

2021 Review of the Disability Services Act 2011

# Consultation Outcomes Report – Full Report

September 2022



What **you** have  
to say is  
**important!**

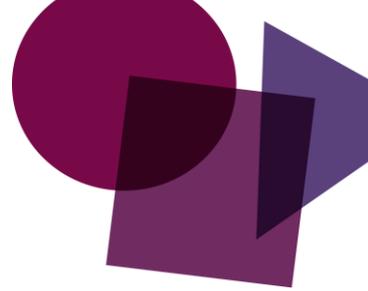
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# Table of Contents

<b>Minister’s Message</b> .....	<b>4</b>
<b>Introduction</b> .....	<b>5</b>
<b>About the Disability Services Act 2011</b> .....	<b>7</b>
<b>1. Inclusion, accessibility and leadership</b> .....	<b>11</b>
<b>2. Principles which support the rights of people with disability</b> .....	<b>25</b>
<b>3. The DSA, NDIS and other national disability program</b> .....	<b>30</b>
<b>4. Quality and safeguards</b> .....	<b>36</b>
<b>5. Regulation of providers</b> .....	<b>48</b>
<b>6. Tasmanian Disability Commissioner</b> .....	<b>54</b>
<b>7. Supported decision making</b> .....	<b>66</b>
<b>8. Consultation Policy and Practice</b> .....	<b>72</b>
<b>Where to from here...</b> .....	<b>76</b>
<b>Appendix 1. Tasmanian Government Reference Group</b> .....	<b>77</b>
<b>Appendix 2. Responses to DSA Review</b> .....	<b>78</b>
<b>Appendix 3. Interaction with other Tasmanian legislative and policy reviews</b> .....	<b>79</b>
<b>Appendix 4. Review of state-based authorisation processes for the use of restrictive practices.</b> ..	<b>81</b>



## Minister's Message

I would like to start by saying thank you to everyone who participated in this consultation process for the review of the *Disability Services Act 2011* and for the time and effort they put into taking part. I am delighted with the level of participation we have seen, particularly from people with disability.

Before we started, we asked people with lived experience about the best ways to consult with the disability community, and we did our best to follow this advice. We are learning more and more about how to consult, and we will look carefully at what worked or didn't work this time.

One of the things I have learnt from conversations I've had with people with disability, is that people want to be involved in decisions and conversations that affect them. And the community has lots to say when given the opportunity. I want to make sure we continue to increase the number of people who take part in consultations and live up to the message we used in this consultation – **what you have to say is vitally important!**

I have read the feedback provided with great interest. There has been many well-thought-out suggestions and we will use this advice in deciding what we do next.

For me, there are some very clear messages about access and inclusion and the role the Tasmanian Government needs to play as a leader in this – for every Tasmanian with disability. I was also very encouraged that so many people supported the creation of a Tasmanian Disability Commissioner and had ideas about what this role should do. I also heard many suggestions about improving the quality and safety of services.

We are now in a good place to know what we need to do to create contemporary legislation for Tasmanians with disability. We will now get to work and will continue to involve and consult all our stakeholders as we move forward.

The Hon Jo Palmer MLC  
Minister for Disability Services



# Introduction

## The Review

The Tasmanian Government is committed to building a more equitable, inclusive and accessible state. Communities Tasmania has undertaken a review of the *Disability Services Act 2011* (DSA) to examine how it can achieve better results for people with disability through high quality and safe services and by supporting national and international commitments.

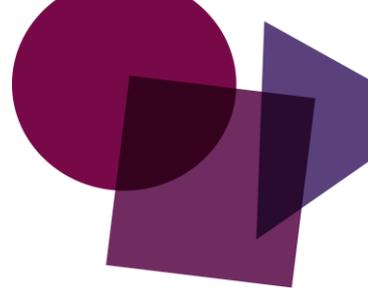
## Review environment

The review of the DSA is occurring during a time of considerable reform and change at a national and local level to support the rights of people with disability and to make Australia more inclusive. These national and local activities include:

- the release of *Australia's Disability Strategy 2021-2031* (ADS)
- Targeted Action Plans under the ADS in the five key areas of employment, community attitudes, early childhood, emergency management and safety
- development of the next iteration of *Accessible Island: Tasmania's Disability Framework for Action 2018-2021*
- *Protect and Respect Older Tasmanians: Tasmania's Elder Abuse Prevention Strategy 2019-2022*
- *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability*
- review of the *NDIS Quality and Safeguarding Framework*, national work to align the regulatory frameworks covering disability, aged care and veterans support and the implementation of Principles for Nationally Consistent Authorisation of Restrictive Practices
- legislative review of the *Mental Health Act (2013)* and the *Guardianship and Administration Act (1995)*
- *Review of the Public Trustee (Tasmania)*
- Tasmanian Parliament Legislative Council: *Report on Disability Services in Tasmania*.

## Consultation

We have heard from people with disability and their families and carers; service providers; advocates and services that support people with disability; Tasmanian Government agencies and independent statutory authorities; and the broader Tasmanian community.



## This report

This report outlines what we heard through our consultations about what needs to stay in the Act, what needs to be updated and what new things could be added.

We start by providing some background information about the DSA and who and how we consulted. The following chapters then include background information and information about other reforms or projects currently underway. Each chapter includes a summary of what we heard in the consultations.

This information is arranged against themes that emerged during the consultation. At the end of each chapter, we have included Consultation Outcomes – these are a summary of what we heard and what we need to consider in the future.

The following abbreviations are used in this Report:

- **‘DSA’** means the *Disability Services Act 2011*
- **‘NDIS’** is the National Disability Insurance Scheme
- **‘NDIA’** is the National Disability Insurance Agency
- **‘UNCRPD’** is *United Nations Convention on the Rights of Persons with Disabilities*
- **‘ADS’** refers to *Australia’s Disability Strategy 2021-2031*
- **‘Accessible Island’** refers to *Accessible Island: Tasmania’s Disability Framework for Action 2018-2021*
- **‘MDCG’** refers to the Minister for Disability Services’ Consultative Group

In this report where we use the terms ‘we’ or ‘our’ this refers to the DSA Review Project Team within the Department of Communities Tasmania.

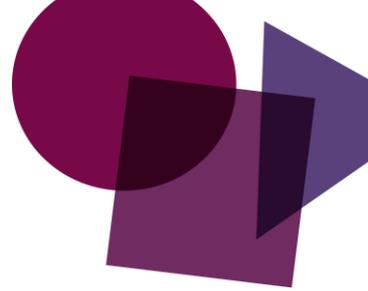
The term ‘mainstream’ is used throughout this document. Mainstream services are provided by the government or community sector to the Australian public, eg health, education, transport, justice, housing, or employment. People with disability may interact with a range of mainstream and specialist disability services throughout their lives.

References that are underlined usually means they are a hyperlink to the document or website where the information can be accessed. This will only work if the document is read electronically but the information can be found through Google if reading a hard copy.

## Related Documents

The following documents are available from the [DSA Review webpage](#):

- DSA Review Consultation Outcomes – Full Report (This Report)
- DSA Review Consultation Outcomes – Summary Report
- DSA Review Consultation Outcomes – Easy Read
- Review of the *Disability Services Act 2011* – Community Consultation Report
- DSA Review Discussion Paper



## About the *Disability Services Act 2011*

The DSA has provided the framework for funding service providers, researchers and individuals with disability, and for the approval and conduct of restrictive practices. It has specifically related to specialist disability services either funded or provided by the Tasmanian Government, however, an amendment in 2018 broadened the definition of ‘funded provider’ to include Tasmanian providers registered with the NDIS.

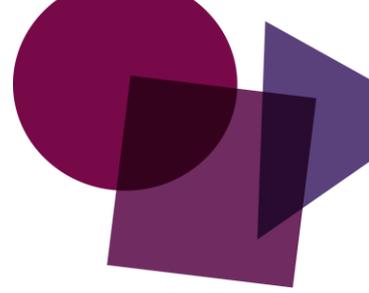
The DSA is supported by the *Disability Services Regulations 2015* which are aligned with the *National Standards for Disability Services*.

Since the DSA was operationalised in 2012 there has been significant change in the delivery of specialist disability services. The *National Disability Insurance Scheme Act 2013* (NDIS Act) has been legislated and the NDIS has been fully operational in Tasmania since 1 July 2019. These changes have moved responsibility for the delivery of most disability services from the states and territories to the Australian Government. This in turn has altered the funding regime in Tasmania from a largely block-funded approach for disability services to individual funding that provides people with choice and control of the support and care they need to help achieve their goals and aspirations. Consequently, large portions of the DSA are no longer relevant and other parts of the Act require revision to align with and complement both national and state quality and safeguarding arrangements.

### **2017/18 Review of the DSA 2011**

A minor review of the DSA 2011, which focussed on the resolution of interoperability issues with the NDIS, was undertaken in 2017/18, resulting in a small number of amendments which came into effect on 1 July 2019. These amendments also updated the DSA principles to align them with the UNCRPD and the Principles in the *NDIS Act 2013*. There were several issues identified during consultations undertaken for the previous review that have been considered during this current review.

For further information on the DSA or the *Disability Services Regulations 2015*, these documents are available on the [Tasmanian Legislation website](#).



## How we consulted

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

A [discussion paper](#) (PDF) was prepared to provide context and stimulate conversation about the operation of the DSA and what needs to change. The discussion paper was concurrently published in both Plain and Easy Read formats and was available in hard copy and still available in digital form on the [DSA Review webpage](#).

Submissions in response to the Discussion Paper were invited from members of the public, community groups, advocates and the broader community from October 2021 and closed at the end of December 2021. Formal consultation activities closed at the end of March 2022.

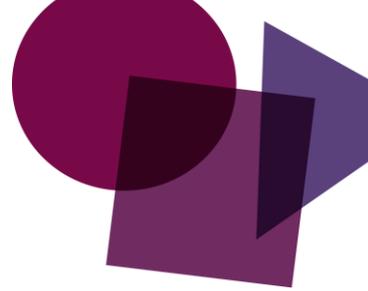
### Communication and Stakeholder Engagement

A Communications and Stakeholder Engagement Strategy to support the DSA Review was developed to promote participation in consultation activities. Strategies for community engagement included:

- promotion on the Communities Tasmania webpage via ‘News and Announcements’ and ‘Latest News’ on the Community and Disability Services webpage. This information included an overview of the Review and listed opportunities to participate in consultation
- advertising via the Tasmanian print media, radio and social media advertisements
- promotion through organisations known to be used by people with disability, as well as peak organisations and advocacy organisations
- utilising the Communities Tasmania Facebook page to promote the Review
- peak organisations, disability organisations and advocates who were encouraged to share this information with their networks. They were also provided with content to share including the social media advertisements
- offering a dedicated 1800 number and email address for the DSA Review.

### Minister’s Disability Consultative Group

The Minister’s Disability Consultative Group is a key stakeholder for the review of the DSA and has been consulted with throughout the process. This has included input during development of the Review Discussion Paper, involvement in the design of the consultation and in a targeted conversation about the role of a Disability Commissioner. The Premier’s Disability Advisory Council (PDAC) was also briefed about the Review and invited to participate in consultation activities.



## Community consultation

Annie Curtis Consulting was selected, through a request for quotation process, to seek feedback from people with disability, family, carers, advocates and disability providers to help ensure consultations with people with lived experience were accessible and inclusive.

The [Discussion Paper](#) (PDF) provided the background and framework for the state-wide consultation. A number of different engagement approaches were undertaken. Adjustment was made to the engagement strategy away from the planned in-person forums to online sessions due to Covid-19 considerations.

Engagement activities included:

- Holding a booth at two Disability Expos (9 November 2021 in Burnie and 17 November 2021 in Hobart) which attracted 153 people with 138 taking a copy of the Discussion Paper and 29 people providing contact details for further follow up in relation to the Review. Prior to engaging Annie Curtis, an information session about the Review was hosted by SpeakOut at the Launceston Disability Expo in October.
- An online forum with members of the Minister for Disability Services' consultative group, MDCG, and PDAC on 2 December 2021. This discussion included design suggestions in relation to consultation as well as feedback and input into elements of the DSA Review, as per the Discussion Paper.
- In-person sessions with groups of people through the organisations Speak Out and Association of Children with Disability Tasmania.
- State-wide on-line sessions utilising EventBrite for registration and Zoom as the platform for each session. 58 registered attendees participated in the forums that were conducted over seven different dates/times between 31 January 2022 and 16 February 2022).
- One-on-one consultations via phone, Zoom and in person.

Consultation participants included people with lived experience of disability, family members (including parents and grandparents), carers, support workers, service providers and other interested parties.

The people with lived experience who were happy to identify their disability during the consultation included people with intellectual disability, physical disability, neurological disability, Autism, psychosocial disability, vision impairment, hearing impairment and acquired brain injury.

Organisations involved in sessions included: Anglicare, Nexus, Migrant Resource Centre, Langford, Association for Children with Disability Youth Leadership Group, Association for Children with Disability Parents Forum (My Time), TAFE, Speak Out, Women with Disabilities, Legal Aid, Family Based Care Tasmania, Glenorchy City Council, Clarence City Council, Kingborough City Council, Mental Health Family and Friends, Guide Dogs of Tasmania and Mosaic. Representatives from these organisations included management, staff in clinical positions and support staff.



## **Government agency and statutory bodies stakeholder consultation**

A Tasmanian Government Reference Group was established in November 2021 to directly engage with government stakeholders. See [Appendix I](#) for membership. After the reference group meeting, follow-up discussions took place with all key stakeholders. Feedback captured by the project team during discussions with various Tasmanian Government agencies is referred to in this report as inter-agency advice.

Statutory authority stakeholders were also consulted. These included the Anti-Discrimination Commissioner, Commissioner for Children and Young People, the Ombudsman and the Health Complaints Commissioner.

### **Public Submissions**

Twelve (12) written submissions were received, including:

- 8 x community sector/advocacy groups/advisory committee
- 2 x members of the public (one lived experience and one carer)
- 2 x statutory authorities.

See [Appendix 2](#) for a full list of consultation inputs considered for this report.



# I. Inclusion, accessibility and leadership

## Introduction

The Tasmanian Government is committed to supporting the rights of people with disability as set out in Australia's Disability Strategy (ADS) and the UNCRPD. This commitment seeks to improve the lives of people with disability and their families and carers, and to provide leadership for a community-wide shift in attitudes. This commitment includes the one in four Tasmanians who report that they have disability and is not restricted only to those who are NDIS participants.

Tasmania has shown leadership in supporting this commitment through plans such as Accessible Island: Tasmania's Disability Framework for Action 2018-2021 (Accessible Island) and in the Disability Action Plans of Tasmanian Government Departments. In most other parts of Australia commitments are included in disability-related legislation. Until now, inclusion and accessibility have been included in the Principles in the DSA but they have not been the Act's core purpose.

### **Profile of People with Disability in Tasmania**

The Australian Bureau of Statistics' 2018 Survey of Disability, Ageing and Carers estimated that there are 140 100 people or 26.8 per cent of Tasmania's population with disability, which is the highest rate in Australia. Of the estimated 140 100 people with disability in Tasmania, 63 800 people were aged over 64 years.

Of all people with disability in Tasmania, 30.6 per cent reported a profound or severe core activity limitation, 48.9 per cent reported moderate or mild core activity limitation and 11.6 per cent did not report any limitation<sup>1</sup>.

The NDIS was established to provide reasonable and necessary supports to people under 65 years of age. At 31 March 2022, 11 832 people with disability were accessing services and supports through the NDIS in Tasmania<sup>2</sup>.

### **Australia's Disability Strategy 2021-2031**

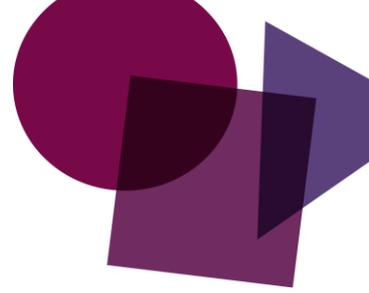
The new national disability strategy, Australia's Disability Strategy 2021-2031 (ADS) was publicly released on 3 December 2021. The purpose of the ADS is to:

- provide national leadership towards greater inclusion of people with disability
- guide activity across all areas of public policy to be inclusive and responsive to people with disability
- drive mainstream services and systems to improve outcomes for people with disability
- engage, inform and involve the whole community in achieving a more inclusive society.

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<sup>1</sup> Australian Bureau of Statistics: Disability, Ageing and Carers, Australia: Summary of Findings 2018 Release - Disability, Ageing and Carers, Australia: Summary of Findings, 2018 | Australian Bureau of Statistics ([abs.gov.au](https://abs.gov.au))

<sup>2</sup> <https://www.ndis.gov.au/about-us/publications/quarterly-reports>



The Strategy's vision is for an inclusive Australian society that ensures people with disability can fulfill their potential as equal members of the community. To achieve this vision, seven Outcome Areas have been agreed, in consultation with people with disability, as areas for improvement:

- employment and financial security
- inclusive homes and communities
- safety, rights and justice
- personal and community support
- education and learning
- health and wellbeing
- community attitudes.

Time-limited Targeted Action Plans and longer-term Associated Plans will be implemented to facilitate delivery of the outcomes. The five Targeted Action Plans launched with the Strategy are focused on improving employment, community attitudes, early childhood, safety and emergency management.

Accessible Island: *Tasmania's Disability Framework for Action 2018-2021* and associated action plans will be updated to align with the ADS with consultations to be undertaken to inform the development of the action plans.

### ***Disability Royal Commission***

The *Overview of Responses to the Promoting Inclusion Issues Paper* prepared for The Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Disability Royal Commission) described an inclusive society as one that:

- recognises and enforces human rights
- adopts meaningful practices of co-production and co-design
- embeds universal design to ensure full accessibility
- provides culturally competent and safe services
- recognises the social model of disability, and
- promotes a sense of belonging.

The *Research Report: Changing community attitudes to improve inclusion of people with disability* released in May 2022 found that the two ways to change attitudes towards people with disability so that they are better included in society are to use strategies that directly target attitude change and strategies to change behaviour, with attitude change as a secondary purpose and outcome.



The facilitators of attitude change are:

1. Active presence of people with disability
2. Leadership
3. Targeting multiple levels and multiple types of policy and interventions
4. Long-term approaches with adequate resources
5. Measuring and monitoring change.

### ***Inclusive Equality***

In March 2018 the Committee on the Rights of Persons with Disabilities adopted General Comment 6 on Article 5: Equality and non-discrimination. The aim of the general comment is to clarify the obligations of States parties regarding non-discrimination and equality as enshrined in Article 5 of the CRPD. The General Comment cites inclusive equality (also referred to as transformative equality<sup>3</sup>) as a new model of equality developed throughout the Convention which embraces a substantive model of equality and extends and elaborates on the content of equality in:

- (a) a fair *redistributive* dimension to address socioeconomic disadvantages
- (b) a *recognition* dimension to combat stigma, stereotyping, prejudice and violence and to recognise the dignity of human beings and their intersectionality
- (c) a *participative* dimension to reaffirm the social nature of people as members of social groups and the full recognition of humanity through inclusion in society, and
- (d) an *accommodating* dimension to make space for difference as a matter of human dignity.

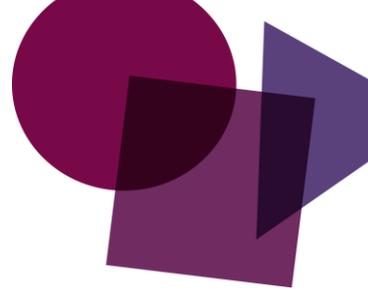
### ***Other jurisdictions***

The Australian Capital Territory (ACT) *Human Rights Commission Social Inclusion Plan 2019-2022* commits to creating an inclusive community that respects and realises everyone's rights.

