



NSW Disability Inclusion Bill 2014

**Prepared for the Department of Family and Community
Services**

Ageing, Disability and Home Care

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Prepared by the Physical Disability Council of NSW

Jordana Goodman
Policy Officer
Physical Disability Council of NSW
St Helens Community Centre
3/184 Glebe Point Road
Glebe NSW 2037

Freecall: 1800 688 831
Phone: 02 9552 1606
Fax: 02 9552 1606
Fax: 02 9552 4644

Web: <http://www.pdcn.nsw.org.au/> Email: admin@pdcnsw.org.au

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Who is the Physical Disability Council of NSW?

1.The Physical Disability Council of NSW (PDCN) is the peak body representing people with physical disabilities across New South Wales. This includes people with a range of physical disability issues, from young children and their representatives to aged people, who are from a wide range of socio-economic circumstances and live in metropolitan, rural and regional areas of NSW.

2.The objectives of PDCN are:

- To educate, inform and assist people with physical disabilities in NSW about the range of services, structure and programs available that enable their full participation, equality of opportunity and equality of citizenship
- To develop the capacity of people with physical disability in NSW to identify their own goals, and the confidence to develop a pathway to achieving their goals (ie self advocate).
- To educate and inform stakeholders (ie about the needs of people with a physical disability) so they are able to achieve and maintain full participation, equality of opportunity and equality of citizenship.

3.The Physical Disability Council appreciates the opportunity to consider, and make comment in relation to the review of the NSW Family and Community Services - Disability Inclusion Bill 2014 Consultation Draft.

Background Information

4.As part of international law Australia is obligated by two significant international covenants regarding human rights and these include the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. These two international covenants contain the most fundamental human rights including the following:

- Right to freedom of conscience and religion
- Right to be free from torture
- Right to a fair trial
- Right to be associated and participate in democratic processes
- Right to an adequate standard of living

- Right to education
- Right to fair wages and the,
- Right to safe working conditions.

5. Additionally Australia is party to the following five international treaties that support an equal recognition before the law:

- Covenant on the Elimination of all Forms of Racial Discrimination
- Convention on the Elimination of all Forms of Discrimination against Women
- Convention against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment and Punishment
- Convention on the Rights of the Child, and the
- Convention on the Rights of Persons with Disabilities (CRPD)

6. To meet these obligations identified in the Convention on the Rights of Persons with Disabilities (CRPD) the Australian Government has adopted and implementing the following legislation, policies, and plans:

- Disability Discrimination Act Cth (1992)
- The following three disability standards as part of section 31 of the Disability Discrimination Act (DDA)
 - Disability Standards for Accessible Public Transport (2002)
 - Disability Standards for Education (2005)
 - Disability (Access to Premises- Buildings) Standards (2010)
- National Disability Strategy (2010- 2020)
- National Disability Insurance Scheme (NDIS) and the National Injury Insurance Scheme (NIIS)

Overall observations

7. As part of the Productivity Commission inquiry into Disability Care and Support inquiry (2011), the following six Objectives were identified as issues needing reform. The reforms being introduced by the NSW Government are part of Objective b) of the national reforms and are included the Disability Inclusion Bill (2014):

- a) Inclusive and accessible communities
- b) Rights protection, justice and legislation
- c) Economic security
- d) Personal and community support
- e) Learning and skills
- f) Health and wellbeing

8. PDCN believes that it is crucial that the NSW State Government retains a Disability Minister as part of the Ministry to provide overall leadership over the adoption of the NSW Disability Inclusion Bill (2014), to oversee the implementation and monitoring of

the National Disability Insurance Scheme (NDIS) and the National Injury Insurance Scheme (NIIS), and to provide leadership to the people with disability not receiving support through the NDIS or the NIIS but still in need of support services.

9.The Disability Inclusion Bill (2014) identifies the following expected roles and responsibilities of a NSW State Minister;

- Updating the State Disability Inclusion Plan as NDIS and NIIS reforms are implemented,
- Provision of financial and administrative support to the NSW Disability Council,
- Reporting to both Houses of Parliament on issues arising from the implementation of Disability Action Plans (DAPs), and the
- Provision of financial assistance directly to individuals seeking support services through the NDIS and NIIS, and to eligible organisations providing financial assistance.

