



Office of the Public Advocate



Safeguarding the rights and interests of people with disability

Submission: Disability Inclusion Bill 2022

Response to the exposure draft overview paper

October 2022

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1. About the Office of the Public Advocate

The Office of the Public Advocate (OPA) is a Victorian statutory office, independent of government and government services that works to safeguard the rights and interests of people with disability.

The Public Advocate is appointed by the Governor in Council and is answerable to the Victorian Parliament. OPA's primary functions include advocacy, investigation, and guardianship services for people with cognitive disability and mental illness. The Office provides advice, information, and education about laws affecting people with disability and coordinates three volunteer programs.

OPA is supported by approximately 700 volunteers, including the Community Visitors Program, Independent Third Person Program and Corrections Independent Support Officer Program.

Community Visitors are empowered by law to make announced or unannounced visits to Victorian accommodation facilities for people with disability or mental illness. They monitor and report on the adequacy of services provided in the interests of residents and patients. They ensure that the human rights of residents or patients are being upheld and that residents are not subject to abuse, neglect or exploitation. In their annual report, Community Visitors report to the Victorian Parliament on the quality and safety of the services they visit. There are more than 400 Community Visitors who visit across three streams: disability services, supported residential services, and mental health services.

2. About this submission

OPA welcomes the opportunity to comment on the exposure draft of the Disability Inclusion Bill 2022.

OPA commends the creation of a new legislative framework for whole-of-government action and accountability in pursuing disability inclusion in Victoria.

OPA provides its feedback to the *Disability Inclusion Bill 2022: Exposure draft overview paper* under the headings that appear in the paper. This submission does not address every question.

3. Response to the *Exposure draft overview paper*

Part 1: Preliminary — The purposes, defined entities and definitions

Question 1: Creation of a new principal Act for Victoria relating to disability inclusion

OPA strongly supports the creation of a new principal Act for Victoria relating to disability inclusion. OPA applauds the objectives of the Bill, especially the focus on the Convention on the Rights of Persons with Disabilities (CRPD).

However, further work is required to shift community understanding of disability so that people with disability, and their representative organisations are recognised as experts in the inclusion of people with disability.

Disability policy should be strongly informed by the voice and experience of people with disability, and OPA welcomes the proposals:

- to create a new Commissioner for Disability Inclusion who must be a person with disability

- that at least three-quarters of the members of the Victorian Disability Advisory Council must be people with disability.

Questions 2 & 3: Purpose of the Bill and its focus on government and defined entities

OPA considers that rather than the legislation being solely focused on government and defined entities, the Bill should also apply to all large community and private sector organisations (with more than 50 employees). The implementation of the Bill could focus on government and defined entities initially, with further organisations prescribed over time.

Question 4: Definitions of important terms

OPA suggests the following changes in relation to the proposed definitions. Suggested changes are in bold.

Ableism: Due to environmental and attitudinal barriers, a belief that persons with disability are, as a result of disability, less worthy of respect and consideration, less able to contribute to or participate in society or of less inherent value than persons without disability. **It leads to a belief that people with disability need to be fixed to fit into the environment rather than the environment being made accessible to all.**

This leads to abuse and neglect of people with disability who cannot fit into the environment as it is.

Disability inclusion: accommodating difference by way of structural and **attitudinal** change.

Barriers: Anything, including anything physical, architectural, technological, **financial**, or attitudinal **including social and ingrained or unconscious bias**, that hinders the full and equal participation in **and contribution to** society of people with impairment, including a physical, mental, intellectual, cognitive, learning, communication or sensory impairment.

Accessibility: Provision for access by a person with disability, on an equal basis with other persons, to the following:

- the physical **and sensory** environment
- transportation
- information and communications (including information and communications systems and technologies)
- other facilities and services open or provided to the public **including employment, education, housing and healthcare.**

Question 5 Objectives of the Bill

OPA is broadly supportive of the proposed objectives of the Bill. However, as noted above, OPA considers that rather than the legislation being solely focused on government and defined entities as reflected in clause 7(d) of the Bill, the Bill should also apply to all large community and private sector organisations (with more than 50 employees). The implementation of the Bill could focus on government and defined entities initially, with further entities prescribed over time.

