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20 February 2014

Submission on the Consultation Draft of the Disability Inclusion Bill 2014

Intellectual Disability Rights Service (IDRS) supports the need for reform in disability legislation in NSW and welcomes the opportunity to make a submission in relation on the Consultation Draft of the Disability Inclusion Bill. Our comments are focused on strengthening the Bill to achieve real change for people with disability.

A. About Us

IDRS is a disability advocacy service and community legal centre that provides legal services and advocacy for people with intellectual disability throughout New South Wales. IDRS advocates for policy and law reform and undertakes a range of community education activities with a view to advancing the rights of people with intellectual disability. IDRS also operates the Criminal Justice Support Network ('CJSN') which supports people with intellectual disability when they come into contact with the criminal justice system.

Importance of Independent Advocacy in a Person Centred System

The Bill is silent in relation to the role and continued funding of independent advocacy.

IDRS notes that the National Disability Insurance Scheme Legislation recognizes the role of advocacy in promoting the aims of that legislation in the General Principles Section 4 and urges the government to ensure the availability of advocacy through the Disability Inclusion legislation.

Most people who approach IDRS for advocacy are people who have no personal support (family or friends) in their lives and need assistance to resolve problems that such as exploitation or abuse, being accused of crime or being a victim of crime, being suspended from a service or subjected to harassment from

neighbours, being threatened with eviction, being financial exploited by a support worker. These crises arise unexpectedly and cannot be planned for.

The Disability Inclusion Bill must provide a basis for independent advocacy to be readily available to people with disability alongside their person centred support packages when problems arise

Part 1 Preliminary

Objects and Principles

Objects

IDRS submits that two further objects of the Disability Inclusion Bill should be

Recommendation:

- To ensure that service providers are accountable to the service user to provide the agreed services as per a clear service agreement. Refer to S4(f) Disability Act 2006 (Vic)
- To ensure equal access for people with disability to NSW government agencies and services and to the community

General Principles

Recommendation

- Amend (4) to read people with disability have the same right as other members of the community to *make their own decisions* or to participate in decisions

Section 6

Recommendation

If the principles are to have real effect this section should be strengthened to require that a person having functions under this legislation should **act in accordance with** rather than merely have regard to the disability principles. There is little accountability in simply requiring agencies to 'have regard' to the principles.

Part 2 Disability Planning

State Disability Inclusion Plan

IDRS welcomes the requirement for the development of a State Disability Inclusion Plan which will be tabled in Parliament. However, the legislation is not clear on the purpose of the State Disability Plan.

The effectiveness of the State Disability Inclusion Plan would be strengthened by the following additions to Sections 8 & 9

Recommendations

- A statement of the overarching purpose should be added to the effect that the purpose of the State Disability Inclusion Plan is to ensure application of the objects and principles of the Disability Inclusion Act across government in NSW
- A requirement to consult with people with disability in the development and the review of the State Disability Inclusion Plan.
- A requirement to identify not only goals but also actions and resources to be allocated to implementation of the State Disability Inclusion Plan
- A requirement to demonstrate cross agency collaboration to achieve goals for people with disability

At Section 9 (2), the purpose of the review of the State Inclusion Plan should be extended to include:

- Actions taken and progress toward the goals of the State Inclusion Plan
- Collaborative strategies implemented across government agencies to achieve the goals
- Proposed changes to the plan and proposed actions to be taken under the plan

Disability Action Plans

The Disability Services Act 1993 included a requirement for Government Departments to develop Disability Action Plans. It is essential that this new legislation include measures to ensure that future Disability Action Plans are more effective and better monitored than those of the past 20 years.

