



people with disability



THE UNIVERSITY OF  
SYDNEY

Australian Law Reform Commission  
Equality, Capacity and Disability in Commonwealth Laws Inquiry  
GPO Box 3708  
Sydney NSW 2001

14 July 2014

Dear Commissioners

We thank the Australian Law Reform Commission (ALRC) for the opportunity to comment upon the Equality, Capacity and Disability in Commonwealth Laws discussion paper.

People with Disability Australia (PWDA) is a leading disability rights, advocacy and representative organisation of and for all people with disability. We are the only national, cross-disability organisation - we represent the interests of people with all kinds of disability. We are a non-profit, non-government organisation.

The Disability Rights Research Collaboration is a partnership between University of Sydney researchers and People with Disability Australia. As part of this project, the Disability Rights Research Collaboration seeks to build links between researchers with Disabled People's Organisations (DPOs) working to further rights recognition for people with disability in Australia and the Asia Pacific.

PWDA and the Disability Rights Research Collaboration have been engaged in research on the potential implications of Australia's international obligations regarding torture and other cruel, inhuman or degrading treatment or punishment in relation to the treatment of people with disability, particularly in institutional health and social support settings.<sup>1</sup> Along with this research, this submission has been informed by the joint submissions to the current ALRC Inquiry made by PWDA, the Australian Centre for Disability Law, and the Australian Human Rights Centre; and has also been developed in collaboration with the European Union funded project on the prevention of torture at the University of Sydney.

We write with respect to ALRC Proposal 8-1 relating to the development of nationally consistent regulation relating to the use of restrictive practices: "The Australian Government and the Council of Australian Governments should facilitate the development of a national or nationally consistent approach to the regulation of restrictive practices. In developing such an approach, the following should be considered: (a) the need for regulation in relation to the use of restrictive practices in a range of sectors, including disability services and aged care; (b) the application of the National Decision-Making Principles; and (c) the provision of mechanisms for supported

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<sup>1</sup> The research underpinning this submission is the result of investigation carried out by Ms. Kathryn O'Shea as part of a University of Sydney, Master of Human Rights research internship.

decision-making in relation to consent to the use of restrictive practices.”<sup>2</sup>

The ALRC proposal aims to build upon the recent Australian Government *National Framework for Reducing and Eliminating the Use of Restrictive Practices in the Disability Service Sector*,<sup>3</sup> and explicitly establish consistent national regulation for a potentially wider set of contexts.

PWDA and the Disability Rights Research Collaboration have a number of concerns regarding these proposals.

### **1. Restrictive practices and seclusion may constitute torture and other cruel, inhuman or degrading treatment or punishment which are prohibited in international law.**

Australia has committed to abide by obligations in relation to disability rights and to take all appropriate measures to ensure that people with disability experience full and effective enjoyment of their human rights.<sup>4</sup> Under both the United Nations *Convention against Torture and Cruel or Inhuman and Degrading Treatment and Punishment* (CAT) and the United Nations *Convention on the Rights of Persons with Disabilities* (CRPD), Australia has a non-derogable obligation to ensure that people with disability are not subject to torture and other cruel, inhuman or degrading treatment or punishment.

Internationally there is an emerging agreed understanding that this explicitly encompasses a range of practices affecting “not only persons arrested or imprisoned, but also patients in institutional and medical institutions.”<sup>5</sup> There is increasing international recognition among health and human rights organisations that torture and other cruel, inhuman or degrading treatment or punishment in care and support contexts is widespread, especially for marginalised groups, such as people with disability.<sup>6</sup> This potentially encompasses practices of treatment and support such as the use of restrictive practices and forced medical treatment, including in health care settings and disability specific institutions.

In 2013 Special Rapporteur on Torture, Juan Méndez, provided a comprehensive overview of the obligations of States Parties with respect to obligations to prevent torture and other cruel, inhuman or degrading treatment or punishment within the context of health and social care institutions.<sup>7</sup> Méndez stated unambiguously that it was “essential that an absolute ban on all coercive and non-consensual measures, including restraint and solitary confinement of people with psychological or intellectual disabilities, should apply in all places of deprivation of liberty, including in psychiatric and social care institutions.”<sup>8</sup>

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<sup>2</sup> Australian Law Reform Commission. *Equality, Capacity and Disability in Commonwealth Laws*. Discussion Paper. May 2014. 201.

