

National Seniors

Australia

Submission in Response to

National Disability Insurance Scheme Bill 2012

29 January 2013

About National Seniors Australia

With a quarter of a million members Australia-wide, National Seniors is the consumer lobby for the over-50s. It is the fourth largest organisation of its type in the world.

We give our members a voice – we listen and represent our members' views to governments, business and the community on the issues of concern to the over 50s.

We keep our members informed – by providing news and information to our members through our Australia-wide branch network, comprehensive website, forums and meetings, bi-monthly lifestyle magazine and weekly e-newsletter.

We provide a world of opportunity – we offer members the chance to use their expertise, skills and life experience to make a difference by volunteering and making a difference to the lives of others.

We support those in need – as a not-for-profit organisation, we raise funds and redirect monies received to older Australians who are most in need.

We help our members save – we offer member rewards with discounts from over 7,000 business across Australia, we offer discount travel and tours designed for the over 50s, and we provide older Australians with affordable, quality insurance to suit their needs.

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National Seniors Recommendations

1. **National Seniors recommends** that the current commitment of \$1B to fund the trials and associated establishment of the NDIS Launch Transition Agency (the Agency) must be complemented by a bipartisan commitment to fund a full NDIS by 2018 through staged increases in budget resources.
2. **National Seniors recommends** that the Australian Government includes older Australians aged 65 and older with no significant age-related conditions in the NDIS launch sites to test the effect of their inclusion, including their ongoing participation in society, their productivity and the impact on budget projections.
3. **National Seniors calls** on the Australian Government to consider expanding the eligibility for participation in the NDIS to include older Australians aged 65 and older with no significant age-related conditions.
4. **National Seniors calls** on the Australian Government to specify how the aged care system will be able to meet the needs of older Australians aged 65 and older who acquire a severe and profound disability and have no requirements for support for significant age-related conditions.
5. **National Seniors recommends** that all sections of the Bill relating to information to be provided by participants should include a requirement for the Agency to take account of a person's preference regarding the form in which information is to be submitted and to ensure support to conform with such requirements is provided, as necessary or requested.
6. **National Seniors recommends** that participants' views, satisfaction and evaluations must be incorporated into the Agency's plans and reports. The incorporation of consumers' views and satisfaction should be one of the performance indicators.
7. **National Seniors recommends** that the Bill should recognise existing State and Territory arrangements as one option for meeting requirements to assess participants' needs and appointing nominees to support clients in their decision-making and communication of their preferences.
8. **National Seniors recommends** that the Bill should specify an independent Complaints Scheme separate to the NDIS Launch Transition Agency. IF the Administrative Appeals Tribunal is to perform this function then that should be clearly stated in the Bill.
9. **National Seniors recommends** that decisions taken under Section 26(3)(b) can be appealed by the prospective participant as a reviewable decision under Section 99.

10. National Seniors recommends that membership of the Board or Advisory Council can be terminated if the member is absent, except on leave of absence, from 3 consecutive meetings or half the number of annual meetings, whichever is the lower amount.

Introduction

National Seniors Australia appreciates the opportunity to provide feedback on the *National Disability Insurance Scheme Bill 2012*. We would also welcome an invitation to present the views of our members to a Hearing that may be conducted by the Senate Committee.

The dearth of support services available to Australians living with a disability is a failure of monumental scale as is evidenced by our low ranking when compared with other OECD countries.

*Australia ranks 21st out of 29 OECD countries in employment participation rates for those with a disability. In addition, around 45% of those with a disability in Australia are living either near or below the poverty line. These facts alone show us that we need to change.*¹

The OECD reports that Australia ranks 29th following the United States of America at 28th in measures of income for people with a disability. Forty-five per cent of people with a disability in Australia live in or near poverty, more than double the OECD average of 22%. Furthermore, Australia has a relative poverty risk (ie people with a disability compared to people without a disability) of 2.7, against the OECD average of 1.6.²

The imperative to act to improve support to people with a disability is recognised in the *2010-2020 National Disability Strategy* which states that:

Concerted attention is needed to improve the responsiveness of Australia's policies in areas such as health, education, employment support, housing and income support. Australia's performance in these areas for people with disability continues to lag well behind achievements for the rest of the population³.

