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Mr David Tune AO PSM
NDIS Consultations
Department of Social Services
GPO Box 9820
Canberra ACT 2601

By email to: NDISConsultations@dss.gov.au

Dear Mr Tune,

Review of the *National Disability Insurance Act 2013* and the NDIS Rules
Submission by State Trustees Limited

State Trustees Limited (**State Trustees**), Victoria's public trustee, welcomes the opportunity to make a submission to the review you are conducting into the *National Disability Insurance Act 2013* (**NDIS Act**) and the NDIS Rules (**Review**).

We have provided background information about State Trustees in the Appendix to the submission.

Introduction

We note that a key part of the Review's Terms of Reference (**ToR**) is consideration of operational matters that support positive participant experiences. Part of the challenges faced by current and prospective participants in the National Disability Insurance Scheme (**NDIS**), particularly those with impaired decision-making capacity, is in the initial access process and in maintaining appropriate access, such as via plan reviews.

As the public trustee for the Victorian community, State Trustees has a significant interest in whether its clients with impaired decision-making capacity:

(a) are appropriately accessing the NDIS (where eligible); and

(b) able to obtain appropriate assistance (where required) regarding such access, including when participating in a plan review.

It is a source of ongoing challenge for State Trustees that, when acting as substitute decision-maker for a client with impaired decision-making capacity, we are often unable to access the information needed to obtain reassurance that the client is accessing the NDIS and that their NDIS arrangements are appropriate. Our submission therefore deals with the systemic impediments to access to NDIS information faced by those appointed to protect the financial and property rights of persons with a disability.

Summary of State Trustees' submission

We submit that the Australian Government should put forward amendments to the NDIS Act that improve the framework for disclosing NDIS information held by the NDIA about an individual with impaired decision-making capacity who has a substitute decision-maker, to enable such a substitute decision-maker better to fulfil their role in protecting relevant financial and property rights of the person with a disability.

Terminology in this submission

This submission focuses on issues relating to current or prospective NDIS participants who:

(a) have impaired decision-making capacity due to a disability; and

(b) by reason of that impairment, need the assistance of — and have in place — an appointed substitute decision-maker (such as State Trustees) authorised to protect the person's rights in respect of their financial and property affairs.

In this submission, for ease of reference, we will refer to the person with impaired decision-making capacity as a '***mutual client***', and to the appointed person authorised to act to protect the mutual client's rights as a '***substitute decision maker***'.

Substitute decision-maker appointment types

A substitute decision-maker may have been appointed to manage the financial and property affairs of a mutual client:

(a) by the mutual client themselves (e.g. under an enduring power of attorney) at a time when the mutual client had the requisite decision-making capacity to make the appointment; or

(b) by a State or Territory tribunal, such as the Victorian Civil and Administrative Tribunal (**VCAT**), under the applicable guardianship and administration legislation.

For example, in Victoria, State Trustees can be appointed as a substitute decision-maker:

- by the person themselves making an enduring power of attorney under the *Powers of Attorney Act 2014* (**POA Act**) – and in such a case State Trustees would be the person's ***attorney***; or
- by VCAT making an administration order under the *Guardianship and Administration Act 1986* (**G&A Act**)[1] — and in such a case, State Trustees would be appointed as the person's '***administrator***'

State Trustees is not the only body that can take on these roles. Family members, friends, or trusted advisers are often appointed and there are privately-operated trustee companies that also offer this service.

However, State Trustees — and its equivalents in other Australian jurisdictions — are the only organisations funded by Government to provide such services when there is no one else willing or suitable for the role, and the person could not afford to pay for the service at a full commercial rate. For this reason, State Trustees and its equivalents are sometimes referred to as having a 'last resort' or 'safety net' role.

Further detail on each of these appointment types is provided below.

Appointment type: enduring power of attorney

A person may appoint State Trustees as attorney for financial matters by executing an enduring power of attorney under the POA Act. When making such an appointment, the person can authorise State Trustees to manage some or all of their financial and property affairs. The person can nominate that the power to act commences immediately, or at some other point in time, such as at any time in the future when the person ceases to have decision making capacity.

All Australian jurisdictions have legislation that enables the making of an enduring power of attorney or an equivalent appointment document.

Appointment type: Tribunal appointment

A Tribunal appointment often occurs via an application by a health worker or family member who is concerned that the person with a disability is struggling to manage their money, or is vulnerable to neglect or exploitation.

