

CLAUSE NOTES

Disability Services Bill 2011

Clause 1

Short Title

This Act will be cited as the *Disability Services Act 2011*.

Clause 2

Commencement

Provides for the Act to commence on a day to be proclaimed; or 1 January 2012 if not proclaimed before that date.

Clause 3

Objects

The Objects indicate that the purpose of this Act is to provide for the funding of specialist disability services and related research and development activities. The Act establishes a quality and safety framework for these services including a statement of principles and the requirement that standards be developed. The Bill also provides new protections through the regulation of restrictive practices.

Clause 4

Interpretation

This clause defines a number of terms used in the Bill.

Features include:

- Definition of Disability has been expanded from that in the current Disability Services Act to include recognition of disability resulting from cognitive impairment, and consideration of the impact that the disability has on a person's capacity to participate in society.
- Definition of Restrictive Intervention (so as to allow for the regulation of these practices, providing protection from the inappropriate use of these practices.) Restrictive Intervention is defined as being any action that is taken to restrict the rights or freedom of movement of a person with disability for the primary purpose of behavioural management. The definition excludes actions that are taken for therapeutic purposes, to enable the safe transport of the person, or actions relating to the provision of mental health or guardianship services.
- Definition of funded entity means a funded provider or a funded private person.
- Definition of funded private person means a person that is receiving a grant under section 14 (1) (c).
- Definition of specialist disability services means services specifically for, or related to the support of persons with disability. Fifteen service types are listed, it is not intended that eligible service types be limited to those identified.

Clause 5

Principles

This clause establishes the principles to be applied to all activities under this Act. The principles reflect those within the United Nations Convention on the Rights of Persons with Disabilities.

Principles include

- That the inherent dignity of persons with disability and their individual autonomy including the freedom to make their own choices and right to independence be respected;
- an overriding requirement that the needs and best interests of persons with disability are to be promoted;
- the notion of “nothing about us without us”;
- that any action taken should be the least intrusive intervention available; and
- recognition of the evolving capacities of children with disability.

Clause 6

Designated standards

This clause requires that standards be developed and incorporated into regulations. New standards are being developed nationally. These have not yet been finalised. Provision has been made to carry forward the existing standards in the *Disability Services Act 1992* until the new regulations have been finalised.

Part 2

Planning and reporting

Division 1: Planning and budgetary oversight

Division 1 introduces new planning and reporting requirements. These provisions are intended to increase transparency and accountability. Consultation requirements for the development of strategic and operational plans are established.

Clause 7

Strategic plan

This clause requires the development of a 3 yearly strategic plan.

Features of the plan includes statements of intended outcomes in relation to the administration of this Act, the provision of specialist disability services and of grants provided under this Act. The plan will also include statements of objectives and financial details, and enable the proportion of funds that will be provided to disability service providers, researchers and grants to individuals to be seen.

The Strategic Plan will be publically available.

Clause 8

Operational plans

This clause requires the development of operational plan(s).

The operational plans will set out how the strategic plan is to be

implemented. Financial details required include the cost of administration, details of funding allocated to the provision of specialist disability services, research and development and summary information on grants to individuals.

Clause 9 **Budgetary oversight**

This clause requires the Minister to table an annual report outlining activity in the preceding financial year. The report is required to include detail on the implementation of the strategic and operational plans, including financial details.

Part 2 **Planning and reporting**

Division 2: Individual Plans

Individual plans may be required as a condition of grants provided either to an individual or to a disability service provider. Division 2 sets out individual plan requirements.

Clause 10 **Contents of individual plans**

This clause stipulates that an individual plan includes statements of desired outcome, the services required to achieve these outcomes, specialist disability services that may require financing under a grant, the rights and responsibility of the individual and a disability services provider that provides services to the individual.

Clause 11 **Approval of individual plans required by condition of grant to funded private persons**

This clause requires that individual plans and amendments to these plans be developed through consultation between the person with disability (or their nominee) and the Secretary. The clause also makes provision for the Secretary to approve plans and amendments.

Clause 12 **Approval of individual plans required as a condition of grant to a service provider**

This clause provides for the development, amendment and approval of individual plans where required as a condition of grant to a service provider.

Part Three **Funding**

Clause 13 **Provision of services**

This clause established that the Secretary may provide specialist disability services to a person with disability.

