



Tasmanian Council of Social Service Inc.

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# Disability Services Act Review

*December 2021*



**INTEGRITY  
COMPASSION  
INFLUENCE**

## About TasCOSS

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TasCOSS's vision is for one Tasmania, free of poverty and inequality where everyone has the same opportunity. Our mission is two-fold: to act as the peak body for the community services industry in Tasmania; and to challenge and change the systems, attitudes and behaviours that create poverty, inequality and exclusion.

Our membership includes individuals and organisations active in the provision of community services to Tasmanians on low incomes or living in vulnerable circumstances. TasCOSS represents the interests of our members and their service users to government, regulators, the media and the public. Through our advocacy and policy development, we draw attention to the causes of poverty and disadvantage, and promote the adoption of effective solutions to address these issues.

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This submission is endorsed by Disability Voices Tasmania.



## Introduction

Thank you for the opportunity to make a submission to the review of the *Disability Services Act 2011* ('the Act'). TasCOSS supports meaningful law reform to ensure the rights of community members with a disability are supported, promoted and protected. This submission is endorsed by Disability Voices Tasmania.

## Background

Any review of existing legislation and service provision must first take into consideration the reality of living with a disability in Tasmania. Our state has the highest rate of disability in Australia: data from 2018 indicates that 24,500 Tasmanians (or 5.8 % of the state's population) had a profound or severe core activity limitation, with a further 31,100 people (or 13.2% of the population) experiencing moderate or mild limitations.<sup>1</sup> People with disability continue to experience structural disadvantages which impact their ability to participate meaningfully in everyday life. For example, Tasmanians with a disability struggle to find work – only 40% of Tasmanians with a disability were employed in 2018, which is lower than the national average of 47.8%.<sup>2</sup> Of the group of employed Tasmanians with a disability, 11.9% were underemployed in 2018, compared to 9.9% of Tasmanians without a disability or the 9.0% of the general Australian population.<sup>3</sup>

These statistics show the existing disadvantage faced by Tasmanians with a disability, as well as the need for legislation which safeguards rights and promotes inclusion. The statistics also show the need for comprehensive community and Government supports in the area of disability services, to improve access and outcomes for Tasmanians with a disability.

The review of the Act provides an opportunity to ensure our legislation is consistent with our international obligations, the National Disability Strategy and the Tasmanian Disability Framework. The Act includes provisions which are related to several rights enshrined in international law and contained in the Convention on the Rights of Persons with Disabilities, including:

- Article 16: Freedom from exploitation, violence and abuse;
- Article 17: Protecting the integrity of the person;
- Article 25: Health; and
- Article 28: Adequate standard of living and social protection.

Recent Australian Government consultations and reports have highlighted the need to implement policies to uphold these rights,<sup>4</sup> as well as making targeted and coordinated changes to service implementation and delivery to better support the needs of people with disability in our communities.

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<sup>1</sup> Productivity Commission, *Report on Government Services* (2020), Part F, Section 15, Table 15A.9.

<sup>2</sup> Productivity Commission, *Report on Government Services* (2020), Part F, Section 15, Table 15A.69

<sup>3</sup> Productivity Commission, *Report on Government Services* (2020), Part F, Section 15, Table 15A.67; Australian Bureau of Statistics, *Labour Force Australia*, (Catalogue 6202.0, August 2020), Table 23: Underutilised persons by state, territory and sex (TasCOSS calculation).

<sup>4</sup> See, for example, Commonwealth of Australia, *Shut Out: The Experience of People with Disabilities and their Families in Australia - National Disability Strategy Consultation Report* (2009).

A review of the Act is an opportunity to better align our state legislation with federal government objectives. Following extensive consultation with individuals, families and organisations throughout Australia, the National Disability Strategy identified six key areas of policy action:<sup>5</sup>

- inclusive and accessible communities
- rights protection, justice and legislation
- economic security
- personal and community support
- learning and skills
- health and wellbeing.

These six priority areas are mirrored in our state frameworks for action.<sup>6</sup> Amending and strengthening our Tasmanian legislation is an opportunity to take stronger action in several of these. For example, establishing bodies which engage in independent review of disability services (such as the Disability Commissioner) is an opportunity to strengthen the rights of Tasmanians with a disability, as well as providing safeguards which enhance support and promote wellbeing. Both the national and the state frameworks have an emphasis on a rights-based, social models of disability, which also assumes a high level of understanding, awareness and support of the particular needs of people with disability. The review of the legislation is therefore an opportunity to reflect on how these needs and rights may be further protected and promoted by our laws.

Our submission will focus on the following key areas identified as priorities for reform:

- The need for a Disability Commissioner and the proposed scope and functions of this role
- The need for a Disability Advisory Council
- Supported decision making
- Human rights principles
- Interaction between the Act and the NDIS
- Legislative provisions establishing an official community visitors scheme
- The need for ongoing funding and support for community service providers and projects

### **Disability Commissioner**

TasCOSS welcomes the Tasmanian Government's funding commitment for a Disability Services Commissioner and we support the introduction of a Disability Commissioner model into the legislative framework of the Act. The introduction of this model will make Tasmania consistent with other jurisdictions, such as Victoria and NSW, who have already implemented this model in their legislation. We also believe the existence of a Tasmanian Commissioner will improve transparency, assist with implementing best-practice standards within disability services, and generally promote the rights of Tasmanians with a disability. We have concerns, however, about whether the funding commitment of \$1.2m over four years is adequate to perform the functions we and the sector believe is necessary for the role to be effective.

