

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.

5.2 The ALRC recommends that the Commonwealth decision-making model be applied to the NDIS, which already incorporates elements of supported decision-making. This will require some amendment of the *National Disability Insurance Scheme Act 2013* (Cth) (NDIS Act) and Rules to provide for legal recognition of ‘supporters’ and ‘representatives’, including provisions for their appointment, removal and associated safeguards.

5.3 The ALRC also recommends that the Chief Executive Officer (CEO) of the National Disability Insurance Agency (NDIA) should retain the power to appoint a ‘representative’ for a participant as a measure of last resort. There are circumstances

where the exercise of this power is necessary—in the absence of a Commonwealth guardianship tribunal or equivalent body—to ensure that people with a disability are properly supported in relation to the NDIS.

5.4 There should be a presumption that an existing state or territory appointed decision-maker with comparable powers and responsibilities should be appointed as an NDIS representative. Amendments to the legislation governing state and territory decision-makers may be necessary to facilitate this.

5.5 In the light of the shift towards a supported decision-making model, the ALRC also recommends that the Australian Government provide guidance and training in relation to decision-making and the NDIS.

The NDIS

5.6 The introduction of the NDIS followed a long-standing 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 persons with disability. The establishment of the NDIS represents a new area of Commonwealth responsibility and ‘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

5.7 The NDIS was designed to empower people with disability and facilitate their choice and control.² With respect to decision-making, while the NDIS Act contains some provisions which facilitate supported decision-making, it ultimately retains a mechanism for substitute decision-making through the use of ‘nominees’.³

5.8 While not all persons with disability are eligible for the NDIS, it represents the primary area of Commonwealth law in which the Commonwealth decision-making model should apply.

5.9 The NDIS is still in its early stages with roll-out at several trial sites. The ongoing roll-out of the NDIS and the scheduled reviews, outlined below, provide timely opportunities for implementing and evaluating a supported decision-making model.

Background

5.10 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

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

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

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, Vol 1, 5.

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.

5.11 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 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

5.12 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 NDIA.

5.13 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. In July 2014, the NDIS commenced further trial sites in the Australian Capital Territory, the Barkly region of the Northern Territory, and in the Perth Hills area of Western Australia.¹² 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

5.14 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

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

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 See, eg, National Disability Insurance Scheme, *NDIS Opens for Business in the ACT* <www.ndis.gov.au>.

13 See, eg, National Disability Insurance Scheme, *Roll out of the NDIS* <www.ndis.gov.au>.

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

- a COAG report on cost drivers of the NDIS;¹⁵
- consideration of the NDIS in the course of the National Commission of Audit;¹⁶
- 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
- a review of the Intergovernmental Agreement by the Ministerial Council;¹⁹ and
- a KPMG interim report for the Board of the NDIA on the optimal approach to transition to the full NDIS.²⁰

5.15 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.²¹

5.16 As many of these reviews and evaluations will be conducted following the conclusion of the ALRC's Inquiry, the recommendations in this Report may inform their work.

Decision-making under the NDIS

5.17 Current decision-making arrangements under the NDIS Act incorporate elements of both supported and substitute decision-making, as well as informal and formal decision-making. The three key decision-making mechanisms include: autonomous decision-making by participants; informal supported decision-making; and substitute decision-making by nominees.

5.18 A person can make an access request to be a participant under the NDIS.²² If the person meets the access criteria, the person becomes a participant on the day the CEO of the NDIA decides that they meet the access criteria.²³

5.19 The main object 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'.²⁴ The Act provides that 'the supportive relationships, friendships and connections with others of people with disability should be recognised'.²⁵

15 Requested by COAG Disability Reform Council: COAG Disability Reform Council, *Meeting Communiqué*, 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).

17 NDIS Evaluation, *Evaluation of the Trial of NDIS* <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 'Review of the Optimal Approach to Transition to the Full NDIS' (Interim Report, KPMG).

21 Parliamentary Joint Standing Committee on the National Disability Insurance Scheme, *Homepage* <www.aph.gov.au>.

22 *National Disability Insurance Scheme Act 2013* (Cth) s 18.

23 *Ibid* ss 28, 22–27 (access criteria).

24 *Ibid* s 3(1)(e).

25 *Ibid* s 5(e).

5.20 If a person is a participant, the CEO must facilitate the preparation of a plan with them. A plan will cover, among others matters, general support to be provided to the participant, as well as any ‘reasonable and necessary’ supports that will be funded under the NDIS.²⁶

Nominees

5.21 The NDIS Act provides for a nominee scheme which is modelled largely on the existing substitute decision-making scheme under social security law. These provisions may limit the scope for autonomous decision-making by participants.

5.22 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.²⁷ 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,²⁸ but in practice is confined to making requests to the NDIA or receiving notices from the NDIA on behalf of the participant.

Appointment

5.23 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.²⁹ The same person can be appointed as both a plan and correspondence nominee.³⁰

5.24 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.³¹ 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.³²

5.25 The Nominee Rules also acknowledge that appointment of a nominee on the initiative of the CEO of the NDIA is to be a measure of last resort:

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.

