



Communities
& Justice

Statutory review of the NSW Disability Inclusion Act 2014

20 November 2020

Report of the review of the Act and recommendations for amendments.

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Executive Summary

The *Disability Inclusion Act 2014* was enacted in 2014 and commenced on 3 December 2014 on the International Day of Persons with Disabilities and made a clear and important commitment by the NSW Government to recognise the human rights of people with disability in all its operations.

The three main objectives of the Act are to:

- Recognise the human rights of people with disability, including giving effect to Australia's ratification of the *United Nations Convention on the Rights of Persons with Disability*
- Promote inclusion and improvements in the lives of people with disability, and
- Commit the NSW government to delivering and funding services and supports in the transition period to the National Disability Insurance Scheme (NDIS).

Those objectives are expressed in the Act through:

- A clear statement of commitment to recognising the rights of people with disability, linked to the NSW Government's commitments arising from Australia ratifying the UN Convention of Rights of Persons with Disability. These are expressed in the 'Objects' and 'Principles' of the Act.
- Disability planning - provisions for a State Disability Inclusion Plan to be prepared by the NSW Government as a whole and for Disability Inclusion Action Plans to be prepared by NSW Government agencies and local councils.
- Disability Council - the Act creates the Disability Council as an advisor to the Minister for Families, Communities and Disability Services, articulates the functions of the Council and sets out the membership of the Council.
- Service standards - provisions to set service standards for specialist disability services.
- Provision of supports and services - powers for the NSW Government, through the Secretary of the Department of Communities and Justice, to provide support to individuals and to provide disability services. These were intended as transitional powers until the full establishment of the NDIS.

Section 51 requires that the Act be reviewed to determine whether its policy objectives remain valid and whether the terms of the Act remain appropriate for achieving those objectives. The Department of Communities and Justice undertook an extensive consultation process with nine consultation sessions around NSW (including two specific sessions for Aboriginal and Torres Strait Islander people) attended by 108 people, a survey (68 responses), and 29 direct submissions. The input from people with disability and others in the sector was invaluable in informing the findings and recommendations of this review.

The context for the Act has changed significantly since it was enacted. The Act was made at the time when the NDIS was being developed but had not yet been implemented, so the Act included transitional arrangements for the period until its full implementation. Those transitional provisions are now obsolete and some parts of the Act are no longer relevant.

The review has found that all objectives are still valid. The provisions that express these objectives are broadly appropriate, although recognising that the responsibility of the State to deliver specialist individual supports and services to people with disability has been taken over by the Commonwealth with full implementation of the NDIS. The State still has a smaller role in delivering mainstream services to people with disability.

The input from stakeholders has also identified some areas where the implementation of the Act can be improved, noting that this does not require legislative change. The review has recommended updating policy and guidelines to give effect to these changes.

Recommendations

Recommendation 1: That the Act be amended to require the State Disability Inclusion Plan and Disability Inclusion Action Plans to be renewed every four years.

Recommendation 2: That sections 10 and 12 be amended to add 'including in an accessible format to people with disability', relating to the requirement that the State Disability Inclusion Plan and the Disability Inclusion Action Plans be publicly available.

Recommendation 3: That Parts 4 and 5 be substantially deleted from the Act (except for provisions relating to disability service standards in the regulations, and financial assistance by the Secretary to promote the objects of the Act), while ensuring that other statutory functions or legislation cross-referring to provisions within these Parts are not adversely affected by their deletion.

Recommendation 4: That provisions in the Act which relate to probity checks be retained as transitional provisions until commencement of the NDIS worker checks.

Recommendation 5: That provisions in the Act which relate to accounts and funds relating to people with disability who are residents of government residential centres be deleted.

Recommendation 6: That Schedule 4 be updated and amended to align with the amendments to the Act arising from this review.

1 Introduction

1.1 About the Act

The *Disability Inclusion Act 2014* (NSW) (the Act) promotes the inclusion and participation of people with disability in the community. The Act commenced on 3 December 2014, International Day of Persons with Disabilities.

1.2 Overview and operation of the Act

The Act sets out the NSW Government's aspirations for creating a society that values equality for, and inclusion of, people with disability in the community.

The key elements of the Act are:

- A clear statement of commitment to recognise the rights of people with disability, linked to the commitments arising when Australia ratified the *United Nations Convention of Rights of Persons with Disability* (UN Convention) in July 2018. These are expressed in the 'Objects' and 'Principles' of the Act.
- Disability planning - provisions for a State Disability Inclusion Plan (State Plan) to be prepared by the NSW Government as a whole and for Disability Inclusion Action Plans (DIAPs) to be prepared by NSW Government agencies and local councils.
- Disability Council - the Act creates the Disability Council as an advisor to the Minister for Families, Communities and Disability Services (Minister), articulates the functions of the Council, and sets out the membership of the Council.
- Service standards - provisions to set service standards for specialist disability services.
- Provision of supports and services - powers for the NSW Government, through the Secretary of the Department of Communities and Justice (Department), to provide support to individuals and to provide disability services. These were intended as transitional powers until the full establishment of the National Disability Insurance Scheme (NDIS), which is a key policy change that has been considered in this review.

1.3 Conduct of the Review

The Act requires review four years after it was made (s 51). The review has involved:

- Discussion Paper - release of a public discussion paper.
- Consultations - nine public consultation sessions in metropolitan and regional centres, including two specifically with Aboriginal and Torres Strait Islander people; 108 people attended in total.
- Submissions - 29 open submissions were received.
- Submission from the Disability Council - the Council made a detailed submission to the review.

- Survey - A 'Have your say' survey for stakeholders to provide responses to the Discussion Paper, open from 16 January to 30 March 2020; 68 responses were received.
- Review of disability inclusion planning - the Department engaged the Sax Institute to review the impact and effectiveness of the State Plan and DIAPs in 2018.

