

# Review of the Disability Act 2006

Consultation paper

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and Housing

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## Minister's foreword

We are reviewing the *Disability Act 2006 (Vic)* following the full rollout of the National Disability Insurance Scheme (NDIS). It is important that Victorian legislation is contemporary and fit-for-purpose for the more than 1.1 million Victorians with disability. I encourage you to get involved in these consultations as we develop amendments to the Disability Act and the next state disability plan.

Victoria has a proud history of leading the nation when it comes to disability policy. The Disability Act transformed our service sector, set up highly regarded safeguards and carried forward important positive measures.

In the first phase of the review in 2019, we changed the Act to pave the way for the NDIS. This second stage of the review brings an opportunity for us to reconsider the Act to ensure it complements the NDIS and drives whole-of-government action.

Victorians value fairness, respect and safety. We are one of Australia's few states with human rights legislation as well as positive duties within our anti-discrimination legislation. Our landmark *Gender Equality Act 2020 (Vic)* has raised the bar when it comes to addressing inequality, particularly in public sector employment.

There is more to do to promote disability equality and pursue disability inclusion. This is particularly the case in helping to create enabling environments and to change negative attitudes. Breaking down barriers and ensuring people with disability can take part and be included in all aspects of our community requires a concerted effort from us all.

Victoria has a small role in providing some continuing disability services and an ongoing role in ensuring appropriate safeguards and protection of rights. This includes upholding residential rights and protections and recognising that people with disability have the right to live independently to be included in their communities and to exercise choice and control over their lives.

We welcome the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability. The royal commission offers a critical opportunity to advocate for improvements to how disability services are delivered across the country. It also gives a much-needed focus on ensuring all Victorians with disability are consistently treated with the dignity and respect that we all deserve and expect. We look forward to continuing to engage with the royal commission to support its critical work.

The voices, experiences and hopes of all Victorians are essential to our review process. I particularly encourage people with disability to have their say about how we should design future disability legislation.

**Hon Luke Donnellan MP**

Minister for Child Protection

Minister for Disability, Ageing and Carers

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## Glossary

**Disability Act** refers to the *Disability Act 2006 (Vic)*

**Disability Royal Commission** means the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability

**UN Convention** means the United Nations Convention on the Rights of Persons with Disabilities

**National disability strategy** refers to the *National disability strategy 2010–2020* and the new national strategy currently under development (*Australia’s disability strategy 2021–2031*)

**NDIS** means the National Disability Insurance Scheme

**NDIS Act** means the *National Disability Insurance Scheme Act 2013 (Cwlth)*

**NDIS Commission** means the NDIS Quality and Safeguards Commission

**SDA** means Specialist Disability Accommodation under the NDIS

**State disability plan** means *Absolutely everyone: state disability plan 2017–2020* and the new state disability plan currently under development.

**The department** refers to the Department of Families, Fairness and Housing.

## How we talk about disability in this paper

Disability is an aspect of identity. We respect peoples’ choice to use identity-first terms when talking about themselves. For example, a person might say ‘I’m autistic’ instead of ‘I’m a person with autism spectrum disorder’. Others might say ‘I’m disabled’ or ‘I’m Deaf’ instead of ‘I’m a person with disability’. We recognise this can be a source of strength and pride.

In this paper we use the term ‘people with disability’ to be consistent with the NDIS Act.

When we talk about definitions in this paper, we mean words that have specific purposes under legislation.

# 1. Introduction

## 1.1. Why is Victoria reviewing the Disability Act?

This consultation paper is about the review of the *Disability Act 2006* (Vic). The Disability Act is an important source of rights and protections.

In 2018 and 2019 we made technical changes to the Act to help with the move to the National Disability Insurance Scheme (the NDIS).

Following the move to the NDIS, Victoria has:

- moved away from most direct delivery of disability services
- given up most regulatory responsibilities for disability services to the NDIS Quality and Safeguards Commission, including most responsibilities of the Disability Services Commissioner, while keeping responsibility for community visitors
- kept functions of the Disability Services Commissioner for disability services that the Department of Families, Fairness and Housing ('the department') provides, funds or contracts including complaint handling, inspection and investigative powers and review of incidents related to abuse, neglect or deaths of people accessing disability services
- kept responsibility for rights and safeguards for people subject to compulsory treatment as well as overseeing the authorisation of restrictive practices in disability services
- set up the Victorian Disability Worker Commission, the Victorian Disability Worker Commissioner and the Disability Worker Registration Board of Victoria through the *Disability Services Safeguards Act 2018* (Vic)
- kept responsibility for forensic disability services and coordinating these services with the state's justice system
- taken on new shared responsibilities to integrate mainstream services with the NDIS as smoothly as possible.

The second stage of the review will consider other changes that are needed after moving to the NDIS. It will also look at how to improve the state's important role in tackling inequality and promoting inclusion.

## Background

The Disability Act replaced the *Intellectually Disabled Persons' Services Act 1986* (Vic) and the *Disability Services Act 1991* (Vic) to provide a stronger whole-of-government and community response to the rights and needs of people with disability within a framework for high quality state-funded services.

The Act carried forward important safeguards and protections such as the community visitor program and set up:

- a protective legal framework for compulsory treatment and a stronger framework for the use of restrictive practices in response to the Victorian Law Reform Commission's 2003 report *People with intellectual disabilities at risk*
- formal mechanisms to promote a strategic whole-of-government approach to increase the participation and inclusion of people with disability in the community
- provisions for an independent ministerial advisory council.

**Appendix 1** has an overview of the Disability Act.

**Appendix 2** is about how the Disability Act works with other laws.

The main elements of the Disability Act include:

- powers and functions relating to monitoring, funding and providing disability services, collection and analysis of data, and development of policies such as priority access to disability services
- registration of disability service providers and monitoring compliance and safety standards
- residential rights, including in group homes
- safeguards and promoting the rights of people subject to compulsory treatment and restrictive practices, including the role and functions of the Senior Practitioner
- the requirement to develop a state disability plan every four years, and for specific public sector agencies to develop disability action plans
- setting up the Disability Services Commissioner, an independent statutory oversight body, to manage complaints and review incidents of abuse and neglect
- the community visitor program gives volunteers the power to visit residential disability services to ensure service providers are giving appropriate support to residents
- setting up the Victorian Disability Advisory Council, which provides advice to the minister and oversees the state disability plan.

The main changes made for the move to the NDIS in the first stage of the review include:

- the Disability Service Safeguards Act, which:
  - provides the Victorian Disability Worker Commission with powers to receive complaints and mandatory notifications, to investigate conduct of disability workers, regardless of how they are funded, and allows the Commissioner to issue prohibition orders and report matters to the NDIS Quality and Safeguards Commission
  - provides for a voluntary registration scheme for disability workers that the Disability Worker Registration Board of Victoria oversees
  - moved residential rights and protections for people living in Specialist Disability Accommodation (SDA) to the *Residential Tenancies Act 1997* (Vic)



- the *Disability (National Disability Insurance Scheme Transition) Amendment Act 2019* (Vic) to allow a smooth transition of regulatory responsibilities and safeguards to the NDIS National Quality and Safeguards Commission on 1 July 2019 and more changes to residential rights.

## 1.2. Scope of the review

The review will need to consider other reforms and developments to ensure the reshaped Disability Act is consistent with:

- Victoria's changing role in direct service delivery, including the state's continuing responsibility to deliver some disability services and ensure support continues for those who previously accessed services under the Act
- changes to how we regulate disability and other social services
- changes to better protect human rights, particularly in compulsory treatment and the justice system, and in the use of restrictive practices
- the need for greater consistency in how supports are provided to people with disability in different service settings
- Victoria's ongoing role in promoting human rights, inclusion and participation.

This paper focuses on several parts of the Disability Act that we need to consider including:

- how the Act promotes inclusion
- the community visitor program
- sections about disability accommodation services and residential rights
- Victoria's legal responsibilities to provide and fund disability services
- the frameworks for compulsory treatment and restrictive practices
- forensic disability services.

The timeline for completing the review includes a Bill to amend the Disability Act which we expect to introduce into parliament in the second half of 2022.

## 1.3. How to contribute

We encourage all Victorians to contribute, particularly:

- people with disability, including young people, and people with disability who are Aboriginal, from culturally and linguistically diverse backgrounds, or who are LGBTIQ+
- people with disability with lived experience of the justice system
- partners, families and carers
- members of the community
- community organisations, statutory bodies and advocates
- service providers and workers

- local governments
- legal experts
- researchers.

There are different ways you can have your say and contribute to the review on the [Engage Victoria website](http://www.engage.vic.gov.au/disability-act) <<http://www.engage.vic.gov.au/disability-act>>.

- You can make a written, video or audio-recording submission.

We will consider all feedback and submissions we receive. We will use this information to develop reform ideas and proposals.

You can submit via the Engage Victoria website or by [emailing the Disability Act Review team](mailto:disabilityactreview@dhhs.vic.gov.au) <[disabilityactreview@dhhs.vic.gov.au](mailto:disabilityactreview@dhhs.vic.gov.au)> or by post to:

Disability Act Review  
Disability and Communities Branch  
Department of Families, Fairness and Housing  
Level 4, 50 Lonsdale Street, Melbourne VIC 3000

Please tell us if you want your submission to be private. It is okay if you want to keep your submission private.

We may publish all the other submissions we receive. We will treat these submissions as public documents. This means members of the public can get copies.

This paper is also available in the following formats on the Engage Victoria website:

- Easy Read
- Auslan
- e-text and audio.

You can also contact the review team to request a braille version.

For more information about the review [email the Disability Act Review team](mailto:disabilityactreview@dhhs.vic.gov.au) <[disabilityactreview@dhhs.vic.gov.au](mailto:disabilityactreview@dhhs.vic.gov.au)> or phone 03 9456 3158 using the National Relay Service 13 36 77 if needed.

## 1.4. Structure of this paper

This paper has three parts.

**1. Introduction** has information about why Victoria is reviewing the Disability Act, the scope of the review, and how you can contribute to the review.

**2. Background** outlines the changing policy landscape, lists recent and ongoing reforms relevant to the review of the Act, and summarises themes from consultations.

**3. Review of the Disability Act** details the key areas of the Act we will review:

- **objectives and principles**
- **definitions**, including 'disability', 'intellectual disability' and 'developmental delay'

- **inclusion mechanisms**, including the state disability plan, disability action plans and the Victorian Disability Advisory Council
- **safeguards and rights protection**, including community visitors, residential rights, restrictive practices and compulsory treatment
- **regulation and oversight**, including forensic disability services and sentencing.

Under each area in part 3, we have included issues for you to consider. We developed these based on:

- consultation feedback
- areas identified for further consideration in the first stage of the review
- the advice of an expert advisory group.

