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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

DISABILITY SERVICES AND INCLUSION BILL 2023

EXPLANATORY MEMORANDUM

**(Circulated by the authority of the
Minister for Social Services, the Hon Amanda Rishworth MP)**

DISABILITY SERVICES AND INCLUSION BILL 2023

OUTLINE

The Disability Services and Inclusion Bill 2023 (the Bill) is designed to help deliver the Government's commitment to enable people with disability to participate fully in society, exercise choice and control over their lives and to improve job opportunities, job readiness and support in employment.

The Bill will repeal and replace the *Disability Services Act 1986* (DS Act) and establish a modern legislative framework for the funding and regulation of programs targeted for the benefit of people with disability, their families and carers. The Bill will provide legislative authority for new and existing spending on disability related programs outside the National Disability Insurance Scheme (NDIS). Arrangements and grants made under the proposed Act will be supported by appropriate quality safeguards such as a Code of Conduct and certification standards.

The Bill does not directly allocate funding for specific supports or services. It is an enabling legislative framework which will allow a range of supports or services to be funded in reliance on it. It acknowledges the social model of disability, which recognises attitudes, practices and structures can be disabling and act as barriers preventing people from full participation as equal members of the community and from exercising their rights.

This Bill purposefully does not include a definition of disability. To do so would be exclusionary, would not recognise the diversity of disability and may limit the range of people with disability that could access and benefit from supports or services. The breadth of this Bill recognises the need for continued development of a wide variety of programs to support people with disability. It also recognises that people with disability experience and describe their disability in different ways.

Supports and services may be provided under the Bill to any person with a disability, including those with physical, psychosocial, cognitive, intellectual or sensory impairments. These disabilities may be present from birth or acquired and may be long-term or episodic.

The Bill engages with the aims of Australia's Disability Strategy 2021-2031 (the Strategy), and thereby plays a role in protecting, promoting and realising the human rights of people with disability. While the rights of people with disability are embedded and enforced through the *Disability Discrimination Act 1992*, this Bill also implements and furthers those rights, including the rights to equality of opportunity and inclusion, autonomy of decision making and privacy.

Existing grants and programs will continue under existing arrangements rather than transition these to the new arrangements. Transition to new arrangements will occur when current funding agreements end.

The Bill is broken up into five parts.

Part 1 of the Bill includes introductory and framing provisions as well as definitions to help inform the subsequent parts of the Bill. Objects and principles included in this Part describe the general aims of the legislation and provide guidance for decision-making under the Bill. The objects aim to ensure that, in conjunction with other legislation, the Bill gives effect to Australia's obligations under international human rights treaties. The principles in the Bill recognise various rights inherent to people with disability.

Part 2 of the Bill outlines funding arrangements under the Bill and prescribes various activities for the benefit of people with disability. A number of statutory funding conditions are set out in this Part of the Bill to ensure quality and safe supports and services for people with disability, their families and carers.

Part 3 of the Bill outlines quality and safeguarding arrangements to keep people with disability safe when receiving supports and services. This includes the introduction of a mandatory Code of Conduct for service providers, including their key personnel and staff. The Bill prescribes compliance requirements for regulated activities, which will be determined by the Secretary, taking into consideration operations and the level of risk to people with disability. Part 3 of the Bill allows for increased regulatory alignment with other quality and safeguard systems where appropriate.

Part 4 of the Bill deals with information management, including unauthorised use or disclosure of protected information, and authorised use or disclosure of relevant information.

Part 5 of the Bill deals with miscellaneous matters. This includes detailing delegation of powers by the Minister and the Secretary and the power to make rules. This Part also outlines the application of the Bill to partnerships, unincorporated associations and trusts.

Financial impact statement

There are no financial impacts of this Bill.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

The statement of compatibility with human rights appears at the end of this explanatory memorandum.

DISABILITY SERVICES AND INCLUSION BILL 2023

NOTES ON CLAUSES

Abbreviations used in this explanatory memorandum

In this explanatory memorandum, unless the contrary is indicated:

- **Acts Interpretation Act** means the *Acts Interpretation Act 1901*.
- **The Strategy** means Australia's Disability Strategy 2021-31.
- **Bill** means the Disability Services and Inclusion Bill 2023.
- **commencement day** means the day the Act commences, which will be a single date to be fixed by proclamation, or 6 months after the Bill receives the Royal Assent if it has not commenced before that time.
- **DS Act** means the *Disability Services Act 1986*.
- **FF(SP) Act** means the *Financial Framework (Supplementary Powers) Regulations 1997*.
- **FF(SP) Regulations** means the *Financial Framework (Supplementary Powers) Regulations 1997*.
- **Legislation Act** means the *Legislation Act 2003*.
- **NDIS** means the National Disability Insurance Scheme.
- **NDIS Act** means the *National Disability Insurance Scheme Act 2013*.
- **UNCPRD** the United Nations Convention on the Rights of Persons with Disabilities done at New York on 13 December 2006, as amended and in force for Australia from time to time.

Background

International and Australian disability policy has evolved significantly over the past several decades, including since the DS Act commenced in 1986. Australia's entry into the UNCRPD and the development and implementation of the Strategy have driven greater engagement by and with people with disability, and their families and carers, in determining how they live and are supported.

At the same time, support by Australian governments for people with disability has moved from solely direct service provision to include person-centred market models of service delivery and support, including through the NDIS, which currently supports over 600,000 people with disability.

With more than 1 in 6 people in Australia estimated to have a disability, it is essential to establish a complementary, modern and streamlined legislative framework that

effectively facilitates funding for supports and services that can benefit all people with disability regardless of whether or not they are an NDIS participant.

Contemporary disability programs employ a range of service delivery models that were not envisaged when the DS Act was established. Several of these programs are delivered through alternative financial arrangements such as procurements. Legislative authority for those programs is generally provided by the FF(SP) Regulations. This can cause significant administrative delays in implementing important programs and means that many programs are not subject to any form of quality and safeguarding regulatory oversight.

Repealing the DS Act and replacing it with a modern, fit-for-purpose Act offers the most effective means to provide a legislative basis for Commonwealth disability programs outside the NDIS.

The Bill will allow for better alignment between different regulatory schemes and provide for a Code of Conduct, similar to that provided for under the NDIS Act. Safeguarding measures will be enforced by the department through contractual arrangements. This means that breaches of terms and conditions may result in the variation or revocation of a financial arrangement with the Commonwealth.

Consultation

The Bill has been designed in consultation with a range of stakeholders, including:

- people with disability, carers and families
- disability advocates, service providers, peak bodies and organisations
- Commonwealth, state and territory government agencies.

Between November 2022 and February 2023 a public consultation was held to provide stakeholders with an opportunity to give feedback on plans and underlying policy for the Bill. This feedback informed the development of the Bill during the drafting phase.

Between June 2023 and August 2023 a second public consultation on the exposure draft of the Bill was held. This allowed stakeholders to see how their initial feedback had been reflected in the Bill and to provide further input on the wording prior to introduction. Based on this consultation, a number of clauses were revised or expanded to address feedback received.

Explanation of the clauses

Part 1—Preliminary

Division 1 - Preliminary

Clause 1 – Short title

1. This clause sets out the short title of this Bill when it becomes law. It specifies that the Act shall be known as the *Disability Services and Inclusion Act 2023*.

Clause 2 – Commencement

2. This clause provides that the Bill will commence on the 28th day after the Act receives the Royal Assent.

Clause 3 – Objects of this Act

3. **Clause 3** outlines the objects of the Bill.
4. The objects of the Bill are to:
 - (a) in conjunction with other laws, give effect to the Convention on the Rights of Persons with Disabilities
 - (b) provide funding, outside of the National Disability Insurance Scheme, to persons that provide supports and services for the benefit of people with disability, their families and carers
 - (c) advance the inclusion and social and economic participation of people with disability
 - (d) support people with disability to exercise choice and control in matters that affect their lives, including by participating in the development and review of policy and programs
 - (e) promote respect for the inherent dignity, difference and individual autonomy of people with disability and raise community understanding of barriers to the inclusion and participation of people with disability on an equal basis
 - (f) protect the rights of people with disability who receive supports or services from persons funded under this Act, including by:
 - (i) setting compliance standards that align with contemporary practice; and
 - (ii) requiring persons providing such supports or services to establish appropriate complaints management and resolution systems and incident management systems
 - (g) promote national consistency, coordination and accessibility of supports and services for people with disability (noting that it is out of scope for the Bill to require national consistency, coordination and accessibility due to the absence of control over how other supports and services operate)
 - (h) support people with disability to access supports or services that:

- (i) are safe and provided in a way that does not expose people with disability to violence, abuse, neglect or exploitation
- (ii) are locally available (including in rural and remote communities where there may be thin markets) and provided in a manner that is timely, effective and innovative
- (iii) to the extent possible, are integrated with services generally available to other members of Australian society (noting that it is out of scope for the Bill to require integrated services due to the absence of control over how those other services operate)
- (iv) to the extent possible, provide continuity of support and services for people with disability (noting that it is out of scope for the Bill to require continuity of support and services due to the absence of control over how other supports and services operate)
- (v) assist people with disability to meet the daily and lifetime norms of other members of Australian society
- (vi) meet the needs of people with disability who experience compound disadvantage, including as a result of being an Indigenous person or as a result of a person's age, sex, gender identity, sexual orientation, intersex status, ethnicity, religious belief or cultural, linguistic background, socioeconomic status or experience of past trauma
- (vii) respect the privacy of people with disability
- (viii) provide accurate and sufficient information about the supports and services available and the quality of those supports and services
- (ix) increase the independence and wellbeing of people with disability
- (x) provide meaningful opportunities for employment, education and development for people with disability
- (xi) support people with disability to participate in Australian society on an equal basis to other members of Australian society; and
- (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), as amended and in force for Australia from time to time
 - (ii) the International Covenant on Economic, Social and Cultural Rights done at New York on 16 December 1966 ([1976] ATS 5), as amended and in force for Australia from time to time
 - (iii) the Convention on the Rights of the Child done at New York on 20 November 1989 ([1991] ATS 4), as amended and in force for Australia from time to time
 - (iv) the Convention on the Elimination of All Forms of Discrimination Against Women done at New York on 18 December 1979 ([1983] ATS 9), as amended and in force for Australia from time to time
 - (v) the International Convention on the Elimination of All Forms of Racial Discrimination done at New York on 21 December 1965 ([1975] ATS 40), as amended and in force for Australia from time to time.

