

Disability Inclusion Bill

Submission by David Morrell

About Me

I offer my opinion as a person with disability and carer.

However, I have 3 relationships with the government of Tasmania;

1. as a member of the Disability Inclusion Bill steering committee, where I help to manage the progress of the Bill from the people to Parliament, no matter what it says;
2. as a member of the Ministerial Disability Consultative Group, where I talk with the other members to give our advice on what the Bill says;
3. as a citizen interested in what the government does about people with disability and carers because I am both of these.

I am also a member of the Board of Carers Tasmania. I was a founding Deputy Chair of Disability Voices Tasmania and of Blind Citizens Australia (Tasmania). My views have been shaped by what I have learned with these organisations, but I do not speak for them.

How To Read This Submission

This submission is 54 pages long. Here are some tips to help; you find what you want to know in the time you may have available.

For the points that could be packed into a media interview or short article, read the .

For an over view of the whole submission, read the .

To understand more about the main points and some others, read the .

In the , jump to the reasons for any comment of interest by holding the Ctrl key and clicking on the comment.

To go back to the list of comments, click the link in each page footer.

Comments are under the same headings as the Bill, so it is easy to find the part of the Bill that is being discussed and make up your own mind about the comment.

The full submission starts with .

Finally, an accessibility tip for those who want to print this submission but need bigger text. Adjust the font size by editing the Default Paragraph Style. All text except headings will change size instantly.

This submission is based on version 6 of 14 August 2023.

Headlines

The Bill has many good features, but also some big problems. It should not go to

Parliament until it's fixed. The history of disability law and policy reform shows that another opportunity is unlikely to come for decades.

The Bill should say what the 2 key words in its Objects mean - inclusion & human rights.

Inclusion means people feel, and are, valued and respected, regardless of their personal characteristics or circumstances. It matters because too many Tasmanians with disabilities are don't get a fair go in education, are unemployed, live in poverty, have poor health, are in prisons, experience violence and abuse, can't get into buildings, don't have usable transport and so many other things.

Human rights must be strong enough to enable inclusion. They must be as complete and universal as the UN Convention on the Rights of Persons With Disabilities. Australia signed that Convention in 2008. Some other states have human rights laws. It's time for Tasmania to catch up.

A Disability Inclusion Commissioner is a big idea for a big job - leading the charge for inclusion and human rights. That means research, consulting, educating, advising, advocating, handling complaints and keeping people safe.

We need a Commission, not a Commissioner. The job is much too big and important for one person with no guarantee of staff.

The Disability Inclusion Advisory Council is another big step. It will help Tasmanians with disability tell the government how to make our lives better. It will have more authority than advisory bodies we have now because it won't exist and operate at the whim of any Premier or Minister.

Disability Inclusion Action Plans will make a lot of organisations take serious action. There will be a plan for the whole government and plans for each part of the government. The plans will have less room for fudging and delays than the Accessible Island strategy they replace.

However, the plans only have to be made by 'defined entities'.

Non-government organisations that get government money should also have plans. The Bill should say that more clearly.

The rules about restricting a person's human rights will be tightened. The enforcer - the Office of the Senior Practitioner - will be given more teeth.

But this is jumping the gun! The Disability Royal Commission is about to report. Will the government have egg on its face if the Bill does not wait for this major report?

If the proposed changes go ahead regardless, the government must guarantee some things for them to work.

1. Behaviour Support Plans can help people avoid having their human rights restricted in the first place. But only if there are skilled people to make them work.
2. The Senior Practitioner must have enough people to enforce the rules quickly and decisively.
3. The Bill must make it hard for the Senior Practitioner to have any cosy relationships with the disability industry. The Senior Practitioner should not work in the industry in Tasmania for at least 2 years before and after their appointment.
4. The Senior Practitioner must take a 'no bullshit' approach to people in disability services who watch how their colleagues use restrictive practices (Appointed Program Officers). APOs must not be allowed to put their jobs and work mates ahead of the people with

disability they are meant to protect.

5. The volunteers and family members who help people understand why their rights have been restricted must be well trained (Independent Persons).

The Bill must guarantee help to enable Tasmanians with disabilities and our unpaid carers to do all of the things the Bill asks of them.

- be members of the Disability Inclusion Advisory Council;
- be members of the many advisory groups that are likely to be set up by government departments;
- take part in the many consultations that are going to come their way;
- act as Independent Persons for people whose human rights have been restricted.

To make all this work, we need;

- training and mentoring to up-skill people for their roles;
- participation enabling resources to overcome disabling barriers like communication and travel;
- operational resources for the Disability Inclusion Advisory Council and the Disability Inclusion Commission(er) so they can talk to Tasmanians with disability early, often and everywhere about what advice they should give the government.

Summary

The most important ideas are in this summary. The quickest way to find all the ideas is to read the .

.What's Good?

The Bill at least opens the door to a conversation about putting the force of law behind inclusion and human rights for Tasmanians with disability. That is a huge step forward.

The Bill lays the ground work for gathering the evidence that could improve inclusion and human rights protections in future; (Inclusion Plans, DIAC, Commissioner, Senior Practitioner reports).

The Bill strengthens the voices of people with disabilities by means of the DIAC and obligations to consult.

The requirement for the Commissioner to be a person with disability is likely to mean that the Commissioner, from day one, will have superior insights, credibility and access to networks of people with disability.

.What's Interesting?

..Advice, Reports & Referrals Could Drive A Learning System

The Bill lets information be given to disability services and others about how to do a better job. They can get advice, referrals or reports from the DIAC, Commissioner or Senior Practitioner. The Bill should also make people who get that information say what they did about it. This will help the people giving information do a better job.

Review the Bill to require parties who receive advice, referrals or reports from the DIAC, Commissioner or Senior Practitioner to tell the senders what happened as a result of the information provided. This will help the senders to improve their work and public reports.

.What Should Be Better?

Perhaps this is a long section because I am as biased toward looking for problems and risks as any other person.

..Human Rights Must Be Stronger

Make the Bill give human rights that are strong enough to achieve its Objects. The Bill must not be made into a law until that is done.

Here are the problems.

The best list of human rights is in the United Nations Convention on the Rights of Persons With Disability (UNCRPD). It was written by many people with disability, including some Australians. The Australian government has said it agrees with the UNCRPD.

The Bill does not give Tasmanians the human rights in the UNCRPD. It only 'supports and furthers' the 'purpose & principles' of the UNCRPD.

The Bill does give some rights, but they might or might not be all of the rights in the UNCRPD. It is very hard to tell because the Bill does not say where the rights come from.

The rights in the Bill are not written as clearly as the rights in the UNCRPD. It's hard to be sure that they are as strong. The rights in the UNCRPD were hammered out in long, hard negotiations. Every word is there for a good reason.

Some rights in the Bill are only given 'as far as practicable'. This allows lots of room for half measures on 'inconvenient' rights.

Sometimes the rights themselves are not there - only the right to receive support to achieve the rights.

Rights are supposed to be for all people, in all places at all times. The Bill might not make rights that work like that. The rights are inside the Bill's Inclusion Principles. The Inclusion Principles are "... to be observed in the operation, administration and enforcement of this Act." This will cause people with disabilities to have to argue about what the word 'observe' really means, and whether the Disability Inclusion Act applies to whatever they want to change.

..The Bill Is Too Reasonable

The Bill uses the word 'reasonable' 23 times. That makes it very hard for people with disability to speak up when we don't like what is done, how hard people try, what is good enough and how long things take to be done.

..Defined Entities - Government Governing Itself, Not Tasmania

The scope of 'defined entities' is too narrow.

It should be expanded to explicitly cover at least all entities operated or funded by the state - all entities, not just disability services.

If inclusion is to be achieved across society, the obligations of 'defined entities' should also

extend to larger business and civil society organisations in all fields. This might be done by setting a cut off for annual income.

..Intersectionality Is Important But Overlooked

Intersectionality is defined in Interpretation but needs to be added to the Inclusion Principles. While 'diversity' in the Inclusion Principles addresses individual choice & control as a key to inclusion, it misses the social and structural impacts on inclusion of the "... overlapping and interdependent systems of disadvantage or discrimination" mentioned in the definition of intersectionality.

The definition of intersectionality should be broadened beyond 'protected attributes' of the Anti-Discrimination Act to include 'socio-economic status'.

..Consultation Is Good, Involvement Is Better

The Bill requires consultation in several places but only discusses it in detail in relation to Disability Inclusion Plans. A uniform approach to consultation could be ensured by discussing consultation in its own Part.

The Bill could add 'involvement' (a tool from the IAP2 Public Participation Spectrum) as an alternative or replacement for consultation. Involvement means people with disabilities contributing to designing ideas and options, not just responding to them when consulted.

The Bill does not proactively favour consultation with organisations appointed - and preferably led - by people with disability to represent our interests.

..DIAC Should Have a Disability Super Majority

Would a women's council allow up to 49% male membership? Would the TCCI allow up to 49% trade union membership?

The majority of people with disability should be increased from 51% to a super majority such as 70-80% because;

- the functions of the DIAC are entirely to advance the interests of people with disability;
- it will be hard to appoint people with disability having diverse backgrounds and experiences if they might be as few as 5 of a 9 member Council s19)2) and s19)3)b);
- other interested parties can be heard by other means (Minister's Carer Advisory Council, National Disability Services);
- DIAC may gain views of any other parties without having them among its members.

..Bill Should Provide Programs & Funding To Support Participation

The Bill asks Tasmanians with disability to do many new things so we can help ourselves (DIAC, other advisory bodies, responding to consultations, Independent Persons). Other things may follow, such as leadership positions in defined entities. That's great!. But it won't work without help.

Capacity building will be needed so people with disabilities can contribute & lead. Most people with disabilities have not had the chance to afford the training, build the mentoring relationships & mix in the networks that might equip them to do what must be done.

Enablement will be needed to overcome the disabling barriers that frustrate participation. This

means systematic & reliable funding for communication, interpreters, personal attendants, travel, accommodation.

Capacity building and enablement could be added to the Bill as functions of the DIAC and Commissioner. However, the topic should have a section of its own if applied more broadly to people with disabilities participating in response to requests for consultation and the like.

Operational funding will be needed for the DIAC to give high quality, timely advice that is well grounded in lived experience. DIAC must have the resources to talk to Tasmanians with disabilities everywhere, early and often.

..Commission, Not Commissioner

The many functions of the Disability Commissioner are too demanding and important to be left to one person with no certainty about staff or other resources.

The Commissioner should have the powers to make mandatory standards for the operation of disability services and to prosecute. These are a logical step on from the Commissioner's powers to investigate. The investigative powers already include coercive options such as compelling production of information and appointing Authorised Officers who may demand entry to premises.

The Commission's responsibilities would be even more demanding if the scope of 'defined entities' was widened to include business and civil society organisations.

The Commission should consult DIAC about all matters, not just violence, abuse, neglect and exploitation.

On that matter, the time limit for victim survivors to make reports to the Commissioner should be made longer than 12 months.

..Don't Rush Restrictive Practices

The Disability Royal Commission is about to make its report. It will obviously be full of recommendations that will affect the use of restrictive practices. A rush to early legislation could be as embarrassing as the rush to amend the Local Government Act to require postal voting. That resulted in a complaint of unlawful discrimination being upheld. The voting process is now being co-designed with people with disability. More amendments to the Local Government Act are sure to be needed.

..Protect Restrictive Practices From Regulatory Capture

Regulatory capture means that a regulated industry infiltrates or influences its regulator.

If restrictive practices must be used, it must only be for their stated purpose of providing safety, never to make the operation of services more convenient or efficient for the organisation and its staff.

The Senior Practitioner should not have close connections to the industry. Perhaps there could be a prohibition on working in Tasmanian disability services for 2 years before and after taking the job.

The Senior Practitioner must have zero tolerance for Appointed Program Officers allowing themselves to be compromised by concern for their job or their relationships with work colleagues.

..Ensure Authorised Officers Implement Inclusion Principles

The permitted reasons for entry exclude all other reasons for entry to premises, including to ensure compliance with the rights and behaviours mandated in the Inclusion Principles. Add a 'safety net' provision to the permitted reasons in s63)2): 'd) ensuring compliance with the Inclusion Principles.'

List of Comments

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Summary

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What's Interesting?

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What Should Be Better?

