



Tasmanian Council of Social Service Inc.

Guardianship and Administration Amendment Bill

November 2022



**INTEGRITY
COMPASSION
INFLUENCE**

About TasCOSS

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

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

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Introduction

TasCOSS welcomes the opportunity to provide feedback to the Department of Justice ('the Department') in relation to the proposed changes to the current guardianship and administration framework in Tasmania, outlined in the draft Guardianship and Administration Amendment Bill 2022 ('the Bill').

The Bill proposes significant changes to the Guardianship and Administration Act 1995 ('the Act') and the Department have indicated these reforms are 'part of a staged approach to updating and modernising Tasmania's guardianship and administration system in response to a report of the Tasmania Law Reform Institute'.¹ The Department states that the Bill will, '[e]stablish rights-based principles as a framework for the way in which decisions under the Guardianship Act are to be made',² as well as providing a 'legislative basis for a shift away from a 'best interests' approach toward decision making to a 'will and preference' model, which requires decision makers to take account of the wishes and preferences of the represented person'.³

The proposed changes have the potential to create significant and meaningful change for the Tasmanian community, as they promote a shift away from a 'medical/legal' view of a person's capacity to make decisions, towards a rights-based framework where all Tasmanians are presumed to be able to make decisions about matters included their lifestyle, finances and healthcare. This is particularly important in the Tasmanian context - any review of existing legislation and service provision must first take into consideration the reality of living with a disability in Tasmania. Our state has the highest rate of disability nationwide: data from 2018 indicates that 24,500 Tasmanians (or 5.8% of the state's population) had a profound or severe core activity limitation, with a further 31,100 people (or 13.2% of the population) experiencing moderate or mild limitations.⁴ People with disability continue to experience structural disadvantages which impact their ability to participate meaningfully in everyday life. For example, Tasmanians with a disability struggle to find work – only 40% of Tasmanians with a disability were employed in 2018, which is lower than the national average of 47.8%.⁵ Of the group of employed Tasmanians with a disability, 11.9% were underemployed in 2018, compared to 9.9% of Tasmanians without a disability or the 9.0% of the general Australian population.⁶

As we noted in a recent submission,⁷ TasCOSS believes these statistics show the existing disadvantage faced by Tasmanians with a disability, as well as the need for legislation which safeguards rights and promotes inclusion.

¹ Tasmanian Government, Department of Justice, 'Guardianship and Administration Amendment Bill 2022 - Have your say' (2022), accessed at <https://www.justice.tas.gov.au/community-consultation/consultations/guardianship-and-administration-amendment-bill-2022>.

² Ibid.

³ Ibid.

⁴ Productivity Commission, *Report on Government Services* (2020), Part F, Section 15, Table 15A.9.

⁵ Productivity Commission, *Report on Government Services* (2020), Part F, Section 15, Table 15A.69

⁶ Productivity Commission, *Report on Government Services* (2020), Part F, Section 15, Table 15A.67; Australian Bureau of Statistics, *Labour Force Australia*, (Catalogue 6202.0, August 2020), Table 23: Underutilised persons by state, territory and sex (TasCOSS calculation).

⁷ TasCOSS, Submission on the Disability Services Act Review (December 2021).

TasCOSS strongly supports a reform of the Act and existing framework around guardianship and administration in Tasmania, noting the extensive and detailed recommendations made not only by the Tasmanian Law Reform Institute ('the TLRI') in their 2018 report,⁸ but also recommendations from other Australian jurisdictions,⁹ as well as recent law reform in other Australian states such as Victoria.¹⁰ Our submission will highlight some of the positive elements of the Bill, as well as reflecting on priorities for future reform.

This submission has been endorsed by Disability Voices Tasmania.

Background

TasCOSS understands the Bill is an attempt to establish a rights-based framework in relation to decision-making, shifting away from a paternalistic model of decisions being made in the 'best interests' of another person towards a model where people are supported where possible to make decisions based on their own preferences. Such developments are consistent with Australia's obligations under the United Nations Convention on the Rights of Persons with Disabilities ('the Convention'),¹¹ including Article 12:

1. *States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.*
2. *States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.*
3. *States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.*
4. *States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.*
5. *Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.*

⁸ Tasmanian Law Reform Institute (TLRI), 'Review of the Guardianship and Administration Act 1995 (Tas) – Final Report No 26' (December 2018).

