



**Submission**

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**NSW Disability Inclusion Bill 2014**

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**February 2014**

**People with Disability Australia Incorporated**

**People with Disability Australia (PWDA)** is a leading disability rights, advocacy and representative organisation of and for all people with disability. We are the only national, cross-disability organisation – we represent the interest of people with all kinds of disability. We are a non-profit, non-government organisation.

PWDA's primary membership is made up of people with disability and organisations primarily constituted by people with disability. PWDA also has a large associate membership of other individuals and organisations committed to the disability rights movement.

We have a vision of a socially just, accessible, and inclusive community, in which the human rights, citizenship, contribution, potential and diversity of all people with disability are recognised, respected and celebrated. PWDA was founded in 1981, the International Year of Disabled Persons, to provide people with disability with a voice of our own.

## **Introduction**

1. People with Disability Australia (PWDA) acknowledges the significant reforms to disability services that are currently unfolding in New South Wales. The Ready Together framework includes many of the aspects necessary to improve the lives of people with disability in NSW: The Living Life My Way Framework recognises that choice and control for people with disability in the design and delivery of their disability support is essential for those supports to be effective; the financial investment from Stronger Together 2 2015-2016 confirms the commitment to person centred approaches; the Government's enthusiasm to be at the forefront of the NDIS through the early commitment to funding, the launch site in the Hunter, and the NDIS (NSW Enabling) Act is welcome; and the Disability Inclusion Bill 2014 ('the Bill') now intends to 'protect the rights of people with disability, provide safeguards, and promote community inclusion'.<sup>1</sup>
2. PWDA acknowledges that the transition towards and implementation of the NDIS marks a period of long fought for and transformational change in the disability sector, and it will take time, commitment, and flexibility to see these changes through to the maximum of their potential. It is also a period of heightened expectations, hope, and some uncertainty for people with disability who want to believe that these changes will bring them the personal, social, and economic benefits that have been promised.

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<sup>1</sup> 'Ready Together: A better future for people with disability in NSW', NSW Department of Family and Community Services 2013.

3. PWDA strongly supports the movement to bring inclusion, participation, independence, choice, and control firmly into the lives of people with disability. Our role as a peak body and disabled people's organisation is to ensure that the opportunities to achieve these goals are taken at every step on the way, and to ensure that the voice of people with disability is heard throughout the journey so that addressing our needs stays at the forefront of policy and legislative reform.

## **Managing the transition to the NDIS**

4. The NDIS should bring significant improvements to the delivery of disability support in NSW and nationally, and this should be celebrated. Parts 4 and 5 of the Bill are clear about what the transition will involve and the Objects and Principles are essential as a means of asserting the rights of people with disability through this process.
5. However, it is a concern that people with psychosocial disability appear to fall outside of the target group. What specialist disability services will be available to these people? Similarly, what advice, information, advocacy, referral, supports and services will be available to any person with disability whose disability is not permanent, or who otherwise are not eligible for support as members of the target group? Furthermore, what assistance will be available for people with disability to help them to navigate and enjoy mainstream supports and services?

## **Inclusion for people with disability across all supports and services**

6. The Principles recognising the needs of Aboriginal and Torres Strait Islander people with disability, people with disability from culturally and linguistically diverse backgrounds, and women with disability (paragraph 5) should apply to *all* providers of supports and services whether they be mainstream or specialist disability service providers. Likewise, the potential vulnerability of children with disability should be recognised in its own provision along with reference to the evolving capacities of the child as opposed to the 'special needs of children with disability' in paragraph 4(11). This would also strengthen implementation of Article 7 of the Convention on the Rights of Persons with Disabilities (CRPD)
7. In general, the Bill fails to adequately address the need for improvement in areas *outside* of specialist disability support. The definition of supports and services in the Bill is not limited to disability supports (paragraph 7). Therefore, the rights, safeguards, choice, and control in the delivery of services referred to in the Objects and Principles apply to all mainstream goods and services that a person

with disability may want or require.<sup>2</sup> This is a welcome move towards inclusion and participation across all aspects of life, but the Bill does not detail how this is to be achieved outside of the specialist disability support sector. For example, the provision of accessible transport, banking, domestic violence services, or accommodation.

