

Our Ref:  
Reply to: Hobart Office

Project Manager – Disability Inclusion Legislation Project  
Community and Disability Services  
Community Partnerships and Priorities Division  
Department of Premier and Cabinet  
GPO Box 123  
Hobart TAS Australia 7001

Attention Maryanne Lewis  
By email to [disabilityinclusionbill@dpac.tas.gov.au](mailto:disabilityinclusionbill@dpac.tas.gov.au)

15 September 2023

Dear Ms Lewis

### *Tasmania Legal Aid Submission: Disability Inclusion Bill 2023*

TLA welcomes the opportunity to provide a submission to the Department of Premier and Cabinet on the draft *Disability Inclusion Bill 2023 (the Bill)* that if adopted will significantly improve the inclusion experience of people with disability who live in Tasmania.

TLA also welcomes all opportunities to participate in stakeholder consultations on this and any future proposals to implement recommendations.

#### **About Tasmania Legal Aid (TLA)**

We are an independent statutory body established to sustainably provide legal services in Tasmania in an effective, efficient and economical manner.

TLA is the largest State and Federal Government-funded legal assistance service in our state with a central role in providing access to justice for Tasmanian people with disability.

More than one in four Tasmanians live with disability and in the 2022-23 financial year 34% of our clients receiving a grant of aid self-identified as having a disability. We know that people with disability, their carers, families and supporters often experience a range of legal and social issues. They are overrepresented in the family violence, child protection and criminal justice systems. TLA is committed to improving access to justice for people with disability by providing high quality, trauma-informed legal services that meet the needs of our clients.

#### **HOBART**

158 Liverpool Street  
Hobart TAS 7000

#### **LAUNCESTON**

64 Cameron Street  
Launceston TAS 7250

#### **BURNIE**

50 Alexander Street  
Burnie TAS 7320

#### **DEVONPORT**

8 Griffith Street  
Devonport TAS 7310

TLA is the major provider of legal representation services for people appearing before the Mental Health and Guardianship Streams of the Tasmanian Civil and Administrative Tribunal (TASCAT). As part of a national legal aid network, TLA is funded by the Commonwealth Government to support people to appeal decisions of the National Disability Insurance Agency at the Administrative Appeals Tribunal. We also assist people with disability with their general legal matters through our Advice Line, civil lawyer and our Your Story Disability Legal Support program which was set up as a national service provided by all state and territory Legal Aid Commissions and Aboriginal Legal Services to provide support to people to safely engage with the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (DRC). Our Senior Assist team provides legal advice, assistance and support to seniors who are experiencing, or at risk of, elder abuse, many of whom have disabilities. Our criminal, family and Safe at Home programs also provide general legal advice, assistance and representation to people with disability on a wide range of issues.

Many of our clients have multiple layers of circumstances and experiences that impact their lives and give rise to legal issues. Common experiences that we see include trauma from racism, discrimination, neglect and abuse, experience of family violence, wellbeing and other social or economic stressors. Intersectionality, as recognised in the Bill, is therefore an important consideration when considering the legal needs of our clients with disability.

#### Case study

*Your Story supported a blind client with an intellectual disability to participate in proceedings in the Tasmanian Magistrates Court. He receives the Disability Support Pension and lives in a homeless shelter with a mobile telephone. The only way he can access information on his mobile telephone is through a software program which reads out his emails and their attachments. The information must be in Word document form to enable the program to scan and process it. The court could only provide documents in a PDF format which his program could not read. TLA was able to assist him to access and complete the court documents and apply for legal representation.*

This case study illustrates some of the issues to access justice equitably that are currently faced by people with disability engaging with the Tasmanian court system.

Our Vision in our Strategic Plan 2023-27 is that the Tasmanian community is safe, respected and has their voices heard. Our priority areas are People, Communication and Collaboration. Disability has been added as a focus theme in our new strategic plan alongside family violence, children and young people and wellbeing and resilience of our staff and clients.

Our service experience enables us to be a persuasive voice for legislative and social reforms that support improved outcomes for our clients and to work collaboratively to improve the legal system.

#### Aspects of the Bill that TLA supports

TLA supports many concepts proposed by the Bill and the focus on disability inclusion and promoting human rights. We strongly support and commend the proposal to bring the Tasmanian legislation and practice into line with aspects of the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) and Australia's Disability Strategy 2021–31 ("ADS"), including:

1. Recognition of the responsibility of the State to advance the human rights of people with disability.
2. Commitment to support and further the objectives and commitments of the UNCRPD and ADS in the Bill's operation, administration and enforcement.
3. Establishment of a framework for a whole of Tasmanian government approach to accountability and transparency in relation to disability inclusion.
4. Acknowledgement of supported decision-making.
5. Establishment of the office of the Disability Inclusion Commissioner ("**the Commissioner**"), the requirement for the Commissioner to have a disability, and the Disability Inclusion Advisory Council.
6. Establishment of a Tasmanian Disability Inclusion Plan.
7. Recognition of the complexities of intersectionality.
8. Enabling the provision of funding to support the implementation of the objects of the Bill.

