

Your Ref:
Our ref: 701

23 December 2021

Professor Michael Pervan
Secretary
Department of Communities Tasmania
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Dear Secretary

Re: Review of the *Disability Services Act 2011* Discussion Paper

Thank you for the opportunity to provide comment in response to the Review of the *Disability Services Act 2011* Discussion Paper (Discussion Paper). I would also like to thank the project manager for providing a briefing in relation to this review.

I note that this is Stage One of the review project, which aims to give stakeholders the opportunity to provide feedback on the *Disability Services Act 2011* (DSA), including deficiencies and opportunities; and that subsequent stages will relate to legislative matters and implementation of changes as required. I also recognise that the current review is further to the 2018 review of the DSA (to which former Interim Commissioner Clements made a submission) which resulted in amendments to the DSA, that came into effect in 2019. For your reference, the former Interim Commissioner's submission to that earlier review is available here: [Comment on the 2017 Review of the *Disability Services Act 2011*](#).

I commend the Tasmanian Government on its commitment to building a more equitable, inclusive and accessible state for people with disability, including children and young people. I note that the aim of the review of the DSA is to achieve better outcomes for people with disability through the provision of high quality and safe services, and by supporting national and international commitments, including the National Disability Strategy and the *United Nations Convention on the Rights of Persons with Disabilities* (CRPD).

The role of the Commissioner for Children and Young People (Tas)

The office of Commissioner for Children and Young People is established under the *Commissioner for Children and Young People Act 2016* (CCYP Act). The Commissioner's functions include:

- (a) advocating for all children and young people in the State generally;
- (c) researching, investigating and influencing policy development into matters relating to children and young people generally;
- (d) promoting, monitoring and reviewing the wellbeing of children and young people generally;
- (e) promoting and empowering the participation of children and young people in the making of decisions, or the expressing of opinions on matters, that may affect their lives;



- (f) assisting in ensuring the State satisfies its national and international obligations in respect of children and young people generally; and
- (g) encouraging and promoting the establishment by organisations of appropriate and accessible mechanisms for the participation of children and young people in matters that may affect them.

In performing these and other functions under the CCYP Act, I am required to:

- do so according to the principle that the wellbeing and best interests of children and young people are paramount; and
- observe any relevant provisions of the United Nations *Convention on the Rights of the Child* (UNCRC).¹

The provisions of the UNCRC which are particularly relevant to my consideration of the Discussion Paper include the rights of the child to:

- develop to their full potential (article 6);
- express their views freely in all matters affecting them, and their views being given due weight in accordance with their age and maturity (article 12);
- be properly cared for and protected from physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation (article 19);
- be entitled to special protection and assistance provided by the State, where the child has been temporarily or permanently deprived of his or her family environment (article 20); and
- specifically, to live a full and decent life, with dignity and, as far as possible, independence and to play an active part in the community. Governments must do all they can to support disabled children and their families (article 23).

Furthermore, article 7 of the CRPD specifically provides that:

1. States Parties shall take all necessary measures to ensure the full enjoyment by children with disabilities of all human rights and fundamental freedoms on an equal basis with other children.
2. In all actions concerning children with disabilities, the best interests of the child shall be a primary consideration.
3. States Parties shall ensure that children with disabilities have the right to express their views freely on all matters affecting them, their views being given due weight in accordance with their age and maturity, on an equal basis with other children, and to be provided with disability and age-appropriate assistance to realize that right.

Comment

Consistent with my functions, my comments below focus on matters that affect the rights and wellbeing of children and young people in Tasmania. Noting that the Discussion Paper represents only the first phase of consultation, my comments are preliminary in nature and are not intended to be exhaustive.

One overarching observation I make initially, is that the timing of the review of the DSA is very opportune. Given the significant legislative reform agenda currently underway in Tasmania which includes a review of the *Children, Young Persons and Their Families Act 1997*, the *Youth Justice*

¹ Section 3(1), *Commissioner for Children and Young People Act 2016* (Tas).



Act 1997, and the *Mental Health Act 2013*, there is a significant opportunity presented to achieve much better alignment between these pieces of legislation, as well as the *Education Act 2016*.

Topic 1 – Inclusion, accessibility and leadership

I note that the CRPD provides that children with disability should be assured full and effective participation and inclusion in society.² To achieve the proposed vision of a more equitable, inclusive and accessible state, a whole-of-government approach is needed. Tasmanian children and young people should be able to access any government or government-funded service they encounter in a way that maintains their dignity and autonomy. For example, they should be able to physically access the services and places that are important to them; as well as be communicated with in a way that meets their age and disability-related needs. Further, in my view, the aim should be to achieve equity of access for children and young people, as far as is practicable, regardless of geographical location. I understand this matter is challenging considering the highly dispersed Tasmanian population.