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<sup>5</sup> Commonwealth of Australia, *2010–2020 National Disability Strategy* (2011), 10.

<sup>6</sup> Communities, Sport and Recreation - Department of Premier and Cabinet, *Accessible Island: Tasmania's Disability Framework for Action 2018 – 2021*, 7.

The Victorian legislation outlines the broad scope and function of the Commissioner's work and duties.<sup>7</sup> The scope of their role includes the following:

- Investigating complaints relating to disability services and regulated disability services, including the review of complaints to identify and potentially address causes;
- Reviewing and identifying causes of abuse and neglect in the provision of disability services;
- Providing advice, inquiring into or investigating matters, including conducting own motion investigations into the provision of services to persons with a disability;
- Facilitating conciliation between a person who has made a complaint and a provider;
- Keeping records of complaints and investigations;
- Considering ways of improving disability services complaints systems or complaints systems;
- Providing education and information about various issues relating to the rights of persons with a disability, as well as conducting research into issues such as abuse and neglect within disability services

One of the key roles of the Disability Commissioner in other jurisdictions is to provide a clear avenue for people with disabilities, their families and their carers to raise concerns with or complaints about government service providers. Even after the transition to the NDIS, where many disability services are now provided by external agencies or organisations, the key function of interstate Disability Commissioners remains complaint handling and resolution. For example, the Disability Services Commissioner of Victoria in 2019-2020 received a total of 750 enquiries and 118 complaints,<sup>8</sup> and in 2020-2021 they received 553 new enquiries,<sup>9</sup> and 103 new complaints.<sup>10</sup> Even in cases where the complaints raised were outside scope (for example, as they related to an NDIS funded service/agency), the Commissioner was able to intervene to confirm which organisation is best placed to assist and deal with a referral to a more appropriate service.<sup>11</sup> We believe the existence of a centralised and disability-specific body to handle complaints would assist with accessibility and provide greater support for Tasmanians with a disability, as well as their carers, to get the information and assistance they need.

Both the Victorian and NSW Commission have functions to engage not only with service providers, but also with the wider community to increase awareness of issues impacting persons with a disability, as well as providing education and training. This work is extremely important not only for Tasmanians with a disability, but also to ensure service delivery bodies and agencies receive appropriate education and training for their staff and stakeholders.

Another important function of both the NSW and Victoria models is the ability for the Commissioner to engage in independent inquiries. In the last year, the NSW Ageing and Disability Commissioner has commenced 20 inquiries relating to people with disabilities,<sup>12</sup> and the Victorian Disability Services Commissioner continued to work on the seven existing investigations which had been opened the previous year.<sup>13</sup> The annual report from the Victorian Disability Services Commissioner highlights that these investigations included complaints of a serious nature and instances where persistent or recurring

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<sup>7</sup> *Disability Act 2006 (Vic)* s16.

<sup>8</sup> Disability Services Commissioner (Vic), *Annual report 2019-2020*, 11.

<sup>9</sup> Disability Services Commissioner (Vic), *Annual report 2020-2021*, 10.

<sup>10</sup> *Ibid*, 11.

<sup>11</sup> See, for example, *ibid* 11-12.

<sup>12</sup> Ageing and Disability Commission (NSW), *Annual Report 2020-2021*, 33.

<sup>13</sup> Disability Services Commissioner, *Annual report 2020-2021*, 16.



systemic abuse or neglect had been alleged.<sup>14</sup> The report also highlights the opportunity investigations provided to engage in ‘person-centred interviews’,<sup>15</sup> which explicitly provide opportunities for the voice and experience of people with disabilities to be heard in the in the process.

TasCOSS recommends the introduction of provisions similar to those which exist in Victoria in relation to the implementation of a disability commissioner model. We believe the broad scope of duties and powers of the Commissioner in Victoria could play a vital role in increasing awareness of significant issues faced by Tasmanians with a disability who are receiving care in state-based services. For example, recent reports have highlighted the continued and persistent use of unauthorised restraints and restrictive practices in residential settings, both within state disability service providers and NDIS-funded services.<sup>16</sup> Our view is that the introduction of a Commissioner model will hopefully provide greater awareness of, and access to, information and resources detailing best-practice guidelines for services working with Tasmanians with a disability. By providing a centralised complaints mechanism, the introduction of a Commissioner model will also increase accessibility and make it easier for Tasmanians with a disability, their carers and their family to raise issues of concern, and to better understand the complaints resolution process.