Clause 4 – General principles guiding actions under this Act

5. This clause sets out a list of general principles underpinning the Bill.
6. **Subclause 4(1)** provides that regard must be had to the principles in taking any action under the Bill.
7. The general principles guiding actions under this Bill are:
 - People with disability are individuals who have the inherent right to respect for their human worth and dignity, and live a life free from neglect, abuse and exploitation.
 - People with disability, whatever the origin, nature, type and degree of disability, have the same basic human rights as other members of Australian society.
 - People with disability have the same right as other members of Australian society to realise their individual capacities for physical, social, emotional and intellectual development.
 - People with disability have the same right as other members of Australian society to services which will support their attaining a reasonable quality of life.
 - People with disability have the same right as other members of Australian society to exercise choice and control in relation to the decisions that affect their lives.
 - People with disability receiving supports or services have the same right as other members of Australian society to receive those supports or services in a manner which results in the least restriction of their rights and opportunities.
 - People with disability have the same right as other members of Australian society to pursue of any grievance in relation to supports or services.
8. Actions under the Bill include (but are not limited to) deciding to make or vary an arrangement or grant for an eligible activity, making rules, such as those setting compliance standards, certifying that a person meets compliance requirements and delivering supports or services funded under the Bill.
9. The general principles apply to any person taking any action under the Bill, including commonwealth officers, certifying authorities and people delivering eligible supports and services.

Clause 5 – Simplified outline of this Act

10. **Clause 5** provides a simplified outline of the Bill to help readers understand the substantive provisions. This is included as a navigation aid for the reader and is not intended to be comprehensive. The reader should consult the substantive provisions to understand the rights and obligations that arise under this Part.

Clauses 6 – Act binds the Crown

11. **Clause 6** provides that the Crown is bound in each of its capacities by this Act but it does not make the Crown liable to be prosecuted for an offence.

Clause 7 – Extension to external Territories

12. **Clause 7** provides that this Bill extends to the external Territories.

Clause 8 – Definitions

13. **Clause 8** sets out definitions for terms used in the Bill.

14. A number of definitions are signpost definitions which refer the reader to where the term is defined in detail later in this Bill. Examples include the following:

- accredited certification body
- accrediting authority
- alternative compliance requirements
- code of conduct
- compliance standards
- eligible activity
- eligible person
- funding agreement
- key personnel
- regulated activity
- rules
- statutory funding condition

15. A number of terms are also defined in other legislation, including:

- centrelink program
- National Disability Insurance Scheme
- medicare program.

16. A number of definitions define the 'eligible activities' that may be funded under clause 13 of the Bill. These are the following:

accessibility supports or services means supports or services to assist a person with disability to access the physical environment or to participate in the social environment.

This definition engages with the CRPD for the purposes of ensuring funding for supports and services that improve and accessibility for people with disability. The definition is intended to capture a broad range of services and supports including those that:

- (a) provide devices or technologies to people with disability to facilitate engagement in the person's physical and social environment

- (b) help to remove or minimise physical and mental barriers to engaging in the physical or social environment
- (c) take account of, or support, a person's personal attributes, including their race, sex, gender identity, sexual orientation, impairment, class, religious, age, social origin and other identity markers.
- (d) The social environment includes online and digital spaces.

accommodation supports or services means supports or services to assist a person with disability to obtain or maintain suitable residential arrangements.

Access to accommodation supports or services to people with disability include:

- (a) temporary accommodation
- (b) supports to find suitable accommodation
- (c) modifications to ensure the suitability of their accommodation
- (d) assistance with housing related costs.

advocacy supports or services means supports or services:

- (a) to assist a person with disability to exercise choice or control in matters that affect the person; or
- (b) to assist a person with disability to understand and advocate for their rights and to uphold and enforce their rights; or
- (c) to influence community attitudes, government policy or laws in relation to the rights and freedoms of people with disability as recognised or declared in the Convention on the Rights of Persons with Disabilities.

This definition is intended to, among other things, capture funding of services and supports that will help people with disability to develop the knowledge and skills to self-advocate or obtain the services of a person who can assist them to advocate or self-advocate in relation to Commonwealth policies, programs and services. It is also aimed at supporting systemic advocacy services that seek to introduce and influence community attitudes and laws.

Advocacy also captures legal services, where the purpose of those services is to assist a person with disability to exercise choice and control and/or to understand, advocate for, uphold and enforce their rights.

capacity building supports or services means the following:

- (a) supports or services to improve the capability of a person with disability to participate in Australian society, including through peer support, mentoring and skills development;

- (b) supports or services to improve the capability of persons to deliver inclusive and accessible infrastructure, supports or services to people with disability

This definition is intended to capture a range of programs including those that aim to improve the skills, abilities, knowledge, expertise and positive culture within the sector and empower people with disability to participate in that development, including in local and community settings. It also captures a range of activities that promote individual capacity, including through peer supports, mentoring and skills development.

carer supports and services means supports or services that assist carers of people with disability in their caring role.

This recognises that carers of people with disability provide a critical role in supporting people with disability. Carer supports and services will be aimed at providing better outcomes for disability through the supports and services provided to their carers.

community inclusion supports or services means supports or services which assist a person with disability to engage with their chosen community and culture, including by removing barriers to their inclusion in community and cultural activities.

This could include supports or services that assist a person with disability to attend cultural or religious ceremonies, facilitate engagement with Country, or ensure their ability to participate fully in culturally and linguistically diverse communities, including communities that use sign language.

counselling supports or services means supports or services based on discussing, describing and addressing issues that a person with disability experiences in their life or relationships with the purpose of assisting that person to resolve or manage those issues.

education supports or services means supports or services to assist a person with disability to prepare for, or participate in, education at any level.

employment supports or services means the following:

- (a) supports or services to assist a person with disability to prepare for, obtain or maintain paid work, including training;
- (b) supports or services to assist a person with disability to gain and maintain self-employment;
- (c) the provision of incentives or supports to employers to employ people with disability.

This definition is intended to cover an extensive range of services such as: providing vocational education and training (job specific, career advancement or broader employment skills), assistance with finding, obtaining and

maintaining employment, transition from disability-specific employment to mainstream employment; assessing capacity for employment; and promoting self-employment and entrepreneurship.

independent living supports or services means supports or services to assist a person with disability to develop or maintain the personal skills and self-confidence necessary to enhance their independence, and self-reliance, in the community and in the person's home.

This definition engages with the CRPD and is intended to capture the supports and services that help people with disability to live independently and to improve self-confidence and self-reliance.

information supports or services means supports or services (including translation and interpretation services) to assist a person with disability and their families and carers to access and understand information available generally to the members of Australian society.

This definition engages with the CRPD and is intended to capture a broad range of services and supports including, but not limited to:

- (a) the translation and conversion of information into suitable formats such as sign language and accessible formats for people with print or learning disabilities
- (b) the provision, delivery and transport of translated or converted information.

recreation supports or services means supports or services to assist a person with disability to participate in recreation and leisure activities.

This definition is intended to facilitate funding of supports and services to help people with disability to develop and enjoy their creative, artistic, intellectual and physical potential; to enjoy cultural pursuits, and participate in recreational, leisure and sporting activities.

research and evaluation program means a program to:

- (a) undertake research or data analysis in relation to people with disability, including in relation to the provision of supports, services and carer arrangements for people with disability; or
- (b) evaluate programs or policies that are directed towards people with disability, including activities funded under arrangements or grants of financial assistance made under this Bill.

These programs are intended to promote and encourage research relevant to the disability community, their families and carers, and the sector that delivers services and supports. This will include programs that support the design and implementation of commissioned and independently conducted research (including data collection and analysis) and the development, evaluation and

analysis of policies and programs affecting people with disability and their families and carers. Where appropriate, research should involve meaningful engagement with people with disability, consistent with the objects and principles of the Bill.

respite care supports or services means supports or services to provide short term care for a person with disability, as an alternative care arrangement, for the purpose of giving relief or assistance to:

- (a) the person with disability; or
- (b) the family members or carers of the person with disability.

This definition captures funding of services and supports that will assist people with disability and their families and carers to have peace of mind that the people for whom they care and support are adequately cared for at times when they are not available or require respite support.

Other key terms include:

arrangement includes a contract, agreement, deed or understanding.

certificate of compliance means a certificate of compliance that is granted under clauses 21 or 22 to a person that is in force.

constitutional corporation means a corporation to which paragraph 51(xx) of the Constitution applies.

Convention on the Rights of Persons with Disabilities means the Convention on the Rights of Persons with Disabilities done at New York on 13 December 2006, as amended and in force for Australia from time to time.

entrusted person means either of the following:

- (a) the Secretary
- (b) an APS employee
- (c) any other person employed or engaged by the Commonwealth to provide services to the Commonwealth.

Indigenous person means a person who is:

- (a) a member of the Aboriginal race of Australia; or
- (b) a descendant of an Indigenous inhabitant of the Torres Strait Islands.

This definition engages the races power in paragraph 51(xxvi) of the Constitution for the purposes of the constitutional limitation provision in section 9 of the Bill. The definition is a composite expression combining terms used in other Commonwealth legislation to signify First Nations people. For the purposes of this Bill, the term 'Indigenous person' is to be defined in a way that

ensures a consistent approach with other laws including the *Aboriginal and Torres Strait Islander Act 2005* (which separately refers to 'Aboriginal person' and Torres Strait Islander' peoples as defined in similar terms).

make, in relation to an arrangement, includes enter into.

protected information means any of the following kinds of information:

- (a) personal information within the meaning of the *Privacy Act 1988*;
- (b) information about the affairs of a person the disclosure of which could reasonably be expected to found an action by a person (other than the Commonwealth) for breach of a duty of confidence;

relevant information means information obtained or generated by an entrusted person in:

- (a) performing functions or duties, or exercising powers, under this Bill; or
- (b) assisting another person to perform functions or duties, or exercise powers, under this Bill.

Secretary means the Secretary of the Department.

supports and services includes the supply of goods or facilities.

Clause 9 – Meaning of eligible person

17. **Clause 9** sets out the meaning of an eligible person. An 'eligible person' is a person who may receive funding under a grant of financial assistance or an arrangement under clause 13.

18. The *Acts Interpretation Act 1901* provides that a person may be a natural person, a State or Territory, a partnership, an incorporated entity, an unincorporated association or a trust.

19. **Subclause 9(1)** provides that a person is an eligible person for a grant or arrangement if:

- the person, and/or its key personnel, is not subject to a banning order in force under the NDIS Act
- in the case the person undertakes an eligible activity that is a regulated activity (see clause 11), they must either hold a certificate of compliance for the regulated activity or be covered by a determination in force under subclause 9(2).

20. **Subclauses 9(2)** and **(3)** together allow for the Secretary to make a determination providing up to 15 months for a person that does not have a

certificate of compliance to obtain that certificate. The purpose of these determinations is to provide persons that have not previously provided supports or services time to obtain a certificate of compliance. This is particularly important to address thin markets as it allows for new persons to step in to provide supports or services that were previously missing or not accessible.

