AUSTRALIA'S RESISTANCE TO IMPLEMENTING THE MONITORING MECHANISMS IN THE OPTIONAL PROTOCOL TO THE CONVENTION AGAINST TORTURE: RESTRICTIVE PRACTICES AND PEOPLE WITH DISABILITIES 'IN THE COMMUNITY'

Julia Duffy & Sam Boyle[*]

INTRODUCTION

The Optional Protocol to the Convention Against Torture (OPCAT) establishes oversight mechanisms to prevent torture and other cruel, inhuman, or degrading treatment or punishment in places of detention.[1] Australia ratified OPCAT in 2017, but has since failed to fully implement it.[2] This article considers the mandate of OPCAT to prevent torture and other cruel, inhuman, or degrading treatment of people with disabilities subject to restrictive practices. Restrictive practices may incorporate mechanical, physical, chemical, or environmental restraint or seclusion.[3] In most Western nations, including Australia, their use is permitted—albeit heavily regulated[4]—for people in mental health[5] and disability support systems[6] to protect them or others from harm.

Until the late twentieth century, people with disabilities in the United States and Australia mainly resided in large public institutions, where restrictive practices were performed routinely and without adequate oversight.[7] Revelations of abuse and neglect behind closed doors led to processes of deinstitutionalization,[8] thus resulting in many people with

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[*] Dr. Julia Duffy is a Research Fellow and Dr. Sam Boyle is a Senior Lecturer, at the Australian Centre for Health Law Research, Queensland University of Technology, Brisbane, Australia. The authors wish to thank Maddy Archer for her invaluable research assistance on this article. They also wish to thank the organisers of the University of Louisville Law Review symposium for their support and interest.

[1] G.A. Res. 57/199, Optional Protocol to the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (Dec. 18, 2002) [hereinafter OPCAT].

[2] *Multilateral Treaties Deposited with the Secretary-General Chapter IV Human Rights, 9.b. Optional Protocol the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, UNITED NATIONS, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9-b&chapter=4&clang=_en [https://perma.cc/5LPW-PMFW] (last visited Apr. 3, 2024).

[3] *See National Disability Insurance Scheme (Restrictive Practices and Behaviour Support) Rules 2018* (Cth) s 6 (Austl.) (definition of "regulated restrictive practice").

[4] *See* discussion *infra* Part I.

[5] *See* Ian Freckleton, *Mental Health Law*, in HEALTH LAW IN AUSTRALIA (Ben White et al. eds., 3rd ed. 2018) (for Australian regulation of restrictive practices in mental health systems).

[6] For Australia, see *National Disability Insurance Scheme (Restrictive Practices and Behaviour Support) Rules 2018* (Cth) s 21(3)(c) (Austl.) [hereinafter NDIS].

[7] *See*, *e.g.*, LUCY SERIES, DEPRIVATION OF LIBERTY IN THE SHADOWS OF THE INSTITUTION 55-58 (2022) (detailing the abuses that occurred where restrictive practices were performed without adequate oversight).

[8] *See*, *e.g.*, Walid Fakhoury & Stefan Priebe, *Deinstitutionalization and Reinstitutionalization: Major Changes*

disabilities now residing in the community and receiving in-home care and support.[9] Yet, restrictive practices are still used in these supposedly de-institutionalized settings.[10] This article focuses on Australia's oversight obligations under OPCAT as they apply to restrictive practices for people with disabilities living in the community, in their own homes. We argue that inaction by the Australian Government in this specific area evinces a misplaced assumption that OPCAT oversight is inappropriate or unnecessary in these ostensibly personal and private places.

Part I describes relevant Australian restrictive practices legislation, and reviews literature demonstrating that the use of restrictive practices heightens risks of inhuman treatment and torture. Part II provides an outline of the applicable international human rights obligations under OPCAT, the Convention Against Torture, Inhuman or Degrading Treatment (Convention Against Torture)[11] and the Convention on the Rights of Persons with Disabilities (CRPD).[12] Part III explains Australian governments' failure at state and federal levels to acknowledge that "private" homes, where people with disabilities are made subject to restrictive practices, may in fact be places of detention. Part IV examines the porous boundaries between public and private spaces which allow for assumptions that "homes" cannot be places of detention and are therefore inherently safe. Finally, Part V argues for acknowledgement by Australian governments—both state and federal—of their immediate obligation to apply OPCAT in homes where it is clear restrictive practices are, or may be, used.

I. RESTRICTIVE PRACTICES IN AUSTRALIA

The term "restrictive practices" refers to practices that impair the "rights or freedom of movement of a person."[13] Under Australian disability services legislation, some restrictive practices that would otherwise amount

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in the Provision of Mental Healthcare, 6 PSYCHIATRY 313, 313-14 (2007); Julie Beadle-Brown et al. , *Deinstitutionalization in Intellectual Disabilities* 20 CURRENT. OP. PSYCHIATRY 437, 438 (2007); Americans with Disabilities Act of 1990, 42 U.S.C. § 12101; Olmstead v. L.C. *ex rel.* Zimring, 527 U.S. 581, 587-88 (1999).

[9] Katherine Cienkus, *Deinstitutionalization or Transinstitutionalization? Barriers to Independent Living for Individuals with Intellectual and Developmental Disabilities*, 36 NOTRE DAME J.L. ETHICS & PUB. POL'Y 315, 329-30 (2022).

[10] *Id.* at 321.

[11] Gen. Res. 39/46, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Dec. 10, 1984) [hereinafter CAT].

[12] Gen. Res. A/RES/61/106, Convention on the Right of Persons with Disabilities (Dec. 13, 2006) [hereinafter CRPD].

[13] ROYAL COMMISSION INTO VIOLENCE, ABUSE, NEGLECT AND EXPLOITATION OF PEOPLE WITH DISABILITY, RESTRICTIVE PRACTICES ISSUES PAPER 1 (May 2020), https://disability.royalcommission.gov.au/publications/restrictive-practices (last visited Jan. 8, 2024) [hereinafter ROYAL COMM'N INTO VIOLENCE].

to assault or false imprisonment are expressly legalised and regulated.[14] These "regulated restrictive practices" are: seclusion, chemical restraint, mechanical restraint, physical restraint, and environmental restraint.[15] "Seclusion" occurs where a person is solely confined in a room or space from which they cannot exit voluntarily.[16] "Chemical restraint" is the use of medication for the "primary purpose of influencing a person's behaviour," as opposed to being used for treatment of a medical condition.[17] Mechanical restraint is the "use of a device to prevent, restrict, or subdue a person's movement for the primary purpose of influencing a person's behaviour."[18] "Physical restraint" is the use of physical force to "prevent, restrict or subdue movement of a person's body, or part of their body, for the primary purpose of influencing their behaviour."[19] Finally, "environmental restraint" refers to the imposition of restrictions on accessing "all parts of their environment, including items or activities."[20]

All of these regulated restrictive practices are allowed and used to protect some people with disabilities—most commonly, intellectual disabilities—from causing harm to themselves or others.[21] However, the growing focus on disability rights in recent decades means that restrictive practices have been the subject of increased scrutiny and controversy in Australia and elsewhere.[22] Some advocates and scholars argue that *any* legal restrictions on the ability of people with disabilities to make their own decisions are discriminatory and in breach of human rights obligations.[23] However, in the case of involuntarily imposed restrictive practices, there are wider concerns that they can be used for "coercion, discipline, convenience, or retaliation,"[24] rather than protection, leading to calls for their elimination, and abolition of the authorization regimes that enable them.[25]

Like the United States, Australia has a federal system of

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[14] *Id.*

[15] *See* NDIS, *supra* note 7.