We have included questions at the end of each topic area to help you consider the key issues. The questions are just a guide. You can make comments on other issues or areas of the Act not covered in this paper.

**Appendix 3** has a list of all consultation questions.

## 2. Background

### 2.1. The changing policy landscape

Why can't Victoria become the most disability friendly place in Australia? – City of Greater Bendigo Disability Inclusion Reference Committee

#### United Nations Convention on the Rights of Persons with Disabilities

The United Nations Convention on the Rights of Persons with Disabilities (the UN Convention) came into force in 2008. It led to developing the *National disability strategy 2010–2020* and the NDIS.

The Victorian Government has responsibilities to follow the UN Convention, as well as other international human rights instruments and the *Charter of Human Rights and Responsibilities Act 2006* (Vic). For example, Victoria must report to the Commonwealth every four years on how it has upheld the UN Convention. The UN Convention seeks to:

... promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.<sup>1</sup>

The Charter of Human Rights and Responsibilities Act describes the basic rights and responsibilities of all people in Victoria and reflects the principles of freedom, respect, equality and dignity.

The UN Convention sets out obligations that nations that are parties to the UN Convention must uphold. These obligations cover a wide range of areas, including equality and non-discrimination, accessibility, and the right to live independently and to be included in the community. One of the most important obligations is to recognise that disability is an evolving concept and that disability arises from:

... the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others.<sup>2</sup>

Prominent legal experts have noted that the UN Convention puts forth the right to 'transformative equality'. Australia's NDIS has been described as an example of the

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<sup>1</sup> [Convention on the Rights of Persons with Disabilities](https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html)

<<https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html>>

<sup>2</sup> Ibid.

transformative promise of the UN Convention. More recently, Canada introduced the Accessible Canada Act to progress towards a barrier-free Canada.

## Recent and ongoing reforms

The review of the Disability Act interacts with several related reforms and inquiries recently completed or underway.

### Victoria

- The department is currently undertaking work to reform regulation of the social services safeguarding system. This will involve considering the functions of the Disability Services Commissioner for disability services after the move to the NDIS. The reforms will consider options for keeping an independent disability complaints function within broader social services arrangements.
- A new social services regulatory framework in the Social Services Regulation Bill 2021 was recently introduced into Parliament. The new regulatory scheme is expected to be operational in 2023.
- The Department of Health has begun a review the *Mental Health Act 2014 (Vic)* following the final report of the Royal Commission into Victoria's Mental Health System.
- The Victorian Parliament is conducting an inquiry into Victoria's criminal justice system.
- The Department of Justice and Community Safety is developing a standalone Youth Justice Bill and considering aspects of the *Sentencing Act 1991 (Vic)*.

### National

- The Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability is expected to deliver its final report in the second half of 2023.
- The Royal Commission into Aged Care Quality and Safety delivered its final report in February 2021.
- The national review of the NDIS Act is underway.
- National discussions are taking place on the role of restrictive practices and community visitors under the NDIS.
- Public consultation has been undertaken to inform the next national disability strategy (*Australia's disability strategy 2021–2031*). States and territories have recently agreed to progress the strategy for formal endorsement by governments.

## Consultations

Formed in 2020, the Disability Act Review Advisory Group gives the department advice to guide the second stage of the review.

Graeme Innes AM, Australia's former Disability Discrimination Commissioner, chairs the advisory group. The group includes people with disability, peak bodies, representative organisations and members of the Victorian Disability Advisory Council.

The advisory group developed the following principles for the department to consider when formulating options for reform:

- substantive equality
- freedom from violence, abuse, neglect and exploitation
- dignity and self-determination
- autonomy and empowerment
- diversity and intersectionality
- participation and inclusion
- accountability and transparency.

**Substantive equality** means recognising that inequality and past discrimination has disadvantaged people with disability. It means understanding people with disability may need specific measures to address that disadvantage, rather than simply being treated equally or the same in a formal sense.

**Intersectionality** refers to the ways in which different aspects of a person's identity can expose them to combined forms of discrimination and marginalisation. Other aspects of identity include things like gender, age, Aboriginality, sexual orientation, gender identity, ethnicity, colour and nationality.

## What we have heard so far

Young people with disability have the same hopes and dreams as other young people: enjoying time with their friends, getting a job and moving out of home. – Association for Children with a Disability

We asked for public views about strengthening inclusion under the Disability Act in late 2019 through the *State disability plan 2021–2024 consultation paper*. We held public workshops early in 2020 and then consultations resumed online early in 2021 after being delayed by the pandemic. Throughout this paper we have included quotes from written submissions.

We designed the online forums to capture the ideas and experiences of Victorians with disability. Forum topics included rural and regional issues, the Disability Act, coronavirus, emergency response and preparedness, as well as other important issues including rights, health and wellbeing, and community inclusion.

We also ran targeted stakeholder discussions with peak bodies and people with disability who are Aboriginal, LGBTIQ+ or culturally and linguistically diverse, as well as with young people, people with intellectual disability and people living in residential services.

The next state disability plan is anticipated to be released in December 2021. It will cover the period from 2021 to 2025.

Common themes raised in consultations to date include:

- ensuring a strong human rights approach in the Disability Act, informed by the rights and principles in the UN Convention
- talking about Victoria's conceptual approach to disability in the Act to promote consistency and strengthen accountability across government for disability inclusion
- laying out the vision and principles for the Victorian Government and the community to better understand and address ableism (negative attitudes toward people with disability), and to identify and remove barriers
- collecting consistent and comprehensive data about disability participation in mainstream services to inform and assess policy and the effectiveness of disability strategies and policies informed by lived experience
- acknowledging in the Act the diversity of the needs, views and experiences of people with disability and the connection to other aspects of identity, spirituality, lived experience and cultural background
- strengthening inclusion mechanisms in the Act, for example, by requiring greater accountability and transparency for reporting on and delivering outcomes under the state disability plan and disability action plans
- strengthening the scope and scale of safeguards and rights protections under the Act, including by continuous quality improvement
- acknowledging the importance of advocacy, self-advocacy and supported decision making where needed.

## 3. Review of the Disability Act 2006

### 3.1. Introduction: review of the Disability Act 2006

A review of the [Disability] Act needs to give as much weight as possible to ensuring that employment and career opportunities are available to people with disabilities. – Yarra City Council

In this part of the paper, we outline key areas of the Disability Act. Under each topic area, we give suggestions of issues to consider, reference the relevant sections of the Act, and provide background information to help you understand these parts of the Act.

There may be parts of the Act not included here that you think need reviewing. Let us know if this is the case.

We include questions at the end of each section. You can answer as many or as few as you like. You can also offer comments on other topics or parts of the Act not discussed here.

The topics covered in part 3 include:

- purpose
- objectives and principles
- definitions
- inclusion
  - state disability plan
  - disability action plans
  - Victorian Disability Advisory Council
- safeguards and rights protection
  - community visitors
  - disability accommodation and residential rights
  - restrictive practices
  - compulsory treatment
- forensic disability services and sentencing.

### 3.2. Purpose

It is a basic human right to be accepted by your community. – City of Greater Bendigo Disability Inclusion Reference Committee

Without accessibility there can be no participation – which compounds the forms of exclusion experienced by people with disability. – The Attitude Foundation



The Disability Act includes a purpose statement and objectives that describe what the Act intends to do. The Act includes principles that guide how to interpret it and sets out important rights of people with disability within specified settings and services.

The second stage of the review will consider if these and other aspects of the Act need updating to reflect Victoria's changed role following full rollout of the NDIS. The review will also consider broader social and regulatory changes. This section provides an overview of key definitions and the objectives and principles of the Act.

## Objectives and principles

A human rights approach should be utilised to develop a contemporary description of disability that promotes government and community-wide action and change. – Victorian Healthcare Association

### Key points: Objectives and principles

- The review will consider if the purpose, objectives and principles in the Disability Act remain fit-for-purpose following full rollout of the NDIS.
- More than 1.1 million people with disability live in Victoria. Just over 116,000 of those people are eligible for the NDIS (about 10 per cent).

### Key legislative provisions: Objectives and principles

Refer to Disability Act, Part 1 (Preliminary), Part 2 (Objectives and principles)

### Issues to consider: Objectives and principles

- Most Victorians who accessed services under the Disability Act now get them from the NDIS.
- Approaches to disability have changed since the ratification of the UN Convention and the rollout of the *National disability strategy 2010–2020* and the NDIS.
- Whether the principles in the Act need updating to reflect a more comprehensive and contemporary understanding of disability, such as the understanding of disability and transformative equality within the UN Convention.
- The Act does not include principles for mainstream services that integrate with the NDIS such as education, health, housing, transport and justice.
- Some groups have specific needs and may experience combined disadvantage due to intersectional attributes or aspects of their identity. This could include women, children and young people, Aboriginal people, people from culturally and linguistically diverse backgrounds and people who are LGBTIQ+.
- The Disability Act does not currently include provisions and principles specific to disability advocacy services.

- The Disability Act is not specific about the importance of Aboriginal cultural safety and Aboriginal self-determination, intersectionality or supported decision making for those who need it.

## **Background: Objectives and principles**

### **Purpose and objectives: Objectives and principles**

The Disability Act (s. 1) outlines the main purposes of the Act. This includes providing a legislative scheme for people with disability in Victoria that affirms and strengthens their rights and responsibilities. The Act recognises that this requires support across the government sector and in the community.

We amended the Disability Act in 2019 to include a new stated purpose. This was to provide a mechanism to extend protections to the rights of NDIS participants in Victoria in relation to the use of restrictive practices and compulsory treatment.

The Disability Act (s. 4) describes what the Act intends to achieve. Among others, these objectives are to:

- advance the inclusion and participation of people with disability in the community
- promote a strategic whole-of-government approach to supporting the needs and aspirations of people with disability
- support the delivery of high-quality disability services
- promote and protect the rights of people using services covered by the Act.

### **Principles: Objectives and principles**

Section 5 of the Disability Act has principles to guide interpretation and to help understanding of the Act. The Act describes three sets of principles that concern the rights of people with disability and service provision.

Under s. 5(2) of the Act, people with disability have the same rights and responsibilities as other members of our community. The Act also says people with disability should be empowered to exercise those rights and responsibilities. These include the right to:

- be given respect for their human worth and dignity as individuals
- live free from abuse, neglect or exploitation
- realise their individual capacity for physical, social, emotional and intellectual development
- exercise control over their own lives
- take active part in the decisions that affect their lives and get information and support where necessary to make this happen
- access information and communicate in a way that meets their communication and cultural needs
- services that support their quality of life.

Section 5(3) lists principles for disability services. Service providers should, among other things:

- support the inclusion and participation of people with disability
- be accountable for providing high-quality services
- acknowledge the important role of families and carers and the unique needs of children
- not tolerate or normalise abuse, neglect or exploitation
- uphold the rights, dignity and wellbeing of NDIS participants subject to restrictive practices.

