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Mr Jim Longley
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Ageing, Disability and Home Care
C/O Disability Inclusion Bill
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Via email: disabilityinclusionbill@facs.nsw.gov.au

Dear Mr Longley

Submission on the Disability Inclusion Bill 2014

The Disability Inclusion Bill 2014 represents a timely development in disability law and policy in NSW. We welcome the commitment to promoting the rights of people with disability, and appreciate the opportunity to comment on the draft Bill.

We note that the Bill has been informed by the UN Convention on the Rights of Persons with Disabilities (UNCRPD), the National Disability Insurance Scheme (NDIS) legislation, and consultations with people with disability and the broader disability sector, and support the proposed changes to:

- clearly enunciate the rights of people with disability
- facilitate the person-centred and individualised funding reforms under *Stronger Together 2*
- improve safeguards to prevent and effectively respond to serious incidents involving people with disability in supported accommodation
- broaden the definition of 'disability' to align with Article 1 of the UNCRPD, and
- enhance accountability and strengthen reporting across government in relation to disability inclusion and action plans.

We have focused our comments on key changes we consider are necessary to strengthen safeguards and give full effect to the intent of the new legislation.

Objects and principles

We support the objects and principles in the proposed Act, and appreciate the inclusion in the principles of the right to decision-making support. However, it is not clear to us why section 3(e) in the objects of the Act seeks to support the purposes and principles of the UNCRPD only '*to the extent reasonably practicable*'. We consider that this part of the section is unnecessary and should be removed.

Part 2 Disability planning – State Disability Inclusion Plan and disability action plans

We welcome the enhanced requirements in the draft Bill relating to disability action planning, including:

- expansion of requirements to include all state and local government agencies
- provision of plans to the Disability Council
- annual public reporting on the implementation of the plans across government, and
- improved direction for agencies via the publication of disability action planning guidelines.

We support the requirements for the development and publication of a State Disability Inclusion Plan, and note that the whole-of-government plan will be increasingly important as NSW transitions to the NDIS.

Nevertheless, we believe that the draft Bill would be strengthened if there was greater clarity in its provisions regarding the purpose and nature of the review processes. As currently worded, the draft Bill requires the plans to be reviewed at least every four years, for the purposes of ensuring that the State Disability Inclusion Plan is 'consistent with the whole of government goals required to be set out in the plan'[1] and for examining whether each individual agency's disability action plan 'fulfils the requirements of section 10 (1) and (3)'.[2]

However, the current requirements for 'review' of the plans appear to be limited to examining whether the plans are fit for purpose. In our view, the goals of the reviews should be to:

- assess whole-of-government and individual agency progress towards achieving the intended goals/strategies and any barriers to implementation
- evaluate the effectiveness of the identified strategies, and
- identify any changes that are required to the plans and how any barriers to achieving the goals will be overcome.

It is imperative that reviews are focused on assessing whether the plan/s are delivering meaningful and systemic change for people with disability. In this regard, we believe that, as part of both the development and review of the individual disability action plans and the State Disability Inclusion Plan, the new legislation should also require mandatory consultation with people with disability.

Principles relating to plans

The draft Bill is silent on the subject of the development of plans for people with disability receiving financial assistance, and the principles to which these plans must adhere. We believe the proposed Act would be strengthened by the inclusion of principles relating to the plans; including the need for the plans to be individualised, directed by the person with disability, and for the plans to maximise the choice and independence of the person. In this regard, we consider that there would be merit in aligning the principles as much as possible to

[1] Disability Inclusion Bill 2014, section 9(2)
[2] Ibid, section 12(2).

those in section 31 of the *National Disability Insurance Scheme Act 2013*. We note that Part 4, Division 3 of the *Disability Act 2006* (Vic) also provides a useful example of the inclusion of principles relating to planning.

Definition of 'supported accommodation'

The definition of 'supported accommodation' in the proposed Act currently includes premises in which a person with a disability is living in a shared living arrangement 'with at least one other person with disability who is not a member of the first person's family'.[3] We are aware of cases of siblings living together in supported accommodation arrangements whose circumstances would not meet the definition outlined above. We would suggest the re-wording of this section to ensure no relevant living arrangements are inadvertently excluded.