⁹ For example, Australian Government, Australian Law Reform Commission, 'Equality, Capacity and Disability in Commonwealth Laws – Final Report' (August 2014); Victorian Law Reform Commission, 'Guardianship – Final Report' (April 2012).

¹⁰ The existing legislative framework in Victoria was recently amended with the introduction of the *Guardianship and Administration Act 2019* (Vic).

¹¹ Convention on the Rights of Persons with Disabilities, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008).

As noted in a recent report, '[o]ver the last decade, there has been a shift in Australia's network of guardianship and mental health laws which have been influenced by article 12. There has been a gradual move away from substituted decision-making, in favour of various forms of assisted or supportive decision-making regimes.'¹² As noted by the TLRI in their report, several Australian jurisdictions have completed reviews of existing guardianship and administration laws and made recommendations for changes to be made;¹³ for example, the Australian Law Reform Commission ('the ALRC') conducted a review through 2013-2014 to 'ensure that Commonwealth laws and legal frameworks are responsive to the needs of people with disability and to advance, promote and respect their rights',¹⁴ and made a number of recommendations, including several relating to decision-making.

Law reform bodies in a number of Australian jurisdictions have also completed reviews, with some recommending the introduction of formal supported decision-making frameworks: according to the TLRI, '[t]he VLRC (the Victorian Law Reform Commission), ACTLRAC (the ACT Law Reform Commission) and the NSWLRC (the NSW Law Reform Commission) have all recommended reform to guardianship legislation to incorporate a formal supported decision-making scheme in light of the Convention. Legislated supported decision-making regimes provide formal acknowledgment of and legitimise decision-making made with support. They provide a further, formal alternative to the appointment of a representative and the making of a representative decision for those requiring support with decision-making.'¹⁵ Other States have recommended the introduction reforms to promote and support informal arrangements for supported decision-making rather than a legislated supported decision-making scheme – for example, the TLRI notes that, '[r]ecent revisions to the Queensland Act have not included a legislated supported decision-making model. The Northern Territory also has not introduced a legislated supported decision-making scheme. Both jurisdictions have, however, made several reforms to their guardianship Acts to better reflect the rights of people with disability'.¹⁶

The TLRI delivered its report on guardianship and administration laws in 2018, which included several recommendations aimed at aligning Tasmanian laws with both the Convention and the recommendations of previous law reform reviews, including recommendations from the ALRC. Since the TLRI delivered its report in 2018, the Tasmanian Government has engaged in legislative reform to respond to some of the recommendations – for example, the Guardianship and Administration Amendment (Advanced Care Directives) Bill 2021, which introduces a formal advance care directive scheme, a recommendation from the TLRI report.¹⁷

¹² Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, 'Research Report - The United Nations Convention on the Rights of Persons with Disabilities: An Assessment of Australia's Level of Compliance' (October 2020), 54.

¹³ Tasmanian Law Reform Institute (TLRI), 'Review of the Guardianship and Administration Act 1995 (Tas) – Final Report No 26' (December 2018), 7-8.

¹⁴ Australian Government, Australian Law Reform Commission, 'Equality, Capacity and Disability in Commonwealth Laws – Summary Report' (August 2014), 4.

¹⁵ Tasmanian Law Reform Institute (TLRI), 'Review of the Guardianship and Administration Act 1995 (Tas) – Final Report No 26' (December 2018), 8.

¹⁶ Ibid.

¹⁷ Ibid, 68-69:

Recommendation 5.1

(1) *That Tasmania adopt a legislative framework for advance care directives.*

Key Issues

As outlined above, TasCOSS is broadly supportive of several elements of the Bill, which we understand to be largely consistent with recommendations from law reform bodies (including the TLRI and ALRC) and intended to promote the rights, dignity and wellbeing of Tasmanians with disability, as well as their families, loved ones and support networks. In particular, we note the following:

- The Bill includes principles which are mostly consistent with the National Decision-Making Principles developed by the ALRC and outlined in their 2014 report.¹⁸ For example, the principles to be observed outlined in the Bill include the following:

(c) the views, wishes and preferences of a person with impaired decision-making ability in respect of decisions are respected and used to inform those decisions; and