10.As a consequence PDCN believes that the State government needs to retain a Disability Minister with a strong background of this portfolio.

11.Data from NSW Planning indicates that there were 3 759 300 people living NSW between the ages of 0- 64 years in 2011. ¹ Using this data, the incidence of disability nationally, divided by the severity of disability, then approximately 530,000 people with a mild to moderate disability are residents of NSW and will not be supported by the NDIS or the NIIS but ² may still require any of the following services from Ageing, Disability and Home Care, and subsequently require the support of a State government Disability Minister:

- Early intervention for children and young people
- Learning new skills for work or leisure
- Everyday living support including household chores, case management, home maintenance and modifications
- Somewhere to live
- Advocacy and information services

12.PDCN believes that the state government needs to consider a complete framework of indicators for the Disability Inclusion Bill (2014) rather than just considering service provision. A social inclusion bill needs to consider a framework where all people with disability have the capabilities, opportunities, responsibilities and resources to learn, work, engage and be heard.

13.It is not considered as appropriate to have included Part 6- Restrictive Practices as part of the Disability Inclusion Bill (2014). PDCN believes that it would be more appropriate

¹ NSW Planning and Infrastructure (August 2013) New South Wales in the future: Preliminary 2013 population projections

² Disability Expectations- Investing in a Better Life, a Stronger Australia (November 2011) Pricewaterhouse Coopers

to include this Part in an alternate legislative framework, similarly to the following recommendation suggested at the CRPD Committee Session 10:

- That, in consultation with people with disability through their representative, advocacy and legal organisations, Australia conducts a comprehensive audit of laws, policies and administrative arrangements underpinning compulsory treatment with a view to:
 - Introducing reforms to eliminate laws and practices that relate to compulsory treatment that inherently breach human rights;
 - Work with people with disability and their representative and advocacy organisations to develop appropriate mechanisms and supports for any person, regardless of disability, who is at risk of causing harm to themselves or others; and
 - Implement administrative arrangements that focus on supported decision making.³

Discussion

Recognising rights - What do you think of the suggested objectives and principles?

14. The following four key principles contained in the International Covenant on Civil and Political Rights have been used to examine the objects and principles identified in the Disability Inclusion Bill (2014):

- Freedom
- Respect
- Equality
- Dignity

15. As part of the international covenant the key principle: 'freedom' refers to the following civil and political rights:

- Freedom of movement, expression, assembly and association
- Right to liberty
- A fair hearing
- Rights in criminal proceedings
- Right not to be tried or punished more than once
- Retrospective criminal laws
- Freedom of thought, conscience, religion and beliefs
- Property rights, and
- Freedom from forced work

³ Convention on the Rights of Persons with Disabilities Committee Session 10 (September 2013) Australian Civil Society Parallel Report Group

16.The International Covenant on Civil and Political Rights refers to ‘respect’ as:

- Right to life
- Protection of families and children
- Cultural rights, including the recognition of Aboriginal people

17.As part of the international covenant the key principle: ‘equality’ refers to the following civil and political rights:

- Equal recognition before the law, and the
- Entitlement to participate in public life (including voting).

18.‘Dignity’ as referred to in the International Covenant on Civil and Political Rights refers to the:

- Protection from torture and cruel, inhumane or degrading treatment, medical or scientific experimentation or treatment without consent
- Protection of privacy and reputation
- Humane treatment when deprived of liberty

19.PDCN considers that Section 3 satisfactorily outlines the basic scope of the Bill. This section outlines that the reforms and objectives needed to comply with international legislation, such as United Nations International Covenant on Civil and Political Rights, the United Nations International Covenant on Economic, Social and Cultural Rights, and the United Nations CRPD and the responsibilities of governments regarding the introduction of the NDIS and NIIS.

20.Section 4(a) refers to the principle that people with disability need to have the same opportunities, respect and right to life as all other members of the community. Sections 4(b) and 4(c) expands on this theme by referring to different circumstances such as in social and economic circumstances where individual qualities and skills should be accessed and enhanced.