South Australia's first *State Disability Inclusion Plan – Inclusive SA* – was established as part of the *Disability Inclusion Act 2018 (SA)* and supports a whole-of-government approach to inclusion. Provisions for the *State Disability Inclusion Plan* and *State Authorities Disability Access and Inclusion Plans* are legislated in the Act. South Australia's legislation is also supported by regulations relating to inclusion, community visiting and worker screening. The Plan's vision is an accessible and inclusive South Australia based on fairness and respect. To achieve this vision, Inclusive South Australia focuses on the following themes: inclusive communities for all, leadership for all, accessible communities and learning and employment.

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<sup>3</sup> Theresia Degener 'Disability in a human rights context', in Laws (2016), 5, 35 cited in Kayess, R., & Sands, T. (2020), *Convention on the Rights of Persons with Disabilities: Shining a light on Social Transformation*. Sydney: UNSW Social Policy Research Centre; and Sandra Fredman, 'Substantive Equality Revisited' (2016) 14(3) *Int'l J of Con L* 712 cited in Fredman, S. et. al (2017) *Achieving Transformative Equality for Persons with Disabilities: Submission to the CRPD Committee for General Comment No.6 on Article 5 of the UN Convention on the Rights of Persons with Disabilities* January 2017.



The West Australian *Disability Services Act 1993* requires all local government and selected State Government agencies to develop a Disability Access and Inclusion Plan.

Like South Australia and Western Australia, Victoria's state disability action plan is required under the Victorian disability legislation. The Victorian Government recently launched the new state disability plan, *Inclusive Victoria: State disability plan 2022-2026* (Inclusive Victoria)<sup>4</sup>. The plan's vision is 'an inclusive, accessible and safe Victoria that upholds the rights of people with disability, celebrates our diversity and pride, and expands our opportunities to belong and control our lives'.

Victoria's Disability Act is currently under review and is expected to deliver a stronger disability inclusion legislative framework.

*The review seeks to modernise Victoria's legislated disability inclusion framework to support the vision of a barrier-free Victoria. This includes looking at changes to strengthen Victoria's ongoing role in promoting the human rights, inclusion and participation of people with disability, drawing on other Victorian, interstate and international models as part of the review. Systemic reforms combined with a strong disability inclusion legislative framework will lay the groundwork for achieving transformative equality for people with disability. (p25, Inclusive Victoria)*

The New South Wales (NSW) *Disability Inclusion Act 2014* seeks to promote the inclusion and participation of people with disability in the community. The objectives of the Act are to:

- recognise the human rights of people with disability, including giving effect to Australia's ratification of the UN CPRD
- promote inclusion and improvements in the lives of people with disability, and
- commit the NSW government to delivering and funding services and supports in the transition period to the NDIS.

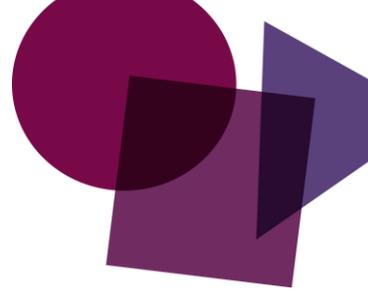
## What we asked

To start the conversation about Inclusion, Access and Leadership we asked the following questions:

- *How could the DSA be changed to advance and drive the inclusion of people with disability in the Tasmanian community?*
- *In what ways could the DSA contribute to inclusion of people with disability in the social, economic, civic, political and cultural life of Tasmania?*
- *What role could the DSA have in driving action and removing barriers in areas like community attitudes, employment, discrimination and in access to mainstream supports including education, health, transport and housing?*

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<sup>4</sup> [Inclusive Victoria: state disability plan \(2022–2026\)](https://www.vic.gov.au/inclusive-victoria-state-disability-plan-2022-2026) | Victorian Government ([www.vic.gov.au](http://www.vic.gov.au))



## What we heard

### ***Inclusion and Accessibility***

To advance and drive the inclusion of people with a disability, submissions included suggestions including amending the definition and scope of disability; legislating a disability advisory council; linking with frameworks that support people with disability such as Accessible Island; and the Act having a stronger focus on human rights:

*[National Disability Service] supports a redevelopment of the Disability Services Act 2011 (DSA) that adopts objectives which have a strong human rights focus and reflect a more comprehensive and contemporary understanding of disability. (NDS)*

Submissions proposed that the DSA could contribute to the inclusion of people with disability in Tasmania’s social, economic, civic, political and cultural life through revising the objects of the Act to include the principles of inclusion and accessibility at the core of the Act and through a charter of rights (see also [3. Principles section](#)),

One submission outlined that the Act should align with a framework of substantive (transformative) equality in supporting inclusion and accessibility for all people with disability. It went on to outline four dimensions that could underpin decisions and ways of operating to support people with disability to be included in the social, economic, civic, political and cultural life of Tasmania. These were described as:

1. *Redistributive dimension – redistribution of resources*
2. *Recognition dimension – knowing and valuing all difference*
3. *Participative dimension – “nothing about us without us”*
4. *Transformative dimension – ensuring space is made for difference at all levels and this is reflected in policy, procedures and legislation.*

Community consultation highlighted that the review of the DSA provides an opportunity for Tasmania to lead the nation and embed best practise in terms of inclusion. Participants reported that inclusion for people living with disability is impacted by stigma and the sense of not belonging. Participants felt that there is a degree of ignorance in the community:

*Some people think we can’t do things because we are different.*

Feedback was also provided by community consultation participants that inclusion meant that they had the opportunity to make and maintain friendships.

A number of participants in the community consultation reflected that the Accessible Island is not functionally effective. An example is the Justice Framework which states that people with disability have access to advocacy and communication supports, where in reality there are not the services available that have the skill or expertise to assist, particularly in relation to civil matters.

Limited training opportunities in Tasmania for Auslan interpreters was also identified as a barrier to inclusion.



## **Accessible Island: Tasmania's Disability Framework for Action**

There was support in submissions for the DSA to link formally with Accessible Island, particularly as it was considered that the Framework 'is the mechanism for government priorities and investment in inclusion' (Autism Tasmania).

One submission suggested that legislated disability access and inclusion plans should apply more broadly whereby:

*All Tasmanian state and local government jurisdictions and government businesses have a disability access and inclusion plan legislated under the DSA. (ParaQuad)*

The review of the DSA was seen as an avenue to formalise reporting on the progress of delivering against actions:

*The DSA contains a legislative requirement that public sector organisations develop and maintain disability action plans, make them available to the public, and report on progress regularly. (NDS)*

Feedback from Communities Tasmania identified that the emphasis on measurement, evaluation and reporting for the ADS will require a clearly targeted Disability Framework for Action with clear linkages to the national commitment to inclusion and accessibility. The review of the DSA therefore could provide a timely opportunity to formalise agency reporting on the Framework and align with the legislative reporting requirements in place in most other jurisdictions.

While PDAC has the role of reporting annually to Cabinet on the implementation of Accessible Island, it has been identified that a clear articulation of the rationale for reporting would provide greater guidance for both PDAC and agencies. An opportunity was seen for the DSA to provide support for the roles of PDAC, MDCG and the proposed Disability Commissioner, to assist in reporting, avoid duplication and help to maintain the focus on inclusion:

*A clearly articulated commitment to support the rights of people with disability and the rationale for reporting against the current and future Disability Frameworks for Action would provide greater guidance and clarity for people with disability, government agencies, and the broader community. It would also send a strong message that inclusion is an ongoing and evolving priority for all parties. (Inter-Agency advice)*

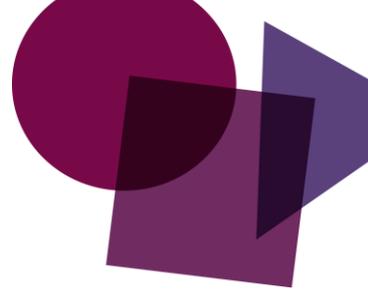
It was recommended in one sector submission that the progress reports by state government agencies be promoted and distributed more widely across the disability sector.

Another submission recommended that upon release of a revised Act:

*An updated disability framework be developed and publicly released to further assist the Tasmanian community to implement the Act to meaningfully support people with disability in Tasmania (CarersTAS).*

## **Mainstream supports and service delivery**

Submissions put forward that the DSA, particularly in conjunction with policy frameworks such as Accessible Island and ADS, could have a role in driving action and removing barriers



to access to mainstream supports through establishing or referring to minimum standards, requirements, targets or mandates.

It was highlighted that the ADS has a clearer and stronger policy focus on housing, safety, employment and community attitudes than the previous strategy. One submission noted that there is an overarching commitment to strengthen inclusion of Australians with disability within the ADS and suggested that the DSA could emphasise Tasmania's commitment to promote inclusivity via policy design, education and advocacy mechanisms.

The Equal Opportunity Tasmania (EOT) submission notes that all service delivery should be accessible and that it is critical that mainstream services deliver non-discriminatory services to people with disability. The submission outlines that while the DSA seeks to provide a framework for service delivery for people with disability, the overarching aims of participation, inclusion, opportunity and accessibility may be facilitated by implementing measures such as:

- minimum standards of disability responsiveness for disability and other service providers
- an obligation of flexible service delivery for people with disability, and
- required training to ensure staff and organisational knowledge is built and maintained, and skills subsequently used in service delivery practice.

In relation to training for mainstream service delivery one submission advocated to:

*Mandate accredited training for all front-line service delivery and HR staff – people in these roles should be able to demonstrate competency in neurodiversity appropriate practice and environment inclusion. (Autism Tasmania)*

In advocating for children and young people with disabilities, the CCYP stated that a whole-of-government approach is needed to achieve the proposed vision of a more equitable, inclusive and accessible state. The submission highlighted challenges for children and young people with disabilities in accessing education, community planning, child safety and youth justice. Examples put forward that could be considered in amendments to the DSA include:

*Education – the 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, enabling greater alignment between the DSA and the Education Act 2016 (Tas).*

*Child safety – 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.*

*Youth Justice – an opportunity 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, including minimum requirements or protocols for appropriate assessment in relation to suspected or confirmed disability.*



The National Disability Service (NDS) submission encouraged the Tasmanian Government to explore setting minimum standards of inclusion, access to services, and employment opportunities both within government and the wider community. The submission went on to suggest that the DSA should include a requirement for disability impact assessments.

*These assessments should include consideration for the impact of proposed changes/actions for people with disability and on access and inclusion. This should be introduced for all state government policy to bring a disability lens to government activity.*

### **Legislated definition of disability, name and scope of the Act**

The current definition reflects the context in which the DSA was developed and its purpose as an Act for the regulation of funding and funders. The definition of ‘disability’ and other terms defined in the Act provided a structure for the determination of eligibility for specialist disability services and a framework for which services the DSA would apply to.

Submissions were in support of the DSA embedding a clear sense of what is meant or covered by ‘disability’ by making the definition clearer.

Two submissions highlighted that the current definition in the DSA defines disability as being ‘permanent’ and they question whether the Act should also reflect disabilities that may be transient or episodic in nature but which require point in time support:

*The definition in the DSA is limited to only those disabilities which are permanent or likely to be permanent... does not include neurological disability and stipulates that there must be a need for continuing 'significant' support services. (EOT)*

The EOT submission referred to the *Anti-Discrimination Act 1998 (ADA)* definition under which disability is a protected attribute. The definition captures situations where people have a temporary illness:

**disability** means any of the following that presently exists, previously existed but no longer exists, may exist in the future, whether or not arising from an illness, disease or injury or from a condition subsisting at birth:

- (a) a total or partial loss of the person's bodily or mental functions;
- (b) total or partial loss of a part of the body;
- (c) the presence in the body of organisms causing or capable of causing disease or illness;
- (d) the malfunction, malformation or disfigurement of a part of a person's body;
- (e) disorder, malformation, malfunction or disfigurement that results in the person learning differently from a person without the disorder, malformation, malfunction or disfigurement;
- (f) a disorder, illness or disease that affects a person's thought processes, perceptions of reality, emotions or judgment or that results in disturbed behaviour;
- (g) reliance on a guide-dog, wheelchair or other remedial or therapeutic device



One particular example of a temporary or episodic disability is psychosocial disability, which is not necessarily a lifelong disability, that is, people can recover with the appropriate treatment. Currently, Section 4 (a) and (b) of the DSA includes:

*‘psychiatric disability, (a) and (b) is permanent or likely to be permanent’.*

Inter-agency advice was provided that it may be appropriate to replace the word ‘psychiatric’ with ‘psychosocial’. This change would align with contemporary language in terms of the NDIS and recovery-orientated practices.

In relation to the scope of the Act, EOT noted that there is a definitional link to service delivery and the opportunity to access services is an enabler for community participation and acceptance:

*A wider definition of disability has the potential to capture both the varied lived experiences of people with disability and may also contribute to the broader understanding and acceptance in the community as to the unique experience each individual has with disability.*

Feedback was provided that terms such as ‘disability’ and ‘disability support provider’ could be redefined to reflect a more contemporary support and service delivery context. This could consider how the definitions are used to support quality and safeguarding mechanisms.

In addition to reviewing the definition and scope of ‘disability’, there were suggestions for the change of the name of the Act, eg Disability Inclusion Act, Disability Commission Act, and Disability Diversity and Inclusion Act, or to retain ‘Disability Services Act’ (ParaQuad submission).

To assist in the interpretation of the Act, the NDS submission highlighted that:

*the introduction of a preamble to legislation, that sets expectation and outlines the government’s ambitions for change and improvement, would support people with disability to access and understand changes in legislation.*

Community consultation highlighted that the DSA needs to be accessible – easy to read and understandable. The option for operational guidelines to assist in interpretation of the Act were raised. The outcomes of the current Disability Royal Commission were also highlighted as important for consideration in Tasmania’s new legislation.

### **Charter of rights for people with disability (see also Chapter 3. Principles)**

A charter of rights for people with a disability as a schedule to the DSA or rights strengthened through the Principles of the DSA, was recommended within four community/advocacy group submissions (Tasmanian Council of Social Service Inc [TasCOSS], CarersTAS, NDS, Your Say Advocacy Tasmania [Your Say]). It was suggested that this could be reported on (CarersTAS) and that the Disability Commissioner could have oversight over the charter (Your Say).

The TasCOSS submission outlined that consultations from the Disability Royal Commission strongly supported a Bill or Charter of Rights in Australia. The submission also referred to



the Tasmanian Law Reform Institute 2007 report 'A Charter of Rights for Tasmania' which supported the introduction of a Tasmanian Charter. TasCOSS highlighted that:

*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.*

## **Leadership**

The proposed Disability Commissioner was raised as having an important leadership role. Section 6 of this report contains more information about the role of a Tasmanian Disability Commissioner.

As noted in the introduction, Australia's Disability Strategy provides national leadership and policy direction for the inclusion of people with disability. An agency submission highlighted that the ADS:

*...is underpinned by a commitment to create an inclusive community - 'to a national aspiration to enshrine and elevate the ideals of respect, inclusivity, and equality'. All governments – Australian, state, territory and local – are committed to delivering on its principles.'*

Community consultation outlined that leadership is an area that should be encouraged, particularly in young people.

Other suggestions included the need for organisations to include people with disability in their governance and leadership structures.

## **Legislated Disability Advisory Council**

While it was acknowledged that disability advisory groups already existed (such as MDCG and PDAC) to provide advice to government, there was some support from community, advocacy groups and the public for the establishment of a legislated disability advisory council or committee under the DSA (TasCOSS, CarersTAS, NDS, Your Say). An example of this was the Victorian Disability Advisory Council (VDAC). It was suggested that there be a requirement within the DSA for a disability advisory committee to be established with regular meetings.

Feedback included that membership of the group should be made up of mostly people with disability with representation from different types of disability and cultural backgrounds and should also include carers.

## **Public/community awareness**

Community consultations highlighted that the language used in commentary about disability was important in the context of community awareness, acceptance and understanding.

It was recommended consistently throughout the consultation that there needs to be an advertising campaign that informs people that everyone is equal. This is recommended using



television, YouTube and social media (Facebook, Twitter, Snapchat and Instagram). The Tasmanian Government was identified as the key driver of this disability awareness opportunity. Further, the requirement for training and professional development in workplaces and programs was identified as a key element of increased awareness.

Training and disability awareness for the Tasmanian community is seen as a proactive way to move from a community of “we will tell you” to a community of asking people “what they need and want”.

Public awareness and information should be made available by government in relation to voting in elections.

### **Physical accessibility**

The Kingborough Council Disability Inclusion & Access Advisory Committee was supportive of local government playing a bigger role in promoting and supporting better disability access and bringing about social change. The committee submission:

*Acknowledges that legislation needs to be supportive of accessibility as a human right and not an additional extra, for example, the National Construction Code could be more supportive of universal access as fundamental and not a special feature.*

The submission went on to explain that:

*Physical access to premises continues to be a barrier. More work needs to be done to ensure access issues are addressed at the earliest possible stage of projects. Many venues, businesses, public amenities and even private households are not accessible. This negatively impacts people with disabilities, their friends and carers and perpetuates a sense of separateness or difference unnecessarily assigned to people with disability.*

Physical accessibility issues were raised in community consultation and a number of areas were discussed:

- shops – entrances and fixtures
- public toilets – poor signage and limited options, particularly in terms of turning space for wheelchairs in accessible toilets and the need for toilet maps (through local councils) so people know where and what toilet facilities are available
- streets (all) need ramped gutters at cross points
- playground equipment is improving but this needs to continue
- buildings access – noting that accessible entrances should not be limited to the rear or back entrance of buildings
- footpaths – uneven footpaths are not safe
- traffic light clickers are not loud enough
- beach access for wheelchair users
- ferries.



## ***Tourism***

Tourism was identified as an area where there should be increased opportunities for people with disability to ensure that all Tasmanians are able to access the beauty of the state. Examples provided included ensuring proportions of walks are wheelchair accessible or supported to access through golf carts. This would also result in an increase in tourism to the state and to build the reputation of Tasmania as an accessible island.

## ***The Arts***

Access to the Arts (live music and theatre) need increased accessibility both physically and economically. In addition, the opportunity for people to engage by being directly involved in the Arts was requested. Access to the community and events also includes the provision of breakout or quiet spaces to ensure people feel safe in the environments they visit.

## ***Transport***

Transport was raised both as an accessibility issue and a barrier to inclusion in 80 per cent of the community consultation conversations.

Changed bus routes were identified as having an impact on community access.

Improved options for learning to drive, and subsequently getting a driving license, was identified by a number of young people.

## ***Employment***

People identified that there is little access to 'real' jobs in Tasmania and that the Disability Employment Services (DES) are not enabling good outcomes for people in Tasmania. These need to be genuine and not made-up roles.

The additional costs of living with disability also impacts on the drive for improved employment conditions including better pay rates in DES jobs.

The ParaQuad submission suggested that there should be a reporting requirement for all government-funded services (ie hospitals, education, transport) to set and meet targets for increasing employment of Tasmanians with disability. The option of government services to include mandated caps/quotas in the employment of people with disability was raised.

One submission suggested the need for stronger protection against discrimination in employment, particularly reasonable accommodations in casual roles and earlier access to sick leave.

## ***Housing***

Housing was a consistent theme raised throughout the community consultation. Housing affordability and the capacity to plan for homeownership was seen as is a significant barrier for many people with disability.