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The Bill Is Too Reasonable

Defined Entities - Government Governing Itself, Not Tasmania

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Ensure Authorised Officers Implement Inclusion Principles

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Over Arching Comments

My Yardstick For The Bill

Comment My yardstick for the Bill: 1) social model for understanding; 2) Inclusion by right; 3) inclusion across business & civil society, not just government & services. 1

Bill Lowers Some Barriers To Progress

Comment The Bill lays the ground work for gathering the evidence that could improve human rights protections and inclusion in future; Inclusion Plans, DIAC, Commissioner, OSP reports. 1

Bill Should Not Go To Parliament Until It Is Improved

Comment Tasmanians should not have to wait years when we can make the Bill better now. While the Bill opens the door to improvements in human rights and inclusion, progress is likely to be slow and uncertain. More importantly, history shows we may have to wait many years for the next opportunity to bring about major reforms in disability law and policy and that we can expect it to be long and slow when it comes. 2

Capacity Building & Enablement

Comment Capacity building & enablement will be needed so Tasmanians with disability can contribute & lead in the many activities proposed in the Bill (DIAC, other advisory bodies, Boards of defined entities, Independent Persons. These functions should be added to those of the DIAC, Commissioner and perhaps the Senior Practitioner (to support Independent Persons). 2

Reduce Unreasonable Reliance on Reasonableness

Comment Increase precision and verifiability by scrutinising and minimising use of the term 'reasonable' wherever it appears. The Objects of the Bill and efficiency of its operation will be served by reducing the number of times people with disability must challenge 'reasonableness'. 3

Turn Reports & Referrals Into Conversations

Comment Review the Bill to require parties who receive advice, referrals or reports from the DIAC, Commissioner or Senior Practitioner to tell the senders what happened as a result of the information provided. This will help the senders to improve their work and public reports. 4

Part 1 Preliminary

Publication of Reports & Other Documents

Title / Short Title

Comment Consider changing the Title to 'Disability Rights Act'. 4

Objects

Interpretation

UNCRPD Must Be Implemented

Comment Amend the Bill so it implements the UNCRPD. The present version does not implement the UNCRPD. It 1) 'supports and furthers' the 'purpose & principles' of the UNCRPD; 2) lists some rights without linking to Articles and 3) only creates rights as Principles for the purpose of implementing the Bill, not rights that apply across society. To remedy this deficit, amendments are proposed for the Objects, Inclusion Principles and some other parts of the Bill. 4

Define The Key Terms of the Objects

Comment Add a definition of 'human rights' to s5 Interpretation. This is not straightforward. It will need attention by competent legal scholars working alongside people with disability. 5

Comment Add a definition of 'inclusion' to s5 Interpretation. 6

Define 'Carer'

Comment The role of carers is significant in the Bill but the term is not defined. Refer to or import the definition in the Carer Recognition Act 2023 s4. 7

Define 'Publish'

Comment Define 'publish' to include making available to the public in accessible formats. 7

Define Other Terms

Comment Define 'disability inclusion', 'barriers' & 'universal services'. 8

Meaning of Defined Entities

Government Governing Itself, Not Society

Comment Only 'government agencies & funded organisations have to develop Inclusion Plans, consult people with disability and take notice of the Commissioner - this is government governing itself, not the society. 8

Inclusion Principles

Implement The UNCRPD

Comment Rename to 'Principles' because of concerns about the language of 'inclusion'. 9

Comment Amend the Bill so it implements the UNCRPD. See suggested wording in the comment on the Objects. 9

Comment Review & amend other Tasmanian laws and regulations so that they are consistent with the rights stated in this Bill or directly implement rights. 9

Comment Avoid incomplete and ineffectual statements of rights by verifying that the Bill contains statements that address all rights in the UNCRPD and that provide verifiable measures of actions to be taken by the state to implement them. 9

Comment Make rights apply to more than just the operation of the bill. Move them from the Inclusion Principles to a stand alone section and state that they apply to all Tasmanians with disability without further limitation. 9

Comment Replace the ambiguous requirement to 'observe' the principles with a requirement to comply with them. 9

Comment Express s8)1)g) in terms of a person with rights and agency rather than a victim e.g. 'people with disability have the same right as other members of Australian society to pursue the protection and enforcement of their rights'. 9

The Problem of Creating Rights For People With Disabilities But Not Other Tasmanians

Use The More Explicit Of 2 Redundant Clauses

Comment The purpose of the Principles is stated in 2 clauses with similar meanings (s8)1) and s8)4)). Combine them to become "The following Principles are to be given effect by every person or body when making decisions for the purpose of this Act:" 15

Role of Principles & UNCRPD Articles

Comment Text could usefully be added to clarify that the Principles in s8)1) must always be considered and that those in s8)2) & s8)3) are additional, not alternative, to the basic principles. 15

Impacts of Intersectionality Must Be Addressed

Comment Intersectionality is not mentioned in the Inclusion Principles, but it is defined in s5 Interpretation. Insert before or after s8)d): "the intersectional nature of the circumstances of people with disability is to be taken into account". 16

Broaden The Definition of Intersectionality

Comment Broaden the definition of intersectionality beyond 'protected attributes' to

include 'socio-economic status' e.g. education, employment, income, wealth, location and others. This is more relevant to Tasmanians with disability than in any other jurisdiction. 17

Make Role & Rights of Carers Consistent With Carer Recognition Act

Comment Clarify carer roles and rights in relation to people with disability by referring to the Carer Recognition Act 2023. 18

Part 2: Disability Inclusion Planning

Division 1 – Tasmanian Disability Inclusion Plan

Comment The Tasmanian Disability Inclusion Plan must include and report against publicly verifiable outcome measures and deadlines. 19

Comment Consultation must include disabled peoples organisations whenever they are available. Replace the words 'persons or bodies representing the interests of people with disability' with 'persons or bodies appointed by people with disability to represent their interests, giving preference among these to organisations led by people with disability'. 19

Division 2 – Disability inclusion action plans for defined entities

Comment I welcome the requirements for all defined entities to develop plans in consultation with disabled people & to report progress. 19

Comment The range of entities required to implement Disability Inclusion Action Plans will be limited by the definition of 'defined entities and, perhaps, by how effectively a Minister for Disability can influence less willing entities outside the disability portfolio. 19

Comment Disability Inclusion Action Plans must include and report against publicly verifiable outcome measures and deadlines. 20

Comment Consultation must include disabled peoples organisations whenever they are available. Replace the words 'persons or bodies representing the interests of people with disability' with 'persons or bodies appointed by people with disability to represent their interests, giving preference among these to organisations led by people with disability'. 20

Division 3 – Disability consultation

Comment Consultation is discussed in several parts of the Bill, which causes content to be repeated (8)1q), 9)3)c)iv), 12)5)c) & 19)4)c). Consultation is also treated as an all pervading activity in UNCRPD Article 4.3. The need to facilitate public participation of people with disability by means of capacity building and enablement measures has also been discussed. Elevate Disability Consultation to become a Part that addresses these issues in a consistent way throughout the Bill. It would cover at least; 1) parties to be consulted, with primacy given to people with disability and their representative organisations; 2) options for various forms of public participation from the IAP2 Spectrum, including at least consultation and involvement; 3) standards for best practice in public participation such as timeliness, information in accessible formats etc. 4) measures to facilitate public participation through capacity building and enablement to overcome barriers to participation such as cost, transport, accommodation etc. 20

Comment Define the terms 'consultation' (one shot) and 'involvement' (dialogue), and replace requirements to consult with requirements to involve. 20

Comment Consultation must include disabled peoples organisations whenever they are available. Replace the words ‘persons or bodies representing the interests of people with disability’ with ‘persons or bodies appointed by people with disability to represent their interests, giving preference among these to organisations led by people with disability’.

20

Comment Defined entities should consult on their internal operations and employment practices, not just their public activities.

20

Division 4 – Guidelines

Comment The Commissioner should be able to give directions, not just make guidelines.

21

Part 3: Disability Inclusion Advisory Council

Comment The functions and powers proposed for the DIAC seem likely to enable more effective advocacy by and for people with disability than has been possible to date through the PDAC, MDCG and their predecessors.

22

Increase Majority Membership By People With Disabilities

Comment Ensure that a super majority of DIAC members are people with disability by amending s19)3)a).

22

Comment Increase the likelihood that people with disabilities will know of the opportunity to join DIAC by requiring that it is advertised by diverse and accessible means rather than “... in at least 3 daily newspapers printed, and circulating, in Tasmania.” s19)8).

22

Comment Amend s20)2 to allow DIAC to request information from parties outside the scope of defined entities e.g. access or legal experts.

22

Comment Remove, or at least review, immunity from complaint of unlawful discrimination and allow allegations to be tested on their merits s19)10.

22

Add Evaluation As A Function of DIAC

Comment Add a requirement for DIAC to be evaluated. DIAC will have to innovate and take risks. It must learn as it goes.

23

Capacity Building & Enablement For DIAC

Comment It is unlikely that DIAC will find enough members with the skills & time to do all that it must do. Capacity building & enablement will be vital.

23

Provide Remuneration And Allowances

Comment DIAC will be more than an advisory body. It may be possible to remunerate members within the terms of the Tasmanian Government Board Fee Policy.

23

Provide Operational and Capital Funds

Comment DIAC will need operational and capital funding to discharge its functions.

24

Part 4: Tasmanian Disability Inclusion Commissioner

A Commissioner Needs a Commission

Comment One Commissioner and a pot plant will not get the job done. The Bill should establish a Commission, not a Commissioner. The provisions now in the Bill enable the Commissioner to build some form of organisation, but under

circumstances likely to yield inadequate resources, an insecure existence and divided loyalties. As a result, it will have compromised independence and impaired ability to do what the Bill says it must do. 24

Appointment of Commissioner

Comment The requirement for the Commissioner to be a person with disability is likely to mean that the Commissioner, from day one, will have superior insights, credibility and access to networks of people with disability. (s23)2). 25

Comment The Minister should be required to consult DIAC before recommending a candidate for Commissioner to the Governor. s23)3). Endorsement of the recommendation by DIAC would add to the credibility of the Minister's recommendation. The reverse - especially after the Minister had made a recommendation - is also true. 25

Functions & Powers

Comment The Commissioner should have powers and resources to lead inclusion across business & civil society, not just defined entities & services. 26

Power To Prosecute

Comment The Commissioner's power to prosecute should be made explicit rather than relying on inference and on the Bill not forbidding it. 26

Comment There must be a clear obligation dealing with enforcement, whether by explicitly empowering and resourcing the Commissioner to prosecute or requiring the Director of Public Prosecutions to show and report why they have not acted on a referral made by the Commissioner. 26

Consultation With DIAC Should Be Broadened

Comment There is a mis-match in the Bill between the scope of the Commissioner's obligation to consult DIAC and the scope of DIAC's obligation to advise the Commissioner. The scope of the Commissioner's obligation should be broadened to match DIAC's obligation. 27

Extend Time Limit For Commissioner To Act On Reports

Comment The 12 month time limit after which the Commissioner may decline a report of abuse should be extended to ensure that the Commissioner must give victim survivors time to come forward and must make a well founded decision. s32)2)d) 27

Commissioner As A Community Visitor

Comment The Commissioner could set up a Community Visitor program to fill a gap in the safeguards provided by the OSP, APOs and Independent Persons. The powers are there, it only needs resources. 28

Part 5: Disability Services Regulations

Comment s35 does all that could be asked of it. However, also see comment on s77. 29

Part 6: Senior Practitioner

Do Not Legislate On Restrictive Practices Until the Disability Royal Commission Has Reported

Comment Do not legislate on restrictive practices until the Disability Royal

Commission has reported. The DRC may recommend abolition, not restriction. 29

Unify Regulation Of Restrictive Practices

Comment Human rights apply to all people without discrimination. Restrictive practices are used in disability services, mental health services, aged care, schools, prisons, youth detention centres, police lockups and possibly other settings. Why apply a unique and therefore potentially discriminatory regime to people with disability? Instead, consider the advantage of having a single centre of excellence for managing restrictive practices in a rights respecting way no matter the setting in which they occur. 30

Amend Bill To Safeguard Against Regulatory Capture

Comment Amend the Bill to manage the risk that the Senior Practitioner will experience 'regulatory capture' by the disability industry. 30

Functions & Powers Are Appropriate

Comment The Senior Practitioner's functions and powers are well chosen. 31

Part 7: Regulation of Restrictive Practices

Use of unauthorised restrictive practice prohibition Is Too Permissive

Comment Defences for using unauthorised restrictive practices should be restricted. The Bill should include a list of conditions that must be satisfied to determine what is the "... least intrusive type of restrictive practice...". Alternatively, to allow for evolving best practice, the Bill might require that a mandatory code of conduct be developed and enforced. s48)2 31

Community Visitor To Reduce Risk of Unreported Practices

Comment The most vulnerable can not complain. Create a Community Visitor program to go looking for trouble rather than have the Senior Practitioner and Disability Inclusion Commissioner wait for complaints. 32

Part 8: Appointed Program Officers

Title of Position

Comment Restrictive Practices Oversight Officer would be a more accurate and self-describing title. 32

Criteria For Approving APOs Must Be Tightened

Comment Steps must be taken to ensure that APOs know what is happening, are not so close to it as to have a conflict of interest and have the seniority to take action. 32

Alternative Arrangements for Small Organisations

Comment Finding APOs is likely to be hard or impractical for smaller organisations, especially if the risk mitigation measures urged above are inserted into the Bill. This may be yet another function for Community Visitors. 33

Part 9: Independent Persons

Improve Measures To Ensure That A Suitable Independent Person Is Sought

Comment The provisions need more work to ensure that the need for an Independent Person is always recognised and impartially met. 33

Improve Measures To Ensure That, If Sought, An Independent Person Can Be Found

Comment It may be hard to find Independent Persons in the informal networks of the most vulnerable people. Formal Independent Persons may sometimes need to be funded - possibly part of a Community Visitor scheme. 34

Support Must Be Available To Independent Persons

Comment Independent Persons will need capacity building & legal protection for their complex, risky work. 34

Part 10: Funding

Power to Make Guidelines and Standards

Comment The Commissioner's power to make guidelines and standards and to give directions should be made explicit, as it is for the Senior Practitioner, rather than relying on inference and on the Bill not forbidding it. 35

Comment The Commissioner should have those powers as part of their general powers rather than, as now, having the limited power to make guidelines only, and then only for the purpose of disability inclusion planning. 35

Comment If the Commissioner is empowered to make guidelines and standards and to give directions, they should be required to consult the DIAC. 35

Provide Funds For Capacity Building & Enablement

Comment The reasons for which funding may be granted should be amended to include funds for organisations providing capacity building and enablement for individuals who must overcome disability and financial barriers to contribute their voluntary work in the various new ways proposed by the Bill. 36

Provide Funds for the Disability Inclusion Advisory Council

Comment Amend the reasons for funding to enable DIAC to have operational and capital funding so it can do its work to a high standard and on time. 36

Funding For Research

Comment Amend s61)3)d) to require that formal ethics approval is a condition of funding for research. 36

Part 11: Authorised Officers

Ensure Authorised Officers Implement Inclusion Principles

Comment The permitted reasons for entry exclude all other reasons for entry to premises, including to ensure compliance with the rights and behaviours mandated in the Inclusion Principles. Add a 'safety net' provision to the permitted reasons in s63)2): 'd) ensuring compliance with the Inclusion Principles.' 36

Part 12: Review of Decisions

Comment To my inexpert eye, the reviewable decisions of the Senior Practitioner discussed here seem likely to enable those affected by them to protect their interests. If the section continues to only refer to decisions of the Senior Practitioner in the final version of the Bill, perhaps the title could be amended to say as much. 37

Part 13: Offences

Comment The offences in relation to requiring and sharing information seem well chosen to enable administration of the Bill to be effective. 37

Part 14: Miscellaneous

Comment No comment.