Recommendations

- Add to 10 (1) *'and exercise equal rights with other members of the community'*
- 10 3(a) agencies should be required to show how they will *'take action to comply with'* or *'take action to promote and apply'* the disability principles. The current wording *'have regard to'* is inadequate to achieve improvement or accountability.
- 10 3 (b) (v) should be amended to include *'and making the necessary adjustments'* for people with disability to access the full range of services..
- Plans should include timelines

- 11 (1) The report should include the actions taken or strategies implemented and the funds allocated to implementation of the Disability Action Plans

Most people with disability currently would have no awareness of the past Disability Action Plans of NSW government agencies. The Disability Inclusion Act should require that every government department and local council must publish its Disability Action Plan and annual progress reports on its website and in hard copy in accessible formats including Easy Read/pictorial formats.

Each agency should advertise a Disability Action Plan **contact point** within the agency and invite people with disability and the public to offer ideas, raise issues or make complaints in relation to the Disability Action Plan or its implementation.

The Bill does not include any process or responsibility for external monitoring of Disability Action Plans. Active external monitoring is key to the effectiveness of the plans.

It is noted that 16 (1) (a) gives the Disability Council a function to 'monitor the implementation of government policy in relation to people with disability and their families.'

IDRS submits that one effective way of fulfilling this function would be to provide in the legislation for the Disability Council to have the role of monitoring the implementation of Disability Action Plans.

What are the incentives for exceptional performance or the repercussions for poor performance against Disability Action Plans?

Part 3 Disability Council of NSW

15 Membership

Recommendations

- Add a requirement that the Disability Council membership reflect the range of disabilities effecting people in the community and that adequate support must be provided to enable all members to fully participate.
- Section 16 should include an additional role for the Disability Council *to monitor the progress and effectiveness of Disability Action Plans of government departments and local councils.*

PART 4 Service Standards

Sections 20 & 21

IDRS receives many requests for advice and assistance in relation to complaints about services.

We raise the following points which have not been covered in the Draft Bill to ensure that they are addressed effectively through regulations under this section. We look forward to the opportunity to comment on the regulations under the Act.

IDRS submits that the regulations must provide a requirement for services to have a clear enforceable agreement with the service user which defines and details the services that will be provided in return for the fee paid.

If the services are not in fact provided, the person should be entitled to reimbursement of the fee paid.

IDRS accepts that it is inevitable that a residential service may need to assist some residents with intellectual disability to manage a strictly limited amount of money if the person is incapable of managing that money, has no family member or friend who can assist and does not object to the residential service taking this role.

However, we submit that it is urgent that regulations clearly state the rules and procedures to be followed if a service is to informally manage personal funds on behalf of people with disability. There should also be clear requirements about how a service should act if some money belonging to a resident is unaccounted for.

Disability services should be required to provide information about how complaints can be made and about advocacy services available to assist service users to pursue a complaint. They should also be required to arrange an advocate to support a service user who wishes to make a complaint.

IDRS is very disappointed that the legislation has not provided for an accessible option for complaint resolution for service users with disability. Our experience demonstrates that there is a great need for such a service and we believe the need will increase in the future. The lack of a complaints resolution service accentuates the importance of ensuring access to independent advocacy to assist people with disability to work through complex and frustrating complaints processes.

Part 5

Financial Assistance to individuals

IDRS welcomes the government's commitment to personalized funding packages in the Disability Inclusion Bill.

The Bill appears to allow that an eligible organisation could be the service provider or potential service provider as well as the plan manager for an individual. If this is the case, IDRS submits that this constitutes an unacceptable conflict of interest between the interests of the service user and the provider. IDRS submits that a service provider or potential service provider for an individual should not be eligible to be that individual's plan manager.