Therefore we welcome the commitment of the Australian Government to establish the National Disability Insurance Scheme (NDIS) and to conduct NDIS trials over two years with participation of 20,000 people in five locations around Australia. We also commend the Government for their recognition that permanent impairment may vary over the lifetime of a person with a disability, such as a mental health or chronic health condition.

However we believe the proposed NDIS trials are a very small step in the right direction to redress this lack of integrated support to the most vulnerable people in our society. Significant bi-partisan support will be required to ensure sufficient funding is available to build a NDIS that allows each person with a disability to achieve a productive and fulfilling life, including meaningful employment.

¹ Price waterhouse Cooper. 2011. *Disability expectations Investing in a better life, a stronger Australia*.

² OECD. (2009). *Sickness, disability and work: Keeping on track in the economic downturn*. Background paper.

³ Council of Australian Governments. 2011. *2010-2020 National Disability Strategy*. Commonwealth of Australia

The Bill commits to adopting an insurance-based approach, informed by actuarial analysis (Chapter 1 Section 3 (2) (b)). The current debate about the Productivity Commission's predicted costs of \$15B annually to implement the NDIS suggests estimated shortfalls of \$7 to \$9B, and total annual costs of up to \$24B.

Careful consideration of the outcomes of the trials and consultation with the Australian people is required to determine the most efficient and effective arrangements to ensure ongoing funding of a comprehensive and equitable NDIS. Therefore as a starting point:

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1. **National Seniors recommends** that the current commitment of \$1B to fund the trials and associated establishment of the NDIS Launch Transition Agency (the Agency) must be complemented by a bipartisan commitment to fund a full NDIS by 2018 through staged increases in budget resources.
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Our Position

The exclusion of people aged 65 and older from the age requirement for eligibility for the NDIS is of great concern to older Australians (Section 22 (1)). This exclusion is perceived as discriminating on the basis of age and relegates people who were active, independent and productive prior to acquiring a severe and profound disability to user-pays aged care services well before they are required.

National Seniors members provided very clear responses expressing their anger and frustration at being treated as 'second-class citizens'. In particular, they call on the Australian Government to treat people aged 65 and older as individuals who are valued members of society and assess their needs for disability support on an individual basis, rather than assuming that all people aged 65 and older are best supported by aged care services.

National Seniors member comments:

"I cannot believe this is happening, it's like you're written off as being of no value whatsoever, just because you're 65 or over. "

"I have been a supporter of the NDIS scheme, however ... I find that I have this new age issue called "OVER 65"."

"This is a particularly difficult issue for people affected by polio during the 1930's to 1960's."

"At 65, many people still have 20+ good years of life left to them and they can be productive and valued members of society."

"It seems to me that with increased lifespan the old 65 is now more like 75. People over 65 have paid taxes as have those under 65. To arbitrarily nominate 65 as the cut off age is discrimination."

"I believe that setting an age restraint at 65 to receive assistance thru' NDIS is an oxymoron. The age in which a person can retire has extended ... a person at the age of 65 will be classed as employable in which case to then say that although you may still be contributing to the country's financial situation with your taxes you are now past the age limit where you will be helped if you suddenly have a disability."

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2. **National Seniors recommends** that the Australian Government includes older Australians aged 65 and older with no significant age-related conditions in the NDIS launch sites to test the effect of their inclusion, including their ongoing participation in society, their productivity and the impact on budget projections.
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Following the implementation of Recommendation 2,

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3. **National Seniors calls** on the Australian Government to consider expanding the eligibility for participation in the NDIS to include older Australians aged 65 and older with no significant age-related conditions.
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In the unfortunate event that people aged 65 and older continue to be excluded from the NDIS trials:

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4. **National Seniors calls** on the Australian Government to specify how the aged care system will be able to meet the needs of older Australians aged 65 and older who acquire a severe and profound disability and have no requirements for support for significant age-related conditions.
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There are fundamental differences between the NDIS and aged care sector regarding access to, and delivery of, disability services. A person aged under 65 who is eligible for support under the NDIS will receive services which meet individual need within an efficient time frame and focus on maintaining independence and early intervention.

