



**Department of Communities**  
**Consultation Paper**  
**Authorisation of Restrictive Practices**

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## Western Australia's Individualised Services (WAiS)

Western Australia's Individualised Services (WAiS) is a member-based community organisation working in partnership with people, families, service providers and government agencies to promote and advance individualised, self-directed supports and services for people living with disability, including psychosocial disability.

Since our inception in 2010, we have evolved to become thought leaders in this space, providing comprehensive, intentional support with integrity, passion and authenticity at our core. By leveraging our extensive local, state, and international network, we seek to lead, influence, innovate and inform to create meaningful and lasting change, supporting people to build capacity and live their lives on their own terms.

## Introduction

Western Australia's Individualised Services (WAiS) would like to thank the Western Australian Department of Communities (**Department of Communities**) for the opportunity to provide a submission regarding the restrictive practice legislation currently being proposed by the Western Australian government (**WA Restrictive Practice Legislation**).

We provide this submission in response to the Department of Communities, 'Consultation Paper: Authorisation of restrictive practices in disability services in Western Australia'<sup>1</sup> (**Consultation Paper**)

## WAIS Key Recommendations

1. The key objective of the WA Restrictive Practice Legislation should be to **uphold the rights of people** with disability and to promote the reduction and elimination of restrictive practices.
2. The legislation should include express provision that:
  - a person with a disability must be presumed to have decision making capacity;
  - people with disabilities have the same human rights as members of society and should be empowered to exercise their rights; and
  - the regulation of restrictive practice must be consistent with a person's human rights.
3. The WA Restrictive Practice Legislation must prioritise the right for a person with a disability to make a restrictive practice consent decision through supported decision-making process over a right for their guardian to make a Restrictive practice consent decision for them.
4. A person with a disability must have the right to make a final decision about restrictive practice consent, through a supported decision – making process, regardless of deemed capacity and/or guardianship in place.
5. In the WA Restrictive Practice Legislation, Implementing Providers have an obligation to undertake a supported decision-making process with people with disability in relation to

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<sup>1</sup> Dated July 2021

restrictive practice consent, and provide evidence that such supported decision making has occurred.

6. The WA Restrictive Practice Legislation, and any related guidance / information should be drafted in active, transparent and accessible language – with definitions to explain key concepts and terms.
7. The WA Restrictive Practice Legislation, policy and guidance materials need to be provided in formats accessible for all people with disabilities, including Easy Read, video, braille and audio recording.
8. There needs to be ongoing capacity building - including training, guidance and provision of information - for people using the WA Restrictive Practice Legislation so they may understand the rights and obligations provided in it.
9. People with disability must be able to make decisions about restrictive practice consent, including final authorisation for a restrictive practice, through a supported decision - making process. The level of decision making must be local.
10. Restrictive practice consent and restrictive practice supported decision-making need to be expressly required and drafted into the WA Restrictive Practice Legislation.
11. People with disability have the right to choose a Decision Supporter to assist them in a supported decision-making process. The Decision Supporter does not have to be legally appointed by the person with a disability; does not have to be their current guardian; and could be family, friends and /or an informal support.
12. The WA Restrictive Practices Legislation should apply to both children and adults with disability.
13. The WA Restrictive Practice Legislation should not regulate the use of restrictive practices by families or informal carers. The legislation should provide restrictive practices safeguards for people with disabilities across all environments.
14. The definition of 'restrictive practice' in the WA Restrictive Practice Legislation should be the same as in the National Disability Insurance Scheme (Restrictive Practices and Behaviour Support) Rules 2018 (Cth).
15. The drafting in the WA Restrictive Practice Legislation should expressly provide for how the legislation operates in relation to the: National Disability Insurance Scheme (Restrictive Practices and Behaviour Support) Rules 2018 (Cth); and the National Disability Insurance Scheme Act 2013 (Cth).
16. The restrictive practices that should not be authorised and should always be prohibited are high – risk physical restraints; physical restraint / punitive practices; seclusion of children; responses to behaviour that does not cause harm to the person or others; practices used as punishment for the convenience of others; practices used to address inadequate levels of staffing, equipment or facilities.

17. The restrictive practices that should be exempt from the WA restrictive practices authorisation process are: restraint for treatment purposes; therapeutic or safety devices; physical restraints that are reflex action of reasonable physical force and duration intended to guide or direct a person in the interests of the person's safety where there is an imminent risk of harm; practice under a court order.
18. The criteria used to make authorisation decisions needs to be in accordance with the restrictive practice legislation of other Australian states and territories, the NDIS Rules, and the National and Western Australian Restrictive Practice Frameworks.
19. The evidence needed to demonstrate that the authorisation has been completed should be the BSP; quality assurance outcome summary report; and documentation of the supported decision-making process and outcome.
20. In relation to settings or locations, restrictive practice authorisation should be required whenever a restrictive practice is proposed to be used with a person with a disability, no matter what the setting or location. For example, education, health, justice, child protection etc.
21. Safeguards for people with disabilities in the legislation should include:
  - processes to appeal or review authorisation decisions;
  - mechanism in the legislation for the raising and addressing of concerns and complaints in relation to restrictive practices;
  - notice, reporting and record keeping obligations for people / agencies carrying out restrictive practices;
  - specific conditions in relation to seclusion; and
  - enforcement actions and penalties, including express provision that the Criminal Code applies to offences of the legislation.
22. In line with the other Australian states and territories, the legislation may include protection from liability for the relevant person/agency. The protection from liability section needs to be drafted so that liability for the misuse/ abuse of restrictive practices remains firmly with the relevant person/agency – with no limitation on applicable criminal penalty and any right of a person with a disability to a civil claim.

Full discussion of these recommendations is provided in the sections below.

## Why is it important get the authorisation of restrictive practice legislation right?

### To ensure the rights and dignity of people with disability are upheld and protected

The Western Australian government has made a commitment to develop an authorisation process that upholds the human rights of people with disability.<sup>2</sup> These human rights are:

- provided in the United Nations Convention on the Rights of Persons with Disabilities (**UNCRPD**); and
- embedded in both federal and Western Australian legislation, policy, guidance and information regarding restrictive practices (**National Restrictive Practice Framework** and **WA Restrictive Practice Framework**, respectively).

These rights are enshrined in Australian law, and reinforced by the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability:<sup>3</sup>

*A fundamental principle of Australia's rule of law is that all adults, and to some extent minors, have a right to make decisions that affect their lives and to have those decisions respected.*

Pursuant to the UNCRPD, the National Disability Insurance Scheme Act 2013 (Cth) (**NDIS Act**) and the National Disability Insurance (Code of Conduct) Rules 2018 (Cth) (**Code of Conduct**), these human rights include:

- individual autonomy;<sup>4</sup>
- freedom of self – determination,<sup>5</sup> and to determine their own best interests<sup>6</sup>
- freedom of expression, and opinion;<sup>7</sup>
- freedom to make their own choices,<sup>8</sup> and exercise control in pursuit of their goals;<sup>9</sup> and
- right to engage as equal partners in decisions that will affect their lives, to the full extent of their capacity.<sup>10</sup>

The rights of people with disability to make decisions that will affect their lives, including decisions about restrictive practice, is embedded in the National Disability Insurance Scheme (NDIS) Quality and Safeguarding Framework (**NDIS Framework**), National Framework for Reducing and Eliminating the Use of Restrictive Practices in the Disability Service Sector (**National RP Framework**), which:

- start from a presumption that all people with disability have the capacity to make decisions and exercise choice and control;<sup>11</sup> and
- include informed consent and participation in decision making from the person with a disability.<sup>12</sup>

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<sup>2</sup> Consultation Paper, Item 4, pg 12

<sup>3</sup> Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, Issues Paper' (26 May 2020). 4.1

<sup>4</sup> CRPD Articles 3; 21

<sup>5</sup> Code of Conduct, s 5(2)

<sup>6</sup> NDIS Act, s 3; s 4(8)

<sup>7</sup> CRPD Articles 3; 21; Code of Conduct, s 5(2)

<sup>8</sup> CRPD Articles 3; 21

<sup>9</sup> NDIS Act, s 4(8)

<sup>10</sup> NDIS Act, s 3; s 4(8)

<sup>11</sup> NDIS Framework, pg 11; National Framework, pg 7

<sup>12</sup> NDIS Framework, pg 95; National Framework, pg 7;

Both the NDIS Framework and the National RP Framework have been endorsed by the Western Australian Government through the Western Australian Government Department of Communities, Authorisation of Restrictive Practices in Funded Disability Services Policy (**WA Authorisation Policy**).<sup>13</sup> The Department of Communities supports a principle that a person with a disability has the right to self-determination in the development of their behaviour support plan (**BSP**),<sup>14</sup> and assumes the capacity to make their own decisions about their lives in the context of making a specific decision at a specific time, with opportunity to express concern and change their minds.<sup>15</sup> The Department of Communities also recognises the UNCRPD and ‘fundamental human rights’ of people with disabilities,<sup>16</sup> which includes a right for people with disabilities to have choice and control about decisions that affect their lives, to communicate their needs and choices, and to have their decisions respected.<sup>17</sup>

**To ensure the authorisation process is based on contemporary, evidence-based practice – supported decision making – and, supports legal capacity as an alternative to guardianship**

What is supported decision making?

