The focus of this chapter is on decision-making by participants in the NDIS. It outlines existing structures that facilitate decision-making by participants; illustrates how decision-making might operate if the Commonwealth decision-making model were implemented; discusses possible approaches to issues concerning interaction between NDIS supporters and representatives with state and territory appointed decision-makers; examines appropriate safeguards within the context of the NDIS; and proposes education, training and guidance in relation to decision-making and the NDIS.

The NDIS

5.2 The introduction of the NDIS followed long-term concern about the inefficiency and inequitable nature of disability support arrangements in Australia and calls for the introduction of a new mechanism for funding support for people with disability. The NDIS represents a significant new area of Commonwealth responsibility and expenditure. The NDIS represents

a significant step toward addressing the deficiencies of the current disability service systems that exist across Australia, and to advancing cultural change and genuine social inclusion.¹

5.3 While not all people with disability are eligible for the NDIS, it represents a key area of Commonwealth law in which the Commonwealth decision-making model should apply. The NDIS was designed to empower people with disability and to facilitate their choice and control.² With respect to decision-making, while the *National Disability Insurance Scheme Act 2013* (Cth) (NDIS Act) contains some provisions which facilitate supported decision-making, it ultimately retains a substitute decision-making model, through the use of ‘nominees’.³

5.4 As outlined below, the NDIS is still in its early stages with roll-out at several trial sites. However, the ALRC considers that the ongoing roll-out of the NDIS and the scheduled reviews, outlined briefly below, provide useful opportunities for evaluating any supported decision-making model and making any necessary changes to ensure the model is working effectively.

Background

5.5 In August 2011, the Productivity Commission released its report, *Disability Care and Support*.⁴ The Report found that ‘current disability support arrangements are inequitable, underfunded, fragmented and inefficient, and give people with a disability little choice’.⁵ The Productivity Commission recommended the establishment of a new National Disability Insurance Scheme to provide insurance cover for all Australians in the event of significant disability. It suggested that the main function of the NDIS would be to fund long-term high quality care and support for people with significant disabilities.

5.6 In response, the Council of Australian Governments (COAG) recognised the need for major reform of disability services through an NDIS. At a meeting of the Select Council on Disability Reform in October 2011, all Select Council Ministers agreed to lay the foundations for the NDIS by mid-2013.⁶ In December 2012, COAG

1 Office of the Public Advocate (Qld), *Submission 05*.

2 See, eg, *National Disability Insurance Scheme Act 2013* (Cth) s 3(1). See also discussion in Ch 2.

3 *Ibid* pt X.

4 Productivity Commission, ‘Disability Care and Support’ (July 2011) 54 Vol 1; Productivity Commission, ‘Disability Care and Support’ (July 2011) 54 Vol 2.

5 Productivity Commission, ‘Disability Care and Support’, above n 4, 2.

6 Select Council on Disability Reform, *Meeting Communiqué* (October 2011).

signed an Intergovernmental Agreement for the NDIS launch.⁷ The Commonwealth and several states and territories also signed bilateral agreements confirming the operational and funding details for the roll-out of the NDIS.⁸

5.7 In March 2013, the NDIS Act was enacted.⁹ The Act is supplemented by a number of NDIS Rules, which address the more detailed operational aspects of the scheme.¹⁰ There are also a number of Operational Guidelines, including about nominees and supporting participants' decision-making.¹¹ The scheme is administered by the National Disability Insurance Agency (NDIA) (formerly DisabilityCare Australia).

5.8 Implementation of the NDIS began in July 2013 with roll-out in four trial sites—South Australia, Tasmania, the Hunter Area in New South Wales, and the Barwon area of Victoria.¹² In July 2014, the NDIS will commence in the ACT, the Barkly region of the Northern Territory, and in the Perth Hills area of Western Australia. Roll-out of the full scheme in all states and territories except Western Australia is scheduled to commence progressively from July 2016.¹³

Reviews and evaluations

5.9 There are a number of completed, current and planned reviews of the NDIS and NDIA of potential relevance to this Inquiry, including:

- a review of the capabilities of the NDIA;¹⁴
- a COAG report on cost drivers of the NDIS;¹⁵
- consideration of the NDIS in the course of the National Commission of Audit;¹⁶

7 *Intergovernmental Agreement on the NDIS Launch*, 7 December 2012.

8 *Ibid* schs A–E.

9 *National Disability Insurance Scheme Act 2013* (Cth).

10 See, eg, *National Disability Insurance Scheme (Children) Rules 2013* (Cth); *National Disability Insurance Scheme (Nominee) Rules 2013* (Cth); *National Disability Insurance Scheme (Plan Management) Rules 2013* (Cth); *National Disability Insurance Scheme (Protection and Disclosure of Information) Rules 2013* (Cth); *National Disability Insurance Scheme (Registered Providers of Supports) Rules 2013* (Cth); *National Disability Insurance Scheme (Becoming a Participant) Rules 2013* (Cth).

11 National Disability Insurance Agency, *Nominees—Overview*, Operational Guideline (2013); National Disability Insurance Agency, *Nominees—Whether a Nominee Is Necessary*, Operational Guideline (2013); National Disability Insurance Agency, *General Conduct—Supporting Participant's Decision-Making*, Operational Guideline (2013).

12 While initially referred to as launch sites, the sites are now referred to as 'trial sites'. See, eg, Tony Abbott on ABC AM program, *NDIS 'launch' Sites Now 'trial' Sites* <www.abc.net.au/am/content/2013/s3911647.htm>.

13 See, eg, National Disability Insurance Scheme, *Roll out of the NDIS* <www.ndis.gov.au/roll-out-national-disability-insurance-scheme>.

14 J Whalan AO, P Acton and J Harmer AO, 'A Review of the Capabilities of the National Disability Insurance Agency' (January 2014).

15 Requested by COAG Disability Reform Council: COAG Disability Reform Council, *Meeting Communique*, 18 December 2013.

16 See, 'Towards Responsible Government, Phase One' (National Commission of Audit, February 2014); 'Towards Responsible Government, Phase Two' (National Commission of Audit, March 2014).

- an evaluation of the trial of the NDIS being led by the National Institute of Labour Studies;¹⁷
- an independent review of the operation of the NDIS Act;¹⁸ and
- a review of the Intergovernmental Agreement by the Ministerial Council.¹⁹

5.10 A Joint Parliamentary Standing Committee on the NDIS was also established in December 2013, tasked with reviewing the implementation, administration and expenditure of the NDIS.²⁰

5.11 While many of these reviews and evaluations will be conducted following the conclusion of the ALRC's Inquiry, the ALRC's Final Report may inform part of their work. In the same manner, the ALRC will consider relevant outcomes of these reports and evaluations, as well as the work of the Joint Standing Committee, in making recommendations in its Final Report.

Decision-making under the NDIS

5.12 Decision-making under the NDIS Act incorporates elements of both supported and substitute decision-making, as well as informal and formal decision-making. There appear to be three key decision-making mechanisms operating in the context of the NDIS: autonomous decision-making by participants; informal supported decision-making; and substitute decision-making by nominees.

5.13 One of the key objects of the NDIS Act is to 'enable people with disability to exercise choice and control in the pursuit of their goals and the planning and delivery of their supports'.²¹ As a result, the focus of many aspects of the NDIS Act, NDIS Rules and Operational Guidelines is on facilitating participants to make their own decisions. However, some of the general principles which guide action under the NDIS Act and other mechanisms under the Act, such as the nominee provisions, may limit the scope for autonomous decision-making by participants.