1.4 Context: a changing landscape and legislative implications

1.4.1 Specialist disability services in NSW: impact of the NDIS

When the Act was made in 2014, State and Territory Governments were solely responsible for the delivery of specialist disability services. In NSW, the then Department of Family and Community Services had lead responsibility for these services and was both delivering services directly, and funding services that were provided by a range of non-government service providers (for profit and not-for-profit entities). This included a wide range of services including accommodation and group homes, respite, post-school programs, transition to work and specific therapeutic supports (e.g. occupational therapy and speech pathology).

At that time, the NDIS was in development.

The National Disability Insurance Scheme (NDIS) provides direct support to people with disability through individual support packages. The scheme provides funding to individuals who then use their funding packages to purchase supports and services in line with an agreed plan. The key functions of the NDIS are to assess individuals, develop individual plans, and provide funding. The NDIS also creates and regulates the market of service providers, and therefore has a key role in market stewardship, regulation of quality and standards and setting prices for services and supports.

The NDIS launched in 2016 and 'full scheme' NDIS commenced in NSW in July 2018. The NDIS is jointly funded by the States, Territories and Commonwealth, with joint governance arrangements under the Council of Australian Governments Disability Reform Council. The NDIS is administered by the National Disability Insurance Agency (NDIA), which has an independent Board.

Responsibility for specialist disability services and regulation of these services has been shared between NSW and the Commonwealth in the period of overlap, while the NDIS has gradually established systems and processes for the effective regulation of the sector.

The NDIS Quality and Safeguards Commissioner regulates the disability sector by setting service standards and monitoring performance against those standards. All registered NDIS providers must now comply with the NDIS standards in order to be able to operate and charge for NDIS-funded services

The NSW Government no longer substantially operates or directly funds specialist disability services and programs. Services are provided by service providers regulated by the NDIS Quality and Safeguards Commission and funded from fees paid by users (funded by the NDIS).

It is important to consider who the 'provider of last resort' is in this new landscape. There are instances of people with disability, particularly people with complex needs, who require specific interventions in order to live safely and sometimes these requirements do not match current administrative arrangements. The NSW Government has noted that the Commonwealth Government retains primary ongoing funding responsibility as provider of last resort and for providing a safety net for participants.¹

1.4.2 Enduring State responsibilities

The NSW Government plays an important role in supporting disability service provision through funding and governance of the NDIS. The Commonwealth provides 53% of the NDIS funding and the balance is provided collectively by the States and Territories. The States and Territories, including NSW, sit on the Disability Reform Council, a Ministerial Council under the Council of Australian Governments,² which is the decision-making body for NDIS policy issues. The Ministerial Council is supported by a Senior Officials Working Group, with State and Territory representatives.

The NSW Government continues to provide services to people with disability as users of mainstream services. The NSW Government provides a wide range of services for all members of the community, including education, transport, and health services. The expectation is that people with disability are able to access these services and receive appropriate support as general users and some programs and services can have elements tailored to meet the needs of people with disability.

1.4.3 Disability discrimination

The Commonwealth, States, and Territories have legislation for the prevention of discrimination against people with disability. The *Disability Discrimination Act 1992* (Cth) makes it unlawful to discriminate against a person with disability. The Act specifically prohibits discrimination at work, in education, accessing premises, when purchasing goods, services or accessing facilities, when accessing accommodation, buying land, dealing with clubs and associations, and engaging in sport.

The Act also creates disability standards, which are made as regulations to the Act, and it is unlawful to fail to comply with the standards. There are currently three standards in effect: access to premises; education; and public

¹ NSW Government Response to the Parliamentary Inquiry into the implementation of the National Disability Insurance Scheme and the provision of disability services in NSW, December 2018, <https://www.parliament.nsw.gov.au/lcdocs/inquiries/2496/NDIS%20-%20Government%20Response.pdf>. Accessed 20 April 2020.

² On 29 May 2020, the Prime Minister of Australia announced that the Council of Australian Governments (COAG) will cease and be replaced by a new National Federation Reform Council (NFRC).

transport. All entities, including the NSW Government, are required to comply with the standards:

- *Disability (Access to Premises – Buildings) Standards 2010* – requirements for symbols and signs, lighting, hearing augmentation, emergency warnings, access ways, manoeuvring areas, passing areas, ramps, doorways and doors, lifts, stairways, toilets, surfaces, handrails and tactile indicators. Requirements are also incremental so that buildings have been required to comply with elements over time. Part 2 of the Standards set performance requirements for public transport buildings that are consistent with compliance targets set in the Transport Standards.
- *Disability Standards for Education 2005* (subject to review) – standards cover enrolment, participation, curriculum development, accreditation and delivery, student support services and elimination of harassment and victimisation. All education institutions have been required to comply with the standards since March 2005.
- *Disability Standards for Accessible Public Transport 2002* – The Transport Standards provide a framework to enable public transport service and infrastructure providers to remove discrimination from public transport services. Under the Transport Standards public transport services and infrastructure, excepting trains which have a compliance target of 2032, should be fully accessible by 2022, and a timeframe with interim compliance goals is set with target dates of 2007, 2012 and 2017.

The *Anti-Discrimination Act 1977* (NSW) also provides that it is unlawful to discriminate against a person on the basis of disability; including: employment, education, provision of goods and services, and accommodation. There is significant overlap between the Commonwealth and the NSW law.

1.4.4 National Disability Strategy

The National Disability Strategy (2010-2020) was released in 2010 and sets goals and aspirations in six policy areas: inclusive and accessible communities; rights, protection, justice and legislation; economic security (including employment of people with disability); personal and community support; learning and skills; and health and well-being. The National Disability Strategy is a high-level framework to guide government activity, and was an important part of Australia's actions to give effect to ratifying the UN Convention.

The Council of Australian Governments, through the Disability Reform Council, is currently developing a new National Disability Strategy. The new strategy is expected to set aspirations for the next ten years, summarising current activity across the Commonwealth and State Governments and articulating key actions or directions. It is also expected to include an outcomes framework and reporting requirements. At this stage, NSW is not expecting that the National Disability Strategy, in itself, will drive action that requires legislative change in NSW. The focus of the new strategy is more

likely to be on agreeing common policy positions and outcome measures and influencing program design.