21. **Subclause 9(2)** provides the Secretary with the power to make a determination specifying a day by which a person must obtain a certificate of compliance for a regulated activity. In order to obtain a certificate of compliance, the person must give written notice to the Secretary stating its intention to seek and obtain such a certificate on or before a certain day. **Subclause 9(3)** provides that that day must be no later than 15 months after the day on which the determination is made.
22. The length of time that the Secretary may grant a person will depend on the type of person, the kind of eligible activity, including whether it is a regulated activity and any other relevant circumstances (such as a lack of necessary supports or services in an area).
23. **Subclause 9(4)** provides that the Secretary may, in writing, vary a determination to specify a later day if the Secretary has made an arrangement for making payments or a grant of financial assistance under clause 13. This period must be no later than 15 months after the day on which the arrangement or grant was made. The ability to vary the date in the determination to a later day reflects the possibility of administrative delays in entering into a grant or arrangement, or reasonable delays in obtaining a certificate of compliance. In making a determination, the Secretary will need to have regard to the principles of the Bill (see **clause 4**).
24. **Subclause 9(5)** clarifies that a determination made under subclause 9(2) is not a legislative instrument within the meaning of subsection 8(1) of the Legislation Act because it does not determine the law, but provides for the making of administrative decisions.
25. The Secretary's powers to make or vary a determination under subclauses 9(2) and 9(4) are not subject to merits review. Merits review of these decisions is not appropriate as the safety or wellbeing of people with disability in respect of regulated activities could be jeopardised, particularly where funding is provided for new activities or to persons that have not delivered supports and services in the past.
26. A number of avenues for review will still be available to persons affected by decisions under subclauses 9(2) and (4), including under the *Administrative Decisions (Judicial Review) Act 1975* (ADJR Act), section 75(v) of the Constitution and section 39B of the *Judiciary Act 1903* (Judiciary Act). Persons affected would also have recourse to the Commonwealth Ombudsman where appropriate.

Clause 10 – Meaning of key personnel

27. **Clause 10** provides a definition of key personnel. As noted above, a requirement for a person to be an eligible person is that it, and/or its key personnel, are not subject to a banning order in force under the NDIS Act.
28. **Subclause 10(1)** provides that the key personnel of a person is the member of the group of persons responsible for its executive decisions, and any other person who has authority or responsibility for planning, directing or controlling the activities of the person.
29. **Subclause 10(2)** clarifies that where the key personnel is a person responsible for the executive decisions of the person where the person is a body corporate that is incorporated, this person can be the director of a body corporate under the *Corporations Act 2001*, or a member of the person's governing body.

Clause 11 – Meaning of regulated activity

30. **Clause 11** provides the meaning of regulated activity. It allows the Secretary to determine a kind of eligible activity as a regulated activity by legislative instrument.
31. Eligible persons undertaking a regulated activity must hold a certificate of compliance under sub-paragraph 9(1)(a)(i) or be covered by a determination under sub-paragraph 9(1)(a)(ii). This reflects that some eligible activities may have a higher risk associated with them. For example, an eligible activity that does not involve any direct contact or interaction with a person with disability may be sufficiently low risk so that a certificate of compliance is not necessary. Other activities, including those involving direct contact or interaction with people with disability would be more likely to require a certificate of compliance.
32. Prescribing the meaning of 'regulated activity' in a legislative instrument is consistent with other regulatory frameworks. For example, the *National Disability Insurance Scheme (Provider Registration and Practice Standards) Rules 2018* prescribe the classes of supports for which NDIS providers must be registered, and the classes of supports that require verification rather than the more comprehensive certification process.
33. In addition, it will allow the Secretary to respond to emerging risks by making an eligible activity a regulated activity on an urgent basis.

Part 2—Funding Arrangements

Clause 12 – Simplified outline of this Part

34. **Clause 12** contains a simplified outline for Part 2 of the Bill.

35. A simplified outline is included as a navigation aid for the reader and is not intended to be comprehensive. The reader should consult the substantive provisions to understand the rights and obligations that arise under this Part.

Clause 13 – Arrangements and grants

36. **Clause 13** empowers the Minister to make, vary or administer arrangements for the making of payments and grants of financial assistance. Arrangements and grants can only be made to an eligible person in respect of eligible activities. The clause provides a definition for 'eligible activities' and sets out the circumstances in which the Minister can enter into an arrangement or grant under the Bill.

37. Funding decisions and payments for arrangements and grants of financial assistance made under subclause 13(1) are not subject to merits review as they relate to the allocation of finite resources. The Administrative Review Council has recognised that it is justifiable to exclude merits review in relation to decisions of this nature (see paragraphs 4.16 to 4.19 of the *What decisions should be subject to merit review?* publication).

38. Decisions under clause 13(1) would be subject to the requirements of the Commonwealth resource management framework including, where relevant, the *Public Governance, Performance and Accountability Act 2013* (PGPA Act), the *Commonwealth Grants Rules and Guidelines 2017* and the *Commonwealth Procurement Rules*. These documents outline, among other things, requirements relating to the publication of applicant guidelines, development of eligibility and assessment criteria, and publication of details relating to the successful applicant and the arrangement and grant subsequently made.

39. In addition, the review and audit process undertaken by the Australian National Audit Office provides a mechanism to review Australian Government spending decisions and report any concerns to the Parliament. These requirements and mechanisms would help to ensure the proper use of Commonwealth resources and appropriate transparency around decisions relating to making, varying or administering arrangements and grants under subclause 13(1).

40. **Subclause 13(1)** empowers the Minister to make, vary or administer arrangements and grants for one or more of the following activities (being eligible activities):

- (a) the provision of accessibility supports or services
- (b) the provision of accommodation supports or services
- (c) the provision of advocacy supports or services
- (d) the provision of capacity building supports or services
- (e) the provision of carer supports or services
- (f) the provision of community inclusion supports or services
- (g) the provision of counselling supports or services
- (h) the provision of education supports or services

- (i) the provision of employment supports or services
- (j) the provision of independent living supports or services
- (k) the provision of information supports or services
- (l) the provision of recreation supports or services
- (m) the provision of respite care supports or services
- (n) the provision of a research and evaluation program
- (o) an activity relating to furthering the objects of this Act
- (p) an activity determined by the Minister under subclause (2)
- (q) a matter that is incidental or ancillary to any of the above.

41. Clause 8 provides definitions for each kind of eligible activity.

42. A note to subsection 13(1) points to clause 16, which sets out the constitutional limits on arrangements and grants.

43. The terms 'provision', 'activity' and 'matter' are applied in a way that corresponds with the nature of the funding item and range of outcomes. For example, supports or services are generally provided by a person to a person whereas a research and development program may be delivered in a range of ways. The use of the term 'matter' also enables flexibility for incidental spending provided it is within constitutional limitations.

44. **Subclause 13(2)** authorises the Minister to determine, by legislative instrument, an activity for the purposes of paragraph 13(1)(p). This enables the Minister to expand the range of eligible activities to cover supports, services or programs that may not yet be contemplated, but are within constitutional limits (see clause 16). The Minister cannot change or remove the kinds of eligible activities that are set out in paragraphs 13(1)(a) to (n). An instrument made under this subsection would determine a category of eligible activity, as well as a definition of that activity.

45. **Subclause 13(3)** clarifies that subclause 13(1) does not limit the kinds of activities that the Minister may determine under subclause 13(2). This ensures that the Bill will cater for emerging developments in the supports and services that may be provided and how they may be delivered. It ensures that the Bill does not constrain the Minister in making choices to fund services, supports and other things and matters for people with disability.

46. **Subclause 13(4)** states that the rules may set out matters to which the Minister must or may have regard in deciding whether to make or vary an arrangement or grant of financial assistance under subclause 13(1). There is no requirement to make rules under this provision. Regardless of whether rules are made under subclause 13(4), the Minister must consider the general principles guiding actions under the Bill (see clause 4) in deciding whether to make or vary an arrangement or grant.

47. **Subclause 13(5)** provides that despite subclause 13(1), the Minister must not make an arrangement of payment or grant of financial assistance in relation to a body unless the person is an eligible person (see clause 9 for definition of eligible person) for that arrangement or grant.
48. **Subclause 13(6)** provides that an arrangement under subclause 13(1) may provide for the Commonwealth to reimburse, or partly reimburse, costs or expenses.
49. **Subclause 13(7)** provides that a grant under subclause 13(1) may be made by way of the reimbursement, or partial reimbursement, of costs or expenses. This includes costs or expenses incurred in obtaining a certificate of compliance for regulated activities in relation to a grant.
50. **Subclause 13(8)** provides that subsections 13(6) and (7) do not limit subclause 13(1).
51. **Subclause 13(9)** clarifies that subclause 13(1) does not authorise the making of a loan.

Clause 14 – Terms and conditions

52. **Clause 14** sets out the terms and conditions that will apply to arrangements and grants made by the Minister under the Bill. These include statutory funding conditions as well as terms and conditions in a funding agreement. This clause also deals with the consequences of a breach of statutory funding conditions. Consequences for a breach of terms and conditions set out in a funding agreement will be set out in the agreement.
53. **Subclause 14(1)** provides that any arrangement or grant entered into between the Commonwealth and an eligible person under clause 13 is subject to statutory funding conditions and any other terms and conditions set out in a written funding agreement between the person and the Commonwealth.
54. **Subclause 14(2)** places an obligation on a person to comply with the statutory funding conditions and the terms and conditions set out in the funding agreement.
55. **Subclause 14(3)** provides that the terms and conditions of the funding agreement must provide the circumstances in which the person must repay amounts to the Commonwealth. A note to subclause 14(3) states that an amount repayable to the Commonwealth would be a debt due to the Commonwealth.
56. This subclause also clarifies that the terms and conditions in a funding agreement may deal with matters also covered by the statutory funding conditions. To the extent of any inconsistency, the statutory funding conditions would prevail (see subclause 14(5)).

57. A funding agreement may also deal with the consequences for a breach of a term or condition of that agreement.
58. Finally, paragraph 14(3)(d) provides that a funding agreement may contain obligations to provide information or reports to the Secretary in relation to alleged breaches, or actual breaches, of the code of conduct by a person and action taken in response to those alleged or actual breaches.
59. These reporting requirements will ensure that the department will be able to track alleged and actual breaches of the Code of Conduct. The consequences for a breach of the reporting requirements may also be set out in the funding agreement. Reporting requirements would be different, depending on the nature of the eligible activity. There may be no reporting requirements where there is no direct involvement with people with disability, whereas other activities may attract a requirement to report on a regular basis. If there are concerns about the eligible entity's compliance with the code of conduct, the funding agreement may also be varied to impose additional reporting requirements, such as increased frequency or detail.
60. **Subclause 14(4)** provides that subclauses 14(3) and (6) do not limit the terms and conditions that may be included in a funding agreement, subject to subclause 14(5).
61. **Subclause 14(5)** provides that a term or condition in a written funding agreement is of no effect to the extent of any inconsistency with a statutory funding term or condition. This recognises that the statutory requirements in this Bill take precedence over any contractual terms or conditions.
62. **Subclause 14(6)** relates to a breach of the statutory funding conditions. It provides that the Minister may, on behalf of the Commonwealth, take one or more of the following actions if the Minister is satisfied that a person (other than the Commonwealth) that is a party to a grant or financial arrangement has failed to comply with a statutory funding condition:
- terminate the funding agreement with the person in relation to the grant or arrangement
 - vary the funding agreement, including by imposing new terms and conditions in the funding agreement and by reducing the amount of money to be paid
 - terminate the arrangement or grant
 - vary the arrangement or grant
 - publish information about the person's failure to comply with the terms and conditions on the Department's website.
63. While merits review is not available for decisions made under subclause 14(6), persons would have access to review under the ADJR Act. Further, these consequences only apply to statutory funding conditions, not to other terms and conditions set out in a funding agreement. Those terms and conditions would be subject to contractual dispute resolution mechanisms.