21.The freedom of expression is referred to in section 4(d), where it allows people with disability the opportunity to make decisions, regardless of whether the decision impacts positively or negatively on their life. PDCN believes that the ability to learn from individual choices that may also have negative consequences that is part of human development, and the ability to take risks is a life- skill necessary for self-growth and self- empowerment. Subsequently PDCN supports the inclusion of the phrase: ‘including decisions involving risk’ within this section to enable all people with disability regardless of upbringing to have the opportunity of making personal decisions that may have negative consequences. Individual development will facilitate individual capabilities, opportunities, responsibilities and resources to learn, work, engage and be heard.

22. The freedom of thought, conscience, religion and beliefs is acknowledged in Section 4(5) when it refers to the right to cultural or linguistic diversity, age, gender, sexual orientation and religious beliefs.
23. Sections 4(6) and 4(7) refer to protective measures as in section 4(6) with the right of all individuals with disability to maintain privacy and confidentiality of personal information, and in section 4(7) the protection from cruel, inhumane or degrading treatment, medical or scientific experimentation or treatment without consent. PDCN considers it as essential that all people with disability recognise the legal significance of acknowledging consent for medical or scientific experimentation or treatment. With the added risk of electronic data being misused, PDCN considers that it is essential that all measures are implemented to prevent the abuse of personal information, and that people with disability understand these risks.
24. PDCN supports section 4(8) which identifies the need to ensure the availability of information in a variety of formats in hard copy and electronically to ensure that people with disability are not disadvantaged.
25. Section 4(9) acknowledges the right to pursue a grievance, but the Disability Inclusion Bill (2014) fails to consider who will administer the complaints process and that this needs to be transparent, accountable, fair and consistent. The Disability Inclusion Bill (2014) makes reference to the Administrative Appeals Tribunal for appeals concerning funding, and the need to review decisions where restrictive practices and seclusion may be implemented, but fails to identify the need for the service provider to have a complaints mechanism, and the need for the availability of individual or systemic advocacy or an independent complaints process. With the Disability Inclusion Bill (2014) there appears to be a presumption that with the adoption of individualised funding, that quality supports will automatically be delivered and that disagreements, appeals and concerns will automatically cease and with the magnitude of reforms identified in the Disability Inclusion Bill (2014) there is no guarantee that so will necessarily occur. In the past people with disability have feared the consequences of making complaints about service availability and service delivery, and as a consequence due to this ambivalence, PDCN believes that all resources need to be made available to ensure independent advocacy and complaints mechanisms can easily be accessed.
26. The protection of families and children is addressed sections 4(10) and 4(11). These sections recognise the importance of maintaining close personal relationships between family members, carers and other significant persons. Whilst PDCN recognises the importance of family relationships, PDCN is not in favour of personal support being provided on a regular basis by close family members, as this changes the dynamics of the relationship by reinforcing a dependency between the person receiving the care and the person delivering the care.
27. Section 4(11) identifies 'the special needs of children with disability as they mature, and their right to respect as equal members of the community, are to be respected'. Whilst all children whether they have a disability or not have individual needs, PDCN believes that highlighting the special needs of children with disabilities is contrary to inclusion,

and subsequently would recommend that this principle be rewritten to the following: 'Children with disabilities may have additional needs, but they need to be respected as equal members of the community'.

28. Section 4(12) recognises the changing abilities, strengths, goals and needs of people with disability as they age are to be respected as a right to life.

29. The following groups of people with disability with additional complex needs are recognised as part of section 5:

- Aboriginal and Torres Strait Islander people
- People from culturally and linguistically diverse backgrounds
- Women

30. Section 5 addresses the four fundamental human rights for people with disability who have additional needs. This section includes detail about the need for awareness and effective consultative procedures, and the need to recognise cultural rights for people from Aboriginal and Torres Strait Islander backgrounds. The freedom of thought, conscience, religion and belief have a particular reference to Aboriginal and Torres Strait Islander people and people from culturally and linguistically diverse backgrounds. Additional resources may need to be provided to ensure that social, cultural and economic inequalities are addressed.