The availability of social housing options that are wheelchair accessible or at minimum universal design, is a challenge for people requiring this level of amenity.



It was suggested that a clear quota on the construction of accessible housing should be mandated.

### **Cost of living**

Further to housing affordability was the additional cost of daily living (eg medication, fuel price) that impact people with disability. The cost of diagnostic assessments was described as prohibitive to people accessing supports and services.

### **Health**

There were many examples provided where engagement with the health system, particularly hospitals, proved highly challenging and unsuccessful for people with disability and/or their families. Generally, the examples reflected a lack of awareness and capacity to accommodate individual needs.

One individual submission expressed how access to Telehealth had made access to healthcare much easier for someone with psychosocial disability, reflecting flexible service delivery which became widespread during the COVID-19 pandemic.

### **Education**

Education was also a consistent theme in the context of inclusion and accessibility across Tasmania. Participants suggested that the education system needs a higher level of focus on students with disability, including support options available to students (eg supports for deaf people, consistency in resource distribution). The creation of more robust and reliable educational opportunities was suggested.

Lack of access to education, or particularly, exclusion from education settings, was identified as a contributor to negative impacts in other areas of life. A range of issues associated with educational settings and education programs was raised.

EOT highlighted that ‘advancing and driving the inclusion of people with disability is especially essential within the education system’. The submission expressed concern that:

*Children who are excluded from education on the basis of their disability are positioned to accept such exclusion throughout their life.*

One submission outlined that the *Disability Standards for Education (2005)* (DSE) clarify the obligations for education and training providers and seek to ensure that that students with disability can access and participate in education on the same basis as students without disability. The standards were reviewed in 2020, with the schooling sector featuring most prominently in the recommendations due to the compulsory nature of schooling and the length of time students with disability engage with the sector. Recommendations which apply to all education sectors include:

- empowering and supporting students with disability and their families
- strengthening the knowledge and capability of educators and providers
- embedding accountability for the Standards throughout the education system.



Another submission suggested that as access to an inclusive education is a basic human right, this should be included in the scope of a Disability Commissioner:

*This needs to include all schools, including public, private and catholic. Access to a Tasmanian Disability Commissioner and an independent complaints conciliation process will hopefully mean that in the future all students in Tasmania will have access to an inclusive education, and that the process to address any issues that occur will be easier and more timely.*  
(Individual Submission)

## Consultation Outcomes

- Focus on inclusion and access by changing the name of the Act.
- Include a whole of government commitment to Australia's Disability Strategy and Accessible Island. Include rules about consultation, planning and reporting of progress in delivering actions.
- Include an inclusion and access principle and a principle relating to consultation in Government planning.
- Commit to improving the inclusiveness of mainstream supports by promoting disability awareness, standards and targets.
- Strengthen links to human rights and transformative equality through the creation of a Charter of Rights for People with Disability.
- Include people with disability in leadership by legislating a Disability Advisory Council.
- Enhance equality by improving community attitudes and understanding about people with disability.
- Broaden the definition of 'disability' in the DSA to include all people with disability.
- Respond to findings of the Disability Royal Commission.
- Make the Act itself accessible, Easy Read and understandable. Develop tools to assist in understanding the Act.



## 2. Principles which support the rights of people with disability

### Introduction

It is intended that the DSA principles form the foundation for everything covered by the DSA and are important in guiding the behaviour of people using the DSA. The principles reflect the UNCRPD and are substantially similar to those included in the *NDIS Act 2013* which are also designed to align with the UNCRPD. The DSA Principles were updated via an amendment to the DSA in 2019 and followed feedback received during a consultation on the DSA in 2018.

### ***Australia's Disability Strategy Guiding Principles***

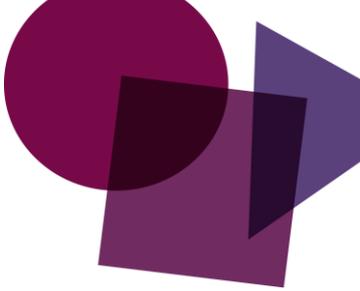
The guiding principles outlined in *the ADS* reflect the human rights principles of the UNCRPD and are based on Article 3. They include:

1. Respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons
2. Non-discrimination
3. Full and effective participation and inclusion in society
4. Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity
5. Equality of opportunity
6. Accessibility
7. Equality of people
8. Respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.

Australian and state governments have agreed to use these Guiding Principles when developing policies, programs, services and systems. A guide to these principles (*the Guide to the Guiding Principles*) will be released by the Australian Government by the end of 2022. Along with The Guiding Principles outlined in the ADS, some prompting questions have been included in the ADS Appendix 5 which aim to assist individuals and organisations to consider whether their proposal upholds the rights of people with disability in accordance with the UNCRPD. It is understood that these questions will be further developed in the *Guide to the Guiding Principles*.

### ***Principles to Determine the Responsibilities of the NDIS***

Other current national commitments include; the guiding principles outlined in the Council of Australian Governments (2015), [Principles to Determine the Responsibilities of the NDIS and other Service Systems - The Applied Principles and Tables of Support \(APTOS\)](#). (Note



these also relate to scope and responsibilities of NDIS and other service systems, [see next section](#)).

## What we asked

To start the conversation about principles which support the rights of people with disability we asked the following questions:

- *Do the DSA Principles reflect an up-to-date way of describing disability and the ways in which people with disability live and are supported?*
- *Do the DSA Principles need to change and if so, how?*

## What we heard

### **Principles based on the UNCRPD**

The Principles in the DSA are currently based on the UNCRPD and were widely supported across the consultation and are reflective of a contemporary way of describing disability. The community consultation raised the option to add further aspirational Tasmanian-specific principles.

Another submission stated that principles should reflect supports over a lifetime but also acknowledge that individual supports should be flexible for people whose needs fluctuate.

One respondent (CCYP) highlighted that there is an opportunity to strengthen the DSA principle (see below) in relation to the cultural needs and circumstances of people with disability:

*People with disability should be supported in all their dealings and communications so that their capacity to exercise choice and control is maximised in a way that is appropriate to their circumstances and cultural needs (Section 5 DSA 2011).*

It was suggested that this could be achieved through the provision of more explicit guidance for service providers on how to implement this principle in various cultural settings.

The ADS guide to principles was cited as an example of how to drive a consistent approach.

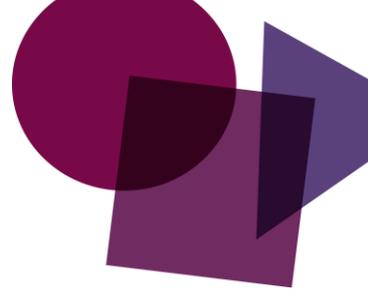
The CCYP submission also noted the Child and Youth Safe Organisations Framework (CYSOFF) pending National Principles for Child Safe Organisations.

One submission suggested that the DSA should have a positive statement in law of the expectations and the principles of behaviour that a person can be held against.

### **Rights for people with disability**

Participants in the community consultation suggested that the new Act should ensure the right to self-determination is reflected in the legislation. The right of people with disability to be a parent was an area that was raised as important in the context of the principles, as well as in relation to supported decision making.

Examples were provided throughout the community consultation where staff in mainstream services (health, justice, emergency services) do not recognise or understand the rights of



people with disability and therefore a sense of discrimination or exclusion from services was identified. Improved disability awareness and mandatory training, particularly of government services, was recommended to improve and ensure that the UNCRPD is adhered to.

In terms of how people with disability live and are supported, respondents advocated for a stronger focus on human rights (Your Say), TasCOSS, ParaQuad) and a social model of disability (EOT). This focus included the suggestion that a charter of rights for people with disability should be included within the DSA (Your Say), TasCOSS, NDS, CarersTAS):

*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. (TasCOSS recommendation)*

The ParaQuad submission outlined that the principles of the DSA need to impress a stronger focus on human rights, respect, dignity and equality. This includes:

- *that diversity, inclusion, and belonging are important priorities*
- *Tasmanians with disability must be free from violence, abuse, neglect, and exploitation*
- *Tasmanians with disability have the right to self-determination, choice and control to pursue their social, economic and cultural development to flourish as equal members of society*
- *the autonomy of the individual and their right to decision-making are respected, and*
- *the disability makes up part of the diversity of being human and is an asset to the fabric of society.*

Your Say suggested looking at the *Victorian Disability Act 2006* which has several provisions that could be incorporated into the Tasmanian DSA to ensure the rights of people with disability are supported, particularly in relation to the provision of funded disability services.

The EOT submission highlighted that the UNCRPD articulated a range of obligations and legal duties which, if implemented, would ensure that the rights of people with disability are realised. These obligations related to areas for action identified within the ADS. The EOT submission recommends that the DSA needs to take these into account as well as being informed by the findings (pending) of the Disability Royal Commission.

Several submissions reflected concern that while ‘rights-based models’ were referred to within national and state frameworks, people with disability had difficulty in upholding their rights:

*The principles that should underpin the DSA are those aligned to basic human rights... If the principles of the Convention on the Rights of Persons with Disabilities (CRPD) and human rights are embedded throughout our communities and form the basis for policy development and legislation, then the rights of people with disability will be upheld. Some countries frame this within a Bill of Rights. (Agency input)*

There was also a suggestion that the funding of advocacy services was an important way to help people with disability have their rights realised (Autism Tasmania).



## **Supported decision making**

There was support for the DSA to include supported decision making as a key principle underpinning all functions of the Act (TasCOSS, CarersTAS Australia, Your Say). As above, the Victorian *Disability Act 2006* was cited by Your Say Advocacy Tasmania as including principles that relate to supporting people with disability to make decisions by building their capacity and the capacity of their support persons. (See also part [7. Supported Decision Making](#))

## **Inclusion and accessibility**

Submissions also supported that the principles of inclusion and accessibility be core to the DSA, and the Victorian and New South Wales Acts were cited as examples of demonstrating this:

*...the objects of the Act need to be overhauled to include the principles of inclusion and accessibility at the core of the Act.*

The ADS is underpinned by a commitment to create an inclusive community, and all governments (Australian, state, territory and local) have committed to delivering on ADS principles. The release of the ADS prompts the review of Accessible Island to reflect the new strategy. It has been noted that while inclusion and accessibility have previously been included in the principles in Tasmania's DSA, they have not been its core purpose and there is not anything further in the Act to drive inclusive practice. The review of the DSA therefore provides a timely opportunity to embed the principles of access and inclusion for all services including mainstream services.

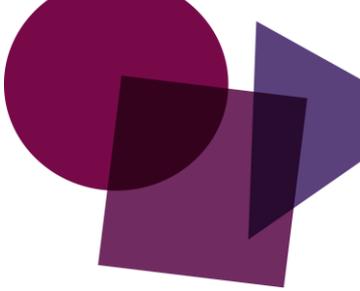
## **Principles need to apply to all services including mainstream**

Community consultations determined that principles and standards should be applied to all services and that this is non-negotiable.

The NDS submission recommended that the Tasmanian Government develop and introduce a clear set of inclusive principles relating to the interface between disability and mainstream services into the DSA or ideally, into a central piece of legislation such as the Anti-Discrimination Act. It is suggested that this would help ensure the inclusivity and protection of rights of people with disability in their access to, and inclusion within, mainstream services such as education, health, housing, transport and justice.

A gap in the principles in the DSA was flagged by Your Say in relation to the right to housing included in Article 28 of the UNCRPD:

- *Article 28(1) outlines the right of [people with disability] to an adequate standard of living for themselves and their families, including adequate food, clothing and housing, and to the continuous improvement of living conditions. It also outlines the requirement that state parties shall take appropriate steps to safeguard and promote the realisation of this right without discrimination on the basis of disability; and*
- *Article 28(2) outlines the right of persons with disabilities to social protection and to the enjoyment of that right without discrimination on the basis of disability. It also outlines the requirement that state parties shall take appropriate steps to safeguard and promote the*



*realisation of this right, including measures to ensure access by persons with disabilities to public housing programmes. (Your Say)*

Regarding current national commitments, it was highlighted by one agency that any decisions made concerning the principles in the DSA should be informed by the guiding principles outlined in the *Principles to Determine the Responsibilities of the NDIS and other Service Systems* - APTOS.

## **Consultation Outcomes**

- The existing DSA principles were broadly supported.
- Frame the objects of the Act and review the principles so that they are driven by the human rights contained within the UNCRPD and the ADS. Including concepts relating to inclusion, accessibility, individual autonomy, self-determination, and choice and control.
- Include a principle relating to supported decision making.
- Apply the principles to all services including mainstream services.
- Strengthen the principles to reflect the intersectionality of disability with other individual characteristics.



### 3. The DSA, NDIS and other national disability program

#### Introduction

The DSA sets out the rules for disability service providers. These rules applied when the Tasmanian Government managed funding (before the NDIS). This means the same rules for service providers are not needed in the DSA anymore. The NDIS has been the main way of delivering specialist disability supports for people with disability since 1 July, 2019 (see the *NDIS Tasmanian Bilateral Agreement 2019*).

Principles to Determine the Responsibilities of the NDIS and other Service Systems – Applied Principles and Tables of Support (APTOS) were established in 2015 by the Council of Australian Governments. This document set out an agreed vision for an inclusive Australian society that enables people with disability to fulfil their potential as equal citizens. Governments also agreed on principles to be used to determine the funding and delivery responsibilities of the NDIS in achieving this vision, as well as the interactions of the NDIS with other service systems to reinforce the obligations of these to improve the lives of people with disability, in line with the then National Disability Strategy.

#### **National Disability Insurance Scheme (NDIS)**

The creation of the NDIS represented a fundamental change to how supports for people with disability are funded and delivered across Australia. In the past, most supports were purchased through government agencies and providers were ‘block funded’ by government agencies to deliver specialist supports to a limited number of eligible people with disability. In the NDIS, people with disability are at the centre of the system. People with a permanent and significant disability that affects their ability to take part in everyday activities and those who would benefit from early intervention receive individualised funding to access reasonable and necessary supports.

#### **Information, Linkages and Capacity Building (ILC)**

It is intended that NDIS participants receiving funded supports and people who are not eligible for individualised funding can access community-based supports through ILC.

The intent of ILC is that it provides funding to organisations to deliver projects in the community that benefit all Australians with disability, their carers and families. These projects create connections between people with disability and the communities they live in. Projects aim to build the knowledge, skills and confidence of people with disability and improve their access to community and mainstream services. ILC comprises four programs: individual capacity building; national information program; economic and community participation; and mainstream capacity building.

The ILC is being aligned with other national disability policies and programs including the ADS, DES, National Disability Advocacy Program, the Disability Gateway and the Carer Gateway.



The ILC transferred from the National Disability Insurance Agency (NDIA) to the Department of Social Services (DSS) in October 2020.

## **Disability Employment Services**

Disability Employment Services (DES) is the Australian Government's employment program that helps people with disability find work and keep a job. Through DES, eligible people with disability, injury or a health condition can receive help to prepare for, find and keep a job. Help can include career advice, employment preparation, resumé development, training, job searching and ongoing support at work (if required), including funding for necessary workplace modifications and wage subsidies to employers.

DES is delivered by a mix of large, medium and small for-profit and not-for-profit organisations that support people with disability. DES providers can also work with employers to help them develop practices that support the employee in the workplace. People with disability may be eligible for one of two different DES programs depending on their disability. Disability Management Service is for jobseekers with disability, injury or health condition who need assistance to find a job and occasional support in the workplace to keep a job. Employment Support Service provides assistance to jobseekers with permanent disability to find a job and who need regular, ongoing support in the workplace to keep a job.

## **What we asked**

To start the conversation about the interaction of the DSA with the NDIS and other national disability programs we asked the following questions:

- *What does the DSA need to include to work with Australian Government funded programs? For example: the NDIS, ILC and Disability Employment Services.*
- *What rules need to be in the DSA for services which are still funded by the Tasmanian Government? For example, the Tasmanian Government still funds advocacy services.*
- *What other rules in the DSA do we need to keep, change, or add?*

## **What we heard**

### **Service gaps and continuity of access to services**

Community consultation provided feedback that there is the need for a commitment by the State Government to fund programs and that there needs to be a mechanism to monitor these services/programs where there is no other legislated monitoring mechanism. These programs include funding for advocacy services, peak bodies, and specific disability groups.

Submissions also expressed concern that there needs to be funding provision within the DSA for ongoing access to disability services, including mainstream services, for those who are not eligible for the NDIS or are unable to access supports.

Community and advocacy organisations expressed concern in their submissions that Tasmanians with disability were at risk of experiencing gaps in funding and services in



situations where people with disability were unable to access the NDIS and wanted to ensure that the DSA would create capacity to cover these gaps. For example, it was suggested that there could be a provision to capture people who have a psychosocial disability but either choose not to access the NDIS or do not meet their eligibility criteria and therefore will need to continue to access state-funded programs. Feedback was also provided that caution should be taken not to set up a duplicate service system in order to pick up short falls in the Australian Government responsibilities or which resulted from lack of coordination or clarity about the inclusive responsibilities of mainstream services. This may result in cost shifting to Tasmania and could result in services that are financially inefficient as they would be specialised and small scale.

Autism Tasmania identified that changes to funding arrangements (NDIS and ILC grants) have resulted in many Tasmanians experiencing gaps and unintended negative consequences in choice and control. The submission advocated that the new DSA needs to offset the risk that the nationally funded programs will increasingly reduce both the number of Tasmanians who are eligible for NDIS funding and the size of funding allocated to them.

In their submission, TasCOSS suggested that:

*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.*

ParaQuad Tasmania also highlighted that there are gaps in access to services due to Tasmanians not being eligible for an individualised funding plan because their impairment may not be permanent or severe and/or they may not meet the additional eligibility requirements such as age and citizenship status. They commented that the NDIS will only support value for money, reasonable and necessary supports that are not already funded by other mainstream services such as healthcare, justice, education, transport, community infrastructure.

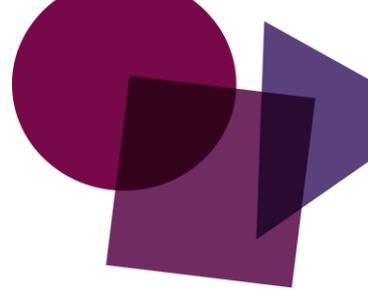
State-wide consistency is recognised as being an important element by Autism Tasmania, and that the DSA rules should apply regardless of which provider funds or delivers the services and supports; and regardless of whether a provider is mainstream, community-based or disability specialised:

*The new DSA must set out clear mechanisms for service provisions that seamlessly supports individuals with disability as they access services from NDIS, mainstream and non-NDIS funded streams. (Autism Tasmania)*

A community member likewise stated in their submission that the DSA should still set rules for services because not everyone accesses the supports they need through the NDIS.

One agency acknowledged that there can be challenges for people, both with and without NDIS supports, to navigate the broader service landscape and that coordination of care is required to ensure supports are not fragmented due to changes to the scope of services funded.

In relation to the funding and delivery responsibilities of the NDIS and how this interacts with other service systems, inter-agency advice included that:



*The APTOS sets out that each system should not fund supports that are the responsibility of other service systems but requires other service systems to work together to negotiate and coordinate streamlined care for individuals. People can access supports to meet different needs across different service systems. Ensuring appropriate continuity between systems for Tasmanians with disability should guide work moving forward.*

A number of people in the community consultation expressed that the introduction of the NDIS has impacted negatively and directly on service development across the state. The general sense from the consultation is that services are now operating competitively and in isolation rather than with the collaborative approaches that previously existed.

