

Your Ref:
Our Ref: 701

19 September 2023

Jenny Gale
Secretary
Department of Premier and Cabinet
By email: disabilityinclusionbill@dpac.tas.gov.au
secretary.executive@dpac.tas.gov.au

Dear Secretary

Re: Disability Inclusion Bill 2023

Thank you for the opportunity to comment on the Draft Disability Inclusion Bill 2023 (draft Bill), and for providing an extension of time within which to lodge this comment.

As you are aware, the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability will deliver its final report on 29 September 2023. This draft Bill therefore comes at an opportune time to ensure that recommendations of the Royal Commission are appropriately incorporated into Tasmanian legislation. I trust that you will take account of the Royal Commission's recommendations in the finalisation of the Bill.

I note that the decision has been made to draft an entirely new piece of legislation, rather than to amend the existing *Disability Services Act 2011*. I commend this decision given the significant changes in the delivery of disability services in Tasmania with the introduction of the National Disability Insurance Scheme, and the work of the national Royal Commission. This approach provides the opportunity for Tasmania to develop nation leading legislation which aligns with other national and state legislation, and any reforms recommended by the Royal Commission. I would like to acknowledge the Disability Inclusion Legislation Project team on their thorough consultation process which has reached a wide range of stakeholders and for providing a comprehensive Overview Paper of the draft Bill to guide feedback.

As I understand it, the purpose of the draft Bill is to drive inclusion for all Tasmanians with disability and to advance the human rights of people with disability as per Australia's national and international commitments. Legislation to advance the human rights of people with disability and the full and effective inclusion of people with disability in the Tasmanian community, including children and young people, is clearly a matter relevant to my functions as Commissioner.



Background

According to the information accompanying the request for comment, the main reforms proposed by the draft Bill:

- Establish the position of Tasmanian Disability Inclusion Commissioner, and provide functions and powers to the Commissioner;
- Establish the Office of the Senior Practitioner, and provide functions and powers to the Senior Practitioner;
- Regulate the use of restrictive practices by disability service providers;
- Establish the Tasmanian Disability Advisory Council;
- Establish the requirement for development of a Tasmanian Disability Inclusion Plan, and the requirement for Disability Inclusion Plans to be developed by Defined Entities;¹
- Establish the role and functions of Appointed Program Officers and Independent Persons in monitoring quality of care for people with disability who are subject to restrictive practices; and
- Retain the ability of the Tasmanian Government to allocate funding for the purpose of delivering services in line with the objects of the Act.

At the outset, I note that it is particularly pleasing to see that the draft Bill reflects some of the feedback provided by individuals and organisations during the consultation period, including issues raised in my 2021 [submission](#) to the Review of the *Disability Services Act 2011* Discussion Paper. My feedback included, among other things, that the definition of restrictive practice should align with the *National Disability Insurance Scheme (Restrictive Practices and Behaviour Support) Rules 2018*, that all government-funded disability services in Tasmania should meet the National Disability Standards (including non-registered providers with the NDIS), and that the principles of the Act should align with article 7 of the *Convention on the Rights of Persons with Disabilities* (CRPD).

Role of the Commissioner

My role as Commissioner for Children and Young People is governed by the *Commissioner for Children and Young People Act 2016* (CCYP Act).

Section 8 of the CCYP Act outlines my functions as follows:

- (a) advocating for all children and young people in the State generally;
- (b) acting as advocate for a detainee under the *Youth Justice Act 1997*;
- (c) researching, investigating and influencing policy development into matters relating to children and young people generally;
- (d) promoting, monitoring and reviewing the wellbeing of children and young people generally;

¹ A Defined Entity includes a State Government Agency or other agent or instrument of the Crown.



- (e) promoting and empowering the participation of children and young people in the making of decisions, or the expressing of opinions on matters, that may affect their lives;
- (f) assisting in ensuring the State satisfies its national and international obligations in respect of children and young people generally; and
- (g) encouraging and promoting the establishment by organisations of appropriate and accessible mechanisms for the participation of children and young people in matters that may affect them.