1.4.5 Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability

The Commonwealth Government established the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Royal Commission) in April 2019. The terms of reference require the Commission to inquire into what should be done to:

- Prevent, and better protect, people with disability from experiencing violence, abuse, neglect and exploitation,
- Achieve best practice in reporting and investigating of, and responding to, violence, abuse, neglect and exploitation of people with disability, and
- Promote a more inclusive society that supports the independence of people with disability and their right to live free from violence, abuse, neglect and exploitation.

The Royal Commission is expected to run for three years. It has been holding public hearings and has been successful in raising the public profile of concerns of practices that impact on people with disability. Given that the Commission has not yet reported, the outcomes do not have a direct bearing on the Act at this stage, although it is possible that the final recommendations of the Commission might require consideration of further reform to give effect to the findings.

1.4.6 NSW Ageing and Disability Commissioner

The NSW Government made an important step in progressing rights for people with disability through the introduction of the *Ageing and Disability Commissioner Act 2019* and the establishment of the NSW Ageing and Disability Commissioner (Commissioner) in July 2019. The Commissioner is independent of the NSW Government and the Commissioner's roles include:

- dealing with allegations of abuse, neglect and exploitation of adults with disability and older adults, including by conducting investigations
- following an investigation, taking further action that is necessary to protect the adult from abuse, neglect and exploitation
- raising awareness and educating the public about matters relating to the abuse, neglect and exploitation of adults with disability and older adults
- inquiring into and reporting on systemic issues relating to the protection and promotion of the rights, or the abuse, neglect and exploitation, of adults with disability and older adults
- monitoring, assessing and reporting on the NSW implementation of the National Disability Strategy.

The Commissioner provides an important new safeguard for adults with disability and older people in NSW, with a particular focus on abuse, neglect and exploitation in family, home and community settings.

The Commissioner also coordinates and oversees the Official Community Visitor (OCV) scheme. OCVs are Ministerial appointees who visit accommodation services where people with disability and children live in the full-time care of the service provider, and people living in assisted boarding houses; and raise matters of concern with the provider, the Commissioner, the Minister and other appropriate bodies.

The Commissioner is required to monitor the implementation of the National Disability Strategy in NSW. It will be establishing a Standing Review to fulfil this ongoing function, which will publicly report on a regular basis.

The Commissioner has also reviewed disability advocacy in NSW. The report on advocacy was published in December 2019 and made a range of recommendations around the structure and role of disability advocacy in NSW. The report is currently with Government for consideration.

1.4.7 NSW Parliamentary Inquiries

In 2017, the NSW Legislative Council released the report of the inquiry titled *Education of students with a disability or special needs in New South Wales*. The inquiry made 39 recommendations relating to how the Department of Education provides educational services to students. The Government response indicated support for all 39 recommendations, either in full or, for a small number, in principle.

The recommendations included: improving training for Principals and teachers, particularly in the operation of the *Disability Discrimination Act 1992* (Cth); improving assessment processes; better reporting of data and performance; and increasing support in key areas.

The matters covered in the inquiry were largely within the scope of existing instruments, including the Department of Education's DIAP and some of the actions cited the DIAP as the mechanism for implementing the commitment.

Many matters also related to the implementation of the *Disability Discrimination Act 1992* (Cth). The Government's response did not indicate that change to the NSW Disability Inclusion Act was required. The NSW Legislative Council also inquired into the implementation of the NDIS and the provision of disability services in NSW. Its report, *Implementation of the National Disability Insurance Scheme and the provision of disability services in New South Wales* (Report 51), was published in December 2018.

The Government response to the Inquiry was a commitment to:

- advocate on a range of issues through the NDIS governance arrangements and national forums
- provide funding to address potential service gaps during the early years of the full scheme
- continue to invest in services and supports through mainstream services that were inclusive of all people with disability; and

in this report, and

- consider opportunities to strengthen governance in relation to DIAPs as part of this review.

The Government response also committed to consider the Inquiry's recommendation that the NSW Ombudsman have an oversight role in the review and monitoring of government agencies' DIAPs. The Government noted that any role for the NSW Ombudsman needed to be in the context of changes to the functions in that office as a result of the transition of some functions to the NDIS Quality and Safeguards Commissioner, and the establishment of the NSW Ageing and Disability Commissioner.

2 Do the policy objectives of the Act remain valid?

There are three broad policy objectives being addressed by this Act, expressed in the objects and principles of the Act, and explained in the second reading speeches when the Bill was considered in Parliament. The three objectives are to:

- recognise the human rights of people with disability, including giving effect to the ratification of the UN Convention,
- provide support for inclusion and improvements in the lives of people with disability, and
- commit the NSW Government to delivering and funding services and supports in the transition period to NDIS and beyond.

2.1 Objective 1: Recognition of human rights, giving effect to the UN Convention

2.1.1 About this objective

The second reading speeches of the Bill before the Houses of Parliament emphasised that the intent of the legislation was to respond to the input from stakeholders who asked that the law promote human rights and that the purpose of the legislation is 'to give effect to the human rights and fundamental freedoms of people with disability'.³

2.1.2 How this objective is currently expressed

Object 3(a): Human rights

The intent of Object 3(a) is to acknowledge that people with disability have the same human rights as other members of the community and that the State and the community have a responsibility to facilitate the exercise of those rights.

Object 3(e): Purposes and principles of UN Convention on the Rights of Persons with Disabilities

Similarly, the intent of Object 3(e), to affirm commitment to the UN Convention, is expressed in the requirements for disability planning. The latter ensures that all government agencies and local councils have disability plans and that those plans address the needs of people with disabilities in the functions and operations of the organisations.

³ Disability Inclusion Bill 2014, 2nd reading speeches, <https://www.parliament.nsw.gov.au/bills/Pages/bill-details.aspx?pk=3195>

Principles

The general principles (Section 4) are a direct reflection of the equivalent principles in the UN Convention. The concepts align closely with the UN Convention, with the addition of some extra considerations (13 principles compared to eight in the UN Convention) and wording changes that reflect NSW considerations.