(d) a person who requires support in decision-making is provided with access to the support necessary to enable the person, as far as is practicable in the circumstances –

(i) to make and participate in decisions affecting the person; and

(ii) to express the person's will and preferences; and

(iii) to develop the person's decision-making ability;

- The Act currently includes 'disability' as a criteria which must be considered when making a determination about a person's decision-making ability. This feature of the Act was highlighted as an issue by TLRI, who noted that, '[o]nly having the Act apply to people with disability treats people with disability differently... effectively put[ting] people with disability at a higher standard of proving their decision-making abilities than those without a cognitive impairment'. TasCOSS therefore supports the removal of 'disability' as a criteria for decision-making ability in the Bill, noting the recommendation from the TLRI:

'A new definition of 'decision-making ability' should focus on a person's ability to make decisions. Whether a person in fact exercises that ability in relation to a particular decision should be immaterial – the focus of the assessment is on the person's ability to do so. This serves an important protective function as it would arguably be discriminatory to not acknowledge the support needs of those who are determined to lack the ability to make their own decisions. This reform gives people with disability the equal right to make a decision that might not be considered by others to be 'rational'. People without disability have the right to make 'bad' decisions that could be assessed as being irrational or

(2) *That the legislative framework for advance care directives be included in the Act.*

¹⁸ Australian Government, Australian Law Reform Commission (ALRC), 'Equality, Capacity and Disability in Commonwealth Laws – Final Report' (August 2014), 24:

Principle 1: The equal right to make decisions

All adults have an equal right to make decisions that affect their lives and to have those decisions respected.

Principle 2: Support

Persons who require support in decision-making must be provided with access to 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

Laws and legal frameworks must contain appropriate and effective safeguards in relation to interventions for persons who may require decision-making support, including to prevent abuse and undue influence.

unreasonable or at odds with their ‘best interests’. People with disability should have the same right to do so if they wish.’

- TasCOSS also supports the removal of the ‘best interests’ test from the Act. As noted in the TLRI report, ‘[t]aking into account a person’s ‘best interests’ can involve consideration of their human rights. But it can also result in a person’s will and preferences being overridden where their will and preferences are assessed to not be in their best interests. The Act’s requirement that representatives uphold a person’s best interests at all times does not give sufficient authority to representatives who may want to act consistently with a person’s wishes, despite those wishes not necessarily being consistent with their ‘best interests.’ The ‘best interests’ approach requires decisions that are deemed best for a person. Under a will, preferences and rights approach, the focus is upon a person’s wishes, whilst considering harm.’¹⁹

Whilst acknowledging the positive features of the Bill, TasCOSS is concerned about some elements of both the proposed framework, as well as how the framework will be applied in practice. The following is an overview of our key concerns in relation to the Bill and how it may be applied.

Assumption in relation to decision-making ability – the equal right to make decisions

The first principle of the ALRC’s National Decision-Making Principles is ‘that all adults have an equal right to make decisions that affect their lives and to have those decisions respected’.²⁰ This effectively creates a presumption that all adults, regardless of whether they have a disability or are engaged with support services, will be able to make decisions for themselves.

The Bill does contain a provision which reflects this principle – Clause 8 inserts a Part entitled ‘Decision-Making Ability’ into the Act, which includes the following subsection:

For the purposes of this Act, an adult is taken to have decision-making ability in respect of a decision unless a person or body responsible for assessing that decision-making ability under this Act is satisfied that the adult has impaired decision-making ability in respect of that decision.

However, given the importance of this concept to the proposed changes under the Act, TasCOSS strongly recommends the Bill also include as its key principle the equal right to make decisions, to more accurately reflect the importance of this principle as the cornerstone of determining an individual’s rights and abilities in decision-making. We also recommend the explicit inclusion of this principle within any decision-making ‘framework’ outlined under the Act – this would apply in a wide variety of situations, including instances where a person or professional (for example, a doctor or an aged care facility worker) is making a decision about a person’s decision-making ability, or a decision by the Tasmanian Civil and Administrative Tribunal (‘TasCAT’) as to whether a guardianship or administration order is needed. We make this recommendation noting the decision-making process recommended by the TLRI in their Report:

¹⁹ Tasmanian Law Reform Institute (TLRI), ‘Review of the Guardianship and Administration Act 1995 (Tas) – Final Report No 26’ (December 2018), 18.

