

National Disability Services Victoria

# Submission to the Disability Act Review

October 2021

## **Overview:**

National Disability Services (NDS) is pleased to make a submission to inform the review of the *Disability Act 2006 (VIC)*. NDS recognises the Disability Act as a critical source of rights and protections for Victorians with disabilities. We recognise that the disability sector has significantly changed since the introduction of the National Disability Insurance Scheme (NDIS). NDS welcomes the consultative approach that is being taken to review the Act to bring it up to date for our contemporary environment.

## **About National Disability Services:**

National Disability Services (NDS) is the peak body in Victoria and Australia for non-government disability service providers. NDS has more than 250 members in Victoria and over 1,080 members nationally. NDS provides information and networking opportunities to its members and policy advice to State, Territory and Commonwealth governments. We have a diverse and vibrant membership, comprised of small, medium and larger service providers, supporting thousands of people with disability. Our members collectively provide the full range of disability services, from supported independent living and specialist disability accommodation, respite and therapy to community access and employment. NDS is committed to improving the disability service system to ensure it better supports people with disability and their families and carers, and to building a more inclusive community.

## **Introduction:**

Since its inception, the *Disability Act 2006 (VIC)* has played an impactful role in promoting social, civic, and economic inclusion of people with disabilities, and safeguarding Victorians with disabilities. The past few years have seen vast changes in the disability landscape. The

introduction of the National Disability Insurance Scheme (NDIS) has fundamentally altered the way that disability services are funded and provided in Victoria and across Australia, and the role of the Victorian government in relation to such services. The introduction of the NDIS Quality and Safeguarding Commission has also had far reaching impacts, with a transfer of regulatory oversight powers away from State and Territory Governments toward a centralised national body with new incident reporting, practice standards and audit requirements for disability service providers. This shift has also transformed the role of the Victorian Government in the disability landscape. As a result, it is timely that the *Disability Act* is reviewed to bring the *Act* in line with contemporary arrangements in our sector.

This review of the *Disability Act* provides the opportunity to consider how rights protections and inclusion mechanisms for Victorians with disabilities can be strengthened and aligned with national and international standards, and how safeguarding structures and systems can be updated to recognise significant changes in disability service provision since the introduction of the NDIS.

### **Objectives:**

NDS supports a redevelopment of the *Disability Act* which adopts objectives which have a strong human rights focus and reflect a more comprehensive and contemporary understanding of disability. This could involve adopting an understanding of disability and equality as reflected within the United Nations Convention on the Rights of Persons with Disabilities.

### **Principles**

#### Principles related to people with disability:

NDS strongly affirms the human rights of people with disabilities. We would like to note our belief that rights should be predominantly protected at a national level. NDS is concerned that while additional human rights protections at the Victorian jurisdiction are well meant, varying human rights protections across states and territories are confusing and can be problematic. Rather, we would encourage the Victorian Government to advocate strongly for comprehensive rights protections at a national level for all people with disabilities, not just for NDIS participants but for all Australians with disabilities and contained within a National Disability Framework.

In the meantime, however, we would support a strengthening of the human rights focus within the principles in the *Disability Act*. We note that the South Australian Disability Inclusion Act

2018 explicitly identifies the United Nations Convention on the Rights of Persons with Disabilities in the purposes of the Act. This could be replicated within the *Disability Act 2006 (VIC)* to strengthen the protection of human rights for Victorians with disabilities. These principles could also include recognition of the unique needs of persons with disabilities who experience intersecting marginalisation as a result of their racial, ethnic, religious, sexual and/or gender identities.

Principles related to disability services and regulated disability services:

Again, while NDS strongly believes that robust guiding principles for the disability service sector are essential, we are concerned that differing principles across different states and territories add to the complexity of the regulatory landscape. NDS encourages the Victorian Government to advocate for a comprehensive set of principles and responsibilities for the disability sector at a national level which covers NDIS providers as well as providers of non-NDIS funded supports.

Principles Related to Mainstream Services which interact with Disability Services:

NDS understands that the *Disability Act 2006* in its current form does not include principles for mainstream services that integrate with disability services. NDS supports the development of a broad set of inclusive principles which apply across all Victorian Government services and which protect and promote the rights of people with disabilities and other marginalised groups in our society. This set of principles should recognise intersectionality, and the importance of Aboriginal cultural safety and self-determination, amongst other things. NDS believes that these principles are perhaps best located in a central piece of legislation, rather than contained within the *Disability Act* and potentially repeated across other legislation (for example, the Gender Equality Act etc).