Supported decision making is a contemporary, evidenced-based practice, and a legitimate process of supporting people with decision making.<sup>18</sup>

As described by the Office of the United Nations High Commissioner for Human rights, supported decision making is “the process whereby a person with a disability is enabled to make and communicate decisions with respect to personal or legal matters.”<sup>19</sup>

With supported decision making, ‘the choice ultimately remains the decision of the person with a disability’.<sup>20</sup>

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<sup>13</sup> Authorisation Policy, pg 5

<sup>14</sup> Western Australian Government Department of Communities, ‘Positive Behaviour Support’ dated June 2021, pg 4

<sup>15</sup> Western Australian Government Department of Communities, ‘Supported Decision Making’ dated June 2021, pg 2; pg 3

<sup>16</sup> Government of Western Australia Department of Communities, ‘Consultation Paper: Authorisation of restrictive practices in disability services in Western Australia’ (dated July 2021), pg 14

<sup>17</sup> Government of Western Australia Department of Communities, ‘Consultation Paper: Authorisation of restrictive practices in disability services in Western Australia’ (dated July 2021), pg 1; Western Australian Government Department of Communities, ‘Supported Decision Making’ dated June 2021, pg 2

<sup>18</sup> See for example: Joanne Watson, ‘The right to supported decision making for people rarely heard’ (January 2016) PHD Thesis viewed August 2021 at <<https://dro.deakin.edu.au/eserv/DU:30083812/watson-theright-2016A.pdf>>; National Disability Services, ‘People with Disability and Supported Decision Making in the NDIS’, nd viewed August 2021 at <[https://www.nds.org.au/images/resources/People\\_with\\_Disability\\_and\\_SDM-Guide\\_for\\_NDIS\\_Providers\\_in\\_NSW.pdf](https://www.nds.org.au/images/resources/People_with_Disability_and_SDM-Guide_for_NDIS_Providers_in_NSW.pdf)>; Duffield, L., Koritsas, S., Watson, J., & Hagiliassis, N., ‘Decision-making support for people with cognitive disability: A guide for disability workers’ (2016); WAIIS, ‘Supported Decision Making’ (current as at 2021) viewed August 2021 at <https://waindividualisedservices.org.au/resources/supported-decision-making/>; See: United Nations Human Rights Office of the High Commissioner, ‘Committee on the Rights of Persons with Disabilities’, Item 2.69 (viewed August 2021) at <<https://www.ohchr.org/en/hrbodies/crpd/pages/crpdindex.aspx>>

<sup>19</sup> United Nations Human Rights Council, ‘Thematic Study by the Office of the United Nations High Commissioner for Human Rights on Enhancing Awareness and Understanding of the Convention on the Rights of Persons with Disabilities’ (January 2009) viewed August 2021 at <<http://www.un.org/disabilities/documents/reports/ohchr/A.HRC.10.48AEV.pdf>>

<sup>20</sup> Victorian Government Department of Human Services, ‘Supported Decision Making: A guide to supporting people with a disability to make their own decisions’ (January 2012)

Supported decision making practice is guided by four values:<sup>21</sup>

1. *Everyone has a right to make decisions and determine their own lives.*
2. *People with complex communication access needs can make decisions when they receive quality decision support.*
3. *Understanding, respecting and acting on a person's will and preferences is the foundation of quality decision support; and*
4. *When people with complex communication access needs and their supporters work collaboratively to engage in supported decision-making, it can transform their lives.*

With supported decision making, a person with a disability and the people who support them learn how to express, notice, understand and interpret the person's will and preferences in relation to their choices about their lives.<sup>22</sup> In supported decision making, people supporting the person with a disability:<sup>23</sup>

- assess and interpret non-verbal communication; and
- support the person to communicate their will and preferences.

As per the UNCRPD,<sup>24</sup> decision support should be established from social networks and community support - meaning the people supporting the person with a disability:<sup>25</sup>

- build the capacity of that person's community to understand their communication;
- help to build the support and communication networks for the person with a disability; and
- help develop the confidence and knowledge of the person and their supporters to engage in supported decision making.

In supported decision-making practice, there is a presumption that a person with a disability is communicating all the time and that these communications include preferences. These preferences can be built up into expressions of choice these into formal decisions.<sup>26</sup>

Why should the right to supported decision-making by a person with a disability be prioritised over a right for a guardian to make choices for them?

Historically in Australia, if a person with a disability was deemed to have impaired decision making capacity, meaning not of:

- sound mind, memory, understanding; and/or
- understanding and ability to assess information, risks and outcomes of a particular decision at a particular time,

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<sup>21</sup> WAiS Supported Decision Making Project 2021

<sup>22</sup> Joanne Watson, 'The right to supported decision making for people rarely heard' (January 2016) PHD Thesis viewed August 2021 at < <https://dro.deakin.edu.au/eserv/DU:30083812/watson-theright-2016A.pdf>>

<sup>23</sup> WAiS Supported Decision Making Project 2021

<sup>24</sup> Mental Health Australia, 'Supported Decision Making, Psychosocial Disability and the National Disability Insurance Scheme' (February 2016), pg 18; Citing: UNCRPD Article 19; United Nations Committee on the Rights of Persons with Disabilities, 'United Nations Convention on the Rights of Persons with Disabilities: General Comment No. 1, 2014, Article 12: Equal Recognition Before the Law' (May 2014)

<sup>25</sup> WAiS Supported Decision Making Project 2021

<sup>26</sup> S Beamer and M Brookes, 'Making Decisions: Best Practice and New Ideas for Supporting People with High Support Needs to Make Decisions' (Values into Action, London, 2001) in Jo Watson, Submission No 19 to the Victorian Law Reform Commission, Review of the Guardianship and Administration Act 1986, May 2010, 10

then that person could be subject to a substituted decision-making regime – including guardianship.<sup>27</sup>

However, as stated by the Australian Law Reform Commission:<sup>28</sup>

*‘Traditional’ guardianship laws have been described as ‘exceedingly paternalistic’, protecting the estate of the person under protection, and not promoting their autonomy, especially where ‘plenary’ forms were used involving a complete vesting of authority in another person.*

Pursuant to the UNCRPD, Australia has a responsibility to ensure that support for legal capacity is available for people with disabilities who need it.<sup>29</sup> However, when a person with a disability becomes subject to guardianship they lose recognition of their legal capacity.<sup>30</sup> This leads to a substantial risk that the person may lose their right to actually exercise their right to legal capacity.<sup>31</sup>

Legal capacity is an inalienable right available to people with disability, protected by the rule of law, through the UNCRPD.<sup>32</sup> For this reason the United Nations Committee on the Rights of Persons with Disabilities (**UN Disability Committee**), a body of independent experts that monitors the UNCRPD by States Parties (including Australia),<sup>33</sup> has stated the following about the harmful effects of substitute decision making in legal regimes – including guardianship - pertaining to people with disabilities:<sup>34</sup>

*Historically, persons with disabilities have been denied their right to legal capacity in many areas in a discriminatory manner under substitute decision-making regimes such as guardianship, conservatorship and mental health laws that permit forced treatment. These practices must be abolished in order to ensure that full legal capacity is restored to persons with disabilities on an equal basis with others.*<sup>35</sup>

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<sup>27</sup> Mental Health Australia, ‘Supported Decision Making, Psychosocial Disability and the National Disability Insurance Scheme’ (February 2016), pg 10

<sup>28</sup> Australian Government Australian Law Reform Commission, ‘Supported and substituted decision-making’ (2014) viewed August 2021 at <<https://www.alrc.gov.au/publication/equality-capacity-and-disability-in-commonwealth-laws-dp-81/2-conceptual-landscape-the-context-for-reform/supported-and-substituted-decision-making/>>

<sup>29</sup> Mental Health Australia, ‘Supported Decision Making, Psychosocial Disability and the National Disability Insurance Scheme’ (February 2016), pg 11; UNCRPD Article 12(3)

<sup>30</sup> Mental Health Australia, ‘Supported Decision Making, Psychosocial Disability and the National Disability Insurance Scheme’ (February 2016), pg 10

<sup>31</sup> Mental Health Australia, ‘Supported Decision Making, Psychosocial Disability and the National Disability Insurance Scheme’ (February 2016), pg 10; Committee on the Rights of Persons with Disabilities, General comment No.1 (2014), Eleventh Session, 31 March – 11 April 2014, pg 10; Citing: Australian Law Reform Commission, ‘Equality, Capacity and Disability in Commonwealth Laws’ (2014) available at <[http://www.alrc.gov.au/sites/default/files/pdfs/publications/whole\\_dp81.pdf](http://www.alrc.gov.au/sites/default/files/pdfs/publications/whole_dp81.pdf)>