²⁰ Australian Government, Australian Law Reform Commission (ALRC), ‘Equality, Capacity and Disability in Commonwealth Laws – Final Report’ (August 2014), 24.

That the Decision-Making Process require the Board and representatives (the decision-maker) to adopt the following process when making any decision on behalf of a person who does not have decision-making ability to make their own decision about the matter:

1. *First, the decision-maker must consider whether there is a need for a decision. There is no need for them to make a decision where the person has made a binding direction in advance that applies to the circumstances, including in a valid advance care directive.*
2. *Second, the decision-maker must consider whether the person is likely to become able to make their own decision, and if so, when. If the decision-maker considers that a decision can be delayed until the person gains the ability to make the decision, without that delay causing harm, then the decision should be delayed.*
3. *If the decision-maker considers that a decision needs to be made, then the person's views, wishes and preferences must be given all practical and appropriate effect. A person may communicate their views, wishes and preferences by any means.*
4. *Where the person's views, wishes, and preferences cannot be determined, the decision-maker must give all practical and appropriate effect to what the decision-maker reasonably believes the person's likely views, wishes and preferences are, based on all the information available, including by consulting with family, carers and other significant people in the person's life that the decision-maker reasonably believes the person would want to be consulted.*
5. *A decision-maker may not give all practical and appropriate effect to the person's views, wishes and preferences only where:*
 - (a) it is necessary to prevent unacceptable harm to the person or another person; or*
 - (b) it would be unlawful.*

In any of these cases, a representative must adopt Step 6 whilst continuing to give as much effect as possible to the person's views, wishes and preference.
6. *If it is not possible to determine or apply the person's views, wishes and preferences, a decision-maker must act to promote and uphold the person's personal and social wellbeing and act in a way least restrictive of their human rights.*

Recommendations:

- The Act should include the equal right to make decisions as the key principle in relation to decision-making ability
- The assumption that all adults are able to make decisions for themselves and consideration as to whether a decision needs to be made about a person's ability to make decisions should be included as part of any decision-making framework under the Act

Decision-making framework in practice

Whilst TasCOSS is strongly in support of proposed changes to the existing tests relating to capacity under the Act, we are concerned that legislative changes alone will be effective in promoting a rights-based framework relating to decision-making ability. These concerns were highlighted in the TLRI report, which

noted that '[t]he most common suggestion to make the Act more sustainable and responsive was the need for education'.²¹

The TLRI Report outlined several ways in which education supports a rights-based decision-making framework, noting that education, 'is a proactive strategy to seek to reduce the incidence of breaches of the Act and other conduct that could amount to abuse, neglect, or exploitation... [and] also has a positive effect upon the represented person and those close to them, including their representative. A shift towards greater emphasis upon support should extend to supporting supporters themselves. One of the ways this can be achieved is through education and resources for representatives and supporters.'²² They also noted that education would, 'assist in raising awareness of people's ability to plan for potential future incapacity',²³ thus increasing opportunities for supported decision-making as well as promoting more active engagement in decision-making and planning.

The TLRI noted that it had received several submissions outlining concerns relating to a lack of understanding about the Act, both within the broader community and amongst professionals with responsibilities under the Act. Submissions received by the TLRI highlighted the need for any legislative reform to be accompanied with a robust community education campaign – for example, Equal Opportunity Tasmania (EOT) noted:

*'We consider that the introduction of any new legislative framework governing guardianship arrangements should be accompanied by a broad based information campaign aimed at service providers outlining their ongoing responsibility under discrimination and disability law.'*²⁴

The importance of education is also highlighted in the recommendations from the TLRI, which included a recommendation that 'there be adequately funded robust and accessible public education about the Act and any reforms',²⁵ and that '[e]ducational materials should be produced in a variety of formats and include both print and web-based information'.²⁶

The need for further education and/or campaigns to raise community awareness about issues relating to guardianship and administration was also raised in the TLRI report during discussions of supported decision-making. We believe some provisions of the Bill address challenges raised in the TLRI report relating to supported decision-making – for example, we note there is a positive obligation on a person who is assessing the decision-making capacity of a person to provide that person the opportunity to receive 'practicable and appropriate support'.²⁷ However, we are concerned that these provisions alone

²¹ Tasmanian Law Reform Institute (TLRI), 'Review of the Guardianship and Administration Act 1995 (Tas) – Final Report No 26' (December 2018), 423.

