



Australian Government
Department of Social Services

Consultation Paper: A New Act to Replace the *Disability Services Act 1986*



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Acknowledgement of Country

The Department of Social Services would like to acknowledge the Traditional Owners and Custodians of the Lands and pay its respects to Elders past, present and emerging. The department would also like to extend that acknowledgement and respect to any Aboriginal and Torres Strait Islander people reading this paper.

Introduction

The Department of Social Services (the department) is seeking your input to help inform the drafting of new legislation to replace the *Disability Services Act 1986* (the Act). The aim of this paper is to inform you how the Act is currently operating, why a new Act to replace it is necessary, and the items within the Act that the department proposes to change.

The Australian Government has an ongoing commitment to supporting people with disability. Since 2008, Australia has been a signatory to the United Nations Convention on the Rights of Persons with Disabilities (UN CRPD). As a signatory, Australia has obligations to promote the equal and active participation of all people with disability.

More recently, the Australian Government has worked closely with people with disability, the disability sector, and state, territory and local governments, to develop Australia's Disability Strategy 2021-31 (the Strategy). The Strategy is Australia's national disability policy framework. It sets out a plan for continuing to improve the lives of people with disability in Australia over the next ten years.

The Strategy identifies seven priority areas for action to improve the lives of people with disability, their families and carers and meet Australia's obligations under the UN CRPD. The priority areas are:

- Employment and financial security
- Inclusive homes and communities
- Safety, rights and justice
- Personal and community support
- Education and learning
- Health and wellbeing
- Community attitudes

The Act has not been significantly updated in over thirty years. The department needs your help to make sure that the new Act can address these priorities, and align with Australia's commitments to the UN CRPD. It should also align with disability services and supports as they exist today, and be flexible enough to ensure it can adapt to future reforms and recommendations, and remain relevant and effective.

Together, we can ensure that the new Act enables supports and services that genuinely improve outcomes for people with disability, fulfilling the promise of the Strategy and the obligations under the UN CRPD.

Have your say at
<https://engage.dss.gov.au>

Background

The *Disability Services Act 1986* (the Act) is a legislative framework for the Australian Government to provide a range of disability services focused on assisting people with disability to achieve independence, employment and opportunities to integrate into the community. The Act also regulates the certification of service providers and specifies standards to adhere to in the delivery of services.

The disability policy landscape has changed markedly since the creation of the Act more than three decades ago. Australia's formal commitment to the UN CRPD and the development of the Strategy have driven greater engagement by people with disability in determining how they live and are supported. At the same time, both Federal and state and territory governments have moved away from direct service provision to person-centred market models of service delivery and support.

The National Disability Insurance Scheme (NDIS) is the most significant example of this changed approach. The NDIS began a phased rollout in 2013 to provide support to eligible people with disability to maximise their independence and participate in the community, including employment.

The establishment of the NDIS and its governing legislation, the *National Disability Insurance Scheme Act 2013* (the NDIS Act), has necessarily affected the programs and services funded under the Act. In 2018, the Government established the NDIS Quality and Safeguards Commission as an independent regulator of NDIS workers and service providers in order to monitor and improve the quality and safety of NDIS supports and services. This means that some providers are now subject to multiple sets of standards.

Our goal: A new and improved Disability Services Act

The Australian Government is committed to supporting people with disability in accordance with the UN CRPD and the Strategy. The new Act will provide a basis for continued supports and services outside the NDIS for people with disability.

Your input will help to ensure that the new Act:

- provides authority to fund services for all Australians with disability, including those who are not eligible for the NDIS, and expands the types of financial mechanisms that can be used
- sets out key principles for service delivery and ensures authority to continue current service delivery
- provides flexibility for future improvements in the design and delivery of supports and services, including the authority to make needed changes
- clearly expresses the rights of people with disability, and outcomes they are entitled to expect
- includes updated quality and safeguard standards arrangements and requirements, including compliance, reporting, review and complaints mechanisms that align with the best practice for disability services.

