

**T A S M A N I A**  
**LAW REFORM**  
**INSTITUTE**

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Attn: Maryanne Lewis

By email: [disabilityinclusionbill@dpac.tas.gov.au](mailto:disabilityinclusionbill@dpac.tas.gov.au)  
18 September 2023

To whom it may concern,

**Re: Feedback on the Disability Inclusion Bill 2023 (Tas)**

Thank you for the opportunity to comment on this Bill. This submission was prepared for the Tasmania Law Reform Institute (TLRI) by Dr Yvette Maker, Senior Lecturer in Law at the University of Tasmania. It draws on Dr Maker's research on the design of human rights-compliant regulation of restrictive practices in disability and mental health care settings both generally, and specifically in relation to women.<sup>1</sup> Dr Maker is a member of the Board of the TLRI.

The TLRI supports the objects and principles of the Act on the basis that they clearly establish the importance of the protection, realisation and promotion of the human rights of people with disability, and the responsibility of the state and the community to contribute to these goals.

The TLRI considers that the inclusion or amendment of some provisions could further strengthen the Bill's alignment with human rights and inclusion principles in relation to two matters:

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<sup>1</sup> Yvette Maker, 'Beyond Restraint: Gender-Sensitive Regulation of the Control of Women's Behaviour in Australian Mental Health and Disability Services' in Bernadette McSherry and Yvette Maker (eds), *Restrictive Practices in Health Care and Disability Settings: Legal, Policy and Practical Responses* (Routledge, 2021) 91 ('Beyond Restraint'); Yvette Maker, 'Ending Seclusion and Restraint Use in Victoria's Mental Health Services: The Implications for Women of the Royal Commission's Recommendations' (2022) 47(2) *Alternative Law Journal* 150 ('Ending Seclusion and Restraint Use in Victoria's Mental Health Services'); Bernadette McSherry and Yvette Maker, *Restrictive Practices in Health Care and Disability Settings: Legal, Policy and Practical Responses* (Routledge, 2021); Yvette Maker and Bernadette McSherry, 'Regulating Restraint Use in Mental Health and Aged Care Settings: Lessons from the Oakden Scandal' (2019) 44(1) *Alternative Law Journal* 29.

- system-level measures to support the reduction and elimination of restrictive practices; and
- gender-sensitive approaches to the use, reduction and elimination of restrictive practices.

### **The Bill should include system-level reduction and elimination measures**

The TLRI supports the emphasis in Part 7 of the Bill on the reduction and elimination of the use of restrictive practices. This is consistent with a range of initiatives in disability, mental health and aged care sectors around Australia to address high rates of restrictive practices use and to support the implementation of alternatives on the basis that restrictive practices are inconsistent with human rights requirements and community expectations and can be dangerous, traumatising and counter-therapeutic.<sup>2</sup> The ‘inclusion principles’ in cl 8 of the Bill allude to the need to minimise and eliminate restrictive practices, especially principles stating that people with disability ‘have the same right as other members of Australian society to be respected for their worth and dignity and to live free from violence, abuse, neglect and exploitation’ and ‘have the right to receive... supports that are person-centred and trauma-informed’, although it is notable that the reduction and elimination of restrictive practices is not explicitly mentioned in the principles.

The TLRI supports the Bill’s inclusion of requirements to identify reduction and elimination strategies for individuals in positive behaviour support (‘PBS’) plans, namely, the requirement for PBS plans to include ‘strategies to reduce and eliminate the need for a restrictive practice to be used on the person’ and ‘the changes made to the environment of the person to reduce or eliminate the need for the restrictive practice to be used on the person’.<sup>3</sup> However, Spivakovsky and colleagues concluded in their recent research report for the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (‘Disability Royal Commission’) that the evidence base for PBS ‘comprises mixed or inconclusive evidence of success’ and suggests PBS plans are generally of poor quality.<sup>4</sup> These authors also conducted a review of evaluated approaches to reducing or eliminating restrictive practices and concluded that, while there is a growing evidence base to support the implementation of effective and safe alternatives to restrictive practices in some contexts, there is limited research on the implementation of alternatives in disability services settings.<sup>5</sup> In the TLRI’s view, this suggests