Recommendations

- That the Bill be amended to make it clear that a service provider or potential service provider is not eligible to be the plan manager for an individual.
- IDRS submits that in making decisions about funding in accordance with Section 24, the Minister should be required to consider the options as to whom funds can be provided in a specified order namely 24 (2) (a); or where that is not suitable 24 (2) (b); or where that is not suitable 24 (2) (c) and finally 24 (2) (d). This would promote a preference toward the most person centred options.
- Section 24 (2) does not take into account the circumstances of people with disability who lack capacity to nominate someone to receive funding on their behalf. This section should be amended to include an option for financial assistance to be provided to a suitable family member or other suitable person on behalf of a person who lacks capacity to propose a nominee.
- Similarly 24 (2) (c) does not provide an option for anyone other than the individual with disability to direct a plan manager. Where the individual lacks capacity to direct a plan manager there should be an option for person nominated by the individual or a suitable family member or other suitable person to direct the plan manager.
- 25 (1) should include a requirement that notices be provided in a manner that is accessible to the person with disability including Easy Read formats and personal phone contact where a person is likely to be unable to read. The notice should include information about advocacy services which could assist the person to seek review of a decision. If the person does not have the capacity to understand the decision and reasons, the required notice should be provided to a nominee of the person, a family member, guardian, advocate or other suitable person on their behalf.
- 25 (1) It appears that a decision of the Minister **not** to provide financial assistance to or on behalf of an individual who is a person in the target group is not reviewable. This is the most fundamental decision and it is essential that it be reviewable. It follows that a notice provided under 25 (1) should specify that the person may apply for a review of the decision and how to apply for that review.

Section 30

IDRS is aware of the recommendations made by the Ombudsman's Office in relation to Section 30. IDRS strongly supports the Ombudsman's recommendations particularly the proposal of a centralized database with information about individuals who have been the subject of adverse findings involving serious misconduct and the need to extend the offences set out in the Bill.

In the experience of IDRS it is unusual that staff members who have perpetrated abuse against people with disability in their care are charged by the police, let alone convicted. Many are simply dismissed and able to move on to other positions in the disability sector. A criminal record check alone will not reveal many past abuses.

It is the view of IDRS that without these additional protections proposed by the Ombudsman, the safeguards in the Draft Bill will not significantly improve the safety of people with disability in services. IDRS urges the government to adopt the safeguards recommended by the Ombudsman.

Section 31

IDRS is concerned that funding to an individual or organization can be suspended under section 31 without the opportunity to be heard. We submit that a written notice of intention to suspend funding should be required requesting that the person show cause why the funding should not be suspended in line with the procedure applying in S 32 .

Division 6 Section 35

Financial Assistance: Information and Documentation

IDRS supports object 3(d) of the Bill, namely 'to provide safeguards in relation to the delivery of supports and services for people with disability'.

IDRS recognises that, to achieve this object, a person receiving financial assistance under Part 5 of the proposed legislation must be accountable for the way in which the financial assistance is used. The purposes for which the financial assistance has been applied, the particular amounts applied for the purposes and performance against agreed indicators should be made known to the Director-General.

However, IDRS is concerned that, as currently expressed, clauses 35 and 36 of the Bill that provide for the giving of information and documents to the Director-General permit serious incursions on the right to privacy and confidentiality for people with disability, referred to in clause 4(6) of the Bill.

Clause 35(1) refers to a 'person' receiving financial assistance under Part 5. 'Person' is not defined in the Bill. Section 21 of the *Interpretation Act 1987* (NSW) provides that in any Act or instrument 'person' includes an individual, a corporation and a body corporate or politic. Part 5 of the Bill provides for financial assistance to individuals (under Division 2) and to 'eligible organisations' (under Division 3). Under s7(1) of the Bill, an 'eligible organisation' includes an entity that is a corporation or body corporate.

Eligible organisations to which financial assistance may be provided potentially include legal advocacy services, health care services and counselling services.

Clause 35(1)(b) of the Bill permits the Director-General to require a person receiving financial assistance to give to the Director-General information or a document in the person's possession or control **relating to** (our highlighting) 'obtaining or providing supports or services with the financial assistance'. Under clause 35(4), a person 'must' comply with a notice that requires the giving of such information or documents.

IDRS believes that the expression 'relating to' in this context does not define with reasonable particularity the nature of the relationship the information or document must have with the provision of supports or services. The clause could be interpreted as permitting the Director-General to obtain, for example, legal advice (including in matters where the Director-General is an opposing party in the relevant dispute or legal proceedings), medical or counselling records, or other confidential information about a person with disability, if legal, medical or counselling services had been provided with the financial assistance of the Director-General.