37

Unaddressed Questions & Concerns

Over Arching Comments

This section addresses matters that do not fit neatly into any single part of the Bill.

.My Yardstick For The Bill

Comment My yardstick for the Bill:
1) social model for understanding;
2) Inclusion by right;
3) inclusion across business & civil society, not just government & services.

My measuring stick for the Bill:

- Social model as basis of understanding exclusion and therefore inclusion.
- Inclusion backed by human rights - we can not leave exclusionary power relationships and institutions as they are now.
- Solutions aimed at realisation of economic, social & cultural rights across government, business & civil society.
- Disabled leaders and movement influencing government, business & civil society.
- Government as expectation setter, educator, enabler & enforcer.

.Bill Lowers Some Barriers To Progress

Comment The Bill lays the ground work for gathering the evidence that could improve human rights protections and inclusion in future; Inclusion Plans, DIAC, Commissioner, OSP reports.

The Bill **lays the ground work** for gathering the evidence that could improve rights protections in future;

- Tasmanian Disability Inclusion Plan (Minister's responsibility, Division 1);
- Disability Inclusion Action Plans (defined entities, Division 2)
- both including requirements to consult people with disability, define measurable outcomes & report on them;
- Disability Inclusion Advisory Council as a focus for consultation;
- Disability Commissioner as a focus for policy.

This sets the scene for more empowered disability rights struggles over the next decades, but they will still be struggles. We know this from our every day experiences. It is affirming to see this view echoed by the United Nations Committee on the Rights of Persons with Disabilities, which has expressed many concerns and criticisms of Australia's compliance with the UNCRPD. ¹

.Bill Should Not Go To Parliament Until It Is Improved

Comment Tasmanians should not have to wait years when we can make the Bill better

¹ [The United Nations Convention on the Rights of Persons with Disabilities: An Assessment of Australia's Level of Compliance](#), Royal Commission Into Violence, Abuse, Neglect & Exploitation of People With Disabilities

now. While the Bill opens the door to improvements in human rights and inclusion, progress is likely to be slow and uncertain. More importantly, history shows we may have to wait many years for the next opportunity to bring about major reforms in disability law and policy and that we can expect it to be long and slow when it comes.

The current wave of reform began in about 2008, with the first stirrings that would lead to the NDIS. The wave before that extended from about 1981 (International Year of Disabled People) to 1998 (last of the state anti-discrimination laws).

Tasmanians with disability should not have to wait years for;

1. human rights that mirror the rights in the UNCRPD and related treaties that Australia has signed;
2. inclusion that extends beyond government and into business and the rest of civil society;
3. a well resourced and capable Disability Inclusion Advisory Council and Disability Inclusion Commissioner;
4. rules for managing restrictive practices that align with the impending advice of the Royal Commission into Violence, Abuse & Neglect of People With Disability.

.Capacity Building & Enablement

Comment Capacity building & enablement will be needed so Tasmanians with disability can contribute & lead in the many activities proposed in the Bill (DIAC, other advisory bodies, Boards of defined entities, Independent Persons. These functions should be added to those of the DIAC, Commissioner and perhaps the Senior Practitioner (to support Independent Persons).

The Bill requires substantial contributions and high level skills from Tasmanians with disabilities. They will be sought;

- as members of the Disability Inclusion Advisory Council;
- as members of advisory bodies for many defined entities;
- as members of the Boards of defined entities and service providers as they respond;
- quite possibly as members of an increasing number of local government advisory bodies and task groups as they respond to the activities of any of the above and the Disability Inclusion Commissioner;
- as respondents to the increased tempo of consultation and involvement activities that may be expected to occur.
- as Independent Persons.

Experience has shown that it is hard to find enough people with disability who can make such contributions. The reasons need more systematic exploration, but are likely to include at least;

- lack of access to education leading to inexperience in thinking about public affairs;
- poverty and lack of accessible education, information, transport and buildings leading to exclusion from the work and social networks in which such topics are discussed and by which access to positions of influence is often mediated;

- the daily grind of simply getting by as a person with disability.

The Bill should be amended to provide;

- a program of research to understand the skills and enablers needed;
- ongoing opportunities for skills development in areas such as governance, how government works, how public policy affects private lives and the particular subjects each advisory body may be required to address;
- ongoing programs to provide the enabling supports that can help would be participants leap frog over barriers to participation.

These matters could be managed by the Disability Commissioner.

Such an amendment to the Bill would give effect to UNCRPD Article 29, which binds states to;

“Promote actively an environment in which persons with disabilities can effectively and fully participate in the conduct of public affairs, without discrimination and on an equal basis with others, and encourage their participation in public affairs, including:

Participation in non-governmental organisations and associations concerned with the public and political life of the country, and in the activities and administration of political parties;

Forming and joining organisations of persons with disabilities to represent persons with disabilities at international, national, regional and local levels.”²

.Reduce Unreasonable Reliance on Reasonableness

Comment Increase precision and verifiability by scrutinising and minimising use of the term ‘reasonable’ wherever it appears. The Objects of the Bill and efficiency of its operation will be served by reducing the number of times people with disability must challenge ‘reasonableness’.

The term ‘reasonable’ is used 23 times in relation to time, grounds, excuses and assistance.

The term is inherently elastic and therefore contestable. While the law can often not be made precise because it must apply generally, every effort should be made to be precise so that it can apply with certainty.

For these reasons a lot of effort has been expended to narrow the meaning in law, but those efforts have achieved no more than to set some conventions around the contest, and then often only in particular contexts e.g. reasonable person, reasonable doubt, reasonable grounds, reasonable satisfaction, reasonably practicable.

Even within these soft constraints, people with disability are unlikely to do well in contests about reasonableness when required to endlessly challenge powerful people and institutions in many contexts. Every effort should be made to specify requirements in verifiable terms governed by unambiguous rules.

This is an important strategy by which the Objects of the Bill may be achieved.

It is unlikely to be possible to simply define ‘reasonable’ in the Interpretation section as the

² UNCRPD [Article 29 - Participation in political and public life](#) clause b)

term occurs in too many different contexts.

Every use of the term 'reasonable' should be closely scrutinised with a view to maximising precision and verifiability.

.Turn Reports & Referrals Into Conversations

Comment Review the Bill to require parties who receive advice, referrals or reports from the DIAC, Commissioner or Senior Practitioner to tell the senders what happened as a result of the information provided. This will help the senders to improve their work and public reports.

The Bill requires or permits the Senior Practitioner and Commissioner to make reports or referrals to others. Further, these and the DIAC must or may advise various parties. The receiving parties should be required to tell the senders about what happened because of the report or referral. This simple measure would enable the senders to improve their work and provide better reports to the Minister, Parliament and public. s24j),

Part 1 Preliminary

Question: Do the objects, Principles and definitions in the Bill better reflect human rights and inclusion?

.Publication of Reports & Other Documents

There are 14 instances

.Title / Short Title

Comment Consider changing the Title to 'Disability Rights Act'.

A better title would be 'Disability Rights Act' because;

- the content sets out rights and describes roles and responsibilities for advancing and managing them in various settings;
- 'inclusion' implies a relationship in which people with disability remain dependent on the very institutions and centres of power that have excluded them rather than being holders of inalienable human rights.

.Objects

.Interpretation

..UNCRPD Must Be Implemented

Comment Amend the Bill so it implements the UNCRPD. The present version does not implement the UNCRPD. It 1) 'supports and furthers' the 'purpose & principles' of the UNCRPD; 2) lists some rights without linking to Articles and 3) only creates rights as Principles for the purpose of implementing the Bill, not rights that apply across society. To remedy this deficit, amendments are proposed for the Objects, Inclusion Principles and some other parts of the Bill.

Replace s3 with;

3) The objects of this Act are to ensure and promote the full realisation of all human rights and fundamental freedoms for all persons with disabilities in accordance with the General Obligations set out in Article 4 of the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD). To this end, the government of Tasmania binds itself to;

- (a) implement all Articles of the UNCRPD to the greatest extent possible;
- (b) establish and maintain the Disability Inclusion Advisory Council;
- (c) establish and maintain the positions of Disability Inclusion Commissioner and Senior Practitioner; and
- (d) regulate practices that restrict the rights and freedoms of people with disability in accordance with section 3)a);
- (e) collaborate with the Commonwealth of Australia to the greatest extent possible;
- (f) provide funding and other resources to achieve the objects of this Act.

Mention of Australia's Disability Strategy was removed to make s3)e) more general and less likely to become obsolete.

Rights are deeply entangled with the Inclusion Principles. Therefore further discussion of this issue is given in on page 9.

..Define The Key Terms of the Objects

The Objects are to improve human rights and inclusion, but neither of these foundational terms is defined.

Comment Add a definition of 'human rights' to s5 Interpretation. This is not straightforward. It will need attention by competent legal scholars working alongside people with disability.

About the definition of 'human rights' the Australian Human Rights Commission says; ³

"Simple definitions that are often given include:

- the recognition and respect of peoples dignity
- a set of moral and legal guidelines that promote and protect a recognition of our values, our identity and ability to ensure an adequate standard of living
- the basic standards by which we can identify and measure inequality and fairness
- those rights associated with the Universal Declaration of Human Rights.

Given this range of definitions, it seems best when considering a new law to look to similar laws.

Commonwealth law says;;

"human rights means the rights and freedoms recognised in the Covenant, declared by the Declarations or recognised or declared by any relevant international instrument." ⁴

The wording of the AHRC Act does not make it obvious which human rights instruments are covered. However, the Human Rights Commission lists them. Unfortunately, only

³ [Human Rights Explained: Fact sheet 1: Defining Human Rights](#), Australian Human Rights Commission

⁴ [Australian Human Rights Commission Act 1986](#) s3

predecessors of the UNCRPD are on this list;

- Convention on the Rights of Persons with Disabilities
- Declaration on the Rights of Disabled Persons
- Declaration on the Rights of Mentally Retarded Persons

Tasmania could import the AHRC definition with an updated list. The way is open to list the UNCRPD because Australia has ratified it. A Tasmanian list should also include all other human rights treaties ratified by Australia that are incidentally relevant to people with disabilities. The Department of Foreign Affairs & Trade provides a list that may be considered for the Disability Inclusion Bill.⁵

Some Australian states takes a different approach. Rather than naming treaties, their Acts list the human rights they enable. Queensland adds that the rights in its Act are in addition to any rights conferred by several other sources.^{6 7 8}

Comment Add a definition of 'inclusion' to s5 Interpretation.

Defining inclusion for the purpose of a law is not a simple matter of finding good ideas in other Australian laws. Even the most directly relevant law in the country - the South Australian Disability Inclusion Act - does not define the term on which it is built.⁹

It seems we must look beyond the law.

This conception of inclusion points to what the Disability Inclusion Bill seeks to achieve:

“the idea that everyone should be able to use the same facilities, take part in the same activities, and enjoy the same experiences, including people who have a disability or other disadvantage”¹⁰

However, a concept does not offer the guidance to decision makers, the clarity to courts and the accountability to citizens that are the hallmarks of a well written law.

The Victorian government describes how inclusion can be recognised when it happens;

“Inclusion occurs when people feel, and are, valued and respected. Regardless of their personal characteristic or circumstance, and where they:

1. have the opportunity to fulfil their individual and combined potential
2. have access to opportunities and resources
3. can contribute their personal best in every encounter
4. can contribute their perspectives and talents to improve their organisation
5. can bring far more of themselves to their jobs
6. have a sense of belonging.”¹¹

It follows from point 3 that points 4 & 5 should be expanded to include all roles, not just the role of a worker.