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<sup>2</sup> For example, Disability Reform Council, National Framework for Reducing and Eliminating the Use of Restrictive Practices in the Disability Service Sector (Commonwealth Department of Social Services, 2014) [https://www.dss.gov.au/sites/default/files/documents/04\\_2014/national\\_framework\\_restrictive\\_practices\\_0.pdf](https://www.dss.gov.au/sites/default/files/documents/04_2014/national_framework_restrictive_practices_0.pdf); Department of Social Services, *NDIS Quality and Safeguarding Framework* (Australian Government, 2016); Restrictive Practice Working Group, National Principles to Support the Goal of Eliminating Mechanical and Physical Restraint in Mental Health Services (Australian Health Ministers’ Advisory Council, 15 December 2016); Royal Commission into Aged Care Quality and Safety, *Neglect* (Interim Report, 2019) ch 8; Royal Commission into Aged Care Quality and Safety, *Care, Dignity and Respect* (Final Report, 2021) vol 2, 91-183; The Royal Australian and New Zealand College of Psychiatrists, *Minimising and, Where Possible, Eliminating the Use of Seclusion and Restraint* (Position Statement, 2021); Claire Spivakovsky, Linda Steele and Dinesh Wadiwel, *Restrictive Practices: A Pathway to Elimination* (Research Report, Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, July 2023); see also Bernadette McSherry and Yvette Maker, ‘Restrictive Practices: Options and Opportunities’ in B McSherry and Y Maker, *Restrictive Practices in Health Care and Disability Settings: Legal, Policy and Practical Responses* (Routledge, 2021) 3.

<sup>3</sup> cl 49(1)(c), (f).

<sup>4</sup> Spivakovsky et al (n 2) 231.

<sup>5</sup> *Ibid* ch 5.

that a reliance on individual PBS plans to reduce and eliminate restrictive practices use in Tasmania is unlikely to be effective, especially in the absence of broader strategies to develop and implement evidence-based strategies for implementing alternatives to restrictive practices.

In the TLRI's view, the Bill's inclusion of (a) penalty provisions for the unauthorised use of restrictive practices, (b) a mechanism for the Senior Practitioner to investigate, audit and monitor the use of restrictive practices and issue directions, and (c) a mechanism for individuals, services or independent persons to seek a review of authorisations to use restrictive practices offers some (albeit limited) avenues for redress for people whose rights are at risk, or are violated, through the use of restrictive practices. However, even *authorised* uses of restrictive practices can be harmful and traumatising for people with disability, with human rights experts, international bodies, and the Disability Royal Commission Research Report mentioned above characterising these practices as inherently incompatible with the human rights of people with disability, regardless of whether they are authorised by law.<sup>6</sup> On this basis, and drawing on research and initiatives taken in other sectors, the authors of the Disability Royal Commission Research Report proposed an eight-point 'pathway to elimination' of restrictive practices that included measures such as prohibiting restrictive practices, changing attitudes and norms, acknowledging and addressing historical injustice, deinstitutionalising and desegregating environments, recognising autonomy and leadership of people with disability and utilising trauma-informed support approaches.<sup>7</sup>

In light of these developments, it is the TLRI's view that a system-wide goal of the reduction, and eventual elimination, of the use of restrictive practices should be established. This would be consistent with the Bill's overall emphasis on the realisation of the full suite of human rights of people with disability.

Developments in other jurisdictions and sectors provide guidance on how the present Bill could more comprehensively promote such reduction and elimination of the use of restrictive practices in Tasmania. For example, the Royal Commission into Victoria's Mental Health System:

- characterised the reduction and elimination of seclusion and restraint as non-negotiable goals due to the human rights implications of these practices and their incompatibility with safe and high quality services for both consumers and staff;<sup>8</sup> and
- set a 10-year timeframe for elimination and proposed specific reduction targets for the intervening years.<sup>9</sup>

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<sup>6</sup> Human Rights Council, *Report of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, Juan E Mendez, 22nd sess, UN Doc A/HRC/22/53 (1 February 2013) para 63; CRPD Committee, Guidelines on Article 14 of the Convention on the Rights of Persons with Disabilities, 14th sess, September 2015, para 12 <https://www.ohchr.org/Documents/HRBodies/CRPD/.../GuidelinesOnArticle14.doc>; Human Rights Council, Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, 35th sess, UN Doc A/HRC/35/21 (28 January 2017) paras 65, 95; Spivakovsky et al (n 2).