The need for improved screening of potential employees in the disability sector

It is of vital importance to ensure that, wherever practical, those individuals in the community who engage in inappropriate behaviour or take advantage of vulnerable people are prevented from working in care-focused roles in the disability care system. As we move to a model where people with disability can exercise greater control and choice over their lives, it will be critical to ensure there is an appropriate workforce to enable and support funding recipients to exercise and enjoy their full complement of rights. The importance of a highly skilled workforce that has the capacity to appropriately support people with disability cannot be overstated.

The proposed Act goes some way towards affording an appropriate level of protection in terms of employment screening. Section 30 of the proposed Act states that:

(1) It is a condition of the provision of financial assistance to an eligible organisation that the organisation must ensure the requirements of this section relating to its workers are complied with.

(2) The organisation must not engage a person as a worker unless it is satisfied that the person is a suitable person to be involved in the provision of supports and services to persons in the target group.

(3) In deciding whether a person is a suitable person for subsection (2), the organisation must ensure that a criminal record check is conducted or obtained in relation to the person before the person is engaged as a worker.

(4) The organisation must ensure that a new criminal record check is conducted or obtained in relation to a worker of the organisation before the end of each 4 year period after the first criminal record check of the person is conducted or obtained.

(5) The organisation must not engage or continue to engage a person as a worker of the organisation if:

  (a) The organisation is satisfied from the person's criminal record check that the person has been convicted of a prescribed criminal offence, or

  (b) The person refuses to obtain or submit to a criminal record check for the purposes of this section.

(6) The regulations may make provision relating to obtaining and conducting criminal record checks for the purposes of this section, including the use of a statutory declaration to verify a person's criminal record when a criminal record cannot be conducted or obtained.

[3] Disability Inclusion Bill 2014, section 19(1)

(7) If the regulations provide for the use of a statutory declaration to verify a person's criminal record and an organisation uses a statutory declaration instead of a criminal record check for the purposes of this section:

(a) a requirement in subsection (3) or (4) to conduct or obtain a criminal record check is taken to be a requirement to obtain a statutory declaration about the person's criminal record, and

(b) subsection (5) (a) applies as if the reference in that subsection to a criminal record check were a reference to a statutory declaration, and

(c) subsection (5) (b) applies as if the reference in that subsection to obtain or submit to a criminal record check were a reference to provide a statutory declaration.

(8) In this section:

prescribed criminal offence means:

(a) an offence stated in Schedule 2, or

(b) another offence prescribed by the regulations.

worker of an eligible organisation means a person engaged by the organisation in working directly with persons in the target group in any of the following capacities:

(a) as an employee,

(b) as a volunteer,

(c) as a person undertaking vocational training,

(d) as a self-employed person, contractor or subcontractor.

However, we consider that a number of amendments could be made to the proposed screening system to further protect the rights of people with disability.

<u>Establishment and role of a database relating to completed employment proceedings</u>

In our view, it is important that the findings of a reportable incident scheme should feed into the screening system for individuals who are applying to work with people with disability, through the establishment of a database maintained by an external body. The database would hold information about individuals who have been the subject of adverse findings involving serious misconduct. (The findings would include matters reported and investigated under the proposed Part 3B scheme).[4]

In relation to this issue, the information booklet accompanying the draft Bill indicates that Ageing, Disability and Home Care (ADHC) decided not to set up a NSW employment screening system 'because it would take a long time to set up and then would have to be dismantled under the NDIS.'[5] However, we are of the view that a simple system of recording Part 3B findings on a central database could be established reasonably easily and at low cost.

In addition, it should also be relatively straightforward to implement a system that requires prospective employers to check the database for the purpose of ascertaining whether an individual has a database entry recorded against them. In the small number of cases where an entry has been made, it would also be a simple process to ensure that the prospective employer is given advice about the nature of the previous relevant employment proceedings. We are also confident that a low-cost interim measure of this kind would not only serve to protect the safety of vulnerable clients, it would also represent an initiative that is likely to

[4] It may also be possible that relevant findings from Part 3A matters could be included in the database.
[5] ADHC *Disability Inclusion Bill 2014 – Consultation draft* information booklet, p27

align with any more advanced employment screening system that might ultimately be rolled out under the NDIS.