<sup>32</sup> UNCRPD, Article 12; Australian Government Australian Law Reform Commission, ‘Equality, Capacity and Disability in Commonwealth Laws’, Item 2.17 (August 2014)

<sup>33</sup> See: United Nations Human Rights Office of the High Commissioner, ‘Committee on the Rights of Persons with Disabilities’, Item 2.60 (viewed August 2021) at <<https://www.ohchr.org/en/hrbodies/crpd/pages/crpdindex.aspx>>

<sup>34</sup> Committee on the Rights of Persons with Disabilities, General comment No.1 (2014), Eleventh Session, 31 March – 11 April 2014, pg 10; Citing: Australian Law Reform Commission, ‘Equality, Capacity and Disability in Commonwealth Laws’ (2014) available at <[http://www.alrc.gov.au/sites/default/files/pdfs/publications/whole\\_dp81.pdf](http://www.alrc.gov.au/sites/default/files/pdfs/publications/whole_dp81.pdf)>

The UN Disability Committee has expressed concern about the possibility of maintaining a regime in Australia of substitute decision-making and absence of detailed and viable framework for supported decision-making in the exercise of legal capacity.<sup>36</sup>

There is also concern from Australian legal advocates that guardianship orders are broader than necessary and being 'excessively used and misapplied' because of their accessibility and low cost.<sup>37</sup>

In contrast, supported decision-making is enshrined as a human right for people with disabilities pursuant to the UNCRPD, requiring that people with a disability need to be provided support to exercise their legal capacity, which they enjoy on an equal basis with all other in all aspects of life.<sup>38</sup> As a signatory to the UNCRPD, Australia has a legal obligation to undertake general reform to establish fully supported decision-making, and so:<sup>39</sup>

- pursuant to the National Disability Service Act 2013 (**NDIS Act**) people with disability need to be supported to make choices;<sup>40</sup>
- the NDIS Framework states that NDIS funded supports must facilitate informed decision making by a person with a disability<sup>41</sup> and NDIS providers are 'required to enhance the decision-making ability of NDIS participants.'<sup>42</sup>
- the NDIS Quality and Safeguards Commission, 'NDIS Practice Standards: NDIS Practice Standards and Quality Indicators' (**NDIS Practice Standards**) emphasises the importance of people with disability leading and directing their supports with support from family, friends, carers and advocates (with consent),<sup>43</sup> including a requirement for people with disabilities are actively involved in the development of their support plans.<sup>44</sup>

In line with the requirements of the UNCRPD, the NDIS Act, the NDIS Framework and the position of the UN Disability Committee, the Western Australian government has made a commitment to develop an authorisation process that is based on contemporary, evidenced-based practice.<sup>45</sup> This practice is founded on a supported-decision making model that moves away from a substitute decision making model.<sup>46</sup>

Supported decision making is already included in the WA Authorisation Policy, as well as the relevant guidelines and supporting documents for the policy, requiring:

- consent processes that are person-centred and promote supported decision-making;<sup>47</sup>

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<sup>36</sup> Australian Government Australian Law Reform Commission, 'Supported and substituted decision-making' (2014); Citing: United Nations Committee on the Rights of Persons with Disabilities, General Comment No 1 (2014) on Article 12 of the Convention—Equal Recognition before the Law [23].

<sup>37</sup> Australian Government Australian Law Reform Commission, 'Supported and substituted decision-making' (2014), Item 2.83: Citing: Office of the Public Advocate (Qld), Submission 05

<sup>38</sup> CRPD Article 12

<sup>39</sup> Mental Health Australia, 'Supported Decision Making, Psychosocial Disability and the National Disability Insurance Scheme', pg 10 (February 2016)

<sup>40</sup> NDIS Act, s 4

<sup>41</sup> NDIS Framework, pg 11

<sup>42</sup> National Disability Services, 'People with Disability and Supported Decision Making in the NDIS', pg 43 nd viewed August 2021 at <[https://www.nds.org.au/images/resources/People\\_with\\_Disability\\_and\\_SDM-Guide\\_for\\_NDIS\\_Providers\\_in\\_NSW.pdf](https://www.nds.org.au/images/resources/People_with_Disability_and_SDM-Guide_for_NDIS_Providers_in_NSW.pdf)>

<sup>43</sup> NDIS Practice Standards

<sup>44</sup> NDIS Practice Standards, pg 13

<sup>45</sup> Consultation Paper, Item 4, pg 12

<sup>46</sup> Western Australian Government Department of Communities, 'Supported Decision Making: Authorisation of Restrictive Practices Information Sheet', pg 4; Consultation Paper, Item 4.3

<sup>47</sup> Authorisation Policy, Item 5.1

- a Behaviour Support Plan with a restrictive practice developed so a person with a disability can access the support they need to make decisions and to communicate their needs and choices;<sup>48</sup> and
- implementing providers needing to use strategies to facilitate supported decision-making;<sup>49</sup> and ensuring that supported decision-making is embedded in the ongoing process of the person with a disability consenting to any restrictive practices.<sup>50</sup>

Therefore, pursuant to and in line with:

- Australia’s obligations pursuant to the UNCRPD;<sup>51</sup>
- the position of the UN Disability Committee;<sup>52</sup>
- the commitment and policy of the Western Australian government in relation to the authorisation process,<sup>53</sup>

the WA Restrictive Practice Legislation must prioritise the right for a person with a disability to make a restrictive practice consent decision through supported decision-making process over a right for a their guardian to make a restrictive practice consent decision for them.

This means a right for consent must be required from the person with a disability themselves for the carrying out of a restrictive practice (regardless of deemed capacity and/or guardianship in place) through a supported decision - making process.

A list of the legislation, policy and guidance referring to, or in support of, restrictive practice consent and supported decision making in the National Restrictive Practices Framework and Western Australian Restrictive Practices Framework is attached Appendix 1, Table 1.

**WAIIS Recommendation: The key objective of the WA Restrictive Practice Legislation should be to uphold the rights of people with disability and to promote the reduction and elimination of restrictive practices.**

**WAIIS Recommendation: The legislation should include express provision that:**

- **a person with a disability must be presumed to have decision making capacity;**
- **people with disabilities have the same human rights as members of society and should be empowered to exercise their rights; and**
- **the regulation of restrictive practice must be consistent with a person’s human rights.**

**WAIIS Recommendation: The WA Restrictive Practice Legislation must prioritise the right for a person with a disability to make a restrictive practice consent decision through supported**

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<sup>48</sup> Western Australian Government Department of Communities, ‘Procedural Guidelines Procedural Guidelines for Authorisation or Restrictive Practices in Funded Disability Services: Stage 2’ (Authorisation Guidelines Stage 2), pg 5 at Item 3.3; pg 7 at 3.3

<sup>49</sup> Authorisation Guidelines Stage 2, pg 5 at Item 3.3; pg 7 at 3.3

<sup>50</sup> Western Australian Government Department of Communities, ‘Supported Decision Making: Authorisation of Restrictive Practices Information Sheet’ pgs 5 and 6

<sup>51</sup> UNCRPD Article 12

<sup>52</sup> United Nations Committee on the Rights of Persons with Disabilities, General comment No.1 (2014), Eleventh Session, 31 March – 11 April 2014, pg 10; United Nations Committee on the Rights of Persons with Disabilities, General Comment No 1 (2014) on Article 12 of the Convention—Equal Recognition before the Law [23]

<sup>53</sup> Authorisation Policy, Item 5.1; Western Australian Government Department of Communities, ‘Procedural Guidelines Procedural Guidelines for Authorisation or Restrictive Practices in Funded Disability Services: Stage 2’ (Authorisation Guidelines Stage 2), pg 5 at Item 3.3; pg 7 at 3.3; Western Australian Government Department of Communities, ‘Supported Decision Making: Authorisation of Restrictive Practices Information Sheet’ pgs 5 and 6

**decision-making process over the right of their guardian to make a Restrictive practice consent decision for them.**

**WAIIS Recommendation: A person with a disability must have a right to make a final decision about Restrictive practice consent, through a supported decision – making process, regardless of deemed capacity and/or guardianship in place.**

### **Consequences of not getting it right**

The government of Western Australia has made a commitment to develop an authorisation process for WA that upholds human rights and is based on the contemporary, evidence-based practice that is supported decision making.<sup>54</sup>

If these human rights are not expressly upheld in the WA Restrictive Practice Legislation, then:

- people with disabilities will be subject to practices:<sup>55</sup>
  - about which they have not made supported decisions, and have not provided consent for; yet
  - infringe on their human rights<sup>56</sup>, some of which may be acts of violence and pose serious threat of harm to them,<sup>57</sup> because restrictive practices may be misused as a ‘means of coercion, discipline, convenience, or retaliation by staff or others providing support’<sup>58</sup> and, for children, may constitute abuse or neglect;<sup>59</sup>
  - where guardianship applications and orders are being unduly and unnecessarily made and peoples’ legal capacity removed/denied; and
- the WA government will not have honoured its commitment to the Western Australian community and will be in breach of the National and Western Australian Restrictive Practice Frameworks.

