

BRIEFING FOR THE COMMUNITIES, DISABILITY SERVICES AND DOMESTIC AND FAMILY VIOLENCE PREVENTION COMMITTEE

Examination of the Disability Services and Other Legislation Amendment Bill 2015

Department of Communities, Child Safety and Disability Services

1. Background

As part of Queensland's readiness for transition to the National Disability Insurance Scheme (NDIS), a two-staged, whole-of-government legislative review has commenced. Stage One involved the identification of critical and essential amendments to facilitate an early transition to the NDIS from 1 April 2016. Stage Two will address the necessary amendments to enable full scheme implementation from 1 July 2019.

As part of Stage One, all relevant agencies across the Queensland Government were required to identify the amendments to their portfolio legislation to enable and support early transition. Initially, this began as a broad review. Since February 2015, the Department of Communities, Child Safety and Disability Services (DCCSDS) has worked with all key agencies to guide the focus of the review and determine priority amendments for transition.

Through this process, it was identified that the majority of critical and essential amendments relate to the operation of Queensland's quality and safeguards system.

What are quality and safeguards?

The NDIS is a market-based model involving individualised funding designed to enable people with disability to exercise choice and control. However, the vulnerability of people with disability means that regulation will continue to play a role in ensuring the quality of services provided and safeguarding the rights and interests of people with disability.

Quality refers to service standards and other tools designed to ensure supports and services meet an individual's requirements. Safeguards are specific measures in a disability support system that aim to minimise the risk of harm to a person with a disability, protect their right to be safe and empower them to achieve choice and control over their lives.

Queensland's existing quality and safeguard framework is a robust mix of legislative and contractual measures, as well as oversight by independent statutory authorities and complaints bodies (Appendix 1).

Disability Services' quality and safeguards framework operates on the basis of the funding relationship between the department and specialist disability service providers. Existing legislative safeguards include: criminal history screening; restrictive practices framework; and a complaints management process (Appendix 2).

2. Key policy drivers

Two key policy drivers underpin the Bill. First, the Queensland Government is committed to extending its existing quality and safeguards systems during the transition to full scheme. The Australian Government is designing a national NDIS quality and safeguards framework, in partnership with the states and territories. This framework is due to be agreed by the Council of Australian Governments Disability Reform Council (DRC) in early 2016.

National implementation of the NDIS framework will take some time and the infrastructure and systems to support a national framework will not be in place through the transition period.

Secondly, as the NDIS rolls out, funding contracts with disability service providers will be gradually phased out. Under the NDIS, people with disability will receive funding to purchase their supports rather than service providers being directly funded by government. In the absence of the proposed legislative amendments, the loss of this funding relationship would result in many of the existing legislative safeguards being lost.

To date, key legislative safeguards under the *Disability Services Act 2006* (the DSA) have only applied to DCCSDS funded and provided disability services. The existing definitions of 'funded service provider' (section 14), 'funded non-government service provider' (section 16) and 'funded relevant service provider' (section 140) represent the threshold limitations to extending the quality and safeguards system.

3. Overview of the Bill

The purpose of the Bill is to:

- ensure Queenslanders who are receiving specialist disability supports funded through their individual package under the NDIS, have the same level of safeguards as Queenslanders who are in receipt of specialist disability supports funded by DCCSDS
- provide DCCSDS with the necessary powers to monitor the compliance of NDIS non-government service providers with safeguards to protect NDIS participants receiving disability services
- provide DCCSDS with the authority to request identifiable client information from other Queensland Government agencies for the purpose of reconciliation against National Disability Insurance Agency (NDIA) invoices.

The Bill amends the *Coroners Act 2003*, *Disability Services Act 2006*, *Guardianship and Administration Act 2000*, *Powers of Attorney Act 1998*, *Public Guardian Regulation 2014* and *Working with Children (Risk Management and Screening) Act 2000*.

The majority of amendments contained in the Bill relate to the DSA.

Definitional changes

The Bill redefines the scope of the DSA by making some key definitional changes.

First, the Bill makes amendments to section 14 to change the definition of 'funded service provider' to include a service provider that provides disability services prescribed by regulation that is funded under a NDIS participant's plan. Secondly, a new definition has been inserted which recognises NDIS non-government service providers. This definition captures non-government service providers that provide disability services prescribed by regulation that are funded under a NDIS participant's plan.

Section 37 of the *NDIS Act 2013* (Cth) stipulates that a participant's plan comes into effect when the NDIA CEO has: (a) received the participant's statement of goals and aspirations from the participant; and (b) approved the statement of participant supports. Funding will be allocated under these plans to the participant to purchase services and supports from providers.