The principles also recognise the needs of particular groups (Section 5 of the Act), being Aboriginal and Torres Strait Islander people, people from culturally and linguistically diverse backgrounds, and women and children. This reflects a desire in NSW to pay special attention to these groups recognising that these groups often suffer intersectional disadvantage.

Requirements for disability planning

This first objective is also expressed in the requirements for disability planning (Divisions 2 and 3 of the Act), specifically for a State Plan to be prepared by the NSW Government and for public authorities (NSW Government agencies) and local councils to prepare DIAPs. These plans facilitate the exercising of the human rights of people with disability in articulating how the NSW Government (as a whole) and separate organisations are addressing the needs of people with disability in their service design and delivery and policy development processes.

2.1.3 Relevance

The NSW Government has made an important and powerful statement in affirming its commitment to people with disability. This commitment informs and influences all NSW Government activity and ensures that the rights of people with disability are given proper consideration in all facets of government action, covering policy development, program design and delivery, budgeting, and performance measurement.

Australia, having ratified the UN Convention in 2008, is required to give legislative effect to its precepts. These sections of the Act are the expression of that requirement in NSW. This commitment by NSW, along with similar commitments in other jurisdictions such as Victoria, bolsters the Australian Government position.

Many stakeholders in the consultations and in survey responses expressed strong support for keeping the object expressed in section 3(e), in the Act.

2.2 Objective 2: provide support for inclusion and improvements in the lives of people with disability

2.2.1 About this objective

This objective aims to ensure that people with disability are able to access all NSW Government services in a way that is appropriate to their needs and to help make our communities more inclusive. The second reading speech for

the Bill emphasised that ‘people with disability have a right to be included as citizens on an equal basis with others’, and that the Bill established a ‘strong outcomes-focused approach to whole-of-government strategies that aim to make communities more accessible and inclusive for people with disability’.

2.2.2 How this objective is currently expressed

Object 3(b): Independence and social and economic inclusion

The first expression of this objective in the Act is the second object (s.3 (b)), which is ‘to promote the independence and social and economic inclusion of people with disability’. This object directly articulates the core concept and frames the key functions of the Act.

Disability planning

The provisions for the State Plan and organisational DIAPs are a functional expression of this objective. The plans demonstrate how the Government and organisations are planning and managing operations in a way to promote the participation and inclusion of people with disability.

Disability Council NSW

The Disability Council is an advisory body to the Minister and the Act defines its functions and membership. The Council is a representative body that provides expert advice on the needs and experience of people with disability. It specifically requires that the majority of Council members be people with lived experience of disability and the Chair also be a person with lived experience of disability. The Council is a key vehicle for ensuring that the needs of people with disability are heard and considered across Government, and is required to consult so that all voices are heard.

2.2.3 Relevance

The Sax Institute reviewed the State Plan and DIAPs. The review found that the Act had been effective in driving the development of plans, that all the organisations which were required to develop plans had done so, and that the plans made significant commitments to increasing participation and inclusion for people with disability. Stakeholders strongly supported the structures that required both a State Plan and organisational DIAPs.

Both the Sax Institute and stakeholders indicated a desire for the plans to be more effective, with stronger requirements around enforcement and accountability for the plans. These issues are discussed further under the assessment of the current provisions of the Act.

Stakeholders were also supportive of the role and purpose of the Disability Council, noting that it played a valuable role in expressing the perspective of people with disability in government processes.

2.3 Objective 3: commit the NSW Government to delivering and funding services and supports in the transition period to NDIS and beyond

2.3.1 About this objective

This objective aimed to ensure effective management of the then anticipated transition to the NDIS. It relates to setting interim controls around services that were delivered or funded by the NSW Government. It also recognised the then significant role of the NSW Government in funding and providing specialist disability supports. This objective is expressed in the objects and provisions of the Act and was a major feature of the second reading speeches.

2.3.2 How this objective is currently expressed

This objective is most clearly expressed in three of the objects of the Act:

- The third object (s 3(c)), which states that the intent 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 and services
- The fourth object (s 3(d)), which states the intent to provide safeguards in relation to the delivery of supports and services for people with disability, and
- The sixth object (s 3(f)), to provide for responsibilities of the State during and following the transition to the NDIS.

Collectively, these objects frame the overall intention for the State's intended management of the transition to the NDIS.

The second reading speech also emphasised the need to maintain quality services and ensure continued provision of services to people with disability in the transition period.

Key provisions in the Act that relate to this objective are:

- Individualised funding—provisions to provide funding to individuals and controls around how that funding will be provided (ss 25-28)
- Rights to appeal—process for appealing decisions to ensure procedural fairness, with powers to appeal to the NSW Civil and Administrative Tribunal (s 35), and
- Provision of supports and services—controls where the NSW Government directly delivers services (ss 20-22).

2.3.3 Relevance

The implementation of the NDIS has effectively removed the NSW Government from direct delivery of services and direct funding to service providers. The NSW Government no longer substantially operates or directly funds specialist disability services. There is only a limited need for the NSW Government to maintain legal controls in these areas.

However, the second reading speech⁴ noted that its objects, which include ss 3(d) and (f), are legacy provisions which are intended to provide a rights-based framework after transition to the NDIS. Among other things, NSW has broader responsibilities relating to its citizens with disability. As such, the objects remain relevant so far as they cover any residual NSW government responsibilities to people with disability after transition to the NDIS.

At present, this includes responsibilities, such as: funding disability advocacy services or continuing to provide worker probity checks until the commencement of the NDIS worker screening checks. This is indicated by the word 'following' in s 3(f) which states that it is an object of the Act 'to provide for responsibilities of the State during and following the transition to the NDIS'.

2.3.4 Overall summary

The first two objectives remain valid and relevant in the current context. Given the significant changes in the delivery context with the implementation of the NDIS and other legislative changes, the third objective is no longer as relevant to NSW, although it remains applicable to residual NSW government responsibilities, and as such should be retained.