As provided by the Department of Communities, consent is required and must be voluntary, informed, specific and current.<sup>60</sup> Also,

*‘...the use of restrictive practices without the consent of the person with disability subject to those practices may breach their rights.’<sup>61</sup>*

<sup>54</sup> Consultation Paper, Item 4, pg 12; Western Australian Government Department of Communities, ‘Supported Decision Making: Authorisation of Restrictive Practices Information Sheet’, pg 4

<sup>55</sup> Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, Issues Paper’ (26 May 2020), Items 4.1; 4.71

<sup>56</sup> Kim Chandler, Lindy Wilmott and Ben White, ‘Rethinking Restrictive Practices: A Comparative Analysis’ (2014), QUT Law Review Volume 14, Number 2, pg 122; Australian Government, Australian Law Commission ‘Restrictive Practices in Australia’ (20 May 2014) at < <https://www.alrc.gov.au/publication/equality-capacity-and-disability-in-commonwealth-laws-dp-81/8-restrictive-practices/restrictive-practices-in-australia/>>

<sup>57</sup> Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, Issues Paper’ (26 May 2020), 4.1

<sup>58</sup> Australian Government, Australian Law Commission ‘Restrictive Practices in Australia’ (20 May 2014) at < <https://www.alrc.gov.au/publication/equality-capacity-and-disability-in-commonwealth-laws-dp-81/8-restrictive-practices/restrictive-practices-in-australia/>> citing Disability Rights Now, Civil Society Report to the United Nations on the Rights of Persons with Disabilities, August 2012, 241

<sup>59</sup> NDIS Quality and Safeguards Commission, ‘Regulated Restrictive Practices with Children and Young People with Disability: Practice Guide’ (March 2021), pg 5

<sup>60</sup> Consultation Paper, Item 3.7

<sup>61</sup> Consultation Paper, Item 3.7

The Department of Communities recognises that the common law requirement for restrictive practice consent, and related issues of civil and criminal liability, need to be addressed through changes to the law,<sup>62</sup> because ‘there are risks to those implementing restrictive practices in the absence of the consent of the person with disability.’<sup>63</sup>

To ensure that individual consent is embedded in the authorisation process, it needs to be expressly required in the WA Restrictive Practice Legislation. Otherwise, there may be a risk that: people/ legal entities carrying out restrictive practices;

- are not specifically aware of the on-going common law and policy requirement for Restrictive practice consent and restrictive practice supported decision making because these are not transparently and clearly provided for in the WA Restrictive Practice Legislation,
- that will result in the breach of relevant policy,<sup>64</sup> and exposed to criminal / civil liability<sup>65</sup> for not acquiring the required Restrictive practice consent through restrictive practice supported decision making.

**WAIIS Recommendation: Restrictive practice consent and restrictive practice supported decision making need to be expressly required and drafted into the proposed WA Restrictive Practice Legislation.**

### **What does it mean to get the restrictive practice legislation right?**

#### **Key Objective of the WA Restrictive Practice Legislation**

The key objective of the WA Restrictive Practice Legislation should be to uphold the rights of people with disability and promote the reduction and elimination of restrictive practice.<sup>66</sup> This aligns with the function of the NDIS Commission<sup>67</sup> and the position of the Australian Law Reform Commission (ALRC), which has stated:

*The ALRC accepts that the overall objective of reform to laws and legal frameworks with respect to restrictive practices should be to reduce, and where possible, eliminate the use of restrictive practices.*<sup>68</sup>

**WAIIS Recommendation: The key objective of the WA Restrictive Practice Legislation should be to uphold the rights of people with disability and promote the reduction and elimination of restrictive practices.**

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<sup>62</sup> Consultation Paper, Item 1.2

<sup>63</sup> Consultation Paper, Item 3.7

<sup>64</sup> Authorisation Policy, s 4.1 (Table 1); s 5.1

<sup>65</sup> Kim Chandler, Lindy Wilmott and Ben White, ‘Rethinking Restrictive Practices: A Comparative Analysis’ (2014), QUT Law Review Volume 14, Number 2, pg 91

<sup>66</sup> Australian Government, Australian Law Commission ‘Restrictive Practices in Australia’ (20 May 2014) at <<https://www.alrc.gov.au/publication/equality-capacity-and-disability-in-commonwealth-laws-dp-81/8-restrictive-practices/restrictive-practices-in-australia/>>, UN Committee on the Rights of Persons with Disabilities, above n 5, [35]–[36].

<sup>67</sup> NDIS Act s181H

<sup>68</sup> Australian Government Australian Law Reform Commission, ‘Restrictive Practices in Australia’ (June 2014), Item 8.12

## Process Principles of the WA Restrictive Practice Legislation

As per the Consultation Paper, Western Australia's authorisation process is proposed to align with the following principles: Respect; Personal safety; Equity; Accountability and Effectiveness.<sup>69</sup>

The proposed Process Principles need to be amended so that people with disabilities have the central voice in the text and their right to make decisions about their own lives is explicit and clearly articulated. The Process Principles should also be drafted into the WA Restrictive Practice Legislation, as is the case in other Australian states and territories.<sup>70</sup>

WAIIS provides the following considerations for inclusion when drafting the Process Principles and the WA Restrictive Practice Legislation:

### Respect

People with disability must be respected and have a dignified, central voice in the text of the legislation and guidance documents, including in the drafting about decision making processes.

People with disability have fundamental human rights that must be upheld, and this needs to be explicitly set out and upheld through the WA Restrictive Practice Legislation – as is the case in other Australian states and territories.<sup>71</sup>

The following rights must be central in the drafting of the WA Restrictive Practice Legislation:

- a right to self – determination<sup>72</sup> and dignity of risk<sup>73</sup> whereby the person with a disability can take reasonable risks so their personal growth, self-esteem and overall quality of life is not impeded;
- a right for consent to be required from the person with a disability themselves for the carrying out of a restrictive practice (regardless of deemed capacity and/or guardianship in place) through a supported decision - making process.<sup>74</sup>

### Equity

Supported decision making must be firmly embedded in the WA Restrictive Practice Legislation - to ensure 'a process that is responsive to different circumstances, contexts, locations and cultural needs, that balances power in decision-making'.<sup>75</sup>

To ensure that supported decision making is required and clearly articulated in the WA Restrictive Practice Legislation, WAIIS recommends that users of restrictive practice in WA (**Implementing**

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<sup>69</sup> Consultation Paper, Item 4.4

<sup>70</sup> See for example: Senior Practitioner Act 2018 (ACT) s 9, Principles for Providers

<sup>71</sup> See: Senior Practitioner Act 2018 (ACT), s 6(e)(i); Disability Services Act 2006 (Qld) s 18; Disability Services Act 2011 (Tas), see s 5 Principles

<sup>72</sup> UNCRPD, Article 3; Code of Conduct, s 5(2)

<sup>73</sup> Ibrahim J., and Davis M. (2013). Impediments to applying the 'dignity of Risk' principle in residential aged care services. Australian Journal of Aging, pg 1-6; See also: Interchange, 'Duty of Care and Dignity of Risk – What does it mean?' (2021) viewed August 2021 at <<https://www.interchangewa.org.au/blog/duty-of-care-and-dignity-of-risk-what-does-it-mean/>>; Mental Health Australia, 'Supported Decision Making, Psychosocial Disability and the National Disability Insurance Scheme' (February 2016), pg 17

<sup>74</sup> CRPD Article 12; NDIS Act, s 4

<sup>75</sup> Consultation Paper, Item 4.4

**Providers**) will have an obligation to undertake a supported decision-making process with the person in relation to restrictive practice, particularly in relation to restrictive practice consent, and provide evidence that such supported decision making has occurred.

**WAI S Recommendation: In the WA Restrictive Practice Legislation, Implementing Providers have an obligation to undertake a supported decision-making process with the person in relation to restrictive practice consent, and provide evidence that such supported decision making has occurred.**

To address the principles of equity the authorisation process, the WA Restrictive Practice Legislation needs to be in a form that supports the exercise of basic human rights, <sup>76</sup>by balancing power in decision making, between people with disabilities / their families and carers who don't use and understand legal language and external agencies (e.g government departments) who do.

The WA Restrictive Practice Legislation needs to be accessible and 'user friendly' so that all users of it, and also the authorisation process contained within, can: <sup>77</sup>

- understand their rights and obligations; and
- make timely and robust decisions regarding restrictive practices.