In my time as Commissioner, children and young people, their parents or carers, and people working in community services have brought several significant challenges to my attention in relation to children and young people with disabilities' access to services. Please note that this is not an exhaustive list.

Education

The importance of accessible education is highlighted in article 24 of the CRPD, which recognises the right of persons with disabilities to education:

2. In realizing this right, States Parties shall ensure that:
 - (a) Persons with disabilities are not excluded from the general education system on the basis of disability, and that children with disabilities are not excluded from free and compulsory primary education, or from secondary education, on the basis of disability;
 - (b) Persons with disabilities can access an inclusive, quality and free primary education and secondary education on an equal basis with others in the communities in which they live;
 - (c) Reasonable accommodation of the individual's requirements is provided;
 - (d) Persons with disabilities receive the support required, within the general education system, to facilitate their effective education;
 - (e) Effective individualized support measures are provided in environments that maximize academic and social development, consistent with the goal of full inclusion.

Although access to education for children is a fundamental right, many children and young people with disability encounter barriers in accessing the education system.³ These barriers may include a physical environment that does not adequately support their needs or inadequate provision of support for their learning and social needs.

The principles underpinning the *Education Act 2016* (Tas) recognise the child's right to education and also that "the provision of education at a school recognises the individual needs of children with disabilities and, to that end, persons involved in the administration of this Act and the provision of education at a school will make appropriate, reasonable provision for those needs".⁴ I note that the

² Article 7(1), *United Nations Convention on the Rights of Persons with Disabilities*.

³ Article 28, *United Nations Convention on the Rights of a Child*.

⁴ Section 4(1)(j), *Education Act 2016* (Tas).



Tasmanian Department of Education is implementing this principle through the new Education Adjustments disability funding model.

I also note that in other Australian jurisdictions, a more comprehensive consideration of the support of children and young people with disability in the education system is legislated.^{5,6} There may be potential for the DSA to act as a driver for increasing the prescribed minimum supports and inclusions available to children and young people with disability in schools. I also note my initial overarching comment that this would enable greater alignment between the DSA and the *Education Act 2016* (Tas).

Community planning

Play and socialisation are fundamental for children and young people's social and emotional development.⁷ As such, consideration should be given to how government-funded play and recreational spaces can be accessed and enjoyed by children and young people with disability. In my view, the best way to achieve this would be by asking children and young people with disability how they would like to access these spaces and what they would like included in them. There may be a role for the DSA to set out the minimum requirements for the consultation of children and young people with disability required to inform various areas of social, economic, civic, political and cultural life in Tasmania, including community planning.

Child safety

I have heard from children and young people, their families and carers that there can be challenges for children and young people with disability when they come into contact with the child safety system and the out-of-home care system, including in the interaction between the NDIS and the child safety and out-of-home-care systems. Given the overrepresentation of children and young people with disability living in out-of-home care in Tasmania, this requires consideration in the planning and implementation of specialist disability services and their seamless integration with other areas of services delivery, including the child safety and out-of-home care systems. Inclusion of legislative mechanisms within the DSA aimed at increasing integration may be worthy of consideration. This is a matter I discuss in greater detail later in this submission.

Youth justice

Although research is still emerging, Australian studies considering the disability status of young people involved with the youth justice system have found disability is a significant concern.⁸ Likewise, in my role as the individual advocate for young people in detention in Tasmania, I am regularly made aware of the complex intersection that can exist for young people with disability and our criminal justice system. I note that the Disability Justice Plan for Tasmania acknowledges the significant over-representation of people with disability in Tasmania's justice system, as either victims or offenders, and aims to improve recognition and responses to disability across Tasmania's justice system.⁹ Further, I note that the CRPD lists access to justice on an equal basis with others as a key right for people with disability.¹⁰

⁵ Section 73 and section 86, *School Education Act 1999* (WA).

⁶ Division 4, *Education Act 2015* (NT).

⁷ Article 6, *United Nations Convention on the Rights of the Child* states that children have the right to live a full life and Governments should ensure that children survive and develop healthily.

⁸ Australian Institute of Health and Welfare. [National data on the health of justice-involved young people: A feasibility study 2016–17](#), p.5.

⁹ https://www.justice.tas.gov.au/_data/assets/word_doc/0016/400462/Disability-Justice-Plan-for-Tasmania-2017-2020-Final-web.docx

¹⁰ Article 13(1), *United Nations Convention on the Rights of Persons with Disabilities*.