In performing my functions, I am required to:

- do so according to the principle that the wellbeing and best interests of children and young people are paramount;
- observe any relevant provisions of the United Nations *Convention on the Rights of the Child* (UNCRC); and
- give special regard to the needs of children and young people who are disadvantaged or vulnerable.

Further, articles of the UNCRC which are particularly relevant to my consideration of the draft Bill include the rights of the child to:

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

Furthermore, article 7 of the CRPD specifically provides that:

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



As part of my role as Commissioner I speak regularly with children, including those with disability, and they have expressed to me their desire for an inclusive community where everyone feels a sense of acceptance, belonging and safety. I have included some quotes from children and young people as part of this submission.

Comment

My comment is focussed on how these draft laws potentially affect children and young people. It is not intended to be exhaustive and should be considered in the context of the views I have expressed previously in my submission to the Discussion Paper.

Tasmanian Disability Inclusion Commissioner

As mentioned in my previous submission, I welcome the establishment of a Tasmanian Disability Inclusion Commissioner to promote, monitor and review the wellbeing of people with disability. The functions of the Commissioner are outlined in section 24 of the draft Bill as follows:

- (a) to provide advice and assistance to, and advocate systematically for, people with disability;
- (b) to undertake research into any matter related to the operation and objects of this Act;
- (c) to advise, and make recommendations to, the Minister, at the Commissioner's own initiative or at the request of the Minister, on any matters arising from the performance of the Commissioner's functions;
- (d) to promote, monitor and review the wellbeing of people with disability;
- (e) to provide leadership, foster inclusion, and promote accessibility across government and mainstream services, including monitoring and reporting in relation to the Tasmanian Disability Inclusion Plan;
- (f) to support defined entities to comply with this Act;
- (g) to promote the rights of people with disability, including rights relating to disability inclusion, accessibility, individual autonomy, self-determination, and choice and control;
- (h) to establish and monitor safeguarding mechanisms that address violence against, and the abuse, neglect and exploitation of, people with disability;
- (i) to raise awareness in relation to, and education about the rights of, people with disability;
- (j) to take action in relation to allegations of violence against, or the abuse, neglect and exploitation of, people with disability, whether on the basis of a report made to the Commissioner or at the Commissioner's own initiative, including by referring matters to appropriate persons or bodies and by conducting investigations;
- (k) to inquire into and report on systemic issues relating to the protection and promotion of the rights of people with disability;
- (l) to consult with the Disability Inclusion Advisory Council on matters relating to violence against, and the abuse, neglect and exploitation of, people with disability;



- (m) any other functions that are conferred or imposed on the Commissioner by or under this or any other Act;
- (n) any other prescribed functions.

The powers of the Commissioner are outlined in s.25, with the Commissioner having the “*power to do all things necessary, or convenient, to be done in connection with the performance of the Commissioner’s functions, and the exercise of the Commissioner’s powers, under this or any other Act*”.² This can include requiring information and data, investigating and making recommendations in respect of the functions of the Commissioner and the systems, policies and practices of organisations (government or non-government) that provide services that affect people with disability, and providing information, advice, recommendations and public reports on the rights and wellbeing of people with disabilities.

The functions and powers of the Commissioner provide the Commissioner with the ability to undertake investigations either via the Commissioner’s own motion or in response to a report³, which does not need to be in writing.⁴ The Commissioner can then (as a result of the investigation) make recommendations to anyone the Commissioner sees fit, including disability service providers, defined entities and other individuals and organisations that provide services that affect people with disability.⁵ When the Commissioner receives a report, the Commissioner can decide to conduct an investigation, make a referral to another person or body, or decline to take action on the report.⁶

Where the Commissioner is of the opinion that a report, or part of a report, constitutes a complaint that can be made to certain persons or bodies outlined in section 34(2), the draft Bill provides that the Commissioner must refer the report, or part of the report, to that person or body. Section 34(2)(c) specifies that the Commissioner for Children and Young People (CCYP) is one such person or body.⁷ It is important to note that unlike the other entities listed in s.34(2), the CCYP does not have the authority to investigate or review a specific decision made in respect of an individual case or specific circumstances unless requested to do so by the Minister for Education, Children and Youth.⁸