[16] *Id.* at s 6(a).

[17] *Id.* at s 6(b).

[18] *Id*. at s 6(c).

[19] *Id.* at s 6(d).

[20] *Id.* at s 6 (an example is restricting access to sharp objects).

[21] *Id.* at s 21(3)(c).

[22] BERNADETTE MCSHERRY & YVETTE MAKER, RESTRICTIVE PRACTICES: OPTIONS AND OPPORTUNITIES, IN RESTRICTIVE PRACTICES IN HEALTH CARE AND DISABILITY SETTINGS: LEGAL, POLICY AND PRACTICAL RESPONSES (Bernadette McSherry & Yvette Maker eds., 2021).

[23] *See* Eilionóir Flynn & Anna Arstein-Kerslake, *State Intervention in the Lives of People with Disabilities: The Case for a Disability-neutral Framework*, 13 INT. J. L. CONTEXT 39 (2017); *see also* discussion *infra* Part II.

[24] Disability Rights Now, *Civil Society Report to the United Nations on the Rights of Persons with Disabilities*, PEOPLE WITH DISABILITY AUSTL. ¶ 241 (2012), https://pwd.org.au/wp-content/uploads/2019/06/CRPD_Civil_Society_Report_Word.pdf.

[25] *See* CLAIRE SPIVAKOVSKY ET AL. , RESTRICTIVE PRACTICES: A PATHWAY TO ELIMINATION 260-61 (2023).

government,[26] and its restrictive practices legislation exists at the Commonwealth, State, and Territory levels.[27] The Commonwealth Government is the primary funder of disability services under what is called the National Disability Insurance Scheme (NDIS).[28] The NDIS is a personalized or individualized system of service provision whereby participants assessed as having functional impairments receive personal budgets to be spent on necessary and reasonable supports.[29] Service providers are mainly private entities, funded and regulated by Australian governments.[30] A small number of people with disabilities who are not eligible for NDIS funded supports may still have access to supports funded by State governments.[31]

The Commonwealth Government's National Disability Insurance Scheme Act 2013 (NDIS Act) establishes a national regime for restrictive practices imposed by registered NDIS disability service providers.[32] Australia has six States and two internal Territories, all of which have their own legislation or administrative policies in place for restrictive practices.[33]

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[26] *Infosheet 20 - The Australian system of government*, PARLIAMENT OF AUSTL., https://www.aph.gov.au/About_Parliament/House_of_Representatives/Powers_practice_and_procedure/00_-_Infosheets/Infosheet_20_-_The_Australian_system_of_government [https://perma.cc/57ZB-5MZL] (last visited Apr. 3, 2024).

[27] *See*, *e.g.*, NDIS, supra note 7; *Disability Services Act 2006* (Qld) (Austl.); *Guardianship and Administration Act 2000* (Qld) (Austl.); *Disability Act 2006* (Vic) (Austl.); *Senior Practitioner Act 2018* (Austl. Cap. Terr.); *Disability Services Act 2011* (Tas) (Austl.); *Disability Insurance Scheme (Authorisations) Act 2019* (N.T.) (Austl.); *Disability Inclusion Act 2018* (SA) (Austl.); *Disability Inclusion (Restrictive Practices - NDIS) Regulations 2021* (S.A.) (Austl.). *See also* Kim Chandler, Lindy Willmott & Ben White, *Rethinking Restrictive Practices: A Comparative Analysis* 14 QUT L. REV. 90, 91-92 (2014).

[28] *How the NDIS Works*, NAT'L DISABILITY INS. AGENCY, www.ndis.gov.au/understanding/how-ndis-works [https://perma.cc/W2Q3-YLDG] (last visited Apr.. 3, 2024).

[29] *Do You Meet the Disability Requirements?*, NAT'L DISABILITY INS. AGENCY, https://ourguidelines.ndis.gov.au/home/becoming-participant/applying-ndis/do-you-meet-disability-requirements [https://perma.cc/H8A6-9QEJ] (last visited Apr. 3, 2024).

[30] *What is a Provider?*, NAT'L DISABILITY INS. AGENCY, https://www.ndis.gov.au/print/pdf/node/95#:~:text=Providers%20can%20be%20large%20companies,NDIS%20Quality%20and%20Safeguards%20Commission%20 [https://perma.cc/BHG6-ZN25] (last visited Apr. 3, 2024) (they may be commercial or not-for-profit).

[31] *Support for People Who are Not Eligible?*, NAT'L DISABILITY INS. AGENCY, https://www.ndis.gov.au/applying-access-ndis/how-apply/receiving-your-access-decision/support-people-who-are-not-eligible [https://perma.cc/5MKG-5NAZ] (last visited Apr. 3, 2024). This paper focuses on the regulation of NDIS providers, but state-funded providers are under the same restrictive practices authorization regimes, although without the additional protections offered by the NDIS Quality and Safeguards Commission.

[32] *Legislation*, NAT'L DISABILITY INS. AGENCY, https://www.ndis.gov.au/about-us/governance/legislation [https://perma.cc/4G5U-A6AB] (last visited Apr. 3, 2024).

[33] NDIS, *supra* note 7, at s 20; *see also* Flynn & Arstein-Kerslake, *supra* note 23 (discussing Australian state and territory legislation). New South Wales and Western Australia don't have any applicable legislation, but they do have administrative policies in place. *See Restrictive Practice Authorisation Policy*, N.S.W. GOV'T, https://www.facs.nsw.gov.au/__data/assets/pdf_file/0006/592755/Restrictive-Practices-Authorisation-Policy.pdf (last visited Jan. 5, 2024); *Policy and Procedure Guidelines*, W.A. GOV'T, https://www.wa.gov.au/organisation/department-of-communities/policy-and-procedure-guidelines [https://perma.cc/WQM3-6T7X] (last visited Apr. 3, 2024).