The clause also

- indicates that the specialist disability services can be provided either indirectly (through a funded disability service provider) or directly to the person; and
- requires services provided to comply with the overarching principles and standards

Clause 14

Grants

This clause establishes that the Secretary may make a grant to enable a person or organisation to provide specialist disability services, research and development activity, or, in some circumstances, “other goods or services”.

Provision of grants to fund “other goods or services” has been limited to goods or services necessary to remediate some of the disadvantage or difficulties experienced by the person with disability to whom the grant relates.

Grants can only be provided where the person or organisation has entered into a funding agreement and the Secretary is satisfied that the principles and standards will be met.

Clause 15

Funding agreements with disability service providers

This clause requires that funding agreements with disability service providers specify

- the specialist disability services to be provided;
- that activities, *so far as is practicable*, comply with the principles and standards; and
- other terms and conditions.

This clause also establishes that the funded disability service provider may be required to develop individual plans for each person receiving services and if this is the case, that these must be reviewed at least annually.

Clause 16

Funding agreements with disability research providers

This clause establishes that a person or organisation may enter into a funding agreement with the Secretary for the purpose of carrying out research or development activities and that these agreements specify

- details of the research or development activity;
- that activities, *so far as is practicable*, comply with the principles and standards; and
- other terms and conditions.

Clause 17

Funding agreements with persons with disability

This clause establishes that that a person with disability may enter into a funding agreement with the Secretary for the purpose of enabling the provision of specialist disability services, or, in some circumstances, other goods or services. (Provision of grants to fund “other goods or services” has been limited to goods or services necessary to remediate some of the disadvantage or difficulties experienced by the person with disability to whom the grant relates.)

It is required that the funding agreement specify:

- the specialist disability services that are to be financed by the grant;

- outcomes intended as a result of the provision of the services; and
- the rights under the funding agreement of the person entering into the agreement as well as the person receiving the services.

Clause 18 Amendment of funding agreement

This clause allows for amendments to be made to a funding agreement. Amendments can only be made by the Secretary with the approval of the person/organisation that has entered into the funding agreement.

This clause provides a level of flexibility to agreements. Where funding agreements are based on individual plans, this will allow for the revision of individual plans to accommodate changing support needs.

Part 4 Monitoring of Grants

Division 1: Review of Grants

Clause 19 Review of grants to funded disability service providers

The Secretary is required to review grants at least every three years. The review is to consider compliance with the principles, standards and other terms and conditions. Importantly, the review is also to consider the extent to which the grant has enabled the quality of life of the person receiving the service to be improved.

Clause 20 Review of grants to funded disability research providers

The Secretary is required to review grants provided for the purpose of research. The review must consider the level of compliance with the principles and other terms and conditions of the grant.

Clause 21 Review of use being made of grant to funded private person

The Secretary is required to review grants to individuals annually. Whilst the review must consider how the grant has been used, and compliance with terms and conditions, the focus of this review is intended to be broader.

Sub section (2) (c) establishes that the main focus of the review is to consider the extent to which the quality of the life of the person with disability has been improved by the grant.

Sub section (2) (d) requires review of the Individual Plan. The review is to consider how well obligations of other persons to provide services to the individual have been fulfilled, whether there has been adequate coordination of the provision of services and whether the plan requires amendment.

Sub section (3) provides the Secretary with flexibility in the decision as to whether it is necessary to conduct a review. This allows for consideration of the proportional appropriateness of the review. (For example a once-off grant for equipment may be acquitted through a less intensive review process such as only requiring the receipt for equipment to be provided.)

Part 4

Monitoring of Grants

Division 2 : Monitoring

Clause 22

Provision of assistance to enable compliance with terms and conditions of grant

This clause establishes an expectation that the Secretary explore providing support to assist a funded entity (which includes both funded organisations and funded individuals) to meet terms and conditions of a grant before the Secretary exercises punitive provisions.

The Secretary may provide assistance including training, services of persons with specialist skills and other assistance considered appropriate.

Clause 23

Requirements must be imposed on entity if non-compliance continues

Where a funded entity refuses to discuss or accept support from the Secretary, and it is believed that there is an ongoing failure to comply, the Secretary must give notice in writing.