In the absence of a more central piece of legislation, however, we would support a strengthening of the principles related to mainstream services and the inclusion of people with disabilities within the *Disability Act*. We note that many people with disabilities experience significant barriers when accessing mainstream services, perhaps most notably within health and education settings. While the State Disability Plan and Disability Action Plans in public sector organisations provide an avenue through which the rights and needs of people with disabilities are promoted across government, NDS believes that there is room for significant improvement in the interface between disability services and mainstream services, and within the roll out of mainstream services to people with disabilities more broadly. In the absence of a

separate piece of legislation that ensures inclusivity and rights protections across a whole range of identities, NDS supports amendments to the *Disability Act* to protect the rights of people with disabilities in their access to and inclusion within mainstream education, housing, transport and justice services, among other mainstream services.

### **Definitions:**

The *Disability Act 2006 (VIC)* defines a number of important terms, including the term 'disability' and several terms relating to service provision. While it is important that these terms are defined within the legislation, NDS would like to see nationally consistent definitions rather than varied definitions across jurisdictions. Varying definitions of key terms like 'disability', 'intellectual disability' and 'disability service' lead to greater complexity and confusion.

### **Inclusion Mechanisms**

NDS supports the three inclusion mechanisms in the *Disability Act*.

#### State Disability Plan:

NDS is very supportive of the state disability plan as a method to foster a strategic whole-of-government approach to promoting the rights and needs of Victorians with disabilities. NDS embraces the opportunity to engage with the Victorian government in the development of state disability plans.

NDS welcomes the recommendation for greater involvement and representation of people with disability in policy processes, including in the development of the state disability plan. NDS encourages the Victorian Government to also recognise the significant expertise of the disability service sector in advocating for the needs of Victorians with disabilities. Disability services operate within a complex ecosystem, with multiple drivers, stakeholders, and interests. Only with broad engagement with these varied stakeholders, alongside a prominent voice for people with disability, can we achieve system-wide change.

NDS encourages the Victorian Government to strengthen accountability mechanisms surrounding the implementation of goals outlined in the state disability plan. We are concerned that if the state disability plan continues to be held within the Department of Families, Fairness and Housing (DFFH), that this may not have the political leverage to drive other Departments to

invest substantially in disability inclusion initiatives. We would like to see a legislative requirement that the plan sit with the Premier's Department. Ideally, this would be accompanied by requirements that the outcomes of the plan are reported on and tabled in parliament at regular intervals (eg annually). NDS understands that annual reporting is currently done at the discretion of the Minister, rather than as a legislative requirement. We would recommend that the Victorian Government legislate the requirement that annual reports on the state disability plan are tabled in Parliament each year.

### Disability Action Plans

NDS supports the legislative requirement that public sector organisations must develop disability action plans. NDS encourages the Victorian Government to consider a legislative requirement that disability action plans are made available to the public. It is also recommended that disability action plans are developed regularly, implemented effectively and progress is reported on at regular intervals. NDS encourages the Victorian Government to consider implementing compulsory consultation with people with disabilities, including internal and external stakeholders with disabilities, in the development of disability action plans. NDS also supports further work to align disability action plans with broader diversity and inclusion plans, including the State Disability Plan.

### The Victorian Disability Advisory Committee

NDS strongly believes that the Victorian Disability Advisory Committee plays an essential role in ensuring that the goals and strategies of the Victorian Government, particularly in the area of disability policy, are informed by people with lived experience of disability. NDS is very supportive of the requirement within the Act that the members of the committee reflect a diversity of disability and cultural backgrounds, including first nations peoples.

### **Safeguards and Rights Protection**

Since its inception, the *Disability Act 2006* has played an essential role in safeguarding the rights of Victorians with disabilities. In the past few years, a great deal of the regulatory and monitoring responsibilities of the Victorian government in the disability sector have transferred to the NDIS Quality and Safeguarding Commission. This transfer of power recognised the utility of a national quality and safeguarding system.

NDS recognises that a significant number of people with disabilities are not NDIS funded, and the Victorian Government still plays a critical safeguarding role. NDS will argue, however, that a recent wave of activist intervention in the disability sector by the Victorian Government has contributed to a complex policy landscape that is difficult to navigate and is, in some cases, creating perverse outcomes. As a result, it is important that this review of the *Disability Act 2006* is recognised as an opportunity to simplify and strengthen safeguarding for all Victorians with disability.