Society attitudes will continue to evolve and this review does not preclude future legislative amendment.

⁴ The [second reading speech](#) for the DIA Bill in the NSW Legislative Assembly states: '*The legacy provisions will continue to operate after the National Disability Insurance Scheme is fully operational in New South Wales. In short, these provisions include the bill's objects and human rights principles, and commit the New South Wales Government to making communities more inclusive for people with disability.*'

2.4 Other issues in relation to the objects and principles of the Act

Stakeholders suggested some amendments to the objects and principles which were also considered by the review:

- Carers—several stakeholders, including the Carers Advisory Council (which advises the Minister on issues relating to carers), indicated that the objects or principles should recognise carers and the role carers play in the lives of people with disability. Disability Principle 11 in s 5 of the Act notes the Carers Charter and the *Carers (Recognition) Act 2010*. This review has found that there is no additional need to replicate the commitment to carers in this Act.
- Gender issues—some stakeholders recommended recognition of LGBTQI people in the principles. The Disability Council further recommended an amendment to s 5, which recognises particular groups (being Aboriginal and Torres Strait islander people, people from diverse cultural backgrounds, women, and children), with a new section making the same commitment to LGBTQI people. However, this issue is already addressed in s 5 of the Act (Principle 6), which says ‘people with disability have the right to respect for their cultural or linguistic diversity, age, gender, sexual orientation and religious beliefs’. The review has found that the current wording is sufficient.

3 Do the provisions of the Act remain appropriate for securing its objectives?

This section explores the extent to which the current provisions of the Act align with the overall objectives of the Act. The objects and principles of the Act are dealt with in Section 2 of this report. Section 3 examines the requirements for disability planning, the role and membership of the Disability Council NSW and the drafting relating to setting service standards and provision of supports and services.

3.1 Disability planning

The Act requires that the NSW Government prepare a State Plan and that NSW Government entities and local councils prepare DIAPs. The nominated NSW Government entities are government departments as defined in the *Government Sector Employment Act 2013* (GSE Act) plus any other organisations listed in the regulations (currently four: the Australian Museum Trust, Destination NSW, Library Council of NSW and the Office of Finance and Services).

3.1.1 Implementation to date

The first State Plan was completed in 2015. The first cycle of DIAPs prepared by NSW Government agencies and local councils was completed in 2017.

The Sax Institute was commissioned to review disability planning in 2018 and found that:

- Every mandated agency had a DIAP in place, and many agencies which were not specifically required under the Act to develop a DIAP had also engaged in disability inclusion planning—a total of 20 organisations prepared a DIAP in that first cycle.
- The legislation was perceived as an effective catalyst, driving the prioritisation of inclusion and increasing visibility within the government sectors.
- The plans demonstrated that significant activity had occurred, evidenced by the volume of actions.
- Reporting was recognised as problematic, and ‘largely anecdotal, giving little sense of impact or outcomes.’
- Stakeholders noted that ‘agencies had not reflected on their DIAP enough, particularly in terms of areas for further work’, and ‘there was little documentation of the challenges and limitations they faced.’
- ‘Most agencies were not actively monitoring or collecting data that could demonstrate meaningful outcomes’.

Many stakeholders in consultations and submissions also expressed strong support for the requirement for a State Plan and DIAPs.

However, stakeholders expressed concerns that the first DIAPs had not yet generated the expected level of change and that there was a perceived lack of enforcement or accountability linked to the plans. In their view, some organisations made aspirational commitments that were not delivered. This perceived lack of impact was also highlighted in the DCJ survey as more than half (55%) of respondents (36 survey respondents) indicated that the DIAPs were not effective in achieving greater community participation and inclusion for people with disability.

The Sax Institute recommended improvements in the process to strengthen the impact by:⁵

- Improving reporting standards and processes for monitoring - to better track implementation of plans and provide a better picture of outcomes
- Targeting agencies and local councils that have been slower to engage with the inclusion agenda - supporting those organisations that were at a more foundational stage in their capacity to engage effectively in disability inclusion
- Engaging more effectively with the priority groups identified in the legislation - Aboriginal and Torres Strait Islander people, people from culturally diverse backgrounds, women, and children, and
- Communicating progress and achievements more effectively - to maintain momentum and facilitate learning.

Planning for inclusion and participation for people with disability is at an early stage, and plans can reasonably be expected to become more sophisticated and comprehensive as they are renewed and updated.

Stakeholders also indicated that it would be valuable for the requirement to develop a DIAP be extended to other organisations beyond State and local government (discussed further below).

3.2 Issues

3.2.1 Who is currently required to develop Disability Inclusion Action Plans

The Act requires 'public authorities' to develop DIAPs which is defined as including:

- a) a government department listed in Schedule 1 to the GSE Act (Department of Premier and Cabinet, The Treasury, Department of Customer Service, Department of Planning Industry and Environment, Department of Transport, Ministry of Health, Department of Education, Department of Communities and Justice and Regional NSW);
- b) a local council; or

⁵ Sax Institute, *Review of the NSW Disability Inclusion Plan 2018* (Final Report, June 2019), <https://www.parliament.nsw.gov.au/tp/files/76444/Final%20Report%20of%20the%20NSW%20Disability%20Inclusion%20Plan%202018.PDF>

- c) another entity listed in the regulations (which currently includes the Australian Museum Trust, Destination NSW, the Library Council of NSW and the Office of Finance and Services).

The Disability Council submission indicated that the list was anomalous and contained gaps and omissions. The Council has recommended that the definition of 'public authority' be broadened to include all NSW Government public sector agencies and public service agencies. It is recommended that this could be addressed through the potential expansion of the list of agencies in the regulations after further consultation with agencies in Schedule 1 of the GSE Act.

