

# Submission to the Review of the Disability Services Act 2011

## December 2021

### **About National Disability Services**

National Disability Services (NDS) is the peak body in Tasmanian and Australia for non-government disability service providers. NDS has more than 1,080 members nationally. NDS provides information and networking opportunities to its members and policy advice to State, Territory and Commonwealth governments. We have a diverse and vibrant membership, comprised of small, medium and larger service providers, supporting thousands of people with disability. Our members collectively provide a full range of disability services, from supported independent living and specialist disability accommodation, respite and therapy, to community access and employment. NDS is committed to improving the disability service system to ensure it better supports people with disability, their families and carers, as well as supports building a more inclusive community.

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## Overview

National Disability Services (NDS) is pleased to make a submission to inform the review of the *Disability Services Act 2011 (DSA)*. NDS recognises the *Disability Services Act 2011 (DSA)* as a critical source of rights and protections for Tasmanians with disability. We recognise that the disability sector has significantly changed since the introduction of the National Disability Insurance Scheme (NDIS). NDS welcomes the consultative approach that is being taken to review the Act to bring it up to date for our contemporary environment.

## Introduction

NDS 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. Traditionally the *DSA* has focused on service provision, but this needs to shift to a focus on human rights, inclusion, and the mainstream interface with the NDIS. This could involve adopting an understanding of disability and equality as reflected within the United Nations Convention on the Rights of Persons with Disabilities. The outcome areas listed in Australia's Disability Strategy 2021-2031<sup>1</sup> can also be used as guidance to ensure the *DSA* reflects areas people with disability have said need to improve. These Outcome Areas are:

- Employment and Financial Security
- Inclusive Homes and Communities
- Safety, Rights and Justice
- Personal and Community Support
- Education and Learning
- Health and Wellbeing
- Community Attitudes

NDS encourage government to explore setting minimum standards of inclusion, access to services, and employment opportunities both within government and the wider community. 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.

The NDIS has fundamentally changed disability practice in Australia. However, it has gaps that the *DSA* can, and should, acknowledge and address. The NDIS does not provide housing to the vast majority of people with disability. Further areas with gaps include interface with mainstream services, including health, education, and justice. Crucially, the NDIS does not fund advocacy, the need for state government to support

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<sup>1</sup> <https://www.disabilitygateway.gov.au/sites/default/files/documents/2021-11/1786-australias-disability.pdf>

people with disability to self-advocate and communicate is consequently very high. The *DSA* has the opportunity to explore and introduce specific measures that ensure Tasmanians with disability are not disadvantaged.

### **Legislative Impact Assessments**

NDS supports the introduction of a formal framework that facilitates the use of a 'disability lens' when considering the impact of legislation or significant government activities, including community developments, on people with disability in the Tasmanian community.

The purpose of a considering the impact on people with disability is to support universal outcomes for all members of the Tasmanian community, the process should include, and be co-designed with, people with disability. Consideration for the impact legislation will have is already common, with regulatory impact statements assembled with direct consideration for the consequences for business and community broadly. An impact assessment, for the consequence of legislation or government activity, for people with disability would promote consideration and respect for the rights of Tasmanians with disability.

This process would protect the rights and welfare of Tasmanians with disability. Existing commonwealth legislation<sup>2</sup> requires a Statement of Compatibility that must contain an assessment of a Bill or legislative instrument's compatibility with the rights and freedoms recognised in the seven core international human rights treaties which Australia has ratified. NDS propose that a document discussing the compatibility of government actions with upholding the rights of people with disability be required for all legislation, funding, procurement, or significant government activities. This impact could be measured against the United Nations Convention on the rights of Persons with Disabilities (CRPD).

Additionally, NDS request that the government build a consultation process to ensure that any action undertaken, or policy developed, that may affect people with disability is designed in consultation with people with disability and their support networks.

**Recommendation:** 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.

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<sup>2</sup> <https://www.ag.gov.au/rights-and-protections/human-rights-and-anti-discrimination/human-rights-scrutiny/statements-compatibility>

**Recommendation:** The *DSA* includes a consultation process that ensures the perspective of people with disability is considered when designing policy across government agencies.

### Disability Action Plans

NDS supports a legislative requirement that public sector organisations must develop disability action plans. NDS encourages the Tasmanian Government to introduce a legislative requirement that disability action plans are made available to the public. It is also recommended that disability action plans are developed and updated regularly, implemented effectively, and progress is reported on at regular intervals.