### Community Visitors

Community Visitors play an important and highly valuable role in safeguarding the rights and wellbeing of people with disabilities and promoting quality and safety in disability service provision. NDS has a good working relationship with the Office of the Public Advocate and is a strong supporter of the Community Visitor Program.

Given that we have now moved to a National Disability Insurance Scheme, with a national regulator in the NDIS Quality and Safeguards Commission, NDS would like to see the development of a national community visitor program which would provide greater consistency across states and territories, or at least, a national framework which regulates the rights and responsibilities of Community Visitors across all states and territories. Currently, there are six Community Visitor Schemes for people with disability operating across Australia, one in each state and territory except Western Australia and Tasmania. Each scheme operates largely in isolation and with different rules and regulations which contribute to a complex landscape for disability service providers. This is particularly challenging for the increasing number of providers offering services across state and territory boundaries. NDS would like to see the development of a single Community Visitor Scheme which could also align community visiting of people with disability within a broader protection framework which monitors safeguarding in a range of settings including mental health institutions and aged care settings. This was suggested as a logical progression by the [Department of Social Services Community Visitors Schemes Review](#). Any development of a national Scheme could also pick up on recent suggestions that community visitors be people with lived experience of disability who undertake assessment of disability services.

NDS has a number of concerns about the limitations on Community Visitors under the *Disability Act* in its current form. We understand that as it currently stands, the *Disability Act* permits

Community Visitors to enter disability 'residential services', 'SDA enrolled dwellings where there are SDA residency agreements in place', 'short-term accommodation and assistance dwellings', 'designated mental health services' and 'SRS'. NDS is concerned that many people with disabilities who are living in properties that are not NDIS registered Specialist Disability Accommodation (SDA) or Short Term Accommodation (STA) dwellings are not protected by the Community Visitor Program. NDS is aware of a number of providers who are operating in 'SIL houses', where a Supported Independent Living (SIL) provider owns or leases a house and sublets a room to a person with disabilities who also receives Supported Independent Living supports. Under the *Disability Act 2006 (VIC)*, Community Visitors do not have the power to visit these houses. It is also worth noting that SIL and STA providers are not required to register under the NDIS Quality and Safeguarding Commission, which means they are not obliged to undertake independent audits or comply with strict compliance and mandatory reporting systems. We would like to see the rights and responsibilities of Community Visitors extended to encompass the monitoring and safeguarding of all people with disabilities receiving overnight accommodation supports.

On the national stage, NDS is currently advocating that all disability providers providing SIL and STA should be required to be registered with the NDIS Quality and Safeguarding Commission. We are also arguing that all workers with more than incidental contact with people with disabilities should be subject to NDIS screening.

NDS notes that since the introduction of the NDIS, people with disabilities are accessing services in a wide array of settings, including in their own private home. While we acknowledge that this has created a new range of potential risks to people with disabilities, the desire to safeguard people with disabilities from harm must be balanced with the need to protect a person's right to privacy and assumption of capacity. For example, NDS feels that it would not be appropriate for Community Visitors to be able to visit the private homes of people with disabilities unannounced to monitor their service providers without an expressed invitation by the person with a disability.

### Residential Rights

The transition to the NDIS has had a profound impact on the disability housing landscape. While the *Disability Act 2006* has historically played a foundational role in providing residential rights and protections for people living in disability accommodation, the NDIS has seen the

introduction of a new housing model in Specialist Disability Accommodation (SDA), which dictated the need for a number of updates to the residential protections available to Victorians with disabilities.

In 2019, the Victorian Government introduced legislative changes designed to provide tenancy protections to people living in SDA. These changes moved the SDA tenancy rules from the *Disability Act 2006* to the *Residential Tenancies Act 1997 (RTA)* under Part 12 A. It was assumed that properties would be ready to successfully transition to the requirements of the RTA, and as such, all properties registered under the *Disability Act* were automatically de-gazetted from the *Disability Act* and residential statements were voided on 1 January 2020.

These changes resulted in some people with disability being ineligible for either of the two lease options under the *RTA*. In response, and as a short-term measure, the Victorian Government sought the re-gazettal of properties under the *Disability Act 2006*. Re-gazettal enabled providers to continue to operate under the *Disability Act* rather than moving residency arrangements under the *RTA*, and residents' rights continue to be protected under residential agreements.

While this was acknowledged as an interim solution, NDS is particularly concerned about a number of implications of the 'band-aid' tenancy protections for people with disabilities that continue to operate in Victoria. NDS would like to see improvements to the *RTA*, rather than additional 'band-aid' fixes within the *Disability Act*, to improve the options for Victoria.