This means that the requirements in both the NDIS Act and relevant State and Territory legislation or policies must be met for restrictive practices to be lawful.[34] A key requirement for a person to be made subject to restrictive practices is that the practices must be included as part of the person's "behavior support plan."[35] A behavior support plan must: (i) be based on a functional behavioral assessment; (ii) aim to reduce, and eventually eliminate, the need for restrictive practices; and (iii) be developed in consultation with the participant, their family, and care provider.[36] Restrictive practices can only be used "for the shortest possible time" and "as a last resort in response to risk of harm to the person with disability or others, and after the provider has explored and applied evidence-based, person-centred and proactive strategies."[37]

Disability service providers must collect data on their use of restrictive practices and provide monthly reports to a national oversight body: the NDIS Quality and Safeguards Commission (the NDIS Commission).[38] In particular, providers must notify the NDIS Commission of "reportable incidents," which include the non-compliant use of a restrictive practice.[39] Restrictive practices used by family members are not covered by the legislation, and are thus not regulated by the NDIS Commission.[40]

State and Territory regulatory legislation differs. In the State of Victoria, for example, the implementation of restrictive practices is overseen by the statutory role of the Victorian Senior Practitioner (VSP).[41] The Disability Act 2006 (Vic) states that the VSP must approve the appointment by every disability service provider of an Authorised Program Officer, who in turn must approve the use of restrictive practices.[42] For seclusion, physical, or mechanical restraint, approval is also required by the VSP.[43] In addition, an "Independent Person" must ensure that the use of a restrictive practice is explained to the participant and advise them of their appeal and review rights.[44] The VSP has issued several guidelines and practice directions providing further safeguards for, and oversight of, restrictive practices.[45]

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[34] NDIS, *supra* note 7, at s 9.

[35] *Id.* at ss 10-13.

[36] *Id.* at s 20.

[37] *Id.* at s 21(3)(c), (g).

[38] *Id.* at ss 14-15.

[39] See *id.* at s 9 (providing a definition of "reportable incident").

[40] *Unauthorised Use of Restrictive Practices Questions and Answers*, NATL DISABILITY INS. SCHEME QUALITY & SAFEGUARDS COMM'N, https://www.ndiscommission.gov.au/sites/default/files/2022-02/unauthorised-use-restrictive-practices-questions-and-answers.pdf, 8-9 (last visited Mar. 21, 2024).

[41] *Disability Act 2006* (Vic) s 23 (Austl.).

[42] *Id.* at ss 132ZI-132ZJ.

[43] *Id.* at s 135(a).

[44] *Id.* at s 140(1).

[45] *See*, *e.g.*, Vic Senior Practitioner, *Physical Restraint Direction Paper Guidelines and Standards* (September 20, 2023); Vic Senior Practitioner, *Behaviour Support Plans and NDIS Behaviour Support Plans* (September 20

Furthermore, the Victorian Office of the Public Advocate—a statutory body that protects the rights of people with impaired decision-making capacity—has the power to receive reports of breaches by providers of the legislation, and it can refer such reports to the VSP or the NDIS Commission for investigation.[46]

II. INTERNATIONAL HUMAN RIGHTS FRAMEWORK

The United Nations Convention Against Torture[47] codified the already existing rule in international law prohibiting torture.[48] This rule is "non-derogable" such that "[n]o exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture."[49] Article 1 of the Convention Against Torture defines "torture" as:

> [A]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as . . . punishing him . . . or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.[50]

Moreover, it obliges states to prohibit and prevent both torture and:

> [O]ther acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article 1, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.[51]

2023); Vic Senior Practitioner, *Authorised Program Officers* (September 20 2023); Vic Senior Practitioner, *Psycho-social Disability* (September 20 2023); Vic Senior Practitioner, *Restrictive Practice Prohibition Orders under Section 27(5B) Department of Families Fairness and Housing Victoria*. *See also Victorian Senior Practitioner's Directions and Prohibitions*, VIC SENIOR PRACTITIONER, https://www.dffh.vic.gov.au/victorian-senior-practitioners-directions-and-prohibitions [https://perma.cc/S3K4-BZER] (last visited Mar.. 31, 2024).

[46] *Disability Act 2006* (Vic) s 141(1) (Austl.).

[47] CAT, *supra* note 11.

[48] Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, 2012 I.C.J.422, ¶ 99 (July 20) ("In the Court's opinion, the prohibition of torture is part of customary international law and it has become a peremptory norm (*jus cogens*)").

[49] CAT, *supra* note 11, at art. II, ¶ 2.

[50] *Id.* at art. 1, ¶ 1.

[51] *Id.* at art. 16.

Overlapping and reinforcing the obligations in the Convention Against Torture are several protections contained in the CRPD[52] against the abuse and exploitation of people with disabilities.[53] The CRPD, ratified by Australia in 2008, is the first international treaty specifically directed at upholding the rights of people with disabilities.[54] Although the United States has signed, but not yet ratified, the CRPD,[55] it has nevertheless been influential in framing debates about law and practice for people with disabilities in the United States,[56] as well as Australia.[57] Article 14 of the CRPD provides that people with disabilities must "not [be] deprived of their liberty unlawfully or arbitrarily, . . . and that the existence of a disability shall in no case justify a deprivation of liberty."[58] Article 15 provides that people with disabilities shall not be "subjected to torture or cruel, inhuman or degrading treatment."[59] Article 16 provides that people with disabilities must be free from "all forms of exploitation, violence and abuse."[60] Collectively, these Articles mirror the obligations found in the Convention Against Torture.

Some advocates and scholars argue that restrictive practices are always discriminatory because they are imposed only on people with disability, and for this reason alone should be immediately ceased.[61] Indeed, there is also a view that restrictive practices may inevitably amount to cruel, inhuman or degrading treatment, or even torture.[62] However, Commonwealth and State government policy—for now and the immediate future—is to retain the current authorisation scheme and make a national commitment to work towards their reduction and eventual elimination.[63] Moreover, Australian

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[52] *See supra* text accompanying note 13 (referring to the Convention on the Rights of Persons with Disabilities as the CRPD).

[53] Meredith Lea et al., *A Disability Aware Approach to Torture Prevention? Australian OPCAT Ratification and Improved Protections for People with Disability*, 24 AUSTL. J. OF HUM. RTS. 70, 72 (2018) (providing a more extensive description of the overlap).

[54] AUSTL LAW REFORM COMM'N, EQUALITY, CAPACITY AND DISABILITY IN COMMONWEALTH LAWS 36 (2014).

[55] *Ratification Status for CRPD–Convention on the Rights of Persons with Disabilities*, UNITED NATIONS OFF. OF THE HIGH COMM'R HUMAN RIGHTS, https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CRPD [https://perma.cc/FX9S-XPNH] (last visited Apr. 3 2024).

[56] *See*, *e.g.*, Kristin Booth Glen, *Supported Decision-Making and the Human Right of Legal Capacity*, 3 INCLUSION 2 (2015).

[57] *See*, *e.g.*, Terry Carney, *Supported Decision-Making for People with Cognitive Impairments: An Australian Perspective?*, 4 LAWS 37, 38 (2015).

[58] CRPD, *supra* note 11, at art. XIV.

[59] *Id*. at art. XV.

[60] *Id.* at art. XVI, ¶1.