However, reports shared with this office can help to inform the CCYP’s systemic advocacy and monitoring functions in relation to the rights and wellbeing of children and young people in Tasmania generally. My view is that it is appropriate to include information sharing and reporting provisions enabling and indeed promoting the appropriate sharing of relevant information with the CCYP. Accordingly, the draft Bill will require amendment to ensure that it does not inadvertently imply that the CCYP has an own motion ability to investigate individual complaints and to facilitate information sharing.

Given the operation of the National Preventative Mechanism (NPM) in Tasmania, and its role in preventative monitoring of places of detention, it would also be important to add the NPM as an information-sharing entity under section 73.

² Disability Inclusion Bill 2023, section 25(1).

³ Disability Inclusion Bill 2023, section 30(1).

⁴ Disability Inclusion Bill 2023, section 30(2).

⁵ Disability Inclusion Bill 2023, section 30(3).

⁶ Disability Inclusion Bill 2023, section 32(1).

⁷ Disability Inclusion Bill 2023, section 34(2)(c).

⁸ CCYP Act, s14(1)(a) and s9(1).



Resourcing of the Commissioner

The functions and powers assigned to the Commissioner, as outlined in the draft Bill, are wide-ranging. There is a risk that the Commissioner will not be able to fulfill the functions of the role if resourcing to the Office of the Commissioner is insufficient. As highlighted during the hearings of the Commission of Inquiry into the Tasmanian Government's Responses to Child Sexual Abuse in Institutional Settings (Col), oversight bodies are only as effective as their ability to perform their functions. As I outlined in my [Witness Statement](#) to the Col, resourcing constraints have hampered my ability to undertake certain activities in the performance of functions under the CCYP Act. While I initiated an own motion investigation last year in response to matters identified through programmatic monitoring of the out-of-home care system, the reality is that the investigation has had a significant effect on the resources available to me for other important work.

It will be imperative that the Disability Inclusion Commissioner is supported by a team of staff equipped with the necessary skills, capabilities, and knowledge to respond in a timely manner to individual reports, research and monitor the situation of people with disability, and conduct investigations when required. I would support inclusion of a provision to the effect that the Commissioner must be provided with the resources reasonably required for exercising the functions of the role. Although I acknowledge that a provision of this type would not impose an enforceable duty on government, it would nevertheless signal a commitment to ensuring the Commissioner can carry out the functions of the office in the manner intended.

“It is important to create inclusive and [accepting] workplace environments. People living with disabilities deserve to be able to have the independence gained from being employed and feel as they too contribute to the wider community. Everyone deserves a purpose whether that be watering the plants at Bunnings or empowering others. Those living with a disability have so much to give to the wider community.”

CCYP Ambassador 2022

Independence

I have some questions around the functional independence of the Commissioner, specifically in relation to the role of the Disability Inclusion Advisory Council. The Consultation Overview Paper states that the role of the Disability Inclusion Advisory Council is to provide independent advice, framed by lived experience of disability, to both the Minister for Disability Services and the Tasmanian Disability Commissioner.⁹ This dual role could potentially undermine the independence of the Commissioner where advice is being provided by the Council to both the Commissioner and the Minister concurrently. It would be preferable for the Council to provide its independent advice directly to the Commissioner, and for the Commissioner to then formulate a position based on that advice and their own knowledge, skills and experience to then be shared with the Minister.

⁹ See section 20(1)(d), Disability Inclusion Bill 2023.



