



Australian
Human Rights
Commission

Submission on A New Act to Replace the *Disability Services Act* 1986

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1 Introduction

The Australian Human Rights Commission (the Commission) welcomes the Department of Social Services' (DSS) consultation paper, *A New Act to Replace the Disability Services Act 1986 (Cth)*, and the opportunity to provide comment on the proposed new Disability Services Act.

The Commission is Australia's National Human Rights Institution, with recognised independent status and roles in United Nations human rights fora.

The Commission works to promote and protect the human rights of everyone in Australia through:

- advising all arms of government and a range of public and private institutions.
- contributing to stronger law, policy and practice;
- delivering an accessible and effective Investigation and Conciliation Services
- engaging inclusively with civil society, communities and the private sector;
- raising human rights awareness and providing human rights educational and working with partners to build a stronger culture of respect for human rights.

2 Summary of recommendations

Recommendation 1: The Department of Social Services should refer to the Australian Law Reform Commission Reports 79 and 124, with a view to ensuring any relevant and applicable recommendations are implemented in a new Disability Services Act.

Recommendation 2: A new Disability Services Act should clearly align with Articles 4, 9, 14, 19, 20, 22, 25, 26, and 30 of the UN Convention on the Rights of Persons with Disabilities.

Recommendation 3: The objects of the new Disability Services Act should include:

- i) to enable people to participate fully in all aspects of life
- ii) to assist people with disability to achieve progressively the full realisation of their economic, social and cultural rights.

Recommendation 4: Proposed object (d) of the new Disability Services Act should be amended to promote the continuous improvement of disability services by ensuring that people with disability are the centre of changes in practices and service delivery and the design and evaluation of systems.

Recommendation 5: The new Disability Services Act should include provisions for the appropriate resourcing of services, and clarify the Australian Government's responsibility in relation to people who require services under the Act.

Recommendation 6: The new Disability Services Act's definition of the target group / disability should be aligned with the definition of disability provided in section 4 of the *Disability Discrimination Act 1992* (Cth).

Recommendation 7: Provisions for safeguarding in the new Disability Services Act should align with the six essential elements identified in the 2018 Australian Human Rights Commission report, *A future free from violence*.

Recommendation 8: The Australian Government should prioritise the design and development of the National Disability Data Asset.

Recommendation 9: The new Disability Services Act should include:

- Include provisions for the collection of data (and accompanying safeguards surrounding privacy) with a view to measuring the

effectiveness of services provided under the Act against a clear set of outcome indicators; and

- **lead to the establishment and enactment of a national framework for mandatory compliance with any new Standards for Disability Services**

Recommendation 10: The new Disability Services Act should remove any distinction between permanent and non-permanent disability, as well as remove any separate provisions for employment and rehabilitation services.

3 General Comments

In providing this submission the Commission acknowledges the previous work of the Australian Law Reform Commission's (ALRC) 1996 report in relation to the Disability Services Act, *Making Rights Count: Services for People with a Disability* (ALRC Report 79), and in its 2014 report on legislative recognition of the right of persons with disability to make decisions that affect their lives and have those decisions respected, *Equality, Capacity and Disability in Commonwealth Laws* (ALRC Report 124).¹ Recommendations made by the ALRC in these two reports remain only partially implemented, and therefore many are still relevant and applicable today.

Recommendation 1: The Department of Social Services should refer to the Australian Law Reform Commission Reports 79 and 124, with a view to ensuring any relevant and applicable recommendations are implemented in a new Disability Services Act.

The recommendations made in this submission are broadly in keeping with those made by the ALRC, particularly the notion that any new Commonwealth disability services legislation should be 'grounded in a recognition of the rights of people with disabilities and the need for achievement of high quality services, rather than simply the provision of funds to service providers'.² The Commission recognises and is very supportive of DSS' goal to have a new Disability Services Act that 'clearly expresses the rights of people with disability, and outcomes they are entitled to expect'.³

The Commission supports a new Disability Services Act that would give effect to, in conjunction with other laws, Australia's obligations under the Convention on the Rights of Persons with Disabilities (CRPD). Australia ratified the CRPD in 2008, a significant advancement since the 1986 Disability Services Act was enacted. Perhaps the most notable development in the disability service landscape since the ratification of the CRPD, is the creation and roll-out of the National Disability

Insurance Scheme (NDIS) from 2013. The replacement of the Disability Services Act is long overdue to reflect these important changes.