⁵ [Treaties Database](#), Australian Department of Foreign Affairs & Trade

⁶ [HUMAN RIGHTS ACT 2004 \(ACT\)](#), Austlii

⁷ [Charter of Human Rights and Responsibilities Act 2006](#), Victorian Legislation

⁸ [Human Rights Act 2019](#), s12, Queensland Legislation

⁹ [Disability Inclusion Act 2018](#), South Australian Legislation

¹⁰ [Definition of inclusion](#), Cambridge Dictionary

¹¹ [What do we mean by diversity and inclusion?](#), Government of Victoria

The key features of this yardstick for inclusion are;

- it is judged by how people feel, by what happens to them and by what they can make happen;
- it works for everyone regardless of diversity;
- resources, rules, institutions and culture are arranged to make inclusion happen;
- it implies that decisions are made and actions taken to make the arrangements.

For the Disability Inclusion Bill, inclusion might be defined as;

Inclusion means that people feel, and are, valued and respected, regardless of their personal characteristics or circumstances. In particular they:

- 1 can fulfil their individual and combined potential;
- 2 can contribute their personal and combined best in every encounter and role;
- 3 have a sense of belonging.
- 4 have access to the opportunities and resources that enable inclusion.

..Define ‘Carer’

Comment The role of carers is significant in the Bill but the term is not defined. Refer to or import the definition in the Carer Recognition Act 2023 s4.

The roles and rights of carers in relation to people with disability are set out by 6 references in the Bill, but the term is not defined. Tasmania has recently adopted a definition in legislation. For the sake of consistency in state law and administration, it should be referred to or imported into the Bill.

The definition in the Carer Recognition Act 2023 at s4 is:

“carer means a person who provides unpaid care and support to a family member, or friend, who –

(a) has disability; or

(b) has mental ill health; or

(c) has a chronic or life-limiting condition; or

(d) has alcohol or other drug dependence; or

(e) is frail or aged; or

(f) is a child, if the person is an informal kinship carer of the child;”

..Define ‘Publish’

Comment Define ‘publish’ to include making available to the public in accessible formats.

The term ‘publish’ is used 14 times. Its formal meaning is that information is provided to all members of the public.¹² However, it is also used colloquially to describe the act of uploading a file to a web site, without regard to whether the site is available to the public.

While mentioning publishing 14 times, the Bill only mentions publication in accessible formats 8 times, and then with the limitation of publication in ‘at least one accessible format’. Apart

¹² [Definition of ‘publish’](#), Cambridge Dictionary

from it being unlikely that 1 format will satisfy all needs, the colloquial use of the term 'accessible' tends to imply sensory barriers. Access barriers caused by cognitive or motor issues may be overlooked.

To address both issues, add;

'Publish means to make information available to the public by one or more means that are easily available and that can be understood by all persons who wish to understand it.

..Define Other Terms

Comment Define 'disability inclusion', 'barriers' & 'universal services'.

The Bill uses but does not define the terms 'disability inclusion', 'barriers' and 'universal services'.

..Meaning of Defined Entities

..Government Governing Itself, Not Society

Comment Only 'government agencies & funded organisations have to develop Inclusion Plans, consult people with disability and take notice of the Commissioner - this is government governing itself, not the society.

The obligation to prepare and report on Disability Inclusion Action Plans must be extended beyond government to include business and civil society organisations.

The Bill imposes the obligation on Defined Entities. It is very unsatisfactory to limit these only to government departments, government agencies¹³ and agents or instrumentalities of the Crown that administer funding or services to the disability sector.

A principal aim of inclusion planning is to improve mainstream services. Many mainstream services are not provided by government or government agents and contractors, but by business and civil society organisations e.g. the local supermarket, non-government health services, recreational and cultural providers, non-government transport providers and so many more.

The meaning of Defined Entity amounts to barely more than government governing itself. It greatly limits the ability of the government to lead the scale of economic, social and cultural change that is actually needed to achieve inclusion of people with disability.

The Bill says Defined Entities are government agencies or entities with close relationship to the government s6)1)a) & b).

Others can be prescribed as Defined Entities by regulation made under s77, but why & how likely is this to be extended outside government? s6)1)c). It is also unlikely that local governments could be prescribed by regulation - an amendment to the Local Government Act would most likely be necessary.

The only explicit reference to leading change beyond government is an educative role for the DIAC "o promote the role of the Tasmanian community, including the business and community sectors, in furthering the rights of people with disability;" s20)1)c).

Within these disappointing limitations, the obligations of Defined Entities are likely to

13. [State Service Act 2000](#) (Tas) Schedule 1

contribute to achievement of the Objects;

- prepare a Disability Inclusion Action Plan in consultation with people with disability and report on measurable outcomes to the Disability Commissioner s12 et. al.
- consult with people with disability when developing or reviewing any policy of, or program or service ... that has a direct and significant impact on the public s17)1)
- 'have regard to' guidelines issued by the Disability Commissioner in consultation with the Disability Inclusion Advisory Council. S18)4);
- give the Disability Information Advisory Council information it requests s20)2 & 3)

.Inclusion Principles

..Implement The UNCRPD

Comment Rename to 'Principles' because of concerns about the language of 'inclusion'.

Comment Amend the Bill so it implements the UNCRPD. See suggested wording in the comment on the Objects.

Comment Review & amend other Tasmanian laws and regulations so that they are consistent with the rights stated in this Bill or directly implement rights.

Comment Avoid incomplete and ineffectual statements of rights by verifying that the Bill contains statements that address all rights in the UNCRPD and that provide verifiable measures of actions to be taken by the state to implement them.

Comment Make rights apply to more than just the operation of the bill. Move them from the Inclusion Principles to a stand alone section and state that they apply to all Tasmanians with disability without further limitation.

Comment Replace the ambiguous requirement to 'observe' the principles with a requirement to comply with them.

Comment Express s8)1)g) in terms of a person with rights and agency rather than a victim e.g. 'people with disability have the same right as other members of Australian society to pursue the protection and enforcement of their rights'.

...Rights Seem Limited In Their Effect

The Inclusion Principles appear to;

- affirm that people with disability have several of the same rights as other Australians;
- create some unqualified rights;
- create some qualified 'rights' that are only to be implemented 'as far as practicable'.

However, rights created in the Principles are in no way the universal human rights of people with disability that are expressed in the UNCRPD.

1. The Bill only goes as far as "... **supporting and furthering** ... the **purpose and Principles** of the United Nations Convention on the Rights of Persons with Disabilities", rather than **implementing** the **rights** themselves in Tasmanian law. s3)b)i).
2. Having excluded the Articles of the UNCRPD, there are several other problems with the rights as they are incorporated in Tasmanian law through the Inclusion Principles;

- 1 There is no assurance and no certain way to determine that every right in the UNCRPD has a corresponding right in the Principles:
 - 2 Rights are given in a shortened form that does not capture the explicit meanings hammered out in extensive and rigorous negotiations by highly motivated and skilled people at the U.N.:¹⁴
 - 3 The life areas to which rights are said to apply do not cover the full scope of the UNCRPD i.e. civil, political, economic, social and cultural:
 - 4 The demonstrated need to remedy the structural causes of disablement that we face in Australian society^{15 16} is neutered by the qualification on several rights that “people with disability have the same right as other members of Australian society” s1)a, f), g), h):
 - 5 Some rights are only to be implemented “... so far as practicable...”, which allows ample room for obstruction of inconvenient rights:
 - 6 The limited effect of the rights is reinforced by the fact that in several cases the Bill does not enact the rights themselves, but only the right to receive support to achieve the rights. s2)b), d), e):
3. The Principles - and therefore the rights - are limited in their scope of application to the operation, administration and enforcement of this Act.” s8)1):
 4. Within that scope, the Principles and included rights are to be ‘observed’, which, after careful examination, appears to mean that the rights are to be observed in the sense that their presence in the Bill is to be noticed, but not observed in the sense that they are to be complied with. (See discussion in on page 12).

The concerns discussed in this section can be addressed by;

- starting from the Articles of the UNCRPD;
- widening their scope of application to all Tasmanians with disabilities rather than just the operation of the Bill;
- ensuring that the Bill contains statements of rights and the verifiable actions to be taken by government to implement every Article;
- amending other Tasmanian laws and regulations to be consistent with or form part of the implementation of the rights.

...Expectation Created By Ratifying The UNCRPD Is Curbed By The Bill

Such a limited implementation of human rights is inconsistent with the General Obligations¹⁷ of states to the UNCRPD to;

- ... ensure and promote the full realisation of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind...” (4.1)
- ... take measures to the maximum of its available resources ... with a view to achieving progressively the full realisation of these (economic, social and cultural) rights.... (4.2).

14. [Understanding the UNCRPD](#), 2nd edition 2009, Marianne Schulze, Handicap International

15. [The Rights of People with Disabilities: Areas of Need for Increased Protection](#), Australian Human Rights Commission

16. [The United Nations Convention on the Rights of Persons with Disabilities: An Assessment of Australia's Level of Compliance](#), Royal Commission Into Violence, Abuse, Neglect & Exploitation of People With Disabilities

17. [Article 4 - General obligations](#), UNCRPD

The weight that should be given to UNCRPD articles when interpreting Australian law is explained by the Australian Human Rights Commission.¹⁸ (The explanation does not mention the UNCRPD but refers to other conventions that have also been ratified by Australia.)

In summary;

- a UN Convention is only a 'direct source of individual rights and obligations' when it is part of a law;
- Conventions are often only partly included in Australian laws, and that inclusion may be scattered among several laws
- where laws are ambiguous, courts should interpret them in a way that is consistent with the UN Conventions;
- ratification of a treaty raises an expectation that decision makers will act consistently with its terms unless a law says otherwise;
- expectations of compliance can be used in arguments for an appeal of a decision that was made wrongly because the decision maker or person affected did not know about the expectation when the decision was made.

When considering how much to favour a generous interpretation of expectations, it should be noted that Australia ratified the UNCRPD with only 3 interpretive declarations and no reservations.¹⁹

The Bill creates only a minimal guarantee of the UNCRPD rights in law and imposes strong limits on the freedom of administrators, appellants and courts to hold expectations that decision makers will act in a manner consistent with the Convention when they are free to use their discretion.

The Bill does this by proposing to "... advance and protect the rights of people with disability..." only as far as "... **supporting and furthering** ... the **purpose and Principles** of the United Nations Convention on the Rights of Persons with Disabilities", **not the specific human rights**. s3)b)i). As noted elsewhere, the rights themselves are only partial statements of those in the UNCRPD, and their scope of application is limited to the operation of the Bill.

These restrictions close off any room for decision makers or appellants to consider the High Court's view that there is an expectation that decision makers will act consistently with the Convention when the law is ambiguous.²⁰ There is little ambiguity about what may be reasonably expected here because;

- only the purpose and principles of the UNCRPD may be considered as creating expectations beyond the Bill;
- they may only be considered to the extent that Tasmania creates an expectation that it will 'further and support' the purpose and principles - a commitment that is hard to define and able to be satisfied with very little effort;
- the limits of that expectation are indicated by the limited nature and scope of application of such rights as are defined in the Bill and the lack of proposals for consequential amendments to other legislation.

Even if a person sought to consider the Articles of the Convention, it would not be possible to

¹⁸ [Australia's Human Rights Obligations](#), Australian Human Rights Commission

¹⁹ Convention on the Rights of Persons with Disabilities, [Declaration by Australia](#)

²⁰ [Australia's Human Rights Obligations](#), Australian Human Rights Commission

build strong arguments based on them. Determining which articles have been implemented is problematic. The Bill implements some human rights that might be traced back to articles in the UNCRPD. However, it is not possible to say reliably what articles have been implemented, since none are mentioned in the Bill. One is left to draw inferences, which can be disputed.

..Limitation On Scope Conflicts With Apparent Purpose Of Bill

It seems absurd to limit the application of the rights in the Principles given that;

- several rights appear to be intended to have broad application (contribute to social and economic life, exercise choice, privacy & dignity);
- parts of the Bill appear intended to enable broad social change to achieve inclusion - especially the Disability Inclusion Commissioner, Disability Inclusion Advisory Council and Inclusion Action Plans.

..The Problem With ‘Observing’

Before plunging into this section, I should give credit to the Bill’s authors on 2 points.

First, the language of the Bill mostly shows good practice in the use of plain language.²¹

Second, the problem discussed in this section and a solution seems to have already been considered by the drafters of the Bill. See on page 15.

The merit of the claim that ‘observing’ the Principles of the Bill renders them ineffective may not be immediately obvious.

The meaning of ‘observe’ in this context is ambiguous, which opens the way to it causing the Principles to have little effect on the ‘operation, administration and enforcement’ of the Bill.