8. Similarly, Paragraph 3(a) acknowledges that the State and community has a responsibility to facilitate the exercise of rights of people with disability. However, the Bill does not go on to say how this role is to be operationalized, what the boundaries of this responsibility may be, or how people with disability can hold these responsible parties to account.

## Planning for inclusion

9. Implementing mainstream inclusion for people with disability in NSW requires making progress in the 6 areas of policy action identified by the National Disability Strategy (NDS) as key to implementing the CRPD: inclusive and accessible communities; rights protection, justice and legislation; economic security; personal and community support; learning and skills; and health and wellbeing.
10. An Inclusion Bill which took steps to implement person centred approaches and the rights of people with disability in the provision of mainstream supports and services *as well as* specialist disability services would be the preferred model. However, the Bill falls far short of this outcome as the provisions around State Disability Inclusion Plans and Government and Local Council Disability Action Plans only require the existence of a plan. They do not provide for the resources, qualitative and quantitative targets, multi-sector and across Government planning and coordination, accountability, monitoring, and evaluation necessary to achieve progress in implementing the Plans and in turn the obligations of the CRPD.
11. As a consequence, these Plans will do little to ameliorate the barriers that prevent people with disability from full inclusion and participation in our communities. Without an active commitment to either resource or fulfil the objectives in the Plans, the portion of the legislation intended to realise inclusion becomes mere rhetoric.
12. Although overall responsibility for disability services will soon move to the Commonwealth, responsibility for the inclusion of *people* with disability in all other

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<sup>2</sup> Paragraph 6 further confirms that all providers of goods and services to people with disability are required to have regard to these provisions.

aspects of life, from health to transport, justice to housing, education to employment, will remain with NSW. The real commitment to inclusion of people with disability in NSW lies in securing change in those areas. As such, PWDA strongly recommends that this ongoing leadership and strategic coordination role should sit with a Minister for Disability. Coupled with improved community consultation procedures (discussed below), this move would significantly strengthen the NSW Governments implementation of Article 33 of the CRPD on implementation and monitoring as well as the social and economic aspects of the Convention as a whole.

13. It is also critical to note that the potential economic and social benefits envisioned by the NDIS will not be achievable unless mainstream supports and services have adapted to be inclusive of people with disability. Not to take the opportunity to invest in the resourcing and implementation of the Plans would be short sighted, and risks reducing the impact of the considerable energy and commitment that has been driven towards realising person centred approaches and individualised funding.

### **Consulting people with disability**

14. Consultation with people with disability and their representative organisations is the most effective way of ensuring that policy and legislation is developed so that the outcomes are positive for people with disability, and that both mainstream and disability services are accessible and meet the needs of people with disability. It is also an overarching requirement of the CRPD as laid out in Articles 33(3) and 4(3).<sup>3</sup>
15. It is encouraging that there is repeated emphasis on consultation with people with disability throughout the Bill, for example paragraphs 5, 10 and 12, and the Bill assumes that there are structures in place through which Government Departments or Local Councils can consult. However, the Bill does not detail what a consultation framework would look like, who it would comprise of or the level, frequency, or form of consultation required. In doing so it fails to acknowledge the crucial role of representative community organisations in making these processes meaningful and effective.

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<sup>3</sup> Article 33(3) Civil society, in particular persons with disabilities and their representative organizations, shall be involved and participate fully in the monitoring process.

Article 4(3) In the development and implementation of legislation and policies to implement the present Convention, and in other decision-making processes concerning issues relating to persons with disabilities, States Parties shall closely consult with and actively involve persons with disabilities, including children with disabilities, through their representative organisations.

16. Representative organisations of people with disability disseminate information, promote consultation opportunities, and facilitate the attendance of people with disability. They also represent the views and interests of their members or constituents by providing advice to government, monitoring the implementation of policy, and contributing to legislative reform initiatives.
17. The Disability Inclusion Bill should provide for support to representative organisations so that they can provide the voice of people with disability to Government. The provisions should be drafted in similar terms to the Functions, Assistance, and Reporting Requirements of the Disability Council (paragraphs 16, 17, 18), i.e. recognising the voice of people with disability as the primary partner in decision making on disability related issues. Failure to fund representative community organisations who serve this function will make it very difficult for entities to discharge their obligations to consult on either a practical or ethical level. This will also leave people with disability with few trusted avenues through which to have their views heard.