### **Roles and responsibilities and interactions with NDIS, other legislation and standards**

Community consultation participants identified the need for a state-funded multi-disciplinary team to support diagnostic assessments and provide pre-NDIS eligibility supports.

In the context of the interface between passenger transport and NDIS supports, it was identified that as disability services fall across multiple levels of government (Australian/state/local), the roles and responsibilities at times are unclear and complex to navigate. It was noted, therefore, that if any amendments are made to the DSA, then effort will be required to ensure that the existing complexity is not worsened.

The submission from the CCYP also highlighted the complexity of the relationships, roles and responsibilities of Tasmanian and Australian Government services and indicated that there remains a very important role for the DSA to clearly define these, and to set rules around, and promote the integration of, those services:

*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. (CCYP)*

### **Interaction with other legislation, policy and standards**

Submissions indicated that in reviewing or amending any part of the DSA that all legislation relating to Tasmanians with a disability needed to be taken into account so that all the interactions were considered (see [Appendix 3](#)):

*Engage in comprehensive review of all legislation impacting Tasmanians with a disability. (TasCOSS)*

Policy frameworks such as the ADS were identified as important for alignment with the DSA including the suggestions that there is a formal link in the legislation with Tasmania's Accessible Island Strategy. It was also noted that there needed to be sufficient flexibility in the DSA to factor in the pending Disability Royal Commission recommendations (due end 2023) and changes in other pieces of legislation or programs currently under review or which may change in the future.

Where there are national commitments to standards, for example: the *Disability Standards for Education 2005* and *Disability Standards for Accessible Public Transport*, there was advice



from government agencies that duplication of these in the DSA should be avoided, particularly where reforms were currently in progress. It was suggested that commitments to other standards could be referred to in the DSA rather than duplicated.

Submissions suggested that a gap analysis is required to ensure that any proposed legislative changes aim to complement established frameworks rather than duplicate these and inadvertently create an unnecessary legislative burden that may undermine the effective delivery of services and supports.

### ***Advocacy services/rules for services still funded by Tasmanian Government***

There was extremely strong support for continuation and expansion of advocacy services throughout the consultation process. The importance of advocacy services for individual advocacy was a common theme throughout the consultation. There were many examples provided where people with disability and/or their family sought advocacy support. Further, the importance of properly resourcing advocacy services was raised consistently throughout the consultation as well as the need for appropriate accountability measures for these services:

*What happens for people without ‘warrior parents’ to support them? (Community Consultation)*

There were also many examples of unpaid or informal advocacy that were provided across Tasmania.

Four submissions called for the legislated funding of independent advocacy services (TasCOSS, Autism Tasmania, Your Say and ParaQuad Tasmania). Specifically, this included retaining the power to make grants under Section 14 of the DSA to include legislated funding for advocacy services and a legislated right to access independent advocacy for people with disabilities.

As an example, the ParaQuad submission put forward that:

*The Disability Services Act legislates annual funding and oversees a grant program dedicated to grassroots projects that promote community inclusion capacity building initiatives targeting Tasmanians with disability.*

The Your Say submission referred to Section 13 of the DSA, and suggested that it is important for the DSA to:

*Retain what appears to be a very broad power to provide assistance for services to a person with disability... The state government needs to be responsible for the gap that occurs when people with a disability are not eligible for the NDIS and the current state-offered supports (such as HACC) are not adequate to address their needs.*

TasCOSS was also in support of increased funding of existing disability advocacy services to meet increased need of service provision. Feedback was also provided that services needed to be sufficiently funded to respond to all clients in a timely way.

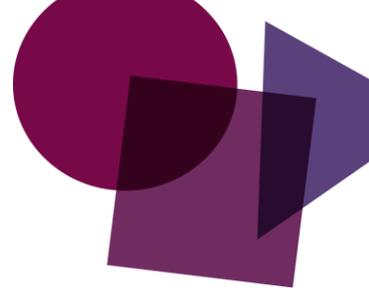


CarersTAS outlined that the DSA needs to ensure that non-NDIS disability programs remain accessible and continue to link people with disability and their carers to adequate wrap-around support:

*The Act must ensure that people with disability can access services appropriate to their needs. We also recommend that all disability services routinely identify carers of people with disability and refer them to access support to sustain their caring role. (CarersTAS)*

## Consultation Outcomes

- Define the relationships, responsibilities and interfaces of Tasmanian and Australian Government services and provide information to make these less complex to understand and the system easier to navigate.
- Gather evidence and improve understanding about who is accessing services or falling in gaps.
- The DSA should apply to all services including mainstream, community-based, or disability specialised.
- Continue to provide for services, including mainstream services, for those who are not eligible for or have been unable to access NDIS supports.
- Continue to support advocacy services and fund them at a level which allows them to meet demand.
- Ensure there is a structure to facilitate funding of services including quality and safeguarding arrangements.
- Complement and consider interoperability with existing regulatory and planning frameworks.



## 4. Quality and safeguards

### Introduction

The DSA includes the principle that people with disability have the same right as other members of Australian society to be respected for their worth and dignity and to live free from abuse, neglect and exploitation. This principle is supported by rules which ensure that supports are safe and of high quality.

The safeguards in the DSA need to be updated to complement and support safety and quality systems already in place for the NDIS, including the National Quality and Safeguards Commission (NDIS Commission). Some jurisdictions have additional quality and safeguarding roles like community visitors, authorised officers or Disability Commissioners.

The Royal Commission on *Disability Safeguards and Quality Issues Paper* outlines that safeguards can be both informal and formal. Informal (or ‘natural’ which was the preferred term in the responses to the issues paper) safeguards include self-advocacy and the protections that accompany personal capacity building, such as through supported decision making, peer or advocacy support. Formal safeguards are described as including legislative and administrative requirements, policies and practices, organisational culture, complaint processes (including within organisations and to external bodies like the police) and regulatory oversight of service providers’ staff.

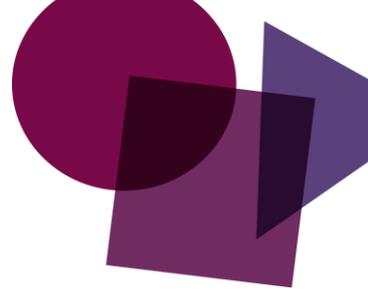
The DSA includes rules relating to Restrictive Interventions. Restrictive Interventions are defined as any practice or intervention that restricts the rights or freedom of movement of a person with disability. The NDIS Rules identify five types of Restrictive Interventions: these are seclusion, chemical restraint, mechanical restraint, physical restraint and environmental restraint. The DSA definitions are defined differently, and chemical restraint is not currently included. A separate targeted review has been conducted which looked at current best practice around Restrictive Interventions.

The review of the DSA provides the opportunity to align Tasmania’s legislative requirements and definitions with the NDIS, thereby strengthening quality and safeguarding requirements across the Tasmanian disability service system.

The NDIS Commission commenced operations in Tasmania from 1 July 2019, concurrent with full scheme NDIS. The NDIS Commission’s Tasmanian-based functions include complaint handling, reportable incident handling, compliance and behaviour support.

Since 1 July 2019, the Tasmanian Government has continued to be responsible for:

- operationalising Tasmanian legislative requirements, including those contained within the DSA
- authorising the use of restrictive interventions
- the legislative and policy framework for NDIS worker screening, and
- quality and safeguarding arrangements of in-kind supports and funded services which are outside the remit of the NDIS Commission.



## **Australian Government**

### **NDIS Quality and Safeguards Commission**

The NDIS Commission is an independent agency established to improve the quality and safety of NDIS supports and services.

The role of the Commission is to regulate NDIS providers, provide national consistency, promote safety and quality services, resolve problems, and identify areas for improvement, including but not limited to:

- responding to concerns, complaints and reportable incidents, including abuse and neglect of NDIS participants
- registering and regulating NDIS providers and oversight of the NDIS Code of Conduct and NDIS Practice Standards
- monitoring the use of restrictive practices within the NDIS with the aim of reducing and eliminating such practices
- working in collaboration with states and territories to design and implement nationally consistent NDIS worker screening

The NDIS Commission is responsible for implementing the NDIS Quality and Safeguarding Framework. An NDIS Quality and Safeguards Commissioner was appointed for a three-year term commencing 10 January 2022, and is responsible for upholding the rights of, and promoting the health, safety and wellbeing of, people with disability receiving supports under the NDIS.

### **NDIS Quality and Safeguarding Framework**

The *NDIS Quality and Safeguarding Framework* (the Framework) came into effect at full scheme NDIS, being 1 July 2019 in Tasmania. The Framework provides a nationally consistent approach to ensure high-quality supports and safe environments for all NDIS participants. The Framework defines ‘quality’ as the extent to which a support being delivered by a provider is able to meet or exceed a participant’s needs and expectations; and the extent to which that provider is meeting or exceeding the relevant NDIS requirements as implemented under the scheme’s quality and safeguarding arrangements. ‘Safeguarding’ is defined as actions designed to protect the rights of people to be safe from the risk of harm, abuse and neglect, while maximising the choice and control they have over their lives.

Consistent with the 2016 agreement by the then Council of Australian Governments, a review of the Framework commenced in 2021 and findings will be delivered at the end of 2022. The review of the Framework will also be considered as part of a broader review of quality and safeguarding regulation across the aged care, disability and veterans care and support sectors. Workshops and public consultations to inform this review commenced in October 2021.

### **National Disability Insurance Agency**

The National Disability Insurance Agency (NDIA) manages access to the NDIS, planning, payments, pricing and direction and investigation of fraud allegations. The NDIA is



independent from, and not regulated by, the NDIS Commission. Concerns or complaints regarding the NDIS or participant plans are made to the NDIA or the Commonwealth Ombudsman.

### **Alignment across care and support sectors**

As part of the 2021-22 Budget, the Australian Government identified opportunities to improve regulatory alignment across the care and support sector, incorporating the aged care, veterans' care and disability support sectors, to reduce red tape for employers, increase mobility of staff across the three sectors and strengthen safeguards for people who are provided with care, supports and services.

### **National Disability Advocacy Framework**

On 30 May 2008, all disability Ministers agreed to bring about improvements to disability advocacy under the National Disability Agreement and a National Disability Advocacy Framework was developed. Through the Framework, the parties committed to the following objective as the long-term goal that the Australian and state governments should strive for in the provision of disability advocacy in Australia:

*People with disability have access to effective disability advocacy that promotes, protects and ensures their full and equal enjoyment of all human rights enabling full community participation.*

Consultations regarding the Framework are being undertaken in mid-2022.

### **Community Visitor Schemes**

Community Visitor Schemes (CVS) have operated in several Australian jurisdictions with the purpose of visiting people with disability. Schemes do not operate in Tasmania or Western Australia. Although Tasmania does not have a CVS, the Act contains a definition of community visitor services.

A feature common to CVS is that a Visitor will visit people with disability and independently monitor whether their human rights are being met by the service systems that they rely on. To date, CVS have typically applied to visitable places, usually closed or restricted locations like group homes or supported residential facilities.

In 2018, a national review of CVS was undertaken by the Australian Government to inform the future role of CVS in the context of the Framework. The Review found that CVS have a role to play in safeguarding vulnerable NDIS participants and that the role complements and strengthens the protections offered by the Framework. The Review also observed that there are strong arguments that the protections offered by the Framework could be enhanced by the inclusion of Community Visitors to disability services as a function within the NDIS Commission.

The review found CVS provide local, independent support to vulnerable NDIS participants by:

- upholding an individual's human rights and ensuring service provision is appropriate in order to prevent violence, abuse and exploitation



- supporting appropriate decision-making reflecting the wishes of individuals
- facilitating local capacity building to achieve resolution of issues in services at the earliest possible stage
- adding to regulatory intelligence on services and systemic issues to the state or territory as well as to the NDIS Commission.

The review identified, however, that there are also important reasons why states and territories should maintain an independent oversight function for disability services including that NDIS-funded services are only one part of the life of a person with disability. It highlighted that safeguarding needs a holistic approach within which community visiting should operate. It was noted that 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.

A recommendation of the national review was that Tasmania and Western Australia may wish to consider establishing a scheme. Tasmania has not progressed the establishment of a CVS to date, however, Communities Tasmania has developed a CVS positioning paper which outlines the considerations and complexities of introducing a CVS in Tasmania.

Following a tragic adverse event in 2020 in South Australia, Alan Robertson (Senior Counsel) was engaged by the Commissioner of the NDIS Commission to undertake an independent review of the adequacy of the regulation of the supports and services provided to Ms Ann-Marie Smith.

Recommendation 4, of Mr Robertson's report states:

*Consideration should be given to the Commission establishing its own equivalent to State and Territory based Community Visitor Schemes to provide for individual face-to-face contact with vulnerable NDIS participants. Such contact is also important in emphasising the personal values necessarily involved in providing services to individuals with disability. The NDIS Act should be amended to provide explicitly for this function. Until that happens, the Commission should continue to support the State and Territory Community Visitor Schemes and any doubt about State and Territory powers under those schemes in relation to NDIS participants should be resolved between the law officers of the Commonwealth and of these States and Territories. The State and Territory Community Visitor Schemes will of course continue to apply directly in relation to those with disability who are not NDIS participants.*

The Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability Overview of Responses to the Safeguards and Quality Issues Paper outlined that to develop nationally-consistent Community Visitors Programs, without losing local knowledge and connections in operational service delivery, was proposed as a formal safeguard.

## **Tasmanian Government**

The Tasmanian Government continues to be responsible for defined quality and safeguarding arrangements including:



- ensuring relevant policy, guidelines and frameworks are in place that protect the rights of people with disability
- quality and safeguarding arrangements for services for people with disability delivered through service systems outside the NDIS, such as in-kind supports and matters which fall outside the remit of the NDIS Commission.

The DSA provides:

- the legislative basis for the regulation and authorisation of restrictive interventions<sup>5</sup> within the Tasmanian service delivery context, and
- for the appointment of Authorised Officers.

The DSA is supported by the *Disability Services Regulations 2015* which are aligned with the *National Standards for Disability Services*. The *National Standards for Disability Services (2013)* define quality services as those that include a focus on providing positive outcomes for people who use services, involve individuals and staff in service design, encourage continuous improvement, and use available data to monitor performance and improve the service. It is intended that there is a clear line of sight between the National Standards and the NDIS Practice Standards. All disability providers operating in Tasmania must comply with the *Disability Services Regulations 2015*.

### **Restrictive practice authorisation**

Like other states and territories, the responsibility for authorisation of restrictive practices remains the responsibility of the Tasmanian Government following the full implementation of the NDIS. Authorising and reporting of restrictive practices contributes to the suite of safeguards designed to protect the rights of people with disability.

The Act provides for regulation of any personal or environmental restrictions on a person with disability and requires that a Senior Practitioner be appointed to monitor and provide advice to the Secretary of the Department of Communities Tasmania (the Secretary) in relation to the use of restrictive interventions.

The type of restrictive practice determines the authorisation pathway. The Secretary can only approve environmental restrictions whereas the Tasmanian Civil and Administrative Tribunal (previously Guardianship and Administration Board) can approve personal restrictions and environmental restrictions.

The NDIS Commission's statutory function includes oversight and regulation of the use of behaviour supports in the NDIS including the planning for those supports as part of a positive behaviour support strategy, and oversight of the implementation of restrictive practices in the NDIS.

Providers who implement restrictive practices must be a registered NDIS provider.

From 1 July 2019, the *National Disability Insurance Scheme (Restrictive Practices and Behaviour Support) Rules 2018* required NDIS providers to report against behaviour support plans and

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<sup>5</sup> Tasmanian Disability Services Act refers to restrictive interventions whereas NDIS legislation and rules refers to restrictive practices.



NDIS-regulated restrictive practices, irrespective of whether such practices are subject to jurisdictional authorisation processes.

Tasmania's restrictive practice regulatory framework does not include or define chemical restraint. This is a notable variance from the NDIS regulatory requirements and is a significant contributing factor regarding the number of unauthorised restrictive practices reported to the NDIS Commission by Tasmanian providers.

Since the NDIS Commission commenced operating in Tasmania, service providers have highlighted confusion regarding the intersect between the national and state requirements, and associated increase and duplication of reporting requirements.

In July 2020, Disability Ministers supported the draft Principles for Nationally Consistent Authorisation of Restrictive Practices. The National Principles are outcomes focussed and allow for flexibility in implementation, while setting a high bar for restrictive practice regulations at the national level.

Department of Communities Tasmania engaged an external party to consult with stakeholders with lived experience of restrictive practices to obtain feedback on Tasmania's restrictive practices authorisation process. The outcomes of this process will be used to shape Tasmania's future restrictive practice systems, ensuring alignment with the NDIS Commission requirements and inform future State disability services legislation.

The Summary Report and the Communities Tasmania response to the Summary Report and included as appendices to this report and will guide further decision making regarding the DSA moving forward (See [Appendix 4](#)).

### **Authorised officers**

The Senior Practitioner and Practice Consultants within the Office of the Senior Practitioner are appointed Authorised Officers. The function of Authorised Officer is established under section 25 (1) of the Act.

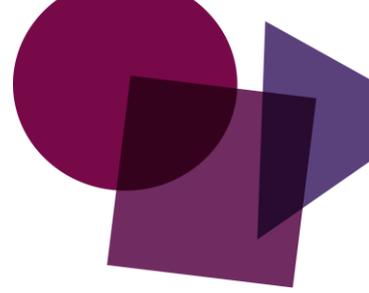
Authorised Officers have the power to enter premises unannounced, take copies of, or remove records and speak to people with disability if there is any concern for the safety or wellbeing of a person with disability in a funded service. The powers of Authorised Officer have not been invoked as providers have cooperatively and collaboratively engaged in investigation processes to date.

In July 2019 an amendment to the Act extended the definition of funded provider to include any other provider as determined by the Secretary. This amendment has the effect of extending application of the Act to all providers receiving funding under the NDIS.

### **NDIS worker screening**

As part of the NDIS Quality and Safeguarding Framework, all states and territories committed to a nationally consistent worker screening process.

The *Intergovernmental Agreement on Nationally Consistent Worker Screening for the National Disability Insurance Scheme* sets out the national policy for NDIS worker screening.



The *Registration to Work with Vulnerable People Act 2013* establishes a worker screening and registration process to protect vulnerable Tasmanians. This Act is administered by the Department of Justice.

In Tasmania the child and vulnerable adult-related (NDIS-endorsed) regulated activity is the NDIS worker screening check. Until 1 February 2021 Tasmania's only working with vulnerable people registration regulated activity was child related.

The NDIS Worker Screening Check is conducted by the Department of Justice's worker screening unit. The worker screening unit make the decision about whether a person is cleared or excluded.

Registered NDIS providers are required to ensure that they only engage workers who have an NDIS Worker Screening Check in certain roles, called risk assessed roles.

An NDIS provider or self-managed participant may, as an additional safety measure, require a worker to have an NDIS worker screening clearance prior to being engaged in a position that is not a risk assessed role.

A worker's NDIS Worker Screening clearance status can be re-assessed if new or updated information suggests the person poses a risk to people with disability.

The National Worker Screening Database holds information about workers' NDIS Worker screening clearance status for those who have undergone a worker screening check. It will not hold the personal information used by the Department of Justice's worker screening unit to assess a worker's screening check outcome.

### ***In-kind and matters outside the remit of the NDIS Commission***

The *Bilateral Agreement between the Commonwealth of Australia and the State of Tasmania on the National Disability Insurance Scheme* identifies the in-kind supports which remain within the remit of existing Tasmanian quality and safeguarding arrangements.