The extension of the DSA to non-government disability service providers that are not funded by DCCSDS will ensure the continued application of the three legislative safeguards. These include DCCSDS's: complaints management system; criminal history screening function; and restrictive practices framework. These changes prevent the creation of a two tiered system where people with disability have widely divergent safeguards in place, depending on the source of funding for their supports.

The definitional changes do not capture organisations that are already subject to other quality and safeguard systems as this would be unnecessary and duplicative. For example, amendments have been made to ensure hospital and health services, which may register under the NDIS, are not captured by the DSA. Rather these services will continue to rely on their existing safeguarding systems.

Clause 7 and 8 of the Bill give effect to these definitional changes. Clauses 9 to 43 of the Bill are a series of consequential amendments which apply to Part 5 of the DSA and ensure criminal history screening requirements are extended to NDIS non-government service providers.

Monitoring and investigative powers

Through transition, DCCSDS will continue its investigative role to ensure NDIS non-government service providers comply with Queensland quality and safeguards standards.

The Bill includes provisions which provide DCCSDS with the power to: (1) require relevant information and documents from NDIS non-government service providers; and (2) enter premises if the entry is authorised by a warrant. These powers will only trigger under certain grounds.

Under the newly proposed section 200M, warrants may be sought to protect a person who is an NDIS participant from risk of harm because of abuse, neglect or exploitation; or to check whether an NDIS non-government service provider has complied with, or is complying with, the DSA. Similarly, for an authorised officer to be able to require information the officer must reasonably believe that an offence against the DSA has been committed; or there has been a service delivery failure; or an NDIS participant may be at risk of harm (new section 200W).

The NDIA will be responsible for any enforcement measures, which will be triggered upon referral from the Queensland Government. The NDIA has the option to de-register providers under the *NDIS Act 2013* for non-compliance issues. Working arrangements are being developed and finalised around how Queensland will work with the NDIA in these cases. These will be in place by 1 April 2016.

The proposed amendments will not replace the NDIA's responsibilities for managing reviews and appeals related to NDIA decisions about the administration of the scheme and any other decisions taken under the *NDIS Act 2013*. Queensland will not have a role in these processes.

Clause 44 creates the new Part 6A.

Sunset and review clauses

The Bill contains a sunset provision, which will bring about the cessation of Part 6A of the DSA, as of 30 June 2019. In addition, the Minister will be required to review the DSA, in light of the amendments made through this Bill. This review is to be completed by 30 June 2019, and will form part of Stage Two of the whole-of-government legislative review. The timing of this review is to enable consideration of the status of the national NDIS quality and safeguard framework.

Clause 51 inserts these provisions.

Information collecting power – financial reconciliation

The Bill provides DCCSDS with the power to obtain identifiable client information from other Queensland government departments through the sharing information about persons who may be eligible persons. Eligible person means a person receiving services funded or delivered by a department who may meet the access criteria under the NDIS Act.

The purpose of this power is to facilitate the monitoring and reconciliation by DCCSDS against NDIA invoices. DCCSDS is best placed to manage the process and as such, will need to hold the discrete identifiable client information of other Queensland Government departments. Client information includes: the person's full name; the person's unique client identifier, if any; date of birth; gender; residential address; and the name of any carer/appointed guardian, if applicable. This power will only be necessary through the transition period. DCCSDS will be bound by its lawful obligations under the Information Privacy Principles in relation to the storage and security of this information.

The information collected pursuant to this power is necessary for audit purposes to ensure Queensland's contribution to the scheme is properly acquitted within the required timeframes.

To facilitate the giving of this information, DCCSDS may enter into written arrangements with other departments. Under these arrangements, DCCSDS will also be authorised to disclose to departments the relevant personal information of their former clients who have now transitioned to the NDIS. This will allow for departments to effectively manage and adjust their funding contracts with non-government providers as well as ensure the continuity of supports for those persons identified by the NDIA as being not eligible.

It is likely that there will only be a limited number of departments from which information is required. However, the impacts of the NDIS are yet to be fully realised. Therefore, the scope of this power is required to be broad to ensure that there are no negative financial impacts to Queensland or service delivery failures to people with disability.

Clause 50 of the Bill provides for this power.

External oversight

The Bill also extends other components of the quality and safeguards system through:

- changes to definition of 'visitable site' under the *Public Guardian Regulation 2014* which will ensure community visitors can visit a place, other than a private dwelling house, where a funded adult NDIS participant with impaired capacity for a personal matter or a financial matter or with impairment, resides (see clause 59); and
- to the definition of 'death in care' under the *Coroners Act 2003*, which will allow the coroner to investigate the death of a NDIS participant who was living in accommodation provided to persons with a disability or living in a residential service and was receiving services paid for by the person from funding under the person's participant's plan (see clause 4).