Frequency of criminal record checks

We note that the *Boarding Houses Act* 2012 requires new criminal record checks to be obtained every three years in relation to staff members in assisted boarding houses.[6] We believe that the timeframe for re-checking employees' criminal records in the proposed Act should be consistent with the *Boarding Houses Act*.

Prescribed criminal offences

Schedule 2 of the draft Bill sets out a range of offences as prescribed criminal offences. While we have not conducted a comprehensive review of this issue, we have noted that there are a number of additional offences which appear to be of a comparable level of seriousness to those offences set out in the draft Bill.[7]

However, as an alternative to *only* relying on a list of proven prescribed offences to exclude people from disability related employment, there is also scope to introduce an additional safeguard that involves a requirement for a risk assessment to be conducted if an individual has been *charged* with a broader range of offences or if they have been the subject of a prescribed serious adverse employment findings.[8] In these circumstances, the Bill could require any agency considering the involved individual for disability related employment to conduct a risk assessment on the individual. Furthermore, if the agency decides to employ the involved individual, then the Bill would require the agency to put in place an appropriate risk management strategy.

In addition, the Bill could require agencies to comply with risk assessment and risk management policies and procedures that are published by the Minister.

While we acknowledge that this proposed system is not as rigorous as the current Working With Children Check process, we believe that, like our proposal concerning a centralised database for employment proceedings, it would provide an efficient and low-cost interim measure that could be used to inform what will be necessary under the NDIS.

Definition of a conviction

We believe that section 30(5)(a) of the proposed Act should be amended in order to align the definition of conviction in the proposed Act with the definition of conviction outlined in the *Criminal Records Act 1991*.[9]

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[6] *Boarding Houses Act 2012*, section 84 (4)

[7] (1) For example, sections 43, 43A, 61, 91H, 530 of the *Crimes Act 1900*. We would also recommend a review of the *Crimes Act 1900* for the inclusion of other offences relevant to sexual offences, excessive use of violence, or exploitation or neglect of vulnerable persons.
(2) It may also be appropriate to consider Schedule 2 Disqualifying offences, *Child Protection (Working with Children) Act 2012*
(3) We would also suggest consideration of including offences under Divisions 115, 268, 270, 271, 272, 273 and 274 of the *Criminal Code Act 1995* (Cth)

[8] See the previous discussion regarding the centralised database.

[9] The *Criminal Records Act 1991* defines a conviction as:

Mandatory referee checks

We note that the proposed Act does not make provisions for mandatory referee checks as part of the proposed screening system. In relation to this issue, section 30(3) could be amended to include the following phrase, or something similar, '*as well as background reference checks undertaken*'. In addition, given the lack of consistency of practice in relation how referee checks are conducted, it might be appropriate to insert a section that allows the Minister to make guidelines regarding baseline referee checking practice.

Review and appeal of decisions

It is important that the proposed Act provides adequate recourse for people with disability to seek independent review of key decisions. In our view, every significant decision in the proposed Act should be reviewable. At present, a number are not.

By way of example, we note that the information booklet accompanying the draft Bill outlines decisions that cannot be reviewed or appealed – namely, decisions not to give a person funds, supports or services; and decisions not to give a person individualised funding rather than a block funded place.

Of concern, the information booklet indicates that a legitimate reason for deciding not to give a person individualised funding may be 'because taking that funding from the service provider would mean the provider would not have enough money to continue helping other people.'[10] We do not believe this position is consistent with the principles of the proposed Act.

We welcome the provisions in the draft Bill requiring the Minister to give the person with disability notice of the decision and the reason for it, including details as to how the person may apply for a review of the decision. It will be important to ensure that the notice, reasons and process for obtaining a review of a decision are provided in a format that is easy for the individual with disability to understand.

Part 6 Restrictive interventions

We note that the stated purpose of Part 6 of the draft Bill is to 'regulate the use of restrictive interventions on persons receiving a disability service with a view to reducing the use of restrictive interventions.' However, we do not believe that the current draft of Part 6 contains adequate requirements to fulfil this purpose.

