Disability Inclusion Bill 2014 – Consultation draft

Information booklet
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Ministerial foreword

I am honoured to be Minister for Disability Services at this time in our history. It is, and has been, a time of great change as people with disability, their families and carers unite as a voice for change. Today service provision is being recast because of you. Disability services are now being shaped by the service users, rather than governments and service providers.

NSW should aspire to be a State whose richness stems from acceptance and tolerance of people’s differences as well as their similarities. Human diversity provides great richness to our communities. It also provides great opportunity if we treat each other with the dignity and respect that every single person is entitled to.

It gives me great pleasure to invite you to provide feedback on the Disability Inclusion Bill. This legislation will replace the Disability Services Act 1993. It will provide the basis for the way we deliver services, supports and safeguards as the service system evolves into one of choice. It will also ensure the right of each individual to make their own decisions with dignity and respect.

Supports and services for people with disability are undergoing rapid transformation. As the Minister for Disability Services, I need to ensure that NSW’s legislative framework embraces these changes in such a way as to support the rights of people, while providing necessary safeguards as we move towards full implementation of the National Disability Insurance Scheme.

The message we want to send with the Disability Inclusion Bill is that both government and the broader community play an integral part in fulfilling the rights of people with disability to live with respect; and that all of us have a role to play in protecting and fulfilling these individual rights.

I hope that with your feedback and support, the Disability Inclusion Bill will set a new benchmark in acknowledging the uniqueness of each person and supporting their individual goals, rights and aspirations.

John Ajaka MLC
Minister for Ageing
Minister for Disability Services
Introduction

About this booklet

This information booklet explains why we (NSW Department of Family and Community Services, Ageing, Disability and Home Care) have developed the Disability Inclusion Bill 2014 draft for public comment and what the Bill will mean for the people of NSW when it becomes law. It also has some questions for you to think about if you want to give feedback on the Bill.

Disability law in NSW

At present, the Disability Services Act 1993 (which this booklet calls the Act) sets out the way support and funding for people with disability is provided in NSW.

We are reviewing the Act so that it better recognises the human rights of people with disability, and helps people move to the new funding arrangements under the National Disability Insurance Scheme (NDIS).

What has happened so far

Early in 2013, we asked for public feedback on what a new disability law should cover. We wrote discussion papers setting out the most important issues for a new law and published them on our website. We also listened to the views of 600 people who came to 25 community consultations across NSW, and we considered the 64 written submissions we received.

You told us that the new disability law should:

- make it clear what the NSW Government should be doing now and following the introduction of the NDIS
- include safeguards to protect the rights of people with disability
- help make our communities more inclusive.

You can read more about the feedback we received on our website.¹

After listening to your feedback and consulting within government, we drafted the Disability Inclusion Bill 2014 draft for public comment. We now need your comments on the Bill to ensure that the new law reflects what people with disability and their families and carers want.

Overview of the Bill

The Bill contains ‘legacy’ parts which will keep going even after the NDIS is operating fully in NSW. These parts include objectives and human rights principles and say how the NSW Government and local councils need to plan to make mainstream services more accessible and communities more inclusive for people with disability.

The Bill also contains ‘transitional’ parts which explain how the NSW disability service system will work up to 1 July 2018, at which point the NDIS will fund all disability supports in NSW. It covers the services we provide and the organisations we fund, as well as providing safeguards for people using NSW disability services.

On the next page is a table which shows the main reforms introduced by the Bill and what we are hoping to achieve through these reforms.
What are we trying to do?

Make it clear that people with disability have the same **human rights** as other people (legacy - ongoing past 2018)

What do we want to achieve?

UN Convention social definition of disability shows it is Government and community’s duty to address barriers

**Principles based on human rights, including principles for groups of people who may have particular needs**

Government and community are more aware of the human rights of people with disability

- people with disability have their human rights respected, protected and fulfilled.

What do we want to achieve?