The Commission welcomes the movement away from the medical model of disability in determining eligibility criteria for disability support. This approach is in better alignment with the human rights models underpinning the CRPD.

At the time of ratification, the human rights model of disability represented a significant shift from the medical model, in recognising intersectionality and in building upon the social model, which recognises the role that barriers play in 'disabling' people. The Commission considers this is well reflected in the consultation paper's proposed target group definition.

The human rights model of disability, which extends upon the social model, recognises that disability is a natural part of the human condition and human diversity, and it must be respected and supported in all its forms. Furthermore, people with disability have the same rights as everyone else in society and should be supported to live a flourishing life.⁴

The Disability Services Act has a role not just in enabling persons with disabilities to live independently and participate fully in all aspects of life (CRPD Article 9(1)) but also to assist people with disability to achieve progressively the full realisation of their economic, social and cultural rights (CRPD Article 4).

The CRPD is a modern treaty developed over years of careful negotiation to be as practicable as possible in its operation. Article 4 (General Obligations) of the CRPD establishes obligations on State Parties to promote, protect, and uphold CRPD rights through effective legislative, administrative, or other measures. These obligations lay out a roadmap towards the progressive realisation of the CRPD in domestic law and policy.

The Commission's view is that the new Disability Services Act should, to as great a degree as possible, facilitate the enlivenment of CRPD rights, aligned to Australia's obligations under Article 4 of the CRPD. These obligations should guide the development, implementation and evaluation of the Disability Services Act, and inform its legislative provisions, as well as any subordinate legislation that is developed.

In addition to these General Obligations under Article 4, it is important that the Disability Services Act align with, and seek to actively uphold and realise, other key obligations under the CRPD. DSS and drafters may consider the following to be among the most relevant for the Disability Services Act.

- Article 9 (Accessibility)

- Article 14 (Liberty and Security of Person)
- Article 19 (Living independently)
- Article 20 (Personal mobility)
- Article 22 (Respect for Privacy)
- Article 25 (Health)
- Article 26 (Habitation and rehabilitation)
- Article 30 (Participation in cultural life, recreation, leisure and sport).

A key consideration for DSS is to identify provisions that should be included in the new Disability Services Act to enable DSS, as a service funder and regulator, as well as service users and their representatives, to seek redress where service providers fail to uphold these rights.

Recommendation 2: A new Disability Services Act should clearly align with Articles 4, 9, 14, 19, 20, 22, 25, 26, and 30 of the UN Convention on the Rights of Persons with Disabilities.

3.1 Proposed objects for the new Act (Question 1)

The Commission supports the proposed objects of the new Disability Services Act to 'affirm Australia's commitment to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms for people with disability, as expressed in the UN CRPD'.

The Commission considers that additional objects should be included.

Recommendation 3: The objects of the new Disability Services Act should include:

i) to enable people to participate fully in all aspects of life

ii) to assist people with disability to achieve progressively the full realisation of their economic, social and cultural rights.

The importance of co-designing supports with people with disability cannot be overstated. This approach provides many benefits:

By co-designing policy, programs and services with people with disabilities rather than for people with disabilities, the asymmetrical relationship of policy development is shifted towards social justice-giving agency to people with disabilities and upholding their right to

not only participate, but to co-design the policies, programs and services that affect their daily lives.⁵

The Commission commends DSS for consulting with people with disability on the objects of a new Disability Services Act. This will go some way to ensuring the early legislative development process as well as the text of law itself embody and affirm the principles it is designed to uphold, in the delivery of supports and services to people with disability.

Proposed object (d) is to 'ensure that supports and services provided ... are planned, developed, implemented and reviewed in conjunction with people with disability'. The Commission suggests the wording could be amended to more assuredly support increasing inclusion of people with disability in decision-making. For example, the *Mental Health and Wellbeing Act 2021 (Vic)* uses language that could be replicated, or at least drawn upon, to mandate co-design in all aspects of service development and delivery.

Recommendation 4: Proposed object (d) of the new Disability Services Act should be amended to promote the continuous improvement of disability services by ensuring that people with disability are the centre of changes in practices and service delivery and the design an evaluation of systems.

