

# **Submission to the NSW Department of Communities and Justice Consultation Paper on a legislative framework to regulate restrictive practices**

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# About the Justice and Equity Centre

The Justice and Equity Centre is a leading, independent law and policy centre. Established in 1982 as the Public Interest Advocacy Centre (PIAC), we work with people and communities who are experiencing marginalisation or disadvantage.

The Centre tackles injustice and inequality through:

- legal advice and representation, specialising in test cases and strategic casework;
- research, analysis and policy development; and
- advocacy for systems change to deliver social justice.

We actively collaborate and partner in our work and focus on finding practical solutions. We work across five focus areas:

**Disability rights:** challenging discrimination and making the NDIS fairer to ensure people with disability can participate equally in economic, social, cultural and political life.

**Justice for First Nations people:** challenging the systems that are causing ongoing harm to First Nations people, including through reforming the child protection system, tackling discriminatory policing and supporting truth-telling.

**Homelessness:** reducing homelessness and defending the rights of people experiencing homelessness through the Homeless Persons' Legal Service and StreetCare's lived experience advocacy.

**Civil rights:** defending the rights of people in prisons and detention, including asylum seekers, modernising legal protection against discrimination, raising the age of criminal responsibility to 14, advancing LGBTIQ+ equality and advocating for open and accountable government.

**Energy and water justice:** working for affordable and sustainable energy and water and promoting a just transition to a zero-carbon energy system.

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# Recommendations

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## **Recommendation 1**

*The proposed legislative framework should apply to all providers of disability services, rather than the recipients of disability services or NDIS participants only.*

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## **Recommendation 2**

*The restrictive practices legislative framework should cover the law enforcement setting as a discrete setting. The legislation should provide that the use of restrictive practices on people with disability by police should be governed by the principles recommended by DRC Recommendation 6.35(b).*

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## **Recommendation 3**

*The NSW Government invest in processes for assisting children and young people with disability in contact with the criminal legal system to obtain a diagnosis and become NDIS participants.*

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## **Recommendation 4**

*Confinement and segregation be prohibited practices for the youth justice system and prison justice settings.*

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## **Recommendation 5**

*The Senior Practitioner's powers with respect to justice system settings should include complaint handling and investigation functions and powers.*

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## **Recommendation 6**

*A statutory review period should be provided for in any legislative framework, so that the evaluation and potential extension of the full statutory regime to justice system settings is considered within a defined period.*

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## **Recommendation 7**

*The restrictive practices legislative framework should cover the out-of-home care setting as a discrete setting. The legislation should provide that the use of restrictive practices on children and young people with disability in out-of-home care should be governed by the principles recommended by DRC Recommendation 6.35(b).*

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## **Recommendation 8**

*A statutory review period should be provided for in any legislative framework, so that the evaluation and potential extension of the full statutory regime to the out-of-home care system is considered within a defined period.*

### ***Recommendation 9***

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*The practices at Appendix B to the Consultation Paper all be prohibited practices for the out-of-home care setting.*

# 1. Introduction

The Justice and Equity Centre ('JEC'), formerly the Public Interest Advocacy Centre ('PIAC'), welcomes the opportunity to provide a submission to the Department of Communities and Justice ('DCJ') Consultation Paper on *A legislative framework to regulate restrictive practices*.

The JEC is a leading social justice law and policy centre. Our work focuses on tackling barriers to justice and fairness experienced by marginalised communities.

We have a long history of involvement in public policy development and advocacy promoting the rights and equal participation of people with a disability. We have experience assisting clients with disability, and work on related law reform in consultation with disability advocates and peak representative organisations.

We have represented people in the criminal legal system in NSW, particularly First Nations young people, who have been subjected to improper, unlawful or discriminatory use of police powers. We have also worked with young people held in youth detention facilities and are currently running a test case, challenging the use of segregation on a young person in one of those facilities.