The department understands that the choice of words used can be significant. The department will ensure the new Act avoids outdated or archaic descriptions of people with disability and meets your expectations for respectful and inclusive language.

Subordinate legislation

The existing Act makes use of subordinate legislation – instruments that provide additional rules or requirements about certain parts of the Act. The benefit of subordinate legislation is that it can be changed more easily in order to ensure that rules, guidelines or standards remain relevant and effective.

It is likely that the new Act will also make use of subordinate legislation. The department will consult with people with disability and the sector as a whole on any significant subordinate instruments that are proposed. Both the instruments themselves, and any later amendments to instruments, must be tabled in parliament to take effect, and are subject to disallowance.

Consultation: How to get involved

Our public consultation **will open 7 November 2022 and close on 12 February 2023** on [DSS Engage](#).

Comments on the proposed changes are welcome from anyone. First and foremost, this includes people with disability, but also includes family members, carers, advocates, service providers, peak bodies and organisations. You can share your own views, or provide feedback on behalf of someone else.

In your submission, we will ask some questions about you. You can choose not to answer and the information will not be used to identify you. It will let us know that we have heard from a wide range of people.

Questions are included after each section for you to think about. If you would like to respond, you can choose to respond to all of the questions, or just some of them.

Other comments and suggestions

You can also give us your feedback or thoughts without responding to any particular question.

In addition to the questions raised in this paper, the department is keen to receive any other comments, suggestions or concerns that you might have about the new Act. This could be about things that the new Act should do or cover, or about the choice of words for the new Act, or any other thoughts that you have about it.

Your response can be in any format – online, in writing, or via video or audio response. It can be as long or short as you like. You can choose whether your response will be confidential or public.

The department will take all responses seriously, and they will help the department to understand your experiences, perspectives, and needs. This will help the department work out what needs to change in the Act and the form these changes should take.

If you have any questions about the consultation process, please refer to the [DSS Engage](#) website or contact sector.engagement@dss.gov.au.

Have your say - please participate at:

<https://engage.dss.gov.au>

Proposed updates to the Act

Objects of the Act

Objects are listed at the beginning of a piece of legislation. They set out the general aims or principles of the legislation. If there is any doubt about the purpose of a clause or provision in legislation, the objects can help to explain what the legislation is trying to achieve.

The department has considered the objects of the original Act, as well as the objects of the NDIS Act. Consistent with Australia's obligations and the NDIS Act, the new Act will affirm Australia's commitment to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms for people with disability, as expressed in the UN CRPD.

This will help to ensure that policies, programs and supports that affect people with disability are aligned with the principles of the UN CRPD at every level.

As a starting point, the department suggests the following objects for the new Act:

- a) in conjunction with other laws, give effect to Australia's obligations under the Convention on the Rights of Persons with Disabilities done at New York on 13 December 2006 ([2008] ATS 12)
- b) support the independence and social and economic participation of people with disability
- c) provide supports and services which empower people with disability to maintain and increase their social and economic participation, including by:
 - i. participating on an equal basis in their communities of choice
 - ii. increasing independence and seeking meaningful opportunities for employment, education, and development
 - iii. understanding and enjoying their inherent human rights and fundamental freedoms
- d) ensure that supports and services provided:
 - i. are planned, developed, implemented and reviewed in conjunction with people with disability
 - ii. are effective, innovative and high quality
- e) increase public awareness, understanding and acceptance of people with disability.

QUESTION 1: Do you agree with the proposed objects for the new Act? What other objects should be included in the new Act?

Who will the new Act support?

Under section 8 of the current Act, people are eligible for support if their disability:

- is attributable to an intellectual, psychiatric, sensory or physical impairment or a combination of such impairments
- is permanent or likely to be permanent, and
- results in:
 - a substantially reduced capacity of the person for communication, learning or mobility, and
 - the need for ongoing support services.