This interpretation of the clause seems even more likely in light of clause 36 in the Bill, which protects a person who gives information or a document in accordance with clause 35 from civil or criminal action and from being held to have breached any code of professional etiquette or ethics.

IDRS believes that the provision of such confidential information and documents as those described above would be an unjustifiable incursion on the right to privacy and confidentiality for people with disability. In the case of mandatory disclosure of confidential communications made for the dominant purpose of a lawyer providing legal advice or for use in existing or anticipated litigation, the unwelcome effect would be to override the person with disability's legal professional privilege. This would be particularly problematic in cases where the Director-General is the opposing party to the relevant legal matter.

IDRS submits that the proposed legislation should clearly limit the nature of the information and documents that can be required by the Director-General for the purpose of verifying that financial assistance is being properly used in the delivery of supports and services for people with disability. For example, the information and documents might be limited to those specifying the type of service or support provided, the time spent providing the service or support and the breakdown of costs and disbursements that the financial assistance was used to pay.

Part 6 Restrictive Interventions

The Consultation Information Booklet asks whether Part 6 of the Bill achieves a balance between human rights and the need for protection and whether it will work to reduce the use of restrictive practices.

Unfortunately IDRS believes, as the Bill stands, the answer to those questions is NO on both counts.

IDRS believes this section would benefit from complete review. Otherwise an important opportunity to make a real difference to the use of restrictive practices on people with disability will be missed. There is a danger that the Bill in its current form could inadvertently lead to an increase in restrictive practices.

Recommendations

The government should establish a specific working group to completely review this section of the Bill.

IDRS believes that legislation about the use of restrictive practices is out of place in the Disability Inclusion Bill. This part of the Bill is more consistent with the purposes of the Guardianship Act 1987 which applies to a small minority of people with disability who may at some time require fully supported or substitute decision making or some level of restriction for their own protection and interests. IDRS submits that this Part of the Bill should be located in the Guardianship Act 1987.

We believe that there are fundamental changes that need to be made to this section and that it will not serve the interests of people with disability. IDRS urges the government to completely review Part 6 of the Bill. We hesitate to suggest amendments to the existing Part 6.

Further comments on amendments to Part 6

- The definition of chemical restraint is unclear and may lead to over inclusion of beneficial medical treatments in restrictive practices.
- In the definition of physical restraint the words 'sustained or prolonged' should be omitted. It is not relevant how sustained or prolonged the restraint is. The use of restraint itself is a restrictive practice unless it is clearly covered by the exceptions in the definition
- The Bill should include a list of prohibited interventions as the current ADHC policy provides.

Establishment and membership of Restricted Practices Authorisation Panels.

Restrictive Practice Authorisation Panels must be fully independent of the provider

IDRS submits that any Restricted Practice Authorisation Panel must be completely independent of the provider. There is a clear conflict of interest between the interests of the provider in decisions about restricted practices.

For example:

- the provider may have disgruntled staff agitating for restriction of the person
- the actions of the provider may have contributed to the person's challenging behaviour and the alleged need for restrictive intervention
- restrictive approaches to management of behaviour may be more economical for the provider in the short term
- the organisation may not have the expertise to develop or implement more complex less restrictive strategies

IDRS submits that the Director General should have responsibility for establishing any Restricted Practices Authorisation Panels and these must be independent of providers. These could be regionally based.