Since 2017, we have been working with the Aboriginal Legal Service (NSW/ACT) to make changes to the child protection and out-of-home care ('OOHC') system, aimed at reducing the numbers of Aboriginal and Torres Strait Islander children and families having contact with that system. More recently this work has also included AbSec – NSW Child, Family and Community Peak Aboriginal Corporation and the University of Technology Jumbunna Institute for Indigenous Education and Research.

We are pleased to see the Consultation Paper's aim to create a legislative framework ('Framework') which reduces and, where possible, eliminates the use of restrictive practices,<sup>1</sup> following recommendation 6.35 of the *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* ('DRC').<sup>2</sup>

Our submission focuses on Questions 1 and 2 in the Consultation Paper. While we agree the Framework should apply to the disability service provision, health, education and justice settings, we consider the Framework's scope should be broadened to:

- apply to all disability service providers, and not just those who are providing services to NDIS participants; and
- cover the OOHC setting;

We also consider that any legislative framework should be more prescriptive with regards to periods when non-disability service settings will be subject to the 'full regime' contemplated by the

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<sup>1</sup> Department of Communities and Justice, *A Legislative Framework to Regulate Restrictive Practices* (Consultation Paper, December 2024) 9 ('Consultation Paper').

<sup>2</sup> *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (Final Report, September 2023) vol 6, 32-3.

framework and that complete prohibition of identified restrictive practices would be appropriate in certain settings.

## 2. Scope of the proposed framework

### 2.1 Disability service provision setting

We recommend the Framework apply to all disability service providers, not just to those providing services to NDIS participants.

The Consultation Paper states the Framework would only cover NDIS funded services which NDIS providers (registered and unregistered) provide to NDIS participants.<sup>3</sup> The rationale for that focus is an expectation that most people who use disability services and whom restrictive practices are applied to are NDIS participants. However, that expectation is inconsistent with the practical reality that non-NDIS participants may be subject to restrictive practices. We note children and young people with disability in justice or OOHHC settings, who may never have made an application to become NDIS participants, and non-citizens or permanent residents and those over the age of 65 with a disability, who are not eligible for the NDIS, are at particular risk of experiencing restrictive practices and would be excluded by the proposed approach.

Outside of the NDIS, mainstream and community disability services are available in NSW.<sup>4</sup> For example, the Information, Linkages and Capacity Building ('ILC') program funds community projects, which are specifically intended to support people with disability outside of individualised NDIS packages.<sup>5</sup> Additionally, as the Consultation Paper points out, foundational supports will commence soon in NSW. As such, limiting the Framework's scope to NDIS participants will not capture all relevant providers of disability services.

As the DRC noted in its Final Report, restrictive practices inherently limit a person with disability's right to liberty and personal security.<sup>6</sup> Those rights should be protected regardless of who is providing disability support. For that reason, the DRC noted that reform to restrictive practices should apply to 'any person or entity...with power to authorise the use of or use restrictive practices'.<sup>7</sup> Similar observations have been made by a Senate Committee which recommended restrictive practices reform capture 'all service delivery contexts'.<sup>8</sup>

The Consultation Paper says focusing on NDIS participants would provide clarity on the scope of the legislation.<sup>9</sup> In our view, the Consultation Paper's concern with ambiguity of the scope is misguided – other Australian jurisdictions have extended their restrictive practices framework to disability services provided to all people with disability. In particular, the approach in the

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<sup>3</sup> Consultation Paper (n 1) 15 [3.2.1], 16 [3.2.4].

<sup>4</sup> 'The NDIS Plan', *Department of Communities and Justice* (Web Page, 16 December 2022) <<https://dcj.nsw.gov.au/children-and-families/national-disability-insurance-scheme-ndis/guidelines-for-carers/the-ndis-plan.html>>.

<sup>5</sup> 'Information, Linkages and Capacity Building', *Community Grants* (Web Page) <<https://www.communitygrants.gov.au/grants/2023-1679>>.