A Disability Commissioner whose mandate is only to be a services watchdog will not achieve inclusion, access and leadership. A more forward leaning role is needed to drive investment and innovation across government, business and community. Such a role would also enable the state to be a more effective partner with the Commonwealth on its National Disability Strategy. TasCOSS therefore recommends a model which allows the commissioner to engage in comprehensive developmental work, including:

- building the capacities of people with disabilities to manage their own affairs individually and collectively, thereby complimenting the Commonwealth’s Information, Linkages & Capacity Building program;<sup>17</sup> and
- make Tasmania a more inclusive and less disabling society, drawing on expertise and creating opportunities for collaboration between government, business and civil society, thereby;
  - o driving forward initiatives that complement the National Disability Strategy, such as Accessible Island
  - o advancing human rights
  - o ensuring compliance with anti-discrimination laws
  - o reducing reliance on specialist disability services
  - o working to address issues experienced by Tasmanians with disabilities, their families and communities who are engaged in intersecting systems, such as health, education, child protection and justice

**Recommendation: The Act creates a Disability Services Commissioner with the scope and funding required to investigate a broad range of complaints, provide referrals to other agencies, engage in developmental work and provide education and training for disability service providers and the community generally to improve attitudes towards people with disability**

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<sup>14</sup> Ibid.

<sup>15</sup> Disability Services Commissioner, *Annual report 2020-2021*, 16.

<sup>16</sup> See, for example, NDIS Quality and Safeguards Commission, Activity Report: 1 July 2020 to 30 June 2021, 5-7.

<sup>17</sup> See [Information Linkages and Capacity Building \(ILC\) program | Department of Social Services, Australian Government \(dss.gov.au\)](https://www.dss.gov.au).

### Disability Advisory Council

TasCOSS recommends legislative provisions to establish a Disability Advisory Council in the Act. Advisory councils exist in other jurisdictions throughout Australia, and we encourage the Government to include similar provisions to establish a similar body in Tasmania. For example, in Victoria, Division 2 of the *Disability Act 2006 (Vic)* outlines the role and functions of the Disability Advisory Council of Victoria. The legislation stipulates the membership of the Council must consist, where possible, of people with lived experience of disability.<sup>18</sup> The Council provides advice to the Minister for Disability, Ageing and Carers about policies and strategies which impact Victorians with a disability, oversees the progress of the state disability plan, and works with other community and government advisory groups. Similar provisions are contained within Part 3 of the *Disability Inclusion Act NSW (2014)*, which establishes the Disability Council NSW.<sup>19</sup>

TasCOSS believes the introduction of an advisory group or council could play an important role in upholding the rights of people with a disability in Tasmania. The inclusion of a group of leaders with lived experience of disability sends a clear message that the Government and the community in general value the expertise of these community members and recognises that Tasmanians with disabilities are best placed to advise on the suitability of projects and reforms which impact their community. A council would also provide an opportunity to enhance collaboration between the Government and community. Importantly, the inclusion of community members with lived experience of disability is also consistent with both State<sup>20</sup> and Federal<sup>21</sup> government policy, as well as our obligations under international law. The council must also be adequately resourced so they can provide advice through engagement with community, academic and professional experts, and relevant literature.

### Recommendation: The Act establishes a Disability Advisory Council

#### Supported decision making and consultation

Decisions that affect people with disabilities are made in contexts regulated by law and policy, but also – and much more often – during informal interactions with family members acting as unpaid carers and/or support workers.

This Disability Services Act should have supported decision making as a key principle guiding all activities the Act covers. It should ensure support for people with disabilities to build their decision making and self-advocacy capacities, education for carers to understand and respect those capacities and timely and effective advocacy and advisory services.

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<sup>18</sup> *Disability Act 2006 (Vic)* s11 (3):

*The Minister must ensure that members of the Victorian Disability Advisory Council are appointed from persons who—*

- (a) reflect the diversity of persons with a disability; and*
- (b) reflect the cultural and indigenous backgrounds of persons with a disability; and*
- (c) have appropriate skills, knowledge and experience in matters relevant to persons with a disability, including children with a disability; and*
- (d) in so far as is possible have personal experience of disability.*

<sup>19</sup> *Disability Inclusion Act 2014 (NSW)*, ss 15-19.

<sup>20</sup> Communities, Sport and Recreation - Department of Premier and Cabinet, *Accessible Island: Tasmania's Disability Framework for Action 2018 – 2021*.

<sup>21</sup> Commonwealth of Australia, *2010–2020 National Disability Strategy (2011)*.

This is consistent with Australia's obligations under international human rights instruments such as the *UN Convention on the Rights of Persons with Disabilities*, which was established to "promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity."<sup>22</sup> Article 12 is particularly relevant because it sets out the specific requirements that States parties must take to ensure the right to equality before the law for people with disability. Five broad principles govern those requirements:

1. People with disability are recognised as persons before the law.
2. Persons with disability have legal capacity on an equal basis with others in all areas of life.
3. States parties have an obligation to provide persons with disability with access to support in the exercise of their legal capacity.
4. States parties must create appropriate and effective safeguards for the exercise of legal capacity, the primary purpose of which must be to ensure the respect of the person's rights, will and preferences.
5. States parties must take measures, including legislative, administrative, judicial and other practical measures, to ensure the rights of persons with disability with respect to financial and economic affairs, on an equal basis with others.