Promote the inclusion of people with disability (legacy - ongoing past 2018)

Four year NSW State Disability Inclusion Plan

- State government and local councils to develop Disability Action Plans (DAPs) for mainstream government services and facilities
- Mandated consultation with people with disability on DAPs
- Disability Council NSW to advise on DAPs
- NSW Government to report on DAPs in Parliament

State and local government work together to continually improve access to their services and facilities

- people with disability find it easier to access mainstream services and facilities such as transport, health and education.

Support people with disability to exercise **choice and control** (transitional until 2018)

Range of options for individualised funding

- Conditions to reduce risk where people lack capacity or are vulnerable
- NSW Government to continue to provide and fund services until the NDIS is fully in place

People with disability can control their funding and choose their supports

- people with disability have more opportunities to manage their own lives, with support when needed.
What are we trying to do?

Provide safeguards for people accessing disability supports and services (transitional until 2018)

What do we want to achieve?

Service providers know how to safeguard the rights of people with disability and improve their risk and safety management

- people with disability receive high quality services and supports and are protected from abuse and neglect

Disability Inclusion Bill 2014 reforms

Standards for disability services

Better screening of workers and volunteers

Reporting to the NSW Ombudsman of abuse or neglect in supported accommodation and centre-based respite

NSW Ombudsman to review and make recommendations to improve services

Restrictive interventions (restraint and seclusion) not to be used without consent unless in an emergency

Restrictive interventions to be part of a behaviour support plan approved by a Restricted Practices Authorisation Panel with an independent panel member

Penalties apply if process not followed

Service providers reduce the use of restrictive interventions

- people with disability receive the least restrictive supports and services.
Giving feedback


We really want your feedback to help us get the Bill right.

We have included some questions at the end of this Information Booklet that you may like to consider in providing your feedback.

To tell us what you think, you can:

call us on 1800 446 470

e-mail us your comments or a video talking about the issues to disabilityinclusionbill@facs.nsw.gov.au

provide online feedback by going to www.adhc.nsw.gov.au/dib and clicking on ‘go to consultation’

write to us at
Disability Inclusion Bill
Locked Bag 4028
Ashfield NSW 2131

The closing date for comment is 14 February 2014.

We will listen to all the feedback and then prepare a final Disability Inclusion Bill. This will go to Parliament in 2014.

We will also need to write some Regulations to provide more detail about some parts of the law. A draft Disability Inclusion Regulation will be developed if the Bill is passed, and we will once again ask for your feedback about the Regulation.
More information and resources

There are a number of resources that will help you to provide your feedback in a clear way, so we can understand your views on the draft Bill.

We have produced an Information Booklet and a Fact Sheet to help you understand the Bill - these can be downloaded from the adhc website www.adhc.nsw.gov.au/dib

- Information booklet (PDF)
- Information booklet – Easy read (PDF)
- Information booklet (RTF)
- Fact Sheet (available in English and 27 community languages)
- Braille and large print versions are also available on request.

If you would like to speak to someone to interpret this information, please phone the Translating and Interpreting Service on 131 450.
ii The need for change

New disability laws are needed for the following reasons:

- **Old thinking** – the current Act is 20 years old, with outdated language and ideas about services for people with disability.

- **New thinking** – in 2008, the Australian Government ratified the United Nations Convention on the Rights of Persons with Disabilities (the UN Convention). The NSW Government is committed to ensuring that people with disability are supported in a way which respects, protects and promotes their human rights.

- **New ideas in action** – we have been working for some years towards supporting the independence and inclusion of people with disability. We want to give people more control over their lives and the supports they receive. That’s why the NSW Government signed up for the NDIS, through which all disability supports will be funded by mid-2018.

- **Protecting rights and supporting transition** – we want to continue to strengthen the rights of people with disability from now until the NDIS is fully operational. At the same time, we want to help people move as easily as possible to the new disability support system.

- **Services and safeguards** – during consultations about a new NSW disability law you suggested the need for better person-centred supports and services, with some safeguards. We have acted on this feedback.