Using this language to describe people with disability is outdated. It resembles the *medical model* of disability and does not align with how we describe disability anymore. The department recognises that the experience of disability is the product of barriers in an individual's society or environment. This is the *social model* of disability. For example, the UN CRPD states that persons with disabilities:

'include 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'

For the new Act, it is important to provide a clear and respectful way to identify who should receive supports and services. With this in mind, the new Act could define the target group for supports and services as people with disability who are experiencing one or more of the following barriers to full and effective participation in society:

- a) attitudinal barriers
- b) environmental barriers
- c) institutional barriers
- d) communication barriers.

The new Act could also identify people with particular identities or characteristics who, due to multiple and overlapping forms of disadvantage or discrimination, may experience greater barriers to full and effective participation. This could include First Nations people, LGBTIQ+ people, and people from culturally and linguistically diverse backgrounds.

In particular, the new Act will need to explain what should happen when someone is separately eligible for services or supports from the NDIS or from state or territory sources. The department suggests the following principles apply:

- a) services and supports provided under the Act should not duplicate or substitute services and supports provided under other legislation. In particular, all governments must continue to consider and uphold the rights of people with disability, consistent with the Strategy.
- b) where a person is eligible for supports or services under more than one piece of legislation, the agencies and providers involved should work together with the person to coordinate the supports and services, avoid duplication, and ensure alignment with the person's goals.

QUESTION 2: Do you agree with the proposed approach to the target group? How do you think the target group should be defined?

QUESTION 3: Do you agree with our suggested principles for avoiding duplication and requiring coordination? What other principles do you think should apply?

Definition of disability

The new Act could also include a definition of disability. If a definition was added to the Act, it could either adopt a broad *social* definition similar to the UN CRPD (as mentioned above), or an exhaustive *legal* definition, similar to the ‘disability requirements’ specified for eligibility under the *National Disability Insurance Scheme Act 2013*:

A person **meets the disability requirements** if:

- a) the person has a disability that is attributable to one or more intellectual, cognitive, neurological, sensory or physical impairments or the person has one or more impairments to which a psychosocial disability is attributable, and
- b) the impairment or impairments are, or are likely to be, permanent, and
- c) the impairment or impairments result in substantially reduced functional capacity to undertake one or more of the following activities:
 - i) communication
 - ii) social interaction
 - iii) learning
 - iv) mobility
 - v) self-care
 - vi) self-management, and
- d) the impairment or impairments affect the person’s capacity for social or economic participation, and
- e) the person is likely to require support under the National Disability Insurance Scheme for the person’s lifetime.

An impairment or impairments that vary in intensity may be permanent, and the person is likely to require support under the National Disability Insurance Scheme for the person’s lifetime, despite the variation.

An impairment or impairments that are episodic or fluctuating may be taken to be permanent, and the person may be taken to be likely to require support under the National Disability Insurance Scheme for the person’s lifetime, despite the episodic or fluctuating nature of the impairments.

The department is aware that preferred language and definitions shift over time. With this in mind, whether or not the new Act provides a definition for disability, the main concern is ensuring that the Act sets out who should receive support in a clear and meaningful way.

QUESTION 4: Do you think the new Act should include a definition for disability? Do you have any additional comments?

Quality and safeguarding arrangements

The existing Act provides authority for the National Standards for Disability Services (NSDS). These standards are in many respects similar to the Aged Care Quality Standards and the NDIS Practice Standards, but operate in parallel, leading to regulatory burden.

Service providers who deliver services and supports for people with disability often work in multiple sectors. A single provider might operate within the NDIS, within the broader disability sector, and/or in aged care and/or veterans' care. At present, these providers are subject to separate and overlapping regulatory frameworks.

While there are distinct differences in the needs, goals and perspectives of service users in each sector, providers operating across these sectors often deliver similar services and supports, and share a common responsibility to deliver a high standard of care, ensure the wellbeing of service users, and respect their needs, preferences and choices. Providers are also often responsible for supporting service users who may be more vulnerable to risk than other people in their community.