NDS encourages the Tasmanian Government to consider implementing compulsory consultation with people with disability, including internal and external stakeholders with disability, in the development of disability action plans. NDS supports further work to align disability action plans with broader diversity and inclusion plans, including *Accessible Island: Tasmania's Disability Framework for Action*.

**Recommendation:** 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.

### Disability Advisory Committee

NDS believes that the Premier's Disability Advisory Council (PDAC) and Minister's Disability Advisory Committee (MDAC) play an essential role in ensuring that the goals and strategies of the Tasmanian Government, particularly in the area of disability policy, are informed by people with lived experience of disability. NDS strongly encourages a requirement within the *DSA* that a Disability Advisory Committee is held at regular intervals, encapsulating the functions of both the PDAC and MDAC. Membership would reflect current membership guidelines for PDAC<sup>3</sup>, ensuring strong representation from people with lived experience of disability. The introduction of this requirement will support effective policy and decision making, as well as promote the inclusion of people with disability in all levels of governance. This will strengthen outcomes and support the respect and advocacy of rights for people with disability.

**Recommendation:** Introduce a requirement within the *DSA* that a Disability Advisory Committee is established and held regularly.

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<sup>3</sup> [https://www.communities.tas.gov.au/\\_\\_data/assets/pdf\\_file/0021/16365/PDAC\\_Terms\\_of\\_Reference\\_2021.pdf](https://www.communities.tas.gov.au/__data/assets/pdf_file/0021/16365/PDAC_Terms_of_Reference_2021.pdf)

**Principles related to people with disability**

NDS would support a strengthening of the human rights focus within the principles in *Disability Services Act (2011)*. We note that the *South Australian Disability Inclusion Act 2018* explicitly identifies the United Nations Convention on the Rights of Persons with Disabilities in the purposes of the Act. This could be replicated within the Tasmanian *DSA* to strengthen the protection of human rights for Tasmanians with disability. These principles could also include recognition of the unique needs of people with disability who experience intersecting marginalisation as a result of their racial, ethnic, religious, sexual and/or gender identities.

NDS would welcome the introduction of a Charter of Rights for people with disability, that clearly outlines relevant rights for people with disability in an accessible way that encourages their consideration in the everyday and large scale decision making process. The promotion of these rights is integral to effectively supporting an inclusive and equitable community for all Tasmanians.

Upon introduction of a Charter of Rights, NDS would recommend a review of all legislation to ensure consistency with the Charter of Rights.

**Recommendation:** Incorporate a Charter of Rights for People with Disability into the *DSA*.

**Principles Related to Mainstream Services which interact with Disability Services:**

NDS understands that the *DSA* in its current form does not include principles for mainstream services that integrate with disability services. NDS supports the development of a broad set of inclusive principles which apply across all Tasmanian Government services, and which protect and promote the rights of people with disability and other marginalised groups in our society. This set of principles should recognise intersectionality, and the importance of Aboriginal cultural safety and self-determination, amongst other things. These principles are perhaps best located in a central piece of legislation, rather than contained within the *DSA* and potentially repeated across other legislation. An appropriate piece of legislation to contain this may be the Anti-Discrimination Act 1998.

In the absence of a more central piece of legislation, however, we would support a strengthening of the principles related to mainstream services and the inclusion of people with disabilities within the *DSA*. We note that many people with disability experience significant barriers when accessing mainstream services, perhaps most notably within health, justice, education, transport, and housing settings. NDS believes that there is room for significant improvement in the interface between disability services and mainstream services, and within the roll out of mainstream services to people with disabilities more broadly. In the absence of a separate piece of legislation that ensures inclusivity and rights protections across a whole range of identities, NDS encourages amendments to the *DSA* to protect the rights of people with disability in

their access to, and inclusion within, mainstream education, health, housing, transport, and justice services, among other mainstream services.

**Recommendation:** Develop and introduce a clear set of inclusive principles relating to the interface between disability and mainstream services into the *DSA*.

### **Restrictive Practices**

Historically, understandings of regulation and use of restrictive practices has varied across the country. NDS had hoped that the introduction of the National Disability Insurance Scheme Quality and Safeguards Commission – and the framework in which it operates – would help drive greater consistency in how and when restrictive practices are used across Australia, ultimately driving a reduction in their use. However, despite the creation of the national regulator, the authorisation of restrictive practices remains in the jurisdiction of the states and territories. Differences in regulatory frameworks concerning restrictive practices exist across jurisdictions.

