

Opportunity through employment

NESA Submission to the Department of Social Services in response to
Consultation Paper: A New Act to Replace the
Disability Services Act 1986



February 2023

About NESA

The National Employment Services Association (NESA) established in 1997 is the peak body for the Australian employment services sector. NESA is dedicated to a vision of opportunity for everyone through employment and inclusion.

Employment inclusion and participation are cornerstones of the economic and social health of society. Employment participation and productivity are key drivers of economic growth and underpin the quality of life of all Australians enabling access to such things as a well-functioning health system, quality education, and a strong social safety net. For the individual, employment participation is more than a means to an income; it provides connection, purpose and inclusion.

The Australian employment services sector plays a critical role preparing Australians to participate productively in the labour market and connecting them to employment opportunities. NESA is the voice of the employment services sector with an extensive and diverse membership base which is inclusive of not-for-profit, public and for-profit provider organisations.

NESA member organisations deliver the range of Australia's labour market assistance programs including Disability Employment Services (ESS/DMS), Workforce Australia Services (Generalist/Specialist), Community Development Program, Transition to Work, ParentsNext, Time to Work, Career Transition Assistance, Employability Skills Training and Self Employment programs. In addition, many members are engaged in the delivery of Vocational Education and Training, and State employment programs as well as a range of social and health services to disadvantaged Australians. This includes a vast array of disability support services provided through the National Disability Insurance Scheme.

NESA has established knowledge exchange and research partnerships with a range of local and international research bodies including University of Melbourne, University of Portsmouth, Sydney University (Brain and Mind Institute), University of Amsterdam and University of NSW. NESA works collaboratively with Government Departments, agencies and non-government stakeholders to support the effective design and delivery of labour market assistance and social policy to promote social and economic inclusion.

NESA welcomes a review of the Disability Services Act (DSA) and recognises that it is important this legislation remains contemporary and fit for purpose so that it can continue to advance the inclusion of people with disability.

NESA recognises the DSA serves as a basis to ensure Australia meets its international obligations and promotes our national priorities to support all people with disability; and ensure the necessary supports are available to assist them to realise their human rights.

As outlined in Australia’s Disability Strategy 2021-2031¹ “Our responsibility as governments, leaders and citizens is to build a society in which people with disability can participate as equal members with equal opportunities to fulfil their potential”. The proposed replacement Act will have an instrumental impact driving this responsibility and enabling achievement of the vision for a more equitable and inclusive Australia.

QUESTION 1: Do you agree with the proposed objects for the new Act? What other objects should be included in the new Act?

Objects provisions are used to give readers a general understanding of the purpose of legislation, or to set out general aims or principles that help readers to interpret the detailed provisions of legislation². Objects clauses are important and are often used to resolve uncertainty and ambiguity.

The proposed Objects lack a focus on intended outcomes which should have a central focus on inclusion rather than merely participation. Participation and inclusion are different dimensions of engagement, and a person can participate without achieving inclusion³. NESA considers a focus on inclusion is important to drive attention to the experience of people with disability rather than merely considering participatory measures. To illustrate, NESA notes feedback from providers of Australian Disability Enterprises that participants who achieve open employment often voluntarily return to supported employment because they did not feel included in the open workplace.

NESA recommends inclusion is incorporated into the Objects: for example

- b) support the independence and social and economic participation and inclusion of people with disability.**
- e) increase public awareness, understanding, acceptance and inclusion of people with disability.**

¹ [Australia's Disability Strategy 2021-2031](#)

² Office of Parliamentary Counsel, OPC’s drafting services: a guide for clients Seventh edition Canberra July 2022

³ Journal of Planning Education and Research Distinguishing Participation and Inclusion, Kathryn S. Quick and Martha S. Feldman, June 2011

The proposed wording of c) focuses on the provision of services to individual people with disability. The consultation paper recognises the social model of disability and acknowledges intersectionality with social and environmental barriers may hinder their full and effective participation in society on an equal basis with others.

The Objects may be strengthened by explicitly referencing intersectionality and the provision of services that address social and structural barriers to participation and inclusion. Such services intend to affect change creating an environment in which people with disability have greater opportunity to exercise and enjoy their rights and fundamental freedoms. To this end Point e) could be strengthened by reflecting intent to drive a reduction in social and structural barriers and improve inclusion of people with disability through increasing community awareness, understanding and acceptance. NESAs notes for consideration the Disability Inclusion Bill 2022⁴ proposed by the Victorian Government which takes a stronger overt approach in its Objects and principles to inclusion, intersectionality, and international human rights instruments.

The consultation indicates one of the goals for a new and improved Disability Services Act is to clearly express the rights of people with disability, and outcomes they are entitled to expect. To this end, using a similar format to the NDIS Act 2013 with inclusion of the various conventions may strengthen articulation of the rights of people with disability.