‘Observe’ can mean;

1. to express an opinion e.g. “As Lord Nicholls of Birkenhead observed ... [L]anguage is an imperfect means of communication.”²²
2. to see something happen e.g. “... the approved witness can observe you signing the statutory declaration...”,²³
3. to comply with an instruction e.g. “... students might be subject to sanctions for failing to observe dress codes...”.²⁴

The meaning that should be taken may seem clear when all meanings are presented together, but perhaps not otherwise. It is clear that the first meaning can not apply in this context, but unclear as to whether the second or third meaning is intended.

If the second meaning is taken, the reader would understand that they must read the Principles, but are then free to use them as they wish in the application of the Bill because nothing is said to the contrary. If the third meaning is taken, the reader would understand that they must observe as in read and observe as in comply with the Principles as though they were instructions.

Which of these is the intended meaning?

²¹ [Plain language](#), Australian Office of Parliamentary Counsel

²² [Principles of good legislation](#), p6, Office of the Queensland Parliamentary Council, 2013

²³ [How to complete a Commonwealth statutory declaration](#), Australian Attorney General’s Department

²⁴ [Principles of good legislation](#), p15, Office of the Queensland Parliamentary Council, 2013

The Principles themselves may lead a reader to believe that the second meaning is intended. That is because some Principles are incapable of being interpreted as instructions to take an action, but could be understood as as guidance for the use of discretion.

The following examples illustrate the problem.

The several sub-sections beginning “people with disability have the same right as other members of Australian society...” can be taken as an instruction to comply with applicable laws and regulations.

In contrast, this Principle could at best be considered as a strong hint that advocacy is likely to be helpful, but can not be taken as an instruction;

“access to disability advocacy plays an essential role in fostering the full and equal enjoyment of human rights, enabling community participation and the inclusion of people with disability...” s1)k).

This next Principle is even further removed from being an instruction. It similarly conveys guidance, but no hint of how to follow it:

”people with disability have the right to be supported to participate in, and contribute to, social and economic life to the full extent of their ability;” s2)b).

..The Problem of Creating Rights For People With Disabilities But Not Other Tasmanians

It might seem that Tasmanians with disabilities would be placed in a privileged position compared to other Tasmanians if the UNCRPD was fully implemented.

This raises ethical issues such as the role of legislation in achieving social justice and the principle of equality before the law.

In this submission I can do no more than sketch my starting position for what should be a deep and inclusive conversation.

...Social Justice

There is ample evidence to show that Tasmanians with disabilities experience persistent, pervasive and pernicious²⁵ disadvantage. Without attempting a complete and well referenced account, here are a few examples;

- unemployment: 4.6% of working age people without disability, 10.3% with disability;
- income: the median for Australians with disability is 50% of that for all other Australians;
- Poverty: 24% of people without disability live in poverty compared to 50% with disability;
- health: 30% of people with disability say they need help to access health services;
- Justice system: people with cognitive impairments are over represented;
- Discrimination: the Tasmanian Anti Discrimination Commission says people with disability consistently face the most discrimination.

Disadvantage has been caused in large part by existing structural arrangements such as laws and the institutions they enable. It follows that the responsibility to remedy those harms falls there.

The evidence also shows that laws and institutions intended to produce equal opportunity have actually produced unequal opportunities and unequal outcomes.

Affirmative action is needed to at least reduce harm, even if it falls short of making equal outcomes more likely. There is nothing radical in this idea. It is the foundation of all social security programs, including disability services.

Yet these social security programs have not been enough. Disadvantage persists because of scarcity, disorganisation and poor design. More is needed.

It is not feasible to simply improve disability services. It is hard to imagine how Australia could afford that or manage it politically with the present tax base, impending demographic changes and competing pressures from other disadvantaged sectors, defence, climate change and other long term issues.²⁶

The remaining option is to embed universal access and inclusion in all institutions and infrastructure. Inclusion by design is likely to be cheaper than retro-fitting. Inclusion by default is likely to be cheaper than inclusion by exception. Inclusion at scale is likely to be cheaper than inclusion for 'special needs'.

Investment in pervasive inclusion will be cheaper in the long term than sinking money into

²⁵ [Definition of pernicious](#), Cambridge Dictionary

²⁶ [2023 Intergenerational Report](#), Australian Treasury

services. It's the difference between buying a house and renting forever.

Human rights implemented in law and practice are necessary to reset the vision and agenda that could open up the cultural, legal and political space for such a program of investment.

...Equality Before The Law

A legal scholar could address this topic much more effectively than me. I can only go as far as to say that equality before the law means that people in like circumstances should be treated alike. People with disability are often in very different circumstances to those who do not have disabilities. Therefore laws made for the benefit of people with disability do not create inequality before the law. They merely ensure that it has the capacity to respond to the needs of people in circumstances that others may not experience.

..Use The More Explicit Of 2 Redundant Clauses

Comment The purpose of the Principles is stated in 2 clauses with similar meanings (s8)1) and s8)4)). Combine them to become "The following Principles are to be given effect by every person or body when making decisions for the purpose of this Act:"

The purpose of the Principles is stated in 2 clauses that have similar meanings (s8)1) and s8)4)).

"1) The following Principles are to be observed in the operation, administration and enforcement of this Act."

and;

"(4) Each person or body engaged in the administration, operation or enforcement of this Act must exercise their powers and perform their functions so as to give effect to the Principles set out in this section."

The significant difference is that the first version says the Principles are to be observed, while the second says that they must be given effect.

I recommend moving the second version to replace the first or combining them to become:

1) The following Principles are to be given effect by every person or body when making decisions for the purpose of this Act:

This version also makes it clear that the Principles only apply when a decision is to be made, since they cannot be applied when the Bill requires an action. In that situation, the required action itself must comply with the Principles, so there is no point to considering them.

..Role of Principles & UNCRPD Articles

Comment Text could usefully be added to clarify that the Principles in s8)1) must always be considered and that those in s8)2) & s8)3) are additional, not alternative, to the basic principles.

The Principles must not give confusing or contradictory guidance by being inconsistent with each other, the Objects or any other part of the Bill. This appears to have been achieved.

The main list of Principles is in s8)1). There are other Principles in s8)2) and s8)3) that are subordinate to s8)1) because;

- they are described as 'additional' i.e. only to be applied when s8)1) has already been

applied;

- they are to be applied ‘... as far as practicable...’, while there is no such limitation on s8)1);
- some are only to be applied to a sub-group of people with disability (s8)3) re children).

Additional Principles are indeed used to enhance the main Principles. For instance, this among several examples that were noted:

- Principle s8)1)h) says that people with disability have the same right as others to make their own decisions.
- An additional principle in s8)2)a) adds the right to support for decision making.
- Additional Principles in s8)3)a) and d) add protection and support for children.

There are no Principles that either;

- undermine or conflict with the Objects of the Bill;
- undermine or conflict with the Principles to which they are additions.

In many cases, more than one additional principle may need to be considered when implementing a basic principle from s)8)1).

The author has prepared a separate document that gives a list of all basic Principles in the Bill, with the additional Principles and UNCRPD Articles that appear most likely to require consideration. It should only be taken as a rough guide, in need of revision with support of more resources than the author could contribute.

..Impacts of Intersectionality Must Be Addressed

Comment Intersectionality is not mentioned in the Inclusion Principles, but it is defined in s5 Interpretation. Insert before or after s8)d): “the intersectional nature of the circumstances of people with disability is to be taken into account”.

The need to take account of diversity in achieving inclusion is given as an Inclusion Principle in s8)2)d). While ‘diversity’ addresses individual choice & control as a key to inclusion, it misses the social and structural impacts on inclusion of the “... overlapping and interdependent systems of disadvantage or discrimination” mentioned in the definition of intersectionality.

The Objects of the Bill clearly say that it is intended to address such social and structural matters. These Objects make the point:

- a) recognising the responsibility of the State and the community to support people with disability in exercising their human rights
- (c) establishing a framework for a whole-of-government approach to accountability and transparency in relation to disability inclusion

The intersectional intent of the Bill is also evident in some of the functions of the Disability Commissioner and Disability Inclusion Advisory Council, and in the purpose of Disability Inclusion Plans.

The importance of intersectionality to achieving inclusion is underscored by strong criticism of Australia’s lack of protection for people affected by intersectional disadvantage & discrimination voiced by the United Nations Committee on the Rights of Persons with

Disabilities (the U.N. body responsible for operation of the UNCRPD that is a foundation of this Bill).²⁷

Therefore insert before or after s8)d):

“the intersectional nature of the circumstances of people with disability is to be taken into account”

..Broaden The Definition of Intersectionality

Comment Broaden the definition of intersectionality beyond ‘protected attributes’ to include ‘socio-economic status’ e.g. education, employment, income, wealth, location and others. This is more relevant to Tasmanians with disability than in any other jurisdiction.

Intersectionality is defined in s5 Interpretation as;

“... the interconnected nature of protected attributes of a person or group of persons that create overlapping and interdependent systems of disadvantage or discrimination”

The ‘protected attributes’ are the broad list specified in [s16 of the Anti-Discrimination Act 1998](#).

However, some dimensions of disadvantage very relevant to the inclusion of people with disability are not in that list. Most of these missing dimensions are wrapped up in the concept of ‘socio-economic status’ e.g. education, employment, income, wealth, location and others.

The Australian Bureau of Statistics summarises such factors in its definition of socio-economic advantage and disadvantage as;

“... people’s access to material and social resources, and their ability to participate in society.”

This definition is closely aligned to the notion of ‘inclusion’ implied in the Objects of the Bill.

Of all Australian jurisdictions, there is none in which socio-economic status is more crucial as an indicator of inclusion.

In the table below, residents of each Australian jurisdiction are divided into 5 groups from most disadvantaged to most advantaged (quintile 1 to 5). Notice that, compared to all other parts of Australia;

- Tasmania has a higher percentage of people in the most disadvantaged 2 quintiles;
- Tasmania has a lower percentage of people in the most advantaged 2 quintiles.

Table 1: PROPORTION OF PERSONS BY INDEX OF RELATIVE SOCIO-ECONOMIC ADVANTAGE AND DISADVANTAGE QUINTILES BY STATE OF USUAL RESIDENCE

	NSW	VIC	QLD	SA	WA	TAS	NT	ACT
Quintile 1	19.1	16.2	21.4	25.7	13.3	37.2	23.5	0.7
Quintile 2	18.8	18	22.2	25.1	18.4	26.1	11.1	3.5
Quintile 3	17.1	21.4	21.7	22.4	22.9	18.3	19.8	12.1

²⁷ [The United Nations Convention on the Rights of Persons with Disabilities: An Assessment of Australia’s Level of Compliance](#), Royal Commission Into Violence, Abuse, Neglect & Exploitation of People With Disabilities

	NSW	VIC	QLD	SA	WA	TAS	NT	ACT
Quintile 4	17.4	23.7	20.7	17.9	24	13.8	25.2	29.1
Quintile 5	27.6	20.8	14	8.9	21.4	4.6	20.5	54.6

One would not normally advocate for such a broad term as socio-economic status to be included in legislation. However, socio-economic status has been highly codified by the Australian Bureau of Statistics in its [Socio-Economic Indexes for Areas](#) (SEIFA). This is a long standing, widely accepted tool for definition and measurement in social policy, as is evident from the ability of the ABS to provide the table above.

It would be possible to plan and evaluate the outcomes of the Disability Inclusion Act as has been done with the NDIS Act,²⁸ or regional areas.^{29 30} It may also be possible to build legal arguments from SEIFA and other credible socio-economic data.

Socio-economic status is therefore a valuable indicator to guide achievement of the progressive realisation of economic, social and cultural rights envisaged in the UNCRPD.³¹

Therefore, amend the definition of intersectionality in s5 Interpretation by inserting 'socio-economic status' to be;

“... the interconnected nature of protected attributes and socio-economic status of a person or group of persons that create overlapping and interdependent systems of disadvantage or discrimination”

..Make Role & Rights of Carers Consistent With Carer Recognition Act

Comment Clarify carer roles and rights in relation to people with disability by referring to the Carer Recognition Act 2023.

For the sake of consistency in state law and administration, the Disability Inclusion Bill should be interpreted by considering the Carer Recognition Act 2023 (Tasmania). It creates a Carer's Charter and provides for a Tasmanian Carer Action Plan.

This issue is especially relevant to interpretation of the Inclusion Principles. They set out the role and rights of carers in relation to people with disability in s2:

“(c) people with disability and their families and carers have the right to certainty that people with disability will receive the care and support that they need over their lifetime;

(m) the role of families, carers and other significant persons in the lives of people with disability is to be acknowledged and respected;

(p) the voices of families, friends and carers of people with disability are to be considered in the development of practical, effective and targeted services and programs;”

Amend the Inclusion Principles by appending a sub-section;

The roles and responsibilities of carers in relation to people with disability set out in this Act are to be interpreted in a manner consistent with the Carer Recognition Act 2023

²⁸ [Plan budgets and socio-economic status](#), NDIS 2021

²⁹ [Loddon Campaspe](#), Infrastructure Victoria 2019

³⁰ Australian Institute of Health and Welfare 2009. [The geography of disability and economic disadvantage in Australian capital cities](#). Cat. no. DIS 54. Canberra: AIHW.

³¹ [“Rights of people with disability”](#), Australian Attorney General's Department

(Tasmania)

Part 2: Disability Inclusion Planning

Question: Will the Disability Inclusion Planning requirements contribute to the advancement of human rights and inclusion?