<sup>6</sup> DRC (n 2) vol 6, 431-2.

<sup>7</sup> Ibid 506.

<sup>8</sup> Community Affairs Reference Committee, Senate, *Inquiry into Indefinite Detention of People with Cognitive and Psychiatric Impairment in Australia* (Final Report, November 2016) 166 [8.59], 201-2 [10.58].

<sup>9</sup> Consultation Paper (n 1) 15 [3.2.2].

Australian Capital Territory and Tasmania focuses on *providers* that engage in disability services, rather than limiting it to the *recipients* of disability services, or NDIS participants.

For example, in the ACT, the *Senior Practitioner Act 2018* (ACT) limits the use of restrictive practices to a ‘provider’,<sup>10</sup> which is broadly defined to include ‘a person or other entity who provides’ a disability service.<sup>11</sup> The positive impact of the ACT legislation’s broader focus on ‘provider’ can be seen in *Evelyn*.<sup>12</sup> Evelyn had a disability but was ineligible for the NDIS. Her disability services provider applied environmental restraints against her.<sup>13</sup> President McCarthy held that in these circumstances, as Evelyn’s provider was managing her disability, the Act applied and the restrictive practices framework should have been enforced.<sup>14</sup> This finding illustrates the Framework’s narrower focus on NDIS participants and their providers, risks not capturing and protecting all people with disability.

Similarly, in Tasmania, s 38 of the *Disability Services Act 2011* (Tas) requires a ‘disability services provider’ to seek approval before engaging in a restrictive practice. Section 4(1) defines this as ‘a person or organisation that provides...specialist disability services’. This means there is no distinguishment between NDIS and non-NDIS providers, and the Tasmanian law applies to all people with disability.<sup>15</sup>

Additionally, extending the Framework to protect all people with disability would align with obligations required in the human rights framework set out in the *Convention on the Rights of Persons with Disabilities* (‘CRPD’).<sup>16</sup> The CRPD is guided by principles such as ensuring autonomy for people with disability to make their own choices and be able to fully participate in society.<sup>17</sup> However, restrictive practices, which are coercive and sometimes performed non-consensually,<sup>18</sup> are contrary to those principles. The CRPD Committee has expressed concern that restrictive practices are incompatible with article 15 which guarantees no one is subjected to cruel, inhuman or degrading treatment.<sup>19</sup> The Australian Human Rights Commission has expressed similar concerns.<sup>20</sup> Applying the Framework solely to NDIS participants would be incompatible with the rights-based approach necessitated by the CRPD.

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<sup>10</sup> *Senior Practitioner Act 2018* (ACT) s 10.

<sup>11</sup> Ibid s 8(1)(a)(ii). See also DRC (n 2) vol 6, 443.

<sup>12</sup> *In the Matter of Evelyn (Guardianship)* [2021] ACAT 126 (McCarthy P) (‘Evelyn’).

<sup>13</sup> Ibid [168].

<sup>14</sup> Ibid [169]–[170].

<sup>15</sup> DRC (n 2) vol 6, 451.

<sup>16</sup> *Convention on the Rights of Persons with Disabilities*, signed 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008). Australia is a signatory to the Convention, see ‘Convention on the Rights of Persons with Disabilities’, *United Nations Treaty Collection* (Web Page, 6 March 2025) <[https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg\\_no=iv-15&chapter=4&clang=\\_en#EndDec](https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=iv-15&chapter=4&clang=_en#EndDec)>.

<sup>17</sup> Ibid art 3(a) and (c). See also Sarah Arduin, ‘General Principles’ in Ilias Bantekas, Michael Ashley Stein and Dimitris Anastasiou (eds), *The UN Convention on the Rights of Persons with Disabilities: A Commentary* (Oxford University Press, 2018) 92–4, 97–9.

<sup>18</sup> See, eg, DRC (n 2) vol 6, 481.