<sup>3</sup> Australian Government. *National Framework for Reducing and Eliminating the Use of Restrictive Practices in the Disability Service Sector*. March 2014.

<sup>4</sup> UN General Assembly, Convention on the Rights of Persons with Disabilities, 24 January 2007, A/RES, 61, 106.

<sup>5</sup> UN Human Rights Committee. “Torture or cruel, inhuman or degrading treatment or punishment (Art 7) 30/05/82. CCPR General Comment. No. 7 Sixteenth session, 1982.

<sup>6</sup> The Global Campaign to Stop Torture in Health Care. “Concept Note.” January 2010, At: [www.health.accel-it.it/.../Campaigning\\_To\\_Stop\\_Torture\\_In\\_Health\\_Care/](http://www.health.accel-it.it/.../Campaigning_To_Stop_Torture_In_Health_Care/)

<sup>7</sup> Juan E. Méndez. “*Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.” 2013. A/HRC/22/53. This built on the ground breaking work of the former Special Rapporteur on Torture, Manfred Nowak. See Manfred Nowak. “Protecting Persons with Disabilities from Torture.” Office of the UN High Commissioner for Human Rights. 2008. A/63/175.

<sup>8</sup> *Ibid*, 7.

Moreover, international torture and other cruel, inhuman or degrading treatment or punishment obligations have a strong proactive requirement of action by States Parties. Governments have to take positive measures to ensure that persons or entities do not inflict torture or inhuman or degrading treatment or punishment. This responsibility extends to institutional care settings where people with disability may reside.

Recent rulings from the European Court of Human Rights (ECHR) underline the potential human rights issues relating to the use of restrictive practices and seclusion. ECHR findings in relation to *Stanev v. Bulgaria*,<sup>9</sup> *Price v. United Kingdom*,<sup>10</sup> *Keenan v. United Kingdom*,<sup>11</sup> *Huseyin Yildirim v. Turkey*,<sup>12</sup> and *Selmouni v. France*,<sup>13</sup> for example, all are suggestive of a normative trend away from any use of seclusion and restraint against people with disability. While these cases highlight the need for an understanding of the context by which seclusion and restraint is used, they also underline the importance of applying the same human rights standards to people with disability as are applied to other people. In the case *Price v. United Kingdom*, the Separate Opinion of Judge Greve observed that “It is obvious that restraining any non-disabled person to the applicant’s level of ability to move and assist herself, for even a limited period of time, would amount to inhuman and degrading treatment – possibly torture.”<sup>14</sup>

## **2. The ALRC Proposals in 8-1 potentially legitimate the use of restrictive practices and seclusion**

The ALRC defines restrictive practices as “the use of intervention and practices that have the effect of restricting the rights or freedom of movement of a person with disability. These primarily include restraint (chemical, mechanical, social or physical) and seclusion.”

Restrictive practices aim to manage behaviour that is “challenging” or that is of danger to the person with disability or others. However, restrictive practices can constitute humiliation and punishment, and can be imposed as a means of coercion, discipline, convenience, or retaliation by staff, family members or others providing support.<sup>15</sup> People with disability are routinely subjected to unregulated and under-regulated restrictive practices which can cause physical pain and discomfort, deprivation of liberty, prevent freedom of movement, and alter thought and thought processes.<sup>16</sup> Moreover, the use of restrictive practices is not limited to disability and mental health service settings, such as institutions, group homes, boarding houses and mental health facilities. They also occur in schools, hospitals, residential aged care facilities and prisons.<sup>17</sup>

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<sup>9</sup> Dute, J. "ECHR 2012/8 Case of *Stanev v. Bulgaria*, 17 January 2012, no. 36760/06 (Grand Chamber)

<sup>10</sup> *Price v. United Kingdom*, App. No. 5493/72 Eur. Ct. H.R. (2001).