To make sure the WA Restrictive Practice Legislation is effective, balances power in decision-making, is responsive to different circumstances, contexts, locations and cultural needs and promotes accountability for those using it, WAI S recommends the WA Restrictive Practice Legislation and all relevant guidance documents be drafted in Easy Read format. This is in accordance with the current advice of the Australian Government Digital Transformation Agency, which states:<sup>78</sup>

*Easy Read is a way to present information for people who are not familiar with English, or who have low literacy or learning disability. Easy Read's unique layout and style presents information so it's easy to understand. The content can explain complex information about law, policy or obligations.*

Examples of Easy Read procedural documents that describe legal processes, which have been developed in Australia, include:

- UN Conventions (Easy Read Guide)<sup>79</sup>
- Disability Discrimination Act 1992 (Cth) Easy Read Guide<sup>80</sup>

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<sup>76</sup> Australian Government Department of Social Services Disability and Carers, 'SHUT OUT: The experience of people with disabilities and their carers in Australia', ), Item 2.5.1 (2012) viewed August 2021 at <<https://www.dss.gov.au/our-responsibilities/disability-and-carers/publications-articles/policy-research/shut-out-the-experience-of-people-with-disabilities-and-their-families-in-australia?HTML#2.5>>

<sup>77</sup> Australian Government Department of Social Services Disability and Carers, 'SHUT OUT: The experience of people with disabilities and their carers in Australia', ), Item 2.5.1 (2012)

<sup>78</sup> Australian Government Digital Transformation Agency, 'Style Manual: Easy Read' (2021) viewed August 2021 at <<https://www.stylemanual.gov.au/format-writing-and-structure/content-formats/easy-read>>; See also the Easy Read guidance for writing government and legal documents provided by the New Zealand Ministry for Social Development Office for Disability Issues, 'A guide to making Easy Read information' (2021) viewed August 2021 at <<https://www.odi.govt.nz/guidance-and-resources/a-guide-to-making-easy-read-information/#About-this-guide>>

<sup>79</sup> See: <https://oursite-easyread.wwda.org.au/your-rights/united-nations-conventions/what-are-the-un-conventions/>

<sup>80</sup> Women with Disabilities Australia, 'Australian Human Rights Commission Disability Discrimination Act 1992 – Easy Ready Guide' (2020) viewed August 2021 at <<https://oursite.wwda.org.au/resources/australian-human-rights-commission-disability-discrimination-act-1992-easy-read-guide>>

- The Queensland Human Rights Act: an easy read guide<sup>81</sup>
- About the Disability Act 2006 (Vic) Easy Read<sup>82</sup>
- National Standards for Disability Services Easy Read Version<sup>83</sup>

**WAIIS Recommendation: The WA Restrictive Practice Legislation, policy and guidance materials need to be provided in formats accessible for all people with disabilities, including Easy Read, video, braille and audio recording.**

## Accountability

To ensure accountability and transparency of process, the key concepts and terms used in the authorisation process and in the WA Restrictive Practice Legislation in general need to be clearly defined using examples.<sup>84</sup> We recommend definitions and examples be provided in the legislation for the following key concepts:

- ‘high-risk physical restraint’;
- ‘psychosocial restraint/punitive practice’;
- ‘restraint for treatment purpose’;
- ‘therapeutic or safety devices’ (including how these are different from ‘restrictive practices’); and
- ‘practice under a court order’.

Also, complete transparency regarding the restrictive practice framework must be provided so that the Western Australian community understands the total extent of their legal obligations in relation to restrictive practice. For this reason, in line with the submissions of the Law Society of New South Wales regarding the proposed New South Wales restrictive practice legislation,<sup>85</sup> WAIIS recommends that:

- the objects and guiding principles of the WA Restrictive Practice Legislation; and
- relevant guidance / information documents provided by the Department of Communities;

inform the Western Australian public about the requirement pursuant to the common law to obtain full, prior and informed consent before a restrictive practice is used – as well as the possible legal consequences for non-compliance - including civil and criminal liability.

**WAIIS Recommendation: The WA Restrictive Practice Legislation, and any related guidance / information should be drafted in active, transparent and accessible language – with definitions to explain key concepts and terms.**

<sup>81</sup> Queensland Human Rights Commission, ‘Fact Sheet: The Queensland Human Rights Act: an easy read guide’ (June 2021) viewed August 2021 at <

[https://www.qhrc.qld.gov.au/\\_\\_data/assets/pdf\\_file/0005/25448/QHRC\\_factsheet\\_HRA\\_easyreadguide.pdf](https://www.qhrc.qld.gov.au/__data/assets/pdf_file/0005/25448/QHRC_factsheet_HRA_easyreadguide.pdf)>

<sup>82</sup> Victoria State Government, ‘Disability Act 2006’ viewed August 2021 at

<<https://services.dffh.vic.gov.au/sites/default/files/2017-05/Disability-Act-2006-easy-read.doc>>

<sup>83</sup> Australian Government Department of Social Services, ‘National Standards for Disability Services Easy Read Version’ (nd) viewed August 2021 at <[https://www.dss.gov.au/sites/default/files/documents/07\\_2015/1500-02-15dss\\_-\\_disability\\_service\\_standards\\_booklet\\_v5r\\_web\\_2.pdf](https://www.dss.gov.au/sites/default/files/documents/07_2015/1500-02-15dss_-_disability_service_standards_booklet_v5r_web_2.pdf)>

<sup>84</sup> See: Senior Practitioner Act 2018 (ACT) s 7

<sup>85</sup> Law Society of New South Wales, ‘Draft Persons with a Disability (Regulation of Restrictive Practices) Bill 2021’ (18 February 2021) viewed August 2021 at <<https://www.lawsociety.com.au/sites/default/files/2021-07/Letter%20to%20Department%20of%20Communities%20and%20Justice%20-%20Draft%20Persons%20with%20Disability%20%28Regulation%20of%20Restrictive%20Practices%29%20Bill%202021%20-%2018%20February%202021.pdf>>

## Effectiveness

So that the authorisation process and WA Restrictive Practice Legislation are understood and enable timely and robust decision-making there needs to be continued capacity building – including training, guidance and information - for people who are subjected to restrictive practices, the people who love the person, and the people using the legislation so they may understand the rights and obligations provided in it. This includes:

- understanding human rights in practice and when breaches of human rights occur
- understanding the principles of supported decision making
- how to facilitate a supported decision - making process, including in relation to a restrictive practice decision, and
- gather/provide evidence that a supported decision - making process has occurred regardless of deemed capacity or guardianship in place.

**WAIIS Recommendation: There needs to be ongoing capacity building - including training, guidance and provision of information - for people who are subjected to restrictive practices, the people who love them, and the people using the legislation so they may understand the rights and obligations provided in it.**

### **The role of person with disability, type of decision maker and where they come from**

#### **Person with disability must be central in restrictive practice consent and authorisation decisions**

In response to Item 5.1A of the Consultation Paper, it is WAIIS position that it is the role (and right) of the person with disability to provide consent decisions about restrictive practice. This means that as provided in column 3 of Figure 4 of the Consultation Paper, the WA Restrictive Practice Legislation needs to explicitly set out that a person with disability themselves, needs to be the decision-maker for consent to any restrictive practice without exception, including seclusion; physical restraint; chemical restraint; mechanical restraint; and environmental restraint.

Restrictive practice consent being required from a person with a disability should be explicitly required for in the WA Restrictive Practice Legislation because Restrictive practice consent is already embedded in the:

- National and Western Australian Restrictive Practice Frameworks; and
- the common law of Australia.

If Restrictive practice consent is not transparently, clearly and expressly required by the legislation, there is arguably increased risk of civil and criminal liability for people /agencies carrying out restrictive practices who may not be aware of the Restrictive practice consent obligations in the common law and the Authorisation Policy.

#### **Consent is required pursuant to the National Restrictive Practice Framework**

Pursuant to the UNCRPD people with disabilities have a right to:

- individual autonomy;<sup>86</sup>

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<sup>86</sup> CRPD Articles 3; 21

- freedom of expression and opinion;<sup>87</sup>
- make their own choices;<sup>88</sup> and
- support to exercise their legal capacity to make their own decisions.<sup>89</sup>

The National Restrictive Practice Framework, including the NDIS Act which gives effect to Australian's obligations under the CRPD, includes:<sup>90</sup>

- a) legislation that requires that people with disabilities have a right to:<sup>91</sup>
  - freedom of expression and self-determination;<sup>92</sup>
  - determine their own best interests;<sup>93</sup>
  - exercise choice and control in pursuit of their goals;<sup>94</sup>
  - engage as equal partners in decisions that will affect their lives, to the full extent of their capacity;<sup>95</sup> and
  - be supported to make these decisions.<sup>96</sup>
  
- b) policy that provides:
  - all people with disability have the capacity to make decisions and exercise choice and control;<sup>97</sup>
  - the Code of Conduct allow them to be consulted and give informed consent;<sup>98</sup> and
  - NDIS funded supports must facilitate informed decision making by a person with a disability.
  
- c) guidance that Implementing Providers:
  - promote individual rights to freedom of expression, self-determination and decision-making;<sup>99</sup> and
  - provide service planning, whereby provision and review is based on individual choice and is undertaken together with an individual.<sup>100</sup>

As provided above, as per the UNCRPD and the National Framework, there is an overarching requirement that people with disability have a right to make their own decisions, through a supported decision-making process, about matters that affect their lives.<sup>101</sup> Logically, this also includes decisions about whether or not to give their consent for a restrictive practice – a matter that is likely to significantly affect their lives and human rights.