[61] SPIVAKOVSKY ET AL., *supra* note 25, at 171-234 (making a comprehensive argument for immediate repeal of restrictive practices authorisation regimes in Australia on human rights grounds).

[62] *Id*.; Lea et al., *supra* note 53, at 75–76; *see also* Penelope Weller, *OPCAT Monitoring and the Convention on the Rights of Persons with Disabilities*, 25 AUST. J. HUM. RTS. 130 (2019).

[63] AUSTL. GOV'T DISABILITY REFORM COUNCIL, NATIONAL FRAMEWORK FOR REDUCING AND ELIMINATING

legislation aims to provide compliance with certain standards and, optimally, ensure transparency and monitoring through the collection of data.[64]

However, given that restrictive practices legislation has the effect of legalising what may otherwise be an assault, there is definitely a "thin yet significant line that divides the ethical and legal use of restraint and seclusion and abusive and illegal practices."[65] When people are in environments where they are or may be detained or restrained, there is a higher risk that torture or cruel, inhuman, or degrading treatment will occur,[66] depending on the actual conditions in which a person is detained.[67] This is why independent oversight under the OPCAT regime is crucial.

OPCAT states that its fundamental objective is to "establish a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment."[68] To this end, OPCAT establishes a Subcommittee on Prevention of Torture and Other Cruel, inhuman or Degrading Treatment or Punishment (SPT)[69] and mandates that state parties "designate or maintain . . . one or several visiting bodies" called National Preventive Mechanisms (NPMs).[70] States agree that the SPT will visit places within their jurisdiction where people are or may be deprived of their liberty and make reports and recommendations.[71] The local NPMs must have "functional independence" from government,[72] be adequately resourced,[73] and have power to "regularly examine the treatment of the persons deprived of their liberty . . . with a view to strengthening, if necessary, their protection against torture and other cruel, inhuman or

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THE USE OF RESTRICTIVE PRACTICES IN THE DISABILITY SERVICE SECTOR (2013), https://www.dss.gov.au/sites/default/files/documents/04_2014/national_fraemwork_restricitive_practices_0.pdf (stating that Commonwealth, State and Territory Disability Ministers endorsed the National Framework for Reducing and Eliminating the Use of Restrictive Practices in the Disability Sector at their meeting at the Disability Reform Council meeting on 21 March 2014).

[64] AUSTL. DISABILITY & AGED CARE OPCAT WORKING GROUP, COVID-19 AND OPCAT: DETENTION OF PEOPLE WITH DISABILITY, AND OLDER PEOPLE 8 (2020) (urging strongly that implementing OPCAT can "preserve transparency in sites such as disability and aged care residential facilities which are places of violence and neglect in the absence of adequate oversight, both formal and informal"). *But see* Lea et al., *supra* note 53, at 85 (referring to evidence that monitoring has less effect on prevention of torture than changing or improving detention conditions).

[65] SAM KARIM, A HUMAN RIGHTS PERSPECTIVE ON REDUCING RESTRICTIVE PRACTICES IN INTELLECTUAL DISABILITY AND AUTISM 5 (Sam Karim ed., 2014).

[66] Lea et al., *supra* note 53, at 86.

[67] *Id.* at 84–85.

[68] OPCAT, *supra* note 1, at art. I.

[69] *Id*. at art. II.

[70] *Id.* at art. III.

[71] *Id*. at arts. 5, 11, 16.

[72] *Id.* at art. 18(1).

[73] *Id.* at art. 18(3).

degrading treatment or punishment."[74] The SPT will assist NPMs in their safeguarding and monitoring role by, for example, "offer[ing] them training and technical assistance with a view to strengthening their capacities."[75] Given the overlapping human rights obligations, commentators write that OPCAT drives compliance not only with the Convention Against Torture, but also with the CRPD.[76]

The Commonwealth Government ratified OPCAT in 2017, but then immediately made a declaration under Article 24[77] that it was postponing its obligation to establish NPMs for three years.[78] The Government's reasoning was that it required additional time to negotiate with the States and Territories on funding and administrative issues for NPMs.[79] While OPCAT allows for existing state monitoring bodies to be nominated as NPMs,[80] this led to political and fiscal tensions in the federation.[81] In Australia, prisons, mental health facilities, and other places of detention are mostly administered by State governments.[82] Thus, even though the Commonwealth Government was the signatory to OPCAT, State governments were, and are largely responsible for, OPCAT implementation on the ground.[83] In 2022, the Commonwealth Government sought an additional year extension to this postponement from the SPT, on the basis that the COVID-19 pandemic had

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[74] *Id.* at art. 19(a).

[75] *Id.* at art. 11(1)(b)(ii).

[76] ROYAL COMM'N INTO VIOLENCE, ABUSE, NEGLECT & EXPLOITATION OF PEOPLE WITH DISABILITY, INDEPENDENT OVERSIGHT AND COMPLAINT MECHANISMS 7 (2013) [hereinafter ROYAL COMM'N INTO VIOLENCE]; RACHEL MURRAY, THE OPTIONAL PROTOCOL TO THE CONVENTION AGAINST TORTURE 181 (2011) (noting overlapping obligations between the CRPD and OPCAT in the context of mental health facilities but failing to mention homes for people with disabilities in this context).

[77] OPCAT, *supra* note 1, at art. XXIV (Article 24 provides that, "[u]pon ratification, States Parties may make a declaration postponing the implementation of their obligations under either part III or part IV of the present Protocol." Further, "[t]his postponement shall be valid for a maximum of three years. After due representations made by the State Party and after consultation with the Subcommittee on Prevention, the Committee against Torture may extend that period for an additional two years").

[78] UNITED NATIONS, *supra* note 2.

[79] *OPCAT: Optional Protocol to the Convention Against Torture*, AUSTL. HUMAM RIGHTS COMM'N (June 29, 2020), https://humanrights.gov.au/our-work/rights-and-freedoms/projects/opcat-optional-protocol-convention-against-torture [https://perma.cc/UU87-933Y].

[80] OPCAT, *supra* note 1, at art. XVII (Article 17 requires that States "maintain, designate or establish" NPMs); *see* MURRAY, *supra* note 76, at 54 (commenting that OPCAT "does not require that States Parties establish any new human rights bodies or mechanisms").

[81] *See generally Monitoring Places of Detention – OPCAT*, COMMONWEALTH OMBUDSMAN, https://www.ombudsman.gov.au/industry-and-agency-oversight/monitoring-places-of-detention-opcat [https://perma.cc/Q5U2-2GSJ] (last visited Apr. 9, 2024) (this page summarizes the administrative progression of implementing OPCAT in Australia and its delays).

[82] *See Australia's mental health system*, AUSTL. INST. OF HEALTH & WELFARE, https://www.aihw.gov.au/mental-health/overview/australias-mental-health-services [https://perma.cc/7YSC-CC7C] (last updated Nov. 29, 2023); *see also Australia*, PRISON INSIDER, https://www.prison-insider.com/countryprofile/prisonsinaustralia [https://perma.cc/3UL3-MRZT] (last visited Apr. 9, 2023).