### Questions: Objectives and principles

1. What objectives should the Disability Act have?
2. How could the Act support the UN Convention?
3. How could we improve the principles in the Act?
4. What mechanisms do we need to support the principles in the Act?
5. How could the Act support disability advocacy?

### Definitions

One in five people in Victoria have a disability, however many would not consider a 'disability plan' to be relevant to them due to a narrow understanding of disability. – Surf Coast Shire Council

### Key points: Definitions

- How the Disability Act defines words affects how we interpret different provisions and how the Act relates to other laws.
- The review will consider whether definitions in the Act are fit-for-purpose and reflect a contemporary understanding of disability.
- The Act has important safeguards for people with intellectual disability arising from Victorian Law Reform Commission recommendations.

### Key legislative provisions: Definitions

Refer to Disability Act, ss. 3 and 3A (Definitions).

### Issues to consider: Definitions

- The Disability Act includes provisions for both promoting inclusion and for disability service delivery. However, the Act defines 'disability' only for the purpose of specifying who can get disability services.
- In the Act, the meaning of 'disability' does not include psychiatric impairment, psychosocial disability or cognitive impairment. All other Australian jurisdictions include psychiatric impairment in their disability statutes; half of them also refer to cognitive impairment. Refer to **Appendix 4** for details about the disability legislation in other jurisdictions.

- Separate legislation and policy frameworks in Victoria respond to mental illness.
- ‘Cognitive impairment’ is a term used in the department’s eligibility and access criteria for forensic disability services.
- The definition of ‘disability’ in the Disability Service Safeguards Act refers to impairment that results in a person having substantially reduced functional capacity to undertake social or economic participation, social interaction or learning.
- New South Wales and South Australia have drawn from the UN Convention to create laws and definitions designed to promote disability inclusion.

## Background: Definitions

The Disability Act defines important terms – for example, ‘disability’, ‘intellectual disability’ and ‘developmental delay’. It also defines terms relating to service provision such as ‘residential service’, ‘group home’, ‘residential treatment facility’, ‘disability service’ and ‘disability service provider’.

The Disability Act does not define social terms such as ‘ableism’, ‘barriers’ or ‘inclusion’.

The Disability Act (s. 3) defines ‘disability’ in relation to a person as:

- (a) a sensory, physical or neurological impairment or acquired brain injury or any combination thereof, which—
  - (i) is, or is likely to be, permanent; and
  - (ii) causes a substantially reduced capacity in at least one of the areas of self-care, self-management, mobility or communication; and
  - (iii) requires significant ongoing or long term episodic support; and
  - (iv) is not related to ageing; or
- (b) an intellectual disability; or
- (c) a developmental delay.

Article 1 of the UN Convention holds that disability arises from interactions and barriers and includes people:

... 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.

This definition highlights the need to address inequality and discrimination by focusing on removing barriers and transforming societies.

How the Disability Act defines words affects how we interpret different provisions and how the Act relates to other laws. For example:

- The Sentencing Act relies on the definition of ‘intellectual disability’ in the Act to determine access to specific sentencing conditions.
- In imposing a supervision order under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic), a court considers the availability of services in a ‘residential treatment facility’ or from a ‘disability services provider’ as defined in the Act.

As with any legislative change, if definitions, principles or other aspects of the Act change, the review will need to identify any consequential amendments to other laws. The review will also need to address any potential impacts on access to supports and services.

### Questions: Definitions

6. How could we improve the definitions of ‘disability’, ‘intellectual disability’ and ‘developmental delay’?
7. How should we define ‘disability’ for the purpose of promoting inclusion?
8. What other terms could we define in the Disability Act? For what purpose?

## 3.3. Inclusion

There are three inclusion mechanisms in the Disability Act. The state disability plan is Victoria’s main mechanism for whole-of-government action. Most public sector organisations need to prepare a disability action plan. The Victorian Disability Advisory Council gives advice about disability matters directly to the minister and oversees the state disability plan.

The biggest improvement can be made by better connecting and aligning these separate [inclusion] mechanisms and bodies. Better alignment and enhanced functions should lead to increased accountability and effectiveness. – Office of the Public Advocate

### State disability plan

In order to strengthen disability inclusion under the *Disability Act 2006*, KPIs and reporting on outcomes need to be incorporated into the [state disability] plan. – Blind Citizens Australia

### Key points: State disability plan

- The purpose of the state disability plan is to set goals to help advance the objectives and principles of the Disability Act.
- The Act specifies how often the minister must prepare state disability plans and what these plans should focus on.

- The review provides an opportunity to consider how to strengthen provisions in the Act to include more focus on tackling inequality and promoting inclusion.

### **Key legislative provisions: State disability plan**

Refer to Disability Act, Part 4 (Disability services), Division 1 (General provisions), s. 37 (State disability plan)

### **Issues to consider: State disability plan**

- Whether the Act should include a focus on addressing inequality. Significant disparities exist between Victorians with and without disability.
- The social model of disability underpinning the UN Convention considers that limits on the participation and inclusion of people with disability are not an inevitable result of impairment. They arise due to barriers that are unfair and avoidable, such as inaccessible environments or negative attitudes.
- A key objective of the Disability Act is to promote a strategic whole-of-government approach to participation and inclusion by identifying and removing barriers.
- Principles in the Act focus on human rights. The Act acknowledges that government and community support may be needed for people with disability to exercise those rights.
- Whether the Act could provide opportunities for greater involvement and representation of people with disability in policy processes.
- Recommendations for more consistent and comprehensive data collection about disability participation to inform policy, set goals, measure progress, evaluate efforts and strengthen accountability.
- The state disability plan promotes strategic whole-of-government action and has broad input from other portfolios across government.
- The state disability plan is the principal way through which we implement the national disability strategy in Victoria.

### **Background: State disability plan**

The Disability Act specifies how to prepare a state disability plan. Under the Act, the minister must ensure a state disability plan is prepared every four years. The state disability plan must have goals to help advance the Act's objectives and principles. The state disability plan must also:

- identify the needs of people with disability
- set goals and priorities for the support of people with disability
- identify objectives and policy priorities for developing and delivering services for people with disability
- identify strategies for achieving those objectives and priorities
- consider the different needs of people with different types of disability who may require different strategies.

Some states and territories have introduced legislative requirements for processes to create and report on their state disability plans, including tabling annual reports in parliament. At present, annual reporting is done by agreement with the minister, rather than as a legislative requirement.

*Absolutely everyone: state disability plan 2017–2020* introduced an outcomes framework with four key domains. These domains set out the main areas of daily life where Victoria is seeking to increase participation and inclusion:

- inclusive communities
- health, housing and wellbeing
- fairness and safety
- contributing lives.

There are five key approaches underpinning *Absolutely everyone*:

- universal design
- attitude change
- economic opportunity
- representation
- rights and protections.

**Appendix 5** details the outcomes and indicators developed under *Absolutely everyone*.

As shown in the *Absolutely everyone* annual reports tabled in the Victorian Parliament, the experiences of Victorians with disability differ from the experiences of those without disability. There are significant and enduring differences in outcomes tied to the social determinants of health. For example, Victorians with disability are significantly less likely to:

- be employed,
- go to cultural events and venues
- feel like they have a say within the general community on important issues
- be satisfied with feeling part of the community
- be satisfied with what they are achieving in life.

On the other hand, Victorians with disability are significantly more likely to be in the lowest income distribution. They report not being able to study, living in unaffordable housing and having trouble getting to work due to transport. They are more likely to say they have experienced violence in the past 12 months and report general discrimination and unfair treatment.

### Questions: State disability plan

9. How could we strengthen the Act's provisions for the state disability plan?
10. What should the state disability plan focus on?

11. How could we improve accountability for achieving the state disability plan's goals?
12. How could we improve reporting on the state disability plan?

## Disability action plans

There needs to be some review mechanism including people with disabilities to review progress against state disability plan commitments (and government disability action plans).

– Simon, individual respondent

### Key points: Disability action plans

- Disability action plans aim to drive public sector employment, reduce barriers, promote inclusion and change attitudes and practices that discriminate.
- Most public sector organisations must prepare a disability action plan and report on its implementation in annual reports, including all departments and local governments.
- The Victorian Government has committed to consider aligning the current system of disability action plans to the state disability plan.

### Key legislative provisions: Disability action plans

Refer to Disability Act, Part 4 (Disability services), Division 1, s. 38 (Disability action plans)

### Issues to consider: Disability action plans

- Aligning the current system of disability action plans to ensure they are consistent with and deliver on the state disability plan.
- Some stakeholders have raised that disability action plans often include good principles and aspirations but are not always implemented effectively and that progress against goals is not always reported or easy to find.
- Whether disability action plans should be made available on a public register.
- Disability action plans only apply to prescribed public sector organisations. Regulations under the Act can specify individual public sector organisations.
- The *Equal Opportunity Act 2010* (Vic) includes a positive duty to eliminate discrimination as far as possible and relies on duty holders to uphold it.
- The *Gender Equality Act 2020* (Vic) includes positive duties to adequately resource the development and delivery of gender equality plans and to make meaningful progress towards workplace inclusion goals.
- Whether to strengthen requirements around disability action plans, including positive duties for development, implementation and progress reporting, and compliance provisions



- The alignment of disability action plans to broader diversity and inclusion plans and initiatives, particularly plans required by other laws such as the Gender Equality Act.

## **Background: Disability action plans**

Disability action plans aim to drive public sector employment, reduce barriers, promote inclusion and change attitudes and practices that discriminate. Section 38 of the Disability Act requires that public sector bodies prepare a disability action plan to:

- reduce barriers to people with disability accessing goods, services and facilities
- reduce barriers to people with disability getting and keeping a job
- promote inclusion and participation of people with disability in the community
- achieve tangible changes in attitudes and practices that discriminate against people with disability.

Under the Act, certain public sector bodies must prepare a disability action plan unless they are entitled to an exemption. This includes government departments and other agencies, local governments and several public health services.

Organisations that prepare a disability action plan must report on its implementation each year in annual reports. The Act does not specify how often a disability action plan must be prepared. It does not distinguish between the roles and responsibilities of organisations in relation to the purpose of the plan. Some organisations have disability action plans that focus only on internal measures around creating more inclusive workplaces. Other organisations also focus on the goods and services they provide.

Some other states and territories have set up legislative requirements to consult with people with disability when preparing disability plans.

The Victorian Government has committed to consider aligning the current system of disability action plans to ensure disability action plans are consistent with, and deliver on, the state disability plan. An example of this approach was the disability action plan for the former Department of Health and Human Services.