.Division 1 – Tasmanian Disability Inclusion Plan

Comment The Tasmanian Disability Inclusion Plan must include and report against publicly verifiable outcome measures and deadlines.

Comment Consultation must include disabled peoples organisations whenever they are available. Replace the words ‘persons or bodies representing the interests of people with disability’ with ‘persons or bodies appointed by people with disability to represent their interests, giving preference among these to organisations led by people with disability’.

The requirement to “... set out whole-of-government policies and measures...” for “the provision of mainstream supports and services...” is very welcome. (s9)2a)).

The highly specified obligation to consult is welcome. (s9)3), s10)

Legislated time frames for reporting are very welcome (s11). However, they must be strengthened by publicly verifiable outcome measures and deadlines. This is essential for the sake of transparency, accountability and achieving results. The often unverifiable claims of outcomes and long delays that mark the history of Accessible Island must never be repeated.

Implementation is likely to suffer from the structural problem that the Minister - even if empowered by this Bill - might be reticent about giving directions outside her portfolio and must therefore “... provide for collaboration and coordination among State authorities and other entities...” (s9)2)b)).

A lot will rely on the motivation and focus of the Minister. At a minimum, the Minister need do no more than allow the other provisions for inclusion planning to operate and report on their work. With more effort, the Minister could pro-actively promote collaboration and co-operation by setting up and encouraging inter-agency mechanisms such as information sharing arrangements, task groups and cross-postings of staff to broaden perspectives and relationships.

.Division 2 – Disability inclusion action plans for defined entities

Comment I welcome the requirements for all defined entities to develop plans in consultation with disabled people & to report progress.

Comment The range of entities required to implement Disability Inclusion Action Plans will be limited by the definition of ‘defined entities and, perhaps, by how effectively a Minister for Disability can influence less willing entities outside the disability portfolio.

Comment Disability Inclusion Action Plans must include and report against publicly verifiable outcome measures and deadlines.

Comment Consultation must include disabled peoples organisations whenever they are

available. Replace the words 'persons or bodies representing the interests of people with disability' with 'persons or bodies appointed by people with disability to represent their interests, giving preference among these to organisations led by people with disability'.

Comments about consultation and time frames made in the previous section apply here.

As mentioned in on page8, it is very unsatisfactory to limit this requirement only to Defined Entities.

The register of disability inclusion action plans (s15) could be made much more useful for enabling systematic evaluation of progress towards inclusion (s16) if reports were designed around a common framework. A framework developed by the Disability Studies & Research Institute offers a very promising start.³²

.Division 3 – Disability consultation

Comment Consultation is discussed in several parts of the Bill, which causes content to be repeated (8)1)q), 9)3)c)iv), 12)5)c) & 19)4)c). Consultation is also treated as an all pervading activity in UNCRPD Article 4.3. The need to facilitate public participation of people with disability by means of capacity building and enablement measures has also been discussed. Elevate Disability Consultation to become a Part that addresses these issues in a consistent way throughout the Bill. It would cover at least;

- 1) parties to be consulted, with primacy given to people with disability and their representative organisations;
- 2) options for various forms of public participation from the IAP2 Spectrum, including at least consultation and involvement;
- 3) standards for best practice in public participation such as timeliness, information in accessible formats etc.
- 4) measures to facilitate public participation through capacity building and enablement to overcome barriers to participation such as cost, transport, accommodation etc.

Comment Define the terms 'consultation' (one shot) and 'involvement' (dialogue), and replace requirements to consult with requirements to involve.

Comment Consultation must include disabled peoples organisations whenever they are available. Replace the words 'persons or bodies representing the interests of people with disability' with 'persons or bodies appointed by people with disability to represent their interests, giving preference among these to organisations led by people with disability'.

Comment Defined entities should consult on their internal operations and employment practices, not just their public activities.

The Bill requires consultation in several Parts but does not define the term and does not proactively favour consultation with organisations appointed - and preferably led - by people with disability to represent our interests.

The UNCRPD requires;;

"In the development and implementation of legislation and policies to implement the

³² ["Human Rights Indicators for People with Disability: A resource for disability activists and policy makers"](#) Phillip French, Disability Studies and Research Institute, 2008, Queensland Advocacy Inc.

present Convention, and in other decision-making processes concerning issues relating to persons with disabilities, States Parties shall closely consult with and actively involve persons with disabilities, including children with disabilities, through their representative organisations.”³³

Note the two distinct requirements to ‘closely consult’ and also to ‘actively involve’.

The IAP2 Public Participation Spectrum is a framework for community engagement that has been widely used across state and local governments for many years.³⁴

The Spectrum distinguishes consultation from involvement by adding the concept of dialogue, in which participation begins early, contributes to the development of alternatives rather than responding to them and continues throughout the development process.

The IAP2 Spectrum defines the goal of **consultation** as;

“To obtain public feedback on analysis, alternatives and/or decisions.”

It provides for this promise to those who have been consulted:

“We will keep you informed, listen to and acknowledge concerns and aspirations, and provide feedback on how public input influenced the decision.”

The Spectrum defines **Involvement** as a level of public participation having a greater goal;

“To work directly with the public throughout the process to ensure that public concerns and aspirations are consistently understood and considered.”

The corresponding promise is;

“We will work with you to ensure that your concerns and aspirations are directly reflected in the alternatives developed and provide feedback on how public input influenced the decision.”

Capacity building and enablement measures will be required to support effective public participation by people with disability in consultation and other activities set out in the Bill. As this topic is broader than consultation, it is discussed in on page 2.

Defined entities should be required to consult on matters that have “... a direct and significant impact...” on their internal operations and employment practices, as well as impact on the general public. This will aid in removal of barriers to employment. (s17)1)).

.Division 4 – Guidelines

Comment The Commissioner should be able to give directions, not just make guidelines.

It is regrettable that the Commissioner is only to be empowered to issue ‘guidelines’ to which defined entities must ‘have regard’.

It is useful to have guidelines to improve the practice of willing agencies and deprive the less willing of the excuse of ignorance. However, advocacy, efficiency and consistency across government could all be improved by amending the Bill to provide for ‘directions’ rather than ‘guidelines’.

Less ambiguity, shorter conversations.

³³ UNCRPD ([Article 4 - General obligations](#), clause 4.3)

³⁴ [IAP2 Public Participation Spectrum](#), International Association for Public Participation.

Part 3: Disability Inclusion Advisory Council

Question: Are there any changes you would make to the proposed functions or the structure of the Disability Inclusion Advisory Council?

Comment The functions and powers proposed for the DIAC seem likely to enable more effective advocacy by and for people with disability than has been possible to date through the PDAC, MDCG and their predecessors.

.Increase Majority Membership By People With Disabilities

Comment Ensure that a super majority of DIAC members are people with disability by amending s19)3)a).

Comment Increase the likelihood that people with disabilities will know of the opportunity to join DIAC by requiring that it is advertised by diverse and accessible means rather than "... in at least 3 daily newspapers printed, and circulating, in Tasmania." s19)8).

Comment Amend s20)2 to allow DIAC to request information from parties outside the scope of defined entities e.g. access or legal experts.

Comment Remove, or at least review, immunity from complaint of unlawful discrimination and allow allegations to be tested on their merits s19)10).

The Bill provides that the majority of DIAC members must be people with disability s19)3)a) and leaves the way open to appoint absolutely anyone to form the minority s19)4).

The majority of people with disability should be increased from 51% to a super majority such as 70-80% because;

- the functions of the DIAC are entirely to do with advancing the interests of people with disability;
- it will be hard to appoint people who reflect "... the diversity of backgrounds and experiences of people with disability..." if they might be as few as 5 of a 9 member Council s19)2) and s19)3)b);
- carers and family members may be heard through the Minister's Carer Advisory Council;
- disability service providers may be heard through National Disability Services and by their own efforts;
- DIAC may gain the views of any other parties it chooses to engage without having them among its members.

For the last to be effective, the power of the DIAC to request information must not be limited to querying 'defined entities' s20)2). There may be times when the DIAC wants advice from experts outside the scope of defined entities, eg, an access or legal expert.

There does not seem to be any reason to provide immunity from complaints of unlawful discrimination in the appointment of DIAC members or Chairperson (s19)10). Complaints are unlikely to be frequent, are usually settled by conciliation and should be tested on their merits. In any case, this clause would be ineffective as a complainant expressly barred from using the Tasmanian anti-discrimination law could go to its Commonwealth equivalent.

.Add Evaluation As A Function of DIAC

Comment Add a requirement for DIAC to be evaluated. DIAC will have to innovate and take risks. It must learn as it goes.

Evaluation of DIAC's work will be crucial to its survival at first, and maturation as it goes on.

The DIAC will be called on to be innovative. It will be a new body charged with many and diverse functions.

The DIAC has a high risk of failure as it will be a new body, without staff, without focused leadership and, most likely, having members in need of some capacity building and enabling supports..

I suggest that evaluation be added to DIAC's functions and that a system of quality assurance and evaluation be developed early in its life.

.Capacity Building & Enablement For DIAC

Comment It is unlikely that DIAC will find enough members with the skills & time to do all that it must do. Capacity building & enablement will be vital.

Experience has shown that advisory bodies can struggle to find enough people with necessary skills to allow the body to produce advice that is timely and of high standard. The DIAC will be even more demanding as it has functions beyond providing advice.

Capacity building and enablement will be needed to allow people with disability to effectively contribute to the DIAC and also to develop their leadership capabilities. This need not be a function of the DIAC, but it should be available for the DIAC to call on.

See on page 2 and on page 35.

.Provide Remuneration And Allowances

Comment DIAC will be more than an advisory body. It may be possible to remunerate members within the terms of the Tasmanian Government Board Fee Policy.

Schedule 1 provides that;

“A member is entitled to be paid such remuneration and allowances as the Minister determines.”

This provision opens the way for the Minister to reimburse DIAC members for expenses incurred in the course of their duties, including costs of reasonable accommodations for disability.

It also opens the way for remuneration beyond merely covering expenses.

Advisory bodies are not normally funded.³⁵ However, some functions of the DIAC go beyond provision of advice to the government. The DIAC may be taken to act as an agent of the government when it engages with the public to carry out some functions required by this Act e.g. to conduct consultations, provide information and provide education.

³⁵ [Tasmanian Government Board Fee Policy](#), DPAC

.Provide Operational and Capital Funds

Comment DIAC will need operational and capital funding to discharge its functions.

DIAC will also need operational and capital funding to;

- remove the financial barrier imposed by the cost of volunteering by paying the expenses incurred by its members in the course of their duties, including the costs of reasonable accommodations;
- enable the DIAC to discharge its functions in a manner that produces outputs of a high standard in a timely manner.

The functions given in s20(1) imply that funds will be required for at least;

- communication in diverse and accessible formats;
- hire of venues, equipment and personnel, including AUSLAN and other interpreters;
- travel and accommodation;
- preparation and maintenance of educational materials;
- research;
- drafting, editing and presentation of reports.

I suggest how the Bill might be amended to provide operational and capital funding in on page 35.

Part 4: Tasmanian Disability Inclusion Commissioner

Question: Are the proposed functions and powers of the Disability Inclusion Commissioner sufficient to promote inclusion and improve quality and safeguarding protections?

.A Commissioner Needs a Commission

Comment One Commissioner and a pot plant will not get the job done. The Bill should establish a Commission, not a Commissioner. The provisions now in the Bill enable the Commissioner to build some form of organisation, but under circumstances likely to yield inadequate resources, an insecure existence and divided loyalties. As a result, it will have compromised independence and impaired ability to do what the Bill says it must do.

The functions of the Commissioner are many, diverse and demanding. They must be done well if they are to make a difference that matters to Tasmanians with disability. It follows that they cannot be done without enough people who have deep and diverse skills, who have access to the goods and services they need, and who can rely on a budget to pay for their operations.

The Bill makes no guarantee of staff, resources or budget. This means that the Bill makes no guarantee of the independence of the Commissioner. The provisions that supposedly protect the Commissioner's independence are seriously undermined (s23(1), Schedule 2).

The newly appointed Commissioner will be tied up in negotiating from nothing to create an effective organisation. The odds of success are low for a new organisation serving marginalised Tasmanians competing for resources from a very constrained state budget.

After bickering over resources, the inevitable result will eventually be a Commissioner with a few staff appointed as provided in s28;

- borrowed from other agencies, subject to recall at their home agency's convenience, probably steeped in the culture of their home agency and mindful of protecting their future prospects with their home agency;
- employed part time by the Commissioner and another agency, and therefore subject to all of the constraints on independence that arise from serving 2 masters;
- employed entirely by the Commissioner but for short term projects, which would make it impossible for a core of skills, networks and corporate memory to evolve.

The Commissioner would probably also be reduced to bargaining for in-kind resources from other state agencies.

The end result of this very unsatisfactory process is likely to be some form of organisation, but it will have inadequate resources, an insecure existence and divided loyalties. As a result, it will have compromised independence and impaired ability to do what the Bill says it must do.

It would be much more efficient and effective to have the Bill enable the design of an organisation that has autonomy and resources in the first place, rather than creating and then disabling a Commissioner.

