# Avant Mutual Group Limited

# Submissions on the National Disability Insurance Scheme Rules Consultation Paper

## 1. About Avant

Avant Mutual Group Limited ("Avant") is Australia's leading medical defence organisation and one of Australia's leading mutuals, offering a range of insurance products and expert legal advice and assistance to over 60,000 medical and allied health practitioners and students in Australia. Our insurance products include medical indemnity insurance for individuals, practices and private hospitals and private health insurance, which is offered through our subsidiary The Doctors' Health Fund Pty Limited.

We also provide extensive risk advisory and education services to our members, as well as access to medico-legal assistance via our Medico Legal Advisory Service. We have offices throughout Australia, providing personalised support and rapid response to urgent medico-legal issues.

We have been involved in the design of the proposed national disability insurance schemes, providing input and formal submissions to the Productivity Commission on medical indemnity and other issues prior to the publication of its Report into Disability Care and Support in July 2011. We have attended a meeting of the NDIS Taskforce to discuss issues specific to medical indemnity arising from the National Disability Insurance Scheme Bill (NDIS Bill) and we are also represented on the NIIS Medical Misadventure Advisory Group, which is currently working on the design of the medical accident provisions of the proposed NIIS.

We welcome this opportunity to comment on the NDIS Rules Consultation Paper. Our comments are borne of a desire to strongly represent the interests of our members, while ensuring that the legislative framework reflects good public policy (as we believe our members would judge it).

In this submission we provide general comments on the Rules overall and the principles that we consider should be applied, as well as specific comments on some of the questions raised in the Consultation Paper.

## 2. General Comments

We welcome and support the introduction of a Federal Government disability insurance scheme to enhance the quality of life and increase economic and social participation for those living with disability, provided that the scheme does not place any undue financial or other burden on our members.

The National Disability Insurance Scheme Bill (NDIS Bill) requires Rules to be made on many key operating provisions of the scheme.

The Productivity Commission recommended that future changes to key elements of the NDIS should only be made after the usual processes of community and Parliamentary scrutiny have been followed, a recommendation that we supported in our submissions to the Community Affairs Legislation Committee Inquiry into the NDIS Bill. As a preliminary point we believe that more detail should be included in the legislation rather than the Rules as this will provide greater certainty to all involved in the scheme, and will ensure that appropriate Parliamentary and community oversight is given to the scheme.

Notwithstanding this, if detail about the operation of the scheme is to be included in the NDIS Rules, there are several general principles that should be applied to provide certainty:

- eligibility criteria should be inclusive rather than overly prescriptive and exclusive
- "red tape" should be kept at a minimum, and onerous and overly bureaucratic processes avoided
- the Rules should reflect good governance to protect the community's interests in the operation of the NDIS.

The Rules should be drafted in plain English so that they are easy to understand by all who use or interact with the NDIS. Debates over definitions and wording should be kept at a minimum. Whatever general information is to be contained in the Rules should be easy to understand and easily accessible to people with disabilities, organisations and others who use the system.

## 3. Specific matters referred to in the Consultation Paper

### Becoming a participant

The ability to access the scheme should be easy, and should involve a minimum of bureaucracy. The Rules should provide clear guidance to prospective participants about what information is needed by the Agency to assess whether the eligibility criteria are met.

Obtaining the information required should not be overly burdensome for prospective participants. For example if an existing assessment is available, but is not one obtained at the request of the CEO under the legislation, the Rules should permit that assessment to be used (reserving the right to require a re-assessment if appropriate). This will reduce the administrative burden on people living with disability and their families.

Complicated eligibility criteria will not enable people to obtain access to the supports that they need. Eligibility criteria should not be overly prescriptive, but should be balanced against the need for the Agency to be consistent and transparent in its decision-making.

Eligibility criteria to access supports and funding, and for disability and early intervention under the NDIS should be inclusive rather exclusive, particularly in the launch phase. This will result in better data for the Agency to enable it to fulfill its research functions and to evaluate the operation of the scheme.

For the launch phase, residential requirements should not be too strict, and the evidence required to meet the residence requirements should be easy for a prospective participant to obtain. Boundary issues should favour inclusion rather than exclusion.