In some instances, organisations choose to meet their disability action plan requirements as part of broader diversity and inclusion plans.

## **Questions: Disability action plans**

13. How could we strengthen the Act's provisions for disability action plans?
14. Who should be required to have a disability action plan?
15. What should a disability action plan focus on?
16. How could we improve accountability for achieving the goals of a disability action plan?
17. How could we improve reporting on disability action plans?

## Victorian Disability Advisory Council

### Key points: Victorian Disability Advisory Council

- The Victorian Disability Advisory Council is an independent ministerial advisory body.
- The council's functions include identifying barriers and monitoring the implementation of disability plans and strategies, among other consultative responsibilities.
- The Disability Act requires that most council members are people with disability and that the council submits an annual report to the minister.

### Key legislative provisions: Victorian Disability Advisory Council

Refer to Disability Act, Part 3 (Administration), Division 2 (Victorian Disability Advisory Council), ss. 11, 12 and 13.

### Issues to consider: Victorian Disability Advisory Council

- The disability community has a motto of 'nothing about us, without us'.
- We have heard it is important that the Victorian Disability Advisory Council has visibility and status across Victoria to lead and influence consultations about disability.
- Whether to create requirements or duties to form disability advisory committees and to involve those groups in co-design and independent monitoring of disability plans.
- We have heard it is important for departments and local governments to regularly report, assess and reflect on performance with independent oversight from people with disability.
- Whether relationships between the UN Convention, the new national disability strategy, the state disability plan, the Victorian Disability Advisory Council and local advisory committees and/or peer support groups should be set out in the Act.

### Background: Victorian Disability Advisory Council

The Victorian Disability Advisory Council is an independent advisory body set up under the Disability Act. It gives advice to the minister about strategic policies and barriers to inclusion and participation.

Section 11 of the Act outlines how to appoint members and provides that the council must have at least eight and no more than 14 members. The Act requires the minister to ensure most members are people with disability that reflect the diversity of disability and the cultural backgrounds of Victorians, including Aboriginal people. Members must also have relevant skills, knowledge and experience and, where possible, personal experience of disability.

The Disability Act (s. 12) outlines the functions of the Victorian Disability Advisory Council to:

- provide advice to the minister about:
  - whole-of-government policy directions and strategic planning and the implementation of initiatives for people with disability
  - the barriers to full inclusion and participation in the community of people with disability and strategies for removing those barriers
  - any matter relating to disability referred by the minister
- effectively communicate with people with disability, the Victorian Government and the community
- raise community awareness of the rights of people with disability and the role of government, the business sector and the community in promoting those rights
- consult and work with other disability advisory councils or bodies at the state, national or local government level
- track the rollout of strategies for promoting inclusion and participation in the community of people with disability and for removing barriers to inclusion and participation.

Section 13 of the Act covers governance and how to appoint and remove members. Council members are entitled to payment fixed by the Governor-in-Council under the Act. The minister must appoint one of the members to be the chairperson.

### **Questions: Victorian Disability Advisory Council**

18. What should the Victorian Disability Advisory Council focus on?
19. How could we improve the role and functions of the Victorian Disability Advisory Council?
20. How could we improve the membership requirements for the Victorian Disability Advisory Council?

## **3.4. Safeguards and rights protection**

The Disability Act has important safeguards and its principles affirm the rights and responsibilities of people with disability. Although the NDIS Commission oversees NDIS-funded services, Victoria retains a critical safeguarding role to do with community visitors, residential rights, the authorisation of restrictive practices and compulsory treatment.

The review of the Disability Act presents an opportunity to improve consistency and equity of access to safeguarding arrangements for all people with a disability where the state of Victoria continues to have responsibility. – Traffic Accident Commission

## Community visitors

### Key points: Community visitors

- Community visitors are volunteers who play a unique and vital role in safeguarding the human rights and wellbeing of people with disability.
- Community visitors conduct unannounced visits to check and report on the standard and adequacy of the accommodation and supports provided to residents.

### Key legislative provisions: Community visitors

*Refer to Disability Act, Division 6 (Community visitors), Part 3 (Administration)*

### Issues to consider: Community visitors

- The Victorian Parliament receives findings from community visitors each year. These reports have helped to protect vulnerable Victorians from abuse, neglect and exploitation.
- Since moving to the NDIS, community visitors are not always aware that a new disability accommodation service has been set up.
- Whether community visitors should only visit disability accommodation services or have powers to visit people who are vulnerable regardless of where they get services.
- Whether the powers and functions of community visitors are adequate to safeguard people living in disability accommodation post transition to the NDIS.
- Whether the powers of the Public Advocate under the Act are adequate to provide safeguards for people with disability where community visitors have identified that someone may be vulnerable to violence, abuse, neglect or exploitation.

### Background: Community visitors

Community visitors can enter a residential service or NDIS disability accommodation as defined by the Act. Once there, they can talk to residents, look at documents and observe and report on the accommodation and support provided to residents. Their role is to visit and enquire into:

- the suitability and standard of the accommodation for residents
- if residents have opportunities for inclusion and participation in the community
- whether the service complies with the principles in s. 5 of the Act
- whether residents receive information as required under the Act
- any case of suspected abuse or neglect of a resident
- the use of restrictive practices and compulsory treatment
- any failure to follow the requirements of the Act
- any complaint made to a community visitor by a resident.

**Appendix 6** has more background about community visitors.

The Department of Social Services conducted a national review of community visitor schemes for disability when developing the NDIS Quality and Safeguarding Framework. It found that the schemes complement and strengthen the framework because they allow independent monitoring of the services that residents receive.

When the Act was reviewed in 2019, changes were made so that community visitors can visit long- and short-term NDIS-funded disability accommodation. Community visitors can also share information about any concerns with the NDIS Quality and Safeguards Commission. Since that time the National Disability Insurance Agency has introduced funding for some new forms of accommodation that community visitors do not have the power to visit.

People access services in a range of settings under the NDIS, including in their own private homes. This raises the issue of whether community visitors should only visit certain accommodation sites or if they should visit more vulnerable people regardless of the service location. However, this raises further issues about the right to privacy, the assumption of capacity and the need to seek consent and support decision making. This must all be balanced with the right to be free from abuse, neglect and exploitation.

### **Questions: Community visitors**

21. What should the role and powers of community visitors be within the changed NDIS service environment?
22. How could the Disability Act support community visitors to know about places they can visit?
23. What principles should apply to the role of community visitors when conducting visits?

### **Residential rights**

The Act provides important protections for people with disability, with considerable work undertaken to protect the housing and tenancy rights of people within specialist disability accommodation settings and group homes in the transition to the NDIS, but appropriate safeguards should be more widely available to people with disability who are not eligible for SDA or the NDIS. – Haven; Home, Safe

The Act largely relates to people with disability in institutional or specialist settings, without adequately addressing mainstream and community service settings. – Haven; Home, Safe

## Key points: Residential rights

- The Disability Act gives residential rights and protections for people living in certain disability accommodation services that are exempt from the Residential Tenancies Act.
- Specialist forensic disability accommodation services must meet the requirements of the Disability Act (Part 5, Division 1). These requirements give general residential rights and protections but were not specifically designed for this purpose.
- Most disability accommodation services are now regulated under the NDIS Act. Rights and protections for SDA residents are provided under the Residential Tenancies Act (refer to **Appendix 7** for details).
- NDIS transition issues have resulted in many residents not being able to move from group home provisions under the Disability Act to the SDA residential rights under the Residential Tenancies Act.

## Key legislative provisions: Residential rights

*Refer to Disability Act, Part 5 (Residential services), Division 1 (General provisions) and Division 2 (Group homes).*

*Refer to Residential Tenancies Act, Part 2 (Residential tenancies – residential rental agreements) and Part 12A (Specialist Disability Accommodation).*

## Issues to consider: Residential rights

- An aim of the NDIS is to separate housing and day-to-day supports to safeguard against participants getting all services from a single provider or single support worker.
- As the NDIS matures, it is expected that more participants will access housing and independent living supports from a range of registered and non-registered providers through the open market.
- Residential rights and protections include residents having clear information about:
  - what is being provided by the service
  - charges and fees
  - how to make a complaint or see a community visitor
  - access to supports when issues arise in their homes, for example, in relation to repairs, disputes and issues with other residents.
- There may be a need for tailored legislative provisions in the Disability Act for people accessing Specialist forensic disability accommodation to reflect the specialist nature of this support provision.
- NDIS transition issues have emerged which have delayed moving some group homes to arrangements under the Residential Tenancies Act. Residential rights under the Disability Act have been kept as an interim safeguarding measure.

## Background: Residential rights

Part 5 of the Disability Act sets out residential rights and protections for people living in certain disability accommodation services that are exempt from the Residential Tenancies Act such as specialist forensic disability accommodation.

Division 1 of Part 5 allows for accommodation services to operate where long-term residency rights are not applicable – for example, transitional or respite services. This Division provides some residential rights for specialist forensic disability accommodation, but it was not designed for this purpose. More specific rules may be needed in the Disability Act for regulating tightly supervised accommodation where residents may be subject to restrictions to protect the community. Refer to **Appendix 7** for more background.

Division 2 of Part 5 outlines residential rights and protections for people who live in longer-term disability accommodation (known as group homes). The minister can declare a place to be a group home in the *Government Gazette* and extend these residential rights and protections to that place.

Most NDIS participants who live in group homes have their residential rights protected by new rules for Specialist Disability Accommodation in the Residential Tenancies Act. Some residents in group homes have not been able to move to the new protections due to NDIS transition issues. Until all people in group homes can transition to the new protections, these residents continue to have residential rights under the Disability Act.

## Questions: Residential rights

24. How could we improve residential rights protections in group homes?
25. What should specific rules in the Disability Act for specialist forensic disability accommodation include?
26. Are there any other types of emerging or existing residential services that may require the safeguards under the Disability Act (Part 5, Division 1)?
27. What options should we consider to address new types of long-term supported disability accommodation in which 'around the clock' support is provided and that do not meet the requirements for residential rights protections under Part 12A of the Residential Tenancies Act?

## Restrictive practices

### Key points: Restrictive practices

- Restrictive practices restrict a person's human rights or freedom of movement.
- The Disability Act uses definitions in the NDIS Rules to define regulated restrictive practices such as seclusion, and chemical, mechanical, physical and environmental restraints.

- These practices may only be used to prevent a person harming themselves or another person. They must be the least restrictive option possible in the circumstances and meet all the requirements of the Act.
- The Act includes authorisation processes that disability service providers and registered NDIS providers must follow in their use of a regulated restrictive practice.