Question 6: Disability inclusion principles

OPA suggests the following additions in bold to the proposed principles:

- All Victorians should have access to... equal power, resources, **services** and opportunities... **and receive the support and funding they need to achieve their goals and aspirations.**
- All people, regardless of disability, should be free to...**have control and** make choices about their lives without being limited by stereotypes or prejudices.

OPA also considers people with disability should be involved when designing **all services**, not just those that affect people with disability. True inclusion is only possible when it is assumed that every service should be available to people with disability.

OPA notes that the Bill includes consideration of the coordination and integration of universal services and supports with the National Disability Insurance Scheme (NDIS) services and supports. OPA considers that there needs to be a recognition in the Bill that not every person with disability is eligible for, or receives, NDIS supports.

In addition to this, OPA considers that the distinctive experiences and needs of people with cognitive disability should be reflected in the disability inclusion principles. People with intellectual and other cognitive disabilities have different experiences to people with physical and sensory disabilities. Without specific reference to people with cognitive disability, there is the risk that inclusion, for example in employment, could appear to be improving without people with cognitive disability benefiting to the same extent as people with other disabilities.

Recommendation 1

The Victorian Government should amend the Disability Inclusion Bill to recognise the distinctive experiences and needs of people with cognitive disability to ensure the inclusion aims of the Bill.

A flourishing life

Finally, OPA suggests that the concept of a ‘flourishing life’, founded within a human-rights approach, be encapsulated within the inclusion principles.

A human rights approach affirms the inherent worth of every individual and promotes and protects rights. A human rights approach provides real equal opportunity, effective participation and full inclusion in society. It also involves creating a culture, both broadly in society and within organisations, that fosters a human-rights-approach mindset. Culture is the product of our values and our actions, including the words we use.

A human-rights approach:

- sees impairment as an expected dimension of human experience and diversity
- recognises that the vast majority of challenges experienced by people with disability are a result of disabling systems and environments
- challenges attitudes and environments that harm the dignity of people with disability
- requires people with disability to be resourced and supported to have the capabilities to lead a dignifying and flourishing life.

OPA describes below elements of the capability-based approach to flourishing human life developed by Amartya Sen and Martha Nussbaum.¹

¹ Martha Nussbaum, *Frontiers of Justice: Disability, Nationality, Species membership* (Harvard University Press, 2006); Amartya Sen, *The idea of Justice* (Harvard University Press, 2011)

In this approach, a flourishing life has these elements:

- **affiliation:**
 - **being able to live with and toward others:** Recognising and showing concern for others. Engaging in social interaction. Being able to imagine the situation of another.
 - **having the social basis for self-respect and non-humiliation;** Being treated as a dignified being whose worth is equal to that of others. This entails provisions of non-discrimination on the basis of race, sex, sexual orientation, ethnicity, caste, religion, national origin and species.
- **bodily health:** having good health, including reproductive health; being adequately nourished; having adequate shelter.
- **bodily integrity:** Being able to move freely from place to place; being secure against violent assault, including sexual assault and domestic violence; having opportunities for sexual satisfaction and choice over contraception and reproduction.
- **control over environment:**
 - **material:** Being able to hold property (both land and movable goods). Having property rights on an equal basis with others. Having the right to seek employment on an equal basis with others. Having freedom from unwarranted search and seizure. Having meaningful work where you can exercise practical reason and your human potential. Having meaningful relationships and mutual recognition with other workers.
 - **political:** Being able to participate effectively in political decisions that govern life. Having the right of political participation. Protections of free speech and association.
- **emotions:** Have attachments to things and people outside ourselves. Generally, to love, grieve, experience longing, gratitude, and justified anger. Not having one's emotional development hindered by fear and anxiety. Supporting forms of human association that are crucial to a person's emotional development.
- **life:** living a normal human life span; not dying prematurely or having life reduced to a life not worth living.
- **other species:** Being able to live with concern for and in relation to animals, plants, and the world of nature
- **play:** Being able to laugh, to play, to enjoy recreational activities.
- **practical reason:** Being able to form a conception of the good and to engage in critical reflection about the planning of one's life
- **senses, imagination and thought:** Being able to use the senses; to be able to imagine, think, and reason broadly, informed and cultivated by an adequate education, including literacy and basic mathematical and scientific training. Being able to use imagination and thought in connection with wide ranging experiences, including religious, literary, musical, and other works and events. Being able to use one's mind in ways protected by guarantees of freedom of expression, including

political and artistic speech, and freedom of religion. Having pleasurable experiences and being able to avoid non-beneficial pain.