There is an opportunity in the context of the review of the DSA, to consider the interface between disability services and the provision of youth justice services, and to commit to promoting the rights and wellbeing of young people with disability who come into conflict with the law. This could include, for example, minimum requirements or protocols to ensure that a young person with suspected or confirmed disability is assessed appropriately when they initially come into conflict with the law, and requirements to ensure they understand their rights and what is happening during any youth justice processes they are involved in.

Topic 2 – Principles which support the rights of people with disability

The principles in the DSA are generally reflective of a contemporary way of describing disability, and I welcome the explicit recognition of the CRPD and the rights that are afforded to children under article 7. I note that the principles currently in the DSA state that the circumstances and cultural needs of people with disability should be considered when supporting people to communicate and exercise choice and control. There is an opportunity to strengthen this principle through the provision of more explicit guidance for service providers on how to implement this principle in various cultural settings. This may ensure better consistency of approach and would guide the work of Tasmanian State Service employees and non-government service providers. By way of example, I refer you to the guiding principles under Australia's Disability Strategy, noting that a guide to these principles is expected to be released in 2022.

Topic 3 – The DSA, NDIS and other national disability programs

The current rules within the DSA are no longer required to guide how services are funded due to the introduction of the NDIS. However, there remains a very important role for the DSA to clearly define the relationships, roles and responsibilities of Tasmanian and Australian Government services, and to set rules around and promote the integration of those services. This may help to ensure that children, young people and their parents or carers are able to understand the full suite of services available to them, and how those services might work together within a system to better promote access and participation.

As Commissioner, I have heard from families and carers that, at times, the disability support system can be difficult to navigate. Feedback includes that access to the NDIS can be challenging and that levels of access can be influenced by a range of factors including a parent, carer or guardian's ability to navigate the system and advocate for the specific needs of their child. I note that the Legislative Council Government Administration Committee Inquiry into Disability Services in Tasmania heard evidence regarding the particular difficulties faced by people in regional and remote areas of Tasmania in accessing the NDIS, and their subsequently lower participation numbers in the Scheme.

It may be worthy of consideration in this review, to examine how the DSA can provide guidance and set the minimum expectations of Tasmanian Government agencies on their interface with the NDIS. To further demonstrate this point, I have included two examples below, from the education and child safety settings.

Education

I have heard from parents and carers of children and young people with disability, who are NDIS participants, that there can be inconsistency at the individual school level as to whether NDIS service providers are able to see a child in their school. This can be confusing for children and their parents or carers, and has the potential to reduce access to disability services. For example, if a parent is unable to take time off work during business hours, they may struggle to get their child to the multiple allied health therapies that their child is funded to receive. If a child is unable to receive these therapies in their school setting, they might miss out altogether. For some parents, multiple after-school disability-related therapy commitments can create a barrier for their child with disability and



their siblings from partaking in other valued community activities. Additionally, some children and young people benefit significantly from accessing services at school, in their everyday context, as this can lead to transferability of skills to the school setting, as well as a chance for therapists to work with school staff to provide better support for the child or young person.

An example role for the DSA in this context may be to include a rule or guideline to ensure that the best interests of the child is given primary consideration in decisions as to how NDIS services can be provided in the school setting, and that this would include consultation with children and families.

Out-of-Home Care

As part of my Out-of-Home Care Monitoring Program, I have been made aware of the challenges faced by children and young people and their carers in the interface between child safety services and disability services. These challenges include some children and young people in out-of-home care not having an NDIS access request completed despite potentially being eligible; and under-utilisation or non-utilisation of funding for some of those who have an NDIS plan. Further, I have been made aware that transition to independence planning through an NDIS-funded accommodation provider, which occurs as some young people with disability in out-of-home care approach adulthood, can be limited by inadequate earlier, appropriate access to and utilisation of funding. I am currently exploring these issues further through my monitoring function. It may be that the review of the DSA, and the concurrent review of the *Children, Young Persons and Their Families Act 1997* provides an opportunity to identify solutions to this issue and to include mechanisms which promote the wellbeing of children and young people with disability who are in contact with the child safety system, including through the provision of early screening and access to services.

Topic 4 – Quality and safeguards

Residential settings

In late 2020, the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Royal Commission) reported hearing many concerns about inadequate oversight of services in group homes, including in their compliance with NDIS standards. Some responses to the Royal Commission, including from Tasmania, identified Community Visitors Schemes as a critical oversight mechanism. I would welcome further discussions regarding the possibility of introducing a Community Visitors Scheme in the Tasmanian context, noting that all other states and territories in Australia, other than Western Australia, already have such a scheme in place.¹¹ Such oversight goes towards child safe practices, which I refer to in greater detail below.