[83] *See* Richard Harding, *Australia's Circuitous Path towards the Ratification of OPCAT, 2002–2017: The Challenges of Implementation*, 25 AUSTL. J. HUM. RTS. 4, 8 (2019) (noting that "the majority of powers relating to imprisonment and other forms of detention remain the responsibility of the constituent States and Territories").

frustrated implementation efforts.[84] However, this deadline was not met, and, at the time of writing, legislative and administrative arrangements for implementation are still under development.[85]

The Australian Human Rights Commission (Human Rights Commission) recommended that each Australian government enact legislation to implement OPCAT rather than solely relying on administrative implementation.[86] Despite this, the Commonwealth has not enacted legislation, and has instead chosen to administratively nominate the existing office of the Commonwealth Ombudsman[87] as both the national coordinator of NPMs and the NPM overseeing those places of detention within the Commonwealth's jurisdiction and control.[88] This is of concern to the Human Rights Commission and others because the Ombudsman must rely on its existing statutory powers to conduct its NPM activities and allow visits by the SPT; but it is not clear that those powers will allow for the unfettered access to all places of detention, as required by OPCAT.[89] Western Australia has similarly chosen to implement OPCAT without legislation, nominating two existing agencies as its NPMs.[90] While the remaining jurisdictions have all passed legislation,[91] at the time of writing the three largest States—Victoria, Queensland, and New South Wales—had not nominated which agencies would become NPMs, claiming that they are waiting for funding issues with the Commonwealth to be resolved.[92]

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[84] *See* UNITED NATIONS, *supra* note 2; AUSTL. HUMAN RIGHTS COMM'N, *supra* note 79.

[85] *See* Rosalind Croucher et. al, *Urgent Action Needed Following Termination of UN Inspection*, AUSTL. HUMAN RIGHTS COMM'N (Feb. 21, 2023), https://humanrights.gov.au/about/news/urgent-action-needed-following-termination-un-inspection [https://perma.cc/U66M-BNKJ].

[86] AUSTL. HUMAN RIGHTS COMM'N, IMPLEMENTING OPCAT IN AUSTRALIA 57-58 (2020), https://humanrights.gov.au/sites/default/files/document/publication/ahrc_2020_implementing_opcat.pdf.

[87] *See Ombudsman Act 1976* (Cth) s 4 (Austl.) (establishing the Commonwealth Ombudsman and the duties of its office).

[88] *Ombudsman Regulations 2017* (Cth) ss 16-17 (Austl.); *see also* COMMONWEALTH OMBUDSMAN, ANNUAL REPORT OF THE COMMONWEALTH NATIONAL PREVENTIVE MECHANISM UNDER THE OPTIONAL PROTOCOL TO THE CONVENTION AGAINST TORTURE (OPCAT) 39 (2023).

[89] AUSTL. HUMAN RIGHTS COMM'N, *supra* note 79; *see* Austl. OPCAT Network, *The Implementation of OPCAT in Australia: Submission by the Australia OPCAT Network to the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (SPT) and the United Nations Working Group on Arbitrary Detention (WGAD) About the Australia OPCAT Network*, 11-15 (Jan. 2020), https://www.refugeecouncil.org.au/wp-content/uploads/2020/02/Implementation_of_OPCAT_in_Australia.pdf [https://perma.cc/YY55-TLQ5].

[90] *See* COMMONWEALTH OMBUDSMAN, *supra* note 88, at 40; *see also* AUSTL. HUMAN RIGHTS COMM'N, *Road Map to OPCAT Compliance* 17 (2022), https://humanrights.gov.au/sites/default/files/opcat_road_map_0.pdf [https://perma.cc/ZFK8-269R] (naming the two nominated bodies as Ombudsman Western Australia (for mental health and other secure facilities) and Western Australia Office of the Inspector of Custodial Services (WA) (for justice-related facilities including police lockups)).

[91] *See*, *e.g.*, *Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) Act 2018* (Austl. Cap. Terr.) (Austl.); *Monitoring of Places of Detention (Optional Protocol to the Convention Against Torture) Act 2018* (N.T.) (Austl.); *OPCAT Implementation Act 2021* (Tas.) pt 1 (Austl.); *see also* COMMONWEALTH OMBUDSMAN, *supra* note 81.

[92] *See Australian NPM Network*, OMBUDSMAN NT, https://ombudsman.nt.gov.au/opcat/australian-npm-

The SPT had planned a visit to Australia for April 2020, but, again, rescheduled it for the second half of 2022 due to the COVID-19 pandemic.[93] In the midst of Australia's ongoing implementation failures, a delegation from the SPT visited Australia in October 2022, intending to conduct visits over 12 days.[94] However, the governments of Queensland and New South Wales failed to grant delegation members unrestricted access to prisons.[95] The governments' stated reasons for this obstruction were that there were safety concerns for SPT members and that there was already adequate domestic oversight.[96] In February 2023, the SPT ended its visit to Australia because of the governments' failure to provide unfettered access as required by OPCAT.[97] It is noteworthy that the only other country where the SPT has had to abandon a visit has been Rwanda, where it withdrew following a series of obstructions by government authorities.[98]

III. OPCAT AND A "DEPRIVATION OF LIBERTY"

There is further cause for concern regarding Australia's adoption of OPCAT which specifically applies to the disability sector. The Commonwealth Government has stated that in the first instance it will only implement OPCAT for what it has defined as "primary" places of detention.[99] It defines "primary" places exhaustively as comprising: adult prisons; mental health facilities; forensic disability services where people are detained for 24 hours or more; and detention centres for juveniles, immigration detainees and the military.[100] A "forensic disability service" houses people with disability who have been charged with a criminal offence but have not faced trial due to a finding of unsoundness of mind at the time of the offence, or because they are found incompetent to stand trial due to a lack of understanding of

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network [https://perma.cc/F587-GYC5] (last updated Feb. 1, 2024) (listing the NPM agencies by geographic region: in the Australian Capital Territory (ACT), the ACT Human Rights Commission, ACT Inspector of Correctional Services and ACT Ombudsman; in the Northern Territory (NT) Ombudsman NT, Office of the Children's Commissioner and the Community Visitor Program; in South Australia (SA), Official visitors, Principal Community Visitor and Training Centre Visitor; in Tasmania (TAS), Tasmanian Ombudsman and Custodial Inspector).

[93] REFUGEE COUNCIL OF AUSTL., IMMIGRATION DETENTION IN AUSTRALIA: MAIN ISSUES OF CONCERN SINCE JANUARY 2020 1 (2022), https://www.refugeecouncil.org.au/wp-content/uploads/2022/08/2022-Report-to-the-SPT-Final.pdf [https://perma.cc/E7QS-SU5J].

[94] *See* ROYAL COMM'N INTO VIOLENCE, *supra* note 76, at 104.

[95] *Id.*

[96] *Id.*

[97] *Id*.