## Our submission regarding the Bill

### General comments

#### 1. Timing and consultation

TLA did not provide a submission to the February 2023 consultation regarding the *Disability Services Act 2011* with a primary function of overseeing disability services provision, as it did not impact significantly on the provision of legal services and the types of legal issues that we assist with. However the Bill is relevant to the work that TLA does to promote the rights of people with disability and facilitate access to justice.

We note that the consultation to get to the draft bill stage may not have been provided by key groups that will be affected by the Bill including the Tasmanian Aboriginal community, culturally and linguistically diverse communities and some key peak bodies representing people living with mental illness, carers and older people with disability. We acknowledge this may have occurred in the course of this consultation about the Bill.

However, if these groups have not engaged in the process, then we consider that further consultation should be actively pursued with generous time frames to achieve robust, inclusive and diverse feedback prior to progressing the Bill. Community led understanding and engagement is essential to ensure the voices of the people most affected are heard and included. TLA recommends that more time is needed to achieve this before advancing the Bill further. We suggest the Tasmanian Aboriginal Centres across the State, Mental Health Council, Carers Tas, Council On The Ageing Tas, Dementia Australia and the Australian

Disability Network as important participants who would provide valuable input about their communities which would strengthen the Bill.

As the Disability Royal Commission (“DRC”) and NDIS Review reports are due to be released in September and October 2023 respectively, it is our view that the recommendations and the Federal Government’s response should be considered prior to progressing this legislation. It is likely that these reports will significantly impact on and provide essential information to shape state and territory responses and actions in relation to people with disability.

It is our recommendation that the progression of the Bill be delayed until after the DRC and NDIS review report outcomes and responses are known and included in it as well as wider consultation with essential community groups affected by the Bill is undertaken. If there is an urgency to update, for example, restrictive practices regulation, then this could be done by amending the existing legislation. We make some further comment about the inclusion of restrictive practice regulation in the Bill below.

## 2. Funding

TLA supports the reference in s.3(g) to enabling the provision of funding to support the Bill’s objects and grant of financial assistance provisions of s.61 to support the objects of the Act. We know from the implementation of the NDIS scheme, that costs associated with providing adequate support to enable inclusion are much more than was anticipated. It is noted that this only relates to the people who are accepted onto the NDIS and that the number of people with disability are significantly more than NDIS recipients.

It is crucial that compliance and initiatives under the Bill, if enacted, are adequately funded if there is to be meaningful change to inclusion for people with disability in Tasmania.

We anticipate that there will be significant financial and resourcing costs to comply with the requirements of the Bill including consulting with people with disability, preparing and implementing a disability inclusion action plan, publishing it in accessible formats, reporting on it, heeding the Commissioner’s guidelines, responding to requests for information or advice from the Disability Advisory Council and attending to subsequent updates. This needs to be adequately funded across all defined entities to support compliance but more importantly implementation of the initiatives/actions so that they are inclusive in practice.

It is essential that the offices created by the Bill are also adequately funded to operate and be effective including the Disability Inclusion Advisory Committee, the Commissioner and the Senior Practitioner.

### [Consultation Overview Paper discussion](#) [Part 1 Preliminary](#)

#### **Title of the Act**

The statement describing the purpose of the Bill after the Title refers to “...full and **effective** social and economic participation...”. We note that this does not align with reference in the

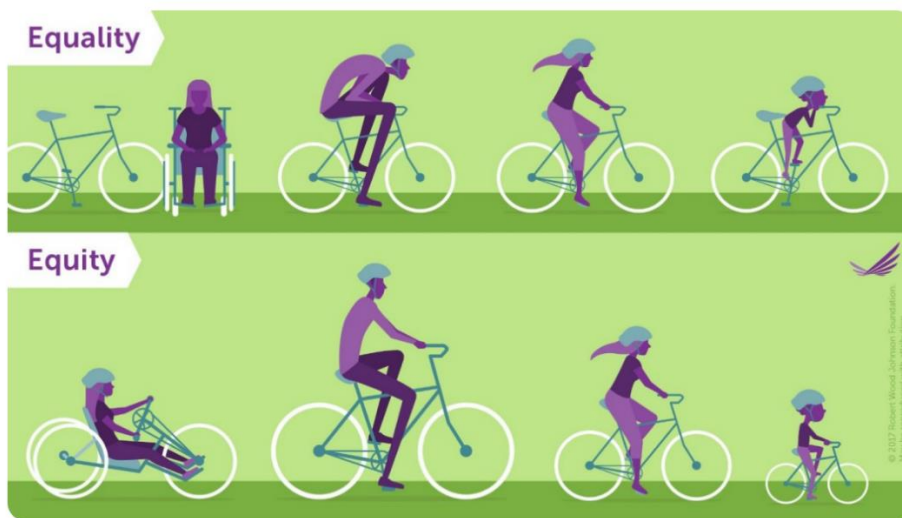
definition of “disability” at s.5 to “full and **equal** participation in society”. We consider that the same terminology should be used throughout the legislation to avoid ambiguity.