Against the background of our extensive work in reviewing the deaths of people with disability in care and the concerns we have consistently reported about the use of restrictive interventions in residential services, we consider that the Bill should:

(a) a finding that an offence has been proved, or that a person is guilty of an offence, without proceeding to a conviction,
(b) a finding that an offence has been proved, or that a person is guilty of an offence, and the discharging of, or the making of an order releasing, the offender conditionally on entering into a recognizance to be of good behaviour for a specified period or on other conditions determined by the court,
(c) in the case of the Children's Court, an order under section 33 of the *Children (Criminal Proceedings) Act* 1987 , other than an order dismissing a charge.

[10] ADHC *Disability Inclusion Bill 2014 – Consultation draft* information booklet, *p22*

- include requirements for monitoring, auditing and public reporting on the use of restrictive interventions
- ensure that the scope of 'restrictive intervention' is comprehensive[11]
- clearly distinguish between restrictive interventions and prohibited practices,[12] and
- include provision for review and appeal of decisions to use restrictive interventions.

As stated in our previous submission, we support the restrictive intervention framework and requirements outlined in the *Disability Act 2006* (Vic), and consider that there would be merit in NSW introducing similar provisions. In particular, we note the provisions in the Victorian legislation concerning the monitoring, oversight and reporting functions and responsibilities of the Office of the Senior Practitioner; including to authorise, investigate, audit and monitor the use of restrictive interventions.

The proposed Part 3B of the *Ombudsman Act 1974*

We support the general proposals in relation to Part 3B of the *Ombudsman Act*, and believe that the new function is an important safeguard for people with disability in supported accommodation in NSW. Importantly, we consider that Part 3B provides a valuable opportunity to achieve critical improvements and to develop best practice approaches in the prevention of, and effective response to, abuse, neglect and exploitation of people with disability more broadly.

We make the following suggestions to strengthen, and improve the operation of, Part 3B.

Jurisdictional reach

1) Inclusion of assisted boarding houses

Section 19(3)(a) of the proposed Act states that 'supported accommodation' does not include '*an assisted boarding house within the meaning of the Boarding Houses Act 2012*'. The information booklet accompanying the draft Bill indicates that the NSW Government has decided to limit the reporting scheme to supported accommodation and centre-based respite services because 'people in these services are likely to be some of our most vulnerable people',[13] and the *Boarding Houses Act* has a new reporting scheme for incidents in assisted boarding houses.

We agree that people in supported accommodation services include those who are highly vulnerable. However, our office has consistently reported on serious incidents, and other significant risk factors, relating to people with disability residing in assisted boarding houses. The evidence demonstrates that people with disability in assisted boarding houses are some of the State's most vulnerable people (especially as they often do not have some of the 'natural safeguards' available to others: such as family and independent advocates).

[11] For example, the current definition of 'restrictive intervention' in the draft Bill does not appear to include restricted access.
[12] It would be useful to define 'prohibited practices' in the proposed Act, including aversion and chemical restraint.
[13] ADHC *Disability Inclusion Bill 2014 – Consultation draft* information booklet, p29

While we acknowledge that the *Boarding Houses Act* requires certain incidents to be reported to the Director-General of the Department of Family and Community Services, this does not provide the same legislative safeguards that will be available under the proposed Part 3B scheme.

Finally, we note that the exclusion of assisted boarding houses from the scheme would be inconsistent with our oversight of assisted boarding houses under the *Community Services (Complaints, Reviews and Monitoring) Act 1993.*

2) Inclusion of unexplained injuries

We believe that 'unexplained serious injuries' should be included under the definition of 'reportable incident'. We note that the Victorian scheme provides for the reporting, independent review and monitoring of allegations of unexplained injuries.

While we take the view that the reporting of all unexplained injuries would cast too wide a net, we nevertheless believe that the reporting of serious injuries that are unexplained does require oversight. This is an area where the Minister could be empowered to issue guidelines that outline the types of unexplained injuries that should be reported.

3) Inclusion of Apprehended Violence Orders (AVOs)

We also believe that any scenario where an Apprehended Violence Order (AVO) is sought by a resident or staff member in a supported accommodation context should be included under the definition of 'reportable incident'.