Services funded by Tasmanian Government through the Department of Communities Tasmania, that are also available to and accessed by people with disability, are outside the jurisdiction of the NDIS Commission. However, a level of protection to people with disability is present through the Funding Agreement requirements the provider must comply and engage with.

### ***Advocacy***

In recognition of the critical role that independent disability advocacy services play in helping to ensure people with disability can enjoy the same rights as anyone else, the Tasmanian Government funds three specialist disability advocacy services through Housing, Disability and Community Services within Communities Tasmania. These include Speak Out, Your Say and the Association for Children with Disability.

Enabling access to advocacy services for people with disability provides an important driver for continuous improvement in the quality of disability services.

Advocacy ensures that people with disability are given the opportunity to present their concerns and provides a voice to people who require assistance to communicate their wishes.



## **The Public Guardian**

In Tasmania, adults with a disability are afforded some safeguards under the current *Guardianship and Administration Act 1995*. The Public Guardian has legislated functions and powers under Section 15 of the Guardianship and Administration Act 1995 that include the promotion and protection of the rights and interests of people with a disability as well as functions in relation to specific individuals within the identified group, effectively providing a limited safeguarding role with power to investigate, report and make recommendations in relation to adults with a disability.

## **Mental Health Act (Tasmania)**

*The Mental Health Act 2013* has provisions for Official Visitors and a Principal Official Visitor. The Principal Official Visitor is currently also the Ombudsman and Health Complaints Commissioner for Tasmania.

Review Outcome 24<sup>6</sup> of the Mental Health Act found that provisions of the Act for the appointment, powers and functions and other matters associated with Official Visitors are operating effectively and efficiently but could be improved with some minor changes to the Act's provisions. This would clarify the powers and functions of Official Visitors with respect to people who have not expressed a wish to see or complain to an Official Visitor, and for children, through greater education and training for consumers and carers around the role and function of Official Visitors, and through increased resourcing.

## **Tasmanian legislative review and other projects**

- *Guardianship and Administration Act (1995)* – Review (see also Chapter 7. Supported Decision Making). The Tasmanian Law Reform Institute released its Final Report into the Review of the Guardianship and Administration Act 1995 in December 2018. The review recommended a significant overhaul of the state's guardianship laws.
- *Mental Health Act (2013)* – Review (see also Chapter 7. Supported Decision Making). This Act included a requirement that its operation be reviewed after six years of it commencing to ensure the Act is working as originally intended. The *Mental Health Act 2013: Review of The Act's Operation Outcomes Report* was released in June 2020. The report summarises the feedback in 29 Review outcomes. Amendments to the Act are currently being considered with additional expert clinical, legal and other advice being sought.
- *Tasmanian Elder Abuse Prevention Strategy 2019-2022* – Safeguards are included as a key theme in the Strategy – with activity aimed at the strengthening and implementation of safeguarding arrangements, including legislature and official oversight. Work in line with this theme includes completion of a gap analysis of the current Tasmanian legislative and oversight system for safeguarding older Tasmanians, and subsequently making recommendations for changes to the current system based on the analysis. This work is being progressed by the Department of Justice which is preparing an

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<sup>6</sup> [Mental Health Act 2013: Review of the Act's Operation Outcomes Report | Tasmanian Department of Health](#)



options paper exploring options for strengthening or implementing legislative frameworks to safeguard older Tasmanians.

- Review of Public Trustee (see also Chapter 6. [Disability Commissioner](#)) – In November 2021 the Tasmanian Government released the independent review into the administrative and operational practices of the Public Trustee. The Report contains 28 recommendations which are supported in full or in principle by the Tasmanian Government.

## What we asked

To start the conversation about quality and safeguards we asked the following questions:

- *How could the DSA support quality and safeguarding without duplicating the NDIS or NDIS Quality and Safeguards Commission?*
- *How could the DSA provide quality and safeguarding for services that are not part of the NDIS?*
- *Are there other roles or tools which would offer additional quality and safeguarding protections for Tasmanians with disability?*

## What we heard

Comments relating to quality and safeguarding arrangements were provided across several of the DSA Review discussion topics. Where appropriate, this feedback has been noted in other parts of this report, eg in chapters summarising feedback on Regulation and the Disability Commissioner.

Feedback was broadly supportive of the role the DSA played in promoting and protecting the rights of Tasmanians with disability and various mechanisms were discussed that were perceived to be appropriate for inclusion in the DSA:

*There are numerous mechanisms for quality and safeguarding for services outside the NDIS that would be appropriate to implement under the DSA, including a Disability Commissioner, an Official Visitor Scheme for disability services, and a legislated right to access to independent advocacy (as distinct from the Official Visitor role). (YourSay)*

Participants in the community consultation questioned whether the quality and safeguarding arrangements translated effectively in rural and remote locations where monitoring of compliance and investigations were perhaps more difficult.

### **Complementary, not duplicative, quality and safety frameworks**

As is evident from the contextual information provided at the beginning of this chapter the quality and safeguarding landscape is complex, with many intersecting systems and players in different parts and levels of Government.

Feedback was provided about the need for protections included in the DSA to be complementary to other protections and not duplicative:



*The safeguards in the DSA need to be updated to complement and support safety and quality systems already in place for the NDIS, including the National Quality and Safeguards Commission and the National Standards for Disability Services. (DPAC)*

*The processes that are now in place to ensure quality of service providers and safeguard the supports of people with disability accessing services are well covered through the NDIS Quality and Safeguards Commission, and do not need to be duplicated in the DSA. DSA could have a complementary role in supporting quality and safety. (Department of Education)*

Feedback from Autism Tasmania highlighted risks associated with the current complex regulatory framework:

*Support a single compliance framework as any other regulatory framework will generate dangerous loopholes and expose the most vulnerable persons in our community to quality and safety risks; and/or unacceptable burdens to remedy [this] risk. (Autism Tasmania)*

The capacity for the NDIS Commission monitoring function to expand to include non-registered providers of NDIS funded supports was highlighted in community consultation as essential, both in terms of protecting individuals but also ensuring that there is not duplication of government resources in providing the monitoring role. It was suggested that if not able to fully encompass the monitoring, then the capacity to leverage off existing systems to monitor non-registered providers should be considered. The need to ensure that there is not duplication with NDIS quality and safeguarding arrangements was highlighted, particularly with regard to regulation of restrictive practise.

### **Mainstream services**

Community consultation participants consistently supported the need for, and potential of, the DSA to provide a quality and safety framework across services, including mainstream services.

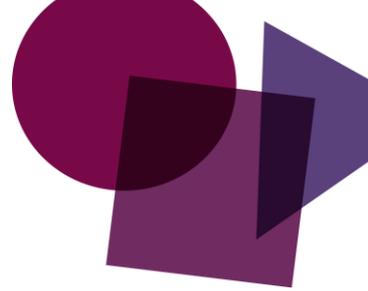
### **Community visitors**

A number of submissions and participants in the community consultation were supportive of the CVS as a protective mechanism and that a CVS could be established within the DSA.

Two submissions (TasCOSS and CCYP) referenced schemes already operating in other jurisdictions, excluding Western Australia who like Tasmania, does not have a scheme. CVS were viewed as providing a critical oversight mechanism. It was suggested that feedback highlighting the value of CVS provided to the Royal Commission should be further considered in this Review. Feedback was provided to the Commissions Issues Paper on Quality and Safeguards that the CVS provided a critical oversight mechanism that warrants expansion.<sup>7</sup>

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<sup>7</sup> [Safeguards and quality | Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability](#)



## **Community attitudes**

TasCOSS provided feedback picking up on the following statement made by the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability:

*Attitudes are developed, reaffirmed and shared within the wider community. Research suggests limited contact between people with disability and the wider community can contribute to a lack of understanding of disability. Negative attitudes can cause a social distance between people with disability and the wider community driven by stigma.<sup>8</sup>*

Feedback provided in previous consultations to inform the development of the ADS and the Disability Royal Commission *Issues paper on Rights and Attitudes* has highlighted the significant impacts of negative community attitudes, ableism and paternalism on people with disability, particularly on their participation in community, education and employment; and that such attitudes contribute to increased risk of violence, abuse, neglect and exploitation.

### **Restrictive practices (See also – [Appendix 4](#))**

It should be noted that several respondents advised that they would not provide additional comment in relation to authorisation of restrictive practices because they had recently participated in the recent consultation on the systems supporting authorisation of restrictive practice. The Summary Report from this consultation and the Communities Tasmania response to this consultation are included in Appendix 4.

In the DSA Review consultations, respondents were supportive of the DSA continuing to include rules around restrictive practices:

*The DSA should also set rules about mechanical, chemical, and physical restraint and least restrictive practice. (Individual submission)*

Feedback was also provided that there needed to be greater consistency with the national approach to definitions and regulation of restrictive practice (NDS) and that chemical constraint was currently not included:

*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). (CCYP)*

Two submissions also commented on the consistency of, or lack of, frameworks regulating other settings in which restrictive practice might occur:

*Government policy should be consistent across all agencies. eg If a restrictive intervention is used as part of a planned intervention in an education or childcare setting it should be within the same policy framework and approach if that individual is also supported through a supported living arrangement of community based program and experiences a Restrictive Intervention in that location. (Agency advice)*

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<sup>8</sup> Rights and attitudes Issues paper, Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, 2020 - [Rights and attitudes | Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability](#)



## Consultation Outcomes

**Note:** Comments relating to quality and safeguarding arrangements were provided across several of the DSA Review discussion topics. Where the feedback fits better it has been included in other parts of the report, e.g. in sections summarising feedback on Regulation and the Disability Commissioner.

- Consider the additional outcomes in the Summary Report and the Communities Tasmania response to the Review of state-based authorisation processes for the use restrictive practices.
- Implement quality and safeguarding protections that complement rather than duplicate existing safeguards and which provide a system that is easy to navigate.
- Develop the capacity of quality and safeguarding systems to cover non-registered and mainstream providers.
- Consider introducing a community visitor scheme as a protective or oversight mechanism.
- Align the definition and regulation of restrictive practice with the *National Disability Insurance Scheme (Restrictive Practices and Behaviour Support) Rules 2018*.
- Align the regulation of restrictive practices in all settings where they are used, e.g. education settings or out of home care.
- Allow information sharing between quality and safeguarding arrangements to protect vulnerable persons from the risk of harm.
- Reduce the risk of abuse, neglect and exploitation through community education to positively inform attitudes about people with disability.



## 5. Regulation of providers

### Introduction

The Tasmanian Disability Services Regulations (the Regulations) have applied to disability providers in Tasmania since 2015. The Regulations provide a standard that a disability service provider must meet in respect of the rights of a person with disability who is a consumer of their services. The Regulations have a focus on human rights, person-centred approaches and promoting choice and control on the services accessed by people with disability. The Regulations reflect the National Standards for Disability Services.

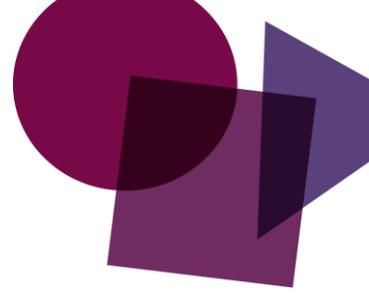
### ***National Standards for Disability Services***

There are six National Standards that apply to disability service providers:

1. **Rights:** The service promotes individual rights to freedom of expression, self-determination and decision-making and actively prevents abuse, harm, neglect and violence.
2. **Participation and Inclusion:** The service works with individuals and families, friends and carers to promote opportunities for meaningful participation and active inclusion in society.
3. **Individual Outcomes:** Services and supports are assessed, planned, delivered and reviewed to build on individual strengths and enable individuals to reach their goals.
4. **Feedback and Complaints:** Regular feedback is sought and used to inform individual and organisation-wide service reviews and improvement.
5. **Service Access:** The service manages access, commencement and leaving a service in a transparent, fair, equal and responsive way.
6. **Service Management:** The service has effective and accountable service management and leadership to maximise outcomes for individuals.

### ***National Disability Insurance Scheme (NDIS)***

The NDIS Code of Conduct, NDIS Practice Standards and NDIS registration process cover many of the same areas as the national standards. Some people with disability receive supports from providers who are not registered with the NDIS and from other community and government providers. The NDIS Code of Conduct applies to all NDIS providers, registered and unregistered, and all persons employed or otherwise engaged by an NDIS provider. However, while the NDIS Code of Conduct applies to unregistered providers, the oversight role of the NDIS Quality and Safeguards Commission is limited when it comes to unregistered providers.



The Code of Conduct requires workers and providers who deliver NDIS supports to:

- act with respect for individual rights to freedom of expression, self-determination and decision-making in accordance with relevant laws and conventions
- respect the privacy of people with disability
- provide supports and services in a safe and competent manner with care and skill
- act with integrity, honesty and transparency
- promptly take steps to raise and act on concerns about matters that might have an impact on the quality and safety of supports provided to people with disability
- take all reasonable steps to prevent and respond to all forms of violence, exploitation, neglect and abuse of people with disability
- take all reasonable steps to prevent and respond to sexual misconduct.

### **Other jurisdictions**

In the Australian Capital Territory, the Human Services Registrar, under the *Disability Services Act 1991* and subordinate instruments, has regulatory oversight of Specialist Disability Service Providers not registered with the NDIS Commission. These providers have ongoing reporting requirements to the Human Services Registrar who also assesses compliance with quality and safeguarding requirements.

### **National regulations and standards**

- Disability Standards for *Accessible Public Transport 2002* Tasmania is regulated by the Commonwealth *Disability Standards for Accessible Public Transport 2002*, established under the Commonwealth *Disability Discrimination Act 1992*.
- *Disability Standards for Education 2005* (DSE) made under the *Commonwealth Disability Discrimination Act 1992*.
- *National Standards for Disability Services* and *Eligible Service Standards* (*Disability Services Act 1986*).
- *National Safety and Quality Health Services Standards* (Australian Commission on Safety and Quality in Health Care); Australian Health Practitioner Regulation Agency (Ahpra).
- *Aged Care Quality Standards* (Aged Care Quality and Safety Commission).
- *NDIS Rules: Practice Standards, Code of Conduct, Restrictive Practices and Behaviour Support*; (the NDIS Quality and Safeguards Commission).
- *Disability (Access to Premises — Buildings) Standards 2010*.



## What we asked

To start the conversation about regulation of providers we asked the following questions:

- *As the National Standards for Disability Services cover local providers, does the DSA need to continue to include regulations about the delivery of supports for people with disability?*
- *Are the Regulations still required or do the NDIS Code of Conduct and the NDIS Practice Standards do the same job?*
- *What other regulation might be required and what role could the DSA have in oversight of non-NDIS services?*

## What we heard

### ***Need for regulation of non-registered providers***

Submissions called for regulation and standards to be applied via the DSA to services providing disability services, including mainstream services, that were not covered by the NDIS Registration and quality and safeguarding requirements.

The CCYP suggested that it would 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*. The Commissioner suggested that there should also be clear processes in place to respond effectively to organisations or individuals who are not meeting these standards.

CarersTAS Australia highlighted that there are still many people with disability who rely on non-NDIS supports, therefore, it is essential that there is adequate regulation of these services through appropriate frameworks that are specific to each service providing support:

*We recommend that all services adhere to the Tasmanian Disability Services Regulations regardless of being an NDIS provider or not. (CarersTAS Australia)*

Many participants in the community consultation provided feedback that:

*Someone needs to check up on support workers.*

They also provided feedback that there is a need for a quality and safety regulation response particularly for non-registered providers:

*There is a strong sense that there is no accountability or consequences if a provider is not registered.*

There was support for mainstream services to be covered by the DSA rather than limiting its application to disability specific services. Three submissions suggested the inclusion of minimum standards for service delivery for disability and other service providers including those who are currently unregistered or unregulated (TasCOSS, EOT, NDS).

TasCOSS suggested introducing comprehensive minimum standards for state-based disability services, similar to the national Disability Standards for Education while EOT



referred to the NSW *Disability Inclusion Act 2014* Disability Service Standards, with specific reference ‘regulations are to improve the quality and effectiveness of the supports and services’. EOT further suggested that:

*minimum standards of disability responsiveness for disability and other service providers should be implemented.*

EOT acknowledged that as people with disability do not just access specialist disability services, nor do those who need disability services always meet the access requirements for the NDIS, all service delivery needs to be accessible.

Autism Tasmania supported regulatory processes that require all disability services to adhere to a single compliance framework without regard to their funding sources. The submission outlined that they would like there to be an aim of prevention before regulation, particularly in regard to educating businesses in neurodiversity. They suggested that staff should have access to training proactively as part of their induction, rather than reactively eg in response to an incident or complaint.

Your Say proposed that there should be an independent regulatory body:

*The current version of the DSA is vague and lacks critical detail regarding who regulates service providers as there is no independent regulating body. It would be appropriate for an independent regulatory body and the NDIS QSC to run in parallel. It is important for the DSA to regulate providers who are not specialist disability services but provide services to people with disability, such as the Housing Tasmania disability stream. (Your Say)*

One individual submission provided feedback that rules should be developed in consultation with people with disability:

*services shouldn't be allowed to tell us it's too hard or expensive to implement or obey those rules.*

Participants in the community consultation suggested that the NDIS needs to make the registration process more accessible and affordable (particularly for smaller operators).

### **NDIS Code of Conduct and practice standards**

Community consultation feedback was provided that the Act needs to reinforce the NDIS Code of Conduct and Practice Standards expectations for non-registered and mainstream services. It was suggested that this could be a Charter that is required for all Tasmanian services, and that this would need to be published as an official document including accessible versions.

The CarersTAS Australia submission identified that standards and codes of conduct should be provided to people with disability and their carers by services as best practice.

Several participants in the community consultation suggested a return to minimum qualifications for support workers.



## **Other national regulation and standards**

Agency advice raised concern over any duplication of regulations and standards that were already in place nationally. Advice outlined other national regulation and standards, eg transport, health and education applying to Tasmanian agencies and that duplication of these should be avoided. These were referred to, or suggested as, good examples to adopt or flag as potential cross overs and additional regulatory burden.

The DSE made under the Commonwealth *Disability Discrimination Act 1992* applies to all education and training providers including schools, vocational education and training providers and universities:

*It is worth noting however that enforcement of the DSE is largely complaints-driven, which can be both intimidating and complex for people to navigate. (State Growth)*

Within the vocational education and training sector, the process for monitoring compliance for Registered Training Organisations (*Standards for Registered Training Organisations 2015*) is undertaken by Australian Skills Quality Authority (ASQA).

State Growth also identified that Tasmania is regulated by the *Disability Standards for Accessible Public Transport 2002* (Transport Standards) established under the Commonwealth *Disability Discrimination Act 1992*. The Transport Standards provide a framework to enable public transport service and infrastructure providers to remove unlawful discrimination. They impose a range of minimum standards to facilitate accessibility. A project to implement the Tasmanian Child and Youth Safe Organisations Framework (Framework) is currently underway. This will include Child Safe Standards and a Reportable Conduct Scheme, based on the recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse.

In relation to the review of the DSA the CCYP submission also notes:

*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 CYSOF when it is enacted.*

Some inter-agency advice cautioned that using the DSA to regulate service providers may risk overregulation. For example, there are many regulations (and regulators) already governing the provision of health care to people with a disability in a variety of settings, including the National Safety and Quality Health Services Standards, the NDIS Practice Standards, Aged Care Quality Standards, Ahpra and the National Boards, and the NDIS Commission. Allied health professionals who are not governed by Ahpra and the National Boards are still required to ensure they are appropriately qualified and meet professional standards. It was suggested that the Act should not regulate service providers that are not already regulated by the NDIA due to regulatory burden and risk of withdrawal of services, which could result in people with disability ultimately having less choice or limited access to certain services.