On the contrary, those people aged 65 and older who have the same disability will receive services under the aged care sector which is not equipped to provide specialised and individualised disability support and care.

Prevalent experiences within the aged care sector include lengthy waiting periods for referrals, assessments and home modifications and variations between rehabilitation and maintenance approaches to care. The client's health

may deteriorate before assistance is received resulting in reduced functioning, readmissions to hospital and increased financial burden on the sector.

The aged care workforce is not trained to deal with profound and severe disability and the sector is not funded to provide individualised equipment and aids and specialised disability support. The proposed Workforce Compact with funding of \$1.2B under *Living Longer Living Better* will not resolve these issues within the immediate future.

The needs of people aged 65 and older with a newly acquired profound and severe disability would best be met by the NDIS where early intervention and rehabilitation to maximum functioning is seen as a significant component of care. Early access to information, support and services will effectively address needs, reduce progression of disability and maintain and enhance quality of life.

National Seniors believes that eligibility to disability services should be based on need, not age. The current proposal fails to recognise the reality that people at age 65 are more likely to be in the workforce or seeking to remain in the workforce. They are simply out of place in the aged care system.

National Seniors submits that in excluding from the NDIS people who acquire a profound and significant disability when they are aged 65 and older, the Australian Government is failing to meet our commitment under the United Nations' *Convention of the Rights of Persons with Disabilities* (the Convention) which Australia co-signed in 2007 and ratified in 2008 as a state party. This is contrary to the claim made in the Bill in Chapter 1 Section 3 (1) (h).

In restricting service on the basis of age, the Bill also fails to meet the General principles guiding actions proposed under the Act as in Chapter 1 Section 4 of the NDIS Bill. People aged 65 and older do not have

certainty that people with disability will receive the care and support they need over their lifetime (3) or the right to exercise informed choice and engage as equal partners in decisions that will affect their lives, to the full extent of their capacity (8).

United Nations' Convention of the Rights of Persons with Disabilities

The United Nations' Convention commits us *to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.*⁴

⁴ United Nations 2006. *Convention of the Rights of Persons with Disabilities and Optional Protocol.*

The current exclusion on the basis of age is against the General Principles of:

equality of opportunity and accessibility (Article 3 (e) and (f)) and Article 5.1 that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.

We also point to Health Article 25 which states that *State Parties shall*

(a) provide persons with disabilities with the same range, quality and standard of free or affordable health care and programmes as provided to other persons ...,

*(b) provide health services needed by persons with disabilities specifically because of their disabilities, including early identification and intervention as appropriate, and services designed to minimize and prevent further disabilities, including among children and **older persons**; and*

(d) require health professionals to provide care of the same quality to persons with disabilities as to others

Limiting people aged 65 and older with disabilities to the aged care services also fails to *enable persons with disabilities to attain and maintain maximum independence, full physical, mental, social and vocational ability, and full inclusion and participation in all aspects of life* as required under Article 26 Habilitation and rehabilitation.

Anti- Discrimination (Age)

In addition, many of our members believe that the decision to refer all people aged 65 and older to the aged care user-pays system to meet their disability needs is discriminatory and is contrary to current Anti-Discrimination Laws.⁵

The Objectives of the *Age Discrimination Act 2004* clearly state that discrimination of the basis of age is unacceptable.

The objects of this Act are:

- (a) to eliminate, as far as possible, discrimination against persons on the ground of age in the areas of work, education, access to premises, the provision of goods, services and facilities, accommodation, the disposal of land, the administration of Commonwealth laws and programs and requests for information;*
- (b) to ensure, as far as practicable, that everyone has the same rights to equality before the law, regardless of age, as the rest of the community; and*
- (c) to allow appropriate benefits and other assistance to be given to people of a certain age, particularly younger and older persons, in recognition of their particular circumstances*

⁵ Commonwealth of Australia. 2004. *Age Discrimination Act 2004*. Office of Parliamentary Counsel, Canberra Amendments as at 2012.