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<sup>87</sup> CRPD Articles 3; 21

<sup>88</sup> CRPD Articles 3; 21

<sup>89</sup> CRPD Article 12

<sup>90</sup> See: NDIS Act, s 3

<sup>91</sup> NDIS Act, s 4(8)

<sup>92</sup> Code of Conduct, s 5(2)

<sup>93</sup> NDIS Act, s 3; s 4(8)

<sup>94</sup> NDIS Act, s 4(8)

<sup>95</sup> NDIS Act, s 4(8)

<sup>96</sup> NDIS Act, s 4

<sup>97</sup> NDIS Framework, pg 11

<sup>98</sup> NDIS Framework, pg 95

<sup>99</sup> NDIS Practice Standards and Quality Indicators, pg 7

<sup>100</sup> NDIS Practice Standards and Quality Indicators, pg 16

<sup>101</sup> CRPD Articles 3; 12; 21; NDIS Act, s 3, s 4, s 4(8); Code of Conduct, s 5(2); NDIS Framework, pg 11, pg 9; NDIS Practice Standards and Quality Indicators, pg 7m pg 16

## Consent is required pursuant to the Western Australian Restrictive Practice Framework

As per the National Disability Insurance Scheme (Provider Registration and Practice Standards) Rules 2018 (**Provider Registration and Practice Standards**):<sup>102</sup>

- *NDIS participants are only to be subject to restrictive practices that meet authorisation and requirements of state or territory where restrictive practice used;*

and

- *requirements in Commonwealth legislation and policies.*

Since December 2020, most of the explicit references to Restrictive Practices Consent have been removed from the Authorisation Policy and Authorisation Guidelines.<sup>103</sup> The Explanatory Notes for the Authorisation Policy which contained detailed requirements in relation to the requirement of Restrictive Practices Consent are no longer available for public viewing.<sup>104</sup>

A number of guidance documents have been produced since December 2020, which require a person with a disability to be 'consulted' during the preparation of the BSP containing a restrictive practice.<sup>105</sup>

Notably however, there is no current piece of legislation, policy, or guidance in the Western Australian Restrictive Practice Framework which stipulates that the use of a restrictive practice does not require consent from the person with a disability.

Instead, the current drafting of the Authorisation Policy explicitly imposes the following responsibilities on Implementing Providers:<sup>106</sup>

- a) in Stage 1 Authorisation (until 30 April 2021) to:
  - *Develop internal policies and procedures to:*
    - *deliver BSP development processes that are person-centred and*
    - *ensure consent processes [our emphasis] are person-centred, promote supported decision-making*
- b) in Stage 2 Authorisation (from 1 May 2021 until legislation is developed) to:
  - *in addition to Stage One Authorisation responsibilities, [our emphasis] develop internal policies and procedures to govern the operations of their Quality Assurance Process and the use of restrictive practices (including risk assessment and mitigation)*

This would appear to create an ongoing obligation for Implementing Providers to, from 1 May 2021 until the WA Restrictive Practice Legislation is developed, to continue to ensure supported Restrictive Practices Consent from a person with a disability have been provided in relation to restrictive practices.

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<sup>102</sup> Provider Registration and Practice Standards, Schedule 4, s 4

<sup>103</sup> See for example paragraph [72] of the Western Australian State Administration Tribunal MS [2020] WASAT 146

<sup>104</sup> See paragraph [68] of MS [2020] WASAT 146, which discusses the consent requirements

<sup>105</sup> See for example: Western Australian Government Department of Communities, 'Positive Behaviour Support' dated June 2021, pg 4

<sup>106</sup> Authorisation Policy, s 4.1 (Table 1); s 5.1

This interpretation of the Authorisation Policy as requiring Restrictive practice consent is supported by the policy itself, in which is stated that the State Government of Western Australia has endorsed the NDIS Framework and the National Framework,<sup>107</sup> and so:

- starts from a presumption that all people with disability have the capacity to make decisions and exercise choice and control;<sup>108</sup>
- supports a Code of Conduct covering the rights of people with disability to given informed consent;<sup>109</sup>
- endorses a guiding principle that a person's consent and participation in decision making (with support if necessary) must be sought prior to making a substitute decision on their behalf.<sup>110</sup>

An interpretation of the Authorisation Policy as requiring Restrictive practice consent is also supported by current, publicly available guidance from the Department of Communities for the Authorisation Policy. As per the relevant guidance documents:

- adults with a disability have equal right to make decisions that affect their lives and to have those decisions respected;<sup>111</sup>
- it is assumed, unless evidence proves otherwise, that the person [with a disability] has the capacity to make their own decisions; and<sup>112</sup>
- a BSP with a restrictive practice must be done so a person with a disability can access the support they need to make decisions and to communicate their needs and choices.<sup>113</sup>

Also, Implementing Providers:

- must ensure that supported decision making is embedded in the ongoing process of the person consenting to any restrictive practices;<sup>114</sup> and
- it is recommended that consent be current and obtained through supportive decision making so the person with a disability has opportunities to express concerns or change their mind.<sup>115</sup>

Therefore, in the absence of policy / guidance to the contrary, it is likely - pursuant to the existing Western Australian legislation, policy and guidance - that an Implementing Provider in Western Australia is required to obtain Restrictive practice consent before carrying out a restrictive practice.

### **Consent is required under the common law**

Consent from a person with a disability for a restrictive practice to be carried out on that person is required pursuant to the common law.<sup>116</sup> This is because, generally speaking:

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<sup>107</sup> Authorisation Policy, pg 5

<sup>108</sup> NDIS Framework, pg 11

<sup>109</sup> NDIS Framework, pg 95

<sup>110</sup> National Framework, pg 7

<sup>111</sup> Supported Decision Making Guidance, pg 2

<sup>112</sup> Supported Decision Making Guidance, pg 2

<sup>113</sup> Authorisation Guidelines Stage 2, pg 5 at Item 3.3; pg 7 at 3.3

<sup>114</sup> Western Australian Government Department of Communities, 'Supported Decision Making: Authorisation of Restrictive Practices Information Sheet' dated December 2020, pg 5; Supported Decision Making Guidance, pg 3

<sup>115</sup> Western Australian Government Department of Communities, 'Supported Decision Making: Authorisation of Restrictive Practices Information Sheet' dated December 2020, pg 6; Supported Decision Making Guidance, pg 3

<sup>116</sup> See: MS [2020] WASAT 146

*'...consent to the use of a restrictive practice is essential because consent ordinarily has the effect of transforming what would otherwise be unlawful into accepted, and therefore acceptable, conduct.'*<sup>117</sup>

The absence of Restrictive practice consent, without a circumstance of emergency or necessity for a restrictive practice (such as providing medical treatment to a person in a case of emergency),<sup>118</sup> may:

- lead to a right to a civil law action and remedy for a person with a disability;<sup>119</sup>
- or
- a criminal prosecution for the person carrying out the restrictive practice.<sup>120</sup>

For example, a restrictive practice that uses:

- *'physical force – may constitute an assault under the criminal law or a trespass to the person, giving rise to civil law remedies'*;<sup>121</sup> and
- *'securing residents in a residential facility by locking their bedroom doors – may give rise to civil actions for false imprisonment, or to criminal prosecution for deprivation of liberty'*.<sup>122</sup>

### **Increased exposure to risk of civil and criminal liability if consent requirement not in legislation**

The WA Restrictive Practice Legislation needs to make the requirement for Restrictive practice consent accessible, transparent, understandable and express. Otherwise, there may be a risk that:

- people/ legal entities carrying out restrictive practices;
- who are not aware of the on-going common law and policy requirement for Restrictive practice consent; because
- these requirements are not transparently and clearly provided for in the WA Restrictive Practice legislation,

will be in breach of relevant policy,<sup>123</sup> and possibly exposed to criminal / civil liability<sup>124</sup> for not acquiring the required Restrictive practice consent.

**WAIIS Recommendations: People with disabilities must be able to make decisions about restrictive practice consent, including final authorisation for a restrictive practice, through a supported decision - making process. The level of decision making must be local.**

**People with disability have the right to choose a decision supporter (Decision Supporter) to assist them in a decision-making process**

The UN Disability Committee has raised concerns that substitute decision-making regimes remain in place and that in Australia, substitute decision-making needs to be replaced with supported

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<sup>117</sup> Secretary, Department of Health and Community Services v JWB and SMB (Marion's Case) [1992] HCA 15; (1992) 175 CLR 218, 233 (Mason CJ, Dawson, Toohey and Gaudron JJ).

<sup>118</sup> MS [2020] WASAT 146 [at 48]

<sup>119</sup> MS [2020] WASAT 146 [at 48]

<sup>120</sup> MS [2020] WASAT 146 [at 48]

<sup>121</sup> Citing In re T (Adult: Refusal of Treatment) [1993] Fam 95, 102 (Lord Donaldson MR).