Restrictive practices

The Royal Commission has also noted that the role of state agencies in strengthening safeguarding practices should be clarified and promoted, specifically for people with disability who are not NDIS participants and for all people with disability using mainstream services, particularly in relation to authorising restrictive practices. This is relevant to the National Principles for Child Safe Organisations, particularly Principle 8 – *Physical and online environments promote safety and wellbeing while minimising the opportunity for children and young people to be harmed*.

Currently, the DSA's definition of restrictive practices does not include any consideration of chemical restraint. As a result, it does not align with the *National Disability Insurance Scheme (Restrictive Practices and Behaviour Support) Rules 2018*, which includes chemical restraint as a form of restrictive practice, defining it as: "the use of medication or chemical substance for the primary

¹¹ [Community Visitors Schemes Review | Department of Social Services, Australian Government \(dss.gov.au\)](https://www.dss.gov.au)



purpose of influencing a person's behaviour".¹² This does not include the use of medication prescribed by a medical practitioner for the treatment of, or to enable treatment of, a diagnosed mental disorder, a physical illness or a physical condition.¹³

As per the *National Disability Insurance Scheme (Restrictive Practices and Behaviour Support) Rules 2018*, behaviour support should be utilised, and restrictive practices should be reduced or eliminated.¹⁴ This is a particularly important consideration in the use of restrictive practices in educational settings and out-of-home care. Furthermore, the use of restrictive practices or restraints should be considered in light of the forthcoming Tasmanian Child Safe Organisations framework.

I note that the *Mental Health Act 2013 (Tas)* provides an example of a legislative framework for regulating the use of chemical restraint for involuntary patients with mental illness (see in particular sections 3, 6(3), 57 and 58).

The issue of parental consent in the context of restrictive practices arose as a key issue for Tasmania's Senior Practitioner during 2016-17; contrary to previous advice to the disability sector, parents and guardians cannot consent or authorise the use of a restrictive intervention on their child by a disability services provider.¹⁵ While I acknowledge the inherent complexity and sensitivity of this particular issue and the fundamental importance of providing education to those providing supports to and care for children with disability, consideration could be given to providing legislative clarification of this issue to further promote children's best interests.

Child Safe Principles

The Tasmanian government is yet to legislate Child Safe Standards for Tasmania. However, the Tasmanian Government has recently committed to developing a comprehensive Child and Youth Safe Organisations Framework (CYSOFF) overseen by an independent oversight and regulation body.¹⁶ The CYSOFF is likely to include:

- A regulatory framework for compliance with the National Principles for Child Safe Organisations;
- A reportable conduct scheme to monitor investigations of child sexual abuse in government and non-government institutional settings; and
- An information exchange for relevant information relating to child safety across government agencies and non-government organisations.

In light of this, it would be prudent to consider the role of the DSA in requiring organisations delivering services under the DSA to children and young people, to implement the National Principles and comply with the Tasmanian CYSOFF when it is enacted.

Topic 5 – Regulation of providers

I support transparent and clear regulation of disability service providers, through prescribed National Disability Standards and penalties for non-compliance, to protect the safety and wellbeing of children and young people with disability. There is a rigorous accreditation process for registered NDIS providers, which must demonstrate compliance with the NDIS Practice Standards. This includes the

¹² *National Disability Insurance Scheme (Restrictive Practices and Behaviour Support) Rules 2018*, s.6(b)

¹³ *National Disability Insurance Scheme (Restrictive Practices and Behaviour Support) Rules 2018*, s.6(b)

¹⁴ *National Disability Insurance Scheme (Restrictive Practices and Behaviour Support) Rules 2018*, s.21, 3a

¹⁵ [Senior Practitioner Annual Report – 1 July 2016 to 30 June 2017](#), p.11.

¹⁶ Tasmanian Government, [Fourth Annual Progress Report and Action Plan 2022: Implementing the Recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse](#) (December 2021).



NDIS Worker Screening Check which is an assessment of whether a person who works, or seeks to work, with people with disability poses a risk to them. This check is conducted by the Worker Screening Unit in the state or territory where a person applies for it, which in Tasmania is Consumer, Building and Occupational Services (within the Department of Justice). In Queensland, as an example, it is an offence for registered NDIS providers to engage a person who is without a clearance, or who is subject to a suspension, interim bar or exclusion.¹⁷ I would support similar measures being adopted in Tasmania.