Disability and early intervention criteria should be clinically relevant but not overly prescriptive. Overly prescriptive criteria for early intervention in particular risks defeats the very purpose of intervention at an early stage.

**Reasonable and necessary supports**

The criteria for deciding which supports will be funded or provided to participants should be consistently applied. We agree that the process for making decisions about supports should be inclusive and flexible, to allow the various different needs of people living with disability to be met in individual circumstances.

The Rules should ensure that the supports are provided by service providers efficiently, and with the minimum of bureaucracy and additional cost.

**Information sharing**

In our submissions to the Senate Committee Inquiry into the NDIS Bill regarding sections 58-68 we recommended that the Bill be amended to ensure that it is clear:

- how sections 58-68 interact with the Freedom of Information Act 1982 (Cth) and therefore what "protected information" and other information collected in relation to the operation of the NDIS can be obtained via the FOI process; and
- that third parties can provide "protected information" and other information collected in relation to the operation of the NDIS to their insurers and legal advisers as necessary to protect their interests.

If the NDIS Bill is not to be amended then the Rules should make this clear.

Rules regarding the release of information in the public interest should be consistent with current privacy legislation and privacy principles. The Rules should contain the circumstances in which it might be "in the public interest" for the CEO to disclose information, to whom that information may be disclosed, and for what purpose.

Clarity in drafting the Rules is important so that there is no debate over which agencies are covered by the rules. An example in this regard is Chapter 16A of the Children and Young Persons (Care and Protection) Act 1998 (NSW) which provides for sharing of information about children between NSW government agencies. We have been asked for advice from members who have received notices under the Act to produce medical records. A lack of definitional clarity in the legislation about the organisations to which the provision applies causes confusion both for those requesting the information and recipients of such requests.

The balance between making sure people do not have to repeat their story and personal information, and making sure their privacy is respected may be struck by:

- outlining the circumstances in which information can be shared and the agencies to which information can and cannot be provided
- confirming in the Rules that consent of the participant is required for disclosure of information to another agency, and confirming that consent can be withdrawn at any time.

Rules should be introduced to minimise the additional administrative burdens on third parties who are required to provide information in relation to the NDIS and to compensate them reasonably for the costs they incur.

**Registered providers of support**

It is not clear from the Bill which categories of person or entity may apply to be registered providers of supports. If the person is a health practitioner registered under the national health practitioner registration scheme, this should be sufficient for the purposes of registration as a registered provider of support under the NDIS.

To require further application and evidence of quality standards including governance, business and accounting practice, complaints handling and auditing processes would increase the administrative and financial burden on health practitioners, and would be a disincentive to health practitioners applying for registration under this scheme.

Rules about how service providers run their business are inappropriate and overly bureaucratic and should not be determined by government.

**Children**

Rules regarding the role of children in decision-making and the appointment of someone other than a parent to act on behalf of a child should be consistent with the existing law.

The role of children and young persons under 18 years of age in decision-making should be based on a test of capacity, rather than being tied to a particular age. The Rules should contain the test of capacity or alternatively specify when a person does not have capacity. An example of this is found in the Health Records and Information Privacy Act 2002 (NSW). Under this Act a person lacks capacity to make decisions under the Act if they are incapable of understanding the general nature and effect of the act, or communicating their intentions with respect to the act.

Any decision by the CEO that a child or young person has the capacity to make decisions for himself or herself should be based on an assessment of the child's decision-making capabilities by an appropriately qualified health professional.

Children who lack the capacity to make decisions for themselves may, particularly as they get older, nevertheless wish to be involved in decision-making processes that affect them. The Rules should include a requirement that the child be consulted for their views and that their views be taken into account in any decisions made on their behalf, subject to the caveat that this should be appropriate in light of the age and maturity of the child. Thus age and maturity may be criteria which can be considered in deciding to exclude a child or young person under the age of 18 from being involved in decisions about the support they receive. However as children and young people mature at different rates, these criteria also should not be tied to a specific age. The principles outlined for supported decision-making on page 25 of the Consultation Paper should apply to children who lack capacity to make decisions for themselves where appropriate.