<sup>19</sup> Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Initial Report of Australia*, 10<sup>th</sup> sess, UN Doc CRPD/C/AUS/CO/1 (21 October 2013) 5 [35] (emphasis added). See also Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Combined Second and Third Periodic Reports of Australia*, 22<sup>nd</sup> sess, UN Doc CRPD/C/AUS/CO/2-3 (15 October 2019) 8 [29].

<sup>20</sup> Australian Human Rights Commission, *Information Concerning Australia’s Compliance with the Convention on the Rights of Persons with Disabilities* (Report, 25 July 2019) 20–1 [67]–[70].



## **Recommendation 1**

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*The proposed legislative framework should apply to all providers of disability services, rather than the recipients of disability services or NDIS participants only.*

## **2.2 Justice setting – law enforcement**

We recommend that any framework cover law enforcement as a justice setting, in addition to prisons and the youth justice system.

The DRC recognised the over-policing of people with disability in their Final Report, observing:

People with disability, particularly cognitive disability, are also exposed to frequent and intense policing. People with cognitive and mental health impairments experience multiple forms of disadvantage, making them more likely to be criminalised and caught up in a cycle of reoffending and incarceration.<sup>21</sup>

The rationale for excluding law enforcement, set out in the Consultation Paper, is that the use of force by NSW Police and other law enforcement agencies is covered by existing legislation and oversight mechanisms.<sup>22</sup> Further, a person is under the control of NSW Police only for a limited time, while the framework is focused on regulating the ongoing use of restrictive practices.<sup>23</sup> We note a number of concerns in response to these suggestions.

Firstly, the existing legislation and oversight mechanisms do not have the required disability-focused lens, and as such fail to protect people with disability who come into contact with the criminal legal system. They also set a lower and less rigorous a standard for the use of restrictive practices than that set by by DRC Recommendation 6.35(b). Currently, this vulnerable cohort are reliant on regulation and oversight mechanisms for the use of restrictive practices which are not well adapted to the experiences of people with disability.

Police powers in NSW are regulated under the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) ('LEPRA'). The safeguards provided by LEPRA fall far short of DRC Recommendation 6.35. For example, s 99 of LEPRA provides police with the power to arrest a person without a warrant. This section does not include the principle of last resort or require that the power should only be exercised when it is the only reasonably practicable means of achieving the purpose of the arrest. Further, under s 230 police may use force when it is 'reasonably necessary' to exercise a function. There is no requirement that force can only be used to address a serious risk of harm, or that it must be a proportionate response. The threshold for the use of force under s 230 is far lower than Recommendation 6.35 would provide.

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<sup>21</sup> *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (Final Report, September 2023) vol 8, 4.

<sup>22</sup> Consultation Paper (n 1) 18.

<sup>23</sup> Consultation Paper (n 1) 18.

As noted in the DRC's Research Report, the Australian Anti-Corruption Commission Committee has found that people with disability or mental health problems are more vulnerable to police misconduct.<sup>24</sup> This is demonstrated in the statistics. For example, the Research Report notes:

...First Nations Australians with disability are disproportionately subject to police violence, abuse and neglect. In the period between 2008 to 2019, 23 First Nations Australians with cognitive impairment and/or mental health problems died in police custody.<sup>25</sup>

Secondly, people with disability may be under the control of NSW Police for prolonged periods, during which time multiple restrictive practices may be used. People are under the control of NSW Police during welfare checks, stop and searches, street interrogation, bail compliance checks, police interviews and during and after arrest. These interactions can last hours and may be repeated over days or weeks to people who are 'known' to police. In these interactions, a combination of restrictive practices may be employed, including mechanical and environmental restraints (e.g. handcuffs may be used, or a person may be directed to remain within a certain room). People with disability may be particularly vulnerable in these interactions.

