

**Submission on violence prevention and restrictive practices responding to
National Disability Insurance Scheme: Code of Conduct Discussion Paper**

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Submission by

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Key Recommendation

The Draft National Disability Insurance Scheme Code of Conduct must engage with issues pertaining to the administration and use of restrictive practices, and explicitly address the potential of restrictive practices to be abused by NDIS providers, with the ultimate aim of eliminating the use of restrictive practices.

1. Executive Summary

- **Restrictive practices are an abuse of human rights, a form of violence and a grave injustice.**
- Under the National Disability Insurance Scheme Quality and Safeguards Framework ('the Framework'), the National Disability Insurance Commission ('the Commission') is responsible for **reducing and ultimately eliminating the use of restrictive practices.**
- Currently, the Draft National Disability Insurance Scheme Code of Conduct ('Draft Code') **does not explicitly address restrictive practices.**
- We recommend changes to the Draft Code which will enhance the Commission's role in preventing and redressing instances of restrictive practices against people with disability.
- These recommendations include:
 - That the Draft Code's obligations explicitly extend to NDIS providers **eliminating restrictive practices.**
 - That the Draft Code's obligations explicitly extend to NDIS providers **redressing past instances of restrictive practices.**
 - That the Draft Code's obligations explicitly extend to NDIS providers **reforming their organisational cultures and practices** to remove systemic and routine use of restrictive practices.
- We recommend that there be **greater guidance provided on the various regulatory actions** that can be ordered by the Commission so as to ensure their use reflects the grave harms and injustices of using restrictive practices.

2. The Expectations Placed on the Draft Code: Eliminating Restrictive Practices

As noted in the *National Disability Insurance Scheme – Code of Conduct: Discussion Paper* (‘the Discussion Paper’), there are significant expectations placed on NDIS providers through the Draft Code, including an obligation to allow participants to live free from abuse, violence neglect and exploitation. This submission has been written to address a **clear gap** in the Draft Code to meet this obligation: the **lack of engagement with issues pertaining to the administration and use of restrictive practices by NDIS providers**. Our submission is focused on the role of the Draft Code in **eliminating restrictive practices**, in line with the NDIS Quality and Safeguards Commission role in monitoring the use of restrictive practices with a view to ‘reducing and eliminating these practices’ (Discussion Paper, 6).

We approach **restrictive practices as an abuse of the human rights of people with disability and as a form of institutional violence**. There is an emerging international view that restrictive practices in the form of **mechanical and chemical restraint constitute torture and ill-treatment** and hence are at odds with Australia’s prevention of torture obligations under international human rights law (see for example, Méndez 2013; Nowak 2008). Pursuant to international law, torture (and ill treatment) is absolutely non-permissible under any circumstances. This means that where restrictive practices constitute torture and ill-treatment they must be prohibited and hence the **Commission must take steps to immediately eliminate torture and ill-treatment** by reason of the use of these forms of restrictive practices, including through the Draft Code. Simply taking an approach of gradual reduction of these forms of restrictive practices is not in line with international law on torture. While, ideally *all* restrictive practices should be immediately eliminated, it may be that there are forms of restriction that are not torture or ill-treatment which should at the very minimum be eliminated progressively.

We consider the use of restrictive practices as harmful and, to the extent that their use generally goes unpunished and reflects a systemic and routine part of some service provision, as **reducing the general levels of safety in disability services experienced by all service users**. Thus, eliminating restrictive practices and redressing past instances of restrictive practices (even historical instances) is relevant to current service provision generally.

We note that the prevention of violence is explicitly stated in Obligation 2 of the Draft Code, as well as s 4(6) of the *National Disability Insurance Scheme Act 2013* (Cth). As forms of violence, we do not support the *gradual* reduction in the use of restrictive practices. Rather, like any other form of violence which is not tolerated in society (let alone in tax-funded services), we support the

immediate elimination of restrictive practices and the **use of the Draft Code to stop NDIS providers from continuing to use restrictive practices.**

We also view the use of **restrictive practices as constituting a grave injustice**, both at the level of individuals who are subjected to specific instances of restrictive practices and at the systemic level by reason of the longstanding, widespread and largely state-sanctioned nature of these practices. As such, we have made recommendations that are focused on how the Draft Code can both eliminate *and* remedy the injustices of restrictive practices both individually and systemically.