I am also aware from my discussions with stakeholders and service providers in Tasmania that there may be a significant number of non-registered NDIS providers who provide services to children and young people. Non-registered providers are not subject to the NDIS Practice Standards but are required to practice according to the NDIS Code of Conduct and are subject to the National Standards for Disability Services. I acknowledge that some of these providers, including allied health providers, practice under their own professional practice standards (e.g., speech pathology¹⁸, social work¹⁹), and others (e.g., nursing, occupational therapy, physiotherapy, podiatry, psychology) are required to be registered with the Australian Health Practitioner Regulation Agency. However, there are some non-registered NDIS providers whose services are not covered by any professional practice or regulatory requirements.

It may therefore be useful for the DSA to continue to have a role in ensuring that all government-funded disability services in Tasmania that are not registered NDIS providers are meeting the National Disability Standards. There should also be clear processes in place to respond effectively to organisations or individuals who are not meeting these standards.

Topic 6 – Creating a Tasmanian Disability Commissioner

I welcome the Tasmanian Government's commitment to the establishment of a Tasmanian Disability Commissioner to promote the safety, health and wellbeing of people with disability and to help ensure they receive the supports and services they need. I understand that further consultation will occur on the proposed model for this role, and I would welcome further discussion on this topic. This would allow me to gain a better understanding of the types of functions and/or powers a Disability Commissioner could have to investigate either individual or systemic issues; how the Disability Commissioner's role would interact with my role as Commissioner for Children and Young People; and the interaction of the Disability Commissioner with the NDIS Quality and Safeguards Commission.

For example, it will be important to clarify the role of the Disability Commissioner in receiving and investigating complaints about disability services delivered in Tasmania by providers who are either NDIS-funded or state-funded. I note that the Disability Services Commissioner in Victoria has the power to become involved in and investigate complaints relating to state-registered disability services, but is unable to investigate complaints involving unregistered providers. This is similar to the functions of the Health and Disability Services Complaints Office (HADSCO) in Western Australia. In contrast, the New South Wales Ageing and Disability Commissioner cannot investigate the conduct of any paid disability service provider (whether state- or NDIS-funded) and instead focuses on the conduct of family members and informal supports of elderly people and people with disability.

In my opinion, a model similar to that in Victoria, where the Commissioner can independently handle complaints relating to the provision of state-funded disability services, may be appropriate in the

¹⁷ [Worker screening requirements | NDIS Quality and Safeguards Commission \(ndiscommission.gov.au\)](https://www.ndiscommission.gov.au/worker-screening-requirements).

¹⁸ [Introducing the Professional Standards \(speechpathologyaustralia.org.au\)](https://www.speechpathologyaustralia.org.au/introducing-the-professional-standards).

¹⁹ [Practice Standards 2021 - AASW - Australian Association of Social Workers](https://www.aasw.org.au/practice-standards-2021).



Tasmanian context, with any complaints relating to NDIS funded services being directed to the NDIS Quality and Safeguards Commission.

It would also be important to clearly define the role of the Disability Commissioner in responding to and investigating complaints involving children and young people. I note that in New South Wales for example, the Ageing and Disability Commissioner's role only includes the protection of older people and adults with disability. However, in Victoria, there is no age specification, and it appears the Commissioner accepts complaints relating to children and young people.

Topic 7 – Supported decision making and consultation

The views of children and young people with disability should be actively sought and taken into account in all decisions that affect them in a way that is accessible and relevant to them.

In my view, the DSA has an integral role in promoting the right of children with disability to express their views freely on all matters affecting them, and for their views to be given due weight in accordance with their age and maturity, on an equal basis with other children, and to be provided with disability and age-appropriate assistance to realise that right.

While the principles of the DSA generally align to article 7 of the CRPD, the DSA could include greater commitments to ensure that children with disability are consulted in the design of, and decisions made about, the services that support them.

Consultation with children and young people should inform all major government decisions – including the review of this legislation.

Conclusion

Thank you again for the opportunity to contribute to the review of the DSA Discussion Paper. If you have any questions about my submission, please do not hesitate to contact me on (03) 6166 1366 or via email to childcomm@childcomm.tas.gov.au. I would welcome the opportunity to provide further feedback as your consultation on the review of the Act continues.

Yours sincerely

Leanne McLean
Commissioner for Children and Young People (Tasmania)

cc. *The Hon. Sarah Courtney, Minister for Children and Youth and Minister for Disability Services*