### **Key legislative provisions: Restrictive practices**

*Refer to Disability Act, Part 6B (Use of restrictive practices by registered NDIS providers) and Part 7 (Use of restrictive practices by disability service providers).*

### **Issues to consider: Restrictive practices**

- Whether the Act's authorisation process for the use of restrictive practices can be strengthened, particularly the role of the independent person.
- The Act currently has separate rules for the authorisation of restrictive practices by registered NDIS providers and non-NDIS disability service providers.
- The Act has penalties for disability service providers using restrictive practices in a way that is not authorised. The penalties do not apply to registered NDIS providers.

### **Background: Restrictive practices**

The Disability Act regulates the use of restrictive practices by disability service providers. It includes approval, authorisation, prohibition and reporting requirements. Refer to **Appendix 8** for more background.

The NDIS Commission regulates restrictive practices for NDIS providers. Victoria remains responsible for authorising and prohibiting these practices for NDIS providers.

The Victorian framework for restrictive practices specifies a range of criteria to be met for authorisation including that it is the least restrictive option to prevent harm to the person or others. Regulated restrictive practices must be included in a behaviour support plan. The authorisation process requires:

- authorisation by an authorised program officer
- additional approval by the Victorian Senior Practitioner for specific restrictive practices including seclusion, mechanical restraint and physical restraint
- an independent person to explain restrictive practices to the person concerned and to tell the person about their right to ask for a review by the Victorian Civil and Administrative Tribunal. The independent person can also report concerns to the Public Advocate or to the Victorian Senior Practitioner.

The Victorian Senior Practitioner can prohibit the use of restrictive practices, provide directions to service providers, undertake audits and investigate issues. To date, neither the Public Advocate nor the Victorian Senior Practitioner have received any reports of concerns from an independent person.



## Questions: Restrictive practices

28. How could the authorisation model be more consistent?
29. How could we strengthen the authorisation model?
30. How could we improve the role of the independent person?
31. Should the Act include penalties for NDIS providers who do not follow the requirements?

## Compulsory treatment

Treatment plans are complex and long documents that can be difficult to understand and comprehend. – Victoria Legal Aid

### Key points: Compulsory treatment

- Compulsory treatment is in the Disability Act to safeguard a small number of people detained in residential services for treatment. The Act covers people:
  - admitted to a residential treatment facility under an order for treatment (such as a custodial supervision order under the Crimes (Mental Impairment and Unfitness to be Tried) Act
  - subject to a supervised treatment order (a civil order for a person living in a disability residential service in the community).
- Compulsory treatment applies only to people with an intellectual disability under the Act.

### Key legislative provisions: Compulsory treatment

*Refer to Disability Act, Part 8 (Compulsory treatment)*

### Issues to consider: Compulsory treatment

- We have heard that a service safety net is needed to address any gaps between the NDIS and mainstream services. This is especially the case for people with complex needs involved with the criminal justice system.
- We have heard that compulsory treatment plans should have clearer lines of accountability and include more detailed transition processes. Stakeholders also suggested that plans should be created in accessible formats that enable meaningful participation and be provided in a timely manner.
- The Disability Act does not specify a maximum period for which a person can be subject to successive supervised treatment orders.

### Background: Compulsory treatment

Compulsory treatment is in the Disability Act to safeguard the small number of people with an intellectual disability who pose a significant risk of serious harm to others. It

relates to people detained in disability residential services for treatment. The aim of compulsory treatment is to:

- reduce the risk of harm posed to others
- avoid entry or re-entry to the criminal justice system
- enable the person to improve their quality of life and increase their opportunities for community participation.

The Disability Act aims to give more transparency and accountability for service providers through clear requirements and oversight of these practices. The Disability Act covers both civil and criminal orders to ensure a robust framework for compulsory treatment. This treatment was previously provided primarily through community orders or guardianship and was subject to inquiry by the Victorian Law Reform Commission. Refer to **Appendix 9** for more background.

### **Residential treatment facilities**

Section 152 of the Act describes the criteria for admission to a residential treatment facility. These include a requirement that the Secretary is satisfied:

- the person has an intellectual disability
- the person is subject to a relevant order
- there is suitable treatment available for that person.

The Disability Act also requires that the Secretary operates residential treatment facilities through the department.

### **Supervised treatment orders**

Supervised treatment orders are civil orders made by the Victorian Civil and Administrative Tribunal under s. 191 of the Act. Supervised treatment orders allow the compulsory treatment of people with an intellectual disability who have displayed a pattern of violent or dangerous behaviour. They apply where there is a significant risk of serious harm to another person that cannot be substantially reduced any other way.

A supervised treatment order can be made for up to 12 months. However, the Disability Act does not specify a maximum period for which a person can be subject to successive orders. Any applications for a new order must still meet all criteria under the Disability Act.

### **Questions: Compulsory treatment**

32. Should the criteria for admission to a residential treatment facility for compulsory treatment be reconsidered to cover people who do not meet the current criteria in s. 152 of the Disability Act?
33. Should supervised treatment orders continue to be an option for people who have previously displayed a pattern of violent or dangerous behaviour, and where there is a significant risk of serious harm to another person?

If yes, should we expand or strengthen the scope or requirements for supervised treatment orders? Should the Disability Act limit the time that a person can be subject to a supervised treatment order?

- (a) If yes, what should happen if a person continues to require treatment and presents a significant risk of serious harm to others?
- (b) If no, are there any other legislative safeguards that could be provided at particular points in time?

### 3.5. Forensic disability services and sentencing

In the current Disability Act 2006 review, the [Centre for Innovative Justice] recommends similar principles to the state disability plan – to meaningfully engage and consult with people with disability with lived experience of the justice system. – Centre for Innovative Justice

Conflict between co-residents in some forms of disability accommodation is a significant issue, and one where there are currently limited responses available to accommodation providers and police. – Centre for Innovative Justice

#### Key points: Forensic disability services and sentencing

- Victoria has an ongoing role in funding, regulating and safeguarding forensic disability services and supports following full rollout of the NDIS.
- There is no overarching framework specific to forensic disability services in the Disability Act.
- Forensic disability services provide specialised support and treatment to people with disability involved in the criminal justice system. The scope of these services is limited.
- The Sentencing Act and the *Children, Youth and Families Act 2005* use definitions in the Disability Act for specific sentencing conditions.
- For people subject to supervision orders under the Crimes (Mental Impairment and Unfitness to be Tried) Act, access to services in a 'residential treatment facility' or from a 'disability services provider' rely on meeting the definition of 'disability' under the Disability Act.

#### Key legislative provisions: Forensic disability services and sentencing

Refer to Disability Act, Part 3 (Definitions), Part 5 (Residential services), Part 8 (Compulsory treatment).

## Issues to consider: Forensic disability services and sentencing

- Aboriginal people and people with cognitive impairments are over-represented in the criminal justice system.
- Effective and holistic service design and delivery is needed for people with disability involved in the justice system, particularly those with cognitive impairments.
- People with an intellectual disability or other cognitive impairment can be held in custody for an extended period while waiting for their case to be heard under the Crimes (Mental Impairment and Unfitness to be Tried) Act.
- Whole-of-government arrangements need to be considered to provide effective justice system responses as well as intergovernmental arrangements to deliver disability supports to NDIS participants on civil or criminal orders.
- People with cognitive impairments can struggle to meet the conditions of community orders, where there is a lack of support and understanding of their disability-related needs. More targeted supports would allow better access to treatment and services more suited to their needs.
- Justice plans and plans of services must be developed in line with the principles and objectives of the Disability Act.
- Justice plans issued under the Sentencing Act include a plan of available services designed to reduce the likelihood of the person committing further offences. Victoria cannot guarantee the availability of services provided through the NDIS. The scope of state-funded forensic disability supports regulated under the Disability Act is now limited to supports that address criminogenic needs and that are not otherwise covered by the NDIS. This consideration also applies to developing plans of services for young people with intellectual disability under the Children, Youth and Families Act.

### Background: Forensic disability services

Current access criteria for forensic disability services require that a person has a cognitive impairment, such as intellectual disability within the meaning of the Disability Act, and that the person requires forensic disability support and treatment. Forensic disability services are only available to people:

- subject to orders, or who are being considered for orders, under the Sentencing Act, the Children, Youth and Families Act or the Crimes (Mental Impairment and Unfitness to be Tried) Act for whom the Secretary of the department has a legal responsibility, or
- on parole, bail, supervised treatment orders under the Disability Act, or orders under the *Serious Offenders Act 2018* (Vic); or engaging in high-risk offending behaviours and/or high-risk behaviours of concern that place them at significant risk of interaction with the criminal justice system.

The term 'cognitive impairment' in the department's access criteria for forensic disability services refers to the functional impairment of a person who:

- presents with subaverage cognitive functioning
- presents with subaverage adaptive behaviour
- meets the definition of disability in the Disability Act.

Cognitive impairment can present as part of an intellectual disability, an acquired brain injury or a neurological impairment.

The Disability Act does not legislate specific access criteria for forensic disability services. The department makes access decisions in line with access to disability services more broadly. Access to forensic disability services may be prioritised by considering the person's needs, the availability and suitability of services to meet those needs, and the overall impact on community safety. Refer to **Appendix 10** for more background.

### **Justice plans and plans of services**

The Sentencing Act provides the option of a justice plan to direct that a person with an intellectual disability takes part in the services designed to meet their individual circumstances and specified in the plan. Currently, about 58 per cent of people receiving services within the Forensic Disability Program have a justice plan.

The justice plan is intended to reduce the likelihood of the person reoffending by engaging them in available services adjusted to meet their disability-related needs. A justice plan is only available for a person with an 'intellectual disability' as defined in the Disability Act. A person must comply with the justice plan condition as part of their criminal order.

Conditions within justice plans must align with the objectives and principles in the Disability Act. Under the Sentencing Act, a disability justice coordinator can submit a justice plan to a court. A disability justice coordinator can advise the court to include NDIS-funded services where available and appropriate as part of a justice plan. Refer to **Appendix 11** for more background.

### **Integration of NDIS and forensic disability services**

Under agreements with the Commonwealth, state-based service offerings must integrate with NDIS service delivery. However, the transition to the NDIS has meant that Victoria has less ability to integrate arrangements for forensic disability supports with those for general disability supports, which are now delivered through NDIS providers.

The NDIS is a voluntary scheme. It is also a market-based system that relies on enough supply of qualified service providers within the market for NDIS participants to access them. In some cases, the NDIS may be responsible to fund reasonable and necessary supports that may affect a participant's compliance with the conditions of a criminal or civil order. However, it may not be able to guarantee that NDIS service organisations will provide these supports.

## Questions: Forensic disability services and sentencing

34. How could we improve the link between criminal orders and a person's engagement with disability services, and how should advice on this be provided to the courts? Do you think this is best supported through legislation or other means?
35. Currently the Disability Act includes only general access criteria for disability services. What should be the specific criteria to access forensic disability services? Are the current criteria appropriate?