A case study detailed in the Research Report was a mother requesting police attend to her son who she was concerned was at risk of suicide:

Despite asking the police to 'come up with a plan' before going into his premises, the man was assaulted by police and taken into custody, ending up with a number of charges, 'the trifecta' of assaulting police, resisting arrest, and offensive language. As several advocates noted, 'police do not know how to make people with disability safe; they don't know how to interact with them'.<sup>26</sup>

As the above case study demonstrates, police interactions can, and often do, lead to incarceration for people with disability. To make an impact on the experience of people with disability in adult prisons and the youth justice system and to reduce the use of restrictive practices more broadly, the proposed framework must also apply to law enforcement activities.

The expansion of the framework would afford people with disability much needed protection in the policing and law enforcement justice setting. The necessity for regulation with a disability-focus is made more acute because of the disproportionate overrepresentation of this cohort in interactions with police and law enforcement. The application of the governing principles, the oversight of the Senior Practitioner and mandatory reporting from NSW Police and other law enforcement agencies on their compliance with the principles would create important safeguards for people with disability in their interactions with police.

## **Recommendation 2**

*The restrictive practices legislative framework should cover the law enforcement setting as a discrete setting. The legislation should provide that the use of restrictive practices on people with*

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<sup>24</sup> Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Research report – Police responses to people with disability, October 2021) 18 (citations omitted).

<sup>25</sup> Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (n 4) 19.

<sup>26</sup> Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (n 4) 85 - 86.

*disability by police should be governed by the principles recommended by DRC Recommendation 6.35(b).*

## **2.3 Justice setting – youth justice**

We are pleased that the youth justice system justice setting is intended to be included in the proposed framework.

As DCJ has recognised in the development of its Youth Justice Disability Action Plan, young people with disability are considerably over-represented and have earlier and more frequent contact with the criminal justice system.<sup>27</sup> In 2023, a study by the Bureau of Crime Statistics and Research ('BOCSAR') found that in NSW:<sup>28</sup>

Despite accounting for only 3.5% of the population, young people with disability comprised 7.7% of all young people who had at least one police caution, youth justice conference or court appearance before the age of 18 and 17.4% of those with at least one youth detention episode. On average, people with disability had their first contact with the NSW criminal justice system at an earlier age, had a higher frequency of contacts, and had a different profile of offence types compared to people without disability...they are significantly overrepresented in the youth custody population.

Often these disabilities have been previously undetected, undiagnosed or inconsistently reported and processes required to gain a diagnosis and refer to appropriate supports are complex and difficult to navigate.<sup>29</sup> Given this, we suggest that any legislative framework that regulates restrictive practices, particularly if this is by reference to NDIS participation, must be accompanied by an investment in processes to assist children and young people in contact with the criminal justice system to obtain a diagnosis and become NDIS participants. Contact with the criminal legal system should prompt engagement with a child or young person to meet their disability-related needs.

### **Recommendation 3**

*The NSW Government invest in processes for assisting children and young people with disability in contact with the criminal legal system to obtain a diagnosis and become NDIS participants.*

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<sup>27</sup> Department of Communities and Justice, *Development of a Youth Justice Disability Action Plan - Improving outcomes for young people with a disability involved with Youth Justice* (20 December 2023) <<https://dcj.nsw.gov.au/community-inclusion/disability-and-inclusion/disability-inclusion-action-plan/projects/development-of-a-youth-justice-disability-action-plan-improving-outcomes-for-young-people-with-a-disability-involved-with-youth-justice.html>>.

<sup>28</sup> NSW Bureau of Crime Statistics and Research, 'Offending by young people with disability: A NSW linkage study' *Crime and Justice Bulletin* Number 254, January 2023 <<https://bocsar.nsw.gov.au/documents/publications/cjb/cjb251-300/cjb254-report-offending-by-young-people-with-disability.pdf>>.