Standards

Part 5 of the draft Bill is concerned with the Disability Services Standards which are to be prescribed in regulations. In line with my comments on the Discussion Paper, I am pleased to note that all disability service providers¹⁰ may be subject to the Disability Service Standards, including any national disability standards that may apply. The Overview Paper indicates that *'consultations to inform the draft Bill noted that it was important that disability service providers, particularly those who are not registered with the NDIS, are held to a standard of practice to protect the rights of individuals and promote outcomes for people with disability'*. However, perhaps with the exception of the use of restrictive practices, the draft Bill does not clearly outline how disability service providers will be held to this standard of practice - for example, the draft Bill does not establish any oversight mechanism to ensure compliance with the Disability Services Standards generally, nor does it impose any consequences or penalties for non-compliance by non-NDIS registered providers.

I note that the Senior Practitioner will have a function to develop guidelines and standards that are in accordance with best practice and the objects of the Act. The Senior Practitioner will also have the function of ensuring, to the greatest extent possible, that disability service providers comply with any applicable guidelines and standards on the use of restrictive practices (see s.37(1)(d)(ii) and s.37(1)(e)). However, it is not clear how these standards will relate to the Disability Service Standards under s.35.

I note also the Commissioner will have a function to *'support defined entities to comply with'* the Act, however the functions of the Commissioner do not include monitoring compliance with standards, and the Commissioner has no enforcement powers to ensure disability service providers are compliant with the Disability Service Standards.

In my view, there should be oversight, by an independent entity or body, to *ensure* compliance with the Disability Services Standards generally. For example, for registered NDIS providers, the NDIS Quality and Safeguards Commission ensures compliance with the NDIS Practice Standards and Code of Conduct.

One example of a regulatory framework which will monitor and enforce standards is the child and youth safe organisations framework which was recently enacted in Tasmania. The *Child and Youth Safe Organisations Act 2023* commenced on 1 July, and from January 2024, organisations which engage with children and young people will be required to comply with the Child and Youth Safe Organisations Framework. The Framework incorporates the Child and Youth Safe Standards which are overseen and enforced by an Independent Regulator who has the power to conduct investigations, issue infringement notices and, if reasonably necessary, enter premises without consent.¹¹ The Independent Regular is appointed by the Governor. This legislative framework is just one example of how standards could be monitored and enforced by an independent entity. If this role is to be undertaken by the Disability Inclusion Commissioner, this should be clearly stated and appropriately resourced.

¹⁰ Section 7(1) states that a "disability services provider means a person or organisation that receives funding under the NDIS or this Act to provide a service specifically for the support of people with disability." Section 7(2) states that "For the purposes of subsection (1), disability services provider includes the following: (a) a provider of supports or services under the NDIS; (b) a grant recipient; (c) a person or body, or class of persons or bodies, prescribed as a disability services provider for the purposes of this Act."

¹¹ Second Reading Speech, *Child and Youth Safe Organisations Bill*, 30/03/2023, p.4.



In addition, it would also be appropriate for the Bill as introduced to explicitly acknowledge the interoperability of the Disability Service Standards (to be outlined in the regulations) with the Child and Youth Safe Standards for any organisation which may provide services to children and young people with disability.

Vulnerable children

As mentioned in my submission to the Discussion Paper, I have heard from children and young people, their families and their carers that there can sometimes be difficulties in the interface between the NDIS and the child safety and out-of-home care systems. I understand that this issue may be better addressed through the concurrent review of the *Children, Young Persons and Their Families Act 1997*, however given the over-representation of children and young people with disability living in the out-of-home care system, it is important that this is also a priority of this Bill.

In addition, I am aware of a cohort of children and young people with complex disabilities who are living outside of their family home, and while their parents retain parental responsibility, their day-to-day care is provided by a disability service provider. I remain concerned about the oversight, monitoring and long-term care planning for this group of children and young people and would like to see further protections for vulnerable children in this Bill. As already mentioned in my submission to the Discussion Paper, one option would be the introduction of a Community Visitors Scheme in the Tasmanian context (administered independently), noting that all other states and territories in Australia, other than Western Australia, already have such schemes in place.¹²