Apart from being a recognised human right, the requirement to fully implement supported decision making also comes from people with disability who use disability and mainstream services and their advocates. It is also consistent with the Australian Law Reform Commission's National Decision Making Principles.<sup>23</sup> The Tasmanian Law Reform Institute's (TLRI) 2018 *Review of the Guardianship and Administration Act 1995 (Tas)* made a number of recommendations to implement the rights and obligations set out in Article 12 of the CRPD regarding supported decision making, and also recommended legislative provisions within the *Guardianship and Administration Act 1995 (Tas)* to outline a step-by-step process for the implementation of supported decision-making:

1. *First, the decision-maker must consider whether there is a need for a decision. There is no need for them to make a decision where the person has made a binding direction in advance that applies to the circumstances, including in a valid advance care directive.*
2. *Second, the decision-maker must consider whether the person is likely to become able to make their own decision, and if so, when. If the decision-maker considers that a decision can be delayed until the person gains the ability to make the decision, without that delay causing harm, then the decision should be delayed.*
3. *If the decision-maker considers that a decision needs to be made, then the person's views, wishes and preferences must be given all practical and appropriate effect. A person may communicate their views, wishes and preferences by any means.*
4. *Where the person's views, wishes, and preferences cannot be determined, the decision-maker must give all practical and appropriate effect to what the decision-maker reasonably believes the person's likely views, wishes and preferences are, based on all the information available,*

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<sup>22</sup> [OHCHR | Convention on the Rights of Persons with Disabilities](#)

<sup>23</sup> [National Decision-Making Principles | ALRC](#)



- including by consulting with family, carers and other significant people in the person's life that the decision-maker reasonably believes the person would want to be consulted.*
5. *A decision-maker may not give all practical and appropriate effect to the person's views, wishes and preferences only where:*
    - a. *it is necessary to prevent unacceptable harm to the person or another person; or*
    - b. *it would be unlawful.*
  6. *If it is not possible to determine or apply the person's views, wishes and preferences, a decision-maker must act to promote and uphold the person's personal and social wellbeing and act in a way least restrictive of their human rights.<sup>24</sup>*

TLRI also acknowledged that comprehensive implementation of a supported decision-making framework will require review of other legislative instruments, including the provisions of the *Powers of Attorney Act 2000 (Tas)*, and review of policies which impact the lives of Tasmanians with a disability, such as the use of restrictive practices and how these are regulated.<sup>25</sup> TasCOSS strongly supports the recommendations contained within the TLRI report, and encourages the Government to engage in a thorough review of the legislative framework to fully empower all Tasmanians to be as engaged in possible in important decisions around their lives and care.

#### **Recommendations:**

- **The Act includes supported decision making as a key principle in all activities covered by the Act**
- **Additional legislative instruments which impact on decision-making and capacity, such as the *Guardianship and Administration Act 1995 (Tas)* and *Powers of Attorney Act 2000 (Tas)* should also be reviewed to ensure they are consistent with supported decision-making and Article 12 of the CRPD**
- **To safeguard everyday informal decision making, the Act should enable support (for example, through the work of the Disability Commissioner) for people with disability to build their decision making and self-advocacy capacities, education for carers to understand and respect those capacities and support for both parties in the form of timely and effective advocacy and advisory services**

#### **Human rights principles**

Despite both the national and state frameworks specifying a 'rights-based model', recent reports and consultations TasCOSS has had with organisations in the disability sector demonstrate the ongoing difficulties experienced by people with disabilities in upholding their rights.

In a recent submission to the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, Advocacy Tasmania highlighted difficulties in understanding and upholding the rights of clients with disabilities due to a lack of clarity around those rights. They said, 'legal rights for people with disabilities in Australia rely on multiple intersecting pieces of legislation, working at various levels of government' and that 'rights and enforcement pathways', such as under Tasmania's *Anti-Discrimination*

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<sup>24</sup> Ibid, 192-193.

<sup>25</sup> Ibid, xi.

Act 1998, are often inaccessible or ineffective.<sup>26</sup> Their recommendation is to have a Charter of Rights for Persons with Disability embedded within the legislation, as a schedule to the Act, to make it easier for people to clearly understand their rights and ensure they are being upheld.

A rights-based framework for disability services also requires not only access to specialist disability services, but also assurances about access and standards in relation to mainstream services. We believe the legislative framework should uphold minimum standards for inclusion into mainstream, state-based services to ensure people with disability are not unjustly excluded. For example, as per the *Disability Standards for Education 2005 (Cth)*, children with disability should not be excluded from mainstream education services on the basis of their ‘disruptive behaviour’, but all involved in the education system (schools, parents, teachers and students) should have clear guidelines about how schools will respond to and support the needs of students with disability.<sup>27</sup>

While the Act does contain some provisions relating to the rights of people with a disability, the reality is that there is a complex framework of rights found in several pieces of state legislation. A human-rights based framework in relation to disability therefore requires an examination of several pieces of existing legislation. The Government is already actively engaged in reviewing legislation which could significantly impact community members with a disability - for example, the recent call for submissions relating to the *Guardianship and Administration Act* and proposed introduction of mechanisms relating to advanced care directives. We know Tasmanians with disability are overrepresented in overlapping and intersecting systems, including the criminal justice system, public and community housing, child protection and health. If our legislative framework for disability and disability services is to actively promote and protect the rights of people with a disability, the Government must therefore commit to broad review of Tasmanian legislation to ensure all Acts comply with our international obligations, as well as the stated objectives of both the national and state disability strategies. A rights-based framework also requires adequate resourcing of the agencies engaging with the social-economic transformation required to support the exercise of rights in practice – for example, by creating a well-resourced Disability Commissioner.