# Appendices

## 1. Overview of the Disability Act

Part	Description
1	<p>Sets out the purpose of the legislation and includes definitions of terms. The main purposes of the Act are:</p> <ul style="list-style-type: none"> <li>to provide a legislative scheme for persons with a disability which affirms and strengthens their rights and responsibilities, and which is based on the recognition this requires support across the government sector and within the community</li> <li>to provide a mechanism by which NDIS participants' rights are protected in relation to the use of restrictive practices and compulsory treatment.</li> </ul>
2	<p>Offers guidance for interpreting the Act and lists three broad sets of principles:</p> <ul style="list-style-type: none"> <li>reinforcing the human rights of people with disability</li> <li>guiding principles that disability service providers must follow</li> <li>specific principles and assessment criteria for people with intellectual disability.</li> </ul>
3	<p>Sets out the roles, functions and powers of the Secretary of the Department of Families, Fairness and Housing, Victorian Disability Advisory Council, Disability Services Commissioner, Disability Services Board, Senior Practitioner and community visitors.</p>
4	<p>Regulates mechanisms for promoting disability inclusion, including the state disability plan and disability action plans.</p> <p>Deals with the registration and regulation of disability service providers. Sets standards for information systems, information sharing and disclosure.</p>
5	<p>Promotes the rights and responsibilities of people in residential services and imposes specific obligations on service providers.</p>
6	<p>Monitors the quality of disability services, sets standards and performance measures, and provides compliance powers.</p> <p>Provides for a complaints system with both internal and independent complaint mechanisms.</p> <p>Makes rules for authorising and using restrictive practices on people with disability (whether NDIS participants or not).</p>
6A	<p>Regulates the appointment of authorised program officers by registered NDIS providers if they intend to use restrictive practices or compulsory treatment on NDIS participants.</p>
6B	<p>Regulates the use of restrictive practices by NDIS providers on NDIS participants who have NDIS behaviour support plans but are not subject to compulsory treatment.</p>

Part	Description
7	<p>Governs the use of restrictive practices by disability service providers on:</p> <ul style="list-style-type: none"> <li>• people receiving disability services</li> <li>• NDIS participants who do not have NDIS behaviour support plans</li> <li>• children and people with disability placed in out-of-home care under the <i>Children, Youth and Families Act 2005</i> who are not subject to compulsory treatment.</li> </ul>
8	<p>Regulates restrictive practices in relation to people with disability subject to compulsory treatment.</p> <p>Provides for compulsory treatment of people with intellectual disability and admission to residential treatment facilities. Describes three categories for residents subject to compulsory treatment:</p> <ul style="list-style-type: none"> <li>• security residents – people with intellectual disability who are transferred from a prison by a security order made under s. 166 of the <i>Disability Act 2006</i></li> <li>• forensic residents – people with intellectual disability detained in prison under the <i>Crimes (Mental Impairment and Unfitness to be Tried) Act 1997</i> and transferred to residential treatment facilities as forensic residents</li> <li>• people subject to supervised treatment orders – civil orders for a disability service provider or a registered NDIS provider to detain a person with an intellectual disability who poses a significant risk of serious harm to others.</li> </ul> <p>Regulates the use of restrictive practices in relation to people with intellectual disability subject to compulsory treatment under Divisions 6 and 7.</p>
9	<p>Addresses issues not covered elsewhere in the Act such as:</p> <ul style="list-style-type: none"> <li>• not defacing documents</li> <li>• special powers of the Secretary of the Department of Families, Fairness and Housing</li> <li>• the role and powers of authorised officers.</li> </ul>
10	<p>Facilitates the transition to the NDIS.</p>



## 2. How the Disability Act works with other Acts

Act	Relevance to the Disability Act
<i>Disability Service Safeguards Act 2018</i> (Vic)	<p>Establishes the Victorian Disability Worker Commission, Victorian Disability Worker Commissioner and Disability Worker Registration Board of Victoria. It provides for:</p> <ul style="list-style-type: none"> <li>• a voluntary registration scheme for disability workers</li> <li>• regulation of all disability workers in Victoria and requires disability workers to comply with the Disability Service Safeguards Code of Conduct</li> <li>• a complaints handling, mandatory notification and investigative mechanism in relation to Victorian disability workers.</li> </ul> <p>Empowers the Commissioner to prohibit disability workers from practising where their conduct gives rise to a serious risk of harm or abuse to people with disability.</p> <p>Authorises disclosure of protected information with relevant entities.</p> <p>The definition of ‘disability’ is broader than that in the Disability Act. It includes impairment that results in a person having substantially reduced functional capacity to undertake social or economic participation, social interaction or learning.</p>
<i>Charter of Human Rights and Responsibilities Act 2006</i> (Vic)	<p>Preamble recognises that ‘human rights are essential in a democratic and inclusive society that respects the rule of law, human dignity, equality and freedom’.</p> <p>Section 7(2) sets out the conditions for limiting the human rights of a person in Victoria. A limitation must be reasonable and justifiable, taking into account, among other things, whether any less restrictive means are reasonably available to achieve the purpose of the limitation.</p>
<i>Equal Opportunity Act 2010</i> (Vic)	<p>Key objectives to ‘eliminate discrimination, sexual harassment and victimisation, to the greatest extent possible’ and to ‘further promote and protect the right to equality’ (Part 1, s. 3(a)(b)).</p> <p>Includes positive duties to reduce discrimination; describes substantive equality and special measures; requires reasonable adjustments to be made.</p>
<i>Disability Discrimination Act 1992</i> (Cwlth)	<p>Makes it unlawful to discriminate against a person based on their disability.</p>
<i>Guardianship and Administration Act 2019</i> (Vic)	<p>Allows the Victorian Civil and Administrative Tribunal to appoint a guardian or an administrator for a person with disability on the basis that a person lacks decision-making capacity. There must be no alternative, less restrictive options. It includes principles about assuming capacity, seeking consent and supporting decision making.</p>

Act	Relevance to the Disability Act
<i>National Disability Insurance Scheme Act 2013</i> (Cwlth)	Determines whether a person is eligible to access the NDIS and reasonable and necessary supports to achieve goals.
<i>Residential Tenancies Act 1997</i> (Vic)	Includes residential tenancy protections for people living in Specialist Disability Accommodation in Victoria.
<i>Sentencing Act 1991</i> (Vic)	Relies on the definition of 'intellectual disability' in the Disability Act to provide access to special conditions for offenders with intellectual disability.
<i>Crimes (Mental Impairment and Unfitness to be Tried) Act 1997</i> (Vic)	<p>In imposing a supervision order, a court considers the availability of services in a 'residential treatment facility' or from a 'disability services provider' as defined in the Disability Act. The access criteria for these services rely on meeting the definition of 'disability' under the Disability Act.</p> <p>Requires the Secretary of the department to take on a supervisory role in relation to certain people, including those with a 'disability' as defined by the Disability Act, who have been found liable for supervision. This can include detaining a person in a 'residential treatment facility'.</p>
<i>Children, Youth and Families Act 2005</i> (Vic)	Allows a court that is sentencing a child to direct that the child take part in disability services if the Secretary advises that the child has an intellectual disability.
<i>Serious Offenders Act 2018</i> (Vic)	A person subject to a supervision order under this Act can be considered for admission to a residential treatment facility. However, there is no requirement under that legislation for the Secretary to take on a supervisory role.

### 3. List of consultation questions

#### Objectives and principles

1. What objectives should the Disability Act have?
2. How could the Act support the UN Convention?
3. How could we improve the principles in the Act?
4. What mechanisms do we need to support the principles in the Act?
5. How could the Act support disability advocacy?

#### Definitions

6. How could we improve the definitions of 'disability', 'intellectual disability' and 'developmental delay'?
7. How should we define 'disability' for the purpose of promoting inclusion?
8. What other terms could we define in the Disability Act? For what purpose?

#### State disability plan

9. How could we strengthen the Act's provisions for the state disability plan?
10. What should the state disability plan focus on?
11. How could we improve accountability for achieving the state disability plan's goals?
12. How could we improve reporting on the state disability plan?

#### Disability action plans

13. How could we strengthen the Act's provisions for disability action plans?
14. Who should be required to have a disability action plan?
15. What should a disability action plan focus on?
16. How could we improve accountability for achieving the goals of a disability action plan?
17. How could we improve reporting on disability action plans?

#### Victorian Disability Advisory Council

18. What should the Victorian Disability Advisory Council focus on?

19. How could we improve the role and functions of the Victorian Disability Advisory Council?
20. How could we improve the membership requirements for the Victorian Disability Advisory Council?

### **Community visitors**

21. What should the role and powers of community visitors be within the changed NDIS service environment?
22. How could the Disability Act support community visitors to know about places they can visit?
23. What principles should apply to the role of community visitors when conducting visits?

### **Residential rights**

24. How could we improve residential rights protections in group homes?
25. What should specific rules in the Disability Act for specialist forensic disability accommodation include?
26. Are there any other types of emerging or existing residential services that may require the safeguards under the Disability Act (Part 5, Division 1)?
27. What options should we consider to address new types of long-term supported disability accommodation in which 'around the clock' support is provided and that do not meet the requirements for residential rights protections under Part 12A of the Residential Tenancies Act?

### **Restrictive practices**

28. How could the authorisation model be more consistent?
29. How could we strengthen the authorisation model?
30. How could we improve the role of the independent person?
31. Should the Act include penalties for NDIS providers who do not follow the requirements?

### Compulsory treatment

32. Should the criteria for admission to a residential treatment facility for compulsory treatment be reconsidered to cover people who do not meet the current criteria in s. 152 of the Disability Act?
33. Should supervised treatment orders continue to be an option for people who have previously displayed a pattern of violent or dangerous behaviour, and where there is a significant risk of serious harm to another person?
- If yes, should we expand or strengthen the scope or requirements for supervised treatment orders? Should the Disability Act limit the time that a person can be subject to a supervised treatment order?
- (a) If yes, what should happen if a person continues to require treatment and presents a significant risk of serious harm to others?
- (b) If no, are there any other legislative safeguards that could be provided at particular points in time?

### Forensic disability services and sentencing

34. How could we improve the link between criminal orders and a person's engagement with disability services, and how should advice on this be provided to the courts? Do you think this is best supported through legislation or other means?
35. Currently the Disability Act includes only general access criteria for disability services. What should be the specific criteria to access forensic disability services? Are the current criteria appropriate?

## 4. Comparison of the Disability Act with legislation in other jurisdictions

Governments in New South Wales and South Australia reviewed their legislation following the rollout of the NDIS. This led to the *Disability Inclusion Act 2014* (NSW) and the *Disability Inclusion Act 2018* (SA).