<sup>29</sup> Department of Communities and Justice, *Development of a Youth Justice Disability Action Plan - Improving outcomes for young people with a disability involved with Youth Justice* (20 December 2023) <<https://dcj.nsw.gov.au/community-inclusion/disability-and-inclusion/disability-inclusion-action-plan/projects/development-of-a-youth-justice-disability-action-plan-improving-outcomes-for-young-people-with-a-disability-involved-with-youth-justice.html>>.

We are concerned by the rates at which confinement and segregation are currently used in youth justice settings in NSW, including on children and young people with disability. We recommend confinement and segregation be prohibited for children and young people with disability in the proposed legislative framework.

As noted in the Consultation Paper, the following three types of isolation are permitted in youth detention centres under the *Children (Detention Centres) Act 1987* (NSW) ('CDC Act') and the *Children (Detention Centres) Regulation 2015* ('CDC Regulation'):

- 'Segregation', which is to be used to protect the personal safety of the person being segregated, or the safety of another person in custody.<sup>30</sup>
- 'Separation', which is to be used for individuals or groups of young people who are required to be managed separately to the general population, for the purpose of maintaining the safety, security or good order of the centre.<sup>31</sup>
- 'Confinement', which is to be used as a form of punishment for misbehaviour.<sup>32</sup>

There are currently no limits on the number of consecutive segregation, separation and/or confinement orders that can be made under the CDC Act. Similarly, there is no restriction on young people moving between consecutive periods of segregation, separation and confinement. The legislative scheme thus leaves open the possibility that young people may be subject to prolonged periods of solitary confinement.

Similar types of isolation are provided for in adult prisons under the *Crimes (Administration of Sentences) Act 1999* (NSW) including:

- 'Segregation', which is used to protect the personal safety of another person, the security of a correctional centre, or the good order and discipline within a correctional centre.<sup>33</sup>
- 'Confinement', which is used as a form of punishment for misbehaviour.<sup>34</sup>

In practice, the use of these powers can amount to solitary confinement. It is our position, in line with international law, that solitary confinement should be prohibited for all children and young people and for adults with disability.<sup>35</sup> DRC Recommendation 8.3 is that isolation amounting to solitary confinement be prohibited in youth detention.<sup>36</sup> For the purpose of the proposed framework, we recommend that confinement and segregation be prohibited for all people with disability. In the absence of a legislative definition of 'solitary confinement', we recommend that

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<sup>30</sup> *Children (Detention Centres) Act 1987* (NSW), s 19.

<sup>31</sup> *Ibid* s 16.

<sup>32</sup> *Ibid* s 21.

<sup>33</sup> *Crimes (Administration of Sentences) Act 1999* (NSW), s 10

<sup>34</sup> *Ibid* s 53

<sup>35</sup> United Nations General Assembly, Rules for the Protection of Juveniles Deprived of their Liberty (UN Doc GA/RES/45/113, 14 December 1990) ('Havana Rules') 8 [67].; see also Committee on the Rights of the Child General comment No. 24 (2019) on children's rights in the child justice system (UN Doc CRC/C/GC/24, 18 September 2019) 95(h); see also Committee Against Torture Concluding observations on the sixth periodic report of Australia (CAT/C/AUS/CO/6) 32(g).

<sup>36</sup> *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (Final Report – Executive Summary, September 2023) 270.

confinement and segregation, both of which may constitute solitary confinement, should be prohibited.

The United Nations Committee Against Torture has repeatedly called for the Australian government to prohibit the use of solitary confinement on children and people with disability, stating that ‘solitary confinement should be prohibited in the case of prisoners with intellectual or psychosocial or physical disabilities when their conditions would be exacerbated by such measures.’<sup>37</sup> It has voiced concern about Australia’s ‘continued use of prolonged and indefinite solitary confinement, which disproportionately affects Indigenous peoples and inmates with intellectual or psychosocial disabilities’.<sup>38</sup>

The NSW Inspector of Custodial Services has found that confinement is the most prevalent punishment in youth justice detention centres in NSW, despite ‘there being no evidence that supports the use of confinement to effect positive behavioural change’.<sup>39</sup> Adversely, it is clear that solitary confinement has a profound impact on health and wellbeing and that children and young people are particularly susceptible.<sup>40</sup> The prevalence of the use of confinement and the severe harm caused by isolation, particularly on people with cognitive disability, makes a complete prohibition under the proposed framework necessary.