²² Tasmanian Law Reform Institute (TLRI), 'Review of the Guardianship and Administration Act 1995 (Tas) – Final Report No 26' (December 2018), 425.

²³ Ibid.

²⁴ Ibid, 424.

²⁵ Ibid, 426.

²⁶ Ibid.

²⁷ See, for example, Guardianship and Administration Amendment Bill 2022 (Tas) Clause 8:

(7) For the purposes of this Act –

(a) an adult has decision-making ability in respect of a decision if it is possible for the adult to make the decision with practicable and appropriate support; and

(b) an adult is not to be treated as having impaired decision-making ability in respect of a decision unless reasonable steps have been taken to provide that adult with access to the practicable and appropriate support needed to make and communicate the decision;

will not assist people to receive the support they may need to make decisions, particularly without additional resourcing for the advocacy and support organisations who are the most likely to be providing this assistance. We echo the TLRI's recommendations in relation to the need for public education campaigns and programs to educate people about the need to provide assistance to adults who need decision-making support,²⁸ as well as the development of adequately funded decision-making support programs.²⁹

We also note there will likely be a need for additional resources for organisations who will be working to support people in relation to their decision-making capacity.

We also note the decision-making framework outlined in the Bill is a significant change to the current framework relating to capacity and decision-making under the Act. These changes will apply to a wide range of professionals and community members – for example, family members who are supporting a person in relation to their decision-making ability, a community organisation working with a person who may be believed to have impaired decision-making ability, doctors or health professionals who are determining whether or not a person has decision-making ability, or Tribunal members who are making determinations about whether or not a guardianship and/or administration order is justified. TasCOSS believes it is imperative that the Government prioritise the development and distribution of materials to raise awareness of the proposed legislative changes in the Bill, noting these materials should be appropriate for a wide range of audiences, including (but not limited to) healthcare and legal professionals with responsibilities under the Act, community members, Tasmanians with disability and support organisations.

Recommendations:

- The Government should prioritise the development and delivery of a comprehensive public education program in relation to the rights of people with disability and the operation of the new provisions in the Act
 - o These programs should include information and resources about the need to provide adults requiring support with decision-making with access to the support they may require to make and implement decisions about matters affecting their lives and the duties of individuals who provide that support
 - o Materials produced and provided in a variety of formats
 - o Education and training should also be given to a wide range of professionals who are likely to exercise powers or make decisions under the Act, and should be tailored to fit these purposes

²⁸ For example, Tasmanian Law Reform Institute (TLRI), 'Review of the Guardianship and Administration Act 1995 (Tas) – Final Report No 26' (December 2018), 122:

Recommendation 7.1

That an adequately funded public education program be developed and delivered to ensure that Tasmanians understand the rights of people with disability articulated in the Convention on the Rights of Persons with Disabilities, including the need to provide adults requiring support with decision-making with access to the support they may require to make and implement decisions about matters affecting their lives and the duties of individuals who provide that support.

²⁹ Ibid:

Recommendation 7.2

That adequately funded decision-making support programs be developed, ensuring equity of access.

- Further resourcing should be provided to organisations who are likely to be assisting people with additional supports needed to make decisions under the Act

Accountability measures

TasCOSS is concerned about the lack of accountability measures in the Bill, particularly in relation to the decision-making framework. As outlined above, there will be a number of people involved in the interpretation and implementation of the Act, with a wide range of professional backgrounds and experiences. To work effectively, the legislation (and related policy and other supports) must ensure decisions and actions taken under the Act are able to be monitored.