.Appointment of Commissioner

Comment The requirement for the Commissioner to be a person with disability is likely to mean that the Commissioner, from day one, will have superior insights, credibility and access to networks of people with disability. (s23)2).

Comment The Minister should be required to consult DIAC before recommending a candidate for Commissioner to the Governor. s23)3). Endorsement of the recommendation by DIAC would add to the credibility of the Minister's recommendation. The reverse - especially after the Minister had made a recommendation - is also true.

I welcome the requirement that the Commissioner be a person with disability, but not the option for the Minister to consult the DIAC before recommending a person for the job s23)3). The Minister should be required to consult. The credibility of a candidate would be enhanced by endorsement of the DIAC. It is open to DIAC to advise the Minister that an unsuitable candidate has been recommended, regardless of whether or not the Minister has consulted it.

I welcome the modest safeguard against making a tokenistic appointment that follows from the definition of disability as;

“... any impairment ... or functional limitation ... that, in interaction with a barrier, hinders a person's full and equal participation in society” (s6).

The fact of my applause for the Commissioner being a person with disability brings home to me how much even I - a person steeped in the disability rights movement - have internalised the marginal place of people with disability. It takes only a moment to realise that it would be unimaginable to have a man as a women's Commissioner, a white person as an Aboriginal Commissioner. Yet that moment of reflection was necessary and noticed.

.Functions & Powers

Comment The Commissioner should have powers and resources to lead inclusion across business & civil society, not just defined entities & services.

..Power To Prosecute

Comment The Commissioner's power to prosecute should be made explicit rather than relying on inference and on the Bill not forbidding it.

Comment There must be a clear obligation dealing with enforcement, whether by explicitly empowering and resourcing the Commissioner to prosecute or requiring the Director of Public Prosecutions to show and report why they have not acted on a referral made by the Commissioner.

The Commissioner has functions that would be adequate if some constraints were removed. Within the constraints, they are inadequate. S24.

The power to investigate appears adequate in that the Commissioner may require information to be produced and may appoint Authorised Officers, who can enter premises.

The power to prosecute if necessary is open to dispute. While it could be argued to exist, the argument would need to be had. An advocate for the power to prosecute would hold a weak hand, since the argument that the power exists relies on nothing more than that it can be inferred and is not forbidden.

This is unsatisfactory for a power that can have such large consequences and require so many resources. With clarity, prosecutions may be still-born for want of resources or confidence.

An argument for the power to prosecute might go as follows.

s24)j). It requires the Commissioner "... to take action in relation to allegations of violence against, or the abuse, neglect..." It empowers the Commissioner to investigate since the Commissioner can act "... on the basis of a report ... or at the Commissioner's own initiative...".

The Commissioner is allowed to carry out this function by means "... including by referring matters to appropriate persons or bodies and by conducting investigations;". The word 'including' would commonly be taken to mean that the actions specified are included among other actions, which are not specified.

This interpretation is reinforced by the Commissioner's broad power given in s25)1) to;

"... to do all things necessary, or convenient, to be done in connection with the performance of the Commissioner's functions, and the exercise of the Commissioner's powers, under this or any other Act."

A list of specified powers follows but it is prefaced by the words "Without limiting subsection (1) ..." s25)2).

Since prosecution is not forbidden, it is permitted.

Resources and organisational culture are more likely to be the constraints that matter, especially for the civil offences in s26)2). I am informed that such civil offences, without express provisions, rely on the state to prosecute and there have been notoriously low levels

of prosecution of such offences.³⁶

There must be a clear obligation dealing with enforcement, whether by explicit empowering and resourcing the Commissioner to prosecute or requiring the Director of Public Prosecutions to show and report why they have not acted on a referral made by the Commissioner.

..Consultation With DIAC Should Be Broadened

Comment There is a mis-match in the Bill between the scope of the Commissioner's obligation to consult DIAC and the scope of DIAC's obligation to advise the Commissioner. The scope of the Commissioner's obligation should be broadened to match DIAC's obligation.

The Commissioner is constrained;

"... to consult with the Disability Inclusion Advisory Council on matters relating to violence against, and the abuse, neglect and exploitation of, people with disability" (s24)l).

Yet the DIAC is required to advise the Commissioner on a much broader range of issues (s20)d).

..Extend Time Limit For Commissioner To Act On Reports

Comment The 12 month time limit after which the Commissioner may decline a report of abuse should be extended to ensure that the Commissioner must give victim survivors time to come forward and must make a well founded decision. (s32)2)d)

The Commissioner may decline to act on a report of violence, abuse, neglect or exploitation made under s31 if "... the report relates to an incident which occurred more than 12 months before the report is made..." (s32)d).

Note that this clause allows but does not direct the Commissioner to decline such old reports. Also note that, in deciding to decline, the Commissioner must also consider that "... the person who made the report has not shown a good reason for the delay".

A risk lies in the word 'consider', which opens a way for the Commissioner to decline the report. To 'consider' is merely to spend time thinking about a possibility or making a decision.³⁷ That is a lower standard for forming a belief than, for example, 'reasonable grounds', which requires "the existence of facts which are sufficient to induce that state of mind in a reasonable person".³⁸

To show consideration, the Commissioner would only have to show time spent thinking. To show reasonable grounds, the Commissioner would have to show facts and argument.

I am also told by a human rights lawyer that this 12 month limit should be extended to 3 years to be consistent with general civil law processes and with federal discrimination law changes.³⁹

Quite apart from any question of legal niceties, this extension of time is

³⁶ Communication from Dr. Robin Banks, 31/8/2023

³⁷ [Definition of consider](#), Cambridge Dictionary

³⁸ [What is a Reasonable Cause? \(ACT\)](#), Armstrong Legal

³⁹ Communication from Dr. Robin Banks, 31/8/2023

- vital because it is universally understood that there will often be long delays before victim - survivors of violence, abuse, neglect and exploitation come forward;
- desirable because there is a strong public interest in having such bad acts addressed and stopped to protect potential future victims.

.Commissioner As A Community Visitor

Comment The Commissioner could set up a Community Visitor program to fill a gap in the safeguards provided by the OSP, APOs and Independent Persons. The powers are there, it only needs resources.

The Commissioner's role in protecting people is to receive and investigate reports. However, this role might be extended to include a [Community Visitor program](#) such as exists in some other states. Community Visitors make unannounced visits to inspect premises without waiting for reports.

A Community Visitor program would be better placed with the Commissioner than the Senior Practitioner. While that office has extensive powers to enter premises and compel production of information, it may do so only for the purpose of regulating approved or suspected restrictive practices.

It would be within the scope of the Commissioner to establish a community visitor program in light of functions in s24;

“(d) to promote, monitor and review the wellbeing of people with disability; ...

(h) to establish and monitor safeguarding mechanisms that address violence against, and the abuse, neglect and exploitation of, people with disability;

The Commissioner would also have the necessary mandate to investigate in s25)2);

“(c) investigate, and make recommendations in respect of, the systems, policies and practices of organisations, government or non-government, that provide services that affect people with disability; and

(d) advise and make recommendations, in relation to the rights and wellbeing of people with disability, to the Minister or defined entities; and

The Commissioner has a necessary power to compel production of information (s26) and to appoint Authorised Officers who may enter premises (s62).

Part 5: Disability Services Regulations

Question: Is it important to retain a requirement for all providers to follow the National Standards for Disability Services and is it clear who these standards apply to?

Comment s35 does all that could be asked of it. However, also see comment on s77.

s35:

- enables regulations to be made;
- clearly defines the parties to be regulated and the purpose and means of regulating them;
- opens the path for national consistency;
- leaves flexibility to meet evolving circumstances and local needs.

National consistency in regulation should be the default position. I do not think that this Bill needs to state that because there are incentives to harmonise state with national instruments;

- regulate without 're-inventing the wheel';
- increase efficiency by reducing compliance costs for organisations operating across jurisdictions;
- increase likelihood that organisations operating under Tasmanian regulations will be well placed to win grants from national funders and inter-operate with national programs and providers.

Part 6: Senior Practitioner

Question: Will the authorisation of restrictive practices process, and roles and functions of the Senior Practitioner, Appointed Program Officers and independent persons provide better quality, protections and safeguards for people with disability?

.Do Not Legislate On Restrictive Practices Until the Disability Royal Commission Has Reported

Comment Do not legislate on restrictive practices until the Disability Royal Commission has reported. The DRC may recommend abolition, not restriction.

Very soon a state that regulates restrictive practices may be confronted with authoritative advice that they should be abolished.

This was the outcome of a research report prepared for the Royal Commission Into Violence, Abuse, Neglect and Exploitation of People With Disabilities. The Commission may have telegraphed its intentions when it chose to feature the report it had commissioned in a recent media release.⁴⁰

It is also possible that restrictive practices are not permissible by [Article 15 - Freedom from torture or cruel, inhuman or degrading treatment or punishment](#).

It seems premature and potentially embarrassing to set up a regime for managing restrictive practices when the Commission is about to make its final report.

.Unify Regulation Of Restrictive Practices

Comment Human rights apply to all people without discrimination. Restrictive practices are used in disability services, mental health services, aged care, schools, prisons, youth detention centres, police lockups and possibly other settings. Why apply a unique and therefore potentially discriminatory regime to people with disability? Instead, consider the advantage of having a single centre of excellence for managing restrictive practices in a rights respecting way no matter the setting in which they occur.

The Bill proposes to regulate restrictive practices only where they occur in disability services. This is likely to perpetuate discrimination, inefficiency and inconsistency of policy.

⁴⁰ [Report proposes an end to restrictive practices](#), Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, 25/7/2023

Restrictive practices are used in disability services, mental health services, aged care, schools, prisons, youth detention centres, police lockups and possibly other settings.

Human rights apply to all people without discrimination. Why apply a unique and therefore potentially discriminatory regime to people with disability?

If it is not possible to unify the management of restrictive practices for all people in all settings, a less ambitious proposal is to unify management for people with disability, no matter the setting. This would bring the important benefit of ensuring that a person is not subjected to arbitrary changes of restriction as they move from one place to another e.g. as they go from a supported living home to school and back, or as they move from prison to engage with a disability service.

If regulation of restrictive practices is to be unified for all Tasmanians in all settings it will obviously have to be moved to another Act. However, if regulation is only for people with disability - even if in all settings - it should remain in this Act. In saying this, I disagree with arguments I have heard for moving it because the management of restrictive practices has nothing to do with inclusion. I say that restrictive practices must be managed in a rights respecting way, and that they therefore belong in a disability rights law.

The UNCRPD includes 2 articles especially relevant to restrictive practices, but these are very similar to articles to be found in other UN treaties. For ease of reference, the articles are;

- [Article 15 - Freedom from torture or cruel, inhuman or degrading treatment or punishment](#)
- [Article 16 - Freedom from exploitation, violence and abuse](#)

.Amend Bill To Safeguard Against Regulatory Capture

Comment Amend the Bill to manage the risk that the Senior Practitioner will experience 'regulatory capture' by the disability industry.

The Bill should be amended to protect the Senior Practitioner's position from capture by the industry it regulates. This is essential to ensure that the Senior Practitioner does not import practices and ways of thinking about restrictive practices from the industry into the role. The purpose of the role is to ensure that the industry improves its practices. It would not have been necessary to create the role if self regulation had delivered human rights protections for highly vulnerable people with disability.

S36)2 requires that a person appointed to the office must have suitable qualifications and experience. People who have worked in the 'disability industry' may be well placed as applicants.

I suggest amending s36)2) to be;

(2) A person may only be appointed to be the Senior Practitioner if;

- in the opinion of the Secretary, the person has appropriate qualifications and experience to perform the functions and exercise the powers of the Senior Practitioner under this Act and;
- the person has not worked for a disability service provider in the 2 years before being appointed.

.Functions & Powers Are Appropriate

Comment The Senior Practitioner's functions and powers are well chosen.

I support the Senior Practitioner having the power to;

- give directions to disability service providers s37)f);
- determine what amounts to a restrictive practice s38;
- and to require the assistance of disability service providers s43.

It is essential to have such force alongside the many quality improvement functions of the Senior Practitioner.

Part 7: Regulation of Restrictive Practices

.Use of unauthorised restrictive practice prohibition Is Too Permissive

Comment Defences for using unauthorised restrictive practices should be restricted. The Bill should include a list of conditions that must be satisfied to determine what is the "... least intrusive type of restrictive practice...". Alternatively, to allow for evolving best practice, the Bill might require that a mandatory code of conduct be developed and enforced. s48)2

It is a defence to use an unauthorised restrictive practice if;

- it was was the least intrusive type of restrictive practice required to prevent serious harm;
- the Senior Practitioner was notified within 5 business days. s48)2).

This implies that a restrictive practice - even one that has a severe impact on a person's liberty and well being - could go on for up to 5 days without authorisation.

This long period is consistent with a provision that is noticeable by its glaring omission. It should be necessary to show that specific criteria were met for determining the "... least intrusive type of restrictive practice...". For example;

- Why was it necessary to act before the Senior Practitioner could provide authority?
- Why was it impossible to change behaviour by de-escalatory conversation or distraction?
- Why was it impossible to provide an alternative activity that would cause the behaviour to be stopped by an act of free choice?
- Why was it impossible to provide a physical barrier while still allowing freedom of movement e.g. closing a door between rooms?