Importantly, the new Disability Services Act should ensure that funding is available to the identified level of need. The ALRC report noted, 'where there are limited resources available for disability services a particular responsibility is placed on program administrators by Commonwealth legal, social justice and human rights policies to ensure that those people who need assistance and for whom the Commonwealth acknowledges responsibility are treated fairly.'⁶

The Commission recommends that a central object of the new Disability Services Act be the appropriate resourcing of services, to enable the objects of the Act to be fully realised. In other words, sufficient funding should be provided for services to wholly support people with disability to achieve full participation as members of our community.

Recommendation 5: The new Disability Services Act should include provisions for the appropriate resourcing of services, and clarify the Australian Government's responsibility in relation to people who require services under the Act.

3.2 Proposed approach to the target group/disability definition (Questions 2 and 4)

The Australian Institute of Health and Welfare cites that 4.4 million (or 18%) Australians live with disability.⁷ However, there is no uniform or agreed definition of disability in Australia. The 4.4 million prevalence rate is based on a definition of disability that assesses functional ability only. Far more Australians live with a chronic medical condition; an estimated 47% of the general population. The same is true of Australians living with mental illness; 1 in 5 Australians experience mental illness every year, but 45% of Australian adults will be affected by mental illness at some time in their life. There are also an estimated 2.65 million carers in Australia, a number that does not account for all family members of people with disability. Disability touches far more than 4.4 million individuals.

At present, disability is defined differently under distinct pieces of legislation, depending on the source of law.

- The CRPD takes a broad definition of disability, which includes impairments, conditions or illnesses that may be permanent, temporary, intermittent or imputed, and includes those that are physical, sensory, psychosocial, neurological, medical or intellectual. It is perhaps the only definition in operation that recognises that disability results from the interaction between persons with impairments, conditions or illnesses and the environmental and attitudinal barriers they face.
- The *Disability Discrimination Act 1992* (Cth) (Disability Discrimination Act) takes a different, but equally broad, definition of disability, that is not limited in time, with a view to eliminating discrimination against persons on the ground of disability in the areas of public life.
- The *National Disability Insurance Scheme Act 2013* (Cth) (NDIS Act) provides eligibility criteria to the scheme that centres on permanent functional impairment, a definition that has been criticised for its narrowness, but that serves the purpose of limiting who can access the scheme.
- State and territory based legislation define 'mental illness' for the purposes of providing compulsory and non-compulsory mental health assessment and treatment.

Given that one of the objects of the new Disability Services Act will be to 'provide a basis for continued supports and services outside the NDIS for people with disability',⁸ it is critically important that the disability definition under the new Disability Services Act be as broad as possible, so as not to inhibit access to services by people who need them.

The definition included in the new Disability Services Act should acknowledge that some disabilities may fluctuate, vary in intensity, or be episodic.⁹ This would serve to further guard against a definition of disability that would in of itself be a barrier to accessing services. A broad definition will go towards empowering people with disability to not only physically participate in their communities, but also to access their social, cultural and political rights.

With this in mind, the Commission supports a human rights-based definition of disability in keeping with the CRPD definition, which acknowledges the diversity of experience of disability and the barriers that may be faced by people with disability. It is not recommended that the NDIS Act requirements be replicated.

In an effort towards achieving consistency across legislation and jurisdictions, the Commission recommends the new Disability Services Act definition of disability replicate that contained within the Disability Discrimination Act:

- total or partial loss of the person's bodily or mental functions; or
- total or partial loss of a part of the body; or
- the presence in the body of organisms causing disease or illness; or
- the presence in the body of organisms capable of causing disease or illness; or
- the malfunction, malformation or disfigurement of a part of the person's body; or
- a disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction; or
- a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgement or that results in disturbed behaviour;

and includes a disability that:

- presently exists; or
- previously existed but no longer exists; or
- may exist in the future (including because of a genetic predisposition to that disability); or
- is imputed to a person.

To avoid doubt, a disability that is otherwise covered by this definition includes behaviour that is a symptom or manifestation of the disability.¹⁰

Adopting this definition avoids further complicating the legislative landscape by adding another, potentially different, definition into the legislative landscape. For the same reasons, the Commission does not recommend the addition of a list of barriers, as is proposed in the consultation paper as this would differentiate the definitions in the Disability Discrimination Act 1992 and the new Disability Services Act.