Accountability was recognised by the ALRC as a fundamental principle underpinning law reform in the areas of guardianship and administration, noting that, *'[t]he principle of accountability has a number of key components. The first is the need for systemic and specific accountability mechanisms and safeguards. 'Supporters' who fulfil a supportive role in decision-making must be properly accountable, as well as those who are appointed to make decisions on a person's behalf. Another important component is the accountability and responsibility of persons with disability for their decisions, recognising that active participation involves both responsibilities and risks.'*

To ensure the intent of the legislation is reflected in practice and the practical interpretation and use of the provisions outlined in the Bill, TasCOSS strongly supports the development and inclusion of further accountability measures at various stages of the decision-making process. One example relates to the obligations of a person who is assessing a person's decision-making ability in relation to a particular matter – we believe the Bill should include provisions imposing an obligation on the decision-maker to record the decision and the reasons for the decision in writing, as well as recording information about whether and how the person assessing decision-making ability took opportunities to provide the person with additional supports (as required by the new provisions under the Bill). TasCOSS also strongly supports the inclusion of regular review mechanisms, to identify and address as needed issues with the interpretation and use of provisions under the Act – ideally, these are issues which could be further supported by the work of the Disability Commissioner, who could also investigate instances of non-compliance with the provisions of the Act and provide additional technical support (including education and training) where needed.

Another example relates to mediation. Whilst TasCOSS supports in theory the provision of alternative dispute resolution mechanisms, we disagree that the Public Guardian will be in many instances the appropriate body. We note these concerns are shared by Advocacy Tasmania, who in their submission noted the potential for conflicts of interest in dispute resolution.³⁰ We echo their recommendations for an independent body to provide oversight and dispute resolution functions, and for consideration to be given to whether the Disability Commissioner, Equal Opportunity Tasmania or both could be more suitable to perform this role.

Finally, we reiterate our support for the appointment of a Disability Commissioner in Tasmania. As stated previously, '[o]ur view is that the introduction of a Commissioner model will hopefully provide greater awareness of, and access to, information and resources detailing best-practice guidelines for services working with Tasmanians with a disability. By providing a centralised complaints mechanism, the introduction of a Commissioner model will also increase accessibility and make it easier for Tasmanians with a disability, their carers and their family to raise issues of concern, and to better understand the

³⁰ Advocacy Tasmania, Submission: Guardianship and Administration Amendment Bill 2022 (October 2022), 8-9.

complaints resolution process.’³¹ We therefore encourage the Government to develop a robust complaints mechanism process to be exercised by the Disability Commissioner, as well as ensuring their role is broad enough to engage in educational and developmental work.

Recommendations:

- The Government should develop and include in the Act accountability measures, including but not limited to the following:
 - o An duty to provide written records of decisions made under the Act (for example, in relation to a person’s decision-making ability), as well as actions taken to provide additional supports and otherwise comply with obligations under the Act
 - o Review mechanisms relating to decisions made under the Act, including alternative dispute resolution processes such as mediation, to be performed by the Disability Commissioner
- The Disability Commissioner should have broad review powers, 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

Engagement in Tribunal proceedings

In order to give meaningful effect to the rights-focused framework outlined in the Bill, TasCOSS strongly believes the Government must also prioritise reforms to support and promote greater participation in Tribunal proceedings.

The most recent annual report from TasCAT confirms that, despite the high number of applications received,³² most people appearing before the Tribunal for guardianship and/or administration matters are not legally represented. As per the Annual Report, although TASCAT conducted 1376 hearings across the State in 2021-2022, only 3.6% of persons subject of a hearing were represented.³³

The TLRI recommended the Government ‘review and monitor the adequacy of resources allocated to groups directly involved in administering the Act... to ensure that those bodies are able to perform their functions, duties and powers effectively’.³⁴ We echo this recommendation and note the need for adequate resourcing for the Disability Commissioner, given the likely role the Commissioner will play in safeguarding and promoting the rights of Tasmanians with disability.

Concerns have been raised by several stakeholders in relation to Tribunal decisions and the need for written reasons. TasCOSS notes this was considered by the TLRI in their report, and that resourcing was raised as a key issue. However, we are concerned about the low numbers of statements of reasons provided in relation to TasCAT decisions,³⁵ and note that Advocacy Tasmania and Community Legal Centres Tasmania are both strongly in favour of written reasons being provided in all instances.

³¹ TasCOSS, Submission to Disability Services Act Review (December 2021), 6.

³² According to the annual report, the Tribunal received 1603 applications during 2021-2022: Tasmanian Civil and Administrative Tribunal, ‘Annual Report: 2021-2022’ (October 2022), 30.

³³ Ibid.

³⁴ Tasmanian Law Reform Institute (TLRI), ‘Review of the Guardianship and Administration Act 1995 (Tas) – Final Report No 26’ (December 2018), 428.