It is unlawful to discriminate against someone on the ground of age in respect of the provision of goods, services and facilities and also within the administration of Commonwealth laws and programs. While the Act does allow for the exclusion of certain health programs as follows:

exempted health program means a program, scheme or arrangement that:

- (a) relates to health goods or services or medical goods or services; and*
- (b) to the extent that it applies to people of a particular age, is reasonably based on evidence of effectiveness, and on cost (if cost has been taken into account in relation to the program, scheme or arrangement).*

Notwithstanding the exception for health laws, the proposed consolidation of Commonwealth anti-discrimination laws also includes under "meaning of discrimination:

Discrimination by imposition of policies

(3) A person (the first person) discriminates against another person if:

- (a) the first person imposes, or proposes to impose, a policy; and*
- (b) the policy has, or is likely to have, the effect of disadvantaging people who have a particular protected attribute, or a particular combination of 2 or more protected attributes; and*
- (c) the other person has that attribute or combination of attributes.*

National Seniors does not believe that there is any justification for the exclusion of people aged 65 and older from access to the NDIS under the above sections of the *Age Discrimination Act 2004* nor should there be any discrimination allowable under the proposed consolidation of the Anti-Discrimination Acts currently under consideration.

Loss of disability support at age 65

We are further alarmed by the exclusion on the basis of age of participants who were previously considered to be eligible for the NDIS. In the NDIS Bill, Chapter 3, Section 29 states that:

S29 (1) A person ceases to be a participant in the NDIS launch when

- (b) the person is aged at least 65 years and has entered a residential care service, or is being provided with community care, on a permanent basis;*

Once again, there is an incorrect assumption that the aged care sector is well equipped to continue to provide disability specific services of a quality equivalent to that provided under the NDIS. This loss of NDIS eligibility and services also appears to be counter to earlier claims that a person who was admitted to the NDIS prior to turning 65 would maintain their existing disability services.

It would be preferable for people who may be in receipt of some aged care services and who require support for a severe and profound disability unrelated

to ageing to be treated as proposed under the NDIS Bill in Chapter 1 Section 4 to *exercise informed choice* (8) and to *receive supports outside the NDIS, and be assisted to coordinate these supports with the supports provided under the NDIS* (13).

Therefore participants could opt to receive the separate aged care services while also receiving a full NDIS package to support their disability.

People who acquire a severe and profound disability when aged 65 and older must be referred to the health or aged care sector only when their disability needs are clearly best met by those sectors.

National Seniors member comments:

"I was horrified to realise that things would change for the over 65's. While not personally affected, I can see a real diminution of services for the ageing population. If we allow this for our vulnerable members of society, then we cannot expect better for ourselves. Health care provision can already be difficult with long waiting lists for treatment. I SAY NO to this"

"This is the most disgusting bit of legislation ... It is not only discriminatory but tugs at the purse strings of many older Australians who did not have the benefit of a Superannuation Scheme - let alone a generous Superannuation Scheme - during their working life."

"It will force older Australians to sell perhaps the one thing they have, ie, a roof over their head and any money received from the sale of the property will be means tested for their Pension and they may have the pension taken from them. It will send older people - often living as couples or singles - to a place of dependant care - or the streets."

Our members are well aware of the current limitations on aged care services, including insufficient supply to meet demand for community and residential services, difficulties in recruiting and retaining well qualified staff and limitations on the range and specificity of assistive technologies and aids.

The NDIS Bill includes the provision of personal care and support, aid and equipment or other supports (Chapter 3) which the aged care system is clearly unable to provide with the current level of resourcing. Aged care staff are not trained to provide the range of disability specific support that will be required for participants with severe and profound disability who would meet all eligibility requirements for the NDIS, other than age.

Therefore we do not believe that the aged care system is capable of providing disability specific support services, including early intervention to those people who have an acquired severe and profound disability that is unrelated to age. Access to the NDIS should be based on assessment of the individual's circumstances as a first priority.

National Seniors member comments:

"This is indeed discrimination on a grand scale, firstly on the grounds of "age" and also against people who have supported this Country and it's past Governments."

"Please act on our behalf and lobby the government to ensure every person with a disability is funded equally for assistance across the country."

"Shutting us out of the NDIS programme just because of our age is just as discriminatory as if we were shut out because of our gender, race or religion, thus it is illegal. How can the gvt even plan of doing that?"

"It is demoralizing to be classed as not being worth receiving any of the government-funded disability care and support but still take your taxes in the other hand."