5.14 The emphasis on the role of family, carers and others, and their involvement in providing informal support to participants, is an important element of the NDIS. The ALRC has heard that the appointment of nominees in trial sites has been low, with far greater involvement by family, carers and others as informal supporters.²²

17 See, eg, NDIS Evaluation, *Information about the Evaluation of the Trial of NDIS* <<http://www.ndisevaluation.net.au/>>.

18 Due to commence in 2015: *National Disability Insurance Scheme Act 2013* (Cth) s 208(1).

19 Due to commence in 2015: *Intergovernmental Agreement on the NDIS Launch*, 7 December 2012 [121]. See J Whalan AO, P Acton and J Harmer AO, above n 14, attachment C.

20 Parliamentary Joint Standing Committee on the National Disability Insurance Scheme, *Homepage* <http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/National_Disability_Insurance_Scheme>.

21 *National Disability Insurance Scheme Act 2013* (Cth) s 3(1)(e).

22 See discussion of informal supporters in Ch 4.

Nominees

5.15 The NDIS Act provides for a nominee scheme which, while incorporating some provisions designed to encourage supported decision-making (such as the duty of nominees not to act if a participant is capable of acting) in many ways reflects the existing scheme under social security law upon which it was modelled (essentially still a substitute decision-making scheme).

5.16 There are two types of nominees under the NDIS—‘plan nominees’ and ‘correspondence nominees’. A plan nominee may be appointed to prepare, review or replace a participant’s plan, or manage the funding for supports under the plan.²³ The role of a correspondence nominee is narrower. A correspondence nominee may be appointed to do any other act that may be done by a participant under, or for the purposes of, the NDIS Act,²⁴ but in practice is confined to making requests to the NDIA or receiving notices from the NDIA on behalf of the participant.

Appointment

5.17 The NDIS Act provides that the CEO of the NDIA may appoint a plan nominee or a correspondence nominee either at the request of the participant, or on their own initiative.²⁵

5.18 The *National Disability Insurance Scheme (Nominee) Rules 2013* (Cth) (Nominee Rules) provide further detail about whether a nominee should be appointed, who should be appointed as a nominee, duties of nominees, and cancellation and suspension of nominees.²⁶ For example, r 3.1 provides:

people with disability are presumed to have capacity to make decisions that affect their own lives. This is usually the case, and it will not be necessary to appoint a nominee where it is possible to support, and build the capacity of, participants to make their own decisions for the purposes of the NDIS.²⁷

5.19 The Nominee Rules also acknowledge that the NDIS Act recognises and makes provision for the appointment of a nominee to ‘act on behalf of, or make decisions on behalf of, a participant’. The Rules state that

appointments of nominees will be justified only when it is not possible for participants to be assisted to make decisions for themselves. Appointments of nominees usually come about as a result of a participant requesting that a nominee be appointed.

23 *National Disability Insurance Scheme Act 2013* (Cth) s 78.

24 *Ibid* s 79. See also: *National Disability Insurance Scheme (Nominee) Rules 2013* (Cth) rr 3.9, 3.10.

25 *National Disability Insurance Scheme Act 2013* (Cth) ss 66, 67. See also *National Disability Insurance Scheme (Nominee) Rules 2013* (Cth) rr 3.11—3.15.

26 A number of other rules are also relevant, including for example, *National Disability Insurance Scheme (Children) Rules 2013* (Cth).

27 *National Disability Insurance Scheme (Nominee) Rules 2013* (Cth) r 3.1.

It is only in rare and exceptional cases that the CEO will find it necessary to appoint a nominee for a participant who has not requested that an appointment be made.²⁸

5.20 In appointing a nominee, the CEO must take into consideration ‘the wishes (if any) of the participant regarding the making of the appointment’²⁹ and have regard to a number of other matters.³⁰ In determining whether to appoint a particular nominee, there are also a range of matters the CEO must take into account.³¹ Appointment of a nominee may be indefinite or for a particular period.³²

5.21 Where requested by the participant, the CEO must cancel the appointment of a nominee who was appointed at a participant’s request.³³ However, where a nominee was appointed on the initiative of the CEO, the CEO may cancel the appointment, but is not obliged to do so.³⁴

Duties

5.22 Nominees owe a duty to a participant ‘to ascertain the wishes of the participant and act in a manner that promotes the personal and social wellbeing of the participant’.³⁵ Nominees also have a number of other duties, including a duty to:

- consult;
- develop the capacity of the participant; and
- avoid or manage conflicts of interest.³⁶

5.23 Importantly, a plan nominee appointed on the initiative of the CEO is ‘able to do an act on behalf of the participant only if the nominee considers that the participant is not capable of doing the act’.³⁷ A plan nominee appointed at the request of the participant has a duty to refrain from doing an act unless satisfied that: ‘it is not possible for the participant to do, or to be supported to do, the act himself or herself’; or it is possible, but the participant does not want to do the act himself or herself.³⁸

5.24 To a certain degree, the duties of nominees reflect those of supporters and representatives under the Commonwealth decision-making model, but require some amendment. For example:

28 Ibid rr 3.1, 3.4.

29 *National Disability Insurance Scheme Act 2013* (Cth) s 88(2)(b).

30 *National Disability Insurance Scheme (Nominee) Rules 2013* (Cth) r 3.14. See also *National Disability Insurance Scheme Act 2013* (Cth) s 88(4).

31 *National Disability Insurance Scheme (Nominee) Rules 2013* (Cth) rr 4.5–4.8.

32 Ibid rr 4.9–4.11.

33 *National Disability Insurance Scheme Act 2013* (Cth) s 89. See also *National Disability Insurance Scheme (Nominee) Rules 2013* (Cth) pt 6.

34 *National Disability Insurance Scheme Act 2013* (Cth) s 90. See also *National Disability Insurance Scheme (Nominee) Rules 2013* (Cth) pt 6.

35 *National Disability Insurance Scheme Act 2013* (Cth) s 80. See also *National Disability Insurance Scheme (Nominee) Rules 2013* (Cth) rr 5.3, 5.4.

36 *National Disability Insurance Scheme (Nominee) Rules 2013* (Cth) rr 5.8–5.14.

37 Ibid r 5.5.

38 Ibid r 5.6.

- duty to ascertain the wishes of the participant³⁹—the ALRC proposes a duty to support the participant to express their will and preferences in making decisions;
- duty to develop the capacity of the participant to make their own decisions, where possible to a point where a nominee is no longer necessary⁴⁰—this duty should complement the ALRC’s proposed duty to support the participant to make their own decisions;
- duty to consult in relation to doing acts under, or for the purposes of, the NDIS Act⁴¹—to reflect the supported rather than substitute decision-making role played by supporters and representatives, this duty might be modified to be a duty to facilitate consultation, rather than to consult per se.

5.25 The need for amendment of some of these duties and the potential application of other duties to the roles of supporter and representative is discussed in more detail later in this chapter.

Reform of decision-making under the NDIS

5.26 In order to ensure consistency with the *UN Convention on the Rights of Persons with Disabilities* (CRPD) and the National Decision-Making Principles, and given concerns about the current nominee provisions, the ALRC proposes that the NDIS Act and Rules be reviewed and amended.

5.27 The ALRC proposes amendment of the objects and principles provisions of the NDIS Act and that the existing NDIS nominee scheme be replaced with the proposed Commonwealth decision-making model in Chapter 4. This would encourage the implementation of supported decision-making in this key area of Commonwealth law.