The table below provides a brief comparison of the Disability Act with select areas of the following laws in other states and territories. These laws may be subject to further review by those jurisdictions:

- *Disability Inclusion Act 2018* (SA)
- *Disability Inclusion Act 2014* (NSW)
- *Disability Services Act 2011* (Tas)
- *Disability Services Act 2006* (Qld)
- *Disability Services Act 1993* (NT)
- *Disability Services Act 1993* (WA)
- *Disability Services Act 1991* (ACT).

Topic	Victoria	Other jurisdictions
Objectives	Service delivery and rights protection	NSW and SA include objectives in legislation to support the UN Convention.
Definitions	Clinical definitions of 'disability' and 'intellectual disability' for access criteria	All other Australian jurisdictions include psychiatric impairment in the definition of 'disability'. Half of them also refer to cognitive impairment.  NSW and SA definition of 'disability' is aligned with the UN Convention for the purposes of promoting inclusion.  Tas harmonises the definitions with those of the NDIS Act.

Topic	Victoria	Other jurisdictions
Principles	General principles of human rights and specific principles for people with an intellectual disability	<p>All jurisdictions have general principles of human rights.</p> <p>NSW and SA adopt specific principles for more vulnerable groups (such as women, children and Aboriginal people).</p> <p>Tas aligns principles with the NDIS Act and with the UN Convention, including advocacy.</p> <p>The NT Act focuses on the therapeutic needs of people with disability and therefore includes principles for treatment and care.</p>
State disability plan	Minister responsible for developing a state disability plan every four years	<p>Not all jurisdictions have specific legislative provisions that require a state disability plan, although it is common in policy.</p> <p>NSW requires a state disability inclusion plan. It must be reviewed every four years.</p> <p>SA requires a state plan every four years and annual reports on its operation.</p> <p>SA requires the state plan to include measures and provides for authorities to collaborate in relation to mainstream supports.</p>
Disability action plans	Disability action plans required for prescribed public sector bodies	<p>SA requires departments to review access and inclusion plans every four years and to report on them annually. Plans must include measures and focus on access to mainstream supports.</p> <p>NSW requires that plans are reviewed every four years.</p> <p>Qld requires departments to develop and implement disability service plans every three years as part of a whole-of-government approach.</p> <p>WA requires public authorities to review plans every five years and includes consultation and publication requirements.</p>

Topic	Victoria	Other jurisdictions
Ministerial advisory council	Establishes the Victorian Disability Advisory Council	<p>Not all jurisdictions have specific requirements for ministerial advisory councils, although it is common in policy.</p> <p>NSW continues the Disability Council of New South Wales.</p> <p>WA sets up the Ministerial Advisory Council on Disability.</p> <p>SA does not require a ministerial advisory council.</p>
Community visitors	Volunteers governed by the Office of the Public Advocate	<p>All jurisdictions have a community visitors scheme but with various components and governance arrangements.</p> <p>In Tas and WA, community visitors apply only to mental health facilities.</p> <p>The Ageing and Disability Commissioner administers community visitors in NSW and the Anti-Discrimination Commission administers the scheme in NT.</p> <p>Community visitors in Qld are regulated under the <i>Public Guardian Act 2014</i> and they inspect various sites and locations for both adults and children.</p> <p>The <i>Official Visitor Act 2012</i> in the ACT governs community visitors in the territory with five other operational statutes.</p>
Residential services	Provision of residential services, including rights and responsibilities	<p>No other similar legislative positions in Australia.</p> <p>Most jurisdictions do not deal with this issue in their disability legislation after the rollout of NDIS.</p> <p>NSW legislation enables regulations to be made about group accommodation and service standards.</p>



Topic	Victoria	Other jurisdictions
Restrictive practices	Regulates the authorisation and the use of restrictive practices for people accessing services under the Disability Act or the NDIS Act	Qld, Tas and NT regulate restrictive practices in their disability legislation.
Forensic services	Regulates compulsory treatment for people with an intellectual disability involved, or at risk of involvement, in the criminal justice system	<p>The NT legislation regulates the involuntary treatment and care of people involved or at risk of involvement in the criminal justice system.</p> <p>Most jurisdictions regulate treatment for mental illness and intellectual disability under one legislation.</p> <p>The <i>Forensic Disability Act 2011</i> (Qld) governs forensic disability services in Qld.</p>
Disability Services Commission and Commissioner	Mainly handles complaints about services provided under the Disability Act	<p>No similar legislative positions in Australia.</p> <p>Most jurisdictions assign complaint handling of disability and other social services matters such as health and aged care to one commissioner or body.</p> <p>Qld relies on complaints agencies such as the Ombudsman.</p> <p>The Disability Services Commission in WA works on advancing opportunities, access and inclusion for people with disability.</p>

## 5. State disability plan outcomes and indicators

### Domain: Inclusive communities

Outcome	What does this mean?	Inclusion indicators
Connection	People with a disability are active participants in communities and identities	Increase social connections Increase activity in the community
Inclusion	Victoria's communities and places are welcoming and inclusive for people with disability	Increase positive community attitudes Increase connections to culture and community Increase inclusion in local neighbourhoods
Accessibility	The built and natural environment is accessible to Victorians with disability	Increase public transport accessibility Increase accessible or adopted footpaths and crossings Increase spaces and places with universal design
Mobility	People with disability are able to move around and get to the places they want to go	Increase access to transport Increase mobility

### Domain: Health, housing and wellbeing

Outcome	What does this mean?	Inclusion indicators
Housing	People with disability have housing choices that are flexible, suitable, affordable and accessible	Increase affordable housing for people with disability Increase stable and secure housing Increase suitable housing
Health	People with disability achieve their optimal mental and physical health	Increase physical health Increase healthy living Increase mental health
Wellbeing	People with disability experience a high level of wellbeing in all aspects of their lives	Increase overall life satisfaction Increase resilience

**Domain: Fairness and safety**

<b>Outcome</b>	<b>What does this mean?</b>	<b>Inclusion indicators</b>
Respect	People with disability are as recognised and respected as any other citizen	Decrease disability-related discrimination Decrease unfair treatment
Safety	People with disability live in safety and feel secure and protected	Increase community safety Reduce experiences of interpersonal violence Reduce experiences of bullying Reduce prevalence and impact of abuse and neglect
Opportunity	People with disability have equal opportunities to identify, pursue and achieve their aspirations	Increase opportunities to pursue and achieve aspirations

**Domain: Contributing lives**

<b>Outcome</b>	<b>What does this mean?</b>	<b>Inclusion indicators</b>
Education and skills	People with disability actively engage and succeed in education and learning	Increase the educational achievement of Victorian students with disability Increase the engagement in education of Victorian students with disability Increase the wellbeing of Victorian students with disability Increase the engagement of Victorian children with disability in state-funded kindergartens Increase the wellbeing of Victorian children with disability at school entry
Employment	People with disability are engaged in flexible and sustainable employment and have opportunities to develop and succeed	Increase employment Increase job quality Increase positive attitudes towards people with disability in the workplace Increase job flexibility and job design adjustment
Economic independence	People with disability generate income through employment, business ownership and entrepreneurship and	Improve financial stability and economic independence

Outcome	What does this mean?	Inclusion indicators
	participate freely as consumers	
Influence	People with disability hold positions of leadership and responsibility across private, public and community sectors	Increase involvement in civic activities Increase leadership opportunities

## 6. Community visitors – further background

Community visitors are volunteers appointed by the Governor-in-Council for terms of three years and form part of the Office of the Public Advocate. Community visitors have significant inspection and entry powers. In 2019–20, 400 active community visitor volunteers across the state conducted 4,142 visits. Provisions for community visitors are in the *Disability Act 2006*, the *Supported Residential Services (Private Proprietors) Act 2010* and the *Mental Health Act 2014*.

### Transition to the NDIS - Amendments made after stage 1 of the Disability Act review

The intent of the NDIS is to enable greater flexibility, choice and control over the services that NDIS participants access. This includes choice of accommodation and the types of support provided in those settings.

Stage 1 amendments to the Disability Act enabled community visitors to visit NDIS properties provided for short-term accommodation and assistance. They could also visit Specialist Disability Accommodation–enrolled properties operating under a Part 12A agreement under the *Residential Tenancies Act 1997*. Amendments also enabled people with disability with private rental agreements under Part 2 of the Residential Tenancies Act to request a visit or consent to a person to request a visit on their behalf.

In late 2019, the National Disability Insurance Agency (NDIA) introduced medium-term accommodation. This is a new type of transitional housing support designed to support NDIS participants as they prepare to move into suitable housing. In addition, some short-term housing provided to children with disability is not classified as short-term accommodation and assistance or Specialist Disability Accommodation by the NDIA. Community visitors are therefore unable to visit these properties.

### Commonwealth Community Visitor Schemes Review

The Commonwealth Department of Social Services undertook the Community Visitor Schemes Review to look at the role of community visitors in the changed NDIS environment. The review identified that community visitor schemes for disability have a contribution to make to the NDIS Quality and Safeguarding Framework. It recommended that the framework formally recognises the contribution of community visitor schemes.

Stage 1 amendments to the Disability Act addressed many of the issues identified in the national review. The amendments enabled access to Specialist Disability Accommodation properties, reporting requirements and information sharing.

The amendments did not address other issues arising from the national review including what the role, functions and powers of a community visitor scheme should be in the new NDIS environment.

The national review also identified that the NDIS promotes a contemporary understanding of disability equality, underpinned by the UN Convention. This highlights the need to:

- assume capacity
- seek consent
- support decision making.

The national review states that the powers of community visitors to enter all visitable homes without invitation and to access all areas, including personal files and records, could be seen to run counter to this.

In addition, the national review found that under the NDIS people will likely access services in a range of settings. The review raises the issue of whether community visitors should visit prescribed accommodation or visit more vulnerable people regardless of service setting.

## 7. Residential rights – further background

### Specialist Forensic Disability Accommodation

Specialist forensic disability accommodation are transitional residential services for people on criminal or civil orders with high-risk behaviours. These residents require a forensic disability response in a community setting. They include people on parole orders under the *Corrections Act 1986* or people on non-custodial supervision orders under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*. These residential services are funded and/or delivered by the Department of Families, Fairness and Housing.

Specialist forensic disability accommodation currently operate under Part 5, Division 1 of the *Disability Act 2006*. However, these provisions were not designed for this purpose. For example, current provisions about entry to a resident's room do not reflect the need to undertake room searches if required by a court order. Current provisions are not clear about when a person should exit the service. In the future, specialist forensic disability accommodation will likely be the only type of residential service operating under Part 5, Division 1.

Current provisions under Part 5, Division 1 do not include:

- criteria for access to specialist forensic disability accommodation
- specific roles and responsibilities of service providers in service delivery, including risk management
- rights and responsibilities of residents
- specific oversight mechanisms.