This lens can guide governments and organisations in responding to people with disability consistent with the CRPD.

Part 2: Duty to promote disability inclusion

Questions 7 & 8: Proposed duty to promote disability inclusion and implementation issues

OPA considers that the proposed duty for government and defined entities to promote disability inclusion is appropriate. However, it will be critical that those entities are appropriately supported to meet their obligations, which will require, among other things, appropriate resourcing of the Commissioner for Disability Inclusion.

OPA supports the proposed functions of the Commissioner for Disability Inclusion in clauses 38(d) and (e) of the Bill to:

- establish and undertake information and education programs for defined entities in order to encourage best practice and to facilitate compliance with this Act
- undertake research into any matter related to the operation and objectives of this Act.

A new Commission for Disability Inclusion with these functions, if appropriately resourced, could play a vital 'centre of excellence' role. For example, entities will require guidance on how, and to what extent, they should consult with people with disability. Practical guidance and tips about best practice in this area from a new Commission for Disability Inclusion could play an important role in guiding entities.

Undertaking co-design, consultation or engagement appropriately requires planning and knowledge of best practice. For example, OPA is currently undertaking a project called 'Healthy Discussions' that aims to improve how health practitioners communicate with people with disability. The voice of people with disability is at the heart of this project. To facilitate this, OPA employs a project coordinator and project officer with lived experience of disability. OPA also employs four people with disability casually who are part of the steering committee for the project. In addition, OPA engaged Reinforce Self Advocacy (a self-advocacy organisation run for and by people with disability) to conduct a series of interviews to hear from people with disability about the key messages that they wish to share with health practitioners. Workshops undertaken as part of the project led to the production of the 'HealthCARE Conversations' video aimed at health practitioners.²

The 'Healthy Discussions' project is a funded project (funded by the Australian Government Department of Social Services) which enables the employment of people with lived experience in these various roles. The project is illustrative of the level of resourcing required to undertake genuine and inclusive co-design. For this reason, it will be of vital importance that a Commission for Disability Inclusion can provide guidance to entities about best practice approaches in a variety of circumstances. This would allow entities to draw on this expertise and be confident that the policies and practices they put in place are inclusive.

² 'Video: 'HealthCARE Conversations', *Office of the Public Advocate (Victoria)* (Webpage) <<https://www.publicadvocate.vic.gov.au/opa-s-work/healthy-discussions-project/watch-online-healthcare-conversations>>.

Consultation and best practice

In OPA's view, the duty to promote disability inclusion in the Act should include reference to undertaking these duties in alignment with best practice as determined by the Commissioner for Disability Inclusion. This would require that the Commissioner for Disability Inclusion has sufficient staff to develop appropriate guides and tips to assist entities. It is also vital that the Commissioner employ people with a range of disabilities.

For example, it would be a poor outcome if the requirement to consult in clause 9(b) led to entities looking to people with disability to provide their time and expertise voluntarily to meet the entity's obligation. If there is no guidance about best practice and appropriate remuneration for people's time, there is the risk of this occurring.

Accessible formats

The Bill as currently drafted requires that defined entities must use at least one form of accessible communications. OPA considers that the emphasise should be on communications being delivered in a format that is accessible to **each** person they are consulting with. This is because people with disability may require multiple types of accessible information, for example, Auslan, Easy English, Braille or audio-text.

Aspirational duty

OPA notes the new duties in Part 2 of the Bill are aspirational and not intended to give rise to legal rights. The danger with this is that in the absence of a legal obligation, organisations may not be willing to invest the time and resources required to promote disability inclusion.

Part 3: Disability impact assessments

In OPA's view, without significant support and guidance, many organisations will struggle to undertake effective and meaningful disability impact assessments. OPA notes that such guidance may be provided in the regulations. However, it will be important to ensure that the new Commissioner for Disability Inclusion is appropriately resourced so that organisations receive the education, training and other support they need to undertake disability impact assessments, especially in the initial years.

Also, OPA considers that in addition to the matters included in clause 11(2), disability assessments should also promote positive attitudes towards inclusion.

Question 9: What do you think about what defined entities need to do when conducting disability impact assessments? Is there anything else defined entities should do?

OPA considers that defined entities should also demonstrate how they will foster empowerment and the contribution of people with disability.