While this concern was also highlighted by one state government agency in relation to services covered by national standards, consideration should also be given to identification of gaps:



*Where possible, the DSA should avoid unnecessary duplication of national standards. This said, consideration must be given to the potential of a regulatory gap for any service providers supporting Tasmanians with disability but operating outside of the NDIS system.*

Feedback was also provided that, whilst duplication of regulation should be avoided, current arrangements could be strengthened by disentangling the standards and regulations which covered professional ethics and competence from those intended to uphold rights of people with disabilities in accessing mainstream and specialist disability services. This rights focus could be included in the DSA.

## Consultation Outcomes

- Ensure accountability and adherence to minimum standards through the regulation of registered and non-registered providers of services to people with disability.
- Clarify and promote regulatory arrangements for different categories of providers, including registered NDIS providers, unregistered NDIS providers, mainstream and other providers supporting people with disability.
- Improve accountability for service providers who are working with people with disability but who do not define themselves as disability providers.
- Consider implementation of a single compliance framework for all providers regardless of funding source or jurisdiction (eg NDIS, Tasmanian Government or other).
- Avoid duplication of existing regulatory frameworks and standards.



## 6. Tasmanian Disability Commissioner

### Introduction

The Tasmanian Government has committed to establishing a Tasmanian Disability Commissioner. This role would promote the safety, health and wellbeing of people with disability and help to ensure that people with disability receive the inclusive and accessible supports and services they need, including individual supports and other Tasmanian Government services. An amendment to the DSA would be one way to create and describe this type of role.

Three key functions of the Disability Commissioner proposed by the Minister's Disability Consultative Group include:

1. Inclusion, accessibility and leadership
2. Receiving and managing complaints
3. Safeguarding – addressing violence, abuse, neglect and exploitation.

The Disability Commissioner will need to function in a complex operating environment including state-based bodies such as:

- The Public Guardian
- Commissioner for Children and Young People
- Ombudsman Tasmania
- Health Complaints Commissioner
- Equal Opportunity Tasmania – Office of the Anti-Discrimination Commissioner
- Other statutory positions such as the Chief Psychiatrist and the Office of the Senior Practitioner.

### **Independent Review of the Public Trustee**

On 30 November 2021, the Tasmanian Government released the independent review into the administrative and operational practices of the Public Trustee. This review included two recommendations that refer to a Disability Commissioner:

*4.3 The counterparty to the next Community Service Obligation (CSO) agreement should be the Minister for Community Services supported by the proposed Tasmanian Disability Commissioner.*

*7.1 That the Government appoint a Disability Services Commissioner to an oversight role for represented persons with a grievance.*

### **Other jurisdictions – Disability Commissioners**

All Australian states and territories have mechanisms that respond to all or some of the features of a Disability Commissioner as proposed by the Minister's Disability Consultative Group. In considering how to progress the establishment of the Disability Commissioner, a



jurisdictional scan has been conducted to consider their operational models including powers, scope, services provided, enabling legislation and target population.

These jurisdictional bodies include:

- NSW Ageing and Disability Commission including a Commissioner.  
Enabling Legislation: *Ageing and Disability Commissioner Act 2019 (NSW)*.
- ACT Human Rights Commission including Human Rights Commissioner; Discrimination, Health Services, Disability and Community Services Commissioner; Public Advocate and Children and Young People Commissioner; and Victims of Crime Commissioner.  
Enabling Legislation: *Human Rights Act (2004)*.
- Victorian Disability Services Commissioner.  
Enabling Legislation: *Disability Services Act 2006*.
- WA Health and Disability Complaints Office – an independent statutory authority which operates under five Western Australian legislative frameworks.
- SA Health and Community Services Complaints Commissioner.  
Enabling Legislation: *Health and Community Services Complaints Act 2004*.
- NT Health and Community Services Complaints Commissioner.  
Enabling Legislation: *The Health and Community services Complaints Act 1998*.
- Queensland Human Rights Commission.  
Enabling Legislation: *Anti-Discrimination Act 1991*.

## What we asked

To start the conversation about a Tasmania Disability Commissioner we asked the following questions:

- *What types of things would this role do?*
- *What powers could they have?*

## What we heard

There was very strong and consistent support for a Disability Commissioner throughout the community consultation with all the submissions and stakeholder discussions supportive of the establishment of a Tasmanian Disability Commissioner. There was, however, some variation in views on the scope and role. Whilst community sector and individual submissions supported a broad role, powers and scope, some government agencies/ statutory authorities were cautious about the role duplicating existing mechanisms for complaints investigation and were concerned with the scope crossover with existing statutory bodies.

There was strong support for the Tasmanian Disability Commissioner to be a person with lived experience.



The functions of the Victorian and NSW Disability Commissioners were cited as good examples of similar roles. Three submissions referred to the Victorian model.

Agency advice included that an initial function of the Tasmanian Disability Commissioner could be to consult and define the future legislative requirements.

TasCOSS recommends that:

*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.*

### **Role and scope**

Community consultation outlined that the need for clear direction in terms of the role of a Disability Commissioner is essential to ensure confusion is avoided. Suggestions included that the role should:

- have a seat at the table of decision making in Tasmania
- increase accountability and oversight
- be apolitical, ensuring that there is equal representation and recognition of the value of this role across all parties as well as confirmation of independence to the role.

There was a high level of expectation that the Disability Commissioner is a person with a lived experience of disability. Participants suggested that the role would be considered as a highly public figure and should be visible in the community.

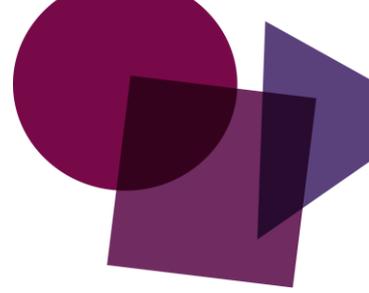
Consultations identified that the Disability Commissioner needs to provide the opportunity to listen to and resolve local issues. This extends to the opportunity to make a difference to local communities and attitudes.

Many participants in the community consultation indicated the importance of the reach of the Disability Commissioner being beyond government services only. For example, education to include independent and Catholic schools to enable occasions of discrimination to have appropriate consequences legislated for.

Many people identified the Disability Commissioner as the means to hold the state service (government) to account.

Other examples of the potential reach of the Disability Commissioner role included:

- the provision of guidance to the courts, legal and justice (forensic) systems
- feedback on new schemes and their impact on people with disability – for example, e-scooters in Hobart and Launceston
- establishment of peer support networks
- advice and overview on new facilities and programs.



TasCOSS recommended 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 complementing the Commonwealth's Information, Linkages and Capacity Building program; 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:*
  - *driving forward initiatives that complement the national disability strategy, such as Accessible Island*
  - *advancing human rights*
  - *ensuring compliance with anti-discrimination laws*
  - *reducing reliance on specialist disability services*
  - *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.*

EOT commented in relation to NDIS complaints going to EOT and how it would need to be made clear to complainants which body they should go to in relation to disability discrimination complaints versus other complaints in relation to disability services, including the jurisdiction of those prior to the establishment of the NDIS.

## **Function**

The function of the Disability Commissioner was identified in community consultation as the following:

- Complaints (relationship with other complaints pathways to minimise duplication)
- Education and Training – disability awareness
- Influence Policy within Tasmanian legislation
- Systemic Advocacy
- Research – community development including grant programs

Suggestions were made that the Disability Commissioner could also assist with system navigation.

Complaint management along with disability awareness are the functions highlighted most frequently for the Commissioner in the community consultation.



## **Complaints Function**

The scope of the complaints function had the most divergent responses in the consultation.

### **1. Receive complaints**

Submissions were in support of there being a function to receive complaints, for example, through a no-wrong-door approach. Types of complaints to include the provision of any support from disability service providers as well as government service providers:

*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. (TasCOSS)*

Community Legal Centres strongly supported the Disability Commissioner accepting complaints from persons with disabilities, their families and their carers about organisations providing disability services that are both registered NDIS providers and unregistered NDIS providers.

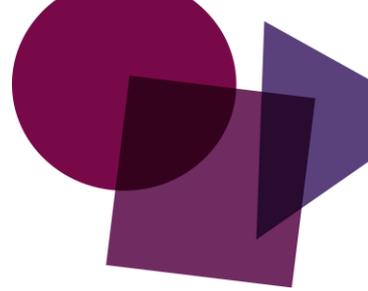
TasCOSS provided feedback that a centralised complaints mechanism for disability-specific complaints through a Commissioner model would assist with accessibility and provide greater support for Tasmanians with a disability, their carers and families to raise issues of concern, get the information, and to better understand the complaints resolution process.

### **2. Refer complaints**

Submissions were highly supportive of the function to provide referrals to other agencies including the National Disability Insurance Scheme Quality and Safeguards Commission (NDIS QSC), Ombudsman or Anti-Discrimination Commissioner.

There was concern from agencies and statutory authorities that the role of the Commissioner should not necessarily go beyond complaint referral where there were existing mechanisms in place. One example included the established avenues available to people with disability to make complaints about health services, such as to the Health Complaints Commissioner. It was also highlighted that while complaints could be referred to relevant office or agency, there are already processes and avenues for complaints processes through the Equal Opportunity Tasmania (EOT) so this role should not duplicate that service. It should also be noted that some community participants provided feedback that they found existing systems hard to navigate and that it was difficult to sustain the effort required to see complaints through.

Equal Opportunity Tasmania expressed concern with regards to potential jurisdictional overlap (EOT currently receives complaints falling under the *Anti-Discrimination Act* and the NDIS) and that people may become confused as to where to lodge their complaint. The submission outlines that it was already difficult to identify the appropriate body to make complaints – for example, EOT, Health Complaints Commissioner, NDIS Commission and or the Office of the Commonwealth Ombudsman. EOT were concerned people may have difficulty understanding the distinction between the Disability Commissioner and the Anti-Discrimination Commissioner (to whom complaints about disability discrimination can be made).



### 3. Investigate and resolve complaints

As outlined above, submissions were mixed about the role of a Disability Commissioner to actively investigate and resolve complaints.

The independence of the role was considered important:

*This office should act as an independent body providing a free and confidential complaint resolution process to support and improve the delivery of support and services for people with disability. (DPAC)*

*The Commissioner must remain independent and be free to act to resolve complaints and make recommendations which are then able to be acted upon. (Kingborough Council Disability Inclusion and Access Advisory Committee)*

One individual submission indicated that it was important that the complaints resolution process be free and confidential and that:

*this complaints process is timely, effective and accessible to all people with a disability in Tasmania and their carers/representatives.*

Submissions in support of an investigative function were supportive of the scope to include a broad range of complaints, for example:

*Receive and respond to reports or allegations of abuse, neglect and exploitation of people with disability that do not involve an NDIS provider such as government service providers and non-registered providers who provide NDIS services, or by family and other members of the community known to a person. This may include an investigation. (NDS)*

*It would be appropriate for the DSA to empower a regulatory and complaints mechanism in the form of a Disability Commissioner, to accept all service or discrimination-related complaints from [people with disability] for initial investigation...It is important that the Commissioner has the scope to handle complaints relating to services that are not NDIS-registered disability services and relating to services that are not specialised disability services but do provide services to people with disability. (Your Say)*

*An inclusive education is a basic human right under the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD). Therefore, education needs to be included in the scope of the Independent Commissioner including public, private and catholic schools. (Individual submission)*

It was also noted by a government agency and a statutory authority that it would be important to consider similar functions including conciliation of complaints already established under legislation such as the *Disability Discrimination Act 1992* and the *Tasmanian Anti-Discrimination Act 1998*, and to clearly define the role of the Disability Commissioner in responding to and investigating complaints involving children and young people.

The potential to work with other areas of government was also identified with interest in further understanding the complaints and investigation function. A consideration may be to examine how other safeguarding mechanisms are able to share information and how this may be used in the resolution of complaints or investigations.



Many participants in the community consultation believe that the Disability Commissioner should take seriously all complaints and allegations of abuse and manage these with dignity and respect. The Disability Commissioner role should provide support for review and mediation.

### **Advocacy, awareness, education and training**

All submissions to a degree saw the role of the Commissioner function to provide support, increase awareness and promote the rights of people with disability through advocacy, education and training. This extended to provide support, information and education to people with disability, support workers or informal carers, government agencies and disability service providers as necessary.

Department of Education advice highlighted that the Commissioner role could be a:

*key role in the state at a high level to celebrate and promote difference on the basis of disability, advocate for the rights of people with disability and truly value the role people with disability play within our community.*

The role could focus on inclusion and equality of people with disability by promoting and representing all Tasmanians with disability. It was suggested that the Commissioner could provide a similar role to that of the CCYP.

Community and advocacy groups thought it was important for the Commissioner to provide systemic advocacy and awareness across government and the wider community:

*Empower the Disability Commissioner to provide systemic advocacy across government to improve life for people with disability, including addressing gaps in services, regulation of currently unregulated providers and the mainstream interface with the NDIS. (NDS)*

*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. (TasCOSS)*

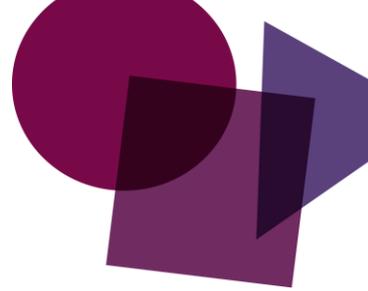
Alongside the advocacy role, it was indicated in agency advice that:

*continued investment in advocacy services will support the role of the Commissioner and provide significant opportunities to ensure a more functioning and equitable system and support regulators' work.*

Several submissions included that it was important for the Commissioner role to raise awareness and promote the rights of people with disability, including in line with the Victorian model to prevent abuse, neglect and exploitation. Specific comments included:

*The opportunity in having a Disability Commissioner role is that it could focus on promoting, advancing and ensuring the human rights of people with disability within an inclusive Tasmanian community. (DoE)*

*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. (TasCOSS)*



One submission that advocated for the creation of a charter of rights linked this to the role of the Commissioner who could have a role in upholding the rights of people with disability:

*It would be appropriate for the Disability Commissioner to have oversight of regulatory actions or complaints made under such a charter. (Your Say)*

Intentional peer support roles were identified in community consultations as an opportunity for disability awareness promotion and training. Ensuring the right skill sets are in place for roles to support the Disability Commissioner was identified. Story telling was also identified as a mechanism to increase disability awareness.

It was suggested that the Disability Commissioner should lead the development of templates and tools for best practise in accessible and inclusive service delivery.

Community consultation suggested that there was an opportunity through the Disability Commissioner for the state government to instigate community development grant programs, particularly pertaining to disability awareness and a more inclusive state.

### **Research and advice**

Some submissions supported a function of a Disability Commissioner be to undertake research and to engage in independent inquiries. This was highlighted in the TasCOSS submission as an important function of both the NSW and Victoria models.

The Community Legal Centres Tasmania submission outlined that the role could include conducting research and providing advice to government:

*As well as investigating complaints, our preferred model would also see the Disability Commissioner undertaking research, responding to Government inquiries and providing community-wide education. (CLCT)*

The NDS also thought a role of the Commissioner could be to report and advise the government on related systemic issues.

The research element of the Disability Commissioner was identified in community consultation as a mechanism to identify gaps in services for people with disability, especially for those who are not eligible for the NDIS. This includes the gathering of data and evidence to support service models and/or highlight gaps and issues in service delivery. A number of people raised the safeguard options for services of last resort for people with disability and the generally thin market in Tasmania for services, as gaps that need to be addressed.

One submission determined that the Commissioner could also have a role in reviewing draft and new legislation to provide advice on a wide range of issues that may affect the safety, health and wellbeing of people with disability.

### **Performance monitoring**

It was suggested in a few submissions that the Commissioner could have a role in monitoring performance against standards and agreed disability action plans. This could include:



*monitoring of an agreed service standard that both [includes] the regulation of Providers, and the effectiveness/cost-effectiveness and local sustainability of national program funding (Autism Tasmania)', and an*

*annual report to parliament including progress against key metrics and value for money achieved from national grant programs including the Information, Linkages and Capacity Building (ILC) program. (NDS)*

Agency advice suggested that an amendment to the DSA would help to embed the role of the Tasmanian Disability Commissioner as one which would provide additional support for, and complement, future Disability Framework/s for Action, reporting requirements and the roles of the consultative groups. This was supported by the NDS submission which outlined that the Commissioner could:

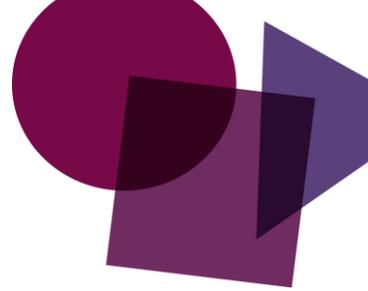
*Work with the Tasmanian Government to create key measurables to ensure adherence to the ADS, future versions of Accessible Island and any other disability action plans. Collect data on performance and report on findings to parliament. For this outcome to be measured accurately, the Commissioner needs the power to collect data on disability participation, disability access etc. (NDS)*

## **Powers**

Community consultation identified that legislation is important to ensure that the Commissioner role has mandated roles, responsibilities and requirements. It was also suggested that the Disability Commissioner might have their own legislation to ensure the powers of the role are not impacted or absorbed by competing priorities within an Act. It was further proposed that the Disability Commissioner might have greater decision-making powers in the context of services and programs, instead of the Minister for Disability Services.

A range of feedback was provided about the powers that would be required by the Commissioner in order to provide a complaints resolution mechanism. These include:

- Broad powers to accept complaints from persons with disabilities, their families and their carers about disability service providers. Community Legal Centres Tasmania described these as:
  - *strongly support the Disability Commissioner having broad powers to accept complaints from persons with disabilities, their families and their carers about organisations providing disability services*
  - *support the Disability Commissioner having broad powers to accept complaints relating to services that are both registered NDIS providers and unregistered NDIS providers but nonetheless provide services to persons with disabilities*
  - *strongly support the Disability Commissioner having the power to accept complaints in relation to children with disability.*
- Direct referral power to the agency who has responsibility for the state or Commonwealth legislation such as the NDIS Commission, Ombudsman or Anti-Discrimination Commissioner.



- Power of Investigation.
- Power of Prosecution, including:  
*legislative powers to investigate and prosecute alleged discrimination, violence, abuse, neglect and exploitation of Tasmanians with disability across all state-funded services (health, education, justice, transport, etc). (ParaQuad)*
- Power to share information across agencies in terms of being able to enable investigation, to inform other relevant parties and for the purpose of systemic issues, to identify and report on trends.

EOT also identified that:

*It is essential that the legal framework setting out enforceable rights and responsibility is easy to navigate and administered without unnecessary complexity.*

## **Other considerations**

### **Funding and Resourcing**

Two submissions and feedback by MDCG expressed concern as to whether the funding commitment of \$1.2m over four years would be adequate to perform the functions deemed necessary for the Commissioner role to be effective:

*We strongly recommend that the Government commit to appropriate funding that allows the Disability Commissioner to build a more equitable, inclusive and accessible Tasmania.*  
(Community Legal Centres Tasmania)

The resourcing of the Disability Commissioner role was raised in community consultation as an important aspect to ensure that the role and function provides for real input and real outcomes.