Reference to “equal” is made in the United Nations Convention on the Rights of Persons with Disabilities (“UNCRPD”) however we note there is information that supports a difference between equal/equality and fair/equity.

Equality is one of the central tenets of democracy, based on the belief that all people should have the same opportunities to be successful and lead a productive and enjoyable life<sup>1</sup> regardless of their status and position.<sup>2</sup> More recently, there has been discourse about whether equality is enough and whether equity is a more important principle.<sup>3</sup>

Equity recognises that not everyone begins in the same place in society. Some people face adverse conditions and circumstances, making it more challenging with the same effort to achieve the same goals. Equity advocates for those who may have been historically disadvantaged, making it difficult for them to achieve the same success as people who have not experienced the same disadvantage. What is ‘fair’ as it relates to equity is not a question of what is the same or equal but rather, the point from which a person begins. Equity takes into account historical and other individual factors in determining what is fair.<sup>4</sup>

The illustration below clarifies the difference between equality and equity.



Source: <https://www.rwjf.org/en/insights/blog/2022/11/we-used-your-insights-to-update-our-graphic-on-equity.html>

Submission points on the questions posed in the Consultation Overview Paper:

### 1. Do you agree with the proposed Objects of the Act? Are there any changes you would make?

<sup>1</sup> <https://risetowin.org/what-we-do/educate/resource-module/equality-vs-equity/>

<sup>2</sup> <https://risetowin.org/what-we-do/educate/resource-module/equality-vs-equity/>

<sup>3</sup> <https://risetowin.org/what-we-do/educate/resource-module/equality-vs-equity/>

<sup>4</sup> <https://risetowin.org/what-we-do/educate/resource-module/equality-vs-equity/>

TLA supports the overall sentiment of the proposed objects of the Bill and considers they are a useful starting point to promote the human rights of people with disability.

## Recommendations

### 1.1 TLA recommends that the statement of objects includes social and economic participation of people with disability and removes the reference to 'protect'.

Clause (c) of Article 3 of the UNCRPD provides the Convention principle that there be "full and effective participation and inclusion in society". TLA considers the Bill should enshrine a positive commitment to meet this obligation as the current reference to 'inclusion' leaves it open to ambiguity as to what people with disability are to be included in.

We also consider that the language of 'protect the rights' is paternalistic and not relevant to many people who have a disability. A more empowering concept is promotion of rights. We note that the UNCRPD uses the term 'protect' but it dates back to 2008 and we support progressive drafting.

TLA suggests the overarching objects statement in s.3 be reworded as follows:

*"The objects of this Act are to advance and promote the rights of people with disability and to advance their full and effective social and economic participation and inclusion in society, including by-*"

As noted on page 4 above, there is an inconsistency in language between the explanatory statement of the Title and initial sentence of s.3 of the Bill of the words 'equal' and 'effective'. If 'equal' is settled on, it needs to be defined.

### 1.2 s.3(a) reference to community responsibility

It is ambiguous to refer to 'community responsibility' when the Bill is about obligations on government agencies as 'defined entities' and 'disability services providers' receiving funding to provide services under the NDIS (see also our discussion at 1.5 below). We suggest reference to 'the community' should be removed from s.3(a) or further clarified.

### 1.3 s.3(b)(i) supporting and furthering the purpose and principles of the UNCRPD

Clauses 1(a) & (b) of Article 4 of the UNCRPD requires States Parties to:

- (a) adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognised in the present Convention;

- (b) take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities.

TLA supports object 3(b)(i) of the Bill but considers it should go further to include a positive commitment to *effect* (or words to that effect) the obligations in clause 1(a) and particularly clause 1(b) of Article 4 of the UNCRPD as opposed to merely *supporting or furthering* them as currently referred to in the Bill.

#### **1.4 s.3(c) establishing a framework for a whole-of-government approach to accountability and transparency in relation to disability inclusion**

TLA welcomes the establishment of a disability inclusion framework but contends there must also be a compliance framework to effect meaningful change. The UNCRPD concept of ‘universal design’ which is defined in the Bill and essential to inclusion, should also be noted to ensure consistency and accountability of government actions under the Bill.

TLA proposes that Clause 3(c) be reworded as:

*“establishing, promoting and providing a compliance framework for a whole-of-government approach to accountability, transparency and universal design in relation to disability inclusion”*

#### **1.5 s.3(d) regulating the use of restrictive practices by disability services providers**

TLA considers that the restrictive practices regulation, particularly given the limitation to disability service providers under the NDIS and as funded under the Bill, should sit outside of the Bill in stand-alone legislation. We consider the Bill should focus solely on whole-of-government to be leaders in the community to promote rights of people with disability, as well as their inclusion and effective participation in society.

TLA notes that the regulation of the use of restrictive practices proposed is limited to disability services providers as defined in s7 of the Bill as providing services under the NDIS or as funded by the Bill. This does not in our view go far enough to regulate restrictive practices used by informal carers and family members who provide support and care to people living in Tasmania who have a disability. Currently any informal carer, including a lay guardian or person responsible, can consent – without seeking authorisation and without independent oversight - to restrictive practices for a person who lacks decision-making ability to consent themselves. This creates a high-risk situation of potentially inappropriate restrictive practices being imposed on some people with disability, which is inequitable and unacceptable. People with disability in situations of family and domestic violence are at particular risk if only disability service providers are subject to careful oversight. We also note that restrictive practices are also overseen under other legislation such as the *Mental Health Act 2013*, potentially creating different levels of authorisation and oversight.