### The National Disability Insurance Scheme (NDIS)

The NDIS will provide people with disability in Australia with lifetime cover for the cost of the supports and services they need for their daily activities.²

In NSW, the Scheme was launched in the Hunter local government areas of Newcastle, Lake Macquarie and Maitland on 1 July 2013. From July 2016, the NDIS will progressively roll out in NSW, and by 1 July 2018 all people with disability in NSW will be covered.

This means that, from now until 1 July 2018, people with disability in NSW might be covered by national disability laws and policies through the NDIS, or they might be covered by NSW disability law and policies, depending on where they live.

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As the NDIS is in its early days, some key safeguards for people using it are still being decided by Australia’s territory, state and national governments. In NSW the disability consultations and reforms of the past three years are informing our position on safeguards under the NDIS and during the change-over. The NSW Government is working with the Australian Government, and the governments of other states and territories, to develop the final safeguards that will be in place after the NDIS is fully operational from 1 July 2018 onwards.

Not only do we want to protect people’s rights, regardless of whether they are in the NSW disability system or the NDIS, we also want to make sure people can move easily from the NSW disability system to the national scheme. The *Disability Inclusion Bill 2014*, along with another law, the *National Disability Insurance Scheme (NSW Enabling) Act 2013*, will help us support people and organisations to move from the NSW disability system to the national scheme.
1 Rights and inclusion continuing past 2018

This section explains the objectives and principles of the whole Bill, as well as the planning requirements for NSW state and local governments from now and into the future, even after the NDIS has been fully implemented.

1.1 Recognising rights, redefining disability

1.1.1 What the Bill aims to cover

- **An equal right to social inclusion** – the Bill recognises that disability results when a person with a physical, mental, intellectual or sensory impairment faces barriers to their full inclusion in society.

- **New principles** – the Bill introduces new principles. Some of these apply to all people with disability and some apply just to specific groups of people who may have particular needs.

- **An updated definition of disability** – the Bill defines disability in a way which reflects human rights. It also sets out a target group for funding and disability services which reflects current NSW policy but is updated in line with the NDIS.

1.1.2 Current law

The current Act focuses on providing or funding specialist disability services.

1.1.3 Reasons for change

Your feedback on a new disability law highlighted the importance of recognising:

- the valuable role of families and carers in supporting people with disability and acting as ‘natural' safeguards against risks to those people

- the need to acknowledge carers’ unique knowledge and experience as set out in the NSW Carers Charter

- the interests of people who are from different cultures or who speak different languages

- the interests and unique role of Aboriginal and Torres Strait Islander people

- the special needs and the developing abilities of children as they grow

- the changing goals and needs of people with disability at different stages of their lives.
In regard to the wider disability framework, you noted:

- the need to acknowledge the human rights of people with disability as recognised in the UN Convention
- the need to keep the definitions used in NSW law in line with those used in the NDIS, where possible.

1.1.4 What the Bill suggests

New objectives

The Bill:

- recognises that society puts up barriers to full participation by people with disability
- introduces the key themes, including:
  - community inclusion (refer to 1.2 Community inclusion)
  - choice and control over funding and supports, and specific safeguards to protect people’s rights (refer to 2.1 Choice and control through funding and 2.2 Protecting rights).

Human rights principles

The Bill’s principles include global principles, which will apply to all people with disability, and principles recognising specific groups who may have particular needs eg people from Aboriginal and Torres Strait Islander backgrounds, people who are from different cultures or who speak different languages, and women and girls. The principles cover issues such as:

- the dignity of individuals
- choice and control
- accessible and appropriate information
- supports to make decisions
- the right to make choices that involve risks
- safeguards to protect vulnerable people.

Service providers will need to show how they will apply the principles in delivering supports and services.
Definition of disability

Disability is defined in a similar way to that set out in the UN Convention:\(^3\)

“A disability includes those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.”

1.2 Community inclusion

1.2.1 What the Bill aims to cover

- **Social inclusion** – the Bill commits the NSW Government to promoting the inclusion of people with disability in all aspects of the community, even after responsibility for funding and delivery of disability services transfers to the Australian Government under the NDIS.

- **Whole-of-government response** – the Bill requires the development of a four year State Disability Inclusion Plan to guide how government agencies promote inclusion.