National Seniors member comments regarding compliance with laws:

"Why is this proposal not outlawed by the anti-discrimination laws of Australia or has the Federal Government conveniently excluded themselves from their responsibilities under these laws?"

"Surely this should be referred to Susan Ryan, the Age Discrimination Commissioner. This is a classic case of Ageism in our community."

Comment from a member with long-term disabilities and a history of participation in government advisory bodies and contribution to the sector:

"I am in two minds about the NDIS as I know it would work really well with people with complex needs. On the other hand I do feel it could limit services for older people with care needs. I would not want myself and all others to be disadvantaged as 'just one of the aged who take the dregs of 'caring.'"

National Seniors feedback on other sections of the Bill

National Seniors has also considered Sections within each Chapter of the Bill relating to the arrangements for participants to lodge an access request for entry to the NDIS and the establishment of the NDIS Transition Launch Agency. Comments on these sections are provided in the remainder of our submission.

Client centred approach

It is essential that the Bill incorporates a strong commitment to a client centred approach. Thus a focus on taking advice from the participants, their families and carers and incorporating this advice into the arrangements for the day to day operations of the NDIS Launch Transition Agency is highly desirable.

Currently the Bill allows the Agency to specify the form of the information to be provided by a participant, or prospective participant to support an access request to the Agency. These sections should be amended to include a requirement on the Agency to take account of a person's preference as long as

all required information is provided. The Agency or an approved provider should also be tasked with providing support to complete the required forms (eg Sections 18, 19, 52).

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5. **National Seniors recommends** that all sections of the Bill relating to information to be provided by participants should include a requirement for the Agency to take account of a person's preference regarding the form in which information is to be submitted and to ensure support to conform with such requirements is provided, as necessary or requested.
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National Seniors strongly supports the establishment of the Advisory Council and the safeguards that their advice is reported to the Ministerial Advisory Council and requirement that action is taken on that advice. However it is very concerning that the views and experiences of participants, their family and carers are not required to inform the NDIS Transition Launch Agency's reports and plans.

National Seniors believes it is essential that a formal process is included to incorporate participants, family and carers' views and satisfaction as well as those of the Advisory Council members into Agency reports and Corporate plans, especially in developing the performance indicators for assessment of the Agency's performance of its functions. (Chapter 6 Part 5, Sections 172, 174 and 177). The incorporation of consumers' views and satisfaction should also be included as one of the performance indicators.

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6. **National Seniors recommends** that participants' views, satisfaction and evaluations must be incorporated into Agency's plans and reports. The incorporation of consumers' views and satisfaction should be one of the performance indicators.
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State and Territory Nominee arrangements

The Bill allows the Agency to request that prospective participants undergo assessments and examinations to establish eligibility for the NDIS (eg Chapter 3 Section 26 (1) and 36 (2)). It also allows for the appointment of a nominee to agree to plans (eg Section 31, 33) or manage support services (eg Section 36 (2)) on behalf of participants.

Existing State and Territory arrangements should be acknowledged as one option for meeting these requirements in the Bill. Thus State or Territory appointed guardians or Powers of Attorney for participants with impaired decision-making skills or who require assistance to communicate their preferences could fulfil the role of nominees in the Bill.

7. **National Seniors recommends** that the Bill should recognise existing State and Territory arrangements as one option for meeting requirements to assess participants' needs and appointing nominees to support clients in their decision-making and communication of their preferences.

The Bill does not specify the establishment of an independent Complaints Scheme separate to the Agency and its review mechanisms outlined in Sections 99 and 100. Participants and applicants for participation can refer an unsuccessful review appeal to the Administrative Appeals Tribunal (Section 103).

If the Tribunal is to function as an independent complaints body then this must be more strongly expressed in the Bill to reflect the General Principle in Section 4 that *People with disability have the same right as other members of Australian society to pursue any grievance (7).i*

8. **National Seniors recommends** that the Bill should specify an independent Complaints Scheme separate to the NDIS Launch Transition Agency. IF the Administrative Appeals Tribunal is to perform this function then that should be clearly stated in the Bill.