[1] See, section 46 of the G&A Act.

In Victoria, before it is able to appoint an administrator, VCAT must first be satisfied that:[2]

- the person has 'a disability';
- the person is unable to make 'reasonable judgments' about all or part of their estate by reason of that disability;
- the person is 'in need of' an administrator; and
- an administration order would be in the 'best interests' of the person.

VCAT must also consider the wishes of the person, if they can be ascertained, and whether there are any 'less restrictive' options available.

When State Trustees is appointed, it becomes a substitute decision maker for the person's estate. It takes control of their money and property and makes financial and legal decisions about the estate on their behalf. An administrator's powers are broad, and include collecting the person's income, paying their bills and expenses, investing their money, buying and selling property, running a business and bringing or defending legal proceedings.

The G&A Act requires administrators to act in a person's 'best interests'. Administrators discharge this duty if they act as far as possible:[3]

- in consultation with the represented person, taking into account as far as possible the wishes of the represented person; and
- in such a way as to encourage and assist the represented person to become capable of administering [their own] estate.

The G&A Act requires that powers under the Act be exercised in accordance with three core principles, being that an administrator conducts themselves in way that:[4]

- is least restrictive of a person's freedom of decision and action in the circumstances;
- the best interests of the person with a disability are promoted; and
- the wishes of a person with a disability are wherever possible given effect to.

The G&A Act also allows administrators to apply to VCAT for formal advice about the exercise of their powers in individual cases.

Like all public trustees in Australia, State Trustees is entitled to be remunerated for the services it provides to its VCAT and enduring power of attorney clients. When acting as administrator or attorney, the following types of fees and commissions would typically apply:

- a commission on:
    - income received; and
    - the value of any assets realised (such as through sale of real property;

  by State Trustees while it is managing the person's affairs,
- a management fee on clients' cash and investment accounts held with State Trustees; and
- fees for professional services as needed such as tax, financial planning and legal advice;

The *State Trustees (State Owned Company) Act 1994* (Vic) (**STL Act**) authorises State Trustees to charge 'fair and reasonable' commissions, fees, charges and disbursements, including its enduring power of attorney clients. VCAT also approves State Trustees' fees and commissions

[2] Section 46(1) of the G&A Act.
[3] Section 49 of the G&A Act.
[4] Section 4 of the G&A Act.

when it makes an administration order in respect of a VCAT client. State Trustees' charges when they execute their power of attorney document.

Issue: Access to Protected Information under the NDIS

Many of State Trustees' clients already participate in the NDIS. Others are likely to become participants in the near future.

State Trustees currently manages the financial and property affairs of around 10,000 clients. For over 94% of these clients, State Trustees has been appointed administrator appointed. The remainder have appointed State Trustees under an enduring power of attorney.[5]

Approximately 26% of such clients have a mental illness, 23% have an intellectual or cognitive disability, and 10% have dementia or Alzheimer's disease.[6]

Many these clients experience some form of financial hardship. Ninety-five per cent of State Trustees' clients receive some form of government pension, and almost 20% have an income of less than $20,000 a year. Almost half of its clients have assets valued at less than $30,000 and almost one in five has savings or assets valued at less than $5,000.[7]

As an attorney for financial matters under enduring power of attorney or as an administrator, State Trustees is not legally empowered to make the types of personal and lifestyle decisions on a client's behalf that are required by the NDIS planning process. In cases where the person cannot make those decisions themselves, the decisions are more appropriately made by a guardian appointed under the G&A Act or an attorney for **personal** matters appointed under POA Act. However, due to the potential impact of NDIS supports on a participant's financial circumstances, State Trustees has a role in ascertaining whether its clients are appropriately participating in the NDIS so that State Trustees does not inadvertently expend the client's own money on supports that could have been paid for by the NDIS.

The ability of State Trustees properly to fulfil its role is, however, hampered by the restrictions on information sharing under the NDIA Act.