3.2.2 Extending requirements to more sectors

Most stakeholders expressed a view that other organisational types should be required to develop DIAPs, variously covering: large corporate entities; large non-government (not for profit) entities; service providers; and any entity that receives government funding (i.e. that it be a condition of funding that the organisation have a DIAP).

Some of these requirements are outside the legal remit of the NSW Government, and some are already addressed in the Act or other legislation:

- Corporate entities are regulated by the Commonwealth under the *Corporations Act 2001* and there is no power for the NSW Government to unilaterally direct their activities.
- Larger not-for-profit entities are also regulated under Commonwealth legislation and smaller not-for-profits are subject to the *Australian Charities and Not-for-profits Commission Act 2012*.

3.2.3 Contents and requirements of the plans

The requirements in the Act for what the plans must address are deliberately broad, covering:

- a) how the organisation will have regard to the disability principles in dealing with matters relating to people with disability
- b) strategies to support people with disability to provide access to supports, services and information, to accommodate specific needs, to support employment and to encourage and create opportunities, and
- c) consultation in development of the plan; and, for DIAPs, how the plan supports the State Plan.

The Act indicates that the plans *may* cover physical access, access to information, accommodating specific needs of people with disability, supporting employment of people with disability, and encouraging and creating opportunities for people with disability to access the full range of services and activities available in the community.

3.2.4 Guidance for preparing Disability Inclusion Action Plans

The Department of Communities and Justice has prepared guidelines to support organisations in developing DIAPs. These guidelines do not prescribe the content or format of the plan. The design focused on consistency and flexibility, and importantly did not have ‘an unnecessary impost on [those preparing plans including] local councils’ (2nd reading speech, Legislative Assembly).

Feedback from the consultations proposed that the Department of Communities and Justice commit to updating the guidelines for disability planning and consider the suggestions that plans include:

- disability inclusion planning for (i) non-government organisations and (ii) the private sector
- advice on identifying the needs of people with disability
- performance measures (and potentially including a suggested ‘standard set of indicators’)
- a suggestion that the plans be developed in consultation with people with lived experience
- that the Disability Council be consulted in the development of the State Disability Inclusion Plan and Disability Inclusion Action Plans developed by NSW Government agencies.

Many stakeholders expressed a view that achieving improved plans required amendment; for example, increasing accountability through enforcement activity.

Specific concerns that were raised by stakeholders:

- *Frequency and duration*—currently there is a requirement to report on the State Plan every four years, but no explicit requirement to renew the plan, after the four year period. The Disability Council recommended setting requirements for renewing the plan every four years. The Act review found this recommendation to be reasonable (Recommendation 1).
- *By a suitably qualified person*—the Council recommended that the Act add a requirement that DIAPs be prepared by a ‘suitably qualified person’, being somebody who has been trained in disability inclusion. The requirement for use of a ‘suitably qualified person’ has precedent, for example, in planning regulations. However, unlike disability inclusion, suitably qualified persons in these domains are typically members of a prescribed professional organisation with relevant professional qualifications and experience. There is no such profession for disability inclusion, and hence such a requirement would be unenforceable. The review does not support this recommendation.
- *Detailed content*—stakeholders, including the Disability Council, recommended that the Act be amended to include more specific requirements in the plans, including: specific inputs into the plans (identifying the needs of people with disability); goals; priorities; strategies and actions; and performance measures. Some stakeholders also

expressed a desire for the Act to include consistent performance measures to facilitate benchmarking of performance across organisations.

As noted in the second reading speech, the legislation was designed to permit tailoring by different organisations, thereby avoiding unnecessary imposts. The review does not support amending the legislation for this purpose. This could be addressed by revising the guidelines and support for organisations when developing plans.

- *Consultation with the Council*—the Disability Council recommended that the Act be amended to require consultation with the Council in the development of the State Plan and DIAPs for public authorities. There is no barrier to this occurring currently, and this request can be addressed administratively, so there is no need to amend the Act to give effect to this practice.
- The Disability Council recommended that the Minister be given the power to approve DIAPs prepared by NSW Government entities. This proposal would create unnecessary delay in review of the plans for limited additional benefit. It also creates uncertainty around agency accountabilities as the Minister for Families, Communities and Disability Services is not accountable for the performance or expenditure of other agencies. The review does not support this recommendation.

3.2.5 Report on implementation of plans

The Act currently requires organisations to report annually on the implementation of their DIAPs, which can be done by including a section in the organisation's own annual report and forwarding that as an extract to the Minister (ss13(1) and (2)). The Minister is required to table an annual report on overall progress in implementation of DIAPs in Parliament as soon as practicable after the end of each financial year (s13 (3)). The review by the Sax Institute found that organisations had undertaken a wide range of actions to improve supports and services for people with disability.

The Disability Council has recommended that the Act be changed to give the Council responsibility for preparing an annual report to the Minister in this regard. Current power to advise public authorities and report to the Minister about the content and implementation of the State Plan and DIAPs (s 17(1) (c) and (d)), mandating reports on every plan would divert resources from areas of particular focus or concern (noting the number of plans).

3.2.6 Enforcement provisions

Many stakeholders expressed concern that there is no enforcement linked to the DIAPs and that organisations can make aspirational plans with limited accountability to then deliver on their commitments. Accountability for DIAPs occurs through the requirement for annual reporting. Enforcement provisions would shift the focus of responsibility from the responsible agency to a third party. The proposal to introduce new enforcement provisions is not supported.

3.2.7 Accessibility of the plans

A small number of stakeholders reported some plans are not produced in accessible formats and noted that this can undermine the effectiveness of the plans if the key stakeholder group is unable to access them. The Disability Council recommended that the Act be amended so that the requirement that the State Plan and DIAPs be publicly available be extended to add 'including to people with disability'. The review supports this recommendation, so that State Plan and DIAPs are publicly available in an accessible format to people with disability.

3.2.8 Summary

The provisions requiring a State Plan and DIAPs are found to be useful and valid in driving effective planning and consideration of the needs of people with disability, and are an effective expression of the policy objectives of the Act.