- **Agency planning** – the Bill proposes a new approach to disability action planning for individual government agencies and local councils.

- **A greater Disability Council role** – the Council’s work will be to:
  - promote community inclusion
  - advise on Disability Action Plans developed by government departments and local councils
  - undertake relevant research.

1.2.2 Current law

The current Act requires disability services and other mainstream government services to ensure that people with disability are included, and participate, in the community. The Act also requires government departments to have Disability Action Plans.

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\(^3\) Article 1, UN Convention on the Rights of Persons with Disabilities
The Disability Council of NSW is set up by another law, the *Community Welfare Act 1987*. In that law, the functions of the Disability Council include advising the NSW Government on services for people with disability in NSW; promoting community awareness about people with disability; and promoting the inclusion of people with disability into the community. Disability Council members are chosen to be on Council because:

- they live with a disability
- they are an expert on disability, or
- they want to improve the lives of people with disability.\(^4\)

### 1.2.3 Reasons for change

In late 2012, the NSW Government made a whole-of-government commitment to implementing the National Disability Strategy in NSW.\(^5\) We think a whole of government plan is so important that it should be made part of the law.

In the consultations of early 2013 you told us that disability action planning should:

- take a flexible approach to social inclusion
- be strengthened, and
- extend to local councils.

### 1.2.4 What the Bill suggests

**Better planning at state level**

The Bill says the NSW Government must develop a State Disability Inclusion Plan as a whole-of-government strategy to promote the inclusion of people with disability in the community. It allows the Minister for Disability Services to say if another plan, such as the *National Disability Strategy - NSW Implementation Plan*, is right for this purpose.

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Better planning by government agencies and local councils

The Bill states that all NSW government departments and local councils need to put in place a Disability Action Plan\(^6\) that describes:

- how they have consulted with people with disability in developing their plan
- how they will implement the Bill’s principles
- how they will support the inclusion of people with disability through:
  - making information accessible
  - making buildings and facilities physically accessible
  - responding to the needs of people with disability as customers
  - making employment opportunities available
  - encouraging and creating opportunities for access to the full range of services and activities available in the community.

Under the Bill, government agencies and local councils will have to meet a deadline for preparing plans and report each year on their achievements under the plans. Within four years of making their plans, they will be required to review them to ensure they are still achieving their purpose.

At the next level, the Department of Family and Community Services will prepare an annual statewide report on the implementation of all Disability Action Plans, which the Minister for Disability Services will table in Parliament. Through this report, the public will be able to see how improvement of mainstream services for people with disability is progressing.

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\(^6\) The Bill says that the plan might be developed under the Bill or under other laws, for example, it may have been developed to meet the purposes of the Commonwealth Disability Discrimination Act 1993, or council plans required by the Division of Local Government, Department of Premier and Cabinet under the Integrated Planning and Reporting Framework.
A stronger Disability Council

We think that information about the Disability Council should be taken out of the Community Welfare Act 1987 and put in the Bill so it is easier to find.

Under the Bill, the Disability Council will still mostly be made up of people with disability. The Council will do much the same job as set out in the Community Welfare Act 1987, but with more of a focus on:

- increasing awareness
- promoting community inclusion
- undertaking research
- advising government agencies and local councils on Disability Action Plans.

These changes will mean that the Council can have a greater input on what is important to people with disability, and contribute more to government improvements.
2 Funding, services and safeguards up until the full NDIS in 2018

This section covers how the Bill will allow NSW disability services to work until the full implementation of the NDIS in 2018.

2.1 Choice and control through funding

2.1.1 What the Bill aims to cover

- **More choice through individualised funding** – we have been moving away from funding service providers to funding individuals. This:
  - gives people with disability control over what, how and when they receive supports and services
  - increases opportunities for people to follow their goals, take part in community life and live independently
  - safeguards against poor services because people can take their funding away from a service they are unhappy with and transfer it to another service provider.

- **Continued funding during change-over to the NDIS** – the Bill lets us continue to fund people and to help them manage their own supports and deal with risks. We will also be able to continue funding disability service providers and continue delivering services ourselves.