<sup>122</sup> Citing Re Application for Guardianship Order (BCB) (2002) 28 SR (WA) 338, 344.

<sup>123</sup> Authorisation Policy, s 4.1 (Table 1); s 5.1

<sup>124</sup> Kim Chandler, Lindy Wilmott and Ben White, 'Rethinking Restrictive Practices: A Comparative Analysis' (2014), QUT Law Review Volume 14, Number 2, pg 91

decision-making and a wide range of measures be put in place which respect a person's autonomy, will and preferences.<sup>125</sup>

Australian supported decision-making projects, including the Self-Determination and Cultural Change project<sup>126</sup> and the People Making Choices project,<sup>127</sup> have provided evidence that people with disabilities have a large range of preferences for people who they want to be their Decision Supporter, including:<sup>128</sup>

- family, friends and / or other informal supports (who know the person well, who have a capacity view of the person , and a will for the persons rights to be upheld);
- support /organisational workers (who know the person well, who have a capacity view of the person , and a will for the persons rights to be upheld)

People with disability were also aware that guardians may have difficulties supporting dignity of risk because as one person remarked "...they have a habit of protecting me".<sup>129</sup>

In line with this current evidence regarding who Decision Supporters could be, the WA Restrictive Practice Legislation should include provision that the Decision Supporter(s) does not have to be legally appointed by the person with a disability; does not have to be their legally appointed guardian; and could be family, friends and /or informal supports.

Though inconsistent with the rights afforded to people with disabilities under the UNCRPD,<sup>130</sup> in WA because of the current substituted decision-making regime there is no requirement for a legally appointed guardian to involve the person with a disability in a decision-making process.<sup>131</sup>

In contrast:

- following the recommendations of the UN Disability Committee,<sup>132</sup> and
- in compliance with their obligations under the UNCRPD, the National and the WA Restrictive Practices Frameworks,<sup>133</sup>

under the WA Restrictive Practice Legislation the Decision Supporter would need to engage in a supported decision-making process with a person with a disability.

**WAIIS Recommendations: People with disability have the right to choose a decision supporter (Decision Supporter) to assist them in a supported decision-making process. The Decision**

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<sup>125</sup> Committee on the Rights of Persons with Disabilities, Concluding Observations on the Initial Report of Australia (adopted by the Committee at its tenth session 2-13 September 2013) at Items 24 and 25

<sup>126</sup> See: ACT Disability Network, 'Self Determination and Cultural Change: A Report on Supported Decision Making for People Experiencing Psychosocial and Intellectual Disability' (2014)

<sup>127</sup> See: Brophy, L., Bruxner, A., Wilson, E., Cocks, N., Stylianou, M. and Mitchell, P 'People making choices: the support needs and preferences of people with psychosocial disability' (2014)

<sup>128</sup> Mental Health Australia, 'Supported Decision Making, Psychosocial Disability and the National Disability Insurance Scheme' (February 2016), pg 23

<sup>129</sup> Mental Health Australia, 'Supported Decision Making, Psychosocial Disability and the National Disability Insurance Scheme' (February 2016), pg 23; Citing: Interviews between Kate Rea and project participants for Self Determination and Cultural Change Project.

<sup>130</sup> Mental Health Australia, 'Supported Decision Making, Psychosocial Disability and the National Disability Insurance Scheme' (February 2016), pg 10

<sup>131</sup> Consultation Paper, pg 10

<sup>132</sup> Committee on the Rights of Persons with Disabilities, Concluding Observations on the Initial Report of Australia (adopted by the Committee at its tenth session 2-13 September 2013) at Items 24 and 25

<sup>133</sup> See full list of authorities at Appendix 1, Table 1 at the end of this submission.

**Supporter does not have to be legally appointed by the person with a disability; does not have to be their current guardian; and could be family, friends and /or an informal support.**

**Should the scope of the legislation include children, families / informal carers?**

## **Children**

The regulation of restrictive practices needs to apply to all people with disability who are members of the Western Australian community. The WA Restrictive Practice Legislation needs to extend to protect the rights of people under 18 years of age.<sup>134</sup>

The NDIS Quality and Safeguards Commission has also recognised that:<sup>135</sup>

*“...children and young people with disability require special considerations and safeguarding in order to protect them from harm whilst actively promoting their development and upholding their legal and human rights.”*

For this reason, the WA Restrictive Practice Legislation, and related guidance and information, should include the relevant key practice points and guidance, regarding the carrying out of restrictive practices on children, which are contained in the NDIS Quality and Safeguards Commission, ‘Regulated Restrictive Practices with Children and Young People with Disability: Practice Guide’.<sup>136</sup>

**WAIS Recommendation: The WA Restrictive Practices Legislation should apply to both children and adults with disabilities.**

## **Families and informal carers**

Currently, Australian state and territory restricted practice legislation does not apply to families. Also, the NDIS Commission does not regulate the use of restrictive practices by the family of a person with a disability.<sup>137</sup> The WA Restrictive Practice Legislation should not regulate families and informal carers but, in line with the position of the NDIS Commission, the legislation should provide restrictive practices safeguards for people with disability with the use of restrictive practices on them<sup>138</sup>

**WAIS Recommendation: The WA Restrictive Practice Legislation should not regulate the use of restrictive practices by families or informal carers. The legislation should provide restrictive practices safeguards for people with disability across all environments where restrictive practices are carried out.**

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<sup>134</sup> See for example: Senior Practitioner Act 2018 (ACT), s 16; Disability Services Act 1993 (NT) s 2; Disability Inclusion (Restrictive Practices – NDIS) Amendment Bill 2021 (SA), s 23M(6)

<sup>135</sup> NDIS Quality and Safeguards Commission, ‘Regulated Restrictive Practices with Children and Young People with Disability: Practice Guide’ (March 2021), pg 3

<sup>136</sup> NDIS Quality and Safeguards Commission, ‘Regulated Restrictive Practices with Children and Young People with Disability: Practice Guide’ (March 2021), pg 5

<sup>137</sup> NDIS Quality and Safeguards Commission, ‘Regulated Restrictive Practices with Children and Young People with Disability: Practice Guide’ (March 2021), pg 18

<sup>138</sup> NDIS Quality and Safeguards Commission, ‘Regulated Restrictive Practices with Children and Young People with Disability: Practice Guide’ (March 2021), pg 18

## What should be the definition of 'restrictive practice' in the legislation?

In order to ensure consistency of regulatory approach, the definition of 'restrictive practice' in the WA Restrictive Practice Legislation should be the same as in the National Disability Insurance Scheme (Restrictive Practices and Behaviour Support) Rules 2018 (Cth) (**NDIS Rules**).<sup>139</sup>

**WAIS Recommendation: The definition of 'restrictive practice' in the WA Restrictive Practice Legislation should be the same as in the National Disability Insurance Scheme (Restrictive Practices and Behaviour Support) Rules 2018 (Cth).**

**WAIS Recommendation: The drafting in the WA Restrictive Practice Legislation should expressly provide for how the legislation operates in relation to the: National Disability Insurance Scheme (Restrictive Practices and Behaviour Support) Rules 2018 (Cth); and the National Disability Insurance Scheme Act 2013 (Cth).**

## What restrictive practices should be exempt

In response to Item 5.2 of the Consultation Paper, and in line with the restrictive practice legislation of other Australian states and territories, restrictive practices that should be exempt from the WA authorisation process include:

- restraint for treatment purpose, including the use of a chemical substance that is:<sup>140</sup>
  - prescribed by a medical practitioner or nurse practitioner for the treatment, or to enable the treatment, of a mental or physical illness or condition in a person; and
  - used in accordance with the prescription
- therapeutic or safety devices, including those used to ensure the person's safety when travelling<sup>141</sup>
- physical restraint that is reflex action of reasonable physical force and duration intended to guide or direct a person in the interests of the person's safety where there is an imminent risk of harm;<sup>142</sup> and
- practice under a court order.

**WAIS Recommendation: The restrictive practices that should be exempt from the WA restrictive practices authorisation process are: restraint for treatment purposes; therapeutic or safety devices; physical restraints that are reflex action of reasonable physical force and**

<sup>139</sup> See: Disability Inclusion (Restrictive Practices – NDIS) Amendment Bill 2021 (SA), s 23B-Interpretation, Definition of 'restrictive practices'

<sup>140</sup> See: Senior Practitioner Act 2018 (ACT) s 7(2)(b); Disability Inclusion (Restrictive Practices—NDIS) Amendment Bill 2021 s 23B, Definition of 'restrictive practice'

<sup>141</sup> See: Senior Practitioner Act 2018 (ACT) s 7(2)(b); Disability Inclusion (Restrictive Practices—NDIS) Amendment Bill 2021 s 23B, Definition of 'restrictive practice'

<sup>142</sup> See: Senior Practitioner Act 2018 (ACT) s 7(2)(b); Disability Inclusion (Restrictive Practices—NDIS) Amendment Bill 2021 s 23B, Definition of 'restrictive practice'

**duration intended to guide or direct a person in the interests of the person's safety where there is an imminent risk of harm; practice under a court order.**

### **How should authorisation decisions be made?**

In response to Item 5.3 of the Consultation Paper, the criteria used to make authorisation decisions needs to be in line with the restrictive practice legislation of other Australian states and territories, the NDIS Rules, and the National and Western Australian Restrictive Practice Frameworks. These require restrictive practices being:

- used in limited circumstances as a last resort;<sup>143</sup>
- the least restrictive option;<sup>144</sup>
- used for the shortest period possible under the circumstances<sup>145</sup>
- used after other strategies considered, meaning positive strategies that must be attempted before using a restrictive practice<sup>146</sup>
- only used to reduce risk of harm to the person and/or others<sup>147</sup>
- proportionate to potential risk of harm, meaning proportionate to the potential negative consequence or risk of harm;<sup>148</sup>
- done in a way that ensures transparency and accountability<sup>149</sup>

Regarding the proposed criteria 'lack of capacity for making decisions about restrictive practices', WAiS believe that everyone has decision making capacity with individually tailored support for decision making.