Recommendation 6: The new Disability Services Act's definition of the target group / disability should be aligned with the definition of disability provided in section 4 of the *Disability Discrimination Act 1992* (Cth).

3.3 Suggested principles for avoiding duplication and requiring coordination (Question 3)

The Commission considers that the social and human rights models of disability provide the best way to avoid duplication and ensure coordination – by first recognising people with disability as ‘rights-holders who can and should determine the course of their lives to the same extent as any member of society’.¹¹

The Commission agrees with the proposition in the consultation paper, that ‘all governments must continue to consider and uphold the rights of people with disability.’

In principle, a person who receives supports under one Act should not, by accepting those supports, be prevented from accessing services and supports made available under other legislation, provided these are not duplicative in nature. For instance, access of accommodation support under one Act should not limit or preclude access to opportunities for employment and training under another Act. A more disputed example would be that eligibility for NDIS services should not limit or preclude access to services provided by any other service system.

While the latter distinction may be the subject of secondary legislation to the NDIS Act, it is not clear that it operates effectively, nor that the Disability Services Act adds any further guidance to guarantee that people with disability are provided with the supports they need, when they need them. Consideration should be given to any secondary legislation or policy that will be developed to determine responsibilities between systems, in a way that avoids cost-shifting resulting in a person with disability being prevented from obtaining the required supports.

To this end, the new Disability Services Act's objects, definitions, and principles should first and foremost be as open and facilitatory as possible. Where the Disability Services Act creates any barriers to access of services, whether that be restrictive definitions or complexities around which services can or cannot be accessed, this could in effect limit the realisation of rights, rather than be a means to affirm people's rights as outlined in the CRPD.

Second, where a person has funding for, or is advised by their healthcare professional to obtain, particular supports, the new Disability Services Act should include means to address the supply, or lack thereof, of the service in a timely manner, where there are issues in obtaining it. The person requiring the service should be able to obtain support by achieving timely resolution of any supply issue, or by being able to acquire an equivalent service of their choosing.

A mechanism co-ordinating ongoing data collection and monitoring, discussed elsewhere in this submission, could be written into the legislation to monitor quality and sufficiency of supply (or, at least, to identify where gaps in quality and supply exist, so as to inform co-ordination between service providers and government to implement effective remedies).

Third, where a person with disability may be eligible for services or supports that could be provided under multiple pieces of legislation, the person with disability should be provided with the information and support necessary to make an informed decision on which service to access. This would require providers involved to work together to coordinate and ensure that whichever route the person may choose to seek supports, they are able to understand the options available to them and make a choice that best aligns with their goals.

3.4 Quality and safeguarding arrangements in the new Act (Question 5)

The purpose of upholding human rights is to protect people's essential dignity and to ensure fairness of treatment, therefore it is essential that the new Disability Services Act has a strong focus on the prevention of violations occurring in the first place. It is vital that safeguarding and regulatory mechanisms that aim to protect human rights are consistent and aligned across sectors, to ensure all people with disability receive high quality and safe services, regardless of the system discharging these services.

The Commission acknowledges that duplication in quality and safeguarding legislative requirements increases complexity and costs, and that a proportionate approach should be favoured.

Aligning regulatory and legislative requirements is only of real benefit where those requirements are demonstrably achieving the goals of continuous improvement and the prevention and redress of abuses. Ideally, quality and safeguard arrangements in the new Disability Services Act should not duplicate or contradict existing arrangements, however they may need to go beyond them where data collection indicates that current safeguards are insufficient.

The Commission's 2018 report, *A Future Without Violence*,¹² discusses safeguarding in relation to the violence against people with disability in institutional settings. The report identifies six essential elements to effective quality, safeguarding and oversight mechanisms that give effect to the rights of people with disability, and effectively prevent and address violence against people with disability in institutional settings.