We support the feedback on page 39 of the Review of the Disability Services Act Consultation Outcomes Report:

"... in the long term, there appear to be strong reasons to align community visiting of people with disability within a broader adult-protection paradigm encompassing safeguarding in mental health institutions and other facilities".

We consider that it would be appropriate to ensure that there is consistency of regulation across all restrictive practices with a safeguarding body to oversee and intervene where the regulations are breached. The current limited regulation in the Bill creates a multi-tiered system ranging from high-level oversight to no oversight of restrictive practices, depending on a person's individual circumstances, which may be outside their control. This causes obvious inequity which jars with the inclusive participation objectives of the Bill.

## 2. What do you think about the definitions included in the Act? Do any definitions need to be added, changed or removed?

### Recommendations

#### 2.1 Definition of Disability

TLA questions the rationale for defining disability at s.5 of the Bill noting that it does not align with current discourse around the social model of disability.

It is unclear what the purpose is of having a definition in the Bill and how presence or absence of disability as defined will be proven or administered for the purposes of the Bill's inclusion commitments. For example, it is not specified in the Bill whether people will self-identify as having a disability and or a clinical diagnosis will be required.

We provide the following information obtained from NSW Legal Aid regarding defining disability:

##### 2.1.1 the UNCRPD does not contain a definition of disability but provides that:

"Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others."

##### 2.1.2 *Disability Discrimination Act* 1992 - Federal

The *Disability Discrimination Act* (s.4) has a much more comprehensive and broad definition of disability than the Bill that includes behavior that is a symptom or manifestation of a disability. It states that:

"*disability*, in relation to a person, means:



- (a) total or partial loss of the person's bodily or mental functions; or
- (b) total or partial loss of a part of the body; or
- (c) the presence in the body of organisms causing disease or illness; or
- (d) the presence in the body of organisms capable of causing disease or illness; or
- (e) the malfunction, malformation or disfigurement of a part of the person's body; or
- (f) a disorder or malfunction that results in the person learning differently from a person without the disorder or malfunction; or
- (g) a disorder, illness or disease that affects a person's thought processes, perception of reality, emotions or judgment or that results in disturbed behavior;

and includes a disability that:

- (h) presently exists; or
- (i) previously existed but no longer exists; or(j) may exist in the future (including because of a genetic predisposition to that disability); or
- (k) is imputed to a person.

To avoid doubt, a **disability** that is otherwise covered by this definition includes behavior that is a symptom or manifestation of the disability”.

### 2.1.3 Social model of disability

By contrast, the social model of disability, based on the UNCRPD concept, does not provide a definition of disability but instead provides a framework within which to understand disability.

People with Disability Australia explains the social model of disability<sup>5</sup> as:

“According to the social model, ‘disability’ is socially constructed. The social model of disability contrasts with what is called the medical model of disability.

According to the medical model, ‘disability’ is a health condition dealt with by medical professionals. People with disability are thought to be different to ‘what is normal’ or abnormal. ‘Disability’ is seen ‘to be a problem of the individual.

From the medical model, a person with disability is in need of being fixed or cured. From this point of view, disability is a tragedy and people with disability are to be pitied. The medical model of disability is all about what a person cannot do and cannot be.

The social model sees ‘disability’ is the result of the interaction between people living with impairments and an environment filled with physical, attitudinal, communication and social barriers. It therefore carries the implication that the physical, attitudinal,

---

<sup>5</sup> <https://pwd.org.au/resources/models-of-disability/>

communication and social environment must change to enable people living with impairments to participate in society on an equal basis with others.

A social model perspective does not deny the reality of impairment nor its impact on the individual. However, it does challenge the physical, attitudinal, communication and social environment to accommodate impairment as an expected incident of human diversity.”

2.1.4 The Australian Public Service Commission<sup>6</sup> uses a definition of ‘disability’ for employment-related purposes (other than discrimination) based on the Australian Bureau of Statistics’ Survey of Disability, Ageing and Carers:

“A person is considered to have a disability if they have a limitation, restriction or impairment, which has lasted, or is likely to last, for at least six months and restricts everyday activities (including episodic conditions if they are likely to recur).

This includes:

#### Sensory

- loss of sight (not corrected by glasses or contact lenses)
- loss of hearing where communication is restricted, or an aid to assist with, or substitute for, hearing is used
- speech difficulties.

#### Intellectual

- difficulty learning or understanding things.

#### Physical

- shortness of breath or breathing difficulties that restrict everyday activities
- blackouts, seizures or loss of consciousness
- chronic or recurrent pain or discomfort that restricts everyday activities
- incomplete use of arms or fingers
- difficulty gripping or holding things
- incomplete use of feet or legs
- restriction in physical activities or in doing physical work
- disfigurement or deformity.