Sub section (2) requires that the notice include details of the compliance failure, action required to comply and an invitation for the funded entity to respond to the notice (via submission) within 28 days.

Sub section (4) provides guidance as to what may be included in the submission, for example whether it is believed that the Secretary's assessment is incorrect and, if so, why and any reasons why the entity cannot or should not comply with the Secretary's requirement.

Following consideration of the information provided, the Secretary may modify or continue to require the funded entity to take certain actions.

Clause 24

Failure of entity to comply with requirement

If the funded entity continues to fail to comply with the requirement, the Secretary may either terminate the funding agreement or, with the consent of the funded entity, appoint an administrator.

If the funding agreement is terminated any balance of funds must be returned within 90 days.

Part 4

Division 3 : Entry of Premises

This Division provides the Secretary the power to authorise officers to enter, inspect and report on activities within funded premises, which may include a private home. The actions of an authorised officer are limited to the purpose of entry which are to enable the officer to determine the quality of funded services, to ensure the safety and wellbeing of a person with disability receiving these services, and to determine whether the terms and conditions of the grant are being met.

Clause 25 Secretary may authorise entry of premises

This clause provides for the Secretary to authorise either state service employees or a state service officers to enter funded premises.

Clause 26 Rights of authorised officers to enter funded providers premises

This clause establishes that the purpose of entering premises is limited to determining the safety and wellbeing of persons receiving the specialist disability services, the quality of services and whether the terms and conditions of the grant are being met.

Subsection (3) establishes that the authorised office may enter the premises at any time without prior warning.

If a person with disability is present when the authorised officer enters funded providers premises the authorised officer is required to immediately explain the reason for their entry.

Sub section (5) requires that if requested the authorised officer must produce proof of their authorised status, or if not able to do so, leave the premises as soon as is practicable.

Subsection (6) stipulates that the officer is not authorised to use force to enter the premises.

Clause 27 Additional requirements where private funded premises are entered

This clause provides additional requirements where private funded premises are to be entered.

This includes a requirement that at least 48 hours prior notice be provided unless there are reasonable grounds to be concerned for the wellbeing and safety of the person with disability.

It also provides that there be no entry between 7 pm and 7 am unless there are reasonable grounds to be concerned for the wellbeing and safety of the person with disability.

Clause 28 Rights of authorised officers after entry of premises

Subsection (1) establishes that an authorised officer may inspect the premises, documents and records, and may take copies of the relevant documents and records. This authority is limited to investigations relating to the purpose of entering, as outlined in clause 26.

Subsection (2) establishes that the authorised officer may ask questions of employees, any person with disability or other person on the premises in relation to the concern being investigated.

Subsection (3) makes provision for a person with disability to have another person present during questioning, and that this person may assist in answering any questions.

Subsection (4) establishes that the funded service provider must permit the

authorised officer to ask questions in relation to the concern being investigated (in private if needed) and must not prohibit or punish a person for answering these questions.

If a funded provider, an employee or any other person (other than a person with a disability) prevents the authorised officer from exercising their functions and powers, this will be taken into account in determining whether the grant should be terminated or refused.

Part 5 Senior Practitioner

Clause 29 Senior Practitioner to be appointed

This clause requires the Secretary to appoint a Senior Practitioner, and that this person must have the appropriate qualifications and experience to perform the functions and exercise the powers under this Act.

The appointment could be either a state service employee or a state service officer.

Clause 30 Functions and powers of the senior practitioner

The functions of the Senior Practitioner will be to provide advice to the Secretary on the provision of specialist disability services, how these may be improved, and any other functions specified under this Act. (The functions of the Senior Practitioner relating to restrictive intervention are outlined in clause 34.)

Clause 31 Annual report

The Senior Practitioner is required to provide the Secretary with an annual report, containing data on the use of restrictive interventions and the performance of functions and exercise of powers of the Senior Practitioner.

Sub section (2) requires that information within the report must not enable the identification of individuals with disability.

It is also required that the report will be made publicly available.

Clause 32 Senior Practitioner may delegate functions, &c.

This clause establishes that the Senior Practitioner may delegate powers and functions to state service employees and state service officers. This may only occur if the Senior Practitioner is satisfied that the person has sufficient knowledge and expertise and appropriate skills and qualifications in respect of the power or function.