- **A smooth change-over** – the Bill helps us move from the present NSW disability services system to the new national arrangements.

2.1.2 Current law

The Act allows the NSW Government to fund people or services to support people with disability and to deliver services ourselves.

2.1.3 Reasons for change

Although the Act allows direct funding to individuals, it focuses on funding to service providers.

We listened when you said in consultations that individual choice is the priority, and that funding should be flexible enough to meet the needs of different people.
You also said that people with disability should have support and information to make funding decisions and assess any risks involved. You also told us that, where someone needs help with making decisions or where they are particularly vulnerable, there should be safeguards in place.

We also need to manage the ‘nuts and bolts’ of the move to the NDIS under which the Australian Government will handle all disability funding and service delivery. This means we must be able to stop NSW funding when a person begins to receive support under the NDIS, or when a service provider no longer has any service users who remain in the NSW disability system because they have all moved to the NDIS.

2.1.4 What the Bill suggests

Who can receive funding, supports and services

The definition of the ‘target group’ of people who can receive funding, supports and services is the same as the current Act’s definition, except for three main changes. It now:

- includes people with cognitive and neurological impairments
- also says that a reduction in a person’s social and self-management skills is an important thing to consider when making a decision about whether a person has difficulties in managing their life activities
- includes children aged six years and under with developmental delay.

This brings the target group into line with most of the NDIS eligibility requirements.

Continuing direct services and ‘block’ funding of service providers

The Bill allows us to continue to provide disability supports and services until everyone has moved to the NDIS. The Bill also continues to allow us to fund service providers for ‘block’ funding until we have moved to the NDIS, that is, where the provider receives a set amount of money which is not in the name of individual service users.

Individualised funding

The Bill also continues to allow the Government to provide funding to a person with disability so they can buy the supports and services they need. This is called individualised funding.
Individualised funding can be provided in a few different ways, or a combination of these ways:

- direct payments to the individual person
- direct payments to a person nominated by the individual person to act for them
- funding to a ‘plan manager’ service to manage the funding in consultation with the individual and their support network
- funding to a service provider to provide services to that individual.

Under the Bill, direct payments can only be provided by the NSW Government to a person with disability, or someone acting for them, if they sign a written agreement.

To minimise risks, the Bill also says there may be conditions placed on individualised funding arrangements for vulnerable people like the person needs to buy particular types of support or services, or to buy these from certain types of providers.

**Reviewing and appealing decisions about funding**

The Bill says there are some decisions about funding which a person can ask the NSW Government to review. If the person is still unhappy after the review, they can appeal the decision to the NSW Administrative Decisions Tribunal.7

Some decisions which can be reviewed or appealed are:

- **Decisions about how individualised funding is managed**
  A example of this is where it has been agreed a person can receive individualised funding, but they won’t receive the funds directly and the funding will be paid to a plan manager or a service provider on their behalf.

- **Decisions putting conditions on individualised funding**
  An example of this is if it has been agreed a person can have individualised funding, but the funding comes with certain conditions that they disagree with.

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7 From January 2014 this will be the NSW Civil and Administrative Tribunal
Some decisions which can’t be reviewed or appealed are:

- **Decisions not to give a person funds, supports or services**
  Unlike the NDIS, the NSW disability system does not give people who are in the target group an absolute right to funding, supports and services. We have to make sure our limited resources reach people who need it the most and in some situations, we might decide not to give a particular person any disability funding, supports or services. The Bill does not allow a person to appeal this decision. This is the same as the current Act.

- **Decisions not to give a person individualised funding rather than a block funded place.**
  An example of this is where a person has a block-funded place but isn’t able to take the funding and go to another service. One reason for this could be because taking that funding from the service provider would mean the provider would not have enough money to continue helping other people.

**How funding can be stopped**

Under the Bill, we must write to a person or organisation if funding is to stop. Generally, the person or organisation then has an opportunity to make a submission about the funding decision, which we must consider. If the person or organisation is unhappy with the decision, they can appeal to the NSW Administrative Decisions Tribunal.  