I understand that the proposed introduction of Independent Persons in Part 9 of the Bill may perform a similar role to a Community Visitor, however their role appears to be limited in scope to matters relating to restrictive practices. The appointment of an Independent Person can also be influenced by the Appointed Program Officer if “*they do not consider the person who is providing assistance or support is an independent person*”,¹³ which then triggers the Senior Practitioner to appoint an appropriate person for the person with disability.¹⁴ A preferable alternative would be for community visitors/independent persons to be appointed independently and administered by an independent statutory authority as is the case in other states and territories, for example with the Ombudsman (NSW), Public Guardian (ACT, Queensland), Public Advocate (Victoria) or Principal Community Visitor (SA). Independent advocacy should also be available for persons with disability in relation to all matters relevant to their disability care and support, rather than being limited to matters relating to restrictive practices.

“I think we need more support for children and young people who have disabilities - not necessarily just the ones you can 'see'. I'd like to help make our community more tolerant and supportive of those with disabilities.”

CCYP Ambassador 2022

¹² <https://www.dss.gov.au/disability-and-carers-publications-articles-policy-research/community-visitors-schemes-review>

¹³ Disability Inclusion Bill 2023, section 59(2)(b).

¹⁴ Disability Inclusion Bill 2023, section 59(3).



Right to Participate

I note the importance of children and young people with disability being supported to express their views freely in all matters affecting them, and for their views to be given due weight in accordance with their age and maturity in accordance with article 12 of the UNCRC. As noted in General Comment No. 6 (2006) on the rights of children with disabilities,¹⁵ more often than not, adults with and without disabilities make policies and decisions related to children with disabilities, without children's voices being heard. I am pleased to see that the Inclusion Principles incorporate principles relevant to the participation of children including listening to the wishes of the child, the provision of disability and age-appropriate support in decision-making, regard and appropriate weight given to the views of the child and ensuring that the best interests of the child are paramount.¹⁶

Noting that the right to participate is a gateway right (ie it is fundamental to the enjoyment of all other rights), it would be appropriate for the Commissioner to have an explicit role in promoting and empowering the participation of people with disability, including children and young people, in the making of decisions or the expressing of opinions on matters that may affect their lives. In my view, this should be included as a function of the Commissioner.

I note also that Tasmania does not have legislation which governs consent to medical treatment for children generally. I have raised this as an issue on several previous occasions, as have other Commissioners, including in my recent [submission](#) on the Mental Health Act Amendments Bill 2022. There remains a pressing need for broader consideration of the law relating to consent to medical treatment for children in Tasmania. This is a matter upon which I would welcome further discussion, noting its relevance for children with disability (eg where medication may be prescribed primarily but not solely to address a behaviour of concern).

“To include people with disabilities more. In class we need to stand up for them and against those who bully them. There should be inclusive parks for them to play in.”

CCYP Ambassador 2022

Restrictive Practice

I am pleased to see that the Bill incorporates an updated definition of restrictive practice which aligns with the *NDIS Act 2013* and the *National Disability Insurance Scheme (Restrictive Practices and Behaviour Support) Rules 2018*, which includes chemical, mechanical, physical, environmental restraints and seclusion, and that the regulation of restrictive practice applies to any disability service provider, as defined in the Bill.¹⁷

¹⁵ Committee on the Rights of the Child, *General Comment No. 9 The rights of children with disabilities*, 2006 [Refworld | General comment No. 9 \(2006\): The rights of children with disabilities](#)

¹⁶ Disability Inclusion Bill 2023, section 8(3).

¹⁷ Section 7(1) defines a disability services provider as “a person or organisation that receives funding under the NDIS or this Act to provide a service specifically for the support of people with disability”. This includes the following: (a) a provider of supports or services under the NDIS; (b) a grant recipient; (c) a person or body, or class of persons or bodies, prescribed as a disability services provider for the purposes of this Act.



However, as recognised by the Royal Commission in its Research Report *Restrictive practices; A pathway to elimination*,¹⁸ Australia should be working towards the full elimination of restrictive practices. If this approach is adopted by the Royal Commission in its final report and recommendations, then this will need to be considered in the finalisation of the Bill.