Clause 33 Disability Service providers to provide assistance to senior practitioner, &c.

This clause requires a disability services provider or any employee of the provider and a funded private person to provide the Senior Practitioner with any reasonable assistance that may be required to perform a function or undertake a power under this Act. Failure to do so is an offence punishable

by a fine of 200 penalty units. A penalty unit is \$130.

Part 6

Regulation of Restrictive Interventions

This Part has been established to provide protection to individuals from the inappropriate use of restrictive interventions. It is required that, should a restrictive intervention be considered, appropriate approvals must be in place. In determining whether to grant approval consideration must be given to whether the intervention is the least restrictive option available and whether the action is in the best interest of the person with disability.

Division 1: Preliminary

Clause 34

Interpretation of Part 6

This clause defines the meaning of environmental and personal restrictions.

An environmental restriction means a restrictive intervention that consists of modification of an object or the environment of the person so as to enable behavioural control.

A personal restriction means a restriction that includes physical contact or may involve an action that restricts the liberty of movement of a person.

The distinction between environmental and personal restriction is established so as to accommodate different approval processes.

Clause 35

Functions of the Senior Practitioner in relation to restrictive interventions

This clause establishes that the Senior Practitioner is to provide a broad range of services that will contribute to the reduction, and where appropriate, the elimination of, the use of restrictive practices. The Senior Practitioner is to develop guidelines and standards in accordance with best practice, to provide education and information on the use of behaviour management techniques and information on the rights of persons with disability that may be subject to the use of restrictive interventions.

The Senior Practitioner is also to provide expert advice to the Secretary, the Guardianship and Administration Board, disability service providers and funded private persons so as to assist the improvement of practices in restrictive interventions, and on behaviour management techniques that minimise, and where appropriate, eliminate the need for restrictive interventions.

Clause 36

Use of unauthorised restrictive intervention prohibited

Sub section (1) establishes that a restrictive intervention is not to be carried out without the appropriate approvals under section 38 or 42; that conditions and limitations associated with the approval are to be observed and that the restrictive intervention must not contravene any direction issued under section 47. Penalties of up to 200 units may be imposed for breaches of this requirement.

Sub section (2) establishes that it is a defence to a charge of an offence under

subsection (1) if the action was required to protect the person with disability or other person from harm and that the intervention was the least intrusive to achieve the protection and the Senior Practitioner was notified as soon as practicable after the event. The intervention must not be continued for greater than 72 hours without approval under section 37.

Division 2: Approvals by the Secretary

Clause 37 Application for approvals of carrying out of restrictive interventions

Under this clause a disability service provider or a funded private individual may apply to the Secretary for approval to carry out restrictive interventions.

Sub section (2) requires that applications to the Secretary be in a form approved by the Secretary.

Clause 38 Approvals of carrying out of restrictive interventions.

This clause establishes the authority for the Secretary, in certain circumstances, to approve the use of restrictive interventions involving environmental restrictions.

Sub section (3) requires that the Secretary be satisfied that consultation has occurred with the person with disability (or their nominee), experts in the area and the Senior Practitioner prior to approving any restriction to the persons environment.

Sub section(4) requires that any approval must consider whether the intervention will be carried out for the primary purpose of ensuring the safety of the person or others, and that the intervention is the least restrictive as is practicable in the circumstances.

Sub section (5) requires that the Secretary must have regards to the best interests of the person with disability to whom the application applies.

Clause 39 Provisions in respect of approvals by the Secretary

This clause establishes that conditions or limitations may be specified when approving the use of a restrictive intervention.

Sub section (3) limits approval under section 38 to a period of 90 days.

This clause also prevents the Secretary from delegating (under any Act) his or her functions or powers under this Division.

Clause 40 Amendment and revocation of approval by the Secretary of restrictive interventions

This clause establishes that the Secretary has the authority to review, amend or revoke an approval made under section 38. This may only occur after the Secretary is satisfied that the provider or person that the approval was granted to and the person with disability (or nominee) that the approval relates to have been consulted.

Division 3: Approvals by the Guardianship and Administration Board

Approvals for restrictive interventions involving personal restrictions can only be granted by the Guardianship and Administration Board. This provides additional checks and balances for the person concerned. Additionally the Board may consider the appointment of a partial or full guardian for the person concerned. The Board is required to ensure that any intervention is in the best interest of the person concerned, and is the least intrusive intervention appropriate in the circumstances

Clause 41

Applications for approvals to carry out restrictive interventions

Under this clause a disability service provider or a funded private individual may apply to the Guardianship and Administration Board for approval to carry out restrictive interventions.