### **Governance**

The governance of the role was also seen as important with the opportunity to utilise existing groups and committees (eg, PDAC, MDCG and Local Council Access and Advisory groups) to form an advisory and consultation structure for the Disability Commissioner. The independence of the advisory mechanisms to the Disability Commissioner was also highlighted as essential to this role.

It was identified in one submission that it would be important that the Commissioner should talk to people with lived experience of disability and stay connected to the community. It was also mentioned that the Commissioner themselves should have some type of oversight such as ‘a panel of community members and disabled people and their carers’ (Individual Submission).

Another submission recommended that the DSA:

*establishes a governance framework to establish an Independent Disability Advisory Council made up of 80% Tasmanians with Disability to provide advice and conduct research for development to the Tasmanian Disability Services Commissioner. (ParaQuad)*



## Quality and Safeguarding

Carers Tasmania welcomed the Tasmanian Government's funding commitment for the appointment and implementation of a Disability Services Commissioner as an additional measure towards improving quality and safeguarding for people with disability.

### Further Consultation

Submissions from some agencies and all statutory authorities (whether written or verbal) expressed desire for the opportunity to provide further input into the scope, model and role of the Disability Commissioner. For example, the CCYP submission commented that they:

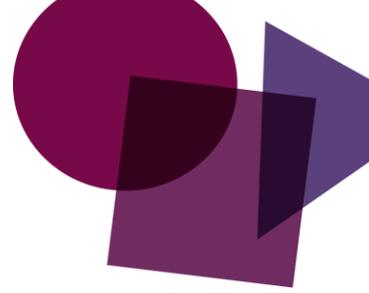
*would welcome further discussion on the proposed model for this role. This would allow the Commissioner to gain a better understanding of the types of functions and/or powers a Disability Commissioner could have to investigate either individual or systemic issues; how the Disability Commissioner's role would interact with her role as Commissioner for Children and Young People; and the interaction of the Disability Commissioner with the NDIS Quality and Safeguards Commission.*

Disability groups also called for further input into the establishment of a Disability Commissioner:

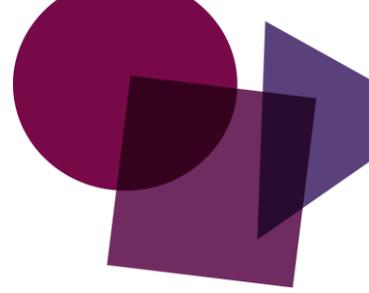
*...we suggest a thorough and comprehensive consultation process takes place across the Tasmanian community including people with disability and their significant others. This would be separate to this review. The purpose of a comprehensive consultation would be to co-design with people with disability the role, powers and functions of an independent disability commissioner. (ParaQuad)*

## Consultation Outcomes

- The role should be apolitical and independent with the ability to influence policy through a seat at the table of decision making in Tasmania.
- The role is ideally filled by a person with a lived experience of disability and that the role is supported by people with lived experience.
- The functions of the commissioner should complement other protective mechanisms and complaints pathways to minimise duplication. These include roles and functions of the *Disability Discrimination Act 1992 (Aust)*, the *Tasmanian Anti-Discrimination Act 1998* and the *Health Complaints Act 1995*, *Ombudsman Act 1978*, and *Commissioner for Children and Young People Act 2016*.
- The following functions were suggested. That the commissioner:
  - accept complaints from people with disability, their families and carers about services that are both registered NDIS providers and unregistered NDIS providers
  - provide a referral pathway to agencies including the NDIS Quality and Safeguards Commission, Ombudsman or Anti-Discrimination Commissioner



- resolve a broad range of complaints such as reports or allegations of abuse, neglect and exploitation of people with disability that do not involve an NDIS provider or NDIS-registered disability service
- have broad powers to accept complaints, directly refer or resolve complaints, investigate complaints, prosecute and to share information
- provide support, increase disability awareness and promote the rights of all Tasmanian people with disability through systemic advocacy, education and training
- undertake research and develop informed advice by gathering data and evidence to support service models and/or highlight gaps and issues in service delivery
- increase accountability and regulatory oversight by upholding the rights of people with disability and
- monitoring performance against minimum standards for access and inclusion for people with disability including for agreed disability action plans.
- Resource the commissioner adequately to ensure that the role can effectively perform the functions.
- Governance of the commissioner utilises existing groups and committees to form an advisory and consultation structure.
- Undertake co-design and further consultation with people with disability to inform the role, powers and functions of the Disability Commissioner.



## 7. Supported decision making

### Introduction

The principles in the DSA uphold the rights of people with disability to determine their own best interests 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.

The principles promote the inclusion of people with disability in decision making that affects them and where possible, supports people with disability to make decisions for themselves.

The DSA and commitments like Accessible Island promote the principle that people with lived experience of disability must be included in the design and decisions about the services which support them.

There is no universally agreed definition of supported decision making (SDM) and it is not defined in the UN CPRD. A desktop review of good practice in SDM undertaken by the University of NSW (UNSW) in 2021 includes the following description which is reflective of research undertaken in the past 10 years:

*SDM can... be seen as a framework in which a person who requires decision-making support can access support from a third-party to assist them in making decisions that reflect their will and preferences, uphold their rights, and give full effect to the exercise and expression of their legal capacity and the promotion of self-determination... a distinguishing element of the supported decision-making paradigm is that it shifts the focus from the capacity of the person being assisted, to the adequacy of the supports available through the rejection of the idea of incapacity, the assertion of an 'entitlement to receive assistance', and an obligation on the state to provide that assistance. (UNSW)*

The UNSW work also provides a distinction between:

(a) *supported decision making* - described as including the legal and policy structures underpinning support for decision making, including formal schemes that recognise the standing and role of supporters in providing support for decision making and

(b) *support for decision making* – described as the practices undertaken by supporters when assisting a person in a decision-making process.

The decision-making principles outlined in the report are based on Australian Law Reform Commission principles.

### **Emerging Australian Government Reforms**

The Australian Law Reform Commission recommends that the reform of relevant Commonwealth, state and territory laws should be consistent with the following [National Decision-Making Principles](#):

*Principle 1: The right to make decisions - Every adult has the right to make decisions that affect their life and to have those decisions respected.*



*Principle 2: Support - Persons who may require support in decision making must be provided with the support necessary for them to make, communicate and participate in decisions that affect their lives.*

*Principle 3: Will, preferences and rights - The will, preferences and rights of persons who may require decision-making support must direct decisions that affect their lives.*

*Principle 4: Safeguards - Decisions, arrangements and interventions for persons who may require decision-making support must respect their human rights.*

The conversation about SDM is most frequently framed within the context of Article 12 of the UNCRPD and is broadly interpreted as a rejection of substitute decision making in favour of processes which recognise and respect the individual's legal capacity.

The ADS is the main instrument for implementation of commitments under the UNCRPD. The Australian Government has sought to clarify understanding and good practice relating to SDM, including commissioning of UNSW to develop the *Good Practice in Supported Decision-making for People with Disability: A desktop review of the evidence for best practice principles for supported decision-making*. The NDIA is currently engaged in a co-design process with a broad reference group representing jurisdictions and disability stakeholders to develop a supported decision-making policy.

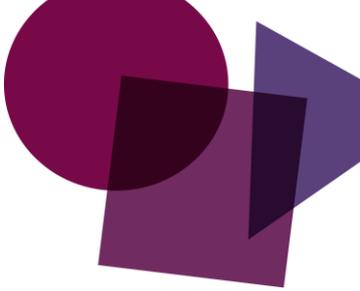
## **Reviews of Guardianship and Mental Health Acts**

Like many other Australian jurisdictions, Tasmania has undertaken Reviews of Guardianship and Mental Health legislation, in addition to this current Review of the DSA.

The 2018 Review of the *Guardianship and Administration Act (1995)* by the Tasmanian Law Reform Institute (TLRI) expansively considered informal and formal decision-making frameworks and included several recommendations (See Chapter 7 of the Review report). The Institute's recommendations include removal of the need to establish that a person has a disability and refocussing on whether a person can make decisions with the use of appropriate support. The TLRI also considered the role of supported decision-making and recommended that:

- the definition of 'decision-making ability' contained in the *Guardianship and Administration Act* confirms that a person has decision-making ability if they can make a decision with practicable and appropriate support, and
- a person may only be determined to lack decision-making ability if all practicable steps have been taken to provide the person with appropriate support to make and communicate a decision.

The Review of the *Mental Health Act* also considered Decision Making Capacity (See Chapter 5 Outcomes Report). The Act specifically recognises the ability of a person with decision-making capacity to make their own decisions about assessment and treatment for a mental illness. It reinforces the need for an adult's decision-making capacity to be presumed and outlines how a person's decision-making capacity can be assessed when this is in doubt. With regard to 'supported decision making' the Tasmanian Governments response in the Outcomes Report was that:



*The Government will consider the need to amend the Act to refer to “decision-making ability” and to reflect concepts of supported decision making as part of the Government’s consideration of and response to the TLRI’s recommendations following its review of the Guardianship and Administration Act 1995.*

## What we asked

To start the conversation about SDM we asked the following questions:

- *Does the DSA have a role in promoting supported decision making or ensuring that substitute decision makers, disability and other service providers act in the best interests of people with disability when it comes to making informed decisions?*

## What we heard

Submissions were positive about the potential of SDM in upholding the rights of people with disability, consistent with the UNCRPD. This was also supported by community consultations feedback, which identified that the DSA does have a role in promoting SDM.

### **Supported decision making and the rights of people with disability**

Many of the submissions were positive about the potential of SDM in achieving the rights of people with disability, consistent with the UNCRPD:

*A supported decision-making framework and a shift away from substitute decision-making is vital to protect the rights of people with disability. (Your Say)*

*State funded services have an utmost duty as legislators working for people to promote support for decision-making and ensuring the person with disability is able to understand the communication and information being shared. (ParaQuad)*

*Importance of choice, control and participation in decision making including through self-advocacy and support. (EOT)*

Feedback was also provided that the DSA had a role in promoting the rights of children with disability:

*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. (CCYP)*

The lack of processes to facilitate supported decision making was seen as an obstacle to achieving the human rights of people with disability and the lack of direct involvement by the person with disability had contributed to negative outcomes that may otherwise have been avoided:

*Discrimination complaints involve situations where choice was removed from people with disability, where they were refused participation in the decision-making process in circumstances specifically involving them, and were adversely affected as a result. (EOT)*



*Supported decision making is really important and the DSA should definitely keep tabs on this, because some of us can be taken advantage of through this process. (Individual Submission)*

To support their submission ParaQuad undertook an online survey with their members:

*100% of respondents agreed with the statement that the Disability Services Act ensures it respects the inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons. (ParaQuad)*

Participants in the community consultation specifically suggested that training for Police and Emergency Services in relation to supported decision making was essential.

### **Supported decision-making framework**

The community consultation outlined that SDM mechanisms and processes such as the Tasmanian Civil and Administrative Tribunal are encouraged to provide support for decision making and to ensure there is a clear framework provided in the context of what supported decision making means for each individual. Many examples provided in the community consultations related to the experience of engagement with Guardianship and Administration processes and were not positive.

Respondents referred to the recently completed Review of the Public Trustee and the Review of the *Guardianship and Administration Act* undertaken in 2018. It was suggested that there are findings and learnings from these reviews regarding frameworks and standards for decision making which should be considered in the review of the DSA or recommendations that could be progressed within the DSA:

*NDS supports recommendations in the report to introduce a decision-making framework to ensure that substitute or representative decision making is a last resort, and effective supports are in place to facilitate true supported decision making in all circumstances where an independent decision is not possible. (NDS)*

Support for development of a framework for SDM:

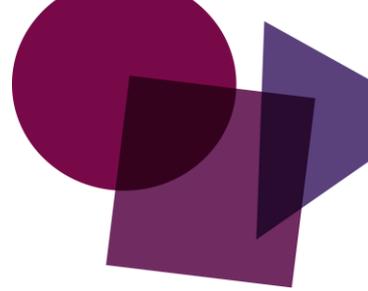
*Introduce and enforce the use of a clear and accessible supported decision-making framework. (NDS)*

### **Principle(s) relating to supported decision making**

Feedback was provided that the DSA should explicitly include principles relating to SDM. TasCOSS suggested that principles should be consistent with the Australian Law Reform Commission's *National Decision Making Principles*. TasCOSS also referred to the recommendations of the Tasmanian Law Reform Institute in relation to supported decision making.

Your Say provided feedback that inclusion of supported decision making as a core principle would ensure that the views of the individual were prioritised:

*The DSA needs to ensure that the views of the individual are prioritised and that providers are not preferencing those of family or friends (and must make all efforts to ensure that the individual wants the particular family/friends/carers consulted or included in supported*



*decision-making). This can be achieved by implementing supported decision-making provisions and including supported decision-making as a core principle of the DSA. (Your Say).*

Feedback was also provided that SDM support should be available from third parties who do not have a conflict of interest and that SDM was a close compliment to advocacy.

### ***Interacting legislation***

Respondents suggested that in addition to the DSA there are several pieces of Tasmanian legislation that have coverage in relation to decision making and capacity. These include the *Guardianship and Administration Act (1995)* and the *Powers of Attorney Act (2000)*. TasCOSS suggested that a review of all the relevant legislative instruments was necessary to ensure consistency and alignment with Article 12 of the UNCRPD.

Your Say provided feedback with regard to these pieces of legislation:

*legislative instruments regarding supportive attorneys and guardians equivalent to those in place in Victoria to be included in the Tasmanian Powers of Attorney Act 2000 and Guardianship and Administration Act 1995.*

It was further suggested by Your Say that if provisions were made in legislation other than the DSA, that the DSA should be updated to reflect the role and importance of supportive attorneys.

### ***Advocacy and capacity***

A number of respondents provided feedback about the importance of advocacy in supporting the rights of people with disability to make decisions.

Autism Tasmania provided feedback that local and subject-matter expertise was key and that without this skill set ‘service solutions will continue to be suboptimal’. Their view was that advocacy provided a safety net for people falling between service funding gaps.

It was noted that for many reasons an individual’s decision-making capacity may vary depending on factors such as general health, time of day, unfamiliar people, unfamiliar surroundings and the complexity or ambiguity of the information presented. Because of this variance additional supports may be required from time to time but not always. For example, for people with psychosocial disability, decision making capacity can fluctuate in periods where a person may be unwell, and therefore additional supports may be needed during this time. It was suggested that this may include individual advocacy support if there are no informal supports available for the person.

Feedback was provided that assumptions may be made about the capacity of people with disability where no formal assessment of capacity had been undertaken or record made with regard to capacity. There was also uncertainty about the process to follow where capacity was in question.

CarersTAS provided feedback that regardless of whether the person had capacity or not, even where substitute decision making arrangements were in place, that they, or family and carers, should still be consulted:



*We recommend that decisions are still made in consultation with the person with disability or the family carer of the person with disability (in cases where there is a public guardian appointed). (CarersTAS)*

Feedback was also provided by CarersTas that was positive about supported decision making for individuals but also advocated for the inclusion of carers in decision making where this was appropriate:

*Carers must be routinely identified, recognised and provided with appropriate information about their own right to be included as part of the supported decision making process, either where a person with disability does not have capacity to make their own decisions, or where a person with disability wants their carer involved in any decision-making process. (CarersTAS)*

Feedback was provided that decision making capacity would be further safeguarded if people with disability were enabled to build their decision making and self-advocacy capacities; if carers were provided with education to understand and respect those capacities; and if both individuals and carers were supported by timely and effective advocacy and advisory services:

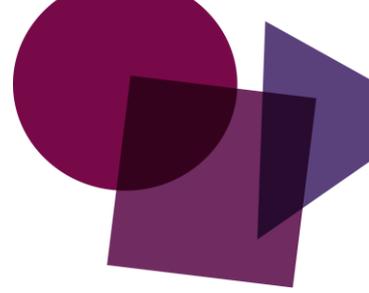
*Advocating for oneself is more effectively done where a person has been supported to exercise choice and control, and is empowered through that support. (EOT)*

## **Example Models**

The Irish *Assisted Decision Making (Capacity) Act 2015* was cited as a good practice example which could be considered for guidance in development of a Tasmanian approach. This Act has been developed to support decision-making and maximise a person's capacity to make decisions. The Act describes various decision-making options depending on the circumstances of the individual and places a legal requirement on service providers to comprehensively enable a person make a decision through the provision of a range of supports and information appropriate to their condition. More information on this model is available from the Irish Department of Justice website – [Assisted Decision-Making \(Capacity\) Act 2015 – The Department of Justice](#).

## **Consultation Outcomes**

- Introduce a supported decision-making framework to strengthen the human rights of people with disability.
- Review the interoperability of all Tasmanian Legislation relating to decision making and decision-making capacity.
- Enable the capacity of people with disability to build their decision making and self-advocacy capacities.
- Include carers as part of the supported decision-making process where appropriate.
- Ensure the availability of supported decision-making supports without conflict of interest.
- Note: The addition of a principle relating to supported decision making is included under the consultation outcomes relating to Principles of the Act (see Chapter 2).



## 8. Consultation Policy and Practice

### Introduction

The DSA, and commitments like Accessible Island, promote the principle that people with lived experience of disability must be included in the design and decisions about the services which support them:

*UNCRPD, Article 4(3): In the development and implementation of legislation and policies to implement the present Convention, and in other decision-making processes concerning issues relating to persons with disabilities, States Parties shall closely consult with and actively involve persons with disabilities, including children with disabilities, through their representative organisations.*

The ADS sets the high-level policy framework for disability to guide public policy decisions by governments and outside of government. Along with Targeted Action Plans, Associated Plans are developed in consultation with people with disability and they will track, monitor and report on their achievements against the Outcome Areas of the Strategy.

The ADS *Engagement Plan* outlines that the Australian Government is funding the development of good practice guidelines for the engagement of people with disability. In the development phase of the Strategy, people with disability indicated that a good practice engagement guide would be a valuable resource. The purpose of the guide will be to help remove barriers to participation for people with disability and uphold the rights of people with disability to access the same opportunities in the community as everyone else.

The Guidelines are expected to facilitate improvements in the engagement and inclusion of people with disability in community consultation, policy development and government decision-making. The Engagement Plan identifies that the Guidelines will be developed by one or more non-government organisations with expertise in lived experience of disability and in engaging and communicating with people with disability. It states that people with disability will be centrally involved in, and advise on, the Guidelines as they are developed.

The Disability Royal Commission's Accessibility and Inclusion strategy guides the Royal Commission in its engagement with people with disability. It commits the Royal Commission to putting people with disability first in everything they do and explains how they will achieve this. The Accessibility and Inclusion Strategy states the principles that guide the Royal Commission in its engagement with people with disability and aligns with the rights-based philosophy of the UNCRPD.

Some other parts of Australia include minimum standards for consultation in their legislation or require the preparation of disability impact statements for new initiatives and developments. Examples include the South Australian Disability Inclusion Regulations 2019 and the NSW *Disability Inclusion Act 2014*.



## What we asked

To start the conversation about including the voices of people with disability we asked the following questions:

- *How can the DSA better ensure that the voices of people with disability are listened to and people with disability are at the centre of decisions made by the Tasmanian Government?*
- *Could the DSA include stronger guidance about who, when, on what issues, and how people with disability are included in consultations?*
- *What could be included in the DSA to encourage consultation?*

## What we heard

### **Co-design – Inclusion of People with Disability in all Government Consultations**

There was positive response to engagement through the DSA review consultation and participants stated that the Review needs to continue to engage and broaden the scope of input:

*Opportunity to have a say is important.*

A number of submissions referenced the phrase: “nothing about us without us” as a basic human right. This phrase has a long association with the disability rights movement and reflects a principle of participation and integration of persons with disabilities in every aspect of political, social, economic and cultural life.