**WAiS Recommendation: The criteria used to make authorisation decisions needs to be in accordance with the restrictive practice legislation of other Australian states and territories, the NDIS Rules, and the National and Western Australian Restrictive Practice Frameworks.**

### **Evidence needed to demonstrate that the authorisation process has been completed**

In response to Item 5.3 of the Consultation Paper, in line with the National and Western Australian Restrictive Practice Framework, evidence needed to demonstrate that the authorisation has been completed should be the:<sup>150</sup>

- Behaviour Support Plan;
- quality assurance outcome summary report; and
- documentation of the supported decision making process and outcome.

<sup>143</sup> Senior Practitioner Act 2018 (ACT), s 6(b); s 9(2)(g)(i); Disability Inclusion (Restrictive Practices – NDIS) Amendment Bill 2021 (SA), s 23G(1)(a); Disability Act 2006 (Vic) s 140(a)

<sup>144</sup> Senior Practitioner Act 2018 (ACT) s 6(b); s 9(2)(g)(i); s 12(2); Disability Services Amendment Act 2012(NT) s 39(1)

<sup>145</sup> Disability Inclusion (Restrictive Practices – NDIS) Amendment Bill 2021 (SA), s 23G(3)(d); National Disability Insurance Scheme (Restrictive Practices and Behaviour Support) Rules 2018 (Cth) s 21(3)(g)

<sup>146</sup> Senior Practitioner Act 2018 (ACT), s 12(2)(b); National Disability Insurance Scheme (Restrictive Practices and Behaviour Support) Rules 2018 (Cth) s 15(2)

<sup>147</sup> Disability Inclusion (Restrictive Practices – NDIS) Amendment Bill 2021 (SA), s 23G(2)(b)

<sup>148</sup> Senior Practitioner Act 2018 (ACT) s 23(c)(iii)

<sup>149</sup> Senior Practitioner Act 2018 (ACT) s 23(c)(v)

<sup>150</sup> As provided in Item 5.3 of the Consultation Paper.

Safeguards of the rights of the person with a disability, include:

- written notice / details regarding the carrying out of the restrictive practice must be provided to person / family / guardian / carer / Decision Supporter
- the use of a restrictive practice must be recorded and reported to the relevant government body
- reporting regarding a restrictive practice must be carried out soon after the restrictive practice is carried out and then on a regular basis for continuous use<sup>151</sup>
- detailed record keeping needs to be done in relation to restrictive practices.<sup>152</sup>
- consent decision making record (please see Appendix 2 WAiS example attached - this is shared in confidence and not yet for distribution)

**WAiS Recommendation: The evidence needed to demonstrate that the authorisation has been completed should be the BSP; quality assurance outcome summary report; and documentation of the supported decision-making process and outcome.**

#### **When and where should authorisation be required?**

In response to Item 5.4 of the Consultation Paper, authorisation should be required for:

- any day-to-day service delivery needs that are included in a BSP; and
- situations where there isn't a BSP.

**WAiS Recommendations: In relation to settings or locations, restrictive practice authorisation should be required whenever a restrictive practice is proposed to be used with a person with a disability, no matter what the setting or location. For example, education, health, justice, child protection etc.**

#### **What safeguards should be in place if something goes wrong?**

In response to Item 5.4 of the Consultation Paper, and in line with the restrictive practice legislation for other Australian states and territories there need to be processes to appeal or review authorisation decisions included in the WA Restrictive Practices Legislation.<sup>153</sup>

There also needs to be a means provided for in the legislation to raise and address concerns and complaints in relation to restrictive practices – including the authorisation process.<sup>154</sup> This process should allow for the investigation of the complaint by the relevant government body who should also be able to take actions after an investigation in relation to a complaint about a restrictive practice and these actions may include reasonable directions and conditions, and cancellation of registration.

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<sup>151</sup> See: National Disability Insurance Scheme (Restrictive Practices and Behaviour Support) Rules 2018 (Cth) s 15(2); Senior Practitioner Act 2018 (ACT), s 10A(2), s 24

<sup>152</sup> National Disability Insurance Scheme (Restrictive Practices and Behaviour Support) Rules 2018 (Cth) s 15(2); Disability Services Amendment Act 2012 (NT) s 43; Disability Services Act 2006 (Qld) s 194(2)

<sup>153</sup> See: Senior Practitioner Act 2018 (ACT), s 45; Disability Services Amendment Act 2012 (NT) s 43

<sup>154</sup> Senior Practitioner Act 2018 (ACT), s 28; Disability Services Amendment Act 2012 (NT) Part 5; Disability Services Act 2006 (Qld) s 3; Part 3

In line with the restrictive practices legislation for other Australian states and territories and the NDIS Rules, there are a number of notice, reporting and record keeping obligations that should be included.

In line with the option presented in the Consultation Paper, there should also be enforcement actions and penalties.<sup>155</sup> In recognition of the serious repercussions for the abuse/misuse of restrictive practices, the WA Restrictive Practice Legislation should expressly provide that the Criminal Code applies to offences of the legislation.<sup>156</sup>

**WAiS Recommendations: Safeguards for people with disabilities in the legislation should include:**

- **processes to appeal or review authorisation decisions including access to advocacy and legal representation;**
- **mechanism in the legislation for the raising and addressing of concerns and complaints in relation to restrictive practices;**
- **notice, reporting and record keeping obligations for people / agencies carrying out restrictive practices;**
- **specific conditions in relation to seclusion; and**
- **enforcement actions and penalties, including express provision that the Criminal Code applies to offences of the legislation.**

**Should protection from liability be included in the legislation?**

Every Australian state and territory with existing or proposed restrictive practice legislation has included a mechanism through which there is protection of liability for the carrying out of a restrictive practice. This protection varies in scope between states and territories as to whom is covered (e.g. NDIS providers, senior practitioners, disability services ministers) and is often included in the 'Miscellaneous' section at the end of the relevant pieces of legislation.<sup>157</sup>

It is understood that a protection from liability term is required in restrictive practices legislation, given the possibly serious consequences in relation to the use of restrictive practices and the harm this could cause to people and agencies advising the use of / using / authorising / approving restrictive practices that were:<sup>158</sup>

- reasonable in the circumstances;
- carried out in good faith; and
- done by the person/agency acting on a reasonable grounds that the use of the restrictive practice was authorised under relevant legislation.

However, the protection from liability section must be drafted narrowly so that liability for the misuse/ abuse of restrictive practices remains firmly with the relevant person/agency – with no limitation on applicable criminal penalty and any right of a person with a disability to a civil claim.

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<sup>155</sup> Consultation Paper, pg 5

<sup>156</sup> Senior Practitioner Act 2018 (ACT), s 5; Disability Services Amendment Act 2012 (NT) s2B

<sup>157</sup> See: Persons with Disability (Regulation of Restrictive Practices) Bill 2021 (NSW), Part 7 – Miscellaneous; Senior Practitioner Act 2018 (ACT) s 51; Disability Services Act 2012 (NT) s 67; Disability Services Act 2006 (QLD) s 190; Disability Services Act 2011 (TAS) s 51; Disability Act 2006 (VIC) s 19A; Disability Inclusion (Restrictive Practices – NDIS Amendment Bill 2021 (SA)) s 23Z

<sup>158</sup> See: Persons with Disability (Regulation of Restrictive Practices) Bill 2021 (NSW), Part 7 - Miscellaneous

In order that the WA Restrictive Practices Legislation be transparent and clear for all users, it is recommended that this section be clearly labelled 'Protection from liability' and that it not be placed at the end of the legislation. Instead, the drafting regarding protection from liability should be included in the part of the legislation dealing with enforcement and penalty.

**WAIIS Recommendation: In line with the other Australian states and territories, the legislation may include protection from liability for the relevant person/agency. The protection from liability section needs to be drafted so that liability for the misuse/ abuse of restrictive practices remains firmly with the relevant person/agency – with no limitation on applicable criminal penalty and any right of a person with a disability to a civil claim.**