Residence Requirements

Chapter 3 Part 1 Participants and their plans, Section 21 and 23 (1)

Although the Explanatory Notes clarify that the ability of the NDIS rules to limit eligibility to residence requirements is primarily to allow the NDIS launch in specific trial sites, it is important to clarify in the Bill that this restriction is for limited use and is not intended to deny access based on residence. The Bill could further clarify that the intent is to have the widest possible location of residence once the NDIS is implemented.

Requests for information

Chapter 3 Part 1 Becoming a participant 26(3)(b)

The Bill allows for an access request for participation in the NDIS to be taken as withdrawn if the prospective participant fails to provide information requested to the CEO within the 28 day or specified period. Decisions such as this appear to be rather onerous and there is no indication within this section or Section 99 Reviewable Decisions that this decision is reviewable, unlike decisions under 20(a), 21(3) or 26(2)(c). This requirement is only acceptable if the person has the right to appeal for a review of that decision. This will remove any doubt that the CEO may not consider the failure to meet timelines to be reasonable.

9. **National Seniors recommends** that decisions taken under Section 26(3)(b) can be appealed by the prospective participant as a reviewable decision under Section 99.

NDIS Launch Transition Agency, Boards and Independent Advisory Council.

With regard to the establishment of the Board of the NDIS Launch Transition Agency and the Advisory Council, National Seniors supports the majority of arrangements outlined in the Bill. In particular we support the skill mix required among the Board members (Section 127) and the number of members (Chair and 8 members). We also support the larger number of Advisory Council members (Principal Member and not more than 12 members) to allow members to reflect the diversity of people with disability.

However the requirement for the Commonwealth to approve (or veto) the Minister's appointment of members of the Board or of the Independent Advisory Council could be perceived by participants and members of the community as open to discrimination (Chapter 6 Part 2 Section 127(4)(b)(ii) and Part 3 Section 147(3)(b)(ii) respectively).

The ability of the Minister to terminate membership of the Board (Section 134(2)(b)) or Advisory Council (Section 155(2)(b)) when the *member is absent, except on leave of absence, from 3 consecutive meetings of the Board or Council* could be strengthened. As the Board is required to meet at least 4 times a year and the Advisory Council is free to determine their own procedures it may be more appropriate to terminate membership for consecutive absences of 3 meetings or half the number of annual meetings, whichever is the lower amount.

10. National Seniors recommends that membership of the Board or Advisory Council can be terminated if the member is absent, except on leave of absence, from 3 consecutive meetings or half the number of annual meetings, whichever is the lower amount.

Conclusion

National Seniors commends the Australian Government for commencing implementation of trials of the National Disability Insurance Scheme. We also note the bipartisan support for the NDIS which reflects the urgency of action to address Australia's appalling record and lack of support for people with a disability.

We are strongly opposed to the proposed ineligibility of people aged 65 and older from the NDIS and their relegation as a group to the aged care system which is currently unable to meet the needs of older Australians for aged care services, let alone specialised disability services. Individual circumstances should be the deciding factor in determining eligibility to the NDIS not age.

National Seniors believes that this proposed exclusion is disrespectful to older Australians, assumes a homogeneity that does not exist among this group and fails to acknowledge the individual circumstances of a person who acquires a severe and profound disability when aged 65 or older. Health status, lifestyles and working patterns vary enormously between individuals with many people wishing to be productive and work beyond 65 years of age.

National Seniors calls on the Australian government to:

- note the strong preferences of older Australians for equity of access to the NDIS and include them in the upcoming trials.
- harness bipartisan support for the NDIS and commit sufficient funds for a progressive implementation of the full NDIS following completion of the trials.
- allow individual circumstances to be the deciding factor in determining eligibility to the NDIS not age.
- refer people who acquire a severe and profound disability when aged 65 and older to the health or aged care sector only when their disability needs are clearly best met by those sectors.

National Seniors would appreciate an opportunity to explain our position further in the event that the Senate Committee undertakes a Hearing.

References

Commonwealth of Australia. 2004. *Age Discrimination Act 2004*. Office of Parliamentary Counsel, Canberra Amendments as at 2012.

Council of Australian Governments. 2011. *2010-2020 National Disability Strategy*. Commonwealth of Australia

OECD. (2009). *Sickness, disability and work: Keeping on track in the economic downturn*. Background paper.

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