However, the Bill also says that in some cases, there will be no opportunity to make a submission against funding being stopped. This will mostly happen where the NDIS is taking over funding in a certain area and the NSW Government no longer has the responsibility or money for services or funding. The idea is to allow individuals and service providers to move as quickly as possible to the NDIS.

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8 See above footnote
2.2 Protecting rights

2.2.1 What the Bill aims to cover

- **New safeguards will reduce risk** – the Bill sets out five main safeguards to protect people with disability before they move to the NDIS. These are:
  - disability service standards, which services provided or funded by us must follow
  - the power to create additional standards for supported accommodation and centre-based respite services
  - employment screening of people before they join us or one of our funded service providers as either employees or volunteers, and then every four years
  - a planned process for using ‘restrictive interventions’ (physical, mechanical and chemical restraints, or seclusion) to protect people from self-harm or from harming others, which service providers must follow
  - compulsory reporting of abuse or neglect in accommodation and centre-based respite services to the NSW Ombudsman by the head of Ageing, Disability and Home Care or our funded organisations.

- **Existing safeguards will still apply** – under the Bill and other laws, the safeguards overseen by the NSW Ombudsman, as well as those giving all community members some protection, remain in place.

2.2.2 Current law

The current Act has very few safeguards protecting the rights of people with disability.

In practice, however, we and the service providers we fund must follow the Disability Service Standards and our policies. These policies cover employment checks\(^9\), reporting of abuse and neglect\(^10\) and use of restrictive practices.\(^11\)

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Under another law, the *Community Services (Complaints, Review and Monitoring) Act 1993*, the NSW Ombudsman has powers to:

- investigate complaints into disability services run or funded by us or used by an NDIS participant
- inquire into matters affecting people who can receive disability services
- review the deaths of people with disability who live in residential care and assisted boarding houses
- manage the Official Community Visitor Scheme for residential care facilities and assisted boarding houses
- monitor, review and make recommendations to improve standards in disability services
- promote access to advocacy support for people with disability.

There are also other safeguards which may help people with disability, such as:

- the Australian Human Rights Commission, which hears cases where people believe they have been discriminated against in employment, education, access to premises, provision of goods and services, housing, sport or other activities because of their disability
- Fair Trading NSW and the Australian Competition and Consumer Commission, which consider complaints about businesses, traders or consumer issues
- the NSW Consumer Trader and Tenancy Tribunal, which hears complaints on matters including consumer goods, residential tenancies, boarding houses, holiday parks, small businesses and home building
- the Health Care Complaints Commission, which can receive complaints about most health professionals
- the NSW Police Force, which can investigate crimes such as assault, theft and fraud.

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12 The NSW Consumer Trader and Tenancy Tribunal will be integrated into the NSW Civil and Administrative Tribunal from January 2014
2.2.3 Reasons for change

With choice comes risk. That’s why the Bill suggests a series of safeguards to reduce risks while respecting the individual’s right to choose under a person-centred disability system.

Currently, most disability service providers commit to following our policies when they sign their funding agreement with us. This will still be an important commitment in the next five years, but we felt that putting safeguards into the law will send a clear message about the importance of these requirements, and provide greater protection for people with disability.

The need for legal safeguards was backed up by a 2013 report commissioned by us and the feedback from consultations on the review of the Act in early 2013.

Not all of the ideas about safeguards that we received have been put into the Bill, mostly because they involved a lot of money for new systems. We felt that now was not the right time to be setting up brand new safeguarding systems, when they might only last for a few years until the NDIS is fully put in place.

The NSW Government is currently working with the Australian Government, and the other state and territory governments, on developing national safeguards to protect the rights of all NDIS participants. The safeguards in the Bill will build on existing systems to protect NSW residents receiving services through NSW government funding until the national safeguards take over.

2.2.4 What the Bill suggests

Standards to promote quality services

The Bill allows the NSW Government to set out disability service standards which we and our funded service providers must follow. These will most likely be the NSW Disability Service Standards or the proposed National Standards for Disability Services. The standards will be the key to quality assurance for NSW disability services in the change-over to the NDIS.