26 Ibid ss 32 (CEO must facilitate a plan), 33 (matters that must be included in a plan).

27 Ibid s 78.

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

29 *National Disability Insurance Scheme Act 2013* (Cth) ss 86, 87. See also *National Disability Insurance Scheme (Nominee) Rules 2013* (Cth) rr 3.11—3.15.

30 *National Disability Insurance Scheme Act 2013* (Cth) s 88(1).

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

32 *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.³³

5.26 In appointing a nominee, the CEO must take into consideration ‘the wishes (if any) of the participant regarding the making of the appointment’,³⁴ and have regard to a number of other matters.³⁵ In determining whether to appoint a particular nominee, there are also a range of matters the CEO must take into account.³⁶ Appointment of a nominee may be indefinite or for a particular period of time.³⁷

5.27 Where requested by the participant, the CEO must cancel the appointment of a nominee who was appointed at a participant’s request.³⁸ 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.³⁹

Duties

5.28 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’.⁴⁰ 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.⁴¹

5.29 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’.⁴² 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.⁴³

5.30 The ALRC understands that, in some trial sites, there have been very few appointments of plan nominees.⁴⁴ For example, to date, no nominee appointments have been made in the NDIS trial site in NSW. As discussed below, use of the CEO’s power

33 Ibid rr 3.1, 3.4.

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

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

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

37 Ibid rr 4.9–4.11.

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

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

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

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

42 Ibid r 5.5.

43 Ibid r 5.6.

44 See discussion of informal supporters in Ch 4.

to appoint a nominee may manage situations where persons with disability have no natural support networks or no-one they know who can be appointed.

Reform of decision-making under the NDIS

5.31 The NDIS Act provides for supported decision-making in a manner largely consistent with the *United Nations Convention on the Rights of Persons with Disabilities* (CRPD) and the National Decision-Making Principles. However, some amendments will be necessary to bring the NDIS in line with the ALRC's Commonwealth decision-making model.

5.32 First, the ALRC recommends amendment of the objects and principles provisions of the NDIS Act.

5.33 Secondly, the existing NDIS nominee scheme should be replaced with a scheme for 'supporters' and 'representatives', as described in Chapter 4. In particular, the NDIS Act, Rules and Operational Guidelines should be amended to provide a mechanism for the recognition of supporters appointed by participants and representatives. In effect, the reforms would result in the current 'correspondence nominee' role being subsumed by the supporter role and plan nominees being replaced by representatives.

5.34 Stakeholders highlighted the importance of ensuring that the NDIS should continue as a benchmark model for supported decision-making. For example, the Queenslanders with Disability Network (QDN) noted that

The NDIS can play a leading role in demonstrating to people with disability and their families, how supported decision-making can lead to better outcomes. This will create an expectation that will drive demand for reform in other jurisdictions to adopt a uniform supported decision-making framework.⁴⁵

5.35 The NDIA expressed support for the objectives of the ALRC's proposals with regard to applying the National Decision-Making Principles and Commonwealth decision-making model, which it considered are consistent with both the objectives of the NDIS Act and the NDIA's strategic plan.⁴⁶

5.36 More generally, stakeholders strongly endorsed the need for supported decision-making in the NDIS to enable participants 'to obtain support to make and implement their own decisions'.⁴⁷ This is likely to be of particular significance for many 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,

45 Queenslanders with Disability Network, *Submission 119*.

46 National Disability Insurance Agency, *Submission 118*.

47 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*.

where local family and neighbourhood networks can be particularly strong and supportive'.⁴⁸

5.37 The application of the Commonwealth decision-making model may go some way to helping avoid the appointment of guardians and other substitute decision-makers 'in lieu of appropriate support, assistance, information or case management'⁴⁹ in most cases. However, as discussed below, there may still be a role for state-appointed decision-makers in instances where a person requires an NDIS representative.

5.38 The ALRC does not intend to be overly prescriptive about the mechanism for recognising supporters in the context of the NDIS. Nor has the ALRC examined funding mechanisms or practical matters involving resources and responsibilities. Whether there is a general duty to provide support and who should bear the cost of support are consequential issues.

Objects and principles

Recommendation 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.

5.39 The ALRC recommends 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 the particular division of the Act dealing with supporters and representatives.

5.40 Stakeholders such as the Disability Advocacy Network Australia (DANA) 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.⁵⁰

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

- people with disability should be supported to participate in and contribute to social and economic life to the extent of their ability;

⁴⁸ Centre for Rural Regional Law and Justice and the National Rural Law and Justice Alliance, *Submission 20*.

⁴⁹ Office of the Public Advocate (Qld), *Submission 05*.

⁵⁰ Disability Advocacy Network Australia, *Submission 36*.

- 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.⁵¹

5.42 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 judgments and decisions that people with disability would have made for themselves should be taken into account.⁵²

5.43 While the intent of the objects and principles provisions in many ways reflects the CRPD and National Decision-Making Principles, some amendment is required, not least to recognise will and preferences decision-making.

5.44 For example, the focus under the general principle in 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’.⁵³ Such amendments would reflect the recommended shift from substitute decision-making to supported decision-making; the shift away from ‘best interests’ towards ‘will, preferences and rights’; and the idea that decision-making authority should remain with the participant.