National consistency in the understanding and application of restrictive practices is an appropriate goal. This goal is outlined in *the National Framework for Reducing and Eliminating the Use of Restrictive Practices in the Disability Services Sector*<sup>4</sup> and is a key tenet of the move to a national scheme under the NDIS. Historical difference across jurisdictions has resulted in variable knowledge and expertise on restrictive practices across the country, and places particular pressure on providers who offer disability supports across multiple jurisdictions. NDS encourages the Tasmanian Government to utilise this opportunity in its redevelopment of the *DSA* to contribute to greater consistency with national definitions and regulations around restrictive practices.

Some definitions, such as what comprises restrictive interventions, in the current act differ to the definitions by the NDIS Quality and Safeguards Commission and TasCAT. It is recommended that definitions in the Tasmanian act and interpretations be aligned with national legislation to avoid confusion.

**Recommendation:** Ensure the *DSA* has greater consistency with national definitions and regulations concerning restrictive practices.

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<sup>4</sup> [https://www.dss.gov.au/sites/default/files/documents/04\\_2014/national\\_framework\\_restrictive\\_practices\\_0.pdf](https://www.dss.gov.au/sites/default/files/documents/04_2014/national_framework_restrictive_practices_0.pdf)

### **Reduction in red tape**

There is scope for changes in processes to reduce red tape. Currently the Senior Practitioner does not authorise restrictive practices, they are approved by the Department Secretary or the Tasmanian Civil and Administrative Tribunal (TasCAT). Neither the Secretary nor TasCAT are experts in restrictive interventions and rely on the expert advice of the Senior Practitioner. A more streamlined process is required<sup>5</sup>.

**Recommendation:** Explore options to improve the process for assessing the proposed use restrictive practice and incorporate solution into the DSA.

### **Community Visitor Scheme**

We support the establishment of a Community Visitor Scheme (CVS) in Tasmania. This could operate logically within the Office of the Disability Commissioner or the Office of the Senior Practitioner.

Community Visitor Schemes currently operate in all Australian states except Tasmania and Western Australia. Community Visitor Schemes are an effective part of the safeguarding regime for people with disability, including the protections they provide from abuse, neglect, and exploitation.

Disability service providers recognise the value of a different perspective on the ground and value the observations that Community Visitors can provide as an extra level of scrutiny. These observations will help service providers continuously improve and ultimately create better outcomes for the most vulnerable people with disability.

While the NDIS Quality and Safeguards Commission is the new national regulatory body for registered NDIS providers, they do not provide the same on the ground and practical support to improve the safety and quality of services that a community Visitor Scheme can deliver.

A Commonwealth review of the schemes in 2018<sup>6</sup> found that that Community Visitor Schemes for disability, having a broader scope than the NDIS, have a contribution to make to the NDIS Quality and Safeguarding Framework. The Review also recommended that Community Visitor Schemes, where they exist, continue to be provided by states and territories. The Review noted support for community visiting as a key mechanism to achieve independent oversight of institutional settings both within the disability service system, and in mainstream settings such as justice and health. The Review also noted that adequate funding is required to deliver this.

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<sup>5</sup> Process options that have been suggested to NDS is that the Senior Practitioner or Disability Commissioner be given the power to assess and provide authorisations (or not) as an administrative process - this would be more efficient and less stressful for participants and families

<sup>6</sup> [https://www.dss.gov.au/sites/default/files/documents/02\\_2020/pdf-version-community-visitors-review\\_0.pdf](https://www.dss.gov.au/sites/default/files/documents/02_2020/pdf-version-community-visitors-review_0.pdf)

The value of the Community Visitor Scheme is also highlighted in the 2020-21 Annual Report of the Victorian Community Visitors Scheme<sup>7</sup>. In this year, despite several months of lock down due to COVID-19, there were 337 active Community Visitors, who visited 1467 facilities and identified more than 500 issues. There were 51 referrals to the Disability Services Commissioner for abuse allegations.