The requirements could be enhanced by:

- Setting a timeframe for the regular renewal of the State Plan and DIAPs
- Expanding the list of NSW Government entities that must develop a DIAP, and
- Requiring that plans be in accessible formats.

Further potential improvements to implementation of the Act may increase its effectiveness, but do not require legislative amendment. These include revising the planning guidelines and suggesting to NSW Government agencies that they consult with the Disability Council in developing their plans.

3.2.9 Recommendations

Recommendation 1: That the Act be amended to require the State Disability Inclusion Plan and Disability Inclusion Action Plans to be renewed every four years.

Recommendation 2: That sections 10 and 12 be amended to add 'including in an accessible format to people with disability', relating to the requirement that the State Disability Inclusion Plan and the Disability Inclusion Action Plans be publicly available.

3.3 Disability Council NSW

3.3.1 Current position

The Disability Council is an advisory body to the Minister and is a leading voice for people with disability in government.

The Council has recruited appropriate members, and new members are appointed as vacancies have occurred. Council members represent a range of people with lived experience of, and with experience in, disability. The Council meets regularly and has responded to issues that are relevant to the needs of people with disability.

In its activities, the Council has:

- Identified strategic priorities and sought ways of delivering against those priorities each year
- Invited Agency Secretaries to attend Council meetings to discuss progress against each agency's DIAP
- Effectively contributed to government policy processes, both in providing members for standing committees, for example, as well as providing comment on issues that arose—the Council is utilised by agencies as one vehicle for consulting with the disability sector, and
- Met with equivalent Councils in other jurisdictions to identify key issues across jurisdictions and identify responses to those issues.

Stakeholders valued the role of the Council and thought it was important to have a body of this nature to advise the Minister. They were also concerned that the Council was not sufficiently resourced to adequately fulfil its role, and needed to undertake more consultation with the sector in order to be truly representative of the voice of people with disability.

3.3.2 Issues

Membership

The requirements for membership are that a majority of members are people with disability and the Chair is a person with disability (for reference, the equivalent body in Victoria does not require that the Chair be a person with disability). The Council has sought members who represent a wide range of perspectives on experience of disability (physical disability, deaf and hard of hearing, blind, mental health issues), and diverse cultural backgrounds, including Aboriginal and Torres Strait Islander people and people from regional and remote areas.

A small number of stakeholders indicated that the Act should be more prescriptive about membership of the Council to ensure that the Council was sufficiently diverse, requiring people with specific disabilities, cultural backgrounds or from regional and remote areas.

There is no apparent benefit from prescribing this in the legislation and to do so may restrict the ability of the Council to respond to emergent needs. The review found that the current requirements for membership of the Council are appropriate.

Functions

- **NDIS impacts** - the introduction of the NDIS necessitates consideration of whether the Council's functions should change. Stakeholders were mixed in this regard, with a small number indicating that the Council should have a role in oversight of the implementation of the NDIS, in providing advice, particularly around service gaps and the activities of the NSW Government as they relate to the NDIS, and in advising on specific issues within the NDIS implementation (for example, transport and education). A similar number of stakeholders indicated that the role of the Council was not affected by the NDIS and should not change.

The Council itself is of the view that its functions should be amended, recommending that two new functions be added: to consult with the NDIA; and to advise the Minister on the implementation of the NDIS and national disability matters, specifically mentioning the implementation of the National Disability Strategy.

There is no impediment to the Council consulting with the NDIA, and NDIA staff have attended Council meetings in the recent past. This amendment appears to generate no additional benefit.

In relation to the National Disability Strategy, the NSW Ageing and Disability Commissioner has legislative responsibility in NSW for reporting on implementation of the National Disability Strategy in NSW and that role should not be duplicated by the Council.

- **Control on reporting to the Minister** - the Council noted that the Act does not specify whether the Government may direct the Council on the content of its advice. The Council has recommended that the Act be amended to clarify this. There is no implication, explicit or implicit, in the Act that the Council is subject to the control of the Minister in this regard, and so no need to specifically express this in the legislation.
- **Annual report** - the Council recommended that the Act be amended to require the Council to report annually to the Minister on the exercise of its functions. There is no impediment to the Council doing this already and no additional benefit gained from including such a requirement in the Act.
- **Report on implementation of government policy** - the Council has recommended that its annual report to the Minister include a report on the implementation of government policy. There is no impediment to the Council doing this already and no additional benefit gained from including such a requirement in the Act.

Concerns by stakeholders that the Council was insufficiently resourced and insufficiently consulting with the sector are issues of implementation rather than legislation. No changes to the Act are required in response to those concerns, but they have been raised with the NSW Government.

3.3.3 Summary

The Disability Council plays a valuable role in advising the Minister and representing the voice of people with disability. Council recommendations regarding the description of its functions are not supported as they would make it more prescriptive and are already within the purview of the Council's operation. Concerns from stakeholders about resourcing of the Council are being considered and have been referred to the NSW Government.

3.4 Service standards (Part 4) and provision of supports and services (Part 5).

Parts 4 and 5 relating to service standards and the powers around provision of disability supports and services were created as transitional provisions and were intended to be obsolete on implementation of the NDIS.

As outlined in Section 2, the changes in the operating context mean that these sections are no longer relevant to the activities of the Department. Good practice dictates removing any inactive elements of legislation so that there are no unnecessary requirements still in force.

Stakeholders supported maintaining these provisions and extending the powers to cover mainstream services. The Disability Council recommended that the Act be amended to include provisions to develop standards delivered by and for NSW Government agencies and to give the function of developing those standards and guidance to the Council.

The NDIS Quality and Safeguards Commissioner has national responsibility for setting and monitoring service standards for all NDIS service providers. NSW has its own disability discrimination legislation under the *Anti-Discrimination Act 1977 (NSW)* which also (like the *Disability Discrimination Act 1992 (Cth)*) covers the areas of employment, education, provision of goods and services, and accommodation. The powers around the State Plan and organisational DIAPs already give the Council significant influence on how NSW Government agencies work with and provide support to people with disability.