Reportable incidents – the need for guidelines

We consider that it would be beneficial to have a clause that enables the Minister to publish guidelines that more fully define certain types of reportable allegations. Giving the Minister the power to issue guidelines would assist in dealing with any ambiguity in relation to the meaning of particular terms.[14] (We have attached a copy of our current Part 3A reportable conduct guidelines – they illustrate the benefit of providing clear guidance on the meaning of particular terms.)

Definition of 'employee' – the inclusion of agency staff

While we note that the definition of 'employee' in the draft Bill includes contractors, this will not bring under our oversight relevant 'incidents' if the involved individual is not engaged by a 'supported accommodation provider' at the time the allegation arises. Therefore, given the significant use of contract labour in supported accommodation environments, this potential gap in the system needs to be closed.[15]

[14] There may also be benefit in considering a similar provision in relation to Part 3A matters.
[15] To a lesser extent, a similar problem exists in relation to Part 3A matters – therefore, it would be timely to also look at amending Part 3A of the *Ombudsman Act*.

Information sharing

We consider that an information sharing provision is a necessary element of a reportable conduct scheme for the disability sector. In our view, such an information sharing provision should be three-fold:

1) Providing information to victims

Firstly, the system should allow for the provision of information by agencies to victims, their families and guardians. In connection with this point, the Office of the Children's Guardian is currently drafting an amendment to Part 3A of the *Ombudsman Act* in line with the following:

> Providing information to alleged victims of reportable allegations and/or their parents/carers
>
> 6.1 The Ombudsman has historically advised agencies subject to Part 3A of the Ombudsman Act, as part of its oversight of agency systems for handling and responding to reportable allegations, to address any support needs of alleged victims of reportable conduct and to advise them (and/or their parents/carers), where appropriate, of the outcome of reportable allegation investigations.
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> 6.2 The Solicitor-General has recently advised that advice about the outcome of an investigation could be a disclosure of 'personal information' within the meaning of section 4 of the *Privacy and Personal Information Protection Act 1998*. Such advice may also be subject to the disclosure restrictions of the *Privacy Act 1988* (Cth), which applies to a number of designated non-government agencies.
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> 6.3 While the NSW Privacy Commissioner is moving to administratively address this matter for NSW public sector agencies and the Ombudsman is pursuing similar action with the Commonwealth Information Commissioner, there are some smaller non-government designated agencies and other NGOs that are not subject to either NSW or Commonwealth privacy legislation or the protections from civil proceedings that are provided in those Acts.
>
> 6.4 It is therefore proposed, consistent with the recommendations of the Victims of Reportable Conduct Roundtable, that the *Ombudsman Act* be amended to expressly permit agencies to provide advice to the involved child and/or parents/carers on the progress and outcome of reportable allegation investigations, including the finding and action taken in response to the finding. The Ombudsman would issue guidance as to appropriate disclosure arrangements.
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> 6.5 This approach will ensure that the civil protections for disclosure of information at s25H of the Ombudsman Act apply. It is also consistent with the approach taken under Part 8A of the *Police Act 1990*, which expressly provides for police informing complainants of the progress and outcomes of police investigations.

2) Exchange of information between agencies

Secondly, we believe that the scheme should allow for provision of information for the purposes of enabling the Director-General or principal officer of a funded agency to provide to, and receive from, other funded agencies and public authorities, information that relates to the promotion of the safety of people with disability in connection with responding to a reportable allegation or conviction under Part 3B.

In this regard, it is important to note that, until the introduction of Chapter 16A of the *Children and Young Persons (Care and Protection) Act 1998*, employing agencies found themselves in the invidious position of having legislative responsibility for responding to reportable conduct under Part 3A, but without having the right to obtain the necessary information needed to allow them to make informed investigative and risk management

decisions. While we do not believe that it is consistent with the rights of people with disability who are adults to be affected by a provision as broad as Chapter 16A, from our extensive experience we are nevertheless convinced that it will be essential that agencies dealing with abuse allegations under this scheme have the ability to exchange information consistent with their proposed legislative obligations and existing common law duty of care responsibilities.