#### **Recommendation 4**

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*Confinement and segregation be prohibited practices for the youth justice system and prison justice settings.*

We recommend considering whether the Senior Practitioner’s role should be expanded to include hearing complaints and conducting investigations within the justice setting. The lack of suitable complaint mechanisms for people with disability, particularly in relation to treatment in prison and detention centres, is raised throughout the DRC’s Final Report.<sup>41</sup> The Report refers to the concern of Committee on the Rights of Persons with Disability about the lack of safe and accessible channels for making complaints in relation to abuse of First Nations persons with disability in prisons.<sup>42</sup> Further, the Report notes the Australian Anti-Corruption Commission Committee’s finding that people with disability have distinctive challenges when making complaints about police misconduct.<sup>43</sup> Expanding the role of the Senior Practitioner to provide

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<sup>37</sup> Committee Against Torture Concluding observations on the sixth periodic report of Australia (CAT/C/AUS/CO/6) 32(g).

<sup>38</sup> Committee Against Torture Concluding observations on the sixth periodic report of Australia (CAT/C/AUS/CO/6) 31.

<sup>39</sup> New South Wales Inspector of Custodial Services, *Use of force, separation, segregation and confinement in NSW juvenile justice centres* (Report, November -2018) 16 <<https://inspectorcustodial.nsw.gov.au/documents/inspection-reports/use-of-force-separation-segregation-and-confinement-in-nsw-juvenile-justice-centres.pdf>>.

<sup>40</sup> Australian Human Rights Commission, *Follow Up Procedures to Australia's Sixth Periodic Review Submission to the Committee Against Torture* (15 September 2023) 77;

<sup>41</sup> *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (Research report – Police responses to people with disability, October 2021) 95; 105.

<sup>42</sup> *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (Research report – Police responses to people with disability, October 2021) 95.

<sup>43</sup> *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability* (Research report – Police responses to people with disability, October 2021) 105.

people with disability in the justice setting with a disability-focused complaints mechanism could address some of these concerns.

We endorse the comments made in the DRC Final Report<sup>44</sup> and referred to in the Consultation Paper,<sup>45</sup> suggesting that states and territories should consider extending a legislated Senior Practitioner framework into justice settings after an initial period of implementation and evaluation in the disability service provision setting. We suggest that a statutory review period be provided for in legislation, so that this evaluation and extension is not overlooked in the future and can be considered within a defined period.

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### **Recommendation 5**

*The Senior Practitioner's powers with respect to justice system settings should include complaint handling and investigation functions and powers.*

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### **Recommendation 6**

*A statutory review period should be provided for in any legislative framework, so that the evaluation and potential extension of the full statutory regime to justice system settings is considered within a defined period.*

## **2.4 Out-of-home care setting**

We recommend that the proposed legislative framework cover the out-of-home care ('OOHC') setting.

We submit that the framework should apply equally to the OOHC setting as a discrete setting, rather than only to the extent that the OOHC setting overlaps with the disability service provision setting. In this regard, we consider that the legislation should provide that the use of restrictive practices on children and young people with disability in OOHC should be governed by the principles recommended by DRC Recommendation 6.35(b). We would also support a legislated requirement for government agencies in the OOHC setting to provide an annual report to the Senior Practitioner on their, and their contractors', compliance with the principles in DRC Recommendation 6.35(b).

Although DRC Recommendation 6.35 did not specifically include OOHC as a setting to which restrictive practices legislation should apply, we consider that the OOHC setting should be included for the following reasons.