5.28 Many of the ideas underlying supported decision-making have already been incorporated in some respects into the NDIS Act, Rules and Operational Guidelines. However, in order to implement the proposed model, these should be reviewed to reflect the idea that all participants, with the appropriate level of support, should be entitled to make decisions expressing their will and preferences in the context of the NDIS.

5.29 Accordingly, the NDIS Act, Rules and Operational Guidelines should be amended to provide a mechanism for the appointment of supporters by participants. In circumstances where a participant may desire, or require, fully supported decision-making, there should also be provision for the appointment of a representative.

5.30 Stakeholders strongly endorsed the need for supported decision-making in the NDIS to enable participants ‘to obtain support to make and implement their own

39 *National Disability Insurance Scheme Act 2013* (Cth) s 80. See also *National Disability Insurance Scheme (Nominee) Rules 2013* (Cth) rr 5.3, 5.4.

40 *National Disability Insurance Scheme (Nominee) Rules 2013* (Cth) r 5.10.

41 *National Disability Insurance Scheme (Nominee) Rules 2013* (Cth) rr, 5.8, 5.9.

decisions’.⁴² This is likely to be of particular significance for a number of groups of people with disability. The Centre for Rural Regional Law and Justice and the National Rural Law and Justice Alliance emphasised, for example, the importance of supported decision-making arrangements ‘for people living in regional and rural communities, where local family and neighbourhood networks can be particularly strong and supportive’.⁴³

5.31 The application of the Commonwealth decision-making model may go some way to avoiding the appointment of guardians and other substitute decision-makers ‘in lieu of appropriate support, assistance, information or case management’.⁴⁴ The interaction between supporters and representatives and state and territory appointed decision-makers is discussed in more detail below.

5.32 Importantly, providing mechanisms for the appointment of formal supporters and representatives under the NDIS Act should not diminish the involvement of and respect for, informal support, including in relation to decision-making. Provisions which recognise and facilitate the involvement of informal supporters in the NDIS are important, and are consistent with the National Decision-Making Principles.⁴⁵ However, as outlined in Chapters 2 and 3, the ALRC considers there are significant benefits to making provision for formal supported decision-making.

5.33 The ALRC does not intend to be overly prescriptive about how the Commonwealth supporter model might operate in the context of the NDIS. For example, while proposing that participants should be entitled to appoint a supporter or representative, the ALRC does not intend to prescribe practice.

5.34 The ALRC has not examined funding mechanisms or practical matters involving funding and resources. Whether there is a general duty to provide support and, if so, who should bear the cost of support are significant issues. In the context of the NDIS, one potential option, which might address the issue of funding for supporters and representatives, may be to include funding for these decision-making arrangements as part of participant packages of support.⁴⁶ On the one hand, it may be inappropriate to use individual participant funding for decision-making support, which should arguably be provided by the NDIA or Government in order to ensure compliance with

42 Office of the Public Advocate (Vic), *Submission 06*. See also: MHCA, *Submission 77*; NSW Public Guardian, *Submission 50*; NCOSS, *Submission 26*; Centre for Rural Regional Law and Justice and the National Rural Law and Justice Alliance, *Submission 20*.

43 Centre for Rural Regional Law and Justice and the National Rural Law and Justice Alliance, *Submission 20*.

44 Office of the Public Advocate (Qld), *Submission 05*.

45 See, eg, *National Disability Insurance Scheme Act 2013* (Cth) principles (e), (f). *National Disability Insurance Scheme (Nominee) Rules 2013* (Cth) rr 3.14(b)(iv), 3.14(b)(v), 4.8(b)(ii)(A), 4.8(c), 5.8(b).

46 Participants develop a plan with the NDIA which must include a participant’s statement of goals and aspirations and a statement of participant supports. The statement of participant supports sets out the supports that will be provided or funded by the NDIS. There are two types of supports—general supports that will be provided to, or in relation to, the participant, and reasonable and necessary supports. There are a range of criteria and tests for determining whether something is a reasonable and necessary support and should be funded by the NDIS: *National Disability Insurance Scheme (Nominee) Rules 2013* (Cth) r 5.11. See also, *National Disability Insurance Scheme (Supports for Participants) Rules 2013* (Cth); and various NDIS, *Operational Guidelines on Planning and Assessment—Supports in the Plan*.

international obligations under the CRPD with respect to the provision of supports. The Nominee Rules provide that ‘it is expected that the Agency will assist nominees in fulfilling’ a duty to develop the capacity of participants,⁴⁷ may provide a basis for arguing such responsibility was envisaged to a certain extent in the drafting of the NDIS Rules. On the other hand, provision of support to make decisions with respect to the NDIS might be exactly the type of reasonable and necessary support that should appropriately be independently funded under the NDIS.

5.35 The next section outlines how decision-making could and should work under the NDIS. In particular, the ALRC makes a number of proposals and asks questions in relation to:

- amendment of the objects and principles in the NDIS Act;
- supporters;
- representatives;
- safeguards; and
- education, training and guidance.

Objects and principles

Proposal 5–1 The objects and principles in the *National Disability Insurance Scheme Act 2013* (Cth) should be amended to ensure consistency with the National Decision-Making Principles.

5.36 The ALRC proposes amendment of the existing objects and principles clauses contained in ss 3–5 of the NDIS Act to reflect the National Decision-Making Principles. This would ensure the National Decision-Making Principles guide the application and interpretation of the legislation as a whole, and to the particular division with respect to supporters and nominees.

5.37 Stakeholders such as the Disability Advocacy Network Australia expressed the view that

it should be an explicit object of legislation in the disability area, such as the NDIS Act, to promote the decision making capacity of people with disability, to build the capacity of people with disability to make decisions and participate in decision making, and to enable access to decision making support for all people with disability whose decision making capacity is impaired.⁴⁸

5.38 Section 3 of the NDIS Act contains general objects of the Act. Section 4 contains general principles guiding actions under the Act, including that:

47 Ibid.

48 Disability Advocacy Network Australia, *Submission 36*.

- ‘people with disability should be supported to participate in and contribute to social and economic life to the extent of their ability’;
- ‘people with disability should be supported to exercise choice, including in relation to taking reasonable risks, in the pursuit of their goals and the planning and delivery of their support’;
- ‘people with disability have the same right as other members of Australian society to be able to determine their own best interests, including the right to exercise choice and control, and to engage as equal partners in decisions that will affect their lives, to the full extent of their capacity’;
- ‘people with disability should be supported in all their dealings and communications with the Agency so that their capacity to exercise choice and control is maximised in a way that is appropriate to their circumstances and cultural needs’; and
- ‘the role of families, carers and other significant persons in the lives of people with disability is to be acknowledged and respected’.⁴⁹

5.39 Section 5 of the NDIS Act contains general principles guiding action of people who may do acts or things on behalf of others, including:

- people with disability should be involved in decision making processes that affect them, and where possible make decisions for themselves; and
- the judgements and decisions that people with disability would have made for themselves should be taken into account.⁵⁰

5.40 While the spirit and intent of the objects and principles provisions in many ways reflect the CRPD and National Decision-Making Principles, the ALRC suggests some amendment is required.

5.41 The ALRC does not intend to be overly prescriptive about necessary changes. However, by way of example, the focus under s 4(8) of the NDIS Act should be on the right of participants to express their will and preferences and to exercise choice and control with respect to decision-making. This would require removal of references to people with disability being ‘able to determine their own best interests’, and being ‘equal partners in decisions’. Such amendments would reflect the proposed shift from substitute decision-making to supported decision-making; the shift away from ‘best interests’ towards ‘will and preferences’; and the idea that decision-making authority should remain with the participant.