#### Psychosocial

- nervous or emotional condition that restricts everyday activities
- mental illness or condition requiring help or supervision
- memory problems or periods of confusion that restrict everyday activities
- social or behavioural difficulties that restrict everyday activities.

---

<sup>6</sup> [Definition of disability | Australian Public Service Commission \(apsc.gov.au\)](https://www.apsc.gov.au/definition-of-disability)

Head injury, stroke or acquired brain injury

- head injury, stroke or other acquired brain injury, with long-term effects that restrict everyday activities.

Other

- receiving treatment or medication for any other long-term conditions or ailments and still restricted in everyday activities
- any other long-term conditions resulting in a restriction in everyday activities”.

2.1.5 The Attorney General’s Department has a Public Sector Guidance resource on the Rights of people with disability.<sup>7</sup>

It does not define disability comprehensively but refers to the UNCRPD concept and the definition within the Disability Discrimination Act (see paragraphs 2.1.1 and 2.1.2 above).

2.1.6 Australian Network on Disability’s Suzanne Colbert AM advised Your Story:

“not to define disability but to refer to the social model and UNCRPD (as per the above) and provide guidance around asking about disability related information in the following terms:

Does your disability impact:

Your hearing? Y/N

Your sight? Y/N

The way you remember and understand complex information? Y/N

The need for assistance with important decisions? Y/N

How you move around the environment? Y/N

Your response to busy, noisy and/or bright environments? Y/N

In another way that needs support Y/N

What is the support that you need (open question)”

The national Your Story Disability Legal Support team has provided advice to TLA that:

- Any definition of disability should be developed from an understanding of the social model of disability, and not reflect a medical definition only.
- If a definition of disability is to be developed or used, it should be a broad and inclusive definition.
- People with disability should not be required to prove their disability, and care should be taken to ensure that the adoption of a definition does not result in this approach.
- In a service delivery context, a definition should reflect a focus on what supports may be required by the individual so they can access a service rather than on an individual’s ‘deficits’.

---

<sup>7</sup> [Rights of people with disability | Attorney-General's Department \(ag.gov.au\)](https://www.ag.gov.au/Attorney-General/Disability)

If a definition is considered essential and retained in the Bill, we support the broadest definition possible, and one which includes 'psychosocial' disability. It is a temporary or episodic disability which is not necessarily lifelong as people can recover with the appropriate treatment. Psychosocial disability involves actual or perceived impairment due to a diversity of mental, emotional or cognitive experiences. Examples include anxiety and depression. The current definition in the Bill does not make it clear that this disability is included. We also note that Tasmania's WHS legislation was amended from January 2023 to include psychosocial risk of harm as requiring employers and employees to identify, mitigate against and respond to it in order to comply.

If a definition of disability is retained, we consider that there should be clarification whether or not a medical diagnosis is required.

2.2 We also consider that 'equal' needs to be defined taking into account the difference between equality and equity discussed at pages 4 and 5 above.

2.3 As s.12(4)(e) refers to 'any prescribed matters' without any further reference to what or where these are prescribed, we consider that this should be a defined term or further clarified elsewhere.

### Inclusion principles

**3. Are these the right principles to advance the human rights of people with disability and the full and effective inclusion of people with disability in Tasmania?**

#### **3.1 Principle in s.8(1)(h), (i), (j) and (2)(a)–decision making and supports**

The current drafting in the Bill provides that "people with disability have the same right as other members of Australian society to be able to make their own decisions, including the right to exercise choice and control, and to engage as equal partners in decisions that will affect their lives, to the full extent of their capacity;"

TLA considers that principle as drafted does not go far enough and should state that adults with disability are taken to have the ability to make their own decisions (as provided for in Article 5 of the UNCPRD) and have equal recognition before the law (provided for in Article 12 of the UNCPRD). A positive statement of the presumption of decision-making ability is in the *Guardianship and Administration Amendment Bill 2023 ("GAAB")* currently before Parliament s.11 and at s.8(1)(a) - it is a principle that a person's decision-making ability is to be respected and promoted.

The presumption of autonomy for people with a disability to make their own decisions is in our view undermined by the phrase in principle 8(1)(h) 'engage as equal partners in decisions that will affect their lives...' as they should mostly be in full control.

We consider that principle 8(1)(h) should be amended to:

“people with disability have the same right as other members of Australian society to make their own decisions, including the right to exercise choice and control in decisions that affect their lives and have equal recognition before the law...”.

We note that in the GAAB, the term decision-making ‘ability’ is used rather than ‘capacity’ and also that where a person can make decisions with supports, they are considered to have decision-making ability. This is a contemporary human rights-based concept, that substituted-decision making, must only occur as an absolute last resort. As supported decision-making is the same as the person making their own decisions, the current wording of principle 8(1)(j) which talks about requiring access to support to enable a person to “participate in decisions”, “expressing will and preference” and “develop decision-making ability” will not align with decision-making ability in the GAAB if it is passed by Parliament.

The Bill must make it clear that supported decision-making does more than enable a person with disability to *participate in decisions* as the person will be making their own decisions and has ‘decision-making ability’.