3) Provision of information from the proposed database

Thirdly, if our proposal for a centralised database relating to completed relevant proceedings is accepted, then it will be critical to ensure that the Bill permits relevant stakeholders to exchange information from the proposed database in the circumstances that we have outlined.

Legislative provisions to strengthen safeguards relating to complaints

Effective complaint practices 'at the coal-face' are essential to a person-centred service system. They involve a recognition – and, if need be, the facilitation – of a person's right to be heard; a commitment to seeking and respecting each individual's views about how they are being treated; and associated practices that ought to guarantee a decent response to concerns that are raised.

Consistent with our submission on the review of the *Disability Services Act*, we consider that the proposed Act should include provisions to strengthen safeguards relating to complaints, including provisions:

- enabling the Minister (or the oversight body) to publish complaint handling guidelines or standards that are consistent with the Principles of the Act, the UNCRPD and the Australian/NZ Standard on Complaints Handling,[16] and
- requiring the resolution of complaints based on adherence to the Principles in the new disability legislation and relevant standards (including the Australian/NZ Standard, and the Minister's published guidelines/ standards).[17]

Unconscionable conduct

Our initial submission regarding the review of the *Disability Services Act* suggested consideration of a provision that creates an offence for exploiting people with a disability. We suggested that this provision might prohibit unconscionable conduct, where one party takes advantage of the 'special disadvantage' of another party.

In the information booklet accompanying the draft Bill, ADHC has argued that there are already consumer laws and criminal laws in place that protect people with disability.[18] In this regard, the booklet notes that 'Section 20 of the Australian Consumer Law has a penalty for unconscionable conduct where a person sells good or services by exploiting another person's

[16] We note that, under the *National Disability Strategy NSW Implementation Plan 2012-2014*, our office has the lead responsibility for developing and distributing resources for government agencies to improve access to complaint handling in relation to people with disability.
[17] At least initially, the requirements should apply to specialist disability services. However, in our view, the requirements should have broader application over time and encompass any service, organisation or individual who receives funds under the proposed Act; all public sector agencies; and broader complaints and consumer protection mechanisms.
[18] ADHC *Disability Inclusion Bill 2014 – Consultation draft* information booklet, p29

disability.'[19] We are concerned that this is not an entirely accurate representation of section 20 of the Australian Consumer Law – in particular, section 20[20] does not specifically refer to people with disability (in fact, section 21(2)(a), (c) and (d) are more relevant provisions in the context of people with disabilities as consumers). We are also concerned that commencing action under Australian Consumer Law may not present an accessible or appropriate option for consumers with a disability – particularly vulnerable consumers with a disability.

Given the importance of ensuring that the rights of people with disability are adequately protected from exploitation in relation to services to which they are entitled, we believe that ADHC would benefit from seeking specialist expert legal advice on whether the current consumer and criminal laws provide a practical and adequate safeguard.

We would be happy to discuss our comments or provide further information as necessary. If you have any questions, please contact Carol Berry, Principal Project Officer, Disability, on 9286 1086 or email cberry@ombo.nsw.gov.au.

Yours sincerely

Bruce Barbour
Ombudsman

Steve Kinmond
Deputy Ombudsman
Community and Disability Services Commissioner

cc:

Hon John Ajaka MP, Minister for Disability Services
Michael Coutts-Trotter, Director-General, Department of Family and Community Services

[19] ADHC *Disability Inclusion Bill 2014 – Consultation draft* information booklet, p29

[20] The term 'unconscionable conduct' has similarly been the subject of judicial consideration in a number of cases, for example, in *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd* [2003] HCA 18, the High Court held that unconscionable conduct is a legal term that involves a party who suffers from some 'special disadvantage' and an unconscionable taking advantage of that special disadvantage by another. The accepted scope of 'special disadvantage' in this context includes, on the part of the consumer, a lack of ability to judge or protect their own interests or that the consumer has a particular vulnerability or weakness; on the part of the provider there must be an abuse of a position of trust or confidence or conduct that is harsh or oppressive. While a disability could qualify as a 'special disadvantage' for the purposes of s 20 of the ACL, it could not confidently be predicted that this would be so in every circumstance.