

Department of Communities and Justice

By email: policy@dcj.nsw.gov.au

25 February 2025

Submission to the Department of Communities and Justice consultation on the proposed restrictive practices legislative framework

Thank you for the opportunity to provide feedback on the proposed framework for regulating the authorisation and use of restrictive practices on people with disability in certain settings, outlined in the [Consultation Paper](#). We welcome the Department's consideration of the views of stakeholders and members of the public, and most importantly the views of people with disability who have experienced restrictive practices and their families, carers, guardians and supporters. As has been asserted by the disability community time and again, it is crucial that any and all reforms affecting people with disability are conducted in ongoing genuine co-design with people with lived experience and their advocates. This must extend beyond consultation, to the empowerment of people with disability as leaders and co-designers of decision-making processes. I urge the Department and the NSW Government to do so throughout the entirety of this particular reform, as well as with all future processes concerning people with disability.

Restrictive practices restrict an individual's freedom, their right to personal autonomy and their personal dignity. These practices are inconsistent with international human rights obligations and do not uphold the fundamental human rights of people with disability. I have advocated alongside the disability community and the expert disability advocacy sector for many years in support of the reduction and elimination of restrictive practices, for all people with disability and across all settings.

The Disability Royal Commission made several recommendations directed toward state and federal governments in relation to regulating, minimising and eliminating the use of restrictive practices. This followed decades of evidence-based calls for government action to create a pathway for eliminating the use of restrictive practices against people with disability, in accordance with Australia's international commitments under the United Nations Convention on the Rights of Persons with Disability (UNCRPD), including through multiple past Royal Commissions and inquiries. Importantly, these calls have emphasised the need for a holistic, person-centred and consent-based approach that properly addresses the systemic drivers enabling the continued use of restrictive practices against people with disability. This must include a shift from substitute decision-making toward a supported decision-making model across all systems, as well as an overhaul of the socio-cultural, legal

and institutional structures that sustain restrictive practices as a form of violence, coercion and control against people with disability.

A pathway toward elimination

Any framework for regulating the use of restrictive practices must first and foremost be underpinned by a clear pathway toward the reduction and elimination of these practices over time. Concerningly, the proposed framework is lacking in this respect. As it stands, the framework seeks to introduce an authorisation process for the ongoing use of restrictive practices without any apparent reduction targets, timeframes or complementary measures to address the underlying drivers.

Recommendation 6.40 of the Disability Royal Commission called for state and federal governments to establish sector-specific targets and performance indicators to drive the reduction and elimination of restrictive practices over time, both at the national and State and Territory levels for disability, health, education and justice settings. This recommendation stated that these targets and performance indicators should be established by 1 July 2025 at the latest. I note that the NSW Government responded to this recommendation with “subject to further consideration”. Beyond this, the NSW Government has made no indication as to its intention to act on establishing such targets and performance indicators. This raises serious alarm over the potential damage that would likely be incurred by the implementation of the proposed framework on progress to reduce the use of restrictive practices. Implementing a regulatory framework for authorisation on its own will do little more than legalise the indefinite use of restrictive practices against people with disability.

Severe gaps in the scope of the proposed framework

The NSW Government’s proposed framework would introduce an authorisation process for the ongoing use of restrictive practices against NDIS participants, in the disability service setting as well as in non-NDIS settings of health, public education and justice. Concerningly, the framework does not adequately recognise the individuals who are most commonly subject to restrictive practices, and the settings where they most commonly occur. Less than approximately 10% of people with disability in our community are NDIS participants, a percentage that will undoubtedly decrease with eligibility for the NDIS becoming increasingly restrictive. Any legal framework must apply to any person or entity with the power to authorise the use of or use restrictive practices on people with disability.

The proposed framework fails to apply a consistent approach across all relevant sectors where restrictive practices are used, and for all people with disability. It is concerning that out-of-home care and aged care settings are excluded from the proposed framework. It is also alarming that non-government educational settings are excluded, given how consistently restrictive practices are used across these settings with little to no oversight. I note that private educational settings continue to be exempt from the Anti-Discrimination Act 1977, permitted to discriminate against a person on the basis of disability. Introducing a

restrictive practices regulatory framework that excludes private educational institutions will only further enable ongoing discrimination, abuse, violence and neglect within these settings.

The proposed framework establishes a Senior Practitioner model similar to that already in place in jurisdictions including Victoria and the Australian Capital Territory, which was recommended by the Disability Royal Commission. It must be noted that the Disability Royal Commission recommended this be established as an independent statutory authority; however the consultation paper makes no indication of whether the Senior Practitioner would be established as such. It is critical that the NSW Government does not establish the role of the Senior Practitioner as a government official under the Department of Communities and Justice, and instead acts in accordance with calls for a robustly funded, independent statutory authority. For example, this could be established as a role under the existing Ageing and Disability Commission. However, I also note that the Commission continues to be unable to effectively fulfill its statutory duties and functions due to consistent under-resourcing since its establishment, an issue which must be urgently rectified by the NSW Government. Should the Senior Practitioner be responsible for carrying out educational and guidance functions as the consultation paper suggests, in addition to being independent from the Department it must be adequately funded to do so.

Further to this, there are several severe gaps in the proposed framework which present serious concerns around its potential implementation. This includes an overt lack of supported decision-making principles underpinning the framework, limited oversight and restrictions on the emergency process for allowing providers to use restrictive practices without approval, expansive powers of providers to appeal decisions, and a lack of strong safeguarding which is proportionate to the restrictive practice being used. I urge the Department to engage with stakeholders including peak expert advocacy organisations in a collaborative manner, to discuss the nuances of these and other gaps in the proposed framework.

Urgent need for immediate action to prohibit certain restrictive practices

There is no justifiable reason to continue delaying action to immediately prohibit the use of certain restrictive practices identified by numerous expert bodies as severely impeding on the human rights of people with disability. Strong prohibitions on these restrictive practices must be urgently introduced by the NSW Government as a matter of priority. It need not be conditional on the development of a regulatory framework for authorisation and use, and must be acted on with the urgency required. As such, in accordance with Recommendation 6.36 of the Disability Royal Commission, the NSW Government must immediately introduce prohibitions on the use of certain restrictive practices in disability, health and education settings, including those agreed by the former Disability Reform Council in 2019 as well as all those identified in Recommendation 6.36.

In conclusion, the NSW Government should develop a clear and consistent pathway for the reduction and elimination of the use of restrictive practices against all people with disability and in all settings across society, in ongoing co-design with the disability community and

their advocates. Such a pathway must also be accompanied by action to embed supported decision-making principles across all relevant systems. An inclusive society is one that prioritises the full human rights of all disabled people, including the right to dignity, autonomy, safety and respect. Critically, any framework for regulating restrictive practices must be underpinned by these principles, and must be accompanied by specific targets and timeframes to drive the reduction and elimination of restrictive practices over time.

Thank you for the opportunity to comment on the proposed restrictive practices legislative framework. We will continue to advocate for action to reduce and eliminate the use of restrictive practices, to fully realise the human rights of people with disability.

Regards,

A handwritten signature in black ink, appearing to read 'A Boyd', with a stylized, cursive script.

Abigail Boyd

Greens NSW Upper House MP and Spokesperson for Disability Rights and Inclusion