Our funding agreements will continue to require service providers to:

- implement a quality management system
- show evidence to an independent third party that they are following the NSW Disability Services Standards.

14 For more information about safeguards for people receiving services under the NDIS, see www.ndis.gov.au/participants/safeguards
After 1 July 2018, the Australian Government will be responsible for the quality of disability services delivered under the NDIS.

Accommodation and service standards

The Bill gives the NSW Government the power to develop standards for supported accommodation and centre-based respite services through the development of a Regulation\(^{15}\). The ability to write such standards will enable us to promote the development of quality homes and to manage risks in the future.

We will seek public input on the standards when they are developed in the future by doing consultation on the Regulation. Standards could potentially include:

- a limit on the number of residents living in particular types of premises
- a requirement that residents be offered single bedrooms
- a requirement to follow certain policies on issues such as medication, behavior support, healthy diet and nutrition.

The standards developed could apply to ADHC operated and funded services, and might apply to private or non-profit services that have no contract or funding directly from government.

Employment screening

We think that people who have a history of serious violence should not be working with people with disability.

Currently we only have a policy, not a law, on employee checks for our funded services.\(^{16}\)

The Bill requires us and the service providers we fund to check whether people applying for employment or voluntary work have a criminal record. The checks are to be repeated every four years.

If the check reveals that someone has been convicted of murder or a prescribed sexual offence\(^{17}\), or sentenced to at least two years in prison for assault, neglect or certain other offences\(^{18}\), then this person cannot become an employee or volunteer. In addition to the check, there must be a Working with Children Check for people who work or volunteer with children.

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15 The standards will not apply to boarding houses
17 Within the meaning of a ‘prescribed sexual offence’ in the Criminal Procedure Act 1986
18 Examples of offences where a ban applies if a sentence of two years’ prison is given include: armed robbery; failure to provide necessities of life; grievous bodily harm, and contravene an apprehended violence order.
Some people we talked to in early 2013 about safeguards said they thought there should be an employment screening system like the Working With Children Check in NSW, so anyone who wants to work with people with disability would have both their criminal record and past employment history checked by an independent government agency. We decided not to set up a NSW system because it would take a long time to set up and then would have to be dismantled under the NDIS. However, we require all of our service providers to do proper reference checks.

**Regulating restrictive interventions**

Staff in disability services sometimes need to use restrictive interventions to manage a person's behaviour or movement in order to protect the person from harming themselves or others.

Regulation of restrictive interventions is an important safeguard because it makes service providers think about other non-restrictive ways they can change peoples' behaviour. The aim is to reduce the use of restrictive interventions by us and the service providers we fund.

The Bill defines restrictive interventions as including:

- physical restraint
- mechanical restraint – using equipment to restrain someone
- chemical restraint – using certain types of medication when a person’s behaviour may harm themselves or others
- seclusion – putting a person somewhere alone so that they cannot harm themselves or others.

Before the Department of Family and Community Services, Ageing, Disability and Home Care or a funded service provider can use restrictive interventions with a particular person with disability, the Bill says they must:

- develop a behaviour support plan with the person with disability, their guardian (if they have one), carers, and a behaviour support specialist
- make sure the plan includes positive behaviour support strategies and only includes restrictive interventions as an option of last resort
- take all plans allowing use of restrictive intervention for approval to a panel set up by Ageing, Disability and Home Care or the relevant service provider, and
- get the consent of the person with disability or their guardian to the plan.

If the panel refuses approval, or the person with disability or their guardian refuses consent for the restrictive intervention, it cannot be used.
There is extra protection in the *Children and Young Persons (Care and Protection) Act 1998* for children or young people, with additional consent requirements for restrictive interventions, and a ban on the use of seclusion.\(^{19}\) The Bill says the *Children and Young Persons (Care and Protection) Act* should apply in these situations.

The Bill also says that in emergency situations restrictive interventions can be used where they have not been authorised if they are the only option to avoid serious physical harm to the person with disability or another person. If this happens the Bill says that service providers have to then follow certain steps.