Question 10: Are there any implementation issues that should be considered around defined entities conducting disability impact assessments?

Disability impact assessments should be led by people with disability. The Commissioner for Disability Inclusion should provide guidance about how governments and defined entities can facilitate this to occur. It will also be necessary to consider what education and training can be provided by the Commissioner for Disability Inclusion to assist entities in developing inclusive programs, policies and services.

Question 11: Do you think the requirements on defined entities are appropriate or need any change?

Subject to the comments made above, OPA supports the requirements on defined entities to conduct disability impact assessments when developing or reviewing a policy, program or service with a direct and significant impact on the public.

Part 4: State Disability Plan and disability action plans

Question 12: What do you think of the proposed focus and requirements for preparing, consulting and reporting on a State Disability Plan?

OPA supports the focus in the State Disability Plan on outcomes and measures that foster inclusion to achieve equality. OPA considers that the State Disability Plan should have a data and performance evaluation framework that is robust and publicly available. While OPA notes that there is provision for the regulations to guide what the State Disability Plan Progress Report must include. However, there is little detail about this in the Bill. For example, given the significant barriers that people with cognitive disability face accessing employment in the government sector, OPA considers that the State Disability Plan provides an opportunity to make progress in this area. OPA acknowledges that there are challenges in capturing this data as employees may not wish to disclose their disability.

The Disability Inclusion Bill's provisions could also strengthen the State Disability Plan by requiring that the Minister responsible for the plan be held accountable for its effective implementation across the Victorian Government. While OPA supports the proposed requirement that the Minister prepare a State Disability Plan progress report to Parliament, OPA considers that the reports should be annual rather than every two years. This report should report both successes and failures and plans for remediation.

In addition, the Victorian Government should be required to produce a disability budget report to be tabled annually in Parliament, which demonstrates how the Victorian Budget has benefitted (or not) Victorians with disability. This 'disability budget' should provide a 'whole of government' perspective and be linked to the state disability plan.

The evaluation of senior officials' performances who are responsible for the implementation of all or some parts of the plan should be linked to their overall performance evaluation and its outcomes.

Recommendation 2

The Victorian Government should amend the Disability Inclusion Bill to require the Minister to report annually to Parliament against the plan.

OPA supports the proposed requirement in clause 12(4)(c) that the Minister must consult with the Victorian Disability Advisory Council in preparing the State Disability Plan.

In relation to the proposed clause 12(4)(b) in the exposure draft of the Disability Inclusion Bill, OPA proposes the following addition in bold:

- the Minister must consider strategies to meet the varied **accessibility and support** needs and experiences of people with disability.

Question 13: What do you think of the proposed focus and requirements for disability action plans? Are there any practical implementation issues that should be considered?

The Victorian Government is responsible for both promoting universal design and working towards changing discriminatory community attitudes in all activities, policies and programs.

This requirement, and monitoring of progress, needs to be mandated and enacted through revamped disability action plan requirements binding on all state authorities. OPA welcomes the proposed direction taken by the Disability Inclusions Bill to breathe new life into disability action plans.

Disability action plans have been an administrative approach to removing barriers and improving access for a generation. This approach has provided many improvements. However, despite the long-standing remit of anti-discrimination legislation, significant access barriers in mainstream services remain. Some of these remaining barriers are attitudinal; some relate to the perceived need for additional resources to make the necessary adjustments to deliver full inclusion. As a result, disability action plans can be lifeless or exceedingly modest in aspiration. There are also no sanctions for failing to produce one.

OPA considers that the *Gender Equality Act 2020 (Vic)* provides a modern, robust model for developing actions plans which addresses many of the current issues with disability action plans. OPA welcomes the inclusion of elements drawn from the Gender Equality Act in the Bill, such as the impact assessments and the recognition of barriers compounded by intersectionality.

OPA notes that clause 52(2)(c) allows for the Minister to issue guidelines in relation to the collection of 'data about the participation of persons with disability in services and supports' and in clause 52(2)(b) about 'advancing employment of persons with disability by defined entities'. However, OPA recommends that, similar to Gender Equality Action Plan³ requirements, there be a greater focus on measurable and reportable data, in particular in the area of employment, including employment of people with cognitive disability.

The Disability Inclusion Bill could go further in adopting a framework of duties and obligations to give more substance to, and better accountability for disability action plans in order to drive meaningful change across Victoria. For example, it is important that a focus on equality and inclusion in the workplace is explicitly part of the Bill.