Sub section (2) provides detail on the content and process for the application.

Clause 42

Approvals to carry out restrictive interventions

This clause provides for the Guardianship and Administration Board to, in certain circumstances, grant approval to carry out a restrictive intervention. Authority to approve restrictive interventions that include a personal restriction has been limited to the Guardianship and Administration Board. The Board may also approve environmental restrictions.

Sub section (3) establishes that approval may only be granted after the Board has consulted with the person (or nominee) that the restriction relates to, and persons who have expertise in carrying out restrictive interventions of that type.

Subsection (4) & (5) establishes that the Board may hold a hearing to consider an application, and that approval (or otherwise) may be granted at the conclusion of the hearing.

Subsection (7) provides for the Board to, in some circumstances, require a party to provide the Board any information required to accompany an application under section 19 of the *Guardianship and Administration Act 1995*, and that under section 20 of that Act the Board may appoint a full or limited guardian in relation to the person with disability.

Clause 43

Circumstances in which approvals may be granted

This clause establishes that approval to carry out a restrictive intervention may only be granted if the Board is satisfied that the intervention is the least restrictive intervention appropriate and that it is in the best interest of the person concerned.

Sub section(1) requires that any approval must consider whether the intervention will be carried out for the primary purpose of ensuring the safety of the person or others, and that the intervention is the least restrictive as is practicable in the circumstances.

Subsection (2) requires, amongst other things, that the Board must have regard to the best interests of the person to whom the application applies.

Clause 44 Provisions in respect of approvals by Guardianship and Administration Board

This clause establishes that conditions or limitations may be specified when approving the use of a restrictive intervention.

Sub section (3) limits approval under section 42 to a period of 90 days, unless it is granted at the conclusion of a Hearing by the Board, in which case it expires after 6 months. However approvals may be issued as often as is necessary.

Clause 45 Review, amendment and revocation of approval by the Guardianship and Administration Board

This clause establishes that an application for a review of an approval granted under section 42 may be made to the Board by either the person with disability that the approval relates to or the service provider or funded private person that the approval was granted to.

Sub section (2) establishes that the Board may review an approval.

Where the approval was granted following a hearing, the review must also be conducted by way of a hearing.

Sub section (8) establishes that an approval can only be amended or revoked without a hearing if the Board has consulted with the organisation or person to whom the approval was granted and the person with disability (or their nominee) to whom the approval relates.

Division 4: Investigations and directions

This Division establishes powers for the Senior Practitioner to investigate the use of unauthorised restrictive interventions, and for the Secretary and the Guardianship and Administration Board to issue directives to cease or amend the use of some interventions. Penalties are established for failing to comply with a directive.

Clause 46 Powers of the Senior Practitioner to investigate, &c. use of Restrictive Intervention

This clause provides power to the Senior Practitioner to investigate unauthorised or inappropriate use of restrictive interventions. The Senior Practitioner must only exercise these powers where there are reasonable grounds to believe restrictive interventions are being carried out. Powers include the right to visit and inspect, observe and speak with a person who is subject to a restrictive intervention, investigate, audit and monitor; inspect and take copies of documentation relating to the concern; and to question individuals involved in the delivery of the service.

Sub section (2) requires that the Senior Practitioner reports to the Secretary

when exercising the powers provided within this Division.

Sub section (3) requires that, where the investigation relates to a restrictive intervention approved by the Guardianship and Administration Board, the Secretary must provide a copy of that report to the Board.

Clause 47

Directions may be issued in relation to restrictive intervention

This clause provides the authority to both the Secretary and the Guardianship and Administration Board to issue directives to disability service providers or a funded private person.

Sub section (1) establishes that after considering the report, the Secretary may issue a directive that

- requires an intervention that has not been approved to be discontinued; or
- requires that an action be altered so as to comply with a previous approval.

Sub section (2) establishes that, after considering the report, the Guardianship and Administration Board may direct the provider to observe a practice or procedure that has been authorised by the Board.