TLA also considers that funding of significant training and support resources will be required, if the GAAB becomes law to ensure that supported decision-making is implemented and embedded effectively and equitably within the Tasmanian community and by all service providers engaging with people with disability.

We are also concerned about people who do not have existing networks of supporters who can assist them with supported decision-making. People who do not have existing networks to support them or whose support people may be abusive or controlling, will need access to government-funded services for effective and inclusive decision-making to occur for all people with disability. The demand for this is currently unknown but many of the people TLA assists are considered to be likely to require funded services to support them with decision-making. It is unclear from the discussion paper whether or not this resourcing has been considered.

### **3.2 Principle in s.8(1)(n) disability advocacy includes access to legal services**

TLA considers that the principle regarding ‘disability advocacy’ ought be expanded to clarify that this includes access to legal advocacy, as well as non-legal advocacy.

We consider that it is important to clearly define and distinguish legal advice and representation from non-legal advocacy as they are very different, although equally valuable, levels of support.

Advocacy services from a lawyer involve the provision of legal services such as legal advice and representation. Only qualified lawyers are permitted to engage in, and provide, legal services and it is an offence for anyone else to do so.

Legal service providers are overseen by the Legal Profession Board of Tasmania and bound by strict professional and ethical rules. A lawyer has strict legal duties of

confidentiality and also must provide sound legal advice with recourse, where duties are breached: clients may take a matter to the Legal Profession Board, and if a complaint is upheld can be given financial compensation. The lawyer may be fined, have restrictions imposed on their practising certificate, and may be suspended or prevented from practising in future. Lawyers are required to have ongoing professional development, including a component of ethics training

Lawyers provide legal information and advice, letting people know of the legitimate options they have to achieve the outcomes they seek, and helping people to navigate systems. Lawyers can represent a person in courts and tribunals and make legal submissions on behalf of a client and non-legal advocates assist a person to outline their will and preferences. Lawyers have a paramount duty to the court and the administration of justice requiring us to exercise independent forensic judgement about the merits of a person's case.

We consider it is important to account for both legal and non-legal advocacy to be provided for in the Bill to ensure people with disability have a choice to take legal action and pursue just outcomes equitably.

TLA recommends that another principle should be added to ensure that legal services are available to people with disability:

*"access to disability-related legal advice, assistance and representation plays an essential role in fostering the full and equal enjoyment of human rights, enabling community participation and the inclusion of people with disability by ensuring that their rights are maintained, promoted and valued".*

3.3 We consider that the Bill should include a principle about right to information about decisions and the right to question decisions such as:

*"People with disability have the same right as other members of Australian society to know and question decisions made for them, particularly where not in accordance with their choices or relating to their safety, as do family members, carers and other significant persons in the lives of people with disability, where appropriate and in accordance with safety, privacy and dignity."*

3.4 We note that "accessible format" is a term used throughout the Bill, but is not defined. We recommend it is defined for clarity.

## **Part 2 Disability Inclusion Planning**

**5. Do you agree with the provisions outlined in the Bill regarding Disability Inclusion Planning? Is there anything else that should be considered?**

5.1 TLA considers that the proposed Tasmanian Disability Inclusion Plan should specifically include promotion of *universal design* as defined in the Bill. We are concerned by the current drafting of advancing the objects of the Bill. Although, s.3(b)(i) proposes

'supporting and furthering' the UNCRPD purpose and principles that includes universal design, we do not consider that this is strong enough to mandate this essential concept.

5.2 TLA also considers it essential that the proposed Tasmanian Disability Inclusion Plan considers the intersectionality of issues for many people with disability which result in multiple layers of discrimination and hardship.

5.3 TLA believes that the Tasmanian Disability Inclusion Plan, Progress Report and Disability Action Evaluation Report should be widely available for access. Sections 9(4), 11(3) and 16(2) of the Bill currently propose that a copy be published:

*(a) on a website operated by, or on behalf of, the Department as soon as reasonably practicable after it is prepared; and*

*(b) in at least one accessible format.*

5.4 It is unclear which Department is intended and whether all other Departmental websites will be linked to it. On the face of it, the Tasmanian Disability Inclusion Plan etc. could just be listed on one Government website without any promotion or link to other Government websites. Further, the reference to 'at least one accessible format' is vague and does not set the bar at a reasonable level. People with disability have many ways in which they find online information inaccessible.

### **Recommendations**

5.5 TLA proposes that s. 9(2)(a) be worded as follows:

*"set out whole-of-government policies and measures for achieving the objects of this Act, advancing the inclusion principles and promoting universal design; and"*

5.6 TLA proposes that s. 9(3)(a) be worded as follows:

*"must have regard to the objects of this Act, the inclusion principles and the promotion of universal design; and"*

5.7 TLA proposes that s. 9(3)(b) be worded as follows:

*"must consider the varied needs, experiences and intersectionality of people with disability and the strategies that may be required in response to those needs and experiences; and"*

5.8 TLA proposes that s. 9(4) of the Bill specify the relevant Department and 'at least one accessible format' be clarified and expanded further to provide transparency and inclusion (also applies to s.16(2)).