[98] *Id*. at 90.

[99] COMMONWEALTH OMBUDSMAN, IMPLEMENTATION OF THE OPTIONAL PROTOCOL TO THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT (OPCAT) 8 (2019), https://www.ombudsman.gov.au/__data/assets/pdf_file/0025/106657/Ombudsman-Report-Implementation-of-OPCAT.pdf [https://perma.cc/5NPN-9GWF].

[100] *Id.* at 8-9.

the trial process.[101] While restrictive practices authorization regimes apply in forensic disability services, populations in these services represent only a small minority of people with disability who may be subject to restrictive practices.[102] As described further below, many people with disability live in the community, such as in "group homes," where they may be subject to restrictive practices.[103]

Many advocacy and human rights organisations in Australia have identified a large number of different types of sites which may constitute places of detention under OPCAT, but which are not included in the Government's list of "primary" places.[104] Relevantly, this includes disability group homes.[105] The breadth of OPCAT's remit is set out in Article 4, which provides that:

> 1. Each State Party shall allow visits . . . to any place under its jurisdiction and control where persons are or may be deprived of their liberty, either by virtue of an order given by a public authority or at its instigation or with its consent or acquiescence (hereinafter referred to as places of detention). . . .
> 2. [D]eprivation of liberty means any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority.[106]

Key to the definition of "places of detention" is that they exist anywhere where people "are or may be deprived of their liberty" with the "consent or acquiescence" of a "public authority."[107] In 2023, the SPT released a draft General Comment setting out its interpretation of Article 4 of OPCAT, emphasising that "[t]his definition contains specific reference to the fact that deprivation of liberty may occur in both public and private settings,"[108] and that "as extensive an approach as possible in order to

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[101] *See id*.
[102] *See* Austl. OPCAT Network, *supra* note 89, at 85.
[103] *See* discussion *infra* note 130.
[104] *See generally* further discussion *infra* note 130.
[105] *See* Austl. OPCAT Network, *supra* note 89, at 82.
[106] OPCAT, *supra* note 1, at art. IV.
[107] *Id.*
[108] Subcomm. on Prevention of Torture & Other Cruel, Inhuman or Degrading Treatment or Punishment, *Draft Gen. Comment No. 1 on Places of Deprivation of Liberty*, ¶ 3 (2023), https://www.ohchr.org/sites/default/files/documents/hrbodies/spt-opcat/call-inputs/draft-GC1-on-art1-for-public-consultation-en.pdf [https://perma.cc/6SCA-7YPS] (last visited Nov. 28, 2023) [hereinafter Gen. Comment No. 1].

maximize the preventive impact" of the NPMs and SPT were required.[109] The General Comment affirms that "an interpretation of places of deprivation of liberty that is limited to such conventional places of deprivation of liberty as prisons would be overly restrictive and, in the view of the Subcommittee, clearly contrary to the Optional Protocol."[110] The Comment further demands a "good faith interpretation" that does not "leave out places where persons could be deprived of liberty and where torture could be taking place."[111]

Thus, OPCAT is intended to apply to anywhere that a person is being deprived or "might be deprived of their liberty," and where "the deprivation of liberty relates to a situation in which the State either exercises or might be expected to exercise a regulatory function."[112] Within the Australian disability and human rights communities, there is widespread agreement that group homes for people with disabilities fall within the definition of "places of detention" in Article 4 of OPCAT, due in part to the widespread use of restrictive practices by service providers.[113] Indeed, the General Comment provides examples of such places of detention as including "institutions that engage in the care of children, older persons or persons with disabilities, including persons with intellectual or psychosocial disabilities."[114] Human rights groups have criticised the Commonwealth Government for making a distinction between primary and secondary places of detention, a distinction which is not supported by the terms of OPCAT.[115] The Government's persistence in retaining this distinction means that Australia will remain with France as one of only two countries not to include "social care institutions" within NPM and OPCAT monitoring.[116]

Suggestions by the Government that a distinction between primary and secondary places of detention to allow for a staged implementation of OPCAT is a "proportionate" response, as allowed by the SPT, have also been widely countered.[117] Indeed, such a response misinterprets the SPT's statement that "in all situations, the [NPM] should also be mindful of the principle of proportionality when determining its priorities and the focus of its work."[118] Importantly, this statement means that while independently

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[109] *Id.* at ¶ 7.
[110] *Id.* at ¶ 8.
[111] *Id.* at ¶ 9.
[112] *Id.* at ¶ 11.
[113] *See* AUSTL. HUMAN RIGHTS COMM'N, INFORMATION CONCERNING AUSTRALIA'S COMPLIANCE WITH THE CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES 22 (2019); *see also* Austl. OPCAT Network, *supra* note 89, at 19-20, 82.
[114] Draft Gen Comment No. 1, *supra* note 108, at ¶ 13.
[115] *See* ROYAL COMM'N INTO VIOLENCE, *supra* note 13, at 6.
[116] *See* SERIES, *supra* note 7, at 97.
[117] *See*, *e.g.*, AUSTL. HUMAN RIGHTS COMM'N, *supra* note 90, at 8.
[118] Comm. Against Torture, *Ninth Annual Report of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. Doc CAT/C/57/4 (2016).

constituted NPMs may have a discretion to prioritise workloads and monitoring, governments do not have power to limit or direct the exercise of that discretion. This is consistent with the original advice given to the Commonwealth Government in 2008 by the Human Rights Commission, which suggested the "primary" versus "secondary" demarcation.[119] That advice makes it clear that it should be the NPMs which have the authority to make such a distinction, not the government.[120]

Although responsibility for OPCAT implementation will be shared between the Commonwealth, States, and Territories, intransigence by the Commonwealth in recognising the necessity or urgency of implementing OPCAT in "secondary" places of detention has a significant political and practical impact. Queensland and Victoria have overtly followed the Commonwealth's lead by passing implementation legislation that effectively excludes group homes from their NPMs' remit. [121] Moreover, to effectively monitor the use of restrictive practices, existing state agencies nominated as NPMs will need new and specialised expertise in disability services and regulation to operationalize the wider mandate.[122] States are reliant on Commonwealth funding for implementation,[123] so the Commonwealth's failure to acknowledge that restrictive practices in group homes amount to deprivations of liberty means that NPMs are unlikely to be able to develop the capability to develop such expertise. Indeed, the Commonwealth government has already been accused of under-funding States so as to inhibit the effective implementation of OPCAT in "primary" places of detention,[124] thus raising a real threat that funding will never be forthcoming for the wider oversight mandate.

Overall, given the liminal positioning of restrictive practices on a precarious boundary between providing protection and causing harm, effective monitoring and oversight are crucial. While Australia has various monitoring and safeguarding processes at State and Commonwealth levels, oversight and monitoring under OPCAT would ensure increased independence of domestic monitoring bodies and overarching accountability to the international community. Most importantly, it would provide insight

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[119] *See* RICHARD HARDING & NIEL MORGAN, AUSTL. HUMAN RIGHTS COMM'N, IMPLEMENTING THE OPTIONAL PROTOCOL TO THE CONVENTION AGAINST TORTURE: OPTIONS FOR AUSTRALIA 9-10 (2008), *available at* https://humanrights.gov.au/sites/default/files/content/human_rights/publications/opcat/opcat.pdf [https://perma.cc/F5C6-X7L2].