5.42 The ALRC welcomes stakeholder feedback on this proposal and on other changes necessary to the objects and principles under the NDIS Act to give effect to the National Decision-Making Principles.

49 *National Disability Insurance Scheme Act 2013* (Cth) s 4.

50 *Ibid* s 5.

Supporters

Proposal 5–2 The *National Disability Insurance Scheme Act 2013* (Cth) and NDIS Rules should be amended to include supporter provisions consistent with the Commonwealth decision-making model.

5.43 The Commonwealth decision-making model proposed by the ALRC would introduce the concept of formal supported decision-making in the NDIS. While there is currently no provision for the nomination of formal supporters under the NDIS Act, the model would, in part, formalise the informal role already recognised and played by the people most likely to be nominated as supporters, such as family members.

5.44 As articulated in Chapters 2 and 3, the central idea is that participants should be supported to make their own decisions in the context of the NDIS. A participant would be entitled to appoint a supporter to support them to make NDIS-related decisions. Importantly, even where a participant appoints a supporter, ultimate decision-making authority remains with the participant. Where a participant chooses to appoint more than one supporter, it would be a matter for the participant to determine what specific roles each supporter might play.

Appointment

5.45 The NDIS represents a significant shift in funding for, and provision of, disability services in Australia. In addition to existing mechanisms such as the Sector Development Fund,⁵¹ the ALRC considers that supporters would play a key role in ensuring prospective participants and participants receive appropriate support to engage with the NDIS.

5.46 A participant or prospective participant should be able to appoint a supporter or supporters at any time during their engagement with the NDIS. Appointment by a participant is the only mechanism by which a supporter may be appointed.⁵² Making provision for the appointment of supporters may also limit instances of carers, family members, service providers or others seeking appointment of a nominee or guardian under state or territory law because they incorrectly assume it is necessary, or simply to facilitate registration as a participant with the NDIS.⁵³

5.47 As discussed in Chapter 4, the most important elements of the proposed supporter regime are recognition that where a supporter is appointed, ultimate decision-making authority remains with the participant; and that any decision made by a

51 ‘The Sector Development Fund helps people with disability, families and carers, service providers, and the disability workforce to transition to the NDIS. A wide range of activities will be funded during the launch period and in the lead up to national roll out of the Scheme’: National Disability Insurance Scheme, *Sector Development Fund* <www.ndis.gov.au/sector-development-fund>.

52 See discussion in Ch 4 in relation to potential alternative mechanisms for appointment of a representative.

53 See, eg, Australian Guardianship and Administration Council, *Submission 51*.

participant with the support of a supporter is recognised by the NDIA, service providers and others as the decision of the participant.

5.48 The other two elements of the Commonwealth decision-making model relevant to appointment is that it suggests the NDIS Act and Rules should be amended to provide for the appointment of a supporter by a prospective participant or participant at any time. The ALRC is interested in stakeholder feedback on the appropriateness of permitting prospective participants appoint a supporter for the purposes of engaging with the NDIA.

5.49 The ALRC suggests that a participant should be entitled to appoint whomever they wish as their supporter. Given many stakeholders emphasised the importance of independent advocacy in supporting participants in the context of the NDIS,⁵⁴ there may be no reason why individual advocates or advocate organisations could not be appointed as a participant's supporter. Only a participant would have the authority to appoint a supporter and must have the power to suspend or revoke the appointment at any time.

Role and duties

Potential roles of a supporter

5.50 Under existing arrangements, a plan nominee's role may encompass decisions relating to the preparation, review or replacement of the participant's plan; or management of funding for supports under the plan.⁵⁵ The scope of the role of a correspondence nominee is narrower and more closely reflects the role potentially played by a supporter in that they may make requests to the NDIA or receive notices from the NDIA, on behalf of the participant.⁵⁶

5.51 The ALRC suggests that the potential roles of a supporter under the NDIS might include those set out in Proposal 4–4. For example, a supporter should be able to liaise with the NDIA on behalf of the participant or prospective participant to obtain information relevant to assessment, planning, or the management of NDIS funds. A supporter may attend planning meetings and support the participant to make decisions about what their goals and aspirations are, and what supports are required. A supporter should also endeavour to ensure the participant's decisions are given effect to.

Supporter duties

5.52 The proposed duties of a supporter amend and expand upon the duties of nominees under the existing system.

5.53 The key duty currently owed by nominees, which the ALRC considers should apply to supporters, is the duty to develop the capacity of the participant. The Nominee Rules provide that nominees are required to 'apply their best endeavours to developing

54 See, eg, MHCA, *Submission 77*; Disability Advocacy Network Australia, *Submission 36*.

55 *National Disability Insurance Scheme Act 2013* (Cth) s 78; *National Disability Insurance Scheme (Nominee) Rules 2013* (Cth) r 3.7.

56 The matters the correspondence nominee is able to deal with cannot be limited further by the instrument of appointment: *National Disability Insurance Scheme (Nominee) Rules 2013* (Cth) r 3.8.

the capacity of the participant to make their own decisions, where possible to a point where a nominee is no longer necessary'.⁵⁷ The ALRC welcomes stakeholder submissions on the appropriateness of imposing such a duty on supporters, recognising that the identity of the supporter is likely to affect their ability to fulfil this duty.

5.54 In addition, the Nominee Rules currently provide that 'it is expected that the Agency will assist nominees in fulfilling this duty'⁵⁸ and the ALRC suggests that the NDIA should also play a role in assisting supporters to fulfil any such duty.

5.55 The duties currently owed by nominees that should apply to supporters, but require some amendment, include the duty to:

- ascertain the wishes of the participant;
- act in a manner that promotes the personal and social wellbeing of the participant;
- consult; and
- act only where a participant is unable to do so.⁵⁹

5.56 Nominees currently owe a duty to ascertain the wishes of the participant. The ALRC proposes that this duty extend to supporting the participant to express their will and preferences in making a decision or decisions in relation to the NDIS.

5.57 Nominees owe a duty to act in a manner that promotes the personal and social wellbeing of the participant. The ALRC considers that it is appropriate to add financial and cultural wellbeing to this list, reflecting the potential role supporters may play in supporting participants to make decisions relating to NDIS funds, and the importance of culturally sensitive and appropriate support.⁶⁰ This idea of sensitivity to cultural and linguistic circumstances is not currently a duty owed by nominees. However, in deciding who to appoint as a nominee, the CEO is to have regard to the degree to which the proposed nominee is 'sensitive to the cultural and linguistic circumstances of the participant'.⁶¹

5.58 A nominee currently has a duty to consult 'any court-appointed decision-maker or any participant-appointed decision-maker' and 'any other person who assists the participant to manage their day-to-day activities and make decisions (for example, a person who cares for the participant)' in relation to doing acts under, or for the purposes of, the NDIS Act.⁶² If more than one person is appointed as plan nominee, each of them also owes a duty to consult with the others.⁶³ In order to reflect the supported rather than substitute decision-making role played by supporters, the ALRC

57 Ibid r 5.10.

58 Ibid r 5.11.

59 *National Disability Insurance Scheme Act 2013* (Cth) s 80. *National Disability Insurance Scheme (Nominee) Rules 2013* (Cth) rr 5.3–5.6, 5.8–5.14.

60 See, eg, MDA, *Submission 43*.

61 *National Disability Insurance Scheme (Nominee) Rules 2013* (Cth) r 4.8(b)(iv).