<sup>7</sup> Spivakovsky et al (n 2) 241 (and see ch 6 generally).

<sup>8</sup> *Royal Commission into Victoria's Mental Health System* (Final Report, February 2021) vol. 4, 300.

<sup>9</sup> *Ibid*, 344-5.

The *Mental Health and Wellbeing Act 2022* (Vic) ('the Act'), which was developed in order to implement the Royal Commission's recommendations and came into force in 1 September 2023, specifies:

- that an objective of the Act is to provide for mental health services that, among other things, 'enable a reduction in the use of seclusion and restraint with the aim of eliminating its use within 10 years';<sup>10</sup>
- that service providers subject to the Act should aim to reduce and eventually eliminate the use of restrictive practices;<sup>11</sup> and
- that the functions of both the Health Secretary and the Chief Officer for Mental Health and Wellbeing include: 'to set targets to reduce and ultimately eliminate the use of restrictive interventions in the provision of mental health and wellbeing services' and 'to develop, monitor and report on appropriate measures to progressively reduce and ultimately eliminate the use of restrictive interventions' in these services.<sup>12</sup>

The TLRI recommends that:

- in order for the aspirations towards reduction and elimination of restrictive practices expressed in the Bill (and in other national statements) to be realised, the Bill's implementation should be supported by a clear timeframe and deadline for elimination and ambitious interim targets – which are subject to monitoring and reporting requirements – to ensure the goal is achieved;
- the inclusion principles in cl 8 should be amended to include reference to:
  - the goals of reduction and elimination of restrictive practices currently mentioned in Part 7; and
  - the harmful nature of restrictive practices and their incompatibility with the human rights of people with disability;
- provision be made for the Bill to be reviewed and amended in light of future recommendations of the Disability Royal Commission on the reduction and elimination of restrictive practices.

### **Regulation should be gender-sensitive**

It is the TLRI's view that the regulation of the use of restrictive practices needs to be gender-sensitive – that is, gender must be recognised as a relevant factor in decisions about the use of restrictive practices and the implementation of alternatives.

The possibility that gender matters in the provision of disability services, and service users' experiences of those services, is not comprehensively addressed in the design and regulation of disability services systems, including in relation to the use and regulation of restrictive practices. This is despite research literature on the use of restrictive practices in disability and mental health settings indicating that:

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<sup>10</sup> s 12(c)(ix)(B).

<sup>11</sup> s 125.

<sup>12</sup> ss 254(h)–(i), 261(1)(g)–(h).

- restrictive practices risk retraumatising women and girls who have previously been subject to trauma, including abuse and sexual violence;<sup>13</sup>
- women's and girls' needs and experiences may vary according to multiple, potentially intersecting, dimensions of difference including sexual orientation, ethnicity, language, religion, class, socioeconomic status, gender identity, disability or age, and there is a particularly high prevalence of experiences of violence or trauma among women with disabilities, Aboriginal and Torres Strait Islander women, women from migrant and refugee backgrounds, and people who identify as LGBTI;<sup>14</sup>
- service users are at considerable risk of experiencing or witnessing violence or abuse, including at the hands of staff, in disability services and mental health inpatient settings;<sup>15</sup>
- women's experiences of trauma and powerlessness can be exacerbated by gendered power asymmetries when male staff are involved in the application of restrictive practices;<sup>16</sup>
- gendered expectations and stereotypes may influence staff decisions about restrictive interventions. For example, several UK studies about restrictive practices use on women with disability have suggested that staff have expectations about appropriate emotional expression and behaviour for women, and views about the motivations behind women's behaviour (such as views that women are 'either manipulative or attention-seeking'<sup>17</sup>), which can influence decisions about the use of restraint;<sup>18</sup>

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<sup>13</sup> For example, Rebecca Fish and Eloise Culshaw, 'The Last Resort?: Staff and Client Perspectives on Physical Intervention' (2005) 9(2) *Journal of Intellectual Disabilities* 93; Rebecca Fish and Chris Hatton, 'Gendered Experiences of Physical Restraint on Locked Wards for Women' (2017) 32(6) *Disability & Society* 790; Ruth Gallop et al, 'The Experience of Hospitalization and Restraint of Women Who Have a History of Childhood Sexual Abuse' (1999) 20(4) *Health Care for Women International* 401; Mary E Johnson, 'Being Restrained: A Study of Power and Powerlessness' (1998) 19(3) *Issues in Mental Health Nursing* 191.