[120] *Id*. at 10.

[121] *See* Austl. OPCAT Network, *supra* note 89, at 19–32; *see also Monitoring of Places of Detention by the United Nations Subcommittee on the Prevention of Torture (OPCAT) Act 2022* (Vic) s 4 (Austl.) (which omits from its definition of "place of detention" congregate disability care or living arrangements that are not forensic services).

[122] *See* Austl. OPCAT Network, *supra* note 89, at 9.

[123] *See id.* at 27-28.

[124] *See id.* at 27-29.

as to whether current legislative regimes were in fact endorsing torture or other cruel, inhuman, or degrading treatment or punishment as those concepts are understood by the international human rights community. Therefore, the failure to provide transparent and independent monitoring under OPCAT is a significant concern.[125]

IV. DISABILITY, REGULATION AND PUBLIC AND PRIVATE SPACES

Australia's resistance to including disability group homes within the OPCAT mandate raises broader questions about how spaces that are seen as private, but in which restrictive practices may be used, are regulated by the state.

As noted above, group homes came about in Australia as part of the broader de-institutionalization movement in Western countries following revelations of abuse and neglect.[126] Group homes typically have a maximum of five residents and are intended to promote community living and inclusion, and many residents have found them to be successful.[127] Group homes are funded under the NDIS, which has as its foundation the ethos of de-institutionalization in its mandate that participants have "choice and control" over their services and lives.[128] This aligns with Article 19 of the CRPD, which provides that "[p]ersons with disabilities have the opportunity to choose their place of residence and where and with whom they live on an equal basis with others and are not obliged to live in a particular living arrangement."[129]

The idea of group home environments as precluding the human and civil rights abuses that occurred in twentieth century institutions aligns with the policy driving deinstitutionalization and community living of providing living environments "least restrictive" of civil rights.[130] Disability scholar

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[125] *See* OPCAT, *supra* note 1, at art. XI.

[126] Ilan Wiesel & Christine Bigby, *Movement on Shifting Sands: Deinstitutionalisation and People with Intellectual Disability in Australia, 1974–2014*, 33 URBAN POL'Y & RES. 178, 180 (2015).

[127] OFFICE OF THE PUBLIC ADVOCATE (VIC), I'M TOO SCARED TO COME OUT OF MY ROOM: PREVENTING AND RESPONDING TO VIOLENCE AND ABUSE BETWEEN CO-RESIDENTS IN GROUP HOMES, 14–15 (2019), *available at* https://www.publicadvocate.vic.gov.au/opa-s-work/research/142-i-m-too-scared-to-come-out-of-my-room [https://perma.cc/KB68-X29P] (a description of group homes in Victoria).

[128] *See*, *e.g.*, NDIS, *supra* note 7, at s 4(8) ("People with disability have the same right as other members of Ausstralian society to be able to determine their own best interests, including the right to exercise choice and control, and to engage as equal partners in decisions that will affect their lives"); JULIA DUFFY, MENTAL CAPACITY, DIGNITY AND THE POWER OF INTERNATIONAL HUMAN RIGHTS 30 (2023).

[129] CRPD, *supra* note 12, at art. XIX.

[130] SERIES, *supra* note 7, at 62 ("The principle of 'least restriction' . . . envisaged a 'continuum' of living arrangements and a 'continuum of supervision', including boarding with families, and 'homelike' cottage-like residences with 'small groupings' of residents, 'providing an evolution toward decreased dependence'); Wiesel and Bigby, *supra* note 126, at 180 ("Normalisation and the movement for deinstitutionalisation were deeply embedded within the broader civil rights movements of the 1960s and 1970s").

Lucy Series writes that the ethos of deinstitutionalization underpinning this type of individualized service provision and the NDIS personal budgeting model has led to a misapprehension that "social care" is necessarily a "locus of freedom" where risks of abuse and violence are lower.[131] However, there are several reasons why disability support in the community should not be assumed to be benign.[132]

While group homes may not physically resemble the old-fashioned institutions, residents may be prevented from leaving when providers determine such freedoms to be unsafe.[133] Thus, these sites have been described as "quasi-carceral,"[134] and despite their association with the deinstitutionalization movement, many consider them to be more aptly classified as "institutions."[135] As one disability rights group points out, "[a]n institution is . . . not defined merely by its size," but rather "it is any place in which people do not have, or are not allowed to exercise control over their lives and day to day decisions."[136] Additionally, within these homes, restrictive practices are often performed on residents.[137] Indeed, there is evidence that restrictive practices have at times been imposed in group homes in a way that is experienced by residents as punitive rather than protective.[138]

Further, there are factors associated with post-deinstitutionalization models that provide potential for concern. In Australia, as elsewhere, the market for disability services and accommodation has been privatized.[139] Commentators have noted how the profit motive inherent in this free market social service model sits uneasily beside an ethos of care and support.[140] Indeed, there is significant evidence that restrictive practices are routinely

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[131] SERIES, *supra* note 7, at 57.

[132] *See*, *e.g.*, P v. Cheshire West [2014] UKSC 19.

[133] Laura I. Appleman, *Deviancy, Dependency, and Disability: The Forgotten History of Eugenics and Mass Incarceration*, 68 DUKE L.J. 417, 459-60 (2018).

[134] Claire Loughnan, *The Scene and the Unseen: Neglect and Death in Immigration Detention and Aged Care*, 3 INCARCERATION 1, 3 (2022) ("Quasi-carceral" is the term used by Loughnan to describe aged care homes where people may also be confined and made subject to restrictive practices).

[135] *See* Jessica Robyn Cadwallader et al., *Institutional Violence Against People with Disability: Recent Legal and Political Developments,* 29 CURRENT ISSUES IN CRIM. JUST. 259, 260 (2018); *see also* Appleman, *supra* note 133, at 459 (describing them as "mini-institutions").

[136] *Key terms related to disability and human rights*, HEALTH & HUMAN RIGHTS RESOURCE GUIDE (Mar. 25, 2014) https://www.hhrguide.org/2014/03/25/key-terms-related-to-disability-and-human-rights/#:~:text=An%20institution%20is%20not%20defined%20merely%20by%20its,over%20their%20lives%20and%20day%20to%20day%20decisions [https://perma.cc/MX64-73AY].

[137] SPIVAKOVSKY ET AL., *supra* note 25, at 41.

[138] *See id*. at 65-69 (describing the experiences of residents in institutional settings).

[139] *See* Vanessa Di Natale, *'Privatised profit over people': NDIS contract stirs questions,* CITIZEN (Aug. 17, 2021), https://www.thecitizen.org.au/articles/privatised-profit-over-people-ndis-contract-stirs-questions [https://perma.cc/2AU3-672B].