31. The principles identified in section 4 and 5 fail to recognise the importance of the ability to freely move around the community. This principle has particular relevance as funds available through the NDIS and the NIIS that will be portable, and subsequently service recipients will not be restricted in acquiring services based on their residential location. This particular human right has particular relevance for Aboriginal people who may have traditionally been mobile as part of their relationship with the land, water and resources in the environment.

32. PDCN would recommend that as part of section 5 that people living in regional and rural locations be included as an additional group of people with disability with additional and complex needs. In regional and rural locations the incidence of catastrophic injury is higher than in metropolitan Sydney, service availability is often restricted due to geographic distances, educational and employment options often less available resulting in poverty, with an increased population of people from Aboriginal and Torres Strait Islander backgrounds. It appears that ADHC recognised the additional needs of this group due to the large number of Ability Link offices currently being established to service people with disability living in rural and remote locations.

Defining disability - What do you think about the suggested definition of disability?

33. The definitions of 'disability' identified in the Disability Inclusion Bill (2014) and the Consultation Draft- Information Booklet are very similar in principle to that used in Article 1 of the CRPD, but there is a very slight difference. This difference is that the

Disability Inclusion Bill (2014) refers to 'participation in the community' and in the Information Booklet the definition refers to 'participation in society'. The definition used in the Consultation Draft- Information Booklet which refers to 'participation in society' is preferred by PDCN as the terminology used is more consistent with that used in other human rights documentation.

34. Whilst PDCN commends the similarity in definitions used in the Disability Inclusion Bill (2014) and that used in the CRPD, PDCN does not understand the reason and possible ambiguity of including a definition of disability in s (7), and then in s (23) (1) (a-d) with the 'Meaning of person in the target group.. Section 23 refers to the target group as;

Section 23 (1) A person in the target group is a person who has a disability, whether or not of a chronic episodic nature, that:

(a) Is attributable to an intellectual, cognitive, neurological, psychiatric, sensory or physical impairment, or a combination of any of those impairments, and

(b) Is permanent or likely to be permanent, and

(c) Results in a significant reduction in the person's functional capacity in one or more areas of major life activity, including, for example, communication, social interaction, learning, mobility, decision-making, self care and self management, and

(d) Results in the need for support, whether or not of an ongoing nature requiring significant support services. ⁴

Community Inclusion - What do you think about the State Disability Inclusion Plan?

35. To oversee the performance of the NDIS and NIIS, the Disability Inclusion Bill (2014) suggests that the Disability Council will be responsible for preparing a report on these two programs once every four years to then be tabled in both houses of Parliament. PDCN believes that it is vital that preparation a report is made mandatory and prepared by a source that ensures independence and transparency. The report needs to be prepared biannually to prevent having operational and strategic issues left without effective resolution. With unresolved operational and strategic issues identified as part of NDIS and NIIS reviews, this potentially could have serious implications on the long- term viability of the NDIS and NIIS. Leadership is required to ensure that issues and recommendations identified in these reviews are effectively and efficiently resolved. Whilst reforms are being implemented in the Hunter locality at the NSW launch site a regular, disciplined review cycle is crucial.

⁴ NSW Government Department of Family and Community Services- Ageing, Disability and Home Care (2014) Disability Inclusion Bill

36. The time delay caused by adopting a four yearly reporting cycle for of the NDIS and NIIS would result in these reforms being delivered over different budget cycles, and with possible changes in leadership having different priorities, making it even more difficult to get issues effectively resolved.

37. The disability community is already familiar with delays in having issues and concerns not being resolved from past reviews of the Commonwealth Disability Discrimination Act (1992) disability standards. Here the lack of leadership has been a recurring issue, and has resulted in recommendations not being resolved.

38. After 2018 when the NDIS and NIIS are fully operational PCDN would recommend that these different programs be integrated into NSW 2021. This would be preferable rather than two separate plans that are not integrated into the broader community. Whilst the State Disability Inclusion Plan and Disability Action Plans address the needs of people with disability, the goal is for full inclusion and whilst these plans are seen as having different objects, financial and reporting mechanisms different from that of NSW 2021, this will not facilitate full integration.