National Disability Insurance Act 2013 – Part 2 section 3 Objects of Act Point (i)

(i) in conjunction with other laws, give effect to certain obligations that Australia has as a party to:

- (i) the International Covenant on Civil and Political Rights done at New York on 16 December 1966 ([1980] ATS 23); and
 - (ii) the International Covenant on Economic, Social and Cultural Rights done at New York on 16 December 1966 ([1976] ATS 5); and
 - (iii) the Convention on the Rights of the Child done at New York on 20 November 1989 ([1991] ATS 4); and
 - (iv) the Convention on the Elimination of All Forms of Discrimination Against Women done at New York on 18 December 1979 ([1983] ATS 9); and
 - (v) the International Convention on the Elimination of All Forms of Racial Discrimination done at New York on 21 December 1965 ([1975] ATS 40)
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⁴ Disability Inclusion Bill 2022: Exposure draft overview paper, Engage Victoria <<https://engage.vic.gov.au/disability-act>>.

While the proposed changes to the Objects for the revised Disability Services Act are positive in many regards some of the valued principles in current Objects are not captured; these include:

(i) assist persons with disabilities to integrate in the community and complement services available generally to persons in the community.

Efforts to ensure all services and supports are inclusive and accessible to people with disability is important. The replacement Disability Services Act, for clarity, should continue to overtly commit to the provision of services and supports to people with disability that are in addition to, and complementary of services generally available in the community.

(f) to assist in achieving positive outcomes, such as increased independence, employment opportunities and integration in the community, for persons with disabilities who are of working age by the provision of comprehensive rehabilitation services.

Modernisation of the Act is supported where such change does not lead to a reduction in services or a narrowing of eligibility. As clearly articulated in the consultation paper the Government can only agree to spend money when legislation authorises it to do so. It is acknowledged that the disability support and services landscape has changed significantly since the implementation of the National Disability Insurance Scheme (NDIS), and legislation needs to reflect the current environment. Removal of a commitment to comprehensive rehabilitation services from the Objects and list of potential categories of services funded under the new Act; is an area of concern.

QUESTION 2: Do you agree with the proposed approach to the target group? How do you think the target group should be defined?

While it is agreed that a medical model definition to describe the target group is outdated, it is essential for there to be a respectful and clear understanding of the target group eligible for support under the Act.

In principle, NESAs is supportive of a proposed definition of the target group for supports and services as people with disability who are experiencing one or more of the following barriers to full and effective participation in society:

- a) Attitudinal barriers
- b) Environmental barriers
- c) Institutional barriers
- d) Communication barriers

Greater detail of the proposed definitions of each of these barriers is required to give unqualified support to this categorisation of barriers.

NESA agrees that the Act may recognise that there are people with particular identities, or characteristics who, due to multiple and overlapping forms of disadvantage or discrimination, may experience greater barriers to full and effective participation. There are many people with particular identities, or characteristics including First Nations people, LGBTIQ+ people, and people from culturally and linguistically diverse backgrounds that experience overlapping forms of disadvantage or discrimination and as such any examples mentioned in the Act should be broad and indicative rather than definitive.

The consultation paper outlines the provisions under section 8 of the current Act, however, omits recognition of the eligibility provided under section 18.

8: Target group etc. (page 16)

(1) The target group for the purposes of this Part consists of persons with a disability that:

(a) is attributable to an intellectual, psychiatric, sensory or physical impairment or a combination of such impairments;

(b) is permanent or likely to be permanent; and

(c) results in:

(i) a substantially reduced capacity of the person for communication, learning or mobility; and

(ii) the need for ongoing support services.

18 Target group (page 43-44)

The target group for the purposes of this Part consists of persons who:

(a) have attained 14 years of age but have not attained pension age; and

(b) have a disability that:

(i) is attributable to an intellectual, psychiatric, sensory, or physical impairment or a combination of such impairments; and

(ii) results in a substantially reduced capacity of the person:

(A) to obtain or retain unsupported paid employment; or

(B) to live independently

Failure to recognise this second target group will see a significant proportion of Australians in need of support excluded. NESA does not support a replacement Act which results in any reduction in services or narrowing of access and eligibility arrangements than is currently provided under existing arrangements.

NESA considers that adoption of a definition of disability resembling the social model definition used by the UN CRPD is preferred. To this end we note the definition proposed in the Victorian Disability Inclusion Act, which states:

disability means any impairment (including a physical, mental, intellectual, cognitive, learning, communication, or sensory impairment) or functional limitation (whether or not the impairment or limitation is permanent, temporary, episodic in nature or evident) that, in interaction with a barrier, hinders a person's full and equal participation in society.

As indicated in the consultation paper it is likely that like the existing Act its replacement will make use of subordinate legislation. NESA welcomes the commitment to consult with people with disability and the sector as a whole, on any significant subordinate instruments that are proposed. It is important that there is consistency in the definitions and a social model of disability is also reflected in such subordinate legislation, instruments, and other mechanisms to ensure a cohesive approach.

QUESTION 3: Do you agree with our suggested principles for avoiding duplication and requiring coordination? What other principles do you think should apply?

NESA acknowledges that in order to support sustainability of disability service provision avoiding duplication and substitution of services is important, and the new Act needs to explain what should happen when someone is separately eligible for services or supports from the NDIS or from State or Territory sources.

NESA broadly supports the principles proposed for avoiding duplication and requiring coordination, however in isolation considers these inadequate to ensure prompt and efficient decision making that ensures people with disability and their family/carers can access the support they need in a timely manner.