In their submission to the 2015 Senate Inquiry, the Australian Cross Disability Alliance (Frohman and Sands 2015) proposed a '**transitional justice**' approach to disability institutional violence. This approach recognises the systematic and deeply entrenched nature of these practices and **requires responses at individual, organisational and system levels**. In responding to instances of disability institutional violence, services should have in place a clear process that can not only address the needs of the individual survivor of the violence, but prompt organisational-wide processes for learning from the incidents in order to reform organisational culture and practice to ensure a safer and more just service for current and future service recipients. Another aspect of a transitional justice response is **addressing historical and pre-NDIS injustices** including for the purpose of addressing any enduring safety concerns that endure in the organisational culture and practices. While not all instances of institutional violence, including restrictive practices, will necessarily relate to current service recipients, it is vital that the Draft Code place obligations on **services to respond effectively and systematically to all instances of institutional violence**, regardless of currency. The Draft Code can address the injustice of restrictive practices through itself serving to punish services who engage in these practices via breach of Obligation 2, as well as through placing obligations on NDIS providers to:

- **constructively engage in legal and other processes** for redressing the use of restrictive practices,
- **redressing historical injustices** of restrictive practices which may precede the NDIS and may be decades old, and
- **systematically reviewing organisational practice and culture** after each instance of restrictive practice.

Thus, we see the **Draft Code as key means of supporting the Commission's role in eliminating the use of restrictive practices**. Through the Draft Code's deterrent and punitive effects NDIS services have very serious economic and legal reasons to eliminate restrictive practices, particularly in a

context where the current lack of legal oversight means there are multiple incentives to utilising these practices in a routine manner and at an organisational (and, indeed, systems/industry) level.

Yet, while the introduction of the NDIS and the safeguarding framework might provide new possibilities for addressing institutional violence, including restrictive practices, we are also concerned that the introduction of the NDIS and the shift to increased marketisation and privatisation of disability services might **present counter-currents for the increased use of restrictive practices**. This is by reason of concerns which have already been expressed by advocates and scholars such as profit disincentives to take on ‘difficult’ service recipients or to support them in a constructive manner, and a workforce inexperienced in working with people with disability, unfamiliar with human rights and unfamiliar with the full scope of violence against people with disability (see, eg, Churchill, Sotiri, and Rowe 2017; Collings, Dew, and Dowse 2016; Dowse, Wiese, Dew, Smith, Collings, and Didi 2016; Simpson, 2013; Soldatic, van Toorn, Dowse, and Muir 2014). These concerns heighten the need for *explicit* reference to restrictive practices in the Draft Code .

3. Government has Prioritised the Framework as a Violence Prevention Mechanism

Our submissions on the use of the Draft Code to eliminate restrictive practices are made in light of Australian Government representations rejecting a Royal Commission into Disability Institutional Violence contrary to a key recommendation made in the Senate Community Affairs References Committee Inquiry into violence, abuse and neglect against people with disability in institutional and residential settings, including the gender and age related dimensions, and the particular situation of Aboriginal and Torres Strait Islander people with disability, and culturally and linguistically diverse people with disability (‘Senate Inquiry’). **On multiple occasions recently the Government has clearly stated that the Framework (of which the Draft Code is part (Discussion Paper, 1)) will be the key mechanism for addressing institutional violence** (see, for example, Branley 2017).