The proposed regulation of restrictive interventions in the Bill is very similar to current policy\(^{20}\). The change to legal regulation will, however, make it clear that a decision to restrict the rights of people with disability is extremely serious.

The Bill will penalise the use of restrictive interventions without following the requirements of the Bill, with a maximum penalty of 300 penalty units, or $33,000. This penalty is in addition to any criminal charges or legal rights a person might have under other laws.

**Compulsory reporting of serious abuse or neglect**

The Bill sets out changes to another law, the *Ombudsman’s Act 1974*, that will make us and our funded service providers report any serious incidents in accommodation services and centre-based respite services to the NSW Ombudsman.

Serious incidents include:

- sexual offences or sexual misconduct\(^ {21}\) by a staff member against, with, or in the presence of, a client
- serious physical assaults by a staff member against a client – which basically means all assaults, except where reasonable force is used for managing client care, or where the force is very minor

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\(^{19}\) Children and Young Persons (Care and Protection) Act 1998.


\(^{21}\) When the law is made, we will issue guidelines to explain what “sexual offence” and “sexual misconduct” mean, as well as other terms set out in the law about “reportable incidents”.

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serious assaults by one client against another which:

- is a sexual offence, or
- cause a serious injury such as fractures, deep cuts, burns, extensive bruising or concussion, or
- involve the use of a dangerous weapon, or
- put together, form a pattern of abuse

- fraud against a client by a staff member
- ill-treatment or neglect of a client.22

As well as reporting these incidents to the Ombudsman, we and our service providers will still have to report criminal offences to the police.

Having an independent agency such as the Ombudsman review reports about these incidents will allow problems to be identified and changes to be made in those services. This will lead to better protection for residents against abuse and neglect.

Establishment of an independent reporting scheme is in line with the recommendations of the 2013 report, *Prevention of abuse and safeguarding mechanisms within ADHC*.23 However that report, and some of the people we talked to early in 2013 about safeguards, said that a reporting scheme should apply across other types of disability services, including boarding houses. The NSW Government decided to only put in place the reporting scheme for supported accommodation and centre-based respite services because people in these services are likely to be some of our most vulnerable people. Also, another recent law called the *Boarding Houses Act 2012* has a new reporting scheme for incidents in boarding houses.

The 2013 report also suggested that there should be a new law about ‘unconscionable conduct’ which makes it an offence to financially exploit people with disability. However, there are already consumer laws24 and criminal laws25 which protect people with disability, and we think that it is more important to raise awareness of these existing laws than to create another law.

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22 We will issue guidelines to explain what “ill-treatment” and “neglect” mean, as well as other terms set out in the law about “reportable incidents”.
24 Section 20 of the *Australian Consumer Law* has a penalty for unconscionable conduct where a person sells goods or services by exploiting another person’s disability.
25 The *Crimes Act 1900* includes offences for theft and fraud.
3 Questions to help your feedback

Recognising rights, defining disability
Q1 What do you think of the suggested objectives and principles?
Q2 What do you think about the suggested definition of disability?

Community Inclusion
Q3 What do you think about the State Disability Inclusion Plan?
Q4 What do you think about the suggested content of the Disability Action Plans?
Q5 Do you think that making NSW Government agencies and local councils develop and put in place Disability Action Plans will help to include people with disability in the community? If not, what do you think would be a better way of improving the inclusion of people with disability in the community?

Choice and control through funding
Q6 Do you think the funding parts of the Bill support the right of people with disability to choice and control?
Q7 Do you think the rules around stopping funding are fair? If not, why not?

Protecting rights
Q8 Do you think the suggested employment screening will reduce the risk of harm to people with disability?
Q9 Do you think in regulating restrictive interventions, the Bill adequately balances the human rights of a person with disability with the need to protect them or other people from harm?
Q10 Do you think the Bill will work to reduce the use of restrictive interventions in disability accommodation services in NSW?
Q11 What do you think about the requirement that certain incidents that happen in accommodation services and centre-based respite services must be reported to the Ombudsman?