With the best efforts to avoid duplication and substitution there is an inevitable overlap in services. It is imperative that there is a clearly articulated decision-making framework, and set of principles which ensures that the goals, choices, and control of the person with disability remains central.

Where a person is eligible for supports or services under more than one piece of legislation, there is potential for numerous agencies and providers to be involved. A clear framework of how agencies and providers should work together, and, with people with disability to coordinate supports and services is required to facilitate accountability, fair, prompt, and consistent decisions and to protect service quality. For clarity, the replacement Act should minimise the need for, but provide for, coordination of supports where required.

QUESTION 4: Do you think the new Act should include a definition for disability? Do you have any additional comments?

The Disability Services Act and its replacement should be the overarching legislation that facilitates the provision of services to all people with disability. NESAs agrees that providing a definition of disability should ensure clarity as to the target group that the Act is applicable to. While it is proposed that the definition used could be similar to that adopted in the NDIS Act 2013, it must be recognised that the existing Disability Services Act applies to a significantly wider cohort of people with disability.

As put forward in its response to question 2, NESAs favours a definition which reflects a social model of disability and that is inclusive of injury, health conditions, and disability whether they be permanent, long term, temporary and/or episodic in nature.

QUESTION 5: How do you think that quality and safeguarding arrangements should be managed by the new Act?

Quality and safeguarding are vitally necessary; however, regulatory and quality assurance arrangements applicable to social service and care sectors are many and complex.

NESAs agrees that regulatory alignment across the social service and care sectors has potential to provide consistent and clear requirements to underpin the quality and integrity of services while also enabling improved efficiency. Management of the obligations and reporting requirements under the various regulatory and quality frameworks are resource intensive and often involve a high level of duplication, particularly for organisations delivering a suite of services or supports.

Greater alignment and reduced duplication of requirements should not compromise standards of care and the quality of support of people with disability. However, ensuring resources are directed to service delivery and not unnecessarily absorbed by regulatory processes is central to achieving efficient, quality, and sustainable service provision. To this end NESAs considers there is a role for Commonwealth leadership and collaborative efforts with State jurisdictions to review, align and/or redesign the quality and safeguarding frameworks applicable to services and supports provided to people with disability.

QUESTION 6: Do you agree with the supports and services listed above? What other kinds of supports and services should be included in the new Act?

As the consultation paper indicates, the Government can only agree to spend money when authorised by legislation and as such ensuring clarity of scope is a critical element of the proposed replacement Act.

NESA agrees that using broad definitions should enable flexibility to respond to emerging needs or changing circumstance. Subject to definitions, NESA agrees with the support and service categories proposed in the consultation paper which include:

- accessibility
- accommodation support
- advocacy
- employment and training
- independent living
- information and education
- recreation
- respite care
- research, development, and data collection

NESA considers Rehabilitation services, Assessment services, Behavioural Supports, Coordination of support and Civil Inclusion Support should be added to the service and support categories proposed in the consultation paper (or within category definitions).

NESA considers that to enable fully informed contributions, the final proposed list of support and services categories and their definitions should be the subject of further consultation.

QUESTION 7: Do you consider it necessary to retain separate provisions for employment services and rehabilitation employment program, or could they be combined?

Disability Employment Services (DES) plays a vital role in supporting people with disability, injury or health condition to realise their human right to work. As indicated in the consultation paper DES has two distinct elements Disability Management Service (DMS) and Employment Support Service (ESS).

DMS and ESS program streams are designed to meet the needs of two distinct cohorts.

- **Disability Management Service** is for job seekers with disability, injury or health condition who need assistance to find a job and occasional support in the workplace to keep a job.
- **Employment Support Service** is for job seekers with permanent disability who need help to find a job and who need regular, ongoing support in the workplace to keep a job.

The service offer of the current DES DMS and ESS programs are different as are participant eligibility rules and the criterion used to select appropriate providers to deliver services.

Within the Australian employment services framework, the rehabilitation focus of the DES - DMS program is unique and a critical component of assistance for people with disability, injury, or health condition. NESAs acknowledges that there are efforts underway to design a new program to replace DES and that the new model is a matter for Government to decide.

Without further information NESAs advocates that separate provisions are retained to ensure the continued availability of disability employment and rehabilitation employment programs.

The consultation paper does not provide any indication of how integrating the existing scope of services into the provisions of the replacement Act will impact service scope and access. The consultation paper does not provide an explicit commitment to the continuation of rehabilitation services, and we note the absence of rehabilitation services from the proposed categories of services and supports.

The consultation paper talks to the complications of the current arrangements with ESS and DMS provided via two distinct parts of the current Act. NESAs is of the view that these complications are secondary to ensuring access and scope of services is not diminished.

NESAs primary concern is to ensure that there is no reduction in the current eligibility of people with disability, injury, or health condition to specialist disability employment support services and maintaining the scope of services currently available under existing arrangements. As such NESAs urges efforts to overcome the identified complications in the development of the replacement Act in ways other than removing an explicit commitment to the continuation of rehabilitation employment programs, are undertaken.



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