The adoption of a rights-based framework in relation to disability also requires acknowledgement of the particular and additional barriers faced by Tasmanians with a disability who experience other forms of disadvantage. Reports have highlighted the ‘specific attitudinal barriers and experiences of violence, abuse, neglect and exploitation faced by people with disability at the intersection of multiple disadvantage’, such as Aboriginal Tasmanians, women, people from culturally and linguistically diverse backgrounds, LGBTIQ+ people and children.<sup>28</sup> People with disability who are in particular settings, such as the criminal justice system, will also face additional barriers to ensuring the protection and promotion of their rights.<sup>29</sup> Tasmanians with disability who also belong to one or more of the above minority groups will therefore need further and specialised supports to access appropriate services.

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<sup>26</sup> Quoted in Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Overview of responses to the Rights and Attitudes Issues Paper* (April 2021), 4.

<sup>27</sup> We note the Department of Education has committed to upholding the *Disability Standards for Education 2005 (Cth)*, which places the obligation on schools and staff to provide ‘reasonable adjustments’ where needed to support students with disability.

<sup>28</sup> Ibid, 11.

<sup>29</sup> For a comprehensive discussion of the criminal justice system in relation to disability, see Australian Government Solicitor, *Report on the key elements of the legislative framework affecting people with disability* (December 2020), chapter 12.

**Snapshot: Aboriginal Tasmanians**

In their submission to the Rights and Attitudes issues paper as part of the Royal Commission, the National Aboriginal Community Controlled Health Organisations (NACCHO) outlined the particular experience of Aboriginal and Torres Strait Islander peoples with a disability, noting they are ‘twice as likely to experience a disability than other Australians (9% with a severe condition compared to 4% for non-Indigenous)’,<sup>30</sup> as well as more likely to experience discrimination on the basis of both their disability and their race.<sup>31</sup> NACCHO highlighted the need for governments to adhere to their commitments as part of the National Agreement on Closing the Gap, to change policies and programs affecting Aboriginal and Torres Strait Islander people, promote shared decision making between Aboriginal and Torres Strait Islander people and government, strengthen the community-controlled sector, and make mainstream institutions more accessible.

The Australian Lawyers Alliance (ALA) in their submission also highlighted the difficulties in accessing NDIS services for Aboriginal people residing in remote communities, and recommended the Government fund an Aboriginal Community Controlled Disability Service Sector, as well as developing and implementing an Aboriginal-specific access to justice strategy for First Nations People with disability.<sup>32</sup>

The consultations into Rights and Attitudes through the Royal Commission also revealed strong support for the introduction of a Bill or Charter of Rights to be introduced in Australia. Experience from other jurisdictions indicates a Tasmanian Charter of Rights could have wide-ranging positive impacts, including encouraging a cultural change in attitudes and beliefs, improved accountability and transparency, greater community awareness and empowerment, and as a tool for legal and social advocacy.<sup>33</sup> The Tasmanian Law Reform Institute in its 2007 report, ‘A Charter of Rights for Tasmania’, also recommended the introduction of a Tasmanian Charter, to ‘provide Tasmanians with legal guarantees for rights they desire in a comprehensive and easily accessible format’.<sup>34</sup> TasCOSS has also advocated for the introduction of a Charter of Rights, particularly in light of difficulties experienced by certain community members and groups during Covid 19, and believes a Charter would assist ‘to ensure that the human rights of everyone in Tasmania are acknowledged, enacted and championed’.<sup>35</sup> We recommend the Government consider the implementation of a human rights instrument as a way of further developing our human rights framework in Tasmania.

Finally, consultations from the Royal Commission highlighted the need for changes in general beliefs and assumptions about people with a disability, noting ‘legislative and systemic change is unlikely to be effective in protecting the human rights of people with disability without a change in the underlying

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<sup>30</sup> NACCHO, Rights and Attitudes: Submission to the Royal Commission into Violence, Abuse, Neglect and Exploitation of people with Disability (September 2020), 3.

<sup>31</sup> Ibid.

<sup>32</sup> Australian Lawyers’ Alliance, Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability – Rights and Attitudes: Response to the Rights and Attitudes Issues Paper (July 2020), 16.

<sup>33</sup> For a general discussion of the impact of the Victorian charter, see Human Rights Law Centre, *Victoria’s Charter of Human Rights and Responsibilities in Action: Case studies from the first five years of operation* (March 2012).

<sup>34</sup> Tasmanian Law Reform Institute, *A Charter of Rights for Tasmania* (2007), 1.

<sup>35</sup> Tasmanian Council of Social Services, *Submission to the TLRI on A Charter of Rights for Tasmania: Update* (November 2020), 4.