Legal framework for sharing protected information

The legal framework for sharing protected information can be summarised as follows:

1. Information about a person that is held by the NDIA – including information about previous interactions with the NDIS – will be 'protected information' for the purposes of the NDIS Act;
2. A person may only:
    a. collect protected information for the purposes of the NDIS Act – e.g. where they are the participant's plan nominee;[8]
    b. make a record of, disclose or otherwise use protected information if it is done in accordance with s 60 of the NDIS Act, being:
        i. for the purposes of the NDIS Act, including most relevantly to disclose protected information to certain public body heads;[9]
        ii. for the purpose for which the information was disclosed to the person by the CEO using his or her public interest discretion under s 66;[10]
        iii. with the express or implied consent of the person to whom the information relates;[11] or

[5] Victorian Ombudsman Investigation into State Trustees, p 19-20.
[6] Victorian Ombudsman Investigation into State Trustees, p 19-20.
[7] Victorian Ombudsman Investigation into State Trustees, p 19-20.
[8] Section 60(1) of the NDIS Act.
[9] Section 60(2)(d)(i) of the NDIS Act.
[10] Section 60(2)(d)(ii) of the NDIS Act.
[11] Section 60(2)(d)(iii) of the NDIS Act.

iv. because the person believes on reasonable grounds that it is necessary to prevent or lessen a serious threat to an individual's life, health or safety.[12]

3. If a person accesses, uses, discloses or offers to supply protected information in breach of s 60, they will risk committing an offence under ss 61-64 of the NDIS Act.

As the NDIS Act does not expressly contemplate the exchange of information with substitute decision-makers (such as administrators), and it is not clear that State Trustees should be, or is able to be, appointed as a client's NDIS plan nominee,[13] the NDIA is generally unable to share protected information about a client with an administrator for a purpose under the NDIS Act.

Due to the nature of some clients' disabilities, State Trustees is also unable to rely on its clients to consistently give their consent to the exchange of protected information, or otherwise communicate the extent of their previous involvement with the NDIS. Indeed, for many of State Trustees' clients, their disability may be such that the client would not, even with support, have the requisite decision-making capacity to provide valid consent to a disclosure of their protected information.

The legal framework in the NDIS Act therefore leaves only two potential grounds on which the NDIA can disclose on a regular basis protected information about a mutual client to State Trustees as substitute decision-maker:

- disclosure by the CEO (or their delegate) to State Trustees on the basis of reasonable grounds in the public interest; or
- potentially, disclosure by the CEO to the head of State Trustees on the basis that it is an 'authority of the State' within the meaning of the NDIS Act.[14]

To date, the NDIA has only disclosed information about a mutual client that is, or was, held in the records of the NDIA with State Trustees on an ad hoc basis. The NDIA has generally required State Trustees as administrator to:

- make a new enrolment application to the NDIA on behalf of their client in order to determine the extent of the client's previous interactions (if any) with the NDIS; or
- ask the CEO to exercise their discretion to disclose protected information on a case-by-case basis if satisfied it would be in the public interest to do so.

In turn, this means that State Trustees as substitute decision-maker can be unaware whether a mutual client has previously applied to the NDIS, is eligible to receive NDIS funding, and/or has previously received funding.

Without reliable access to this information, substitute decision-makers are not readily able to determine whether it would be in the best interests of the mutual client to make an application to the NDIS for supports before committing resources from the client's estate to a particular service or support.[15] In practical terms, this means that individuals who would be eligible for NDIS supports may instead be forced to use their own (often limited) financial resources on those supports.

[12] Section 60(2)(e) of the NDIS Act.
[13] See s 5.14 of the National Disability Insurance Scheme (Nominees) Rules 2013, which provides that if the nominee is, in a professional or administrative capacity, directly or indirectly responsible for, or involved in, the provision of any services for fee or reward to the participant there will be a conflict. In the case of an Administrator appointed by VCAT, or an attorney, those representatives perform services for a fee or commission paid by the client's estate.
[14] State Trustees understands that protected information has not been disclosed to a public trustee on this basis noting that the definition of a 'public body head' is somewhat ambiguous, but considers that it would be possible to do so.
[15] This limitation means that in some circumstances State Trustees, as administrator, may be hampered in the discharge its duties under the G&A Act. This is despite the requirement in s 207 of the NDIS Act, which makes clear that the NDIS is not intended to 'replace' any State or Territory law, and that those laws (such as the G&A Act) should operate concurrently with the NDIS Act.

Specific areas of concern: Transport payments

One area of particular impact relates to transport funding. State Trustees currently accepts management of our clients' NDIS self-managed fortnightly transport payments and manages transport related payments and allowances. Currently, approximately 40% of State Trustee enquiries and work related to the NDIS are for client's transport allowance.

State Trustees currently receives, approximately, only a quarter of our overall clients' NDIS transport payments, and we have no consistent overview over whether a mutual client is receiving NDIS transport funding. The result of this inconsistency is that many of State Trustees' clients do not have access to their NDIS transport funding, and consequently may be paying for transport related costs out of their own funds.

