

Restrictive Practices Legislative Framework
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Dear Restrictive Practices Legislative Framework Consultation

This submission is made by Associate Professor Dinesh Wadiwel and Associate Professor Linda Steele.

We understand that the formal deadline for the submissions to the Consultation has passed; however, we hope that you would be willing to receive this late submission.

We are co-authors along with our colleague Dr Claire Spivakovsky (University of Melbourne) of *Restrictive Practices: A Pathway to Elimination*. This research report was commissioned by the Royal Commission into Violence, Abuse, Neglect and Exploitation and published in 2023. It was produced with the guidance of an expert advisory group of representatives from Australian Disabled People's Organisations and is informed by published accounts of disabled people's lived experiences of restrictive practices.

We are writing to formally submit our research report to this consultation process on the basis it provides an evidence-based and human rights framework for eliminating restrictive practices which could inform NSW's legislative reform. We note that our report contains an eight-point plan for the elimination of restrictive practices that will also deliver justice and equality to people with disability who experience their use.

In addition, we highlight the following reflections on the Restrictive Practices Legislative Framework Consultation paper.

Alignment with Human Rights

The proposed principles governing the use of restrictive practices do not include a principle that these practices must be in conformity with international human rights law. This is a significant omission. The Consultation Paper's cursory mention of rights ('they can seriously limit a person's rights' (p 13)) is deeply concerning. The paper does not discuss human rights issues associated with restrictive practices, nor engage specifically with the UN Convention on the Rights of Persons with Disabilities (CRPD) and other relevant treaties such as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).

Australian Governments are bound by international law. Any forms of forced and / or non-consensual treatment authorised by the proposed legislation must be in conformity with international law, including the absolute prohibition on torture and ill-treatment. This would shape the powers proposed for the Senior Practitioner to make determinations on definitions

and to authorise restrictive practices. International human rights law would also govern the rights of individuals to seek review and redress.

Discrimination

The proposed legislation, as suggested by the Consultation Paper, would authorise persons to use force and non-consensual treatment against persons with disability. This authorisation is not extended in the same way to people without disability. In other words, the legislation targets a group of individuals for differential treatment based upon their status as persons with disability.

Under international human rights law differential treatment may be justified, and not considered discrimination, where the objectives of such treatment ‘are reasonable and objective.’ Further Article 5.4 CRPD states that ‘specific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination under the terms of the present Convention.’ However, as *Restrictive Practices: A Pathway to Elimination* demonstrates, it is not clear that the use of restrictive practices is either reasonable or objective in protecting individuals from harm and reducing violence against people with disability, nor that the continuation of these practices is assisting Australian Governments to achieve equality objectives. As such, our view is that the proposed legislation regulating the use of restrictive practices against people with disability is discriminatory and at odds with the general prohibition on discrimination against people with disability that is articulated by international law.

Inequality Before the Law

Relevant to the above, the proposed legislation is potentially at odds with the rights of people with disability to equal recognition before the law, as articulated by Article 12 CRPD. In this context, we note several significant issues and omissions in the consultation paper:

- We note that rights of review, or rights to provide feedback or complaints, must not undermine the rights of people with disability to seek independent review and redress through the criminal justice system. In this context, we note that there is a conflict of interest in the ability of the Senior Practitioner to receive complaints about the use of restrictive practices, since the Senior Practitioner, under proposed legislation, will be the person who has authorised these practices in the first instance.
- Further, because of the right of people with disability to equal recognition before the law, we strongly oppose blanket immunity from civil and criminal liability being granted to Program Providers and staff. As in other areas of the law, such as law enforcement powers, individuals who are subject to the authorised use of force, and the discretionary decisions that underpin this, must have rights to review and redress. Relatedly, it is uncertain how a good faith immunity will resist rather than accommodate staff knowledge and assumptions based on ableism and lack of human rights awareness about when the restrictive practices are necessary and when less restrictive alternatives have been tried.
- In the consultation paper there is no detail on how people with disability will be advised when they have been subjected to a civil or criminal wrong, and how they will be supported to access criminal and civil justice systems and victim support. This is significant given the access to justice barriers experienced by people with disability (particularly people with cognitive and psychosocial disability) which are exacerbated in closed, institutional and segregated settings.

- Relatedly, while the Senior Practitioner is proposed to have an education and information function (Proposal 12), it is unclear whether this will explicitly extend to education on legal rights and human rights violations associated with restrictive practices. Education and information is essential so people with disability are aware of potential legal and human rights avenues for redress for use of restrictive practices and preventing further use.
- The Consultation Paper does not address the role of the *Parens Patriae* jurisdiction of the Supreme Court of NSW in use of restrictive practices, particularly in the out of home context.

Harm and Lifelong Impacts of Restrictive Practices

Restrictive practices have significant, lifelong and lifechanging impacts on people with disability. However, the Consultation Paper contains no engagement with the lived experiences of people with disability and any recognition of their impacts (aside noting restrictive practices ‘may pose risks [people with disability’s health and well-being’ (p 13)).

Failure to foreground these dimensions of restrictive practices contributes to an understanding of restrictive practices as non-violent and benign which in turn supports the proposal to grant good faith immunity from liability (Question 25), as well as justifying the general approach to regulation instead of elimination.

We hope the attached report and the above observations, are informative for this consultation process.

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Sincere Regards,



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