4. Fundamental Legislative Principles

Under the Bill, the scope of the definitional changes is limited to service providers that are delivering specific types of disability services. These services will be prescribed by Regulation. This approach potentially breaches fundamental legislative principles (FLP) because it allows for the delegation of a legislative power (*Legislative Standards Act 1992*, section 4(2)(b)). However, the prescription of services by Regulation is justified on a number of grounds.

The Regulation allows for the full range of disability services to be listed. This level of technical detail most appropriately belongs in a Regulation. In order to properly capture all disability services, it is necessary to use a range of definitions and conventions. The definition of disability services under the DSA has been used. From there, the services under the DSA have been aligned to the outputs and measures through which Queensland currently funds non-government service providers. These are in accordance with the Disability Services National Minimum Data Set.

To make this relevant for the NDIS, Queensland's disability service types have been mapped to the relevant NDIS support categories (which are referred to as 'NDIS support clusters'). Service providers that elect to register with the NDIA to deliver services within the support clusters identified in the Regulation will be caught by the new definition. As a result, these providers will be subject to Queensland's quality and safeguards system.

The Regulation also represents the most practical mechanism to capture the relevant disability service providers. The prescription of disability services under the Act would be impractical. Rather, listing services under Regulation provides the necessary flexibility to amend this list if NDIS supports clusters change or are updated. These changes are not in the control of the Queensland Government.

Monitoring and investigative powers have also been drafted for re-introduction into the DSA after they had been removed and consolidated in the *Community Services Act 2007* (the CSA) by legislation passed in 2014. These changes have sufficient regard to the rights and liberties of individuals as the re-introduction of the powers into the DSA is necessary. The application of the CSA is limited to funding provided by a Queensland government department that is the subject of a funding declaration (see section 10 CSA). Funding under the NDIS falls outside the application of the CSA.

The Office of Queensland Parliamentary Counsel worked with DCCSDS during drafting to minimise any FLP impact.