Finally, OPA welcomes the proposed oversight of disability action plans by a Disability Inclusion Commissioner. This approach would be further strengthened by a requirement for all state authorities to have a disability inclusion portfolio holder who reports directly to the CEO or Secretary, or to their senior Human Resources nominee. The disability inclusion portfolio holder would be responsible for monitoring and reporting on the agreed performance measures under the disability action plan.

Part 5: Monitoring and compliance

Question 14: What do you think about the proposed monitoring and compliance mechanisms?

The effectiveness of the proposed monitoring and compliance mechanism will be dependent upon the Commissioner for Disability Inclusion being sufficiently resourced and the willingness of the Commissioner to take a pro-active approach towards supporting organisations to become compliant.

Part 6: Commissioner for Disability Inclusion

OPA considers that the Commissioner for Disability Inclusion, as well as having lived experience of disability, must be able to represent a diverse range of people with disability. It is important the Commissioner work in consultation with people with a diverse range of disabilities.

³ *Gender Equality Act 2020 (Vic)* s 10-11

Question 17: What do you think of the proposal to create a Commissioner for Disability Inclusion?

OPA supports the proposal to create a Commissioner for Disability Inclusion and considers that it will be necessary for the Commissioner to be supported by a properly resourced Commission for Disability Inclusion.

The Commission should be independent of day-to-day departmental operations. This new Commission should be administratively structured somewhat like the Mental Health Reform Victoria body and the Commission for Gender Equality in the Public Sector and led by the proposed Commissioner for Disability Inclusion.

Question 18: What do you think of the proposed functions and powers of the Commissioner? What would you change?

OPA supports the proposed functions of the Commissioner for Disability Inclusion:

- in clause 38(d), to 'establish and undertake information and education programs for defined entities in order to encourage best practice and facilitate compliance with this Act' and
- in clause 38(e), to 'undertake research into any matter related to the operation and objectives of this Act'.

OPA suggests that, in addition, the Commissioner's functions include:

- **forming partnerships** to research and develop best-practice approaches to:
 - disability inclusion
 - reasonable adjustments and universal design.
- coordination of grants programs for disability-led groups, representative bodies and disability pride measures.

In the relation to forming partnerships, OPA notes that the Bill recognises in clause 8(n) that advocacy on behalf of people with disability, including self-advocacy and systemic advocacy, is essential to advance disability inclusion. OPA considers that it would be an essential function of the Commissioner to form partnerships with, for example, self-advocacy organisations in researching and developing best practice approaches.

Question 19: Do you have any other comments on the proposed Commissioner model (or an alternative model)?

OPA has previously proposed an alternative model in its Submission to Review of the Disability Act 2006.⁴

However, in relation to the proposed model, OPA considers that it is of vital importance that people with a range of disabilities are employed as staff of the Commissioner for Disability Inclusion to guide the implementation of the Bill. This is important because people with different disabilities will have varying requirements to ensure services are inclusive and accessible. It is also important that there is proper remuneration of people with disability involved in designing government and government-funded programs, services and policies.

⁴ Office of the Public Advocate (Vic), *Submission to Review of the Disability Act 2006* (Submission, October 2021) 19 <<https://www.publicadvocate.vic.gov.au/opa-s-work/submissions/354-submission-to-review-of-disability-act-2006-vic>>.

Part 7: Victorian Disability Advisory Council

Question 20: What do you think about the proposed changes to VDAC?

Under the present Disability Act, the Victorian Disability Advisory Council has an advisory role to the Minister for Disability. This role has given the Council the opportunity to influence government directions and policy, however it has limited resources to undertake its role. The power and influence of the Council rests on the individual members' personal commitment and the Minister's willingness to listen to and implement their advice.

OPA considers that the focus of the Advisory Council should be on promoting inclusion, equality, and flourishing lives for all Victorians with disability.

OPA welcomes:

- The proposed function of the Advisory Council to advise the Minister on matters relating to disability inclusion.
- The Advisory Council's proposed advisory role to the Commissioner for Disability Inclusion which further promotes 'nothing about us without us'.
- The proposed requirement that a significant majority of the Council's membership is comprised of people with direct lived experience of disability.

OPA considers that the Advisory Council should also include more people with a cognitive disability than it does currently (who should receive the supports required to participate).