Firstly, the OOHC setting is closely and inextricably connected to each of the settings included in DRC Recommendation 6.35 – namely, disability, health, education and justice – and children and young people with a disability in OOHC will inevitably be affected by one (and likely more) of these settings.

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<sup>44</sup> DRC Final Report, Volume 6, p. 512.

<sup>45</sup> Consultation Paper, p. 19.



Secondly, extension of the legislative framework to the OOHC setting would provide an additional layer of protection to an acutely vulnerable cohort – namely, children and young people with a disability in OOHC. Restrictive practices have a disproportionate impact on children with disability, and Aboriginal children with disability, both of whom are over-represented in the OOHC system.<sup>46</sup> In this regard, it is important to note that existing policies which regulate the use of restrictive practices in OOHC on NDIS participants (set out on page 19 of the Discussion Paper) are designed to enable and authorise the use of restrictive practices and, unlike the framework currently under consideration, do not have the overarching and express objective of reducing and where possible eliminating the use of restrictive practices.

Thirdly, legislative coverage and the extension of an empowered and independent Senior Practitioner model to the OOHC setting would provide a much-needed layer of oversight and monitoring of the use of restrictive practices in the OOHC setting. In this regard, we endorse the comments made in the DRC Final Report<sup>47</sup> and referred to in the Consultation Paper,<sup>48</sup> suggesting that states and territories should consider extending a legislated Senior Practitioner framework into the OOHC setting after an initial period of implementation and evaluation in the disability service provision setting. We suggest that a statutory review period be provided for in legislation, so that this evaluation and extension is not overlooked in the future and can be considered within a defined period.

Finally, the requirements for accreditation as a designated agency to provide statutory OOHC with the Office of the Children’s Guardian (‘OCG’) – namely, submission of the behaviour support policy, psychotropic medication policy and procedure for use of physical restraint – are insufficient and inadequate and are no substitute for a detailed and targeted legislative framework regulating the use of restrictive practices. The proposed framework would therefore not only enhance visibility over the OOHC setting but promote consistency and improve practice across OOHC service providers accredited by the OCG.

Given the particular vulnerabilities of children and young people with disability in OOHC, we suggest that all restrictive practices at Appendix B to the Consultation Paper be prohibited practices for the OOHC system setting.

### ***Recommendation 7***

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*The restrictive practices legislative framework should cover the out-of-home care setting as a discrete setting. The legislation should provide that the use of restrictive practices on children and young people with disability in out-of-home care should be governed by the principles recommended by DRC Recommendation 6.35(b).*

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<sup>46</sup> On the over-representation of children with disability in OOHC, see, eg, NSW Government, Pathways of Care Longitudinal Study: Outcomes of Children and Young People in Out-of-Home Care, Research Report 6: *Literature Review: Factors Influencing the Outcomes of Children and Young People in Out-of-Home Care* (June 2018), pp. 31-33. Available here: <https://apo.org.au/sites/default/files/resource-files/2018-07/apo-nid314021.pdf>. On the over-representation of Aboriginal children with disability in OOHC and issues with recording and collection of data, see, eg, Professor Amy Conley Wright and Dr Susan Collings, The University of Sydney Research Centre for Children and Families (28 February 2023), Slide 4. Available here: [https://dcj.nsw.gov.au/documents/about-us/facsiar/research-seminars/past-seminars/2023/Conley\\_Wright-and-Collings-Presentation.pdf](https://dcj.nsw.gov.au/documents/about-us/facsiar/research-seminars/past-seminars/2023/Conley_Wright-and-Collings-Presentation.pdf).

<sup>47</sup> DRC Final Report, Volume 6, p. 512.

<sup>48</sup> Consultation Paper, p. 19.

**Recommendation 8**

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*A statutory review period should be provided for in any legislative framework, so that the evaluation and potential extension of the full statutory regime to the out-of-home care system is considered within a defined period.*

**Recommendation 9**

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*The practices at Appendix B to the Consultation Paper all be prohibited practices for the out-of-home care setting.*