3.1 Restrictive Practices as a Form of Institutional Violence: The Evidence

3.1.1 The Senate Inquiry

The 2015 Final Report of the Senate Inquiry found that ‘under the guise of “therapeutic treatment”, people with disability can be subjected to forcible actions that could be considered assault in any other context” (xxvi). The Committee dedicated Chapter Four of its Report to investigating disability service provider practices that would be seen in any other area of service as unlawful loss of personal rights or even as acts of violence. It focused in part on the use and abuse of restrictive practices and stated in its ‘Concluding committee view’ that it was ‘highly disturbed at the evidence

presented of restrictive practice. **Clearly, in many cases what is deemed to be a necessary therapeutic or personal safety intervention is in fact, assault and unlawful deprivation of liberty'** (115). Ultimately the Senate Inquiry identified **restrictive practices as one form of institutional violence**, and hence there is no reason to assume that the Government through its representations on the role of the Framework in institutional violence prevention intended to exclude institutional violence in the form of restrictive practices. We have drawn similar conclusions from our own research.

3.1.2 Research Findings of Dr Linda Steele, University of Technology Sydney

Focusing on an analysis of the legal doctrine around criminal and civil assault and the defences of consent (Steele 2014; Steele 2015; Steele 2016; Steele & Dowse 2016) and necessity (Steele 2016), Dr Steele's research has established that restrictive practices and other interventions applicable to people with disability (e.g. sterilisation) are forms of **'disability-specific lawful violence'**. This means that they are legally permissible only in relation to people with disability by reason of the denial of their legal capacity based on their mental incapacity, and that this denial of legal capacity provides a basis on which to override the autonomy of the individual and allow interventions without their own consent. Interventions are rendered lawful when done pursuant to third party consent, the doctrine of necessity or specific legislative schemes such as guardianship and civil mental health laws. The Senate Inquiry acknowledged the phenomenon of lawful violence and found that these disability-specific interventions would be unlawful violence in any other circumstances. Dr Steele has argued that **the current lawfulness of this violence prevents the actions from being understood as legal wrongs and hence denies both the violence itself and legally actionable harms and injustice.**

3.1.3 Research Findings of Dr Claire Spivakovsky, Monash University

Focusing on the State of Victoria, Dr Spivakovsky's research has shown that in addition to restrictive practices constituting a form of 'lawful' violence that is on par with a term of imprisonment (Spivakovsky 2014a, 2014b), **restrictive practices are often misused by disability service providers.** Indeed, Dr Spivakovsky's research shows how some service providers:

- inappropriately extend the use of restrictive practices in order to manage their perceived organisational risk to reputation (Spivakovsky, 2017),
- inappropriately use PRN medication (i.e. chemical restraints that are only allowed to be administered 'as and when required') in order to avoid the paperwork associated with having to respond to a potential incident (Spivakovsky, 2016), and

- inappropriately apply restrictive practices to people with disability under claims of workers' rights and occupational health and safety (Spivakovsky, 2017).

In her 2016 Consultation with key stakeholders in disability law, policy and practice, Dr Spivakovsky found that **stakeholders are concerned that these known problems with the misuse of restrictive practices will be exacerbated as many new service providers enter the disability sector under the market-driven NDIA model** (Spivakovsky 2016).

4. Key Areas of Concern

We have a range of concerns about the ability of the NDIS to address all forms of institutional violence against all people with disability in all institutional settings. We also have concerns about its ability to address historical injustices preceding the NDIS. However, with these strong reservations in mind, and to the extent that the Government remains committed to the Framework being the key strategy for addressing disability institutional violence, we have constructively engaged with how the Draft Code can be enhanced in its ability to eliminate restrictive practices as one form of institutional disability violence.

The Draft Code is vital in setting behaviour standards and providing sanctions for breach of those standards. We support the focus in the Draft Code on the *active prevention* of violence (Obligation 3). Yet, there are two ways in which Obligation 3 and the Draft Code as a whole do not address restrictive practices to the extent that they do not explicitly require NDIS providers to:

- explicitly eliminate restrictive practices, and
- respond to and remedy past instances of restrictive practices.

Conclusions and Key Recommendation

The evidence shows that restrictive practices can constitute violence and a breach of people with disability's human rights. It also shows that service providers struggle to identify when they should apply restrictive practices, under what circumstances, and for what length of time, and that this leads to the further abuse of people with disability. As such:

The Draft Code must engage with issues pertaining to the administration and use of restrictive practices, and explicitly address their potential to be abused by NDIS providers.