<sup>11</sup> *Keenan v. United Kingdom*, App. No. 27229/95, Eur. Ct. H.R. (2001).

<sup>12</sup> *Huseyin Yildirim v. Turkey*, App. No. 2778/02 Eur. Ct. H.R. (2007).

<sup>13</sup> *Selmouni v. France*, App. No. 25803/94 Eur. Ct. HR (1999).

<sup>14</sup> Greve quoted in *Price v. United Kingdom*, App. No. 5493/72 Eur. Ct. H.R. (2001).

<sup>15</sup> Women with Disabilities Australia, Submission to the UN, Analytical Study on Violence against Women and Girls with Disabilities, December 2011, 25; French, Dardel and Price-Kelly, from K McVilly, *Physical Restraint in Disability Services: Current Practices, Contemporary Concerns and Future Directions*, (Report, Office of the Senior Practitioner, Department of Human Services Victoria, 2008).

<sup>16</sup> People with Disability Australia and the Mental Health Coordinating Council, Submission to the NSW Legislative Council: ‘Substitute Decision-Making for People Lacking Capacity, 2009, 27.

<sup>17</sup> Women with Disabilities Australia, Submission to the UN, Analytical Study on Violence against Women and Girls with Disabilities, December 2011.

In Australia, available research indicates that an estimated 44 to 80 percent of people with disability who show ‘behaviours of concern’ are administered a form of chemical restraint;<sup>18</sup> between 50 and 60 percent are subjected to regular physical restraint;<sup>19</sup> and those with multiple impairments and complex support needs are subjected to much higher levels of restraint and seclusion.<sup>20</sup>

The above factors illustrate the need for a considered and consultative approach in developing any regulation. We also note that PWDA’s proposal in 2010 (in *Rights Denied: Towards a National Policy Agenda about Abuse, Neglect and Exploitation of Persons with Cognitive Impairment*) contained much stronger provisions both for clearer protections in relevant criminal law,<sup>21</sup> and stronger regulation with clear boundaries on the use of restrictive practices.<sup>22</sup>

We urge the ALRC to exercise caution in developing national regulation for restrictive practices:

- a. By advocating for national regulation, as opposed to protection from or elimination of restrictive practices, the ALRC Proposals in 8-1 potentially legitimate the continued use of restrictive practices. Frameworks which establish provisions for the use of restrictive practices for people with disability open the door for the sanction of potentially very serious human rights breaches. They are also discriminatory as they are only applicable to people with disability. Indeed the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has expressed concern that restrictive practices “when perpetrated against persons with disabilities, remain invisible or are being justified, and are not recognised as torture or other cruel, inhuman or degrading treatment or punishment.”<sup>23</sup>
- b. The ALRC proposal for “the provision of mechanisms for supported decision-making in relation to consent to the use of restrictive practices” is alarming and discriminatory. In general, the law does not provide for people (with or without disability) to consent to practices which may cause them physical or psychological harm or deprive them of their liberty. It would be a perverse outcome if the ALRC proposals to create a national framework for decision making resulted in the opportunity for people with disability to voluntarily consent to practices which are potentially very serious breaches of their fundamental rights.
- c. The deprivation of legal capacity for people with disability is not only a deprivation of that particular right. It leads to further actual and potential breaches of rights such as the right to live in the community, the right to access justice, the right to be free from violence and abuse, torture, inhuman and degrading treatment, the right to physical and mental integrity, and the right to liberty. Reforms to the legal framework regarding legal

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<sup>18</sup> Lynne Webber, Mandy Donley and Hellen Tzanakis. “Chemical Restraint: What Every Disability Support Worker Needs to Know.” Office of the Senior Practitioner, 2008.

<sup>19</sup> Lynne Webber, Mandy Donley and Hellen Tzanakis. “Chemical Restraint: What Every Disability Support Worker Needs to Know.” Office of the Senior Practitioner, 2008.

<sup>20</sup> Office of the Senior Practitioner. Annual Report 2008–2009. Department of Human Services, 2010. 21.

<sup>21</sup> Philip French, Julie Dardel and Sonya Price-Kelly. *Rights Denied: Towards a National Policy Agenda about Abuse, Neglect and Exploitation of Persons with Cognitive Impairment*. People with Disability Australia, 2010. 64-5.