*negative assumptions and attitudes towards people with disability in Australia*.<sup>36</sup> Recommendations from the Royal Commission relating to community attitudes included more opportunities for training for disability service providers, a focus on improving community attitudes towards people with disability in the National Disability Strategy, and increasing the presence and representation of people with disability in media, culture and the arts.<sup>37</sup>

#### **Recommendations:**

- **Include a Charter of Rights for Persons with Disability in the Act, as well as implementing a human rights instrument such as a Tasmanian Charter of Human Rights**
- **Introduce comprehensive minimum standards for state-based disability services, similar to the *Disability Standards for Education 2005* (Cth)**
- **Engage in comprehensive review of all legislation impacting Tasmanians with a disability**
- **Establish a Disability Commissioner capable of leading the investment & innovation required to bring about the social, economic, cultural & infrastructure changes required to promote and uphold the rights of Tasmanians with a disability**

#### **Interaction between the Act and the NDIS**

The Act should also contain provisions which clearly outline a process for supporting Tasmanians with a disability who, for whatever reason, are not receiving the services and/or support they need, either through the NDIS or private providers. NDIS eligibility is a binary decision, yet disability exists on a continuum. Inevitably there will be thousands of Tasmanians ineligible for the NDIS yet facing substantial functional limitations. Beyond those lies the larger cohort of Tasmanians facing less severe disablement, yet still identified as living with disabilities. The degree of disability depends on the nature of their impairment, but also on their socio-economic circumstances, aspirations and obligations. Tasmania remains responsible for meeting the service needs of Tasmanians ineligible for the NDIS but nonetheless living with substantial functional impacts (for example, those who were too old to apply when the NDIS was rolled out or who have acquired a disability after reaching 65 years of age). The Tasmanian government must have processes and funded services in place to ensure the ongoing regulation of services which support all Tasmanians with a disability, which includes the following:

- Ensuring seamless transitions between NDIS and non-NDIS supports;
- Continued investment in the disability services workforce to overcome ever more acute shortages as demand grows due to the NDIS and demographic changes;
- Maintaining accessible and inclusive mainstream services, with sufficient quality and safeguarding measures; and
- Creating a more inclusive society not only for NDIS participants, but also the 133,000 other Tasmanians with disabilities.

Without a framework to allow for a ‘provider of last resort’, TasCOSS believes it is likely some individuals, families or communities will ‘fall through the cracks’ and not be supported to access the services they need or are entitled to.

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<sup>36</sup> Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Overview of responses to the Rights and Attitudes Issues Paper* (April 2021), p5.

<sup>37</sup> Ibid, 16.

### **Case study: Francis**

A recent case from Victoria highlights the importance of a ‘provider of last resort’ framework in relation to disability services and the NDIS. Francis, a 19-year-old man with no criminal history and an intellectual disability, was remanded in custody following an allegation of assault, and spent 180 days in prison because there was no suitable accommodation for him in the community. Although Francis had a funded NDIS plan (which included accommodation and support workers), after he was charged and remanded his existing service provider withdrew their services due to risk. Ultimately, Francis was released on bail after the Victorian Government intervened and provided services through the Department of Health and Human Services. All charges against Francis were later dismissed.

This case demonstrates the need for a clear legislative framework for how services will support people with a disability who, for whatever reason, are not able to access NDIS-funded services or supports. Victoria Legal Aid, who represented Francis in relation to his criminal matters, have highlighted the need for a ‘provider of last resort’ model to be implemented, noting that, ‘[t]he Victorian government took the initiative and found solutions for Francis, but we know that for many people with complex needs or in regional areas, when the NDIS market fails, no one is required to take responsibility’.<sup>38</sup>

**Recommendation: the Government develops a framework for a ‘provider of last resort’ model, with legislative provisions confirming ongoing access to mainstream services for those who are not eligible for the NDIS or unable to access supports**

### **Community Visitors Scheme**

Independent oversight of services is key to ensuring the rights of people with disability are protected. Tasmanians living in residential care services are in a particularly vulnerable situation, as they may fear negative repercussions if they make complaints about the service providing them with care. Numerous organisations and reports have highlighted the importance of a scheme which provides opportunities for independent oversight of residential service providers, noting that ‘people in such situations may face unique barriers to accessing services and supports, raising concerns or making complaints’.<sup>39</sup> And that ‘[o]ngoing preventative oversight must be undertaken with sufficient universality, timeliness and frequency to enable issues to be identified early and to be addressed quickly’.<sup>40</sup>

Schemes and projects which allow for independent oversight can assist to improve accountability and transparency, as well as ensuring people with disability are given meaningful opportunities to address concerns about their care. Independent oversight of places where people may be held involuntarily is also an important part of our international obligations under the Optional Protocol to the Convention Against Torture (OpCAT), to which Australia is signatory.<sup>41</sup>

TasCOSS recommends the inclusion of provisions to establish a community visitor scheme, such as those operating in Queensland, South Australia and Victoria. We believe a community visitor scheme would

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<sup>38</sup> [All charges dropped against our NDIS client Francis | Victoria Legal Aid](https://www.legalaid.vic.gov.au/about-us/news/hope-for-francis-but-ndis-system-gaps-remain); <https://www.legalaid.vic.gov.au/about-us/news/hope-for-francis-but-ndis-system-gaps-remain>

<sup>39</sup> Equal Opportunity Tasmania, *Submission: Review of Community Visitor Schemes* (November 2018), 2.

<sup>40</sup> Ibid.