Supporters

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

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

52 *Ibid* s 5.

53 *Ibid* s 4(8).

5.45 The Commonwealth decision-making model recommended 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 formalise the role played by nominees as supporters, such as family members.

5.46 As discussed in Chapters 2 and 3, the central idea, already recognised by the NDIS Act, is that participants should be supported to make their own decisions. 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 functions each supporter might play.

5.47 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 in decision-making. Provisions which recognise and facilitate the involvement of informal supporters in the NDIS are consistent with the National Decision-Making Principles.⁵⁴

5.48 The ALRC recognises the danger of over-formalising the role of informal supporters, but argues that it is necessary to provide some mechanism for legislative recognition, especially when dealing with third parties. Even where people have 'natural' or informal support from families, they may want to appoint a particular person to help them deal with the NDIS. Providing some legal recognition of such a role may help prevent situations where the NDIA is not sure whom to deal with, for example, where there is conflicting communication or advice from family members.

Appointment

5.49 The NDIS represents a fundamental shift in funding for, and provision of, disability services in Australia. In addition to existing mechanisms, such as the Sector Development Fund,⁵⁵ supporters would play a key role in ensuring prospective participants and participants receive appropriate support to engage with the NDIS.

5.50 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 would be the only mechanism by which a supporter may be appointed.⁵⁶ 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

54 See, eg, Ibid 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).

55 '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>.

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

guardian under state or territory law because they incorrectly assume it is necessary, or simply to facilitate registration as a participant with the NDIS.⁵⁷

5.51 Most importantly, applying the Commonwealth decision-making model to the NDIS should ensure that, where a supporter is appointed, ultimate decision-making authority remains with the participant. Any decision made by a participant with the support of a supporter should be recognised by the NDIA, service providers and others as the decision of the participant.

5.52 A participant should be entitled to appoint whomever they want as their supporter, if they want one. Stakeholders have highlighted, however, that there are many instances where a person will not have any available support, and an independent body may be required to provide support. Justice Connect and Seniors Rights Victoria suggested that,

ideally, an independent body would be provided with sufficient resources and funding to 'employ suitably qualified people to take on the role' equivalent to the OPA/State Trustees in the Victorian jurisdiction.⁵⁸

5.53 Advocacy for Inclusion also submitted that, where a person has no existing natural support, 'they should have access to formal supporters who have undergone appropriate checks and training so that they can select a person they are comfortable with'.⁵⁹

5.54 Other stakeholders emphasised the importance of independent advocacy in supporting NDIS participants.⁶⁰ There seems no reason why individual advocates or advocate organisations should not be appointed as a participant's supporter. Only a participant would have the authority to appoint a supporter and would also have the power to suspend or revoke the appointment at any time.

5.55 The National Disability Advocacy Program (NDAP), managed by the Department of Social Services, funds advocates at NDIS trial sites. These advocates can 'assist people to participate in decision making and increase their capacity to understand the service delivery options available to enable them to meet their goals'.⁶¹ Funding also allows advocates to provide assistance to people seeking merits review of NDIA decisions before the Administrative Appeals Tribunal (AAT), by providing a support person.

57 See, eg, AGAC, *Submission 51*.

58 Justice Connect and Seniors Rights Victoria, *Submission 120*.

59 Advocacy for Inclusion, *Submission 126*.

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

61 Department of Social Services, *National Disability Advocacy Program* <www.dss.gov.au>.

5.56 One option, which might help 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.⁶² This might include support to allow a participant to make supported decisions in the management of their own funds.⁶³

5.57 It may be inappropriate, however, to use individual participant funding for decision-making support. Arguably this should be provided separately by the NDIA or other government agency—through programs such as the NDAP—in order to ensure compliance with international obligations of State Parties under the CRPD with respect to the provision of support. The Nominee Rules provide that it is ‘expected that the Agency will assist nominees in fulfilling’ a duty to develop the capacity of participants.⁶⁴ This may be a basis for arguing that NDIA responsibility for support was envisaged, to at least 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 be funded under the NDIS.

Functions and duties

Functions of a supporter

5.58 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.⁶⁵ The scope of the role of a correspondence nominee is narrower, and more closely reflects the functions of a supporter, who is able to make requests to or receives notices from the NDIA on behalf of the participant.⁶⁶

5.59 The functions of a supporter under the NDIS should include those set out in Recommendation 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.

62 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 Operational Guidelines, such as the *Operational Guidelines on Planning and Assessment—Supports in the Plan*.

63 Queenslanders with Disability Network, *Submission 119*.

64 *National Disability Insurance Scheme (Nominee) Rules 2013* (Cth) r 5.11.

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

66 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.

Supporter duties

5.60 The recommended duties of a supporter amend and expand upon the duties of nominees under the existing system. The ALRC recommends that a supporter's duties should include:

- supporting the NDIS participant to make the decision or decisions for which they are appointed;
- supporting the NDIS participant to express their will and preferences in making a decision;
- acting in a manner promoting the personal, social, financial and cultural wellbeing of the NDIS participant;
- acting honestly, diligently and in good faith;
- supporting the NDIS participant to consult with 'existing appointees', family members, carers and other significant people in their life in making a decision; and
- assisting the NDIS participant to develop their own decision-making ability.