A Restrictive Practices Panel should at least include

- a professional member recognised as having **experience and expertise** in the range of potential behavioural strategies
- a member with human rights, advocacy background
- an experienced senior disability worker

- if issues of chemical restraint are involved the panel would need to include a specialist medical practitioner/psychiatrist with experience and expertise treating people with disability who have behavioural problems

Section 43

- 43 (1) should additionally require that the plan demonstrate what non-restrictive, positive strategies have been implemented and why these are not considered sufficient and details of how and when the plan will be reviewed
- In preparing a behaviour support plan the provider should consult with the person for whom the plan is being prepared. This section and section 44
- (5) should also require consultation with *family or friends of the person and an advocate for the person.*
- Section 44 (2) Authorisation of a plan which includes restrictive practices should be for a period of not more than 4 months at least in the first instance and never longer than 6 months.
Restrictive practices should always be regarded as short term with an active strategy to reduce and end restrictions.
- Section 44 (4) In addition to the person being able to seek a review of the plan, another person should be able to seek a review of the plan or the authorisation of the plan on behalf of the person.
- 49 (2) Suggest add the word 'only' so that the sentence reads ...'restraint or seclusion may 'only' be used on the person if:
- 49 (2)(a) & 2(b) suggest this should read 'the use of restraint is the option that is least restrictive of the person *to is necessary in the circumstances to prevent imminent risk of the person causing serious harm or injury to himself/herself or to someone else.*
- There Bill should include a requirement that restraint or seclusion is only used in an emergency for the time necessary to manage the imminent risk of harm or injury and no longer to avoid prolonged restriction after the crisis has passed.

- 50 (1) In accordance with best practice the provider should assess a number of factors following emergency use of restraint or seclusion.
 - Whether the restraint or seclusion was justified in the circumstances
 - The possible causes of the behaviour leading to restraint or seclusion
 - Alternative strategies to address the causes of the behaviour so as to avoid the need for restraint or seclusion in the future
 - Having assessed these factors, assess the likelihood of need for future use of restraint or seclusion on the person

The Bill must include requirements and processes for monitoring, auditing and reporting on the use of restrictive interventions and allocation of responsibility for training and promotion about best practice to avoid the use of restraint.

This is fundamental to assess and achieving progress toward the stated goal of reducing the use of restrictive interventions in services.

These functions could be assigned to the Department of the Family and Community Services through an office or team similar to that of the Senior Practitioner in the Victorian context.

Alternatively the Ombudsman should be resourced to undertake the role of monitoring and promoting best practice.

Proposed Part 3B of the Ombudsman Act 1974

IDRS welcomes the requirement for providers of supported accommodation and centre based respite services to report certain incidents to the Ombudsman.

IDRS submits that people with disability living in assisted Boarding Houses should also receive the benefit of this safeguard. In our experience people living in assisted boarding houses are some of the most isolated people with disability and are particularly vulnerable to instances of violence in their accommodation.

Proposal that incidents resulting in an Apprehended Violence Order be included as a reportable incident.

IDRS has a high involvement with people with intellectual disability living in group homes who have had Apprehended Domestic Violence Orders (ADVOs) taken out against them by disability support workers or by the police on behalf of disability support workers or another resident. Some of these orders have led to imprisonment of people with significant disabilities due to their lack of

capacity to understand or adhere to the conditions of the order and yet they are routinely returned to live in close proximity to the Person in Need of Protection (PINOP) under the order. In these circumstances breach of the order is predictable and inevitable. Of even more concern the AVO often proves ineffective in providing real protection to the PINOP.

IDRS is alarmed at the rate of AVO applications against group home residents with intellectual disability as an indicator of the apparent level of threat in group homes. We believe that an application for an ADVO against a group home resident by or on behalf of another resident or a staff member should be included as a reportable incident.

We note the Ombudsman supports this addition to the list of reportable incidents in its submission.

IDRS supports the recommendations of the Ombudsman in relation reportable allegations or conviction and providing information to victims, their family and their guardian. IDRS also supports the Ombudsman's recommendations to enable sharing of information between agencies for the promotion of the safety of people with disability.

We would be very pleased to discuss this submission and our recommendations further.

Please contact Janene Cootes, IDRS Executive Officer, on 9318 0144 or email janene@idrs.org.au for any further information.

Yours sincerely

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