64. **Subclause 14(7)** allows the Minister, on behalf of the Commonwealth, enter into a funding agreement.
65. **Subclause 14(8)** provides that the Commonwealth, the Minister or a delegate of the Minister is not liable to any action, suit or other civil proceeding for or in relation to the publication, in good faith, of information under paragraph (6)(g).

Clause 15 – Statutory funding conditions

66. **Clause 15** sets out the statutory funding conditions that will apply to arrangements and grants entered into under clause 13. The statutory funding conditions provide important safeguards for people with disability. A breach of the statutory funding conditions can lead to the termination or variation of a funding agreement, arrangement or grant (see subclause 14(6)).
67. **Subclause 15(1)** provides that the clause sets out the statutory funding conditions that apply to a person who receives a grant of financial assistance or to whom money may be payable under an arrangement, made under clause 13 of the Bill.
68. **Subclause 15(2)** sets out the first statutory funding condition. The clause requires a person (other than the Commonwealth) that is a party to a funding agreement to comply with the Code of Conduct (see clause 20). This applies to all persons receiving funding under the Bill.
69. **Subclause 15(3)** sets out the second statutory funding condition. The clause requires a person that is performing a regulated activity to either hold a certificate of compliance for the regulated activity (see clauses 21 and 22) or be covered by a determination made under subclause 9(2).
70. **Subclause 15(4)** sets out the third statutory funding condition. The clause requires a person (other than the Commonwealth) that is a party to a funding agreement to implement and maintain a complaints management and resolution system that is appropriate for the size of the person and the kinds of eligible activities to which the arrangement or grant relates. For example, a person who is conducting a remote research project will not have the same kind of system as a large organisation providing employment supports or services directly to a person with disability.
71. In addition to being appropriate for the size and kinds of eligible activities, the system must also:
- acknowledge the role of advocates (including independent advocates) and other representatives of persons with disability
 - provide for cooperation with, and facilitate arrangements for, advocates (including independent advocates) and other representatives of persons with disability who are affected by the complaints process and who wish to be independently supported in that process by an advocate or other representative

- comply with the requirements (if any) prescribed by rules made for the purposes of paragraph 15(4)(d).
72. In general, the requirements for a complaints management and resolution system will be set out in departmental guidance and/or a funding agreement. If appropriate, the rules can be utilised to more formally prescribe what may be considered an appropriate system in particular circumstances.
73. **Subclause 15(5)** sets out the fourth statutory funding condition. The clause requires a person (other than the Commonwealth) that is a party to a funding agreement to implement and maintain an incident management system that is appropriate for the size of the person and for the kinds of eligible activities to which the arrangement or grant relates.
74. A person must also comply with the requirements (if any) prescribed by rules made for the purposes of paragraph 15(5)(b).
75. Similarly to the complaints management system, the respective requirements for an incident management system will be set out in departmental guidance and/or a funding agreement. If appropriate, the rules can be utilised to more formally prescribe what may be considered an appropriate system in particular circumstances.
76. **Subclause 15(6)** sets out the fifth statutory funding condition. The clause provides that it is a statutory funding condition that a person (other than the Commonwealth) or a member of the person's key personnel are not subject to a banning order under the NDIS Act (see section 73ZN of the NDIS Act).
77. In addition, if an employee is subject to a banning order under the NDIS Act in respect of certain activities, that employee must not engage in those activities or provide those supports or services for, or on behalf of, that person. The person must notify the Secretary if an employee is, or becomes, subject to a banning order before the day the arrangement or grant is made or as soon as practicable after the banning order is made (as the case requires).

Clause 16 - Constitutional limits

78. **Clause 16** contains a constitutional limitation provision. The purpose of this provision is to ensure that the Minister only makes, varies and administers arrangements or grants under clause 13 within the limits of the Commonwealth's powers under the Constitution. The Minister may only exercise the power to provide financial assistance in relation to one or more of the following:
- (a) implementing any of Australia's international obligations under the Convention on the Rights of Persons with Disabilities
 - (b) the granting of financial assistance to a State or Territory
 - (c) a Territory
 - (d) activities, supports or services for Indigenous persons

- (e) activities, supports or services that involve the use of a postal, telegraphic, telephonic or other like service within the meaning of paragraph 51(v) of the Constitution
- (f) activities, supports or services provided by way of sickness benefits or medical services
- (g) the granting of financial assistance to a constitutional corporation for the purposes of carrying out the corporation's activities
- (h) implementing any of Australia's international obligations under a Convention or Covenant mentioned in the objects of this Bill (see clause 3)
- (i) matters with respect to the exercise of the executive power of the Commonwealth
- (j) matters incidental to the execution of any of the legislative powers of the Parliament or the executive power of the Commonwealth.

79. Paragraph 16(d) only authorises the provision of supports and services that meet the specific needs of indigenous persons, for example the provision of advocacy supports specifically to indigenous persons with disability.

Clause 17 – Relationship with other laws

80. **Clause 17** clarifies the relationship of Part 2 of the Bill with other laws.

81. **Subclause 17(1)** deals with the relationship with the FF(SP) Act.

82. The effect of subclause 17(1) is that Part 2 of the Bill will not limit the operation of paragraph 32B(1)(a) of the FF(SP) Act. Paragraph 32B(1)(a) of the FF(SP) Act provides that the FF(SP) Act may only be relied upon to make, vary or administer an arrangement where the Commonwealth does not have the power under any law other than subsection 32B(1).

83. This clause clarifies that programs currently funded under the FF(SP) Act and *Financial Framework (Supplementary Powers) Regulations 1997* will retain their authority and continue to operate under existing funding agreements once the Bill comes into effect. This ensures continuity of services for people with disability and provides persons with an opportunity to obtain a certificate of compliance if required. All new funding agreements will be made under the Bill.

84. The Bill is not intended to operate as an exhaustive code that completely precludes reliance on the FF(SP) Act by other portfolios. It is not practical or appropriate for supports or services administered by other portfolios to be funded under the Bill given that all of the powers and functions rest with the Minister and Secretary of the portfolio responsible for the Bill.

85. **Subclause 17(2)** provides that Part 2 of the Bill does not limit Chapter 2D of the *Social Security Act 1991*, which deals with arrangements and grants relating to assisting persons to obtain and maintain work.

Clause 18 – Executive power of the Commonwealth

86. **Clause 18** ensures that Part 2 of the Bill does not, by implication limit the executive power of the Commonwealth. This clause clarifies that the powers of the Minister relating to funding arrangements in Part 2 does not limit the Commonwealth's ability to function effectively.

Part 3—Code of Conduct and Certificate of Compliance

Division 1—Introduction

Clause 19 – Simplified outline of this Part

87. **Clause 19** contains a simplified outline for Part 3 of the Bill. A simplified outline is included as a navigation aid for the reader and is not intended to be comprehensive. The reader should consult the substantive provisions to understand the rights and obligations that arise under this Part.

Division 2—Code of Conduct

Clause 20—Code of Conduct

88. **Clause 20** allows the Minister to make a rule for a Code of Conduct that applies to all persons who receive funding under the Bill.

89. The rule will also prescribe circumstances in which a person breaches the Code of Conduct because of an act or omission by a member of the key personnel of the person or by an employee or individual otherwise engaged by the person. This makes it the responsibility of persons who receive funding under the Bill to ensure that their key personnel, staff and contractors comply with the Code of Conduct and take necessary and appropriate action if they do not.

90. The Code of Conduct contributes to ethical and safe delivery of supports and services by stating the standards and obligations that people with disability, their families and carers can expect of persons funded under the Bill. This will have both a preventative effect, by clearly setting out expectations of persons, and a corrective effect through sanctions for non-compliance.

91. Compliance with the Code of Conduct is a statutory funding condition (see subclauses 15(1) and (2)). A breach of the Code of Conduct (including by key personnel, employees or contractors) may lead to the termination or variation of a funding agreement and publication on a departmental website of information about the person's failure to comply with the Code.

92. Prescribing the Code of Conduct in a legislative instrument allows for flexibility to accommodate changing circumstances, for example, to amend the Code of Conduct to add additional requirements. This approach is consistent with other

regulatory frameworks such as the *National Disability Insurance Scheme (Code of Conduct) Rules 2018*, which prescribe the NDIS Code of Conduct.

93. A note to subclause 20(1) points to subclause 14(3) that provides that a funding agreement may contain obligations to provide information or reports to the Secretary in relation to alleged breaches, or actual breaches, of the code of conduct, and to action taken in response to those alleged or actual breaches.
94. The *Criminal Code Act 1995* makes it an offence to provide information to a Commonwealth entity (such as the Department) if that information is false or misleading or omits any matter or thing without which the information is misleading. Depending on the circumstances and the nature of the information, providing false or misleading information in response to a reporting requirement (including omitting alleged incidents or breaches of the Code of Conduct), could be an offence.

Division 3—Certificates of compliance

95. **Division 3 of Part 3** deals with certificates of compliance. It is a statutory funding condition that any person undertaking a regulated activity must hold a certificate of compliance or be covered by a determination in force under subclause 9(2) (see subclause 15(3)).
96. A failure to meet compliance standards in relation to regulated activities may lead to the revocation or variation of a funding agreement or publication on a departmental website of information about the person's failure to meet with standard.

Clause 21 – Accredited certification body may grant certificate of compliance for meeting compliance standards

97. **Clause 21** deals with certificates of compliance granted by an accredited certification body. It sets out how an accredited certification body grants a certificate of compliance to a person for meeting compliance standards.
98. **Subclause 21(1)** requires an accredited certification body to grant a certificate of compliance to a person for one or more regulated activities if the body is satisfied that the person complies with the compliance standards for those activities. The person must make a written request for a certificate of compliance to an accredited certification body. There is no limit on the number of applications that a person may make.
99. **Subclause 21(2)** requires the body to give a copy of the certificate of compliance to the person as soon as practicable after the certificate has been granted. **Subclause 21(3)** provides that the certificate must state that the person complies with the compliance standards for the regulated activities covered by the certificate and specify the day on which the certificate ceases to be in force.
100. **Subclause 21(4)** requires an accredited certification body to notify the person, in writing, if it refuses to grant a certificate of compliance for a regulated activity.