3.4.1 Residual powers

Four existing provisions should be carried forward to support the disability service system as follows.

3.4.2 Transitional arrangements

Transitional arrangements should be put in place regarding provisions relating to disability worker checks in operation until the NDIS worker checks start at a time to be confirmed in 2021. These provisions are: employment checks in s 32 for eligible entities receiving financial assistance, and s 36 (similar to s 32 but for departmental workers) in Part 5 and the sanction of Schedule 2 prescribed criminal offences.

| Section | Content of the section | Benefit of retaining |
|--|--|---|
| s.20 | Power to make regulations for or with respect to standards relating to the provision of supports and services for people with disability. | There are currently standards in the regulations and if NSW continues to deliver some supports and services then it is appropriate to have standards. |
| s.32 Transitional arrangements | Conditions about probity checks—eligible entities receiving financial assistance. | Appropriate until the NDIS worker checks commence. |
| s.36 Transitional arrangements | Secretary to conduct probity check of particular departmental workers. | Appropriate until the NDIS worker checks commence. |
| s.37 | Secretary may provide financial assistance to a government department, local council or another entity for the purpose of promoting the objects of this Act. | Creates a structure to provide funding to organisations to undertake activities if required. |
| s.38 | Giving information – requirements around information that could be required if funding were provided. | Powers to require information that may be relevant to financial assistance; good practice in the expenditure of public money. |
| s.39 | Protection from liability for person providing information in s. 38. | Appropriate protection for the person giving information. |

These sections will need to be renumbered and potentially reworded to be relevant to the updated context for the Act.

3.4.3 Recommendation

Recommendation 3: That Parts 4 and 5 be substantially deleted from the Act (except for provisions relating to disability service standards in the regulations, and financial assistance by the Secretary to promote the objects of the Act), while ensuring that other statutory functions or legislation cross-referring to provisions within these Parts are not adversely affected by their deletion.

Recommendation 4: That provisions in the Act which relate to probity checks be retained as transitional provisions until commencement of the NDIS worker checks.

3.5 Miscellaneous provisions and Schedules

3.5.1 Miscellaneous provisions

The Miscellaneous provisions of the Act are procedural and give effect to the provisions in the main body of the Act such as processes for probity checks, relationship with other Acts and Laws. Limited items may be retained in the Act if required for drafting completeness.

3.5.2 Schedules to the Act

- Schedule 1, in relation to the terms of office of Members of the Disability Council and filling of vacancies, remains current and should be retained.
- Schedule 2, prescribed criminal offences in relation to criminal checks for employees of the Department, should be retained for transitional arrangements to be made.
- Schedule 3, residents' amenities accounts, will be deleted as these instruments are no longer used or needed by the Department.
- Schedule 4, savings provisions, will be updated to reflect the consequential impacts of the other recommendations of this review.

3.5.3 Recommendation

Recommendation 5: That provisions in the Act which relate to accounts and funds relating to people with disability who are residents of government residential centres be deleted.

Recommendation 6: That Schedule 4 be updated and amended to align with the amendments to the Act arising from this review.

4 Other issues

Stakeholders raised a range of issues in consultations and submissions which are outside the scope of this review or the operation of the Act, some of which have been addressed earlier in this report. The Department has noted stakeholder concerns in these areas and will refer to that material in ongoing discussion about policy and program development in the disability sector.

4.1 NDIS and interaction with State programs and services

Stakeholders raised concerns that there were many people who were reportedly ‘falling between the gaps’ of State and Commonwealth funded services. The concerns are in two broad areas: people who were eligible for NDIS support but were unable to use their packages because appropriate service providers were not available (thin markets, local shortages, high demand in specific locations, unable to get support at the funded rate); and people who were not eligible for NDIS support.

- *People unable to use their NDIS packages* - this is an NDIS operational issue. The NSW Government is continuing to raise issues around the operation of the NDIS through DRC. It is clear that the Commonwealth Government is the funder of last resort and structures are in place for the NDIS to draw on service providers in those instances.
- *People not eligible for NDIS packages* - NSW provides mainstream services in a wide range of areas and users are able to access these according to the nature of the program and the needs of the user. As both State and Commonwealth laws apply, one must comply with both the Anti-Discrimination Act 1977 (NSW) and the *Disability Discrimination Act 1992* (Cth) and are therefore required to ensure appropriate access for people with disability.

4.2 Advocacy

Many stakeholders indicated a desire for this legislation to be amended to include a commitment to disability advocacy. The NSW Government is currently funding advocacy services until December 2020. The NSW Ageing and Disability Commissioner completed a review of disability advocacy in 2019 and made a report to Government at that time. The report is currently with Government for consideration and any position on advocacy will be subject to the response to the review.

4.3 Communication

There was a general request to improve communication with stakeholders and engage more effectively in ongoing dialogue. Specific requests were to ensure that more materials were available in a wide range of community languages, to provide targeted information to schools, colleges and the media

and to fund information sessions in the community so that they understood the nature of the support system and where they could get support. These are issues that relate to the implementation of the Act and have been noted by the Department and the Disability Council in consideration of future activity.

4.4 Wording of the legislation

Several stakeholders expressed concern about the language used in the Act, one noting that it was 'othering' in its tone, another indicating that it was still framed in terms of something that is 'done to' people with disability, rather than 'done with'. The review notes these concerns and accepts that legislation is drafted to a general convention about wording, tone and definitions, particularly with the aim of making all legislation broadly consistent.

5 Conclusion

The review has found that the first two policy objectives for the Act remain valid. The third policy objective is no longer as relevant to NSW, because of the implementation of the NDIS in this State, but the objective still remains valid for residual NSW government responsibilities.

The review has found that the Act is an important commitment by the NSW Government to the rights of people with disability and in establishing structures and processes for activating those rights in the planning and access to general supports and services across all NSW Government agencies and local councils.

The review has raised issues in relation to the implementation of the Act and will support updating guidance to agencies and councils on disability planning in order to strengthen and improve future delivery of activity under this Act.