62 Ibid r 5.8.

63 Ibid r 5.9.

considers this duty might be appropriately modified to be a duty on supporters to facilitate consultation with these same categories of people.

5.59 The new duties supporters should owe include the duty to support the participant to make the decision or decisions in relation to which they were appointed and to express their will and preferences, and to act honestly, diligently and in good faith. As discussed below, safeguards should be in place to ensure, for example, that supporters do not abuse their position for their own self-interest.

5.60 While there is currently no duty of nominees to support the participant to make decisions, this type of duty may have been intended under the NDIS Rules. That is, in deciding who to appoint as a nominee, the CEO is to have regard to the degree to which the proposed nominee is willing and able to ‘involve the participant in decision-making processes’, and ‘assist the participant to make decisions for himself or herself’.⁶⁴ It is important that there be a duty of supporters to support a participant to make decisions and to express their will and preferences.

5.61 The other new duty proposed is the duty to act honestly, diligently and in good faith.⁶⁵ The ALRC welcomes stakeholder feedback on the proposed supporter roles and duties articulated above as well as in relation to whether there should be additional duties placed on supporters in the context of the NDIS.

Representatives

Proposal 5-3 *The National Disability Insurance Scheme Act 2013 (Cth)* and NDIS Rules should be amended to include representative provisions consistent with the Commonwealth decision-making model.

5.62 In certain circumstances, a participant may require fully supported decision-making. While this should only occur in line with the National Decision-Making Principles, as a last resort, the ALRC proposes the introduction of Commonwealth representatives as a mechanism for the provision of fully supported decision-making under the NDIS.

5.63 A representative under the Commonwealth decision-making model is an individual or organisation appointed by a participant, or through some other mechanism to support a participant to make a decision or decisions in relation to their participation in the NDIS. The role of a representative is to support a participant to express their will and preferences in making decisions; where necessary, to determine the will and preferences of a participant and give effect to them or, as a last resort, consider the human rights relevant to the situation in making a decision. Such decisions may relate to the planning process, the participant’s plan, supports funded by the NDIS, interaction with service providers, or similar matters.

64 *Ibid* rr 4.8(b)(C), 4.8(b)(D).

65 See Ch 4.

5.64 Many of the elements contained in the proposed model are already incorporated into the NDIS Act, Rules or Operational Guidelines. For example, consistent with the ALRC's approach, nominees are appointed as a last resort, and there are duties on nominees to ascertain the wishes of the participant and to act in a manner that promotes the personal and social wellbeing of the participant.

Appointment

5.65 The NDIS Act provides that the CEO of the NDIA may appoint a plan nominee or a correspondence nominee at the request of the participant, or on the initiative of the CEO.⁶⁶ There are a range of matters the CEO of the NDIA must take into account in determining whether to appoint a particular nominee.⁶⁷ In addition, the CEO has the power to make an appointment for a particular period⁶⁸ and power to limit the scope of the appointment.⁶⁹

5.66 Stakeholders expressed particular concern about provisions which enable the CEO of the NDIA or their delegate to appoint a nominee on the initiative of a delegate, as distinct from at the request of the participant.⁷⁰ For example, the Physical Disability Council of NSW submitted that the provision 'is not consistent with person centred practice'.⁷¹ The Disability Advocacy Network Australia expressed concern that power is 'largely unfettered' and gives the CEO or delegate

considerable freedom to appoint or cancel appointment of a nominee with or without the agreement of the participant or respect for the participant's wishes, with or without regard for any existing guardianship, power of attorney or other substitute decision-making arrangement for the participant, and most importantly with or without first seeking to support and enable the participant to make the required decisions for him/her-self. This appointment power appears to give little regard to enabling the decision-making capacity of participants.⁷²

5.67 Children with Disability Australia submitted that the CEO of the NDIA should not have power to appoint a representative, and 'if the circumstances exist where the CEO believes a nominee should be appointed other than at the participant's initiative it should be dealt with by the relevant systems for obtaining administration or guardianship orders'.⁷³

5.68 The preferable appointment method for a representative is appointment by a participant. However, as discussed in more detail in Chapter 4, there are a number of other potential options for appointment, including appointment by a court, tribunal or

66 *National Disability Insurance Scheme Act 2013* (Cth) ss 66, 67. See also *National Disability Insurance Scheme (Nominee) Rules 2013* (Cth) rr 3.11–3.15.

67 *National Disability Insurance Scheme (Nominee) Rules 2013* (Cth) rr 4.5–4.8.

68 *Ibid* rr 4.9–4.11.

69 *Ibid* r 3.8.

70 See, eg, Disability Advocacy Network Australia, *Submission 36*; Physical Disability Council of NSW, *Submission 32*. A similar concern was expressed in relation to child's representatives: Children with Disability Australia, *Submission 68*.

71 Physical Disability Council of NSW, *Submission 32*.

72 Disability Advocacy Network Australia, *Submission 36*.

73 Children with Disability Australia, *Submission 68*.

other body with Commonwealth jurisdiction, and retaining the CEO's power to appoint, but in more limited circumstances than at present.

5.69 Regardless of the way in which a representative is appointed, if there is an external mechanism for appointment, stakeholders such as OPA (Vic) submitted that

the participant's preference of nominee should be respected unless there are very good reasons for not doing so (such a reason would be that the appointment of the person would jeopardise the personal and social wellbeing of the participant).⁷⁴

5.70 The ALRC is interested in stakeholder feedback on the most appropriate mechanisms in the context of the NDIS to appoint a representative for a person who requires full decision-making support.

Role and duties

Potential roles of a representative

5.71 Under the current nominee provisions, the role of a plan nominee may encompass decisions relating to the preparation, review or replacement of the participant's plan; or management of funding for supports under the plan. However, the Nominee Rules provide for limitations on the matters that a plan nominee is appointed to deal with:

For example, the appointment might be restricted so as to prevent the nominee from specifying the goals, objectives and aspirations of the participant. In such a case, the nominee might still have authority with respect to the management of funding under a plan. Alternatively, the CEO might appoint 2 or more plan nominees, and, in each instrument of appointment, limit the matters in relation to which each person is the plan nominee.⁷⁵

5.72 Despite this provision, some stakeholders have expressed concern about the existing role played by plan nominees which tends to be 'a global appointment', and relies on the discretion of the nominee to limit the use of their power; in particular the power to make substitute decisions when a person cannot be supported to make their own decisions'.⁷⁶

5.73 The scope of the role of a correspondence nominee is narrower and more closely reflects the role potentially played by a supporter. For example, a correspondence nominee may make requests to the NDIA or receive notices from the NDIA, on behalf of the participant.⁷⁷

5.74 The ALRC considers that a representative should perform some or all of the roles articulated in Proposal 4–7. These mirror the potential role of supporters and are discussed in more detail below.

74 Office of the Public Advocate (Vic), *Submission 06*.

75 Ibid.

76 Office of the Public Advocate (SA), *Submission 17*.

77 The matters the correspondence nominee is able to deal with cannot be limited further by the instrument of appointment: *National Disability Insurance Scheme (Nominee) Rules 2013* (Cth) r 3.8.