The notice must be given as soon as practicable after the request for certification is refused. A person who has been refused a certificate of compliance is not prevented from making further applications for certification.

101. **Subclause 21(5)** imposes an obligation on an accredited certification body to revoke a certificate of compliance if a person ceases to comply with the compliance standards for the regulated activities covered by the certificate.
102. **Subclause 21(6)** requires the body to notify a person in writing as soon as practicable after revoking the certificate. **Subclause 21(7)** provides that the notice must specify the day on which the revocation takes effect, which must be no earlier than the day after the notice is given to the person.
103. **Subclause 21(8)** requires an accredited certification body to vary a certificate of compliance to exclude a regulated activity if the body is satisfied the person ceases to comply with the compliance standards for that activity or to include one or more additional regulated activities. A person must make a written request to add a regulated activity to a certificate of compliance and the accredited certification body must be satisfied that the person complies with the compliance standards for those activities.
104. **Subclause 21(9)** requires the accredited certification body to notify a person in writing as soon as practicable after varying their certificate of compliance.
105. **Subclause 21(10)** provides that the notice must specify the day that the variation takes effect, which must be no earlier than the day after the notice is given to the person.
106. **Subclause 21(11)** requires an accredited certification body to notify a person in writing if it refuses to vary a certificate of compliance as requested by that person.
107. **Subclause 21(12)** provides that a certificate of compliance comes into force on the day that a copy of the certificate is provided to an person under subclause 21(2) and it remains in force until one of the following occurs:
 - the day specified in the notice given under paragraph 21(3)(b)
 - the day the revocation of the certificate takes effect
 - if the accredited certification that granted the certificate ceases to be accredited—the end of the period of 3 months after the cessation.
108. **Subclause 21(13)** requires an accredited certification body to notify the Secretary if it refuses to grant, revoke or refuse to vary a certificate of compliance. The body must notify the Secretary in writing as soon as practicable after the fact and must provide reasons for the decision. A written statement of reasons should convey the substantive reasons for the decision of the accredited certification body so as to inform the government about any particular or systemic shortfalls in entities who seek, or processes for obtaining, Commonwealth funding to assist people with disability. There is no prescribed form in which a statement of reasons must be furnished.

109. **Subclause 21(14)** clarifies that the certificate of compliance granted under this Bill is not a legislative instrument for the purposes of subsection 8(1) of the Legislation Act as it is not declarative of the law. It is included to assist readers only.
110. The decisions of an accredited certification body under clause 21 are not subject to merits review. These decisions relate to whether a particular entity is capable of performing a regulated activity based on their compliance with the compliance standards. There is a substantial public interest in ensuring adequate standards of quality assurance for funded services under the Bill. An entity's capacity to meet these standards will be determined by an independent and internationally recognised accreditation body approved on the basis of their skills and experience. A person who is aggrieved by a decision by an accredited certification body can engage with the certification body itself. Alternatively, it will be open to the person to make a further application for certification or variation of certification as they consider appropriate.

Clause 22 – Secretary may grant certificate of compliance for meeting alternative compliance requirements

111. **Clause 22** deals with certificates of compliance granted in recognition of a person meeting alternative compliance requirements. These alternative compliance requirements will allow for the Secretary to recognise a person's compliance or certification under another comparable legislative or other scheme. For example, an alternative compliance requirement may be that a provider is a registered NDIS provider (in which case the person is required to comply with the NDIS Practice Standards).
112. **Subclause 22(1)** allows the Secretary to grant a certificate of compliance to a person for one or more regulated activities if the Secretary is satisfied that the person complies with the alternative compliance requirements for those activities. The person must make a written request for a certificate of compliance to the Secretary. There is no limit on the number of applications that a person may make.
113. Prior to entering into any grants or arrangements for a regulated activity, the Secretary will determine whether it is appropriate to recognise alternative compliance requirements in respect of that activity. This will not be determined on an entity by entity basis, but will apply to all entities taking part in a particular regulated activity. This reflects the fact that alternative compliance requirements may or may not be appropriate for different types of regulated activities.
114. **Subclause 22(2)** requires the Secretary to give a copy of the certificate of compliance to the person as soon as practicable after the certificate has been granted. **Subclause 22(3)** provides that the certificate must state that the person complies with the alternative compliance requirements for the regulated activities covered by the certificate and specify the day on which the certificate ceases to be in force.

115. **Subclause 22(4)** requires the Secretary to notify a person if the Secretary refuses to grant a certificate of compliance requested by a person. The notice must be given as soon as practicable after the request for certification is refused. A person who has been refused a certificate of compliance is not prevented from making further applications for certification.
116. **Subclause 22(5)** requires the Secretary to revoke a certificate of compliance if the Secretary is satisfied that a person ceases to comply with alternative compliance requirements for the regulated activities covered by the certificate.
117. **Subclause 22(6)** requires the Secretary to notify a person in writing as soon as practicable after revoking the certificate. **Subclause 22(7)** provides that the notice must specify the day on which the revocation takes effect, which must be no earlier than the day after the notice is given to the person.
118. **Subclause 22(8)** requires the Secretary to vary a certificate of compliance granted to a person. The certificate must be varied to exclude a regulated activity if the Secretary is satisfied that the person no longer meets the alternative compliance requirements for that activity. The certificate must also be varied to include one or more regulated activities if a person makes a request in writing and the Secretary is satisfied that the person complies with the alternative compliance requirements for that activity.
119. **Subclause 22(9)** requires the Secretary to notify a person in writing as soon as practicable after varying the certificate of compliance. **Subclause 22(10)** provides that the notice must specify the day that the variation takes effect, which must be no earlier than the day after the notice is given to the person. **Subclause 22(11)** also requires the Secretary to notify a person as soon as practicable if the Secretary refuses to vary a certificate of compliance requested by a person.
120. **Subclause 22(12)** provides that a certificate of compliance comes into force on the day that a copy of the certificate is provided to a person under subclause 22(2). It also provides that the certificate remains in force until the earlier of the day specified in the certificate of compliance and the day the revocation of the certificate takes effect.
121. **Subclause 22(13)** clarifies that the certificate of compliance granted under this clause is not a legislative instrument for the purposes of subsection 8(1) of the Legislation Act as it is not declarative of the law. It is included to assist readers only.
122. The decisions of the Secretary under clause 22 are not subject to merits review. Decisions about whether a person meets alternative compliance requirements are operational in nature and do not involve an independent or separate assessment of whether an entity meets relevant standards.

Clause 23—Compliance standards

123. This clause allows the Minister to make rules providing for standards for persons undertaking regulated activities. These rules are the 'compliance standards'.
124. The Minister may make rules providing for or in relation to different standards for different kinds of persons or regulated activities. This allows for flexibility in how standards will be applied to different kinds of regulated activities. For example, this would allow the Minister to make standards dealing with a specific type of eligible activity such as advocacy supports or services, separately from employment or educational supports or services.

Clause 24—Alternative compliance requirements

125. **Subclauses 24(1) to (3)** allow the Minister to make rules providing for requirements for persons undertaking regulated activities. The rules may provide for different requirements for different kinds of persons or regulated activities. These rules are the alternative compliance requirements.
126. The rules could, for example, provide that being a registered NDIS provider, and therefore compliant with the NDIS Practice Standards, is an alternative compliance requirement for the purposes of this clause. As outlined above, this would relieve dual regulatory burden on providers who operate under both legislative frameworks.
127. Allowing the Minister to make rules that determine the alternative compliance requirements will facilitate timely and flexible responses in circumstances where the alternative compliance requirements are based on matters not directly connected to the Bill. For example, the alternative compliance requirement may be determined that the provider meets standards related to particular health issues or age. It is appropriate that new compliance requirements can be added, varied or removed without delay so as to ensure that people with disability receive services and supports in a safe and timely manner, including in locations that offer limited services. Any changes will be subject to parliamentary oversight and disallowance processes.

Division 4—Accredited certification bodies

Clause 25 – Secretary may grant approval for accrediting authorities

128. **Clause 25** empowers the Secretary to approve accrediting authorities.
129. **Subclause 25(1)** allows the Secretary to approve a person to perform the function of granting and withdrawing accreditation under clause 26. The Secretary will only approve a person as an accredited certification body if the Secretary is satisfied that the person is internationally recognised as a suitable authority to grant accreditations of this kind and will perform its functions in an independent and impartial way.
130. **Subclause 25(2)** provides that the Secretary must give written notice of approval to the person as soon as practicable after the approval is granted.

131. **Subclause 25(3)** requires the Secretary to revoke a person's approval as an accrediting authority if the Secretary is satisfied that the person is no longer internationally recognised or is no longer able to perform its functions in an independent and impartial way.
132. **Subclause 25(4)** requires the Secretary, as soon as practicable after revoking the approval, to give written notice of a revocation to the person, each accredited certification body granted an accreditation by the person under clause 26 and each person granted a certificate of compliance by the body. **Subclause 25(5)** provides that the notice must specify the day that the revocation takes effect, which must not be earlier than the day after the notice is given to the person.
133. **Subclause 25(6)** provides that an approval granted under this clause comes into effect on the day that a notice is given and remains in force indefinitely unless revoked earlier.
134. **Subsection 25(8)** clarifies that an approval under this clause is not a legislative instrument for the purposes of subsection 8(1) of the Legislation Act as it is not declarative of the law. It is included to assist readers only.
135. Decisions of the Secretary made under clause 25 are not subject to merits review as they relate to the suitability of persons to conduct accreditation functions for the provision of regulated activities. The Administrative Review Council's publication on *What decisions should be subject to merit review?* states that decisions to appoint a person to undertake a specified function should not generally be subject to merits review. Appointment as an accredited certification body is dependent on the person's credentials and qualifications such that approval is not, in functional terms, conferring a new qualification upon them.

Clause 26 – Accrediting authorities may grant accreditation for certification bodies

136. **Clause 26** empowers accrediting authorities to grant accreditation for certification bodies.
137. **Subclause 26(1)** requires an accrediting authority to grant an accreditation to a person to perform the functions of granting, revoking and varying certificates of compliance (see clause 21). The accrediting authority must be satisfied that the person will perform those functions competently and impartially. The person must make a request to the accrediting authority for accreditation.
138. **Subclause 26(2)** requires the authority to give written notice of accreditation to the person as soon as practicable after granting the accreditation. **Subclause 26(3)** provides that if the authority refuses to grant accreditation as requested by a person, the authority must give written notice of that refusal to the person.
139. **Subclause 26(4)** requires the accrediting authority to withdraw an accreditation if it ceases to be satisfied that the person is performing the function of granting certificates of compliance competently or impartially.