5 The Draft Code: Recommendations for Eliminating the Use of Restrictive Practices

We offer the following recommendations to assist the drafting party of the Code of Conduct to ensure that the administration and use of restrictive practices is explicitly addressed in the final version of the Code, and that the final Code of Conduct supports the Commission's role in achieving the elimination of restrictive practices:

5.1 Obligation 2: violence prevention

Obligation 2 is the key obligation relating to the prevention of violence in the form of restrictive practices. However, there are key changes that are necessary in order to enhance the capacity of the Draft Code to be used to eliminate the use of restrictive practices and ensure justice for those who have experienced the use of restrictive practices.

An additional two bullet points under 'The obligation includes the following expectations' should be inserted which state:

- 'NDIS providers and staff will cease use of restrictive practices.'
- 'NDIS providers and staff will cooperate with requests by service recipients and their lawyers/advocates pertaining to legal and other processes relating to restrictive practices.'

In the Draft Code's discussion of the Senate Inquiry under this obligation, the explanation for the obligation to actively prevent all forms of violence, exploitation, neglect and abuse should include explicit mention of the Senate Committee's Finding that one of the key forms of violence people with disability experience is the use of restrictive practices.

The Draft Code should include a scenario of a service provider or a worker inappropriately applying restrictive interventions. This scenario can be included in addition to the scenarios already provided, or in replacement of one.

Additional to changes to obligation 2, we propose changes to other obligations of the Draft Code which intersect with restrictive practices.

5.2 Obligation 1: Self determination

An additional bulletpoint under 'The obligation includes the following expectations' should be inserted which states: 'Eliminate the use of restrictive practices because these inherently limit the freedom of expression, self-determination and decision-making of service recipients through.'

5.3 Obligation 3: Honesty and transparency

An additional bulletpoint under 'The obligation includes the following expectations' should be inserted which states: 'NDIS providers are to provide to service recipients access to all documentation that the service has generated or otherwise holds on them in order for service recipients to access justice relating to restrictive practices.'

This is relevant to complaints under the Code itself (12-13) – any complaints process that a service has and the ultimately effectiveness of making complaints will benefit from the service recipients having access to all information about them held by the service – the ultimate success of the Code relies upon access to this information.

5.4 Obligation 4: Safe and ethical supports

An additional bulletpoint under 'The obligation includes the following expectations' should be inserted which states: 'NDIS providers will regularly train staff on human rights and on all forms of violence against people with disability (including restrictive practices), as well as positive behaviour support practices.'

5.5 Obligation 5: Reporting

An additional bulletpoint under 'The obligation includes the following expectations' should be inserted which states: 'NDIS providers are to encourage staff to report to the Commission all instances of use of restrictive practice, and to make clear that staff will not be subject to any repercussions for so reporting.'

5.6 Obligation 8: Record keeping

An additional bulletpoint under 'The obligation includes the following expectations' should be inserted which states: 'NDIS providers are to have record keeping processes and practices in place concerning all instances of restrictive practices, including clearly documenting reasons for their use and identify all staff members involved in the decision making, administering and monitoring of these practices. These records should be easily accessible and readily available on request of service recipients and their lawyers/advocates.'

6 Additional Considerations: Regulatory Actions

We note that there is little guidance on the regulatory actions and the thresholds for the use of these (as per flowchart on 36). We note the point made by Australian Cross Disability Alliance in its submission to the Senate Inquiry that institutional violence is typically ‘conceptualised, downplayed and “detoxified” as “abuse” or “neglect” or “service incidents,” “administrative infringements” or a “workplace issue to be addressed”’ (Frohman & Sands 2015, 19). We recommend that there be greater guidance provided on the various regulatory actions that can be ordered by the Commission so as to ensure their use reflects the grave harms and injustices of using restrictive practices.

There should also be regulatory action options for ensuring services engage in organisation-wide review, particularly given the systemic nature of restrictive practices.

7 References

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