Firstly, NDS is very concerned about the limited tenancy options currently available under the *RTA*. The *RTA* dictates that the SDA Residency Agreement cannot be used alongside a standard Residential Rental Agreement in the one dwelling. This means that people with SDA funding who are on an SDA Residency Agreement cannot live with people who do not have SDA funding (and therefore cannot be on an SDA Residency Agreement). This needlessly prevents people living in SDA from living with a partner, their family, friends, or other NDIS participants who do not have SDA funding. This situation is at odds with contemporary expectations around the rights of people with disabilities to choose how and with whom they wish to live. The limited tenancy options do not reflect the key principle of the *NDIS Act 2013*, for people with disability to exercise choice and control in regard to the supports they need. NDS recommends that the Victorian Government permanently migrate the SDA tenancy rules from the *Disability Act* to the *RTA* under Part 12A, and introduce a step-change approach to provide more tenancy options that reflect the principle of choice and control and ensure that



SDA residents can choose to live with non-SDA residents while still receiving the highest level of tenancy protections.

Secondly, NDS is concerned about the regulatory burden associated with gazettal under the *Disability Act*. SIL providers operating under the DFFH-gazetted properties are subject to the regulatory requirements of the *Disability Act 2006* in addition to the requirements of the national NDIS Quality and Safeguarding Framework. There are concerns that the double auditing and reporting requirements are duplicative, costly, time consuming, and unnecessary, resulting in more housing providers solely offering the standard Residential Rental Agreements to their residents, leading to a lower level of tenancy protections. To resolve this double audit issue, NDS encourages the Victorian Government to recognise the NDIS Quality and Safeguarding Framework and audits, which provide a nationally consistent approach to help empower and support NDIS participants to exercise choice and control, while ensuring appropriate safeguards are in place and establishes expectations for providers and their staff to deliver high quality supports.

Finally, NDS encourages the Victorian Government to consider and take into account prospective future changes to the disability housing landscape when further developing residential rights arrangements for people with disabilities. While the first few years of the NDIS have seen the dominance of the SDA and SIL model of disability accommodation and supports, a number of issues have arisen with this model, sparking a shift toward new and emerging models of disability accommodation. One of such issues has been a significant mismatch in the supply and demand of SDA dwelling types, with poorly implemented price drivers leading to oversupply of particular dwelling types (e.g. 1 bedroom apartments) and undersupply of others. More recently, the NDIA stated in their [SDA Market Information Statement – August 2021](#), that ‘further investment at current rate in single resident High Physical Support dwellings will likely carry a greater risk of vacancies’. Another issue relates to significant cost blowouts in the provision of SIL supports, and a strong cost-curbing agenda within the National Disability Insurance Agency.

These issues have seen a policy shift towards new and emerging housing support options on offer for NDIS participants, as reflected in the recent release of the NDIS Home and Living consultation paper and the Individualised Living Option (ILO) policy. NDS expects to see a push away from the existing group home arrangements towards greater integration of people with

disabilities in community living, enabling participants to choose the home they live in and set up supports in the way that best suits them.

As transformation of the disability housing landscape continues, NDS would like to see a stronger focus on redeveloping the RTA to provide avenues under which *ALL* social tenants, including those who do not have a disability, regardless of whether they receive SDA funding or not, can access the highest level of tenancy protections. As such, NDS is calling for all residential protections to be moved out of the Disability Act and redeveloped within the RTA.

### **Restrictive Practices**

The use of restrictive practices is a serious infringement of a person's rights. Nonetheless there are limited circumstances where there may be no other way to ensure the safety of the person or another. A number of principles and regulatory tools should guide the use of restrictive practices when there are no alternatives. NDS argues that these principles should be consistent with human rights enshrined in the United Nations Convention on the Rights of Persons with Disabilities, with a particular focus on Article 12 (Equality before the Law) and Article 14 (Liberty and Security of Persons).

NDS supports the provisions in the *Disability Act* which permit only the option which is the least restrictive to the person with disability as possible in the circumstances, and is applied for no longer than the period of time that it is necessary to prevent the person with a disability from causing physical harm to themselves or another person. We also support provisions which dictate the need for authorisation by an appropriate legal body and with right for appeal and review, and the involvement of appropriate independent advocacy support.

Historically, understanding of regulation and use of restrictive practices has varied across the country. NDS had hoped that the introduction of the National Disability Insurance Scheme Quality and Safeguards Commission – and the framework in which it operates – would help drive greater consistency in how and when restrictive practices are used across Australia, and ultimately drive a reduction in their use. However, despite the creation of the national regulator, the authorisation of restrictive practices remains in the jurisdiction of the states and territories and differences in regulatory frameworks around restrictive practices exist across jurisdictions.