140. **Subclause 26(5)** requires the accrediting authority to give written notice of a withdrawal to the person as soon as practicable after the accreditation is withdrawn. **Subclause 26(6)** provides that the notice must specify the day that the withdrawal takes effect, which must not be earlier than the day after the notice is given to the person.
141. **Subclause 26(7)** requires an accrediting authority to notify the Secretary if it grants, refuses to grant or withdraws accreditation. The notification must advise the Secretary of the fact of the refusal to grant, or withdrawal of, accreditation and the reasons for the decision.
142. **Subclause 26(8)** provides that if the Secretary is notified that an accreditation of an accredited certification body is withdrawn, the Secretary must, as soon as practicable, notify in writing each person that holds a certificate of compliance granted by that body.
143. **Subclause 26(9)** provides that an accreditation granted under the clause comes into force on the day that the notice is given under subclause 26(2) and remains in force until the earlier of the following occurs:
- the day the withdrawal of accreditation takes effect
 - if the authority that granted the accreditation ceases to be an accrediting authority—the end of the period of 3 months after the cessation.
144. The Bill provides a grace period of 3 months for a person’s accreditation as a certification body to continue. A grace period is considered necessary to ensure continuous service provision, particularly in the event that there is only one accredited certification body that performs the functions. This grace period will enable the certification body to finalise any outstanding matters while remedial action is underway or a replacement body is accredited.
145. **Subsection 26(10)** clarifies that accreditation under this clause is not a legislative instrument for the purposes of subsection 8(1) of the Legislation Act as it is not declarative of the law. It is included to assist readers only.
146. Decisions made by an accrediting authority under clause 26 are not subject to merits review. These decisions require expert, competent and impartial assessment as to whether an entity is equipped to undertake a specified function. The Administrative Review Council’s publication on *What decisions should be subject to merit review?* states that decisions to appoint a person to undertake a specified function should not generally be subject to merits review. Appointment as an accredited certification body is dependent on the person’s credentials and qualifications.

Part 4— Information Management

Clause 27 – Simplified outline of this Part

147. **Clause 27** contains a simplified outline for Part 4 of the Bill. A simplified outline is a navigation aid for the reader and is not intended to be comprehensive. The reader should consult the substantive provisions to understand the rights and obligations that arise under this Part.

Clause 28 – Unauthorised use or disclosure of protected information

148. **Clause 28** sets out the circumstances in which an entrusted person commits an offence in relation to the use or disclosure of protected information.

149. Entrusted person is defined in clause 8 and means the Secretary, an APS employee or any other person employed or engaged by the Commonwealth to provide services to the Commonwealth, such as contractors.

150. Protected information is defined in clause 8 and means any of the following:

- information or an opinion about an identified individual, or an individual who is reasonably identifiable, whether the information or opinion is true or not and whether the information or opinion is recorded in a material form or not
- information about the affairs of a person the disclosure of which could reasonably be expected to found an action by a person (other than the Commonwealth) for breach of a duty of confidence.

151. **Subclause 28(1)** provides that a person commits an offence if all of the following apply:

- the person is, or has been, an entrusted person
- the person has obtained or generated relevant information in the person's capacity as an entrusted person
- the information is protected information
- the person uses or discloses the information.

152. The penalty for committing the offence is imprisonment for 2 years or 120 penalty units or both. This penalty is an appropriate deterrent against unauthorised disclosure or use of protected information and recognises that protected information may include highly sensitive information, including about people with disability.

153. **Subclause 28(2)** provides that subclause 28(1) does not apply if the use or disclosure is required or authorised by the Bill or another law of the Commonwealth or by a law of a State or Territory prescribed by the rules.

154. The note to subclause 28(2) provides that the evidential burden of proving this is on the defendant and directs the reader to section 13.4 of the Criminal Code. This provision in the Criminal Code provides that a defendant who wishes to rely on any exception, exemption, excuse, qualification or justification provided by the law creating an offence bears an evidential

burden in relation to that matter. It is appropriate that the defendant bears the evidential burden for these matters, as they should be within the defendant's knowledge.

Clause 29—Authorised uses and disclosures of relevant information

155. **Clause 29** sets out the circumstances in which relevant information may be used and disclosed by an entrusted person.
156. 'Relevant information' is defined in clause 8 and means information obtained or generated by an entrusted person in:
- performing functions or duties, or exercising powers, under this Bill, or
 - assisting another person to perform functions or duties, or exercise powers, under this Bill.
157. 'Entrusted person' is defined in clause 8 and means the Secretary, an APS employee or any other person employed or engaged by the Commonwealth to provide services to the Commonwealth.
158. The authorised purposes for which relevant information may be used and disclosure are for:
- the administration of the Bill
 - a purpose determined by the Secretary
 - Commonwealth purposes
 - use disclosure to a State or Territory for a purpose determined by the Secretary
 - disclosure to a court or tribunal etc.
 - preventing threat to life, health or safety of a person with disability
 - statistical purposes
 - with the consent of the person to whom the information relates
 - disclosure to a person to whom the information relates
 - information that is already public.
159. **Subclause 29(1)** provides that an entrusted person may use or disclose relevant information for the purposes of performing functions or duties, or exercising powers under the Bill, or assisting another person to do so.
160. **Subclause 29(2)** provides that an entrusted person may use or disclose relevant information for a purpose specified in a determination made by the Secretary under subclause 29(3).
161. **Subclause 29(3)** provides that the Secretary may, by legislative instrument, make a determination setting out purposes for which an entrusted person may use or disclose relevant information. **Subclause 29(4)** provides that this instrument must specify the legislative power or powers of the Parliament in respect of which the instrument is made.

162. For example, a determination made under subclause 29(3) could allow for the use or disclosure of relevant information for purposes such as providing a brief to a Minister so that the Minister can consider complaints or issues raised with the Minister by or on behalf of a person, and respond to that person in relation to the complaints or issues. Requiring the Secretary to set out the purposes for which an entrusted person may use or disclose relevant information provides for transparency so that people are aware of how their information may be used or disclosed.
163. **Subclause 29(5)** provides that an entrusted person may disclose relevant information for a Commonwealth purpose, specifically:
- to the Secretary of a Department of State of the Commonwealth, or to the head of an authority of the Commonwealth, for the purposes of that Department or authority
 - to the Chief Executive Centrelink for the purposes of a centrelink program
 - to the Chief Executive Medicare for the purposes of a medicare program.
164. **Subclause 29(6)** provides that an entrusted person may disclose relevant information to the head of a Department of State of a State or Territory, or an authority of a State or Territory, for a purpose specified in a determination made by the Secretary under subclause 29(7).
165. **Subclause 29(7)** provides that the Secretary may, by legislative instrument, make a determination setting out the purposes for which an entrusted person may use or disclose relevant information under subclause 29(6). Requiring the Secretary to set out the purposes for which an entrusted person may use or disclose relevant information provides for transparency so that people are aware of how their information may be used or disclosed.
166. **Subclause 29(8)** provides that this instrument must specify the legislative power or powers in respect of which the instrument is made. For example, a determination made under subclause 29(7) could allow for the use or disclosure of relevant information for purposes such as a State or Territory law enforcement purpose.
167. **Subclause 29(9)** allows an entrusted person to disclose relevant information to a court exercising federal jurisdiction. **Subclause 29(10)** allows an entrusted person to disclose relevant information to a court or a tribunal, authority or person that has the power to require the answering of questions or the production of documents for the purposes of the enforcement of a law of the Commonwealth or to assist the court, tribunal, authority or person to make or review an administrative decision that is required or authorised to be made or reviewed under a law of the Commonwealth.
168. **Subclause 29(11)** allows an entrusted person to use or disclose relevant information if the entrusted person reasonably believes that doing so is necessary to lessen or prevent a threat to the life, health or safety of a person with disability.

169. For example, this would allow an entrusted person to use or disclose information about the whereabouts of a person with disability who may be at risk of violence, including family violence.
170. **Subclause 29(12)** allows an entrusted person to use or disclose relevant information if the information is statistics (within the meaning of paragraph 51(xi) of the Constitution) that are not likely to enable the identification of a person.
171. **Subclause 29(13)** allows an entrusted person to use or disclose relevant information that relates to the person if the person, or an agent of the person, has consented to the use or disclosure and the use or disclosure is in accordance with that consent.
172. **Subclause 29(14)** allows an entrusted person to use or disclose relevant information to the person to whom it relates.
173. **Subclause 29(15)** allows an entrusted person to use or disclose relevant information if the information has already been lawfully made available to the public.

Part 5— Miscellaneous

Clause 30 – Simplified outline of this Part

174. This clause contains a simplified outline for Part 5 of the Bill. A simplified outline is included as a navigation aid for the reader and is not intended to be comprehensive. The reader should consult the substantive provisions to understand the rights and obligations that arise under this Part.

Clause 31 – Delegation by the Minister

175. **Clause 31** deals with the delegation of Ministerial powers to specified officials.
176. **Subclause 31(1)** provides that the Minister may, in writing, delegate the following powers to the Secretary or an SES employee or acting SES employee in the Department:
- under subclause 13(1), the power to make, vary or administer an arrangement for the making of payments by the Commonwealth to a person or make, vary or administer a grant of financial assistance to a person
 - under clause 14, the power to enter into a funding agreement (see subclause 14(7)), to terminate or vary a funding agreement for a breach of a term or condition and to arrange to publish information about a person's failure to comply with the terms and conditions of a funding agreement (see subclause 14(6)).

177. This is a common administrative provision, which will enable the effective day-to-day administration of the Bill. The delegation of these particular powers will allow the handling of high-volume decisions including the power to provide funding for supports and services for persons with disability efficiently, and also facilitate the efficient administration of grants or arrangements made under the Bill.

178. Delegations will be to SES level to ensure that officers with appropriate levels of skill and experience make the final decisions on any of these matters. SES officers have the kinds of qualifications, skills and expertise to make these delegated decisions based on their assigned functions, leadership and administration skills.

179. **Subclauses 31(1) and (2)** together provide that the Minister may, in writing, also delegate the following powers to an SES employee, or acting SES employee, in a Department of State of the Commonwealth other than the Department:

- under subclause 13(1), the power to vary and administer an arrangement for the making of payments by the Commonwealth to a person or make, vary or administer a grant of financial assistance to a person. The power to make an arrangement or grant is not delegated.
- under subclause 14(7), the power to enter into a funding agreement.

180. This addresses a situation where the administration of a support or service, but not the administration of the Bill, is moved to a different portfolio as a result of machinery of government changes. This will allow SES employees in other portfolios to continue to administer funding agreements to ensure continuity of service.

181. **Subclause 31(3)** requires the delegate to comply with any directions of the Minister in the exercise of powers under a delegation.

Clause 32 – Delegation by the Secretary

182. **Clause 32** deals with the delegation of the Secretary's powers to specified officials.