Where the CEO has determined that one or more persons have parental responsibility for the purposes of the scheme, to avoid conflict between those persons, the Rules should make clear how decisions should be made for the child. This is to cater for those situations in which parents who have parental authority are separated or divorced. We are frequently approached for advice from members about how to deal with separated parents where the parents disagree about treatment to be provided to their children, or who refuse to provide consent to the other parent having access to information about the child. The Rules should encourage collaborative decision-making, in the best interests of the child, and should include the requirement that those with parental responsibility share information about the child. Failure to cooperate and to abide by these requirements should be a factor that the CEO can take into account in determining whether someone other than a parent should act on behalf of the child.

In relation to the criteria to take into account in determining whether a person other than a parent should be appointed to act for a child, guardianship legislation around Australia contains various factors for consideration by a tribunal in making a guardianship order which could apply in this context (as well as in relation to nominees for people with a disability). Factors include:

- that the appointee must have a genuine concern for the welfare of the child
- that there is no conflict of interest
- the wishes of the person with the disability
- the appropriateness and competence of the person to be appointed, including whether they have a criminal history or have ever been bankrupt
- the availability and accessibility of the person to be appointed.

**Supporting decision-making**

Rules regarding the role of nominees in decision-making for people with disabilities should as far as possible be consistent with existing laws. The difficulty in this regard is a lack of national consistency regarding decision-making for people who lack capacity to make their own decisions (as recognised in the note at the bottom of page 25 of the Consultation Paper).

The Rules should deal with the situation where a person moves interstate and as a result may be subject to different legislative provisions about substituted decision-making. An appointment in one state or territory should be recognised in another state, even if it does not technically comply with the law in the second state, so that any additional red tape and uncertainty is avoided. Guardianship acts around the country contain provisions in this regard in the context of the appointment of guardians and in the context of advance health care directives.

We repeat our submissions outlined above regarding the criteria for appointing a person to act for a child in relation to the criteria to be considered in deciding to appoint a nominee for a person with a disability.

**Compensation**

In our experience the interrelationship between compensation schemes can be complicated due to arguments over definitions and wording (see for example section 151Z of the Workers Compensation Act 1997 (NSW) and its relationship with common law actions especially in medical negligence claims).

The method for determining how to take into account compensation payments should be simple and easy to apply and the language should be clear to avoid legal uncertainty in its application. Importantly, the method should ensure that there is no double recovery but equally should not leave participants without the reasonable and supports they need. The Rules should make it clear how compensation payments through compromised settlements (rather than judgments) are taken into account, as well what will happen if settlement or judgment money is exhausted.

**Other matters that should be dealt with in the Rules**

We believe that it would appropriate also to include the following matters in the Rules to provide further certainty about the design and operation of the NDIS:

1. the way in which the NDIS interacts with state-based NIIS schemes.

2. the manner in which the CEO exercises his powers.

The CEO has broad powers under the NDIS Bill and there should be appropriate checks and balances in the Rules, if not in the legislation, on the exercise of the CEO's powers to ensure appropriate Parliamentary and community scrutiny. The Rules should contain guidelines on how the CEO is to make key decisions.

The Rules should include guidance as to how the CEO satisfies himself that a potential claim for compensation under Part 5 of the NDIS Bill has "reasonable prospects of success", and the process to be adopted in this regard.

3. operational aspects of the scheme as they apply to examination and assessments performed at the request of the Agency.

Every effort should be made in designing the "approved forms" to streamline the administrative processes which need to be completed so that they are not overly burdensome on healthcare providers. If fees are to be specified in the Rules they should reflect the commercial value of the services provided, require payment to be made within a specified time, and provide for interest to accrue for payments outstanding beyond the specified time.

Should you have any further queries in relation to this submission, please contact:

Georgie Haysom

Head of Advocacy

Avant

Telephone: 02 9260 9185

Email: Georgie.haysom@avant.org.au

1 March 2013

**Authorised by:**

**David Nathan**

Chief Executive Officer

Avant Mutual Group Limited

**Fraser MacLennan-Pike**

General Counsel

Avant Mutual Group Limited