

Submission:

## Australian Law Reform Commission

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# Equality, Capacity and Disability in Commonwealth Laws



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## **Introduction**

The Disability Discrimination Legal Service Inc. (“DDLS”) is a community legal centre that works on disability discrimination legal matters. It provides free legal advice in several areas including information, referral, advice, casework assistance, community legal education, and policy & law reform. The long term goals of the DDLS are the elimination of discrimination on the basis of disability, securing equal treatment before the law for people with a disability and generally promoting equality for those with a disability.

Villamanta Disability Rights Legal Service Inc. (“Villamanta”) is a community legal centre that works only on disability related legal and justice matters for people who have a disability. Its priority constituency are people who have an intellectual disability and most of its legal casework is done for them. Villamanta provides free legal advice in several areas including information, referral, advice, casework assistance, community legal education, and policy & law reform. The long term goals of Villamanta are to ensure that people who have a disability have the same rights and opportunities as other people and are equally included in the community; in particular, that they know about the law and are able to use the law to secure their rights.

### **Supported Decision-Making in Commonwealth Laws Proposal 2-1** **(also covering National Decision-Making Principles and Supported Decision-Making in Commonwealth Laws)**

We believe that the "Interpretative Declaration" should be withdrawn as it does not reflect one of the key aspirations of people with disabilities set out in the CPRD, that is, to be treated equally with other people. As far as decision-making is concerned, this means that people with disabilities should be free to make their own choices. The Interpretative Declaration contributes nothing to this aspiration and is contrary to the objectives of the CRPD.

The declaration does not distinguish between fully supported and substitute decision making. It also does not say what principles should be applied when fully supported or substitute decision making may have to be made. The DDLS and Villamanta support the Commission's view that the will and preferences of people with disabilities should guide supported decision making. An advance directive is one mechanism to express the will and preferences of people with disabilities. Such a document is very effective where a person has fluctuating abilities or has communication difficulties. Advance directives have been strongly supported by people with psychiatric disabilities in the recent amendments to the Victorian Mental Health Act 2014.

In addition, it is our view that all Commonwealth legislation should remove substitute decision making and replace it with supported decision making. Fully supported

decision making should only be a last resort, when a person has not expressed their views and at the time of the need for a decision the person is unable to express their views.

The declaration also does not outline the type of safeguards which should be applied and the phrase "subject to safeguards" is vague and unhelpful. In view of these substantial shortcomings, it is our submission that the Interpretive Declaration be withdrawn.

The issue of appropriate safeguards needs to be addressed before supported or substituted decision making is implemented in Commonwealth laws. A range of mechanisms to record the will and preferences of people with disabilities would be one of the ways to provide appropriate safeguards.

### **Restrictive Practices [Proposal 8-1]**

The proposal of a National Framework to formulate a consistent approach to regulate restrictive practices against people with disabilities is welcomed by our agencies. However we remain concerned at the failure to include children with disabilities in schools in such a framework.

The current approach electing to target people with disabilities who receive government services, by virtue of that target group, concentrates on adults. Therefore the perhaps unintended consequence of the current proposal is a proposal to afford protection to adults, while withholding the same protection to children, thereby treating those groups unequally.

We know that restrictive practices, at least in Victoria, are occurring in government and nongovernment schools.<sup>1</sup> From a practical perspective, given the reports on the serious consequences of restraint against children with disabilities<sup>2</sup>, and the knowledge we have about the importance of early intervention and prevention, we believe that to exclude the protection of children under the National Framework may breach Australia's obligations under various international human rights conventions, including under the equality before the law provisions.

Whilst our understanding of the current proposal is that any framework will not have a legislative basis, we believe that the spirit of the framework requires the Commonwealth to provide equal protection to children with disabilities from abusive practices.

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<sup>1</sup> Victorian Equal Opportunity and Human Rights Commission "*Held Back-the Experiences of Students with Disabilities in Victorian Schools*" Chapter 10

<sup>2</sup> "*Schools Not Supposed to Hurt: Investigative Report on Abuse of Restraint and Seclusion in Schools*" National Disability Rights Network

## **International Covenant on Civil and Political Rights (ICCPR)**

The ICCPR provides that all persons are equal before the law, and are entitled without any discrimination to the equal protection of the law.<sup>3</sup>

## **Convention on the Rights of the Child (CRoC)**

The CRoC sets out those children need special safeguards and care, and that States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment<sup>4</sup> and commits Australia to take all appropriate legislative and administrative measures<sup>5</sup>.

Furthermore Article 23 of the CRoC relates to children with disabilities and provides:

*States Parties recognize that a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community.*

The restrictions on restraint are aimed at ensuring the safety and dignity of adults. However, it fails to protect the rights of children. If the guidelines that relate to restraint are not equally applied to children then clearly their dignity will be compromised. Under the new national framework the people that are not being protected are particularly vulnerable - firstly because of their disability, and secondly because they are children.

Article 37 requires States Parties to ensure that no child should be subjected to cruel, inhuman or degrading treatment or punishment. We believe that it could be argued that restrictive practices constitute inhuman or degrading treatment or punishment.

## **Convention on the Rights of Persons with Disabilities (CRPD)**

The purpose of the CRPD as set out in Article 1 is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.'

General obligations pursuant to Article 4 include States Parties to take all appropriate measures to abolish existing practices that constitute discrimination against persons with disabilities. States parties are obliged to consult closely with people with disabilities directly or through representative organisations in the development and implementation of policies to implement the CRPD.

Article 5 sets out that all persons are equal before and under the law and are entitled to equal protection and equal benefit of the law.

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<sup>3</sup> ICCPR Article 26

<sup>4</sup> CRoC Article 2

<sup>5</sup> CRoC Article 3

The above-mentioned international conventions make it clear in our view that children are entitled to equal protection before the law, and children with disabilities are entitled to special rights and protections due to their vulnerability.

We understand that prior to the suggestion of a National Framework to address restrictive practices, children with disabilities have been subject to long-standing and substandard guidelines [or no guidelines] which has not afforded them sufficient protection from abuse. On the other hand, adults with disabilities have to date historically received stronger protections. In our submission, the Commonwealth, by virtue of their failure to provide the same protections to children, have already failed in their international obligations.

Now, however, there are further protections in the form of guidelines being proposed that again omit to protect children with disabilities. We do not believe this is acceptable given the history of these matters, and our obligations to this very vulnerable group.