183. **Subclause 32(1)** provides that the Secretary may, in writing, delegate the following powers to an SES employee, or acting SES employee, of the Department:

- under subclause 9(2), the power to make a determination specifying a day by which a person must obtain a certificate of compliance for a regulated activity
- under subclause 9(4), the power to vary a determination made under subclause 9(2) to specify a later date
- under clause 22, the power to grant certificate of compliance
- under clause 25, the power to approve an accrediting authority

184. This is a common administrative provision, which will enable the effective day-to-day administration of the Bill by senior officers of the Department. The delegation of these particular powers will allow the Department to efficiently manage some compliance decisions.

185. Delegations will be to SES level to ensure that officers with appropriate levels of skill and experience make the final decisions on any of these matters. SES officers have the kinds of qualifications, skills and expertise to make these delegated decisions based on their assigned functions, leadership and administration skills.

186. **Subclause 32(2)** requires the delegate to comply with any directions of the Secretary in the exercise of powers under a delegation.

Clause 33 – Treatment of partnerships

187. **Clause 33** clarifies how the Bill applies to a partnership.

188. **Subclause 33(1)** provides that Bill applies to a partnership as if it were a person, subject to this clause.

189. **Subclause 35(2)** provides that where an obligation is imposed on the partnership by this Bill, that obligation is imposed on each partner instead and may be discharged by any of the partners.

190. **Subclause 33(3)** provides that if a thing is to be done by the partnership, the thing may be done by one or more of the partners, on the partnership's behalf.

191. **Subclause 33(4)** clarifies that a change in the composition of a partnership does not affect the continuity of the partnership.

Clause 34 – Treatment of unincorporated associations

192. **Clause 34** clarifies how the Bill applies to unincorporated associations.

193. **Subclause 34(1)** provides that the Bill applies to an unincorporated association as if it were a person, subject to this clause.

194. **Subclause 34(2)** provides that where an obligation is imposed on the association by this Bill, it is imposed on each member of the association's committee of management instead and may be discharged by any of the members.

195. **Subclause 34(3)** provides that if a thing is to be done by the unincorporated association, the thing may be done by one or more of the member of the association's committee of management on the association's behalf.

Clause 35 – Treatment of trusts

196. **Clause 35** clarifies how the Bill applies to trusts.

197. **Subclause 35(1)** provides that the Bill applies to a trust as if it were a person, subject to this clause.

198. **Subclause 35(2)** sets out how the obligations on a trust with a single trustee is discharged. It provides that an obligation that would otherwise be imposed on the trust by the Bill is imposed on the trustee instead and if the Bill would otherwise permit something to be done by the trust, the thing may be done by the trustee.

199. **Subclause 35(3)** sets out how the obligations on a trust with multiple trustees is discharged. It provides that an obligation that would otherwise be imposed on the trust by the Bill is imposed on each trustee instead and if the Bill would otherwise permit something to be done by the trust, the thing may be done by any of the trustees.

Clause 36 – Rules

200. **Clause 36** provides a rule-making power for the Minister. This power will allow the Minister to set out matters that will ensure the effective functioning of the Bill.

201. **Subclause 36(1)** provides that the Minister may make rules, by legislative instrument, to prescribe matters that are required or permitted by the Bill to be prescribed or which are necessary or convenient to be prescribed for carrying out or giving effect to this Bill. The nature and scope of matters that may be subject to this rule-making power include:

- making a **code of conduct** that applies to an person that is a party to a funding agreement for the purposes of subclause 20(1) of the Bill
- setting **compliance standards** for persons undertaking regulated activities for the purposes of subclause 21(1) of the Bill
- setting **alternative compliance requirements** in which a person is to comply with for undertaking regulated activities for the purposes of subclause 22(1) of the Bill.

202. This rule-making power simplifies the language and structure of the provisions in the Bill, improving its accessibility. Having a single set of rules facilitates the use of a single type of Ministerial legislative instrument being needed for the Bill.

203. **Subclause 36(2)** provides that, to avoid doubt, the rules may not do any of the following:

- create an offence or civil penalty;
- provide powers of:
 - arrest or detention; or
 - entry, search or seizure;
- impose a tax;

- set an amount to be appropriated from the Consolidated Revenue Fund under an appropriation in this Act;
- directly amend the text of this Act.

204. **Subclause 36(3)** allows the rules to make provision in relation to a matter by applying, adopting or incorporating, with or without modification, any matter contained in an instrument or other writing as in force or existing from time to time. This will provide flexibility on the kinds of requirements that could be alternative compliance requirements. For example, the rules concerning alternative compliance requirements could allow for standards under another relevant scheme could be adopted.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

*Prepared in accordance with Part 3 of the
Human Rights (Parliamentary Scrutiny) Act 2011*

DISABILITY SERVICES AND INCLUSION BILL 2023

This Bill is compatible with the human rights and freedoms recognised or declared in the international instrument listed in section 3 of the Human Rights (Parliamentary Scrutiny) Act 2011.

Overview of the Bill

The Disability Services and Inclusions Bill 2023 (the Bill) is designed to give effect to the Government's commitment to enable people with disability to participate fully in society and exercise full choice and control over their lives and to improve job opportunities, job readiness and support in employment.

The Bill will repeal and replace the *Disability Services Act 1986* (DS Act). The DS Act was established in a markedly different policy landscape and disability supports and services have changed significantly in the decades that followed. This includes changes as a result of international conventions adopted by Australia and moving toward a unified and national approach to building inclusion for people with disability, their families and carers.

The Bill establishes a modernised regime for activities targeted for the benefit of people with disability, their families and carers. The Bill will provide the statutory framework for the majority of new spending on disability-related programs outside the National Disability Insurance Scheme (NDIS).

Arrangements and grants made under the Bill will be supported by appropriate, consistent and flexible quality safeguards such as a Code of Conduct and compliance standards. The Bill will be supported by legislative instruments that will address the more detailed operational aspects of the legislation.

The Bill complements existing measures to remove discrimination against persons with disabilities in Australia and to provide them with support and assistance. These include the *Disability Discrimination Act 1992* and the NDIS; the provision of income support through the Disability Support Pension, Carer Payment and Carer Allowance; Commonwealth, state and territory and local government programs.

Parts of the Bill

Part 1 of the Bill includes introductory and framing provisions as well as definitions to help inform the subsequent parts of the Bill. Objects and principles included in this Part describe the general aims of the legislation and provide guidance for decision-making under the Bill. The objects aim to ensure that, in conjunction with other legislation, the Bill gives effect to Australia's obligations under international human rights treaties. The principles in the Bill recognise various rights inherent to people with disability.

Part 2 of the Bill outlines funding arrangements under the Bill and prescribes various activities for the benefit of people with disability. A number of statutory funding conditions are set out in this Part of the Bill to ensure quality and safe supports and services for people with disability, their families and carers.

Part 3 of the Bill outlines quality and safeguarding arrangements to keep people with disability safe when receiving supports and services. This includes the introduction of a mandatory Code of Conduct for service providers, including their key personnel and staff. The Bill prescribes compliance requirements for regulated activities, which will be determined by the Secretary, taking into consideration operations and the level of risk to people with disability. Part 3 of the Bill allows for increased regulatory alignment with other quality and safeguard systems.

Part 4 of the Bill deals with information management, including unauthorised use or disclosure of protected information, and authorised use or disclosure of relevant information.

Part 5 of the Bill deals with miscellaneous matters. This includes detailing delegation of powers by the Minister and the Secretary and the power to make rule. This Part also outlines the application of the Bill to partnerships, unincorporated associations and trusts.

Human rights implications

The Bill engages the following human rights:

- Right to equality and non-discrimination – Articles 3, 4, 5 and 12 of the *Convention on the Rights of Persons with Disabilities* (CRPD) and Articles 2, 16 and 26 of the *International Covenant on Civil and Political Rights* (ICCPR)
- Rights of people with disability – Articles 9, 11, 16, 19, 20, 24, 25, 26, 27, 28 and 30 of the CRPD
- Right to freedom of opinion and expression – Article 21 of the CRPD and Articles 19 of the ICCPR
- Right to privacy and reputation and Statistics and data collection – Articles 22 and 31 of the CRPD and Article 17 of the ICCPR
- Right to presumption of innocence – Article 14 of the ICCPR

The Bill will enable the Commonwealth to fulfil its continuing commitment to provide services and supports outside the NDIS for people with disability. Services and supports funded under the Bill have the potential to promote or fulfil the rights of persons with disability in line with a number of CRPD Articles, expanded on below.

Right to equality and non-discrimination – Articles 3, 4, 5 and 12 of the CRPD and Articles 2, 16 and 26 of the ICCPR

Article 3 of the CRPD reflects the need for the respect for the inherent dignity, individual autonomy (including the freedom to make one's own choices and the independence of the person), non-discrimination, full and effective participation and inclusion in society, the need for respect for difference and acceptance of persons with disabilities, equality of opportunity, accessibility, gender equality and respect for the evolving capacities of children with disabilities, including their right to preserve their identities.

In addition, Article 4 of the CRPD outlines the obligations of State Parties to ensure and promote the full realisation of all human rights and fundamental freedoms for all persons with disability without discrimination of any kind on the basis of disability.

The objects and guiding principles of this Bill recognise the rights of people with disabilities to full and effective participation and inclusion in society. The Bill achieves this by providing authority to fund supports and services designed to support said persons' social and economic participation, ability to exercise choice and control in all matters that affect their lives, access to meaningful employment, education and development and participation in society on an equal basis to other members of Australian society.

The Bill provides legislative authority for supports and services for accessibility, accommodation, advocacy, capacity-building, carers, community inclusion, counselling education, employment, independent living, information, recreation, research and evaluation, respite care and/or further activities for the benefit of people with disability determined by the Minister under section 13(2). This complies with the general principles of the CRPD articulated in Article 3 to advance the freedom of choice in promoting the full realisation of persons with disability as per obligations in Article 4.

Article 5(2) of the CRPD requires State Parties to prohibit all discrimination on the basis of disability and guarantee persons with disabilities equal and effective legal protection against discrimination on all grounds. Article 12 of the CRPD reaffirms that persons with disability have the right to recognition everywhere as persons before the law and shall enjoy legal capacity on an equal basis with others, with appropriate measures being taken to provide access and support in exercising their legal capacity, including appropriate safeguards. The article also provides that persons with disability should be ensured equal rights to, among other things, control their financial affairs and not be arbitrarily deprived of their property.

Similarly, Article 16 of the ICCPR states that everyone shall have the right to recognition everywhere as a person before the law, and Article 26 of the ICCPR states that all persons are equal before the law and are entitled, without any discrimination on any grounds, to the equal protection of the law, including protection from discrimination. Article 2(3) of the ICCPR provides State Parties to undertake to ensure that any person whose rights or freedoms are violated shall have an effective remedy, and that competent authorities enforce such remedies when granted.