The Commission considers these elements equally apply to quality and safeguarding in the new Disability Services Act. These are:

1. a human rights-based approach (i.e. one in which people with disability are empowered to have choice and control in decisions that affect them);
2. a connected and integrated system (in terms of ensuring that safeguards and mechanisms compliment and build on each other, rather than being duplicative or increasing regulatory complexity);
3. independent oversight and monitoring (with independence maintained through the inclusion of community visitors in the Safeguarding Framework, adequate powers and funding for independent individual and systemic advocacy organisations);
4. robust prevention and response elements (such as provider screening, and complaint and reporting systems for service recipients);
5. accessibility for people with disability (including an accessible legal process available to people to enforce their rights in relation to services covered by the Act);
6. continuous systems improvement through data from service providers and the experiences of end users that allows for ongoing assessment of quality and safeguarding.

Recommendation 7: Provisions for safeguarding in the new Disability Services Act should align with the six essential elements identified in the 2018 Australian Human Rights Commission report, *A future free from violence*.

Article 31 of the CRPD requires state parties to collect disaggregated data to give effect to CRPD rights, and identify and address the barriers faced by persons with disabilities in exercising their rights. The Commission strongly recommends that data collection be a central pillar of quality and safeguarding.

The importance of data was identified by the ALRC:

Without reliable data to provide a broad picture of need across Australia it is extremely difficult for the Commonwealth to ensure services are located properly. Inappropriate planning targets may be set. Factors other than demographic data are important in needs-based planning. The development of reliable indicators of need should be the basis of the Commonwealth's planning process.¹³

The introduction of the NDIS and the well-documented impacts of thin markets on people with disability more than ever highlight the need for robust data to inform service planning.

The Commission recognises that the Australian Government established a new National Disability Data Asset some years ago to link data sets from different government agencies and services, to have greater visibility of outcomes from policies and services for people with disability. However, it appears this work has stagnated.

Recommendation 8: The Australian Government should prioritise the design and development of the National Disability Data Asset.

Australia's Disability Strategy (ADS) Outcomes Framework does provide for the measurement of high-level outcomes around the provision of supports. However, it is too early in the legislative drafting process to know whether the objectives and outcomes in the ADS Outcomes Framework will align and be sufficiently comprehensive to measure the effectiveness of a new Disability Services Act and new Standards.

The UN CRPD Committee, in its 2019 review of Australia's implementation of the CRPD, raised concerns about the lack of a national framework for reporting compliance against the National Standards for Disability Services. A recommendation was made to establish and enact a national framework for mandatory compliance with the Standards.

The Commission endorses the above UN CRPD Committee recommendation and considers that at minimum, drafters should:

- **develop clear outcome-based success indicators:** To ensure that the new Disability Services Act is able to drive service delivery in alignment with the legislative objectives and principles, clear indicators of success are needed to measure tangible outcomes.
- **build in data-collection:** Evaluation of the effectiveness of the Disability Services Act requires not only clear indicators of success, but also well-

designed data collection mechanisms with appropriate privacy safeguards for users. In order to further embed a human rights-based approach, the data collection should be informed by the needs and concerns of people with disability; further, goods and service providers, especially large businesses, should be required to participate.

Recommendation 9: The new Disability Services Act should include:

- **include provisions for the collection of data (and accompanying safeguards surrounding privacy) with a view to measuring the effectiveness of services provided under the Act against a clear set of outcome indicators; and**
- **lead to the establishment and enactment of a national framework for mandatory compliance with any new Standards for Disability Services**

Finally, it is likely that the Disability Royal Commission will make recommendations in relation to quality and safeguarding, and the new Disability Services Act should be reviewed in light of the Royal Commission's final report.

3.5 List of supports and services (Question 6)

A list of services may be useful where it is indicative and serves to provide clarity around the types of services included within the new Disability Services Act, and where it does not have the effect of limiting access to other valuable supports and services that might otherwise be sought by people with disability.

The Commission agrees with the proposal to i) describe any service and support categories listed in the new Disability Services Act broadly and ii) include the flexibility for the new Disability Services Act to provide authority for new and different supports in future which could respond to emerging needs or changing circumstances.

3.6 Provisions for employment services and rehabilitation employment program (Question 7)

The Commission recommends that the new Disability Services Act adopt the same as the definition established in the Disability Discrimination Act. This definition includes disability that:

- presently exists; or
- previously existed but no longer exists; or

- may exist in the future (including because of a genetic predisposition to that disability); or
- is imputed to a person.¹⁴

The Disability Discrimination Act definition covers disabilities of all kinds and is broad enough to encompass permanent and non-permanent disability. It recognises that the needs of each person with disability are unique and may be subject to change over time irrespective of the duration or long-lasting presence of their disability, whether it is from birth or acquired, episodic or chronic.