Subsection (3) requires that the Secretary and the Guardianship and Administration Board consider whether the intervention will be carried out for the primary purpose of ensuring the safety of the person and others, that the intervention is the least restrictive as is practicable in the circumstances and whether it is in the best interest of the person with disability.

Subsection (4) establishes that a penalty of up to 200 penalty units could be imposed for failure to comply with a direction.

Subsection (6) and (7) requires the Secretary or the Guardianship and Administration Board to advise the person to whom the restrictive intervention relates of any directive that is issued.

Subsection (8) establishes that a direction under this section that is inconsistent with an approval under section 37 is invalid to the extent of the inconsistency.

Part 7

Miscellaneous

Clause 48

Review by Magistrate Court (Administrative Appeals Division)

Certain decisions and actions taken by the Secretary may be reviewed by the Magistrates Court (Administrative Division). These include decisions that relate to :

- the approval (or non-approval) of an individual plan; and
- approval, or the imposition of a condition on an approval; or an amendment or revocation of an approval relating to a restrictive practice; and

- a direction issued under section 41; and
- a requirement to comply with standards or conditions of grant issued under section 23.

Clause 49

Secretary to be responsible for coordination of services

This clause establishes a requirement that the Secretary is to take reasonable steps to assist in the effective coordination of the provisions of the following services for persons with disability :

- specialist disability services;
- health and psychiatric services;
- specialist education services; and
- other services by or on behalf of Tasmania or the Commonwealth for the purpose of providing specialist assistance to persons with disability.

Clause 50

Sharing of information

This clause limits the right to share information to circumstances where the information is necessary or desirable for the assessment of need, to determine whether goods or services to be provided are appropriate and for the safety, welfare and wellbeing of the person or other persons. Where possible this is to be with the consent of the person with disability to whom the information relates.

Sub section (1) defines information sharing entities , prescribed persons and relevant persons

Sub section (2) establishes that in some circumstances the Secretary may provide information to an information sharing entity or require an information sharing entity to provide information to the Secretary.

Sub section (3) establishes that the Secretary may only provide or require information if the Secretary is satisfied that the information is necessary or desirable for the assessment of need, to determine where goods or services provided are appropriate or for the safety welfare or well being of the person or other persons. Where a person with disability is capable of giving consent and the information is not required for the safety of the person or some other person, the consent of the person with disability is required.

Sub section (4) establishes that in the case of information not being provided within a specified time. A penalty of 5 penalty units may be imposed.

Sub section (5) establishes that an information sharing entity may provide either the Secretary or another information sharing entity with relevant information.

Sub section (6) establishes the circumstances where information sharing is appropriate, and that in most circumstances this should be with the consent of the person with disability to whom the information relates.

Sub section (7) establishes that a person providing information under this

section has certain immunities. A person providing information under this section cannot be held to have breached any code of professional ethics or etiquette, and to the extent that he or she has operated in good faith, incurs no civil or criminal liability.

Clause 51 Immunity

This clause provides certain immunities for the Minister, Secretary, Guardianship and Administration Board, Senior Practitioner and delegates and authorised officers where actions taken under this Act have been in good faith.

Clause 52 Regulations

This clause provides that the Governor may make Regulations for the purpose of this Act.

Clause 53 Administration of Act

The administration of this Act is assigned to the Minister for Human Services, and the department responsible for that Minister for the administration of the Act is the Department of Health and Human Services.

Clause 54 Savings and transitional

This clause establishes that grants and funding agreements established under the *Disability Services Act 1992* will continue in force as if they were given or entered into under this Act.

Part 8 Children Young Persons and Their Families Act 1997 amended

Clause 55 &56 Consequential amendments to the *Children Young Persons and their Families Act 1997* (information sharing provisions)

Part 9 Mental Health Act 1996 amended

Clause 57 &58 Consequential amendment to the *Mental Health Act 1996*

Part 10 Obstetric and Paediatric Mortality and Morbidity Act 1994 amended

Clause 59 &60 Consequential amendments to the *Obstetric and Paediatric Mortality and Morbidity Act 1994*

Part 11 Poisons Regulations 2008 amended

Clause 61 &62 Consequential amendments to the *Poisons Regulation 2008*

Part 12 Legislation Repealed

Clause 63 & Schedule I Repeal of *Disability Services Act 1992*