Specific areas of concern: Aged care fees

State Trustees as substitute decision-maker also faces issues arising from the payment of aged care fees for clients residing in aged care. Currently, we are often unable obtain the information needed to ascertain:

1. which of our mutual clients are entitled to funding from the NDIS; and
2. which of our mutual clients have incorrectly paid for their aged care fees from their own money when this should have been covered by NDIS funding.

This presents a significant challenge for State Trustees, and similar organisations, when acting as substitute decision-maker. Obtaining this information from the mutual client is often very difficult, especially if the mutual client has no supports and is new to aged care. Many mutual clients in aged care do not have the financial resources to pay for their aged care fees upfront and must therefore wait for the NDIS or a plan manager to reimburse them. This results in a significant administrative burden, and adversely impacts the mutual client, as the time and effort spent chasing reimbursements from the NDIS or plan managers could be better spent servicing the mutual client.

Specific areas of concern: Information about appointed support co-ordinators, etc.

Even where State Trustees has been able to obtain a copy of a mutual client's NDIS plan, or information as to the status of an existing NDIS application, we still will not necessarily be informed of the details of a mutual client's Support Coordinator, Plan Manager, or other service provider(s). Currently this information is not included in a mutual client's NDIS plan, and the NDIA takes the view that it is generally prevented from disclosing this information to an entity such as State Trustees that is a mere substitute decision-maker.

While the NDIS may include funding for a Support Coordinator or Plan Manager in a plan, it is up to the client to engage these services themselves. However, many mutual clients do not have the requisite capacity to engage these services. This can, in turn, result in a mutual client under-utilising the funding in their NDIS plan, or failing to utilise the plan at all, and then being unable to engage other services equivalent to those provided for in the NDIS plan.

The impediments to the NDIA's sharing protected information with substitute decision-makers also leads to unnecessary administrative burden for both the substitute decision-maker (e.g. State Trustees) and the NDIA. In the event, for example, that State Trustees is uncertain about a mutual client's eligibility for NDIS supports, we are often forced to assist the mutual client to make a **new** application for supports, in order to determine the mutual client's eligibility and/or the extent of their existing supports. This can potentially lead to delays in important decisions about a client's financial and property affairs while their eligibility for NDIS supports is determined, and consumes the resources of the substitute decision-maker that could otherwise be directed to improving the mutual client's financial position and general wellbeing.

No doubt the burden of receiving and/or reassessing new applications for previous applicants and existing participants also imposes a significant administrative burden on the NDIA.

Recommendation:

The Australian Government put forward amendments to the NDIS Act to enhance the framework for disclosing protected information held by the NDIA about individuals (NDIS participants and potential NDIS participants) who have a substitute decision-maker in place, to that substitute decision-maker, to enable the substitute decision-maker to make decisions that appropriately protect the financial and property rights of the person.

The NDIS Act should expressly provide that, where a substitute decision-maker with relevant authority has been appointed in respect of an individual who is eligible, or potentially eligible, to access the NDIS, the NDIA is empowered to disclose protected information about the individual to that substitute decision-maker.[16]

While there are several ways in which such a framework could be added to the existing information-sharing provisions in the NDIS Act to address the issues outlined above, State Trustees considers that the framework set out in the *National Redress Scheme for Institutional Child Sexual Abuse Act 2018* (**Redress Scheme Act**) provides an appropriate model.

National Redress Scheme Model

The Redress Scheme Act establishes the 'National Redress Scheme for Survivors of Institutional Child Sexual Abuse' (**the Scheme**).

The Scheme is intended to recognise and alleviate the impact of past child sexual abuse that occurred in an institutional environment by providing redress to eligible survivors. Redress under the Scheme consists of a monetary payment of up to $150,000 as a tangible means of recognising the wrong survivors have suffered, access to counselling and psychological services, and the option to receive a direct personal response from a responsible institution. Applicants can only make one claim under the Scheme. A person who accepts an offer of redress is then required to release a responsible participating institution from civil liability for abuse that is within scope of the Scheme. Relevantly, Part 4-2 of the Redress Scheme Act allows a person to appoint either a 'legal' or 'assistance' nominee to act for them in the redress application process.