5.61 A key duty owed by supporters is the duty to develop the decision-making ability of the participant. A similar duty is already owed by nominees under the NDIS Rules, which provide that a nominee has a duty to 'apply their best endeavours to developing the capacity of the participant to make their own decisions, where possible to a point where a nominee is no longer necessary'.⁶⁷ The importance of the duty to assist a person to develop their own decision-making capacity is discussed in Chapter 4.

5.62 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'.⁶⁸ It is important that there be a similar duty on supporters to support a participant to make decisions and to express their will and preferences.

5.63 It is appropriate to add financial and cultural wellbeing to this list, reflecting the role supporters may play in supporting participants to make decisions relating to NDIS funds, and the importance of culturally sensitive and appropriate support.⁶⁹ This idea of sensitivity to cultural and linguistic circumstances is not an existing duty owed by nominees. However, in deciding whom to appoint as a nominee, the CEO is to have

67 Ibid r 5.10.

68 Ibid rr 4.8(b)(C), 4.8(b)(D).

69 See, eg, MDAA, *Submission 43*.

regard to the degree to which the proposed nominee is ‘sensitive to the cultural and linguistic circumstances of the participant’.⁷⁰

5.64 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.⁷¹ If more than one person is appointed as plan nominee, each of them also owes a duty to consult with the others.⁷² In order to reflect the supported rather than substitute decision-making role played by supporters, the ALRC considers that the supporter duty be modified to be a duty to facilitate consultation with the same categories of people.

5.65 The 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.

Representatives

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

5.66 In certain circumstances, a participant may not be able to make decisions themselves or with support, and may need a representative to be appointed for them. This should only occur in line with the National Decision-Making Principles and as a last resort.

5.67 The ALRC recommends that the current ‘nominee’ provisions be amended to allow the appointment of a representative. The change in terminology from ‘nominee’ to ‘representative’ is consistent with the National Decision-Making Principles. However, the provisions dealing with representatives will operate much the same as the nominee provisions, with some exceptions as discussed below.

5.68 Many of the elements contained in the ALRC’s model for ‘representatives’ are already incorporated into the NDIS Act, Rules or Operational Guidelines. For instance, consistent with the ALRC’s approach, nominees are appointed as a last resort, and there are duties on nominees to ascertain the will and preferences of the participant and to act in a manner that promotes the personal and social wellbeing of the participant.

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

71 *Ibid* r 5.8.

72 *Ibid* r 5.9.

5.69 The role of a representative is to support a participant to express their will and preferences in making decisions and, where necessary, to determine the will and preferences of a participant and give effect to them. If the will and preferences of the participant cannot be ascertained, the representative should 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.

Functions and duties

Functions of a representative

5.70 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.⁷³

5.71 Despite this provision, some stakeholders expressed concern that the role played by plan nominees is 'a global appointment', and it 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'.⁷⁴

5.72 The scope of the role of a correspondence nominee is narrower and more closely reflects the functions performed 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.⁷⁵

5.73 The ALRC considers that a representative should perform some or all of the functions articulated in Recommendation 4–7. These parallel the functions of supporters and are discussed in more detail below.

5.74 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

73 Ibid r 3.8.

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

75 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.

interaction with the NDIA and planning, and those who are involved in financial decisions.⁷⁶

Representative duties

5.75 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 Recommendation 4–8. A representative should have the same duties as a supporter, and a number of additional duties. It is important that representatives owe specific duties under the NDIS Act and Rules, even where they are an existing state or territory appointed decision-maker and are subject to duties under state and territory legislation.

5.76 The key duties the ALRC recommends that a representative should owe under the NDIS Act and Rules are:

- providing support to a participant to express their will and preferences in making decisions;
- where it is not possible to determine the current will and preferences of the participant, determining what the person would likely want based on all the information available;
- where the first two avenues 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 participant;
- providing 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 participant to make their own decisions.

5.77 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 is similar to but does not require provision of support to express will and preferences. However, there is some suggestion that this type of duty was intended under the NDIS Rules because, 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’.⁷⁷ Nonetheless, it is necessary for a representative to have an explicit duty to support a participant to express their will and preferences.

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

⁷⁷ *National Disability Insurance Scheme (Nominee) Rules 2013* (Cth) rr 4.8(b)(C), 4.8(b)(D), 4.8(b)(E).

5.78 While the focus of 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 full support in 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 the NDIA, service providers, family members and others to establish an understanding of factors 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, and make the decision that is least restrictive of these rights.

Appointment by the CEO

Recommendation 5-4 The *National Disability Insurance Scheme Act 2013* (Cth) should be amended to incorporate provisions dealing with the process and factors to be taken into account by the CEO of the National Disability Insurance Agency in appointing representatives. These provisions should make it clear that the CEO's powers are to be exercised as a measure of last resort, with the presumption that an existing state or territory appointee will be appointed, and with particular regard to the participant's will, preferences and support networks.