<sup>41</sup> The Tasmanian Government has indicated a clear intention to implement OpCAT in state law, by drafting a proposed Bill introducing OpCAT provisions which has now passed the Lower House – see Elise Archer (Attorney-General), ‘OpCAT Implementation Bill 2021 passes Lower House’ (Media Release, 28 October 2021).



support the principles outlined in the Act and increase transparency in how service is provided to people with disabilities in residential care.

In relation to residential services provided by a disability service provider, the Victorian legislation outlines the functions of the community visitor program are to attend the premises and inquire into the following:<sup>42</sup>

- (a) the appropriateness and standard of premises for the accommodation of residents;*
- (b) the adequacy of opportunities for inclusion and participation by residents in the community;*
- (c) whether the residential services are being provided in accordance with the principles specified in section 5;*
- (d) whether information is being provided to residents as required by this Act;*
- (e) any case of suspected abuse or neglect of a resident;*
- (f) the use of restrictive practices and compulsory treatment;*
- (g) any failure to comply with the provisions of this Act;*
- (h) any complaint made to a community visitor by a resident.*

Community visitors can access information and documentation as needed to assess the above, including medical information with the consent of the resident or their guardian.<sup>43</sup> Following a visit, they can raise any issues which need to be addressed in their Record of Visit, which provided to the regional convenor to follow up with disability service provider.<sup>44</sup> The legislation also provides that community visitors can refer matters to the Community Visitors Board or the Minister.<sup>45</sup>

A community visitor is appointed for a term of three years, cannot be a Department employee or have any direct interest in any contract with the Department,<sup>46</sup> and is bound to keep their work confidential other than for the purpose of reporting on conditions as per their role.<sup>47</sup>

The Australian Government undertook a review of Community Visitor Schemes in 2018, and the final report recommended the establishment of a community visitor scheme in Tasmania,<sup>48</sup> as a way of safeguarding the rights of those with disabilities. Tasmanian organisations and government bodies have also been supportive of this concept: for example, in their submission to the Australian Government's review, Equal Opportunity Tasmania stated, *'[w]e consider that community visitor schemes should be implemented as an integral component of a comprehensive safeguarding framework in this State.'*

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<sup>42</sup> *Disability Act 2006* (Vic) s30 – for NDIS dwellings see also s31.

<sup>43</sup> Victorian Government Department of Human Services, *Community Visitors protocol* (2013), 5-6.

<sup>44</sup> *Ibid*, 8-11.

<sup>45</sup> *Disability Act 2006* (Vic) s34.

<sup>46</sup> *Disability Act 2006* (Vic) s28.

<sup>47</sup> *Disability Act 2006* (Vic) s36.

<sup>48</sup> Department of Social Services for the Disability Reform Council, Council of Australian Governments, *Community Visitor Schemes Review* (December 2018), 11.

TasCOSS also recommends the Government introduce legislative provisions extending the scheme to encompass services provided through the NDIS, including private operators of facilities such as boarding houses and caravan parks. Recent reports have highlighted potential gaps in the oversight of these programs as disability services have changed with the introduction of the NDIS,<sup>49</sup> meaning more people are residing in properties provided through and serviced by NDIS providers. The final report of the Community Visitor Schemes Review, commissioned by the Department of Social Services, found that community visitor schemes ‘have a role to play in safeguarding vulnerable NDIS participants’,<sup>50</sup> and recommended that state legislation include provisions which would allow the scheme to operate in premises provided through and run by the NDIS.<sup>51</sup> Other jurisdictions have responded to this gap in oversight by amending the legislative provisions governing their community visitors schemes – for example, the Australian Capital Territory has recently amended the definition of ‘visitable place’ in relation to their community visitor scheme to provide sufficient authority for visitors to enter and inspect in residential services provided through the NDIS.<sup>52</sup>

#### Recommendations:

- **The Act make provisions for establishing a Community Visitor Scheme**
- **The Act provides for the Scheme to operate in premises provided through and run by the NDIS, as well as private providers such as boarding house & caravan park operators**

#### Funding of community services

Community agencies and support services play a key role in the protection and promotion of the rights of Tasmanians with a disability. Both the national and the state disability strategies have acknowledged that people with disability have widely different needs and priorities, based on several diverse factors including their age, gender and cultural background. Reports have highlighted geographical difficulties in relation to adequate service provision and support,<sup>53</sup> which is significant in the Tasmanian context due to the remote nature of many of our communities, and difficulties experienced by Tasmanians with a disability in accessing the services they need. Community services and not-for-profit organisations provide place-based services which are tailored to the needs of their community, whether in metropolitan settings or regional/remote areas.

Without ongoing, secure and adequate funding of these community organisations, many Tasmanians with disabilities would struggle to access the support they need. Many community organisations have faced particularly acute challenges throughout Covid-19, including difficulties with providing services due to restrictions and lockdowns, increased pressure and need for services in the community, and significant

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<sup>49</sup> See, for example, Department of Social Services for the Disability Reform Council, Council of Australian Governments, *Community Visitor Schemes Review* (December 2018) 36-47, and also Australian Government Solicitor, *Report on the key elements of the legislative framework affecting people with disability* (December 2020) 94-102.

<sup>50</sup> Department of Social Services for the Disability Reform Council, Council of Australian Governments, *Community Visitor Schemes Review* (December 2018) 9.