5.9 TLA proposes that sections 11(3)(a) and (b) of the Bill be amended to make clear which Department is responsible and a minimum requirement for other Departmental website to be linked to it.

5.10 TLA proposes that a section 12(4)(f) be added as follows:

*"the principles of universal design".*

5.11 TLA proposes that in s16(2) 'at least one accessible format' be expanded to enable reasonable access and promote transparency.

**6. Will these requirements contribute to the advancement of human rights and inclusion?**

6.1 We consider that the requirements certainly support the advancement of human rights and inclusion for people with disability, however we also support that this would be best achieved by adopting a state or federal Charter of Human Rights.

### **Part 3 Disability Inclusion Advisory Council**

**7. Are there any changes you would make to the proposed functions or the structure of the Disability Inclusion Advisory Council?**

7.1 TLA supports the proposal to have a specialist advisory group but considers that there needs to be a clear position in the discussion paper about whether the Disability Inclusion Advisory Council ("**Council**") will replace the current ministerial and community advisory groups or not. It also does not specify whether these are paid positions and TLA supports them being so if the member is attending and carrying out the functions other than in the course of their employment.

7.2 We welcome the requirement for the chairperson and a majority of members to be people with disability.

7.3 Please note our comments at pages 13 and 14 about distinguishing legal and non-legal advocacy in relation to s.19(4)(c).

7.4 We are concerned that the functions of the Council are extremely onerous and may not be achievable. For example s.20(1)(a) refers to a "communicating effectively with people with disability" but does not state what else they are to communicate about, apart from consulting to inform the development of the Tasmanian Disability Inclusion Plan. We suggest that consideration be given to clarifying this function further and aligning it with relevant aspects of the Bill.

7.5 As well, s.20(1)(b) requires the Council to raise awareness of the rights and contributions of people with disability but does not specify in what context or how they are to do so.

7.6 We also note there is no measurement framework proposed to evaluate the achievement and effectiveness of the Council's functions.

7.7 Further it is a clear conflict of interest that the Council must provide an annual report on its performance and functions to the Commissioner under s.22, but at s.20(1)(f) it is also



tasked with providing information and advice to the Commissioner relevant to the Commissioner's functions under the Act or any other Act. Further consideration is needed regarding whom the Council ought be advising and to whom it ought to report.

7.8 TLA notes that considerable funding of the Council will be necessary to carry out the functions that are currently included in the Bill.

#### **Part 4 Disability Inclusion Commissioner**

#### **8. What do you think about the proposed functions and powers of the Disability Inclusion Commissioner? Is there anything you would change or add?**

8.1 TLA considers that s.24(d) requires more detail on what "promoting, monitoring and reviewing the wellbeing of people with disability" includes and means. For example, it is unclear whether it will involve only systemic issues, only issues involving government agencies or extend to private individual matters. It is unclear what monitoring or reviewing functions the Commissioner will have.

8.2 We consider that the functions of s.24(h) ought to be about providing recommendations and advice to the Minister, rather than the Commissioner being tasked to 'establish and monitor safeguarding mechanisms that address violence against, and the abuse, neglect and exploitation of, people with disability.' To require the Commissioner to establish and monitor safeguarding mechanisms is a huge task that require resources and powers in excess of what is proposed. If this is what is intended, the Bill needs to include a lot more detail about what this will involve, timeframes etc. For example, it is unclear what interaction or role the Commissioner would have with the Safe at Home whole of government response to family violence. We note the setting up of the Council has more detail than this onerous function does. We also consider that this function is inextricably linked to the DRC's report of findings and recommendations and should not proceed as drafted until the report is released and the Federal Government has indicated its plan to respond (see also page 4 above).

8.3 We are concerned that the functions of s.24(j) are insufficient to promote the rights of people with disability to be free from violence, abuse, neglect and exploitation. "Investigations" is not defined, does not go far enough and is very different from intervention in situations where a person with disability consents from where the person lacks ability to consent. The powers of police will be limited to intervening where there is a criminal offence, and the only other option is to apply to TASCAT for guardianship or administration orders, which may not always be appropriate depending on the circumstances.

8.4 The benefits of having a person able to investigate, pursue through other complaints processes where appropriate, or take action and impose penalties themselves is significant, but may require an Ombudsman or Legal Profession Board-like organisation to support the function.