³⁵ Tasmanian Civil and Administrative Tribunal, ‘Annual Report: 2021-2022’ (October 2022), 30 – in the last year, the Guardianship and Administration Division of TASCAT issued 41 statements of reasons.

We also encourage the Government to consider ways the Tribunal processes could be changed to promote more meaningful and active engagement by those who are or may be subject to orders. Additional funding for legal representation is one recommendation, as well as the establishment of a duty lawyer scheme. Another possibility would be the development and funding of a non-legal advocacy service to provide in-person support at hearings, as well as assistance preparing for a hearing and engaging with follow-up support as needed. A potential model for a non-legal service is Independent Mental Health Advocacy (IMHA),³⁶ a non-legal advocacy service established to support people subject to compulsory mental health treatment in Victoria. Alternatively, existing services providing advocacy support for Tasmanians with disability (such as Disability Voices and Advocacy Tasmania) could receive additional funding to perform this role.

Recommendations:

- The Government should review and monitor the resourcing of bodies responsible for administering the Act (including, but not limited to, the Office of the Public Guardian, the Public Trustee, Tasmania Legal Aid and the Disability Commissioner)
- TasCAT should provide written reasons for decisions in all guardianship and administration matters
- Tribunal processes should be changed to increase accessibility – suggested changes include:
 - o Increased funding and resourcing for legal representation
 - o Consideration given as to whether a duty lawyer service should be established for the Guardianship and Administration list at TASCAT
 - o The development and funding of non-legal advocacy services to support participation

Medical research

The Bill contains several sections which relate to medical research and how (and in what circumstances) medical research can be conducted when a person is assessed as not having decision-making ability.

We note Article 15 of the Convention enshrines the right to be protected from torture or cruel, inhuman or degrading treatment or punishment, which includes protection from medical or scientific experimentation without free consent.³⁷ However, as the TLRI explained in their report,³⁸ this provision has been interpreted in Australia to allow for a ‘person authorised to consent’ to agree to participation in medical research on behalf of another in circumstances where they do not have the ability to make the decision for themselves.

³⁶ Information about IMHA can be found on their website: <https://www.imha.vic.gov.au/>

³⁷ Convention on the Rights of Persons with Disabilities, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008):

Article 15 - Freedom from torture or cruel, inhuman or degrading treatment or punishment

1. No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his or her free consent to medical or scientific experimentation.

2. States Parties shall take all effective legislative, administrative, judicial or other measures to prevent persons with disabilities, on an equal basis with others, from being subjected to torture or cruel, inhuman or degrading treatment or punishment.

³⁸ Tasmanian Law Reform Institute (TLRI), ‘Review of the Guardianship and Administration Act 1995 (Tas) – Final Report No 26’ (December 2018), 303.

The TLRI report points to the need to balance competing issues – on the one hand the individual and public benefits of medical research, and on the other hand the right for people to participate in such research after giving free and informed consent.³⁹

TasCOSS shares concerns raised by Advocacy Tas and others about the provisions relating to medical research in situations where a person is unable to provide consent. We endorse their recommendation that the provisions in the Bill should focus on the need to provide people who have impaired decision-making ability with additional supports to enable them to choose whether they provide free and informed consent to treatment or research.

Final Comments

TasCOSS notes the extended consultation time provided for submissions in relation to the Bill, and thanks the Government for responding to calls from community members and organisations in relation to the need for more comprehensive public engagement processes. However, we note the consultation period in relation to this Bill has still been fairly limited, particularly when considering the breadth and impact of the proposed changes. We echo the comments and recommendations from Advocacy Tasmania in relation to both the consultation period and process,⁴⁰ and strongly recommend the Government implement changes to consultations for legislation and reforms involving Tasmanians with disability to encourage more meaningful participation and promote the voices of those with lived experience.

Recommendations:

- The Government should engage in further consultation in relation to the Bill and any future proposed changes to the Act
 - o As part of their consultation process, the Department should prepare and circulate both an Easy English and Plain English consultation document outlining the changes proposed by the Bill and their potential impact on those who are or may be subject to the Act
 - o The consultation should also promote the voices of those with lived experience, as well as organisations working to support people who are or may be subject to the Act

³⁹ Ibid.

⁴⁰ Advocacy Tasmania, Submission: Guardianship and Administration Amendment Bill 2022 (October 2022), 2-3.