Some states operate with volunteer Community Visitors with others employing Community Visitors. It is essential all Community Visitors are selectively recruited, undertake safety checks, training in how to conduct themselves in the role, and follow policies and procedures for the success of the scheme. They visit, unannounced, group homes, institutions and supported residential boarding houses and write a brief report at the conclusion of the visit that details who they have spoken to, what documents they have looked at, any issues of concern, as well as good practices they have observed.

NDS propose that the Community Visitor Scheme could be housed in the Office of the Disability Commissioner (to be established). CVs are empowered under state disability acts or separate legislation to perform their role. NDS proposes similar powers be enshrined in the Tasmanian legislation as a result of the review of the DSA.

**Recommendation:** Establish and empower a Community Visitor Scheme within the DSA.

### **Principles related to disability services and regulated disability services**

NDS strongly believe that robust guiding principles for the disability service sector are essential, we are concerned that differing principles across different states and territories add to the complexity of the regulatory landscape. There should not be unregulated providers. All providers, whether registered with the NDIS or not, should be held to the same standard. If this is not addressed at the Commonwealth level it needs to be addressed by the State. It should be a requirement that anyone receiving funding for disability services in Tasmania needs to meet the standards. Compliance can be demonstrated by meeting national standards to avoid duplication. For example, NDIS registered providers that are compliant with the NDIS Quality and Safeguards Commission would be able to demonstrate compliance. This requires the capacity for oversight of those that are unregistered or currently not regulated at all.

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<sup>7</sup> <https://www.publicadvocate.vic.gov.au/opa-s-work/our-organisation/annual-reports/community-visitor-annual-reports/363-community-visitor-annual-report-2020-2021>



**Recommendation:** Establish standards in the DSA for all disability service provision, applicable to all unregulated providers, including unregistered providers and government departments.

### Tasmanian Disability Commissioner

NDS welcomes the introduction of a Disability Commissioner in Tasmania. The Disability Commissioner should empower people with disability and give visibility to important issues. The Commissioner can be a single point within the government that can provide systemic advocacy across government to improve life for people with disability, including addressing gaps in services and the mainstream interface with the NDIS. There are several key functions missing in the current environment that NDS believe the Disability Commissioner could perform. To achieve better outcomes for people with disability in Tasmania, the Disability Commissioner role could include:

- Raise community awareness to reduce and prevent abuse, neglect and exploitation towards people with disability.
- Receive and respond to reports or allegations of abuse, neglect and exploitation of people with disability that do not involve an NDIS provider (these providers are already regulated by the NDIS Quality and Safeguards Commission). This would include in intermediate environments such as government service providers, through 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.
- Provide support and information to people with disability, support workers or informal carers, government agencies, and disability service providers as necessary.
- Report and advise the government on related systemic issues.
- Work with the Tasmanian Government to create key measurables to ensure adherence to Australia's Disability Strategy 2021-2031, 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.
- 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 would welcome the opportunity to work with the state government and consult further with the disability sector on the design of the Disability Commissioner role.

**Recommendation:** 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

### **Supported decision making and consultation**

The DSA has an obligation to promote and support effective frameworks concerning supported decision making. The effective promotion of the CRPD requires that the rights of people with disability be respected and upheld. The capacity for neglect and abuse in the area of supported and substitutive decision making is high. The State government has a role to play in ensuring that Tasmanians with disability are not disadvantaged by systems that do not support them in exercising their right to choice and control.

With the release of the independent review concerning the Tasmanian Public Trustee<sup>8</sup>, it is crucial that effective and clear frameworks and standards are established to ensure people with disability are not disadvantaged. 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 encourages the inclusion of increased resources to support people with disability, as well as their support networks to be educated and empowered to advocate for their own rights and choices. Resources and information on supported decision making should also be made easily available to all providers of disability support.

This framework should clearly state that independent decision making is the preferred outcome. Where a person requires support, all efforts should be made to ensure this is provided in a clear and unbiased manner, and if supported decision making is effectively explored but not an option, then finally substitute decision making becomes a viable outcome.

**Recommendation:** Introduce and enforce the use of a clear and accessible supported decision-making framework.

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<sup>8</sup> [https://www.justice.tas.gov.au/\\_\\_data/assets/pdf\\_file/0008/641663/Report-on-the-Review-of-the-Public-Trustee.pdf](https://www.justice.tas.gov.au/__data/assets/pdf_file/0008/641663/Report-on-the-Review-of-the-Public-Trustee.pdf)