### **Providing for exclusion**

18. Restrictive interventions are fundamentally about removing the ability of a person to do something through some form of restriction. This is the opposite of inclusion, and some restrictive interventions may potentially be counter to human rights standards<sup>4</sup> and the Objects and Principles of the Bill. Including provisions around restrictive interventions in this Bill is inappropriate. Regulation and progress towards elimination of restrictive interventions is essential, but this should be addressed elsewhere.
19. Notwithstanding the above, the content of the provisions reads more like a policy position than a regulatory provision, and does not question the need for restrictive intervention. For example, the proposed Restricted Practice Authorisation Panel is designed to approve action rather than to regulate action, and to produce guidelines to assist people who are using or contemplating using restrictive interventions as opposed to taking steps to eliminate them altogether.
20. PWDA makes the following recommendations<sup>5</sup> as regards the regulation of restrictive interventions:

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<sup>4</sup> For example CRPD Article 14 on liberty and security of the person, Article 15 on freedom from torture or cruel, inhumane or degrading treatment or punishment, Article 16 freedom from exploiting, violence and abuse, and Article 17 on protecting the integrity of the person.

<sup>5</sup> See 'Rights Denied: Towards a national policy agenda about abuse, neglect and exploitation of persons with cognitive impairment, People with Disability Australia 2010, p.95.

- (a) an independent, statutory office of Senior Practitioner should be established to regulate the use of restrictive practices in NSW, similar to the practice in others States such as Victoria. The Senior Practitioner ought to have the explicit role of protecting and promoting the human rights of persons with disability subject to, or at risk of, restrictive practices;
- (b) the Office ought to have at least the power to: declare a restrictive practice prohibited (both at large and in relation to a specific individual); authorise, or refuse to authorise, a restrictive practice (both at large and in relation to a specific individual); impose mandatory conditions on the use of restrictive practices (both at large and in relation to a specific individual); give compulsory directions to service providers in relation to the use of restrictive practices; enter any premises upon reasonable notice, interview any personnel, and examine and copy any document about or relating to the use, or suspected use, of a restrictive practice;
- (c) the Senior Practitioner ought to have the following functions: developing standards and guidelines in relation to the use of restrictive practices; developing and delivering professional education in relation to restrictive practices and positive alternatives to restrictive practices; research and development in relation to restrictive practices, and in particular, to positive alternatives to the use of restrictive practices; evaluating and monitoring the use of restrictive practices; developing policy recommendations to government and other relevant bodies about any matter relating to the use of restrictive practices; publication of comprehensive periodic reports detailing the type and incidence of restrictive practices used in NSW;
- (d) legislation regarding restrictive practices ought to provide that certain restrictive practices are entirely prohibited. These should include practices that are experimental; that cause pain or discomfort; that are cruel, inhuman, degrading, or humiliating; that result in emotional or psychological deprivation or other harm; physical restraint; and seclusion; and
- (e) legislation should provide that all forms of restrictive practice not prohibited must be subject to explicit approval, monitoring and review arrangements. Evidence that a restrictive practice has been used contrary to a direction of the Senior Practitioner ought to be designated prima facie proof that the practice is unlawful for the purpose of civil and criminal proceedings.

## **Conclusion**

21. In conclusion, the content of the Bill does not live up to the promise of inclusion suggested by its name. The Bill covers three main areas: the creation of

Disability Plans, the provision of disability services until the full NDIS roll out, and restrictive practices. However, the Bill does not improve or create any new approaches to inclusion for people with disability in these areas. In doing so it restates the status quo and misses the opportunity to establish a framework for real inclusion and participation for people with disability in NSW.

**People with Disability Australia (PWDA) thanks the Department of Family and Community Services for the opportunity to make this submission.**