The Bill affirms these rights by avoiding language or framing which would unnecessarily limit or restrict people with disability, their families or carers from programs authorised under the Bill. In consultation with the public, the decision was made to avoid defining 'disability' within the Bill specifically to avoid limiting the people to whom the Bill may apply.

The rights articulated in Article 12 of the CRPD above are directly supported through the operation of the Bill by facilitating funding for supports and services, including advocacy supports which assist people with disability to understand and advocate for their rights.

The Bill promotes Article 2 of the ICCPR by providing that funding agreements may be terminated where a person, among other things, breaches the Code of Conduct, or does not maintain appropriate complaints and incidents management and resolution systems. The requirement to comply with the Code of Conduct and to have in place both a complaints and an incident management system means that any person with disability whose rights have been breached by a person receiving funding under the Bill has access to a remedy.

Rights of people with disability – Articles 9, 16, 19, 20, 24, 25, 26, 27, 28 and 30 of the CRPD

Article 9(1) of the CRPD provides that persons with disabilities have the right to live independently and participate fully in all aspects of life. Article 9(2) provides that State Parties must take appropriate measures to develop, distribute and monitor the implementation of minimum standards and guidelines for the accessibility of facilities and services open or provided to the public.

The Bill engages with Article 9 by providing for funding for accessibility support and services and information supports and services.

Article 11(3) of the CRPD requires States Parties to take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.

The Bill promotes this right by providing for advocacy supports and services, which include legal services that assist a person with disability to understand, advocate and uphold their rights.

Article 16 states that States Parties shall take all appropriate measures to protect persons with disabilities from all forms of exploitation, violence and abuse and that to facilitate this. State Parties must ensure that all facilities and programmes designed to serve persons with disabilities are effectively monitored by independent authorities.

Part 3 of this Bill provides for a Code of Conduct that applies to all providers receiving funding under the Bill. The Code of Conduct will establish expectations for provider conduct, and the safe and ethical delivery of their services and supports.

Part 3 of this Bill also provides for certification and compliance standards. Under the Bill, the Secretary can determine that certain activities are 'regulated activities'. Providers who are funded to provide regulated activities must hold a certificate of

compliance with the standards, obtained and maintained through regular audits by accredited certification bodies.

This Bill engages article 16 of the CRPD to enable, and enhance, the lives of persons with disabilities in ensuring providers comply with standards suitable for the safe and ethical delivery of supports and services to people with disability.

The Bill also includes provisions to ensure that the Department is able to share information in relation to people with disability who may be at risk of harm. This will enable information to be passed to relevant regulators, such as the NDIS Quality and Safeguards Commission.

As such, this Bill promotes the right of people with disability to live free from abuse, violence, neglect and exploitation, consistent with Australia's obligations with Article 16 of the CRPD.

Article 19 of the CRPD recognises the equal right of all persons with disabilities to live in the community, with choices equal to others, and requires that effective and appropriate measures be taken to facilitate full enjoyment by persons with disability of this right and their full inclusion and participation in the community. This is facilitated by ensuring, amongst other things, that persons with disabilities have access to a range of in-home, residential and other community support services necessary to support living and inclusion in the community.

The Bill engages this right by providing for supports and services in relation to accessibility, accommodation, information, respite and independent living.

Article 20 of the CRPD requires State Parties to take effective measures to ensure personal mobility with the greatest possible independence for persons with disabilities, including by facilitating access by to quality mobility aids, devices, assistive technologies and forms of live assistance and intermediaries and providing training in mobility skills to persons with disabilities and to specialist staff working with persons with disabilities.

The Bill engages this right by providing for supports and services in relation to accessibility and information.

Article 24 of the CRPD requires State Parties to recognise the right of persons with disability to education. The Bill engages this right by providing for supports and services in relation to education.

Article 25 of the CRPD requires State Parties to recognise that persons with disability have the right to the enjoyment of the highest attainable standard of health without discrimination on the basis of disability. The article requires State Parties to provide health services needed by persons with disabilities specifically because of their disabilities and services designed to minimize and prevent further disabilities to be provided. Similarly, Article 26(1) of the CRPD requires State Parties to take effective and appropriate measures to enable persons with disabilities to attain and maintain maximum independence, full physical, mental, social and vocational ability, and full inclusion and participation in all aspects of life. This ensure the full provision of

habilitation and rehabilitation services and programs, in the domain of health but also education, employment and social services.

The Bill supports the above rights by providing for supports and services in relation to counselling, information, education, employment, capacity building and advocacy.

Article 27 of the CRPD requires States Parties to recognise the right of persons with disabilities to work on an equal basis with others, including by enabling persons with disabilities to have effective access to general technical and vocational guidance programmes, placement services and vocational and continuing training, promoting employment opportunities and career advancement for persons with disabilities in the labour market, as well as assistance in finding, obtaining, maintaining and returning to employment, promoting opportunities for self-employment, entrepreneurship, the development of cooperatives and starting one's own business.

The Bill furthers this right by providing for supports and services in relation to employment.

Article 28 of the CRPD recognises the right of people with disability to an adequate standard of living for themselves and their families, including adequate food, clothing, housing, and to continuous improvement of living conditions, and to take appropriate steps to safeguard and promote the right without discrimination on the basis of disability.

The Bill furthers this right by providing for the funding of services such as accommodation and independent living that further this right by ensuring adequate standards of living.

Article 30 of the CRPD recognises the right of persons with disabilities to take part on an equal basis with others in cultural life, including the provision of entertainment on an accessible basis, and that State Parties should encourage the provision of appropriate instruction, training and resources to support persons with disabilities in organising, developing and participating in disability-specific sporting and recreational activities.

The Bill furthers this right by providing for supports and services related to cultural inclusion, information, capacity building and recreation.

Right to freedom of opinion and expression – Article 21 of the CRPD and Articles 19 of the ICCPR

Article 21 of the CRPD provides that Parties shall take all appropriate measures to ensure that persons with disability can exercise their right to freedom of expression and opinion. This includes provision of public information in accessible formats in a timely manner and urging private entities that provide public services to do likewise.

Article 19 of the ICCPR requires that everyone shall have the right to freedom of expression, which includes the freedom to seek, receive and impart information.

The Bill engages these rights by providing for supports and services relating to advocacy, capacity building and information.

Right to privacy and reputation – Articles 22 and 31 of the CRPD and Article 17 of the ICCPR

Article 22 of the CRPD provides that no person with disability, regardless of place of residence or living arrangements, shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence or other types of communication, or to unlawful attacks on his or her honour and reputation. It also provides that the privacy of personal, health and rehabilitation information of persons with disabilities should be protected on an equal basis with others. This right contains similar protections to those in Article 17 of the ICCPR. The right to privacy in Article 17 includes respect for informational privacy, including in respect of storing, using and sharing private information and the right to control the dissemination of private information.

For interference with privacy not to be arbitrary, it must be in accordance with the provisions, aims and objectives of the ICCPR and should be reasonable in the particular circumstances. Reasonableness in this context incorporates notions of proportionality to the end sought and necessity in the circumstances.

Under Part 4 of the Bill, personal information is considered to be protected information and will be handled in accordance with the limitations placed on the use and disclosure of protected information under this Bill, the *Privacy Act 1988*, and any other applicable Commonwealth, State or Territory legislation.

The Bill creates an offence for unauthorised use or disclosure of protected information. The offence attracts a penalty of two years imprisonment or 120 penalty units, or both. These are the standard penalties applied in Commonwealth legislation for breaches of privacy in relation to personal information. The potential serious consequences reflect the position of trust that individuals with access to protected information are in and the consequences that can arise if information is used or disclosed in an unauthorised way.

The Bill does limit the above Articles by allowing the disclosure of relevant information in particular circumstances. These limitations are connected to a legitimate objective and proportionate to the purpose of providing safe and high quality supports and services to people with disability, protecting people with disability from exploitation, violence and abuse and providing equal recognition before the law.

For example, the Bill limits the right to privacy by enabling the provision of information to other Commonwealth or State bodies for the purposes of that body. This could include disclosing personal information about a person's circumstances, the supports they receive and details of complaints or allegations made by them about an entity providing supports or services. This information may be disclosed to authorities such as the NDIS Quality and Safeguards Commission, other regulatory bodies or law enforcement agencies for the purposes of investigation of allegations or complaints.

Information may also be disclosed for the purposes of a centrelink or medicare program. For example, information may be disclosed for the purposes of confirming eligibility for the Disability Support Pension.

These limitations on the right to privacy are proportionate and for a legitimate objective.

Article 31 of the CRPD provides that States Parties will undertake the collection of appropriate information, that is also appropriately disaggregated, including statistical and research data, to enable the formulation and implementation of policies intended to give effect to the CRPD on the grounds that the information collection and maintenance complies with legally established safeguards to ensure confidentiality and privacy and that it complies with internationally accepted norms to protect human rights, fundamental freedoms and ethical principles. The process of collecting and maintaining the information must comply with legally established safeguards to ensure confidentiality and respect for the privacy of persons with disabilities. States Parties must assume responsibility for the dissemination of these statistics and ensure their accessibility to persons with disabilities and others.

The Bill provides for research and evaluation programs that undertake research or data analysis in relation to people with disability, and to evaluate programs or policies that are directed towards people with disability. This supports Australia's obligation to assess the implementation of obligations under the CRPD and to identify and address the barriers faced by persons with disabilities in exercising their rights.

The Bill also provides for the use or disclosure of statistics, so long as they are not likely to enable the identification of a person. The Bill also provides for information supports and services that could assist dissemination of information in accessible formats.

Right to presumption of innocence – Article 14 of the ICCPR

Article 14 of the ICCPR establishes, amongst other things, that all persons shall be equal before the courts and tribunals and shall be entitled to a fair hearing, and that everyone charged with a criminal offence shall be presumed innocent until proven guilty. In the determination of any criminal charge, everyone shall be guaranteed to, among other things, be informed promptly and in detail in a language which they understand.

By recognising banning orders made under the NDIS Act, this Bill limits the right to the presumption of innocence. This is because section 73ZN of the NDIS Act provides the NDIS Quality and Safeguards Commissioner with the power to ban NDIS providers and individual NDIS workers based on the Commissioner's reasonable belief that:

- the person has contravened, is contravening, or is likely to contravene the NDIS Act
- the person has been involved in, or is likely to become involved in, a contravention by another person
- the person is not suitable to provide supports or services to people with disability or
- there is an immediate danger to the health, safety or wellbeing of a person with disability if the person continues to be an NDIS provider

This limitation on the right to the presumption of innocence is justified because it helps to ensure that services and supports delivered under this Bill are delivered in a safe

manner by suitably qualified workers and providers and that people with disability are not subjected to harm.

Conclusion

The Bill advances the protection of the rights of people with disability in Australia, including in relation to preventing exploitation, violence and abuse in the disability sector. To the extent that the Bill limits human rights, these limitations are proportionate and for a legitimate objective.