Feedback was provided that people with disability should be included in decisions that affect the community:

*It should be a requirement that every decision or new law that affects the community, which is everything, has input from disabled people. (Individual Submission)*

NDS responded that the DSA could establish standards for inclusion of people with disability and their support networks in Tasmanian Government consultations processes on decisions or policies, particularly those that affect people with disability:

*The DSA include a consultation process that ensures the perspective of people with disability is considered when designing policy across government agencies. (NDS)*

The CCYP provided feedback that the DSA may include minimum requirements for consultation with children and young people to inform major government decisions, including this legislation, and other consultation relating to the social, economic, civic, political and cultural life in Tasmania:

*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.*

ParaQuad suggested that it was particularly important that people with disability are included in the establishment of the Disability Commissioner role:



*The purpose of a comprehensive consultation would be to co-design with people with disability, the role, powers and functions of an independent disability commissioner. (ParaQuad)*

## **Consultation Methodologies**

Consultation was identified as essential in the community consultation. Participants noted that it is important that consultation is undertaken before a decision is made by Government that may impact on the lives of people with disability:

*Everyone can interpret the same thing differently.*

Participants also provided feedback that consultation is also more than just inviting people to participate: it is providing opportunity to talk and to be heard. People involved in the consultation indicated that there is too much decision-making being done for people rather than listening to them.

Feedback was provided that consultation by itself is not enough and that it should be replaced with the term ‘public participation’ or ‘engagement’. The [IAP2 Spectrum of Public Participation](#) was suggested as a model.

The use of explainer videos to explain services, options and context was recommended as a useful consultation element.

Community consultations highlighted that consultation needs to include the opportunity for people with complex support needs to be represented. Also, timeframes for consultation need to be realistic and appropriate to ensure people have the chance to have a say.

Feedback was provided that consultations need to consider the ways in which the voice and agency of people with disability is included.

An individual with disability, commented in their submission that:

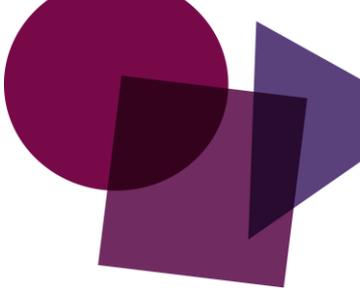
*We should be able to give input in the ways that are easiest for us, like writing, speaking, video call, AUSLAN, etc.*

Agency feedback about the design of consultations included:

*The processes for consultation need to be more accessible and creative to allow people with disability to contribute in much broader ways than is currently the norm. Utilising online platforms that are compatible with Alternate/Augmentative Communication devices, as well as consistent accessibility of documents/other resources is vital (eg videos with captions, Auslan sign interpretation etc).*

## **Feedback loop after consultation**

Generally, participants involved in the community consultation processes were interested in ensuring feedback on the DSA Review as it progresses towards enacting the legislation. This feedback loop is necessary so that people who have contributed feel they have been heard and their input valued:



*Acknowledgement of input to enquiries and reviews by sending draft documents to contributors to reassure them that their input has been valued.*  
(Kingsborough Council – Disability Inclusion and Access Advisory Committee)

### **Disability Commissioner pathway to promote consultation**

The Disability Commissioner was identified in the community consultation as a pathway to promote consultation and the opportunity to teach people with disability how to raise any concerns. Similarly, the opportunity to provide education and advice to family members about a range of systems and processes was identified as part of the role.

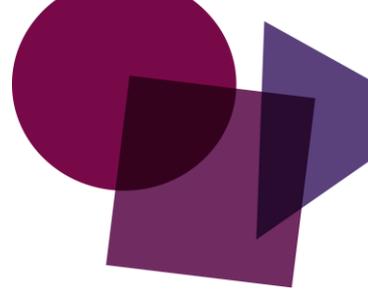
#### **Example Model**

Principles in the *Disability Standard for Education Review – The 2020 Review of the DSE Final Report* included the following recommendation:

*Recommendation 2 - That the Australian Government amend the Standards to include principles on consultation, issues resolution and complaints handling processes.*

### **Consultation Outcomes**

- Establish standards for consultation with people with disability before major planning or policy decisions that will impact on the lives of people with disability are made at all levels of Government.
- Include a feedback loop for people with disability after consultation to demonstrate how their input has been included or considered.
- Develop the capacity of disability led organisations to participate in consultations and represent the interests of people with disability.



## Where to from here...

Thank you to everyone who provided feedback in the consultation.

Your participation means that we are much better informed about what Tasmanians with disability and our other stakeholders think needs to happen to make Tasmania a safe and inclusive place to live.

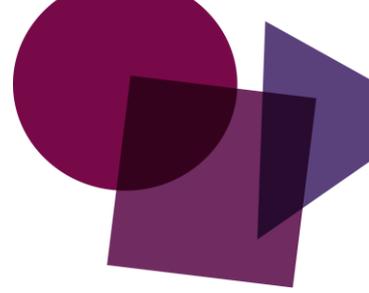
The feedback included in this report will feed into further analysis by the Tasmanian Government about how the Disability Services Act needs to change.

We have provided advice to the Government for their consideration of the next steps in the review of the *Disability Services Act 2011*.

We know that this will be a complex task but we are committed to creating a contemporary piece of legislation that celebrates the strength, diversity and experience of Tasmanians with disability.

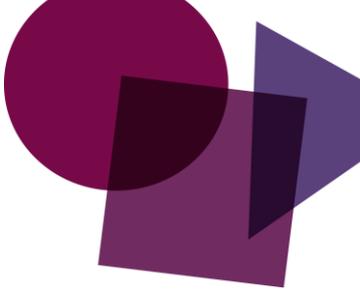
A summary report and an Easy Read report on the consultation are also available.

We will make the information available to people who participated in the consultation.



# Appendix I. Tasmanian Government Reference Group

<b>Department of Communities:</b>
Community and Disability Services (Chair)
DSA Review Project Team
Disability Policy and Programs
Quality and Safety Services
Office of the Senior Practitioner
Housing Policy and Programs
Policy and Programs, Communities Sport and Recreation (CSR)
Tasmanian Autism Diagnostic Services
Specialist Accommodation and Support
Strategy and Engagement
Advice and Referral Service, Children and Youth Services
Office for Children
<b>Department of Health:</b>
Government Relations and Strategic Policy
Health Planning - Policy, Purchasing, Performance and Reform
Allied Health Strategy and Policy - Clinical Quality, Regulation and Accreditation
Community Care Reform - Policy, Purchasing, Performance and Reform
Mental Health, Alcohol and Drug Directorate
<b>Premier and Cabinet:</b>
Policy Division
<b>Department of Justice:</b>
Public Guardian
Tasmanian Civil and Administrative Tribunal (TasCAT)
Strategic Legislation and Policy
Consumer Building and Occupational Services (CBOS)
<b>Department of State Growth:</b>
Passenger Transport
Policy and Coordination, Projects and Policy
<b>Treasury:</b>
Intergovernment and Financial Policy Branch, Economic and Financial Policy Division
<b>Department of Education:</b>
Inclusion and Diversity Services
<b>Department of Police, Fire and Emergency Management:</b>
Senior Sergeant



## Appendix 2. Responses to DSA Review

### Written Input received

#### Individuals

Individual Submission 1  
Individual Submission 2

#### Advocacy and Community Sector

Your Say Advocacy Tasmania  
CarersTAS Australia  
Community Legal Centres Tasmania  
National Disability Services (NDS)  
Autism Tasmania  
ParaQuad Tasmania  
TasCOSS (endorsed by Disability Voices Tasmania)  
Kingborough Council's Disability Inclusion & Access Advisory Committee

#### Agency and Statutory Authority

Department of State Growth (State Growth)  
Department of Justice – Tasmanian Civil and Administrative Tribunal (TasCAT)  
Department of Justice – Consumer Building and Occupational Services (CBOS)  
Department of Health (DoH)  
Department of Premier and Cabinet (Premier and Cabinet)  
Department of Education (DoE)  
Communities Tasmania – Communities, Sport and Recreation (CSR)  
Commissioner for Children and Young People (CCYP)  
Equal Opportunity Tasmania (EOT)

#### Additional Stakeholder Discussions

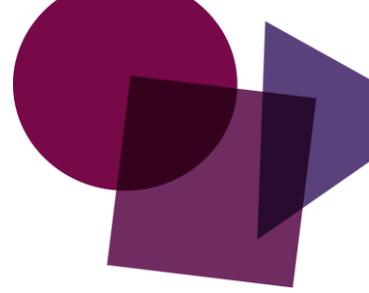
Department of Justice - Public Guardian  
Department of Justice – Policy and Legislation  
Ombudsman/Health Complaints Commissioner  
Communities Tasmania – CYF  
Communities Tasmania – DCS including Senior Practitioner  
Ministers Disability Consultative Group

## Appendix 3. Interaction with other Tasmanian legislative and policy reviews



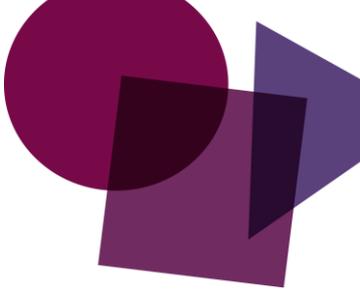
### Tasmanian Legislation

Legislation	Interaction with DSA
Guardianship and Administration Act 1995	Reviewed 2018.
Anti-Discrimination Act 1998	Commissioner powers. Complaints about discrimination for people with disability.
Mental Health Act 2013	Reviewed 2019-20, amendments pending. Psycho-social disability, decision making and role and powers of the Chief Psychiatrist and Principal Official Visitor. Restrictive practice in relation to treatment order, supervision or restriction order.
Children, Young Persons and Their Families Act 1997	Under review. Commissioner powers and how applied to individuals with disability; reference to disability service providers under DSA.
Youth Justice Act 1997	Under review. Refers to youth with disability, review cited in CCYP submission.
Education Act 2016	How it applied to people with disability.
Health Complaints Act 1995	Commissioner powers and how applied to individuals with disability.
Tasmanian Civil and Administrative Tribunal Act 2020	Guardianship Stream - restrictive intervention has the same meaning as in the Disability Services Act 2011.
Public Trustee Act 1930	Review of Public Trustee 2021, recommendations relating to a disability commissioner. How applied to people with a disability.
Building Act 2016 and Building Regulations 2016 (refers to Disability Discrimination Act 1992)	Building access.
Registration to Work with Vulnerable People Act 2013 and Regulations 2014	Covers NDIS service providers and refers to NDIS Act 2013
Residential Tenancy Act 1997	Refers to NDIS participants and refers to NDIS Act 2013.
Carer recognition legislation	Pending. Supported decision making.



## Reviews and frameworks

- Development of the next iteration of *Accessible Island: Tasmania's Disability Framework for Action 2018-2021*
- Review of the *Guardianship and Administration Act 1995*, Tasmanian Law Reform Institute (TLRI 2018)
- Adult Safeguarding Options (DOJ 2021), and elder abuse framework and safeguarding - *Tasmania's Elder Abuse Prevention Strategy*, national plan and implementation plan
- *Review of Tasmanian Public Trustee (2021)*
- Review of Quality and Safety and the development of *Principles for Nationally Consistent Authorisation of Restrictive Practices*
- *Supporting our Carers Action Plan 2021-24* and development of Carer recognition legislation – pending
- Review of funding models for community service organisations (Premier and Cabinet 2022 TBD) PESRAC Recommendation 43. Community Service Funding
- Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability



## Appendix 4. Review of state-based authorisation processes for the use of restrictive practices

*A consultation for the Government of Tasmania – Summary Report*, provides an outline of the methodology and recommendations from an independent analysis of Tasmania's authorisation processes for the use of restrictive practices.

Communities Tasmania's response to each of the recommendations is outlined in *A consultation for the Government of Tasmania Recommendations – Communities Tasmania Response* and are outlined below:

### Recommendation 1

That the Tasmanian Government changes the current dual authorisation pathways to a single authorisation pathway removing the function of the Guardianship and Administration Board from the authorisation pathway.

#### **Communities Tasmania Response:**

Partially supported.

- Streamlining the authorisation process to a single pathway is fully supported.
- The role and function of the Tasmanian Civil and Administrative Tribunal – Guardian Stream (formerly the Guardianship and Administration Board) within a single authorisation pathway requires further consideration.
- Implementation of this recommendation would be contingent on legislative amendment.

### Recommendation 2

That the Tasmanian Government reviews the sequence of steps currently involved in seeking approvals for restrictive interventions and considers a linear pathway where the participant is supported at each step via a behaviour support plan leading to a reduced need for restrictive practices.

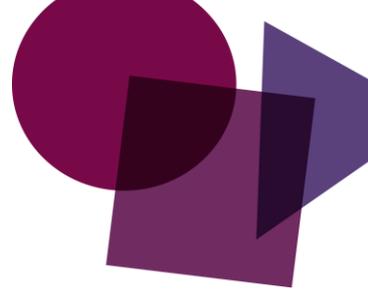
#### **Communities Tasmania Response:**

Fully supported.

- Communities Tasmania will develop a best-practice model based on the experience and successful approaches in other jurisdictions and in consideration of the Recommendations and model proposed by JFA Purple Orange.
- Consultation on the model will occur in conjunction with legislative changes arising from the *Review of Tasmania's Disability Services Act*.

### Recommendation 3

That the Tasmanian Government reviews the role, positioning and current reporting structure of the Senior Practitioner and considers elevating this role to bring it into alignment with other jurisdictions that can be considered to use best practice designs.



### **Communities Tasmania Response:**

In-principle support.

- The Senior Practitioner role, positioning and reporting structure will be considered in the drafting of legislation as a result of the *Review of the Disability Services Act*.

### **Recommendation 4**

That the Tasmanian Government considers widening the current legislation under which the Senior Practitioner can operate in order to allow for greater consistency and oversight of restrictive practices across other appropriate settings such as educational and child protection, thereby ensuring a coordinated approach for participants accessing multiple services.

### **Communities Tasmania Response:**

In-principle support.

- Communities Tasmania will consult with relevant agencies to seek advice regarding the opportunities for broadening the scope of the Senior Practitioner's role and consideration of the legislative, administrative and resource impacts.

### **Recommendation 5**

That the Tasmanian Government positions the Office of the Senior Practitioner as a leader for sector-wide education and capacity building towards a positive context for how people are supported, particularly people most at risk of a service provider using restrictive practices in their support arrangements.

### **Communities Tasmania Response:**

In-principle support.

- Communities Tasmania will consider the resource implications and mechanisms to ensure education and capacity building activity offered by the Office of the Senior Practitioner is complementary to activity undertaken by other relevant parties such as the NDIS Quality and Safeguards Commission and the Disability Commissioner.

### **Recommendation 6**

That the Office of the Senior Practitioner (OSP) role and resourcing include capacity to directly provide specialist input to agencies in relation to alternatives to restrictive practices through positive behaviour support strategies, and to develop other best-practice resources that assist service agencies to build capacity.

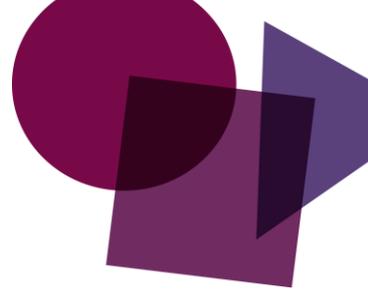
### **Communities Tasmania Response:**

Partially supported.

- The development of best-practice resources to build capacity is supported.
- Responsibility for the development of behaviour support strategies rests with Behaviour Support Practitioners. Communities Tasmania is not an NDIS registered provider for the provision of specialist positive behaviour support practitioner.

### **Recommendation 7**

That the Tasmanian Government commits to supporting the OSP to lead a human rights approach to the broader context surrounding a restrictive practices authorisation pathway, including an emphasis on authentic, strengths-based, vision-based approaches to planning that place the person's vulnerability in the context of building life chances leading to a reduced need for restrictive practices.



### **Communities Tasmania Response:**

In-principle support.

- Communities Tasmania is supportive of a human rights approach and people with disability exercising choice and control in the planning process, including in the development of their NDIS and behaviour support plans. However, the broader aspects of this recommendation may be out of scope of the authorisation pathway for restrictive practices.

## **Recommendation 8**

That the Tasmanian Government change the current definition of restrictive interventions and in doing so, refer to the national definition of restrictive practices. It is also recommend that as part of this change, chemical restraint is included as a category of restrictive practices requiring approval.

### **Communities Tasmania Response:**

Fully supported.

- Communities Tasmania will:
  - consider ways to incorporate the national restrictive practice definitions into state disability legislation that will minimise the risk of future divergence between state and national definitions; and
  - progress changes to the definition of restrictive practices in conjunction with the outcomes from the review of Tasmania's *Disability Services Act 2011*.

## **Recommendation 9**

That the Tasmanian Government require an *NDIS Interim Behaviour Support Plan* for an interim authorisation period of no longer than six months or an *NDIS Behaviour Support Plan*, including a complete *Functional Behavioural Assessment*, for an authorisation period of no longer than 12 months. That there be no authorisations of any duration without a plan; deferring instead to a strict emergency arrangement.

### **Communities Tasmania Response:**

Fully supported

- Communities Tasmania, in consultation with the NDIS Quality and Safeguards Commission, will consider the implications for the NDIS behaviour support market including the market's capacity to respond to potential increased demand.
- Should market capacity and capability not be evident, Communities Tasmania may consider expanding the scope of interim authorisations to include situations where the provider is making all reasonable endeavours to engage a behaviour support practitioner, but a behaviour support plan is yet to be developed. This approach would address the unintended consequence of increased reporting of unauthorised restrictive practices for providers.
- Changes to the authorisation requirements and timeframes will require legislative amendments and would therefore be progressed in conjunction with the outcomes from the review of Tasmania's *Disability Services Act 2011*.

## **Recommendation 10**

That the Tasmanian Government implements supported decision-making frameworks within its restrictive practices authorisation processes and lead a national conversation relating to this approach.



### **Communities Tasmania Response:**

In-principle support.

- Communities Tasmania will incorporate strategies within the restrictive practice authorisation processes that ensure people with disability and their support networks are supported to make decisions about the use of restrictive practices.
- Communities Tasmania will utilise existing national forums and practice leadership meetings to discuss and share the approach with colleagues from across the nation.

### **Recommendation 11**

That the Tasmanian Government implements a mechanism within the authorisation pathway that provides people living with disability and their families clear access to authentic, independent review processes, separate from original decision-makers.

### **Communities Tasmania Response:**

Fully supported.

- Communities Tasmania will consider the implementation of a mechanism that provides independent review processes within the development of the authorisation pathway and in conjunction with the outcomes from the review of the *Disability Services Act 2011*.

### **Recommendation 12**

That the Tasmanian Government continues to explore ways to establish a data capture and reporting mechanism for the conduct of restrictive practices, and that this database is curated by the OSP.

### **Communities Tasmania Response:**

Fully supported.

- Communities Tasmania will research the data capture and reporting mechanisms being used across other states and territories to determine the viability of an existing database being appropriate within the Tasmanian context.
- Although not dependent on legislative reform, progression of this recommendation is contingent on the restrictive practice authorisation pathway being determined.



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