5.79 In the ALRC's view, the power of the CEO to appoint a representative needs to be retained. Problems may arise where an NDIS participant has no informal networks to support them, and no state-based appointed decision maker is available to be appointed as a representative. In the absence of the creation of some new Commonwealth body, similar to a guardianship tribunal, the exercise of the power to appoint a representative by the CEO may be necessary and desirable, provided that the power is subject to appropriate safeguards.

5.80 Despite the concerns of some stakeholders, the NDIS Act and Rules make it clear that the CEO's powers are to be exercised as a measure of last resort, with particular regard to the participant's wishes and support networks and the existence of state or territory appointees. However, given the importance of this issue, some of these provisions should be elevated into the primary legislation.

5.81 The NDIS Act currently 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.⁷⁸ The CEO of the NDIA must take into account several factors in determining whether to appoint a particular nominee.⁷⁹ In addition, the CEO has the

78 *National Disability Insurance Scheme Act 2013* (Cth) ss 86, 87. See also *National Disability Insurance Scheme (Nominee) Rules 2013* (Cth) rr 3.11–3.15.

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

power to make an appointment for a particular period⁸⁰ and power to limit the scope of the appointment.⁸¹ The Rules provide that:

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. In appointing a nominee in such circumstances, the CEO will have regard to the participant's wishes and the participant's circumstances (including their formal and informal support networks).⁸²

5.82 This general principle is expanded upon in r 3.14, which provides that the CEO, when deciding to appoint a nominee must:

- (a) consult with the participant; and
- (b) have regard to the following:
 - (i) whether the participant would be able to participate effectively in the NDIS without having a nominee appointed;
 - (ii) the principle that a nominee should be appointed only when necessary, as a last resort, and subject to appropriate safeguards;
 - (iii) whether the participant has a court-appointed decision-maker or a participant-appointed decision-maker;
 - (iv) whether the participant has supportive relationships, friendships or connections with others that could be:
 - (A) relied on or strengthened to assist the participant to make their own decisions; or
 - (B) improved by appointment of an appropriate person as a nominee;
 - (v) any relevant views of:
 - (A) the participant; and
 - (B) any person (including a carer) who assists the participant to manage their day-to-day activities and make decisions; and
 - (C) any court-appointed decision-maker or participant-appointed decision-maker.

5.83 Rule 3.14 requires that the decision is taken with regard to the wishes of the applicant and in the context of available supports. The Rules also provide that

An example of a circumstance in which a nominee might be appointed without a request from the participant is where the CEO considers that the participant needs a nominee, but is unable to request appointment himself or herself, even with support. In such circumstances, the initiative might come from a carer or other person who offers to be the nominee.⁸³

80 Ibid rr 4.9–4.11.

81 Ibid r 3.8.

82 Ibid r 3.4.

83 Ibid r 3.15.

5.84 Stakeholders expressed concern about provisions that enable the CEO or delegate to appoint a nominee on the initiative of the agency, rather than at the request of the participant.⁸⁴ DANA, for example, submitted that the 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.⁸⁵

5.85 Similarly, the National Association of Community Legal Centres submitted the current provisions give the agency ‘considerable power’ to appoint a nominee and do not require ‘consideration or facilitation of the decision-making capability of the person with disability’—and that such provisions should not be replicated under the Commonwealth decision-making model.⁸⁶

Interaction with state and territory systems

Recommendation 5–5 The *National Disability Insurance Scheme Act 2013* (Cth) should be amended to provide that, before exercising the power to appoint a representative, the CEO of the National Disability Insurance Agency may make an application to a state or territory guardianship or administration body for the appointment of a person with comparable powers and responsibilities. The CEO may then exercise the power to appoint that person as a representative under the NDIS Act.

5.86 Under 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 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’.⁸⁷ The Rules provide that the CEO must also 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

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

85 Disability Advocacy Network Australia, *Submission 36*. See also National Association of Community Legal Centres, *Submission 127*. See also Physical Disability Council of NSW, *Submission 32*. The Physical Disability Council of NSW submitted that the provision ‘is not consistent with person centred practice’.

86 National Association of Community Legal Centres, *Submission 127*.

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

person are comparable with those of a nominee, that person should be appointed as nominee.⁸⁸

5.87 Further, the CEO is to ‘consult, in writing, with any court appointed decision-maker or participant-appointed decision maker in relation to any appointment’.⁸⁹ Nominees themselves also have a duty to consult with ‘any court-appointed decision-maker or any participant-appointed decision-maker’.⁹⁰

5.88 As discussed in Chapter 4, one of the key difficulties in applying the Commonwealth decision-making model to the NDIS is determining how NDIS supporters and representatives interact with state and territory appointed decision-makers.

5.89 The NDIA stated that, in relation to interaction issues generally, it ‘recognises the importance of ensuring that to the greatest extent possible the NDIS operates in a way that complements other arrangements for supporting people with disability including in relation to the management of NDIS funds’.