National consistency in the understanding and application of restrictive practices is an appropriate goal. It is outlined in the [National Framework for Reducing and Eliminating the Use](#)

[of Restrictive Practices in the Disability Services Sector](#) and is a key tenet of the move to a national scheme under the NDIS. Historical difference across jurisdictions has resulted in variable knowledge and expertise on restrictive practices across the country, and places particular pressure on providers who offer disability supports across multiple jurisdictions. NDS encourages the Victorian Government to utilise this opportunity in its redevelopment of the *Disability Act 2006* to contribute to greater consistency with national definitions and regulations around restrictive practices. The Victorian Government should also work with the Federal government and other State and Territory governments to develop a single national restrictive practices authorisation and regulation framework.

This review of the *Disability Act* also provides an opportunity to consider how the legislation could be amended in order to iron out inconsistencies between the NDIS and the state-based authorisation powers. NDS understands that one of these inconsistencies exists within the interface between the Victorian Civil and Administrative Tribunal (VCAT) and the NDIS. Victorian participants can appeal to VCAT against the inclusion of restrictive practices in their behaviour support plan. While VCAT is able to mandate that the NDIS registered provider seeks a review of the participants Behaviour Support Plan by an NDIS Behaviour Support Practitioner, VCAT is unable to mandate that such a review take place as they do not have jurisdiction to order an NDIS planner to review a plan.

### **Compulsory Treatment**

NDS understands that Supervised Treatment Orders (STO) currently only apply to people with an intellectual disability. NDS recognises that the Office of the Public Advocate (VIC) has argued in its [submission](#) to the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability for the extension of these provisions to apply to all people with cognitive impairments who would benefit from an STO. NDS would support amendments to the *Disability Act (2006)* to extend compulsory treatment provisions to include all forms of cognitive impairment, including acquired brain injury.

NDS understands that, as it currently stands, the *Disability Act* does not prevent continuous detention by means of continuous renewal of STO applications. NDS strongly affirms the human rights of people with disabilities and is concerned by the potential for indefinite detention under the current provisions in the Act. NDS encourages a strong focus on the creation of systems

and options to reduce levels of supervision and increase freedom of movement where possible for people with disabilities, while maintaining community safety.

### **Forensic Disability Services & Sentencing**

Victorians with disabilities continue to be significantly overrepresented at all stages of the criminal justice system as victims, witnesses, defendants, offenders and detainees. NDS is concerned that real disconnects exist between the State Government administered criminal justice system and the Commonwealth-run NDIS. Strong pathways between the criminal justice system and mainstream disability services are vital for the wellbeing of Victorians with disabilities who become involved, as offenders and detainees, with the criminal justice system. The absence of these strong pathways has costly ramifications for the Victorian Government, as the provider and funder of the criminal justice system, and for Victorian society more broadly. NDS would like to see targeted and funded initiatives in this space to improve outcomes for people with disabilities who come into contact with the criminal justice system.

Within this, we would like to see greater work while the person with disability is incarcerated to establish and report on their disability diagnosis and their disability support needs prior to entry into mainstream disability settings. NDS is concerned that much of the record and report development in criminal justice settings focuses on offending, criminal proceedings and risk, with little focus on support needs and disability. NDS understands that quality disability support can have a significant impact on reducing the likelihood of reoffending.

### **Conclusion:**

NDS encourages the Victorian Government to consider how it can work within this review of the *Disability Act 2006* to support the nationalisation of the disability support landscape with the introduction of the National Disability Insurance Scheme. While NDS would like to see a transfer of much of the regulatory oversight that rests within the *Disability Act 2006* toward a national framework and regulator, NDS acknowledges that the Act remains a significant and important piece of legislation for the protection and promotion of the rights and needs of Victorians with disabilities. This review of the *Disability Act 2006* provides an opportunity to bring the Act in line with the contemporary disability landscape through the strengthening of rights and disability inclusion mechanisms, and through recognition of the national disability support model now operating across Australia.



For queries in regard to this submission, please contact myself or Clare Hambly, Policy and Projects Officer – Quality and Safeguards, via email at [clare.hambly@nds.org.au](mailto:clare.hambly@nds.org.au).

Sarah Fordyce,

Victorian State Manager,

National Disability Services (NDS)

[Sarah.fordyce@nds.org.au](mailto:Sarah.fordyce@nds.org.au)