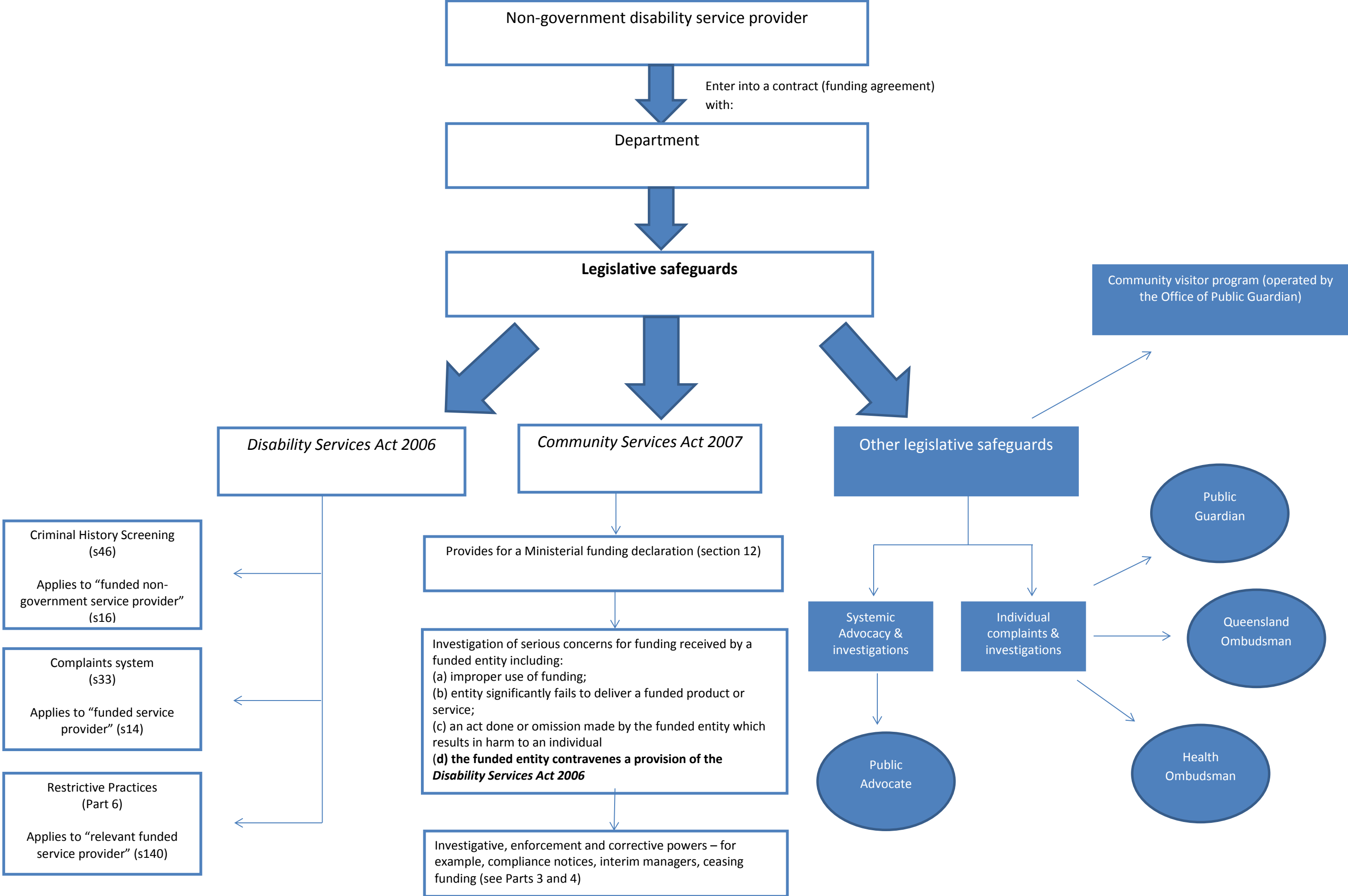
5. Stakeholder Consultation

Targeted consultation occurred with members of the Disability Services Partnership Forum through a draft exposure Bill. Membership of the Forum includes a range of service providers as well as peak and advocacy organisations. They were supportive of the Bill and its objectives.

For the most part, issues raised throughout consultation related to the design of the NDIS quality and safeguards framework. These issues have been noted and will be addressed as part of Queensland's ongoing role in the development and implementation of that national framework.

In addition, the Offices of the Public Guardian and the Public Advocate are supportive of the Bill. The State Coroner supports the amendments to the definition of 'death in care' in the *Coroners Act 2003*.

Appendix One – Overview of Quality and Safeguards System



Appendix 2 – Legislative Safeguards for People with Disability

| Safeguard | Type | Detail | Applies to... |
|-------------------------------------|--|--|--|
| Complaints management system | Legislative <i>Disability Services Act 2006</i> Section 33 | Complaints by consumers (1) The following may make a complaint to the chief executive about the delivery of disability services by a funded service provider— (a) a consumer; (b) a family member, carer or advocate of a consumer; (c) another person on behalf of a consumer. (2) The chief executive must maintain a system that deals effectively with complaints received. | A funded service provider, which is defined as: a service provider that receives funds from the department to provide disability services. A funded service provider also includes the department to the extent it provides disability services. (see section 14 <i>Disability Services Act 2006</i>) |
| Criminal history screening | Legislative <i>Disability Services Act 2006</i> Section 46 | Persons engaged by a funded non-government service provider at a service outlet (1) For this part, a funded non-government service provider is engaging a person at a service outlet of the service provider if the provider has an agreement with the person for the person to carry out work at the outlet. (2) Without limiting subsection (1), each of the following persons at a service outlet of a funded non-government service provider is engaged by the service provider— (a) an employee of the service provider employed under a contract of service; (b) a volunteer of the service provider; (c) a person employed by the service provider under a contract for services; (d) a member of a board, management committee or other governing body of the service provider; (e) an executive officer of the service provider; (f) a student on work experience | A funded non-government service provider, which is defined as: a non-government service provider receiving recurrent or one-off funds from the department to provide disability services. Note: it is immaterial whether other funds or resources are also used by the non-government service provider to provide disability services (see section 16 <i>Disability Services Act 2006</i>) |

| Safeguard | Type | Detail | Applies to... |
|--|--|---|---|
| Restrictive practices regime | Legislative <i>Part 6 of Disability Services Act 2006</i> | This part applies to a relevant service provider. | A relevant service provider, which is defined as: funded service provider who provides disability services to an adult with an intellectual or cognitive disability. Note: this part applies to a funded service provider in relation to the provision of disability services to all adults with an intellectual or cognitive disability receiving disability services from the funded service provider, even if the disability services are not provided with the funding received. (see section 140 <i>Disability Services Act 2006</i>) |
| Monitoring & investigating serious concerns | Legislative <i>Community Services Act 2007</i> | A serious concern for funding received by a funded entity exists if any of the following happen or there is a serious risk that any of the following will happen— (a) the funding received by the funded entity is improperly used; (b) the funded entity significantly fails to deliver a funded product or service; (c) an act done or omission made by the funded entity in providing a funded product or service results in harm to an individual; (d) if the funded entity received the funding to deliver disability services to which the <i>Disability Services Act 2006</i> applies—the funded entity contravenes a provision of the Disability Services Act 2006. In monitoring and investigating serious concerns, DCCSDS may enter places (with consent or by way of warrant) and request information. | A funded entity, which is defined as: an entity that receives funding provided by a department to deliver a product or service. A funded product or service, in relation to a funded entity, is a product or service required to be delivered by the funded entity with funding received by the funded entity. (see section 7 <i>Community Services Act 2007</i>) |