39. PDCN would recommend that both the NDIS and NIIS be reviewed by the following two separate State Government Committees:

- Legislative Council Standing Committee on Law and Justice, and the
- Legislative Assembly Legal Affairs Committee.

40. The Legislative Council Standing Committee on Law and Justice is already familiar with reviewing the Lifetime Care and Support Program, and regularly review the following types of issues:

- Legal and constitutional issues in New South Wales, including law reform, parliamentary matters, criminal law, administrative law and the justice system, and
- Matters concerned with industrial relations and fair trading.⁵

41. The Legal Affairs Committee is a recently established standing committee of the Legislative Assembly, and it is a specialist standing committee appointed for the current parliament. Specialist standing committees are able to report on any proposal, matter or thing concerned with the subject area of the committee. Inquiries can be referred to the committee or the committee may initiate an inquiry on their own motion.

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⁵ Parliament of New South Wales Legislative Council- Standing Committee on Law and Justice
http://www.parliament.nsw.gov.au/lawandjustice?open&refnavid=CO3_1

⁶ Parliament of New South Wales Legislative Assembly- Legal Affairs Committee
http://www.parliament.nsw.gov.au/legalaffairs?open&refnavid=CO3_1

Community Inclusion

What do you think about the suggested content of the Disability Action Plans (DAPs)?

Do you think that making NSW Government agencies and local councils develop and put in place DAPs 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?

42. Over the past thirty years Disability Action Plans (DAPs) have been prepared by Commonwealth, State and Local Governments to itemise the following types of programs aimed at enhancing opportunities for people with disability:

- Access to the built environment
- Provision to information
- Enhancing staff awareness
- Complaint mechanisms
- Provision of employment strategies

43. Whilst government department have been consistent in addressing these five areas of program delivery, there has been an inconsistency in detail, performance indicators, plan duration and format. Following completion of DAPs the government department responsible for preparing the DAP had the option of lodging this with the Australian Human Rights Commission but regardless of whether it was lodged or not, there was no regulatory body overseeing the implementation. Regardless of this the programs identified in the DAPs have resulted in positive changes, most significantly in relation to access to the built environment.

44. The Disability Inclusion Bill. (2014) does not include the adoption of a complaints mechanism part of a DAP. As previously discussed PDCN understands that provision of a complaints mechanism is now regarded as a universal safeguard that needs to be transparent, accountable, fair and consistent available directly by the service provider and via an independent complaints body.

45. PDCN believes that whilst this planning tool has been effective, DAPs need to be seen as having a universal application, and incorporated into government programs and operations, and be integrated into broader strategies, such as within Corporate Plans. Following full integration common key performance indicators, similar time schedules, and budget parameters could be easily adopted. Reporting on the implementation of the Corporate Plan would be incorporated into annual reports for each government department. This is recommended in the Disability Inclusion Bill. (2014), and s (11) identifies the following legal requirements:

Section 11

(a) of a department, means its annual report under the *Annual Reports (Departments) Act 1985*, and

(b)of a local council, means its annual report under the *Local Government Act 1993*.⁷

46.As part of the biannual reporting procedure identified in Question 3 of this submission, PDCN would recommend that government departments forward details regarding the implementation of the NDIS and NIIS to the NSW Disability Council every second year until the NDIS and NIIS are fully operational. This is to ensure that concerns and issues regarding reforms to the delivery of services are dealt with as soon as possible.

Choice and control through funding

Do you think the funding parts of the Bill support the right of people with disability to choice and control?

Do you think the rules around stopping funding are fair? If not, why not?

47.PDCN is concerned about the anomaly caused by the difference between the definition provided for 'disability' and that suggested in s(23) of the target group.

48.It is presumed that due to the urgency in resolving the following concerns that ADHC is already investigating in how best to resolve the issues identified below, and that funding will only cease as from 2018, if all stakeholders agree on a common resolution:

- Provide safeguards for people accessing disability supports and services
- Reduce the use of restrictive interventions in NSW disability services

⁷ NSW Government- Ageing, Disability and Home Care (2014) Disability Inclusion Bill, section 11 (3)