5.75 In line with the National Decision-Making Principles, the ALRC suggests that in introducing the concept of representative under the NDIS, consideration be given to potential categories of representatives and ensuring that any appointment is decision-specific and limited in scope and time. For example, it may be appropriate to separate representative roles between those who provide general support in relation to interaction with the NDIA and planning, and those who are involved in financial decisions.⁷⁸

Representative duties

5.76 Representatives under the NDIS will play a key role in providing support to participants requiring full decision-making support. As a result, representatives should be subject to the duties and responsibilities articulated in Proposal 4–8. The ALRC considers that a representative should have the same duties as a supporter, and a number of additional duties. It is important that representatives owe specific additional duties under the NDIS Act and Rules, even where they are an existing state or territory appointed decision-maker (an issue discussed further below) and are therefore subject to duties under state and territory legislation.

5.77 The key duties the ALRC proposes that a representative should owe under the NDIS Act and Rules include:

- providing of support to a participant to express their will and preferences in making decisions;
- where it is not possible to determine what the wishes of the participant, determining what the person would likely want based on all the information available;
- where the first two dot points are not possible, considering the human rights relevant to the situation;
- acting in a manner promoting the personal, social, financial and cultural wellbeing of the person who requires decision-making support;
- providing of support to the participant to consult with ‘existing appointees’, family members, carers and other significant people in their life when making a decision; and
- developing the capacity of the person who requires decision-making support to make their own decisions.

5.78 The application of many of these duties to support is discussed above. There are a number of additional duties appropriate for NDIS representatives, who provide fully supported decision-making support. One such duty is to support the participant to express their will and preferences. This is not currently reflected in the duties of nominees to ‘ascertain the wishes of the participant’, which does not necessarily require provision of support to express will and preferences. However, there is some

78 As suggested by Office of the Public Advocate (SA), *Submission 17*.

suggestion that this type of duty was intended under the NDIS Rules, as in deciding who to appoint as a nominee, the CEO is to have regard to the degree to which the proposed nominee is willing and able to: ‘involve the participant in decision-making processes’, ‘assist the participant to make decisions for himself or herself’ and ‘ascertain what judgements and decisions the participant would have made for him or herself’.⁷⁹ Nonetheless, the ALRC considers it is necessary for a representative to have an explicit duty to support a participant to express their will and preferences.

5.79 While the focus of supported decision-making under the NDIS should be on supporting a participant to express their will and preferences, there is a need to make provision for circumstances in which a representative is providing fully supported decision-making. In such circumstances, the representative must determine what the person would likely want based on all the information available. This may require engagement with NDIA, service providers, family members and others to establish things such as the nature of decisions the participant has made in the past, and their values and beliefs. Where this is not possible, the representative must consider the human rights relevant to the situation.

Interaction with state and territory systems

Question 5–1 How should the *National Disability Insurance Scheme Act 2013* (Cth) and NDIS Rules be amended to clarify interaction between supporters and representatives appointed in relation to the NDIS, other supporters and representatives, and state and territory appointed decision-makers?

5.80 One of the key difficulties in applying the Commonwealth decision-making model to the NDIS is determining the appropriate interaction between NDIS supporters and representatives, supporters and representatives in other areas of Commonwealth responsibility, and state and territory appointed decision-makers.

5.81 This issue is of particular relevance given the ongoing roll-out of the NDIS. AGAC provided a scenario which highlights the potentially difficult interaction between the NDIS and state and territory appointed decision-makers under the existing scheme:

A person who is the subject of an administration (financial management) order appointing a Public Trustee makes an application for NDIS support themselves or through a nominee for funding a particular matter. The operators of the NDIS scheme are unaware that the person has been found to have a decision-making disability by a Tribunal and is incapable of managing their own financial and property affairs. The result has been that money has been paid out to such applicants directly to their bank accounts which the Public Trustee is under order to manage. Without the knowledge and intervention by the Public Trustee, this

⁷⁹ *National Disability Insurance Scheme (Nominee) Rules 2013* (Cth) rr 4.8(b)(C), 4.8(b)(D), 4.8(b)(E).

may be seen as a windfall by the applicant and spent for purposes other than that for which the grant was paid.⁸⁰

5.82 It is also important to address stakeholder concerns about an increase in applications for the appointment of state or territory decision-makers since the introduction of the NDIS. For example, AGAC submitted that

the introduction of the NDIS creates a number of decision making ‘events’ and a greater degree of scrutiny of informal substitute decision-makers or supporters and leads to an increase in the number of applications under guardianship legislation. In these and other hearings there have been discussions about the increased number and complexity of decisions that will need to be made as a result of the introduction of the NDIS. AGAC anticipates a commensurate increased call on the advocacy functions of the Public Advocates and Public Guardians and on the financial management role of the Public Trustees as well as on the Tribunals.⁸¹

5.83 This was echoed by the OPA (Qld):

there are a number of points in the process of becoming and being a participant that may prompt the appointment of a guardian or other substitute decision-maker if appropriate support and assistance is not provided.⁸²

5.84 The general issue of interaction under the NDIS is discussed below. Interaction involving management of NDIS funds is discussed separately later in the chapter. The ALRC is interested in stakeholder comment on the interaction issues which arise in the context of the NDIS, the two possible approaches discussed below, and other possible approaches.

Current interaction

5.85 Under the NDIS Act and Rules there is limited recognition of state and territory appointed decision-making arrangements. The key points of interaction relate to the appointment of a nominee at the initiative of the CEO, the duty of nominees to consult, and the obligations of nominees who are also state or territory or participant appointed decision-makers.

5.86 The provision of the Nominee Rules requiring a plan nominee to act is stated as not being intended

to affect any obligations or restrictions that impact on a plan nominee and which apply under State or Territory law (including obligations or restrictions that impact on them in their capacity as a court-appointed decision-maker or a participant-appointed decision-maker).⁸³

5.87 Under s 88(4) of the NDIS Act, the CEO of the NDIA must, in considering whether to appoint a nominee, have regard to whether there is a person under Commonwealth, state or territory law who ‘has guardianship of the participant’, or ‘is a

80 Australian Guardianship and Administration Council, *Submission 51*.

81 *Ibid.*

82 Office of the Public Advocate (Qld), *Submission 05*.

83 *National Disability Insurance Scheme (Nominee) Rules 2013* (Cth) r 5.7.

person appointed by a court, tribunal, board or panel (however described) who has power to make decisions for the participant and whose responsibilities in relation to the participant are relevant to the duties of a nominee'.⁸⁴ The Nominee Rules further provide that in such circumstances, the CEO must have regard to a number of things, including 'whether the participant has a court-appointed decision-maker or a participant-appointed decision-maker'; and any relevant views of a 'court-appointed decision-maker or a participant-appointed decision-maker'.⁸⁵

5.88 The matters the CEO must have regard to in deciding who to appoint as nominee include 'whether the participant has a court-appointed decision-maker or a participant-appointed decision-maker', and their views.⁸⁶ The CEO is also to have regard to

the presumption that, if the participant has a court-appointed decision-maker or a participant-appointed decision-maker, and the powers and responsibilities of that person are comparable with those of a nominee, that person should be appointed as nominee.⁸⁷

5.89 The OPA (Qld) submitted that, while there is currently a 'presumption' that an existing guardian would also be appointed as a nominee for a participant, this is not sufficient.⁸⁸ Similarly, the OPA (Vic) said that

it is expected that state/territory-appointed guardians and administrators would be appointed as nominees under the NDIS where this would be appropriate, but a review is required to ascertain the extent to which this is happening in practice in the launch sites.⁸⁹

5.90 Nominees also have a duty to consult with 'any court-appointed decision-maker or any participant-appointed decision-maker'.⁹⁰

5.91 Section 207 of the NDIS Act deals with the concurrent operation of state and territory laws with the Act and states that 'it is the intention of the Parliament that this Act is not to apply to the exclusion of a law of a State or Territory to the extent that that law is capable of operating concurrently with this Act'.⁹¹

5.92 The OPA (Qld) submitted that,

given this position of nominees as 'de facto substitute decision makers' it is also important that the interaction between the [NDIS Act], the NDIS Rules and the state-based guardianship and administration legislation is further clarified.⁹²

84 *National Disability Insurance Scheme Act 2013* (Cth) s 88(4).