<sup>22</sup> Ibid 97-8.

<sup>23</sup> Manfred Nowak, Special Rapporteur, *Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 63<sup>rd</sup> sess, UN Doc A/63/175 (28 July 2008) 9.

capacity should be aiming to reduce and limit the potential for these further rights violations to occur.

- d. Supporting as opposed to limiting the exercise of legal capacity by people with disability to exercise control over decisions that affect their lives is the most significant step required in ending this cycle of discrimination and abuse.

### **3. Legal capacity frameworks should operate to eliminate rather than justify the use of restrictive practices.**

Research with people with disability about their experiences and views regarding restrictive practices has found that many feel unsafe in the situations and environments they are faced with.<sup>24</sup> People with disability may justifiably feel angry when services are not delivered or are withdrawn, and where restrictive practices are renamed, thereby influencing future behaviour towards staff and heightening the risk of further restrictive practices being imposed. Many people with disability find communal settings and institutional environments increase behaviours that make them feel unsafe, and that maintaining private space and safety is more difficult where staff numbers are low, where there is no active engagement, there are locked areas, and where there are too many people. People with disability often feel a sense of powerlessness in disability and mental health facilities in terms of a lack of personal autonomy which adversely impacts on their behaviour. They often communicate their views about different environments and situations through their behaviour in those environments and situations.

Overall, the research shows that many behaviours that are identified as “behaviours of concern” which should be resolved with the use of restrictive practices are a form of resistance or protest to maladaptive environments, and that these should be viewed as legitimate responses to problematic environments and situations. Changing services, systems and environments should be the starting point for changing behaviour, rather than changing the person themselves, or providing methods for the person to consent to the practices which lead to their “behaviours of concern.”

There is a strong need for further research to understand the experiences of people with disability with respect to the use of restrictive practices. Indeed a report to the Office of the Senior Practitioner (Victoria) has stated frankly that: “there are still very few empirical studies of the views of people with disabilities and family carers which contribute to our understanding of restrictive practices.”<sup>25</sup> Any nationally consistent framework on restrictive practices must be shaped directly by the experiences of people with disability and their representative organisations.

### **Recommendation**

Given the above concerns, we call on the ALRC to recommend a national dialogue with people with disability and their representative organisations on the use of and protection from restrictive practices.

This dialogue would:

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<sup>24</sup> Paul Ramcharan, Karen Nankervis, Maria Strong and Alan Robertson. *Experiences of restrictive practices: A view from people with disabilities and family carers A final research report to the Office of the Senior Practitioner*. Office of the Senior Practitioner. Department of Human Services, Victoria, 2009

<sup>25</sup> Ibid. 12.

- Ensure any national framework must be consistent with international obligations and ensure that people with disability enjoy the legal protections that are otherwise extended to others under Australian law without discrimination. This national dialogue could examine broader issues, including the development of national preventive mechanisms in line with *Optional Protocol to the Convention against Torture and Cruel or Inhuman and Degrading Treatment and Punishment*.
- More closely evaluate the interrelationship between the denial of legal capacity, the use of restrictive practices, and the experience of torture and other cruel, inhuman or degrading treatment or punishment, violence, abuse and neglect in health and social support settings, such as institutions.
- Create the opportunity for the experiences of people with disability themselves to shape the development of any national framework that might be devised. We note that the current Royal Commission into Institutional Responses to Child Sexual Abuse will potentially produce evidence of the experiences of people with disability with respect to violence within institutional contexts: this may feasibly extend to institutional practices such as restriction and seclusion.

We urge the ALRC to take into account the above issues in developing its final recommendations. For further information on this submission, please contact Ms. Ngila Bevan, Manager Advocacy and Communications, People with Disability Australia, at [NgilaB@pwd.org.au](mailto:NgilaB@pwd.org.au) or Dr. Dinesh Wadiwel, Director Master of Human Rights, University of Sydney at [dinesh.wadiwel@sydney.edu.au](mailto:dinesh.wadiwel@sydney.edu.au).

Yours sincerely



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