The Agency is working collaboratively with others including state and territory guardianship and administration tribunals to address the issues raised by these and other questions. For example, the Agency has been entering into arrangements for the exchange of information, consistent with the privacy provisions of the NDIS Act, with state and territory guardianship and administration tribunals.⁹¹

5.90 The interaction issues are of particular relevance given the ongoing roll-out of the NDIS. Stakeholders expressed concerns about an increase in applications for the appointment of state or territory decision-makers since the introduction of the NDIS. For example, the Australian Guardianship and Administration Council (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.⁹²

5.91 To address concerns about the duplication of representatives, and the development of a parallel Commonwealth system of appointments, the NDIS Act should be amended to provide that, before exercising the power to appoint a representative, the CEO of the NDIA may make an application to a state or territory guardianship or administration body for the appointment of a person with comparable powers and responsibilities.

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

89 *Ibid* r 4.12.

90 *Ibid* r 5.8(a).

91 National Disability Insurance Agency, *Submission 118*.

92 AGAC, *Submission 51*.

5.92 If the NDIA is to have regular recourse to state and territory guardianship and administration systems to find people suitable for appointment as representatives, this will have resource and funding implications for state and territory governments.

State and territory appointments

5.93 The NSW Government expressed concern about the ‘practical reality’ that, where a participant has no informal support network, the NDIA is managing the plan on the participant’s behalf and that ‘the decisions being made by the NDIA are in the nature of substitute decisions with no independent monitoring or scrutiny’.⁹³

5.94 The Guardianship Division of the Civil and Administrative Tribunal of NSW (NCAT) has received ‘over 85 applications for the appointment of a guardian for a person who is, or will become a participant in the NDIS’ in the Hunter Region launch site.⁹⁴ NCAT noted that applications were made by family members or care providers who were concerned about the operation of the NDIS.

5.95 In some cases, where a participant is seen to have adequate support from informal support networks, or strong advocates, NCAT has rejected the application for guardianship. For example, in *KTG*, NCAT commented

The Tribunal was cautious about pre-empting the NDIA processes by making a guardianship order so that Mrs LBU was all the more likely to be appointed nominee by the NDIA.⁹⁵

5.96 In contrast, NCAT appointed a Public Guardian in the case of *KCG*, where the person did not have a friend or family member who could support her. NCAT noted:

The irony in reaching this conclusion is that a state based appointment is required for a person in Miss KCG’s circumstances to ensure that her interests in relation to a Commonwealth scheme are protected, as it seems there is no Commonwealth equivalent of a Public Guardian, a Public Advocate or other independent body who could be appointed as a nominee on her behalf.⁹⁶

5.97 The Office of the Public Advocate (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.⁹⁷ Similarly, the Office of the Public Advocate (Vic) stated that, while it was expected that state and territory-appointed guardians and administrators would be appointed as nominees under the NDIS, ‘a review is required to ascertain the extent to which this is happening in practice in the launch sites’.⁹⁸

5.98 The ALRC understands that very few nominees have been appointed by the CEO of the NDIA, and that this may have contributed to the number of applications for guardianship being made to relevant state tribunals.

93 NSW Government, *Submission 135*.

94 *Ibid*.

95 *KTG* [2014] NSWCATGD 6, [29].

96 *KCG* [2014] NSWCATGD 7, [69].

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

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

Interaction issues

5.99 Stakeholders provided a range of opinions on how interaction issues might be dealt with. Many suggested that there should be a centralised process because, in most cases, ‘it is highly desirable that the same person should fulfil both roles’⁹⁹—that is, acting as plan nominee and performing guardianship roles more generally.

5.100 The OPA (Qld) submitted that it is logical to have a system of central registration and ‘the state based decision-making regimes are an obvious vehicle for this’. Tapping into the existing state based system would ensure that it ‘also connects people with an existing system of safeguards in the form of opportunities for tribunal review and oversight of Public Guardians and Trustees’. While this will ‘not provide all the safeguards needed, it helps to have people connected with an existing and substantial system’.¹⁰⁰ Children with Disability Australia submitted that if a representative is to be appointed ‘other than at the participant’s initiative it should be dealt with by the relevant systems for obtaining administration or guardianship orders’.¹⁰¹

5.101 While stakeholders agreed that it would be desirable to have one decision-maker, there were differing views on how this should be achieved. For example, the OPA (SA and Vic) suggested that one option would be for ‘the Commonwealth to cross-vest state and territory Tribunals with the power to appoint federal representatives, but this seems unnecessarily complex’.¹⁰²

5.102 The ALRC considers that the starting point should be that, where a representative is required, the NDIS Act should encourage the appointment of existing state or territory appointees as NDIS representatives. This may require amendment to the NDIS Act to make it more explicit that the CEO should appoint existing state appointees where possible, and the ALRC recommends elevating such provisions from the Rules and into the Act itself.

5.103 In addition, state and territory guardianship and administration legislation should be amended, if necessary, to facilitate the appointment of guardians and administrators as NDIS representatives. The OPA (SA and Vic) argued that NDIS nominee arrangements should ‘better align with state and territory appointments’.¹⁰³

OPA Vic, for instance, cannot at the moment play the role of NDIS nominee (as a result of the limitations of our state legislative authority, which requires amendment if we are to be able to play the role of nominee). And while there is no reason why OPA as guardian of last resort could not in theory act as a plan nominee and make decisions about goals, services and supports, clearly OPA should not take on financial management responsibilities. It appears that the NDIA can particularise the role of nominee, however we note that an equivalent administrator nominee/representative

99 ADACAS, *Submission 108*. ADACAS argued that the Commonwealth should recognise state-appointed representatives unless exceptional circumstances exist, in which case the matter should be referred to an independent tribunal for resolution.