The Bill does not currently make it explicit that other government agencies and services, such as schools and hospitals, are required to comply with the restrictive practice regulatory framework. For example, the Department for Education, Children and Young People (DECYP) has its own internal policy and procedure for regulating restrictive practices for all employees and school sites (noting that both the policy and procedure are yet to be updated since the creation of DECYP).¹⁹ In New South Wales, a Bill specific to the regulation of restrictive practices has been drafted – see the Persons with Disability (Regulation of Restrictive Practices) Bill 2021. One of the aims of the Bill is to regulate the use of restrictive practices by NDIS providers, whilst also requiring NDIS providers, hospitals, schools and other government services, to follow a common set of human rights-based principles. Section 7 of the draft Bill places obligations on government sector agencies:

- 7 Obligations on government sector agencies using restrictive practices
 - (1) This section applies to a government sector agency that uses or proposes to use a restrictive practice on a person with disability (a relevant government sector agency).
 - (2) A relevant government sector agency must take into account the objects and guiding principles of this Act when —
 - (a) developing and implementing policies about the use of restrictive practices on a person with disability, and
 - (b) providing, or arranging for the provision of, services that include the use of restrictive practices to a person with disability.
 - (3) A relevant government sector agency must co-operate with the Commissioner and provide information or assistance that the Commissioner reasonably requires to exercise the Commissioner’s functions under this Act.
 - (4) A relevant government sector agency must, within the period of 4 months after 30 June in each year—
 - (a) prepare a report for the year ended on that 30 June, and
 - (b) provide the report to the Commissioner.
 - (5) The report must—
 - (a) address how the objects and guiding principles of this Act were taken into account during the year by the relevant government sector agency, as required under subsection (2), and
 - (b) extend to services that include the use of restrictive practices on a person with disability that are provided by a person or body engaged by the relevant government sector agency.

¹⁸ Royal Commission in Violence, Abuse, Neglect, and Exploitation of People with Disability, *Research Report; Restrictive Practices: A pathway to elimination*, July 2023, [Research Report – Restrictive practices: A pathway to elimination \(royalcommission.gov.au\)](https://www.royalcommission.gov.au/research-reports/restrictive-practices-a-pathway-to-elimination)

¹⁹ Department of Education, *Restrictive Practices Policy*, <https://publicdocumentcentre.education.tas.gov.au/library/Document%20Centre/Restrictive-Practices-Policy.pdf>; Department of Education, *Restrictive Practices Procedure*, <https://publicdocumentcentre.education.tas.gov.au/library/Document%20Centre/Restrictive-Practices-Procedure.pdf>



- (6) The regulations may make provision for or with respect to—
- (a) the manner and form in which a report is required to be prepared, including the information required to be included and the matters required to be addressed in a report, and
 - (b) exempting a relevant government sector agency, or a class of relevant government sector agency, from a requirement to include specified information or to address specified matters in a report.

This section provides for a more robust approach in regulating how restrictive practices are used in government service settings, including compliance with a common set of restrictive practices principles, and reporting annually to the Commissioner on compliance with the principles. This creates a benchmark for agencies when developing their own policies and procedures on restrictive practice and enables some independent oversight of these practices. I would recommend that a similar provision be included in this Bill, noting the desirability of achieving the national goal of reducing and eliminating restrictive practices.

“...we [my brother and I] both have ASD and it’s not fair that kids at my school make me feel more welcome than kids at his school do. Tasmania should really change that, we all have the right to feel welcome, even if we have a disability”

CCYP Ambassador 2022

Conclusion

I thank you for the opportunity to comment on this important draft Bill. I am available to discuss my comments if that would be of assistance.

Yours sincerely

Leanne McLean

Commissioner for Children and Young People

cc Hon. Roger Jaensch, Minister for Education, Children and Youth
Hon. Jo Palmer, Minister for Disability Services
Craig Limkin, Associate Secretary, Department of Premier and Cabinet
Tim Bullard, Secretary, Department for Education, Children and Young People