85 *National Disability Insurance Scheme (Nominee) Rules 2013* (Cth) rr 3.14(b)(iii), 3.14(b)(v)(C).

86 *Ibid* r 4.6(c). See also *National Disability Insurance Scheme Act 2013* (Cth) ss 88(2), 88(4).

87 *National Disability Insurance Scheme (Nominee) Rules 2013* (Cth) r 4.8(a).

88 Office of the Public Advocate (Qld), *Submission 05*.

89 Office of the Public Advocate (Vic), *Submission 06*.

90 *National Disability Insurance Scheme (Nominee) Rules 2013* (Cth) r 5.8(a).

91 *National Disability Insurance Scheme Act 2013* (Cth) s 207.

92 Office of the Public Advocate (Qld), *Submission 05*.

Possible models of interaction

5.93 There appear to be a range of possible approaches to interaction issues. In this section the ALRC discusses the possible application, in the context of the NDIS, of the two approaches outlined in Chapter 4.

First approach

5.94 Under the first approach, which reflects the current position, it is possible to have an NDIS supporter or representative and a state or territory appointed decision-maker.

5.95 In circumstances where appointments of an NDIS supporter or representative do not overlap with that of a state or territory appointed decision-maker—for example, because they are appointed in relation to different decisions or areas—there is unlikely to be any conflict. Reducing the possibility of conflict with Commonwealth appointments may be strengthened by amendment of state and territory legislation to ensure state and territory appointments are, as much as possible, confined in scope and time.⁹³

5.96 In circumstances there may still be some overlap in the areas of decision-making covered by the appointments. If there is conflict, s 109 of the *Australian Constitution* may require that the responsibility of a state or territory appointed decision-maker extend only to those areas not covered by the decision-making power of the Commonwealth representative. To facilitate this interaction, information sharing arrangements may be necessary for the representative and state or territory appointed decision-maker to fulfill their particular roles.

5.97 This could occur either as a result of formal mechanisms, or more informally.⁹⁴ The ALRC considers this aspect of the approach may address some concerns expressed by stakeholders in relation to the appointment of different individuals or organisations.⁹⁵

5.98 The ALRC welcomes stakeholder comment on mechanisms to ensure sharing of information between Commonwealth representatives and state and territory appointed decision-makers where they are different.

Second approach

5.99 Under a second possible approach, where a state or territory decision-maker has been appointed, a new assessment of the support needs of the participant should be undertaken for NDIS purposes. If the person requires fully supported decision-making, then a representative should be appointed, either by the person, or using a Commonwealth appointment mechanism.⁹⁶ The appointment of the existing state or

93 See Proposal 10–1 (state and territory proposal).

94 As the ALRC understands is currently the case—with the sharing of information between the NDIA and the NSW Trustee and Guardian.

95 Financial Services Council, *Submission 35*.

96 See discussion of possible appointment mechanisms for representatives in Ch 4.

territory decision-maker as representative should be permitted and encouraged, but would not be automatic.

5.100 As suggested in Chapter 4, one of the considerations a decision-maker could have regard to in appointing a Commonwealth representative should be the desirability of appointing an existing Commonwealth representative or state or territory appointed decision-maker where one exists. This is likely to encourage appointment of state and territory decision-makers as representatives for NDIS purposes where appropriate. However, even where an existing representative or state or territory appointed decision-maker is appointed, the appointee would be subject to the provisions of the NDIS Act and Rules relating to their role and duties, as well as associated safeguards.

5.101 This model appears to be most consistent with the views of stakeholders such as the FSC which submitted that where a state or territory decision-maker has been appointed, they should automatically be the NDIS representative.⁹⁷ Similarly, the NSW Council for Intellectual Disability submitted that,

if a guardian has been appointed with authority to make decisions about services, then that person should automatically be recognised as NDIS nominee. Similarly, if there is a nominee and a different person is appointed as guardian, the guardian should automatically take over as nominee.⁹⁸

Management of NDIS funds

Question 5–2 In what ways should the *National Disability Insurance Scheme Act 2013* (Cth) and NDIS Rules in relation to managing the funding for supports under a participant’s plan be amended to:

- (a) maximise the opportunity for participants to manage their own funds, or be provided with support to manage their own funds; and
- (b) clarify the interaction between a person appointed to manage NDIS funds and a state or territory appointed decision-maker?

5.102 Under the NDIS Act, a participant may request that NDIS funds be self-managed by the participant, the participant’s plan nominee, a plan management provider nominated by the participant, or the NDIA.⁹⁹ Different options can be chosen for different supports. If a plan nominee has been appointed, then funding for supports must be managed in accordance with the terms of the appointment.¹⁰⁰ There are also currently a number of circumstances under which a participant must not manage plan funds, including if the CEO is satisfied that management of the plan would present an ‘unreasonable risk to the participant’.¹⁰¹

⁹⁷ Financial Services Council, *Submission 35*.

⁹⁸ NSW Council for Intellectual Disability, *Submission 33*.

⁹⁹ *National Disability Insurance Scheme Act 2013* (Cth) ss 42(2), 43(1).

¹⁰⁰ *Ibid* s 43(2).

¹⁰¹ *Ibid* s 44.

5.103 If a participant does not make a plan management request, outlining how they would like their NDIS funds managed, the funding for supports under the plan is managed by either a registered plan management provider specified by the NDIA, or the NDIA.¹⁰² If this occurs, the CEO of the NDIA ‘must, so far as reasonably practicable, have regard to the wishes of the participant in specifying who is to manage the funding for supports under the plan’.¹⁰³

5.104 The introduction of supporters and representatives under the NDIS is likely to reduce the circumstances in which a participant does not make, or is not supported to make, a plan management request. However, in circumstances where they do not, these provisions may require amendment to remove the power of the CEO of the NDIA to determine who should manage the funding for supports. Alternatively, the provisions could be amended to remove the qualifier and require that, in such circumstances, the CEO is required to give effect to the will, preferences and rights of the participant.

5.105 Under the existing provisions of the NDIS, Queenslanders with Disability Network observed that

the capacity of an individual to manage their own funds is a potentially contentious issue ... An individual with a disability may wish to manage their own supports, but the CEO may deem the person incapable of discharging this responsibility. These decisions may not be consistent with guardianship decisions made at a state level, and consequently the potential for appeal is high.¹⁰⁴

5.106 The preferable approach is for participants to self-manage their funding for supports to the greatest extent possible, and that the NDIS legislation should be amended to reflect this.

5.107 Where the scope of the appointment of a state or territory appointed decision-maker does not cover management of NDIS funds, a participant should be able to self-manage their funds, or to appoint a supporter or representative to support them in making decisions about fund management. Participants should also be entitled to nominate a plan management provider, or the NDIA to manage their funds.