100 Office of the Public Advocate (Qld), *Submission 110*.

101 Children with Disability Australia, *Submission 68*.

102 Offices of the Public Advocate (SA and Vic), *Submission 95*.

103 Ibid.

function could be devised for situations where a public trustee would be best placed to perform this role.¹⁰⁴

5.104 These comments highlight that this alignment may require state and territory legislative change. For example, at present, while a plan nominee may manage the funding for supports under the NDIS participant's plan, this is not a role a guardian is able to undertake under some state and territory legislation, including the *Guardianship and Administration Act 1986* (Vic).¹⁰⁵

5.105 In Chapter 10, the ALRC recommends that state and territory governments review laws that deal with decision-making by persons who need decision-making support by having regard to interaction with supporter and representative schemes under Commonwealth legislation.

Conflicts of duties

5.106 Another important issue concerns possible conflicts of duties where a state or territory appointee is also appointed as a representative under the NDIS Act. A person appointed by a state or territory body, such as NCAT, would have duties under state or territory legislation, as well as under the Commonwealth law.

5.107 While these duties may sometimes be interpreted as consistent, there may be times when they conflict. Most obviously, under state legislation, a guardian may have a duty to make decisions in the best interests of the person represented, while having a duty under Commonwealth legislation to ensure that the person's own will and preferences direct the decision.

5.108 When making decisions for the purposes of Commonwealth legislation, Commonwealth legislative duties would apply, but the person may then be in breach of duties owed as a guardian under state or territory legislation making it impossible for them to continue to act in the latter role.

5.109 However, the Nominee Rules contain some recognition that state and territory appointees may have different roles and duties than those provided under the NDIS. Provisions that require a plan nominee appointed on the initiative of the CEO to act only if the participant is not capable of acting, are 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).¹⁰⁶

5.110 This rule appears to operate so that a nominee who has duties to act under state or territory legislation can continue to do so in relation to decisions under the NDIS—including acting when the participant is themselves capable of doing so—although obligations to consult and develop the capacity of the participant are not affected by the clause.

104 Ibid.

105 Ibid.

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

5.111 In addition, the Act itself contains a standard constitutional ‘concurrent operation’ clause providing 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’.¹⁰⁷ This provision also enables regulations to prescribe ‘kinds of laws of States and Territories as examples of laws’ to which concurrent operation applies.¹⁰⁸

5.112 It is not clear exactly how concurrent operation of laws might affect conflicts of duties under the NDIS, and under state and territory legislation. This is an issue that might need future clarification as the NDIS evolves.

Management of NDIS funds

5.113 Under the NDIS Act, a participant has a choice between requesting that NDIS funds be self-managed by the participant, managed by the participant’s plan nominee, a plan management provider nominated by the participant, or the NDIA.¹⁰⁹ 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.¹¹⁰

5.114 There are also 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’.¹¹¹

5.115 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.¹¹² 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’.¹¹³

5.116 QDN observed that under the NDIS

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.¹¹⁴

5.117 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

107 *National Disability Insurance Scheme Act 2013* (Cth) s 207(1).

108 *Ibid* s 207(2).

109 *Ibid* ss 42(2), 43(1).

110 *Ibid* s 43(2).

111 *Ibid* s 44.

112 *Ibid* s 43(4).

113 *Ibid* s 43(5).

114 Queenslanders with Disability Network, *Submission 59*.

making decisions about fund management. Participants should also be entitled to nominate a plan management provider, or the NDIA to manage their funds.

5.118 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 Financial Services Council 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’¹¹⁵ and that ‘the NDIS should pay amounts directly to product/service providers after due consultation with the relevant appointed decision-maker’.¹¹⁶

5.119 The preferable approach is for participants to self-manage their funding for supports to the extent they desire. One possible benefit is said to be that

the capacity to manage their own funds, also allows participants to recruit their own staff. Many people with disability identify this as being one of the most influential elements in achieving ‘choice and control’ in their lives. By facilitating a participant’s capacity to manage their own funds through the use of supported decision-making, people with disability (who in many cases will spend extended periods of time with paid support workers) will be empowered to recruit the support workers that best suit their needs. This could be the catalyst for major improvements in many aspects of a participant’s life.¹¹⁷

5.120 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. Where the NDIA does harbour concerns, safeguards such as trial periods may be used to ensure that any problems that may arise are addressed. QDN observed that this is ‘an example of how the “dignity of risk” that is much talked about, can be put into practice’.¹¹⁸

5.121 At the same time, given the amounts of money sometimes involved, there need to be protective provisions. The ALRC does not recommend any change to the power of the CEO to refuse to allow self-management where there is an ‘unreasonable risk to the participant’.¹¹⁹ However, the ALRC suggests that the NDIS Rules, in prescribing criteria the CEO is to apply in considering whether an unreasonable risk to the participant would exist,¹²⁰ include regard to the person’s will and preferences and decision-making support available to them.