- 8.5 The funding for the Commissioner will need to be considerable to be adequate to carry out the functions that are currently included in the Bill or expanded as recommended by TLA.
- 8.6 It is unclear as to whom the Commissioner is to report under s.24(k).
- 8.7 Section 24(l) requires the Commissioner to consult with the Council about violence, abuse, neglect and exploitation but provides no detail about the purpose or outcome of this. The phrasing is inconsistent with s.20(f) that provides for the Council to provide information and advice to the Commissioner rather than for the Commissioner consult with them.
- 8.8 The limitations on the information compelling provisions of s.24(2) make the powers of the Commissioner potentially ineffective. We consider the protection from incrimination should also attach an expectation that the person obtains legal advice.
- 8.9 In our experience, although there are penalty provisions in, for example, the Mental Health Act 2013 for failing to comply, we are unaware of any offences being prosecuted under that Act which may mean there are no consequences where breaches of human rights promoted under the legislation are not upheld.
- 8.10 A person complying with the requirement of the Commissioner should also have protection from retribution actions from their employer under s.26(3) which is different from the disciplinary action provided for in s.33(2).
- 8.11 TLA proposes that in s.29(3) 'at least one accessible format' be clarified further to provide transparency.
- 8.12 We draw your attention to unforeseen consequences of the acronym for the Disability Inclusion Commissioner and suggest that this name be changed.
- 8.13 There is a requirement in s.52 for the Commissioner to refer reports to police or the Director of Public Prosecutions where they are of the opinion that a report, or part of a report, may provide evidence of the commission of a criminal offence s. 34. We consider this is currently too broad as technically would include many minor offences including begging, speeding, committing a nuisance etc. and would include offences committed by a person with disability. There needs to be limits on what is to be reported and in our view at least should involve a connection with violence, abuse, neglect or exploitation of a person with disability.
- 9. Is there anything else which needs to be added so that the Commissioner can work effectively with other safeguarding mechanisms?**
- 9.1 We recommend that the Commissioner's powers be extended to cover intervention powers.

9.2 That if the Commissioner's powers and resources are not expanded, that a safeguarding body be formed to investigate, make findings and penalize failures to comply with the requirements of the Act which fall short of criminal prosecution.

### Part 5 Disability Services Standards

**10. Is it important for this Act to continue to include a requirement for all providers to follow the National Standards for Disability Services?**

TLA agrees it is important for all disability service providers to follow minimum National Standards, but considers this should sit separately with standalone restrictive practices legislation.

### Part 6 Senior Practitioner

**12. Do you think the functions and powers provided in the Bill for the Senior Practitioner improve safeguards for people with disability?**

12.1 We consider that the Senior Practitioner improves safeguards for people with disability but as their powers are limited only to NDIS service providers we consider their function should sit separately with standalone restrictive practices legislation.

12.2 Section 43(2)(a) contains a double negative of 'must not fail to provide reasonable assistance'. For clarity, TLA proposes that s43(2)(a) be reworded to:

*"must provide reasonable assistance when required to do so under subsection (1); and"*

### Part 7 Regulation of restrictive practices

**14. Will the authorisation of restrictive practices process provided for in the Bill contribute to improved safeguarding for people with disability? If not, please expand on your answer?**

As mentioned at pages 7 and 8 above, we consider that all restrictive practices should require authorisation, and that requirement should not be limited to NDIS service providers, and those receiving funding under the Bill. Compliance needs to be enforceable with adequate penalties for non-compliance, regardless of the circumstances. We also consider that this regulatory function, the role of the Senior Practitioner and a safeguarding unit should sit outside of the Bill in separate legislation, preferably simultaneously, leaving this Bill to focus on concepts of promoting human rights and inclusion only.

15. Does aligning the definitions of restrictive practices with the NDIS Quality and Safeguards Commission Behaviour Support and Restrictive Practice Rules 2018 provide better protections and safeguards for people with disability?

TLA considers that aligning the definition of restrictive practices with the 2018 NDIS rules provides better protection and safeguards for people with disability than is currently the case in the Disability Services legislation. However, as mentioned in paragraph 14 above, limiting the obligation to only NDIS service providers and those funded under the Bill, is too narrow and does not go far enough. Although we recognise that oversight is more complex, we consider that it is necessary to ensure that all people with disability have the same rights in relation to restrictive practices which the Bill in its current form does not achieve.

### **Part 10 Funding**

19. Does this Part provide for the Minister for Disability Services to fund activities in relation to the objects of this Act? Is anything more required in relation to funding?

### **Recommendations**

1. TLA supports permanent funding of a specialist disability legal service such as TLA's Your Story, which is part of a national program that is currently funded to 30 March 2024.

It is likely that the DRC will make recommendations about improving access to justice for people with disability in response to this overrepresentation and priority access to justice issues identified in their interim report, including a recommendation for a specialist disability legal service.

Your Story staff have specialist expertise in working with people with disability, including lived experience of disability and has a national infrastructure across the 8 Legal Aid Commissions to meet the communication and other specialist needs of people with disability including caseworker support for clients, a call centre and an accessible website, as well as central coordination. Your Story enhances access to justice for people with disability, noting the discussion on pages 13 and 14 above regarding the need to specify advocacy includes both legal and non-legal services.

People with disability, their carers, families and supporters often experience a range of related legal and social problems connected with their disability and in our experience are overrepresented in family violence, child protection and criminal justice systems. People with disability, their carers, families and supporters benefit from specialist legal services that are delivered with expert knowledge of disability as well as expertise in facilitating access, communication and referral needs of clients.

TLA welcomes the opportunity to comment on the Bill and further consultations about amendments or implementation.

Yours sincerely

A handwritten signature in black ink, appearing to read 'KW', with a long horizontal flourish extending to the right.

**KRISTEN WYLIE**  
**DIRECTOR**

18 September 2023