In the Consultation paper, DSS notes that the current distinctions between employment services for people with permanent disability (s12AD of the Disability Services Act) and employment assistance to job seekers with a non-permanent disability (s20 (2) of the Disability Services Act) 'creates complications in both the funding and management of these programs'.¹⁵

The Commission supports the application of universal design principles in the design and delivery of disability services. This should not prevent services in being adapted and fit for purpose for each individual, taking into account the unique manifestation of disability as well as intersectional identity characteristics that impact a person's needs.

For these reasons, the Commission recommends a single set of provisions be developed which cover employment services and rehabilitation employment programs, rather than separate provisions for each.

Recommendation 10: The new Disability Services Act should remove any distinction between permanent and non-permanent disability, as well as remove any separate provisions for employment and rehabilitation services.

¹ Australian Law Reform Commission, *Making Rights Count: Services for People with Disability* (ALRC Report 79) 15, available at: <https://www.alrc.gov.au/wp-content/uploads/2019/08/ALRC79.pdf>

² Australian Law Reform Commission, 'Disability Services' available at: <https://www.alrc.gov.au/inquiry/disability-services/>

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- ³ Department of Social Services, *Consultation Paper: A New Act to Replace the Disability Services Act 1986*, 2, available at: https://engage.dss.gov.au/wp-content/uploads/2022/11/Consultation_Paper-Disability_Services_Act_Repeal_and_Replace-28-Nov.docx.
- ⁴ Ben Gauntlett, 'Australia's Disability Strategy, Human Rights and the Convention on the Rights of Persons with Disabilities' (Speech, 16 August 2022), available at: <https://humanrights.gov.au/about/news/speeches/australias-disability-strategy-human-rights-and-convention-rights-persons>
- ⁵ Janice Rieger, 'Right to Participate: Co-designing Disability Policies in Australia' Centre for Justice, December 2020, available at: <https://research.qut.edu.au/centre-for-justice/wp-content/uploads/sites/304/2021/02/Briefing-paper-series-Dec-2020-Issue12.pdf>
- ⁶ Australian Law Reform Commission, *Making Rights Count: Services for People with Disability* (ALRC Report 79) 15, available at: <https://www.alrc.gov.au/wp-content/uploads/2019/08/ALRC79.pdf>
- ⁷ Australian Institute of Health and Welfare. (2022). People with Disability in Australia. (Web Page, 17 January 2023) <https://www.aihw.gov.au/reports/disability/people-with-disability-in-australia/contents/people-with-disability/prevalence-of-disability>.
- ⁸ Department of Social Services, , *Consultation Paper: A New Act to Replace the Disability Services Act 1986*, 2, available at: https://engage.dss.gov.au/wp-content/uploads/2022/11/Consultation_Paper-Disability_Services_Act_Repeal_and_Replace-28-Nov.docx
- ⁹ *National Disability Insurance Scheme Act 2013* (Cth), s 24, available at: <https://www.legislation.gov.au/Details/C2022C00206>
- ¹⁰ *Disability Discrimination Act 1992* (Cth) s 4.
- ¹¹ Rehabilitation International, 'UN Convention on the Human Rights of People with Disabilities: Ad Hoc Committee Seventh Session–Daily Summaries'(on file with the authors), 24 January 2006.
- ¹² Australian Human Rights Commission, *'A Future Without Violence*, 2018 available at: <https://humanrights.gov.au/our-work/disability-rights/publications/future-without-violence-2018>
- ¹³ Australian Law Reform Commission, *Making Rights Count: Services for People with Disability* (ALRC Report 79) 64, available at: <https://www.alrc.gov.au/wp-content/uploads/2019/08/ALRC79.pdf>
- ¹⁴ See definition of 'disability' in *Disability Discrimination Act*, s 4 (Interpretation).
- ¹⁵ Department of Social Services, *Consultation Paper: A New Act to Replace the Disability Services Act 1986*, 9, available at: https://engage.dss.gov.au/wp-content/uploads/2022/11/Consultation_Paper-Disability_Services_Act_Repeal_and_Replace-28-Nov.docx.