5.108 However, where a state or territory order which covers the management of finances is in place, some stakeholders have submitted that it should not be possible for participants to self-manage NDIS funds. For example, the FSC argued that where a state or territory decision-maker has been appointed, they should ‘automatically be the person or entity responsible for managing the funding for supports’¹⁰⁵ and that ‘the NDIS should pay amounts directly to product/service providers after due consultation with the relevant appointed decision-maker’.¹⁰⁶

102 Ibid s 43(4).

103 Ibid s 43(5).

104 Queenslanders with Disability Network, *Submission 59*.

105 Financial Services Council, *Submission 35*.

106 Ibid.

5.109 The ALRC is interested in stakeholder comments on ways in which the NDIS Act and Rules could be amended to maximise the opportunity for participants to manage their own funds, or be provided with support to manage their own funds; and clarify the interaction between Commonwealth supporters or representatives and state and territory appointed decision maker, in relation to the management of NDIS funds.

Safeguards

General safeguards

5.110 In Proposal 4–9, the ALRC proposes that the appointment and conduct of Commonwealth representatives should be subject to appropriate and effective safeguards.

5.111 The ALRC does not intend to make a proposal with respect to the specific safeguards that may be required in the context of the NDIS, or comment on systemic issues relating to safeguards under the NDIS raised by stakeholders, including the provision of funding to support participants to seek review of NDIA decisions.¹⁰⁷

5.112 However, a number of stakeholders, including the Disability Services Commission of Victoria, strongly advocated the development of independent oversight of the NDIS, consisting of a body or bodies with complaint handling and investigative powers, legislative responsibilities to conduct monitoring, review and inquiry functions; and responsibility for promoting access to advocacy and supported decision-making.¹⁰⁸

5.113 There are a number of existing complaint, review and appeal mechanisms under the NDIS. For example, participants may seek internal review of a reviewable decision,¹⁰⁹ make a complaint to the Commonwealth Ombudsman, or seek review of a reviewable decision by the Administrative Appeals Tribunal (AAT).¹¹⁰

5.114 In the trial sites, existing state and territory quality assurance frameworks and safeguards also apply.¹¹¹ The Department of Social Services is currently developing a number of proposed options for a national quality assurance and safeguards framework or approach as part of the NDIS. It is anticipated that when the NDIS is fully rolled out, safeguards will include:

- individualised strategies built into participant plans to help the participant, their family and support network to reduce the risk of harm, through mechanisms such as advocates, guardians and nominees;
- arrangements that organisations put in place to protect participants, such as: staff supervision; internal complaints processes; quality frameworks;

107 See, eg, Law Council of Australia, *Submission 83*; NCOSS, *Submission 26*.

108 See, eg, MHCA, *Submission 77*; Disability Services Commissioner Victoria, *Submission 39*.

109 *National Disability Insurance Scheme Act 2013* (Cth) s 99, 100.

110 *Ibid* s 103.

111 'Intergovernmental Agreement, Schedule A: Bilateral Agreement for NDIS Launch between the Commonwealth and New South Wales' (7 December 2012).

- system level safeguards such as:
 - external review of decisions and actions that directly impact on a person, such as access to relevant tribunals or commissions; community visitors schemes; and police checks and working with children checks
 - community based safeguards that are available to all members of the community, such as: practitioner registration requirements; ombudsman offices; and anti-discrimination, human rights and consumer protection law.¹¹²

5.115 The ALRC suggests that the safeguard issues outlined in this Discussion Paper be considered in the course of developing the national quality assurance and safeguards framework or approach as part of the NDIS.

Education, training and guidance

5.116 Education, training and guidance for all people involved in the decision-making under the NDIS is vitally important to ensure the effective operation of the supported decision-making model.

5.117 The NDIA has developed a number of approaches to education, training and community engagement (including through video, quotes, cameos, stories, and webinars) and has produced a range of guidance material for people with disability, family and carers, service providers, and participants.¹¹³

5.118 The NDIA also offers disability support organisations capacity building strategy grants to ‘provide and promote local mutual support activities for people with disability’ with the aim of leading to ‘increased capacity of people with disability and their families to exercise choice and control, engage with the NDIS and other community supports as well as actively participate economically and socially’.¹¹⁴

5.119 In terms of decision-making mechanisms stakeholders such as the Office of the Public Advocate (SA) have emphasised the need to ensure the NDIS Act and NDIS Rules are applied appropriately in practice:

Close attention will need to be applied to the implementation of the NDIS Nominees Rules, and the extent that they encourage support to enable people’s capacity as opposed to potentially disempowering participants by transferring effective decision making to plan nominees. NDIS itself can play a role in educating nominees on their role so that this does not happen, and expecting nominees to attempt to support a participant make their own decision before taking on a substitute role.¹¹⁵

112 National Disability Insurance Scheme, *Safeguards* <www.ndis.gov.au/participants-0>.

113 See, eg, National Disability Insurance Scheme, *Homepage* <www.ndis.gov.au>.

114 National Disability Insurance Scheme, *Disability Support Organisations—Capacity Building Strategy Grants* <<http://www.ndis.gov.au/document/759>>.

115 Office of the Public Advocate (SA), *Submission 17*.

5.120 National Disability Services suggested that it also be timely

to develop and provide education material to NDIA staff, families, guardians and participants about the principles of supported decision-making and the law around legal capacity.¹¹⁶

5.121 The Mental Health Council of Australia highlighted the need for

capacity building measures, programs or processes at the individual or community levels to empower consumers and communities to actively participate in supported decision-making. These could include programs to educate consumers and carers about the NDIS.¹¹⁷

5.122 Accordingly, consistent with Proposal 4–11, people who may require decision-making support, and supporters and representatives (or potential supporters and representatives) should be provided with information and advice to enable them to understand their roles and duties. In addition, the ALRC proposes that Australian Public Service employees who engage with supporters and representatives are provided with regular, ongoing and consistent training in relation to the roles of supporters and representatives. The ALRC notes that NDIA employees, service providers, plan management providers, and other experts and third parties engaged in the NDIS would benefit from such training.

5.123 The focus of training and guidance could include topics such as: the introduction of the supporter and representative model under the NDIS and differences between the new model and existing nominee provisions; interaction with state and territory decision-making systems; and supported decision-making in the context of the NDIS.

Issues outside the scope of this Inquiry

5.124 Stakeholders raised a range of other concerns about the NDIS, some of which extend beyond the Inquiry's scope. They are nonetheless important and indicate systemic and practical concerns with the structure and operation of the NDIS. These include, for example:

- eligibility and becoming a participant under the NDIS;¹¹⁸
- the operation of the NDIS for people with particular types of disability, for example psychosocial disability;¹¹⁹
- the interaction between the NDIS and other systems, particularly with respect to funding responsibility;¹²⁰

116 National Disability Services, *Submission 49*.

117 MHCA, *Submission 77*.

118 See, eg, Women's Legal Services NSW, *Submission 57*; Physical Disability Council of NSW, *Submission 32*; Mental Health Coordinating Council, *Submission 07*; MHCA, *Submission 77*.

119 See, eg, MHCA, *Submission 77*. See also, Mental Health Council of Australia, *Providing Psychological Support through the NDIS*, March 2014.

120 See, eg, Office of the Public Advocate (Qld), *Submission 05*.

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- registration and oversight of providers of support;¹²¹ and
 - issues in relation to decreased funding of state and territory services, and potential gaps where people with disability are not eligible for the NDIS.¹²²

5.125 While these concerns are important, the issues do not relate directly to the concepts of legal capacity of decision-making ability and the ALRC does not intend to make proposals in these areas.

121 See, eg, *Ibid.*

122 See, eg, MHCA, *Submission 77*.