<sup>51</sup> *Ibid*, 11-12.

<sup>52</sup> The legislation from the Australian Capital Territory, the *Disability Services Act 1991* (ACT), defines ‘visitable place’ (eg a place that can be visited through their official visitor program, in s8B (1) as the following:

- (a) means accommodation provided to an entitled person for respite or long-term residential purposes; and
- (b) includes—
  - (i) accommodation that is owned, rented or operated by a specialist disability service provider; and
  - (ii) accommodation at which a specialist disability service provider provides a specialist disability service; and
  - (iii) a residential aged care facility that accommodates the entitled person.

<sup>53</sup> Commonwealth of Australia, *2010–2020 National Disability Strategy* (2011), 14.

losses to income due to an inability to engage in regular fundraising activities.<sup>54</sup> A lack of services places additional pressures on people with disabilities, their families and on service providers, which in turn can undermine their rights and ability to access necessary support. Even within the NDIS landscape in Tasmania, community service organisations are fulfilling a significant role in helping participants understand and uphold their rights in relation to the provision of services.

TasCOSS recommends further funding of existing community service organisations, who have established relationships with communities and individuals in Tasmania, to ensure these services can remain responsive to need. We note the increased demand for advocacy support has been recognised in other jurisdictions: for example, following a report from the Safeguarding Task Force,<sup>55</sup> the South Australian government announced it would fund a new advocacy service, to be implemented by an existing community organisation Uniting Communities, to assist members of the community to negotiate the challenges of the NDIS,<sup>56</sup> recognising that ‘people with disabilities don’t always receive adequate support to understand the NDIS and pursue their rights’.<sup>57</sup>

TasCOSS acknowledges the work of community service organisations in relation to disability services, advocacy and support, and strongly recommends the Government commit to adequate resourcing for the sector.

**Recommendation: Increased funding of existing disability services organisations to meet increased need of service provision and advocacy.**

## Conclusion

The disability services landscape is complex, and those accessing disability services are some of the most marginalised members of our community. TasCOSS welcomes the Government’s commitment to meaningful reform in this area, and encourages the Government to embrace reforms to promote the rights of Tasmanians with a disability.

A review of the Act is an important step towards ensuring services are effective and consistent with our obligations under international law, as well as the stated objectives of both the State and Federal governments in relation to disability. We have recommended several changes to the Act which we believe would increase access to justice for Tasmanians with a disability, including the introduction of a disability commissioner and the implementation of a community visitor scheme. However, further legislative and policy reform is needed to ensure the protection and promotion of the rights of Tasmanians with a disability, to ensure we hear the voices of people with disability and that their rights, will and preferences direct the care and support they need at all times.

## Recommendations

1. The Act should include provisions establishing a Disability Commissioner with appropriate scope and funding, using the Victorian legislation as an example.
2. The Act should include provisions establishing an advisory council, panel or group

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<sup>54</sup> Tasmanian Council of Social Services, *Community Services Industry Combined Response* (June 2020), 3-4.

<sup>55</sup> Kelly Vincent and David Caudry, *Safeguarding Task Force: Final Report* (July 2020).

<sup>56</sup> Michelle Lensink MLC, ‘New advocacy service for South Australians with a disability’ (Media Release, 9 December 2020).

<sup>57</sup> *Ibid.*

- TasCOSS recommends provisions similar to those contained in the Victorian legislation, which mandates that the membership of the Council must reflect the diversity and cultural background of those with disabilities, and explicitly promotes the inclusion of people with lived experience of disability.
  - In relation to the functions of the group, TasCOSS also recommends a scope similar to what is included in s12 of the Disability Act 2006 (Vic), which allows for the Council to provide advice to the Minister on a wide range of matters, as well as engaging in community consultation, regular monitoring of strategies and projects and raising community awareness of the rights of community members with a disability.
3. The Act must explicitly incorporate supported decision-making principles, consistent with the ALRC's National Decision Making Principles and the recommendations of the TLRI in relation to supported decision-making.
  4. The Government must review all legislative instruments which impact on decision-making and capacity, such as the *Guardianship and Administration Act 1995* (Tas) and *Powers of Attorney Act 2000* (Tas) to ensure they are consistent with supported decision-making and Article 12 of the CRPD.
  5. The Act should include a Charter of Rights in relation to disability, to be included as a schedule to the Act.
  6. The Government must also establish a legislative framework which outlines, promotes and protects the rights of Tasmanians with a disability, including:
    - the introduction of minimum standards for mainstream services and provisions relating to a 'provider of last resort' model to support clients who have NDIS funding
    - a comprehensive review of existing Tasmanian legislation to ensure compatibility with these rights
    - Development and introduction of a Tasmanian Charter of Rights, similar to the Victorian Charter
  7. The Government should implement the recommendations from the Royal Commission in relation to increased awareness of disability rights and a focus on changing community attitudes, through increased presence and representation of Tasmanians with a disability, training and activities and projects to raise awareness of these rights
  8. The Act should include provisions establishing a Community Visitors scheme
    - the community visitor scheme should extend to services provided through the NDIS, using the ACT legislation as an example
  9. The Government should commit to ongoing and comprehensive funding of the community disability sector