Regulatory alignment across these sectors will ensure consistent and clear requirements for all providers. This will allow providers to operate across sectors without being subject to duplicative requirements, supporting the growth and development of the market. A sector with a wider range of providers will help to support more meaningful choice and control, and will help to support smaller, niche services to remain viable.

To align with this work, the department suggests the new Act should allow recognition of other, similar quality and safety standards, such as those established for the NDIS or the Aged Care sector. This could be accomplished in a number of ways:

- Recognising existing accreditation under similar regulatory schemes
- Aligning the requirements under the new Act with other regulatory schemes
- Exploring options for providers under the new Act to be directly accredited by an existing regulatory scheme.

Whichever option is preferred, the goal would be to ensure providers are held to consistent standards across all the sectors in which they operate.

Under the current Act, clauses in grant agreements are the only means to establish quality and safeguards for funded services. If the new Act makes use of other regulatory systems, it will also need to establish what powers would apply and which regulator would be responsible for ensuring quality and investigating noncompliance.

QUESTION 5: How do you think quality and safeguarding arrangements should be managed by the new Act?

Types of services funded under the new Act

The Government can only agree to spend money when legislation authorises it to do so. The existing Act covered disability services when it was first introduced, but today, not all disability programs are covered by the Act. This means that authority is not clearly established by the Act, and has to be sought from other legislation.

The department's plan for the new Act is to describe service and support categories broadly. This will ensure a broad range of disability services and supports being delivered by the Australian Government can be authorised under the new Act. This should include flexibility for the new Act to provide authority for new and different supports in future to ensure that the department can respond to emerging needs or changing circumstances.

The types of supports and services could include:

- accessibility
- accommodation support
- advocacy
- employment and training
- independent living
- information and education
- recreation
- respite care
- research, development and data collection.

QUESTION 6: Do you agree with the supports and services listed above? What other kinds of supports and services should be included in the new Act?

Disability Employment and Rehabilitation Services

The Disability Employment Services (DES) program helps people with disability, injury or health condition(s) to prepare for, find, and maintain employment.

DES providers are organisations that are funded to support people with disability and assist employers to put in place practices that support the employee in the workplace.

The DES program currently provides services under two distinct parts of the Act:

- employment services (s12AD of the Act) (Employment Support Service (ESS) program) providing assistance to job seekers with a permanent disability
- rehabilitation employment programs (s20 (2) of the Act) (Disability Management Service (DMS) program) providing employment assistance to job seekers with a non-permanent disability.

The current structure of these programs is based on historical arrangements and creates complications in both the funding and management of these programs. For example, employment services must be delivered as a grant, while the same limitation does not apply to rehabilitation employment programs.

In an effort to improve systems and services for job seekers and employers, the department is currently developing a new approach to disability employment supports, to replace the current DES program. This design process includes consultations with people with disability, carers, employers, academics, disability advocates, DES providers and provider peaks including a separate public consultation process on DSS Engage. A decision on the new model is a matter for Government.

QUESTION 7: Do you consider it necessary to retain separate provisions for employment services and rehabilitation employment program, or could they be combined?

Consultation questions summary

Please respond to as many or as few questions as you like. You are also welcome to provide any other comments, suggestions or concerns about the Act.

QUESTION 1: Do you agree with the proposed objects for the new Act? What other objects should be included in the new Act?

QUESTION 2: Do you agree with the proposed approach to the target group? How do you think the target group should be defined?

QUESTION 3: Do you agree with our suggested principles for avoiding duplication and requiring coordination? What other principles do you think should apply?

QUESTION 4: Do you think the new Act should include a definition for disability? Do you have any additional comments?

QUESTION 5: How do you think that quality and safeguarding arrangements should be managed by the new Act?

QUESTION 6: Do you agree with the supports and services listed above? What other kinds of supports and services should be included in the new Act?

QUESTION 7: Do you consider it necessary to retain separate provisions for employment services and rehabilitation employment program, or could they be combined?

COMMENTS: If you have any other comments, suggestions, concerns, or thoughts about our plans for the new Act, please let us know.

Have your say - please participate at:

<https://engage.dss.gov.au>