Safeguards

5.122 The appointment and conduct of Commonwealth representatives should be subject to appropriate and effective safeguards.

115 Financial Services Council, *Submission 35*.

116 *Ibid.*

117 Queenslanders with Disability Network, *Submission 119*.

118 *Ibid.*

119 *National Disability Insurance Scheme Act 2013* (Cth) s 44.

120 Under *Ibid* s 44(3).

5.123 There are a range of existing complaint, review and appeal mechanisms under the NDIS. For example, participants may seek internal review of a reviewable decision,¹²¹ make a complaint to the Commonwealth Ombudsman, or seek review of a reviewable decision by the AAT.¹²²

5.124 In the trial sites, existing state and territory quality assurance frameworks and safeguards also apply.¹²³ The Department of Social Services is currently developing a number of options for a national quality assurance and safeguards framework or approach as part of the NDIS for consideration by COAG. 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;
- 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; and
- 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.¹²⁴

5.125 Issues concerning safeguards should be considered in the course of developing the national quality assurance and safeguards framework as part of the NDIS.

5.126 A number of stakeholders, including the Disability Services Commission of Victoria, advocated for 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.¹²⁵

5.127 The ALRC does not make recommendations with respect to the specific safeguards that may be required in the context of the NDIS. Nor does the ALRC comment on systemic issues relating to safeguards under the NDIS raised by stakeholders, such as the funding of legal support for participants to seek administrative review of NDIA decisions.¹²⁶

121 Ibid ss 99, 100.

122 Ibid s 103.

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

124 National Disability Insurance Scheme, *Safeguards* <www.ndis.gov.au>.

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

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

5.128 However, there are two matters the ALRC considers might be reviewed in the context of the NDIS quality assurance and safeguards framework.

5.129 First, the NSW Government observed that there are provisions in the *Guardianship Act 1987* (NSW) that prohibit the appointment of paid carers and other persons with a conflict of interest as substitute decision makers.¹²⁷ It submitted that if such appointments were allowed under the Commonwealth model, there would need to be appropriate supervision and support from an independent body, with powers to seek the removal of supporters and representatives if required.¹²⁸ At present, under the NDIS Act, the CEO has power to cancel or suspend the appointment of a nominee for a range of reasons,¹²⁹ including on the request of the participant and where there are reasonable grounds to believe that the person is likely to cause, ‘physical, mental or financial harm to the participant’.¹³⁰ This may be sufficient, but might be reviewed.

5.130 Secondly, AGAC raised concerns about the operation of s 65 of the NDIS Act. This provision is said to prevent a guardianship tribunal from having access to information held by the NDIA, when this information may be critical to the tribunal’s consideration of whether a guardianship or administration order is needed.¹³¹ This provision may also require review.

Guidance and training

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

5.132 The NDIA has developed approaches to education, training and community engagement (including through video, quotes, stories, and webinars) and has produced a range of guidance material for people with disability, family and carers, service providers, and participants.¹³²

5.133 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’.¹³³

5.134 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 Nominee Rules are applied appropriately in practice:

127 *Guardianship Act 1987* (NSW) ss 6B(2), 17(1)(b), 25M(1)(a).

128 NSW Government, *Submission 135*.

129 *National Disability Insurance Scheme Act 2013* (Cth) ss 89–91.

130 *Ibid* s 91(1).

131 AGAC, *Submission 91*.

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

133 National Disability Insurance Scheme, *Disability Support Organisations—Capacity Building Strategy Grants* <www.ndis.gov.au>.

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.¹³⁴

5.135 National Disability Services suggested that it would 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.¹³⁵

5.136 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.¹³⁶

5.137 Accordingly, participants and supporters and representatives (or potential supporters and representatives) should be provided with information and advice to enable them to understand their functions and duties. In addition, the ALRC recommends that employees and contractors of Commonwealth agencies who engage with supporters and representatives are provided with information, guidance and training in relation to the roles of supporters and representatives.¹³⁷ 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 guidance and training.

5.138 The focus of guidance and training 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.

Other issues

5.139 Stakeholders raised a range of other concerns about the NDIS, some of which extend beyond the Inquiry's scope. They involve systemic and practical concerns with the structure and operation of the NDIS, including those relating to:

- eligibility to become a participant under the NDIS;¹³⁸

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

135 National Disability Services, *Submission 49*.

136 MHCA, *Submission 77*.

137 See Recs 4–11, 4–12.

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

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- the operation of the NDIS for people with particular types of disability, for example psychosocial disability;¹³⁹
 - the interaction between the NDIS and other systems, particularly with respect to funding responsibility;¹⁴⁰
 - registration and oversight of providers of support;¹⁴¹ and
 - decreased funding of state and territory services, and potential gaps where people with disability are not eligible for the NDIS.¹⁴²

5.140 While these concerns are important, the issues do not relate directly to the concepts of legal capacity or decision-making ability.

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

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

141 See, eg, *Ibid*.

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