<sup>14</sup> Leanne Dowse et al, 'Mind the Gap: The Extent of Violence against Women with Disabilities in Australia' (2016) 51(3) *Australian Journal of Social Issues* 341; Senate Community Affairs References Committee (Australia), *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* (Report, November 2015); Stephanie Ortoleva and Hope Lewis, *Forgotten Sisters: A Report on Violence against Women with Disabilities: An Overview of Its Nature, Scope, Causes and Consequences (No 04-2012, Northeastern University School of Law, 2012)* 228; Phillip French, Julie Dardel and Sonya Price-Kelly, *Towards a National Policy Agenda about Abuse, Neglect & Exploitation of Persons with Cognitive Impairment (People with Disability Australia, 2009)* 158.

<sup>15</sup> Ravi K Thiara, Gill Hague and Audrey Mullender, 'Losing out on Both Counts: Disabled Women and Domestic Violence' (2011) 26(6) *Disability & Society* 757; Parliament and Victoria Family and Community Development Committee, *Inquiry into Abuse in Disability Services: Final Report* (Final Report, May 2016); Fiona Judd, Sue Armstrong and Jayashri Kulkarni, 'Gender-Sensitive Mental Health Care' (2009) 17(2) *Australasian Psychiatry* 105.

<sup>16</sup> Fish and Culshaw (n 13); Fish and Hatton (n 13); Gallop et al (n 13); Gwen Bonner et al, 'Trauma for All: A Pilot Study of the Subjective Experience of Physical Restraint for Mental Health Inpatients and Staff in the UK' (2002) 9(4) *Journal of Psychiatric and Mental Health Nursing* 465.

<sup>17</sup> Esther Wilcox, WM Finlay and Jane Edmonds, 'His Brain Is Totally Different: An Analysis of Care-Staff Explanations of Aggressive Challenging Behaviour and the Impact of Gendered Discourses' (2006) 45(1) *British Journal of Social Psychology* 197, 209.

<sup>18</sup> Wilcox et al (n 17); Fish and Hatton (n 13); for a review, see Yvette Maker, 'Beyond Restraint' (n 1) 93-95.

- ‘relational’ approaches to service provision, which emphasise good and trusting relationships, recognition and management of distress, and knowledge and understanding of service users, may be especially important in avoiding the use of restrictive practices on women and providing safe and therapeutic services for them;<sup>19</sup>
- there is a need for more research on the gender-specific needs and experiences of people with disability, including women and girls and trans and gender-diverse people, in the implementation of effective alternatives to restrictive practices.<sup>20</sup>

The TLRI supports the statement in the Bill’s ‘inclusion principles’ that acts or things done under the legislation are to be done, as far as practicable, in accordance with the principle that ‘the cultural or linguistic diversity (including Aboriginality), age, gender, sexual orientation and religious beliefs, of people with disability are to be taken into account’.<sup>21</sup> A similar diversity principle is found in the new *Mental Health and Wellbeing Act 2022* (Vic) but is accompanied by a separate ‘gender safety principle’ that identifies safety-specific issues such as those raised in the research summarised above. It states, at s 26, that:

*People receiving mental health and wellbeing services may have specific safety needs or concerns based on their gender. Consideration is therefore to be given to these needs and concerns and access is to be provided to services that—*

*(a) are safe; and*

*(b) are responsive to any current experience of family violence and trauma or any history of family violence and trauma; and*

*(c) recognise and respond to the ways gender dynamics may affect service delivery, treatment and recovery; and*

*(d) recognise and respond to the ways in which gender intersects with other types of discrimination and disadvantage.*

While such legislative principles have symbolic significance,<sup>22</sup> the TLRI observes Prof Penelope Weller’s view that principles constitute only ‘a weak response to Australia’s human rights obligations’ unless they are consistent with the powers found elsewhere in legislation.<sup>23</sup>

On this basis, the TLRI recommends that:

- The Bill should be amended to include a ‘gender safety principle’ that acknowledges, and requires consideration of, safety needs and concerns based on gender, including those relating to trauma and trauma history, gender dynamics that affect service delivery, and intersectional discrimination and disadvantage;

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<sup>19</sup> For example, Gill Aitken and Kate Noble, ‘Violence and Violation: Women and Secure Settings’ [2001] (68) *Feminist Review* 68; CG Long et al, ‘Effective Therapeutic Milieus in Secure Services for Women: The Service User Perspective’ (2012) 21(6) *Journal of Mental Health* 567; Georgie Parry-Crooke and Penny Stafford, *My Life: In Safe Hands* (Research Report, London Metropolitan University, 2009).

<sup>20</sup> See Yvette Maker, ‘Beyond Restraint’ (n 1) 91, 92-3, 111; Yvette Maker, ‘Ending Seclusion and Restraint Use in Victoria’s Mental Health Services’ (n 1) fn 13.

<sup>21</sup> cl 8(2)(d)

<sup>22</sup> Yvette Maker, ‘Beyond Restraint’ (n 1) 91.

<sup>23</sup> Penelope Weller, ‘The Contradictions of Gender: Women, Men and Violence in Mental Health Research-Policy, Law and Human Rights’ (2016) 25(1) *Griffith Law Review* 87,

- The Bill should be amended to require that individuals’ gender and trauma history be taken into consideration in planning and authorisation processes around restrictive practices set out in Part 7.<sup>24</sup> These processes should also involve consultation about, and consideration of, the gender of staff involved in applying any restrictive practices. The TLRI notes that similar practices are recommended in the Chief Civil Psychiatrist’s guidelines on restrictive practices use in Tasmanian mental health services.<sup>25</sup>
- The Bill should be amended to require the Senior Practitioner to apply an intersectional gender lens in all activities under Part 7 of the Bill.
- The Bill should be amended to require that data reporting, collection, monitoring and reporting on restrictive practices (provided for in several places in the Bill) should involve the disaggregation of data according to gender and other demographic characteristics. Such data is essential for understanding the experiences and needs of women and gender diverse consumers, among others, and will be valuable in assessing whether individual and systemic reduction and elimination efforts are adequately tailored to these groups.
- The Bill should be amended to ensure that a diversity of people with disability are represented on the Disability Inclusion Advisory Council, in keeping with the inclusion principle in cl 8 that refers to ‘the cultural or linguistic diversity (including Aboriginality), age, gender, sexual orientation and religious beliefs’ of people with disability.
- The Bill, or guidelines and action to implement the Bill (as appropriate), should make provision for processes, such as training and resourcing, to equip disability services to:
  - address the influence of gendered expectations and stereotypes on staff decisions about using restrictive practices;
  - understand the significance of the gender of people with disability and staff in relation to restrictive practices use and avoidance; and

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<sup>24</sup> Cathy Kezelman and Pam Stavropoulos, *Practice Guidelines for Treatment of Complex Trauma and Trauma Informed Care and Service Delivery* (Blue Knot Foundation, 2012); Weller (n 23); Juliet Watson et al, *Preventing Gender-based Violence in Mental Health Inpatient Units* (ANROWS, 2020).

<sup>25</sup> The guideline recognises the importance of gender safety and sensitivity in light of the high incidence of trauma and risk of restrictive practices ‘retrigger[ing] previous experiences of trauma in some people’, particularly where staff are predominantly male or female. It states that ‘services should ensure that staff demonstrate sensitivity to individual patient’s [sic] needs and wellbeing in carrying out such interventions, particularly with regard to gender’. It also recommends that patients’ preferences about the gender of staff involved in interventions should be sought. See Department of Health and Human Services (Tas) (DHHS), *Mechanical and Physical Restraint: Chief Civil Psychiatrist Clinical Guideline 10A* (Tasmanian Government, December 2021) <<https://www.health.tas.gov.au/publications/ccp-clinical-guideline-10a-mechanical-and-physical-restraint>>

- implement evidence-based alternatives to restrictive practices that are gender-sensitive, trauma-informed and consistent with contemporary best practice.

Kind regards,

A handwritten signature in blue ink that reads "J. Prichard". The signature is written in a cursive style with a checkmark-like flourish at the beginning.

Prof. Jeremy Prichard

Director