In State Trustees' opinion, the framework for both recognising the status of nominees, and sharing protected information with them during the redress application process, provides an appropriate example on which the NDIS Act could be modelled. In particular, Part 4-2 of the Redress Scheme Act includes the following features:

- The Act distinguishes between 'assistance nominees' and 'legal nominees', and the different powers and duties they hold.[17] The recognition of these two categories of nominee, and the roles they can perform, would be a helpful model for recognising the role of substitute decision-makers in the NDIS Act, as distinct from plan nominees. Helpfully, the Redress Scheme Act provides that:
    - a legal nominee is defined to be a person appointed under a law of the Commonwealth, a State or a Territory that has power to make decisions for the applicant in all matters that are relevant to the duties of a legal nominee – this would clearly include, for example, a guardian or administrator appointed by VCAT; and
    - legal nominees have a greater range of powers under the Redress Scheme Act than assistance nominees. The distinction between the two roles is clearly defined, which reduces the risk of confusion about what each type of nominee can do.[18] In the NDIS context, distinguishing between the powers and duties of a plan nominee and those of an

[16] State Trustees notes that, despite the Objects of the NDIS Act being to give effect to the Convention on the Rights of Persons with Disabilities (**CPRD**) and support the independence of people with disability, the role of substitute decision-makers is recognised by the Australian Government as being a necessary component of its public role. In that respect, Australia has made an 'Interpretative Declaration' in relation to the CPRD's Article 12, which recognises that the CPRD allows for fully supported or substituted decision-making arrangements, where such arrangements are necessary, as a last resort and subject to safeguards (such as those provided for under the G&A Act, including ss 4, 46, 47A, 49, 53, 55-56, 58, 58E, 60, 60A, and 61).

[17] See, s 81(1)-(3) of the Redress Scheme Act.

[18] See, ss 84-85 of the Redress Scheme Act.

existing substitute decision-maker would provide much greater clarity about the role that substitute decision-makers have under the NDIS when compared to plan nominees.

- The Redress Scheme Act makes clear that all notices that must be given to a redress applicant must also be given to the nominee.[19]
- The authority in charge of the Scheme is expressly authorised to disclose protected information to an applicant's nominee.[20]
- The authority also has discretion to disclose protected information to a person (other than a legal or assistance nominee) who is expressly or impliedly authorised by an applicant to obtain it.[21] This provision effectively functions as a 'catch-all' to allow the disclosure of protected information to an authorised representative despite that person not being appointed a legal or assistance nominee. In the case of State Trustees and the NDIS, a provision of this nature would allow protected information to be disclosed where an administrator has been appointed by VCAT (i.e. authorised to obtain information) but the participant does not have the capacity to give consent.

In State Trustees' view, inserting a framework in the NDIS Act for recognising and sharing information with a substitute decision-maker, such as a guardian, administrator or attorney under enduring power of attorney, that is similar to the framework in the Redress Scheme Act would:

- provide a clear mechanism for sharing protected information under the NDIS Act with substitute decision-makers on an ongoing basis;
- overcome the tension between the two roles that must co-exist under the NDIS — on the one hand, a substituted decision-maker appointed outside the NDIS Act and, on the other hand, a plan nominee (who is in effect a substitute decision-maker appointed **within** the NDIS Act) — without diminishing the status of either; and
- authorise the NDIS to share protected information with a substitute decision-maker as necessary, despite a mutual client's inability to give consent.

Conclusion

We trust the information above is of assistance. We would welcome the opportunity to meet to discuss this submission or to provide further information if necessary.

Yours sincerely

Matt Carrick
Chief Executive Officer

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[19] Section 86 of the Redress Scheme Act.
[20] Section 94 of the Redress Scheme Act.
[21] Section 95 of the Redress Scheme Act.

Appendix

About State Trustees Limited

State Trustees is Victoria's public trustee.

State Trustees has a long history of representing and providing services to the Victorian public. Victoria's original Public Trustee Act commenced in 1940. Since the commencement of the *State Trustees (State Owned Company) Act 1994* (Vic) (**STL Act**), State Trustees had been operating as a State-owned company, all the shares in which are owned by the State of Victoria.

As public trustee, State Trustees is regularly appointed by the Victorian Civil and Administrative Tribunal (**VCAT**) to manage the financial and property affairs of people with a disability.

State Trustees also provides a range of other services including: the preparation of wills and powers of attorney; acting as an executor for deceased estates; and administering trusts.

The Victorian Government, through the Department of Health and Human Services, provides funding each year under a community services agreement so that people who cannot afford to pay for the trustee services they require can still access these services.