A more suitable and considered list could no doubt be made by someone with more experience in this area than the author.

.Community Visitor To Reduce Risk of Unreported Practices

Comment The most vulnerable can not complain. Create a Community Visitor program to go looking for trouble rather than have the Senior Practitioner and Disability Inclusion Commissioner wait for complaints.

The Bill only provides for restrictive practices to come to the notice of the Senior Practitioner when a disability service provider asks for authorisation to use them. However, service providers have an incentive to ask for authorisation because the Bill forbids use of

unauthorised practices on pain of a penalty of up to 200 penalty units (Insert Formula 200*195 from 1/7/2023).

A service provider who did not apply would be at risk of being found out if a complaint was made. However, it is quite possible that an organisation could develop a culture of silence and abuse, and quite unlikely that a complaint might be made by or for a person who experiences some or all of social isolation, fear of reprisal, lack of knowledge about how to complain, being non-verbal or having a severe cognitive impairment.

I note also that restrictive practices may be authorised separately by the "... Chief Forensic Psychiatrist, or the Chief Civil Psychiatrist, under the Mental Health Act 2013, or an authorisation under another enactment..." s48)3). I do not know what safeguards may exist under such other laws.

A community visitor scheme with scope to visit all relevant facilities would reduce this risk of unauthorised restrictive practices being perpetrated (see on page 28).

Part 8: Appointed Program Officers

.Title of Position

Comment Restrictive Practices Oversight Officer would be a more accurate and self-describing title.

.Criteria For Approving APOs Must Be Tightened

Comment Steps must be taken to ensure that APOs know what is happening, are not so close to it as to have a conflict of interest and have the seniority to take action.

Having Appointed Program Officers as employees of the service using the restrictive practice may be efficient & allow for good knowledge of what is happening on the ground. It may also allow for abuse to become business as usual.

The risk might be mitigated by ensuring that an Appointed Program Officer has;

- enough oversight to know what is actually happening, including behind closed doors, away from the service's premises and outside business hours;
- not have overly close personal or professional relationships with staff who are directly responsible for implementing restrictive practices and behaviour support plans;
- enough seniority to be able to take effective and quick action when a breach is detected.

This could be achieved by amending the matters that must be considered by the Senior Practitioner when;

- approving an Appointed Program Officer proposed by a disability service provider s54)3).
- issuing directions to service providers about how to appoint suitable Appointed Program Officers s57)1).

.Alternative Arrangements for Small Organisations

Comment Finding APOs is likely to be hard or impractical for smaller organisations,

especially if the risk mitigation measures urged above are inserted into the Bill. This may be yet another function for Community Visitors.

Part 9: Independent Persons

.Improve Measures To Ensure That A Suitable Independent Person Is Sought

Comment The provisions need more work to ensure that the need for an Independent Person is always recognised and impartially met.

There are measures to ensure that an independent person will be sought if the APO or client think one is needed s59)2). However, there are risks that;

- the APO will not realise that an independent person is needed or may not wish to have one appointed;
- a highly vulnerable, at risk client will not have the judgement, confidence or means to tell an Appointed Program Officer that their independent person is unsuitable.
- the Appointed Program Officer will tell the Senior Practitioner that a person is not an independent person in order to get rid of them if they are inconvenient;

I do not have any suggestion for addressing the first 2 cases beyond saying that this is a problem that needs more consideration.

In the last case, the Senior Practitioner must appoint an independent person and would be free to re-appoint the allegedly unsuitable person if they believed that to be the right decision s59)3).

.Improve Measures To Ensure That, If Sought, An Independent Person Can Be Found

Comment It may be hard to find Independent Persons in the informal networks of the most vulnerable people. Formal Independent Persons may sometimes need to be funded - possibly part of a Community Visitor scheme.

The criteria for determining that a person is independent of the disability service that their client is using are clear s59)4).

The degree of separation required from the disability service is likely to mean that an independent person must be sought from within the client's family and friendship networks. If that fails - which may well happen for highly marginalised and isolated people - more formal networks must be tested.

Formal networks might be found in;

- disability advocacy services;
- peer support programs run by Disabled Persons Organisations;
- staff of disability service providers who have no relationship with the client's provider;
- perhaps an extension of a community visitor program, if one was established.

All of these options will require funding if they are to be available when needed and able to

work with the intensity and for the duration that may be required.

.Support Must Be Available To Independent Persons

Comment Independent Persons will need capacity building & legal protection for their complex, risky work.

The roles of the independent person are to explain the restrictive practice to its subject, to tell them of their rights and to tell the Senior Practitioner about specified breaches and concerns s60.

These tasks are complex, demanding and legally risky.

As can be inferred from the preceding section, independent persons may very well not come to the task with suitable capabilities.

The Bill should be amended to insert supports for independent persons such as;

- training;
- confidential supervision (the independent person will be likely to encounter ethical challenges and ambiguous situations);
- indemnity insurance (the subject of the restrictive practice may be harmed by poor advice or failure to act on the part of the independent person).

Part 10: Funding

Question: Are the conditions for the Minister to fund activities in relation to the objects of this Act clear?

..Power to Make Guidelines and Standards

Comment The Commissioner's power to make guidelines and standards and to give directions should be made explicit, as it is for the Senior Practitioner, rather than relying on inference and on the Bill not forbidding it.

Comment The Commissioner should have those powers as part of their general powers rather than, as now, having the limited power to make guidelines only, and then only for the purpose of disability inclusion planning.

Comment If the Commissioner is empowered to make guidelines and standards and to give directions, they should be required to consult the DIAC.

In managing restrictive practices, the Senior Practitioner has powers to;

- make guidelines (which are to be considered) and standards (which must be complied with). s37(1)e);
- give directions to disability services providers s37(1)f)

The Commissioner has a function similar to the Senior Practitioner, which is "... to establish and monitor safeguarding mechanisms that address violence against, and the abuse, neglect and exploitation of, people with disability;" s24)h).

However, the Commissioner does not have powers equivalent to those of the Senior Practitioner. The Commissioner may only make guidelines, not standards, though the scope of application is;

- broader as guidelines may be made for all defined entities, not just disability services s18;
- narrower because the power only applies to the activities of defined entities engaged in disability inclusion planning (s18 is a sub-section of PART 2 – DISABILITY INCLUSION PLANNING).

The power to make standards can only be reached by following the argument given in the previous section to conclude that what is not prohibited is permitted.

In this case such an argument would be doubly hard to mount because the Commissioner is specifically given another way to carry out their protective function. The Commissioner may;

“advise and make recommendations, in relation to the rights and wellbeing of people with disability, to the Minister or defined entities;” s25)2)d).

This is a much less direct and more limited way to carry out this protective function.

The powers of the Commissioner to make guidelines (and hopefully standards) should be made broader in scope than disability inclusion planning by moving them to the list of Commissioner’s powers given in s25. To achieve this, a sub-sections might be inserted after s25)2)d) such as;

to develop guidelines and standards, that are in accordance with best practice and the objects of this Act;

to give directions to defined entities about actions required to achieve the Objects of this Act;

If the Commissioner is so empowered, they should exercise that power in consultation with the DIAC (see on page 27).

.Provide Funds For Capacity Building & Enablement

Comment The reasons for which funding may be granted should be amended to include funds for organisations providing capacity building and enablement for individuals who must overcome disability and financial barriers to contribute their voluntary work in the various new ways proposed by the Bill.

Following the argument put in on page 2, the reasons for which funding may be granted should be amended by adding to s61)3);

- an organisation providing capacity building services to enable people with disability to participate more effectively to the activities in which this Act seeks their involvement and leadership;
- a person with disability, for the purpose of defraying the costs of participating in an activity that is permitted or required by this Act.

.Provide Funds for the Disability Inclusion Advisory Council

Comment Amend the reasons for funding to enable DIAC to have operational and capital funding so it can do its work to a high standard and on time.

Section 61)3 should be further amended to provide for funding of the Disability Inclusion Advisory Council. See on page 23.

.Funding For Research

Comment Amend s61)3)d) to require that formal ethics approval is a condition of funding for research.

Part 11: Authorised Officers

Question: Do you think the role, functions and provisions made for Authorised Officers are clear?

.Ensure Authorised Officers Implement Inclusion Principles

Comment The permitted reasons for entry exclude all other reasons for entry to premises, including to ensure compliance with the rights and behaviours mandated in the Inclusion Principles. Add a 'safety net' provision to the permitted reasons in s63)2): 'd) ensuring compliance with the Inclusion Principles.'

The reasons for which Authorised Officers may enter premises are specified in s63)2). This section excludes all other reasons for entry by saying that entry "... may **only** be made..." for the purposes given in the section.

This excludes ironically, entry to uphold the long list of rights and inclusive behaviours mandated in the Inclusion Principles.

These mandatory rights and behaviours go well beyond the reasons for entry permitted in s63)2), which are to ensure;

- compliance with funding agreements;
- health, wellbeing and safety.

The rights of people with disability to health and safety are upheld by the permitted reasons and powers of entry. Likewise, a good balance seems to have been struck between these concerns and privacy.

However, other matters could only be addressed if they formed part of a funding agreement e.g.;

- rights, to decision making, choice and control, personal development, various supports, high quality in supports, pursuit of grievances, , ;
- implied behaviours, such as consulting people with disability, respect for families & carers, facilitating access to engagement in the community and to advocacy, respecting cultural and linguistic diversity, providing age & disability appropriate supports.

While it is likely that most modern funding agreements will specify these matters, it can not be taken for granted in all present agreements, or agreements made in a future policy climate. Nor is it reasonable to expect Authorised Officers to understand the nuances of various agreements.

It would be simpler and more effective to add to the permitted reasons for entry in s63)2);

d) ensuring compliance with the Inclusion Principles"

This amendment would have no material effect if the matters addressed by the Inclusion Principles were covered in a funding agreement, but it would provide a safety net to ensure they can not be overlooked.

Suitable policies and training materials would be required to help Authorised Officers operationalise the Inclusion Principles.

Part 12: Review of Decisions

Comment To my inexperienced eye, the reviewable decisions of the Senior Practitioner discussed here seem likely to enable those affected by them to protect their interests. If the section continues to only refer to decisions of the Senior Practitioner in the final version of the Bill, perhaps the title could be amended to say as much.

Part 13: Offences

Comment The offences in relation to requiring and sharing information seem well chosen to enable administration of the Bill to be effective.

Part 14: Miscellaneous

Comment No comment.

Unaddressed Questions & Concerns

As is obvious from this very long submission, there are many improvements that might be made to the Bill.

Many more questions and concerns remain unanswered in my mind. Each of them may hold the key to another improvement.

I submit this list of questions, edited from a list provided by Dr. Robin Banks. If a matter appears here, it is because I share that question or concern and have not been able to dedicate the effort to addressing it in another part of this submission.

1. Senior Practitioner is not required to report to the Commissioner (37) or consult with the Commissioner or the DIAC re restrictive practices, guidelines, etc (38, 39), should they be?
2. Restrictive practices regulations do not apply to actions under the mental health act (48(3))
3. Delegation by Senior Practitioner does not require expertise in the rights of people with disability, just knowledge and expertise in respect of people with disability
4. Restrictive practices: should require the proponent of a restrictive practice to detail what non-discriminatory, non-restrictive alternatives have been considered (45)
5. Reports on use of authorised restrictive practices appear to be an optional condition (46(2)). It should be a compulsory element.
6. Restrictive practices appear to be able to have rolling authorisations without any review (46). This should be an obligatory requirement as circumstances (including options) change over time
7. Behaviour support plan preparation obligations do not clearly specify whether those who have to be consulted include an obligation to consult with the person with disability or if they are one of a list of people who may be consulted (49(2)).

8. Provisions requiring the SP to give assistance to an entity where a restrictive practice is directed to discontinue, does this undermine the SP's independence. Would it be better to establish a specialist unit separate to the SP to provide such assistance.
9. Obligation to notify the person with disability of an authorised restrictive practice does not require the notification to be made in a form that is accessible to that person (s50(4)).
10. The authorised program officer is required to ensure that a person subject to restrictive practices has an 'independent person' ... (not defined, despite the definitions section having the term included, but referring back to section 59, which does not defined).
11. The Bill empowers the SP to appoint an independent person. This would have greater integrity and protective value if the appointment was by the Commissioner, and always subject to review by the Commissioner to ensure independence. There is no reference to the independent person being chosen by the person with disability.
12. Bill requires the independent person to explain the authorised restrictive practice (60(1)) and behaviour support plan (60(2)) to the person with disability. This is inappropriate as it will result in the PWD linking the practice to the independent person and undermine their trust. It would be appropriate for the independent person to be there when the restrictive practice, etc, is explained to ensure the person understands it.
13. There is internal review of SP decisions ... who is sufficiently independent (and empowered) to conduct such an internal review. Consider option of review by Commissioner or Tribunal.
14. Should there be a general provision that permits/requires the Commission, etc, to apply affirmative action principles to employment, etc, in the operation of the Bill
15. Any review process initiated by a person with disability or on their behalf should be free of fees, see eg 47(4)