### Residential rights in group homes

Part 5, Division 2 of the Disability Act describes residential rights for residents of disability group homes, including Specialist Disability Accommodation (SDA). Under Part 5, Division 2 residential services are declared by the minister by publication in the *Government Gazette* as group homes. These provisions were originally included in the Disability Act to apply to residential services that are exempted from the *Residential Tenancies Act 1997*. Residential services operating under Part 5 of the Disability Act continue to be exempted from the Residential Tenancies Act.

Amendments were made to the Disability Act in 2019 to allow transition of residential services gazetted as group homes to the new SDA arrangements under the NDIS Act and new SDA residential rights protections under Part 12A of the Residential Tenancies Act. It was expected that Part 5, Division 2 of the Disability Act would no longer be required following full transition of group home residents and dwellings to SDA arrangements.

## Transition to SDA provisions under the Residential Tenancies Act

The new Residential Tenancies Act provisions give protections and residential rights for people living in SDA but are subject to residents being eligible for SDA funding under the NDIS. All existing residents of state-owned group homes (approximately 70 per cent of disability group homes under the Disability Act in Victoria) will eventually transition to SDA.

Because of transition issues, many disability group homes and residents in Victoria are not ready or eligible to make the transition from protections under the Disability Act to the new SDA protections under the Residential Tenancies Act.

The Victorian Government has kept gazettal of group homes under Part 5, Division 2 of the Disability Act as an interim measure. This will ensure the rights of residents in existing group homes are protected until SDA access issues are resolved.

The Department of Families, Fairness and Housing is working with the NDIA and service providers to transition remaining gazetted group homes to SDA arrangements where possible. We must consider whether there are new types of supported disability accommodation in which 'around the clock' support is needed and that do not meet the requirements for Part 12A of the Residential Tenancies Act. If so, we must determine how the residential rights of people with disability who require this type of accommodation can be protected.



## 8. Restrictive practices – further background

### Regulation of restrictive practices by NDIS providers

The Commonwealth Government has regulatory responsibility for services funded by the NDIS. Victoria carries out some functions under the NDIS Quality and Safeguards Framework. States and territories are responsible for prohibiting and authorising restrictive practices within their jurisdiction. The NDIS Commission is responsible for:

- registration of NDIS providers
- requirements for behaviour support plans
- behaviour support practitioners
- monitoring and reporting on the use of regulated restrictive practices.

The NDIS Commission has a range of regulatory powers under the NDIS Act to support these functions including investigations, undertakings, civil penalties and de-registration.

### Victoria's authorisation framework

During the first stage of the Disability Act review, Victoria expanded the powers of the Victorian Senior Practitioner to include new provisions that deal with the authorisation of restrictive practices by registered NDIS providers.

### Offence provisions

The *Disability Act 2006* includes offences related to the use of restrictive practices by disability service providers (ss. 149 and 201G). For example, it is an offence for a disability service provider to use a restrictive practice outside the requirements of the Act or not follow the directions of the Victorian Senior Practitioner. The penalty is 240 penalty units (currently equivalent to \$39,652).

### The role of independent persons

Under the Disability Act (ss. 132ZS and 143), an 'independent person' must be made available to explain the inclusion and authorisation of a regulated restrictive practice in a behaviour support plan. The independent person must inform the person about their right to seek review by the Victorian Civil and Administrative Tribunal.

The independent person may report any concerns to the Public Advocate or the Victorian Senior Practitioner. To date, neither the Public Advocate nor the Victorian Senior Practitioner have received any reports of concern from an independent person. Research by both the Office of the Public Advocate and the Victorian Senior Practitioner has confirmed that independent persons are most often family members who have been involved in developing the behaviour support plan.

## 9. Compulsory treatment – further background

Part 8 of the *Disability Act 2006* provides requirements for treating people in a residential treatment facility (criminal order) or a supervised treatment order in the community.

### Residential treatment facilities

The Disability Act requires that residential treatment facilities be operated by the Secretary of the Department of Families, Fairness and Housing (s. 151(7)). Victoria's two residential treatment facilities are exempted from Part 5 of the Disability Act (Residential services). These services are operated under Part 8 (Compulsory treatment).

The Disability Act provides that the purpose of residential treatment facilities is to provide compulsory treatment to people with an intellectual disability admitted to these facilities. Victoria has a short-term residential treatment facility allowing for placement up to five years and a long-term facility that does not limit the length of placement.

### Treatment plans for forensic residents

The Disability Act does not require people subject to custodial supervision orders under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* to receive a treatment plan on admission to a residential treatment facility (s. 153(1)). This means that forensic residents are subject to the rules of the Crimes (Mental Impairment and Unfitness to be Tried) Act in respect of most aspects of their compulsory treatment. Amendments to the Disability Act currently before parliament propose that treatment plans be required for forensic residents, as they are required for people on other types of orders.

### Supervised treatment orders

An application for a supervised treatment order can only be made where the person with an intellectual disability is living in a disability residential service or a Specialist Disability Accommodation property. The order can apply to NDIS participants and non-NDIS participants.

Supervised treatment orders are subject to safeguarding measures under the Disability Act. These include a person with necessary skills developing a treatment plan, approval of the plan by the Victorian Senior Practitioner, and notification to, and involvement of, the Public Advocate.

Additionally, a review of the supervised treatment order can be sought at any time by the person subject to the supervised treatment order, the Senior Practitioner or the Public Advocate. For NDIS participants, a treatment plan must include an NDIS behaviour support plan developed by an NDIS behaviour support practitioner.

The authorised program officer of the service provider that applied for the supervised treatment order is responsible for implementation and monitoring. Six-monthly reports must be provided to the Victorian Senior Practitioner. NDIS service providers are required to report monthly to the NDIS Commission on the use of restrictive practices.

A supervised treatment order can be made for up to 12 months. The Disability Act does not specify a maximum period for which a person can be subject to successive supervised treatment orders. However, on application for a new supervised treatment order, all criteria of the Disability Act must continue to be met.

## 10. Forensic disability services and sentencing – further background

Victoria's Forensic Disability Program provides targeted treatment and supports to forensic disability clients based on criminogenic needs<sup>3</sup> that manifest due to a person's disability. The Forensic Disability Program aims to contribute to community safety by:

- reducing risk of offending
- addressing behaviours of concern
- improving quality of life to assist community integration and participation.

Service settings and frameworks for the Forensic Disability Program are set out in policy and are legislated insofar as they relate to delivering services under the *Disability Act 2006*, and relate to criminal and civil orders under justice legislation, such as the *Sentencing Act 1991* and the *Children, Youth and Families Act 2005*.

Respective program components are delivered in line with the Disability Act. Relevant sections relate to providing residential services, access and planning, and other provisions for compulsory treatment, including supervised treatment orders. The residential components of the Forensic Disability Program (except for residential treatment facilities) operate under Part 5, Division 1 of the Disability Act. However, these provisions were not expressly designed for this purpose. As outlined below, residential treatment facilities are regulated under Part 8 of the Disability Act.

People with cognitive impairment are over-represented in the Victorian justice system. Victorian statistics show that 42 per cent of male prisoners and 33 per cent of female prisoners have a confirmed acquired brain injury, compared with 2 per cent of the general Australian population.<sup>4</sup> Within the youth justice system, around 38 per cent of young people have cognitive difficulties affecting daily functioning.<sup>5</sup>

The over-representation of Aboriginal people in the criminal justice system is a complex and enduring issue. For Aboriginal people living with disability, coming into contact with the criminal justice system can combine interlocking levels of disadvantage. The Victorian Government is committed to working in partnership with Aboriginal communities through the Aboriginal Justice Agreement. Work towards advancing self-determination and developing a Treaty between the Victorian Government and Aboriginal communities aims to empower Aboriginal communities to achieve long-term generational change and improved outcomes. However, the number of Aboriginal people entering Victoria's criminal justice system has increased at a greater rate than

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<sup>3</sup> Criminogenic needs can be understood as characteristics, traits or problems that may increase an individuals' risk of reoffending.

<sup>4</sup> Corrections Victoria 2011, [Acquired brain injury in the Victorian prison system](https://www.corrections.vic.gov.au/acquired-brain-injury-in-the-victorian-prison-system), Department of Justice, viewed 14 April 2021, <<https://www.corrections.vic.gov.au/acquired-brain-injury-in-the-victorian-prison-system>>.

<sup>5</sup> Department of Justice and Community Safety 2019, [Annual report 2018–19](https://www.justice.vic.gov.au/annual-reports/annual-report-2018-19), Youth Parole Board, viewed 14 April 2021, <<https://www.justice.vic.gov.au/annual-reports/annual-report-2018-19>>

the non-Aboriginal population. Aboriginal people with cognitive impairment are over-represented in Victoria's criminal justice system.

## 11. Justice plans and plans of services – further background

The *Sentencing Act 1991* provides the option of a justice plan to be attached as a condition or undertaking to either:

- a community correction order, or
- an order releasing a person with an intellectual disability on conditional adjournment with or without recording a conviction.

The condition directs the person to take part in specified services. Currently, around 58 per cent of people receiving services within the Forensic Disability Program are on a justice plan.

Justice plans direct service participation for people who need forensic disability services to support their rehabilitation. This includes allocating a disability justice coordinator to oversee the coordination of services for the person. Courts often use justice plans as a way to support the person's compliance and engagement with service providers.

The justice plan condition is intended to reduce the likelihood of the person with disability reoffending by engaging them in available services adjusted to meet their disability-related needs.

Conditions within justice plans must align with the objectives and principles of the *Disability Act 2006*. Under the *Sentencing Act*, a disability justice coordinator can provide a justice plan to a court. A disability justice coordinator can advise the court to include NDIS-funded services where available and appropriate as part of a justice plan. In practice, however, this depends on available information about funded services in a participant's NDIS plan. It can, therefore, be operationally challenging for disability justice coordinators to include NDIS-funded services as part of a justice plan due to the separate planning and coordination functions of the NDIA and the state. Further, the responsiveness of the NDIA to provide access to the NDIS or adjust a participant's NDIS plan for reasonable and necessary offence-related disability supports may not always align with the requirement of a court to address forensic risk.

For plans of services, s. 571 of the *Children, Youth and Families Act 2005* requires the court to request a pre-sentence report if it appears to the court that a young person has an intellectual disability. To respond to this request, prior to sentencing, the Department of Families, Fairness and Housing undertakes a Target Group Assessment. This assessment determines whether the young person has an intellectual disability within the meaning of the Disability Act. If the department considers the young person as within the target group, or the young person has previously accessed services from the department under the Disability Act, then the *Children, Youth and Families Act* requires the department to provide the court with information about services that the young person can access under the Disability Act to reduce the likelihood of reoffending. This document is a plan of services.