[140] *See* Sara Dehm et al., *Covid-19 and Sites of Confinement: Public Health, Disposable Lives and Legal Accountability in Immigration Detention and Aged Care*, 44 U. N.S.W. L. J. 59, 63 (2021).

used when residences are staffed by workers without the requisite expertise to meet residents' needs, or where there is chronic understaffing.[141] In an ostensibly free market environment, albeit one in which the government underwrites payment for services, it is perhaps not surprising that the quality of services would be sacrificed for the sake of profits.[142]

While privatized, the provision of disability services and accommodation has also been individualized.[143] Again, such individualization is a positive change associated with deinstitutionalization, and one that is aligned with human rights obligations. However, individualization carries its own risks. People with disabilities may be framed as always "choosing" their service providers, including those providers who impose restrictive practices. In fact, however, restrictive practices are by their nature imposed involuntarily, outside the choice and control of the person with disabilities.[144] Where a participant exhibits behaviour considered particularly challenging, there may be only one service provider in the market willing to take on that role.[145] Moreover, while a key plank of the right to autonomy promoted by the NDIS is that people with disability have the choice to manage their own personal budgets, people subject to restrictive practices are specifically prohibited from exercising this right to self-management.[146] Self-management allows for greater flexibility in engaging and choosing service providers than the alternative arrangement, whereby the government's National Disability Insurance Agency manages contracting and payment.[147]

The characterization of group homes as providing choice and control is further undermined in practice by the fact that people with disabilities, particularly intellectual disabilities with complex support requirements, may have very little choice of accommodation.[148] The reality is that they can be on waiting lists for housing which, when available, is allocated to them, not

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[141] SPIVAKOVSKY ET AL. *supra* note 25, at 128-29.

[142] Dehm et al., *supra* note 140, at 63 ("Privatisation introduced a profit-motive...that sits ambivalently alongside service models supposedly offering care, welfare and humanitarian support").

[143] AUSTL. DEP'T OF SOC. SERVS., AUSTRALIA'S DISABILITY STRATEGY 2021-2031 15, 17 (2021), *available at* https://www.disabilitygateway.gov.au/sites/default/files/documents/2021-11/1786-australias-disability.pdf [https://perma.cc/2YSQ-LCNU].

[144] AUSTL. DISABILITY EMP'T SERVS., SERVICING PARTICIPANTS WITH CHALLENGING BEHAVIOURS GUIDELINES 3-4 (2018), https://www.dss.gov.au/sites/default/files/documents/07_2018/des_servicing_participants_with_challenging_behaviours_guidelines.pdf [https://perma.cc/8KWP-U3DT].

[145] *See generally* NAT'L DISABILITY SERVS., RECOGNIZING RESTRICTIVE PRACTICES: GUIDE 8 (2021), https://www.nds.org.au/images/zt/Recognising_Restrictive_Practices_Guide.pdf.

[146] Lea et al., *supra* note 53, at 79.

[147] *See* Di Natale, *supra* note 139.

[148] OFFICE OF THE PUBLIC ADVOCATE (VIC), *supra* note 127, at 14 ("Evidence has established that residents of group homes have no choice and control over where or with whom they live").

chosen by them, and they are often placed with strangers.[149] In short, the imposition of restrictive practices in group homes blurs the distinction between living conditions in the public institutions of the twentieth century and conditions in these residences which carry the label of "homes," with all the connotations of safety and comfort that the term conjures.[150]

Lucy Series has written of the complexities of these blurred boundaries in the United Kingdom, where restrictive practices can be authorized when administered by both government-funded service providers and family members.[151] In Australia, restrictive practices imposed by family members at home are beyond the current regulatory scheme.[152] However, Series' analysis of the porous nature of the boundary between private and public spaces once government regulation is imposed in the home has significant purchase in the Australian group home context.[153] Series proposes that Australia's failure to recognise disability group homes as places of detention under OPCAT demonstrates government resistance to acknowledging the "symbolism of social care detention," implying that the government is embarrassed to acknowledge the reality of effective institutionalization in what is supposed to be the post-institutionalization era.[154] The troubling reality is that the Commonwealth Government's tacit classification of these places as personal, private, and benign may act as a smokescreen behind which restrictive practices can continue unchallenged.[155] Moreover, the implication that personal responsibility underpins the individualized service system also risks blaming people with disabilities for their own lack of freedom.

Other commentators note that UK health and care professionals reject the legal framing of restrictive practices as deprivations of liberty in favour of framing them in the context and language of providing care, thereby obscuring their quasi-carceral nature.[156] Restrictive practices are more likely to be recognized as such in the mental health context, where inpatient

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[149] EILIONÓIR FLYNN ET AL., *DISABILITY-SPECIFIC FORMS OF DEPRIVATION OF LIBERTY* 9 (2019), *available at* https://www.universityofgalway.ie/media/centrefordisabilitylawandpolicy/files/DoL-Report-Final.pdf [https://perma.cc/KM4J-2HHH].

[150] ROYAL COMM'N INTO VIOLENCE, *supra* note 76, at 257 (indeed, the majority of Commissioners in the Disability Royal Commission recommended that they be phased out).

[151] SERIES, supra note 7 at 4-5.

[152] *Id.* at 110-111.

[153] We have written elsewhere on the ambivalence around regulating family decision makers in the context of mental health decision-making. *See* Julia Duffy, Sam Boyle & Katrine Del Villar, *What Does "Least Restrictive" or "Less Restrictive" Mean in Mental Health Law? Contradictions and Confusion in the Case of Queensland, Australia*, 49 AM. J. L. & MED. 283, 295-96, 298 (2023).

[154] SERIES, *supra* note 7, at 184.

[155] OFFICE OF THE PUBLIC ADVOCATE (VIC), *supra* note 127, at 14 (noting that "[g]roup homes can exhibit many of the hallmarks of institutions, like the one-size-fits-all approach").

[156] Flynn et al., *supra* note 149, at 69, 74, 85.

facilities more overtly declare their institutional nature.[157] Indeed, mental health institutions are included in the Commonwealth Government's list of primary places of detention.[158] Commentators have suggested that, given that alternatives would require larger amounts of funding, the human rights implications of deprivations of liberty are minimized and tolerated by professionals and the community.[159] Indeed, it is a fact that restrictive practices are more commonplace in Australia where staff are ill-trained and under-resourced.[160]

Yet the reality is that the NDIS Commission as the domestic monitoring body for restrictive practices has been severely criticized as inadequate and largely ineffective.[161] NDIS providers must inform the NDIS Commission of incidents of non-compliance with the authorisation regime, and the number of such reports is continually rising.[162] This may be due to increased adherence to reporting obligations rather than decreasing compliance with other regulatory requirements. However, we can only assume that non-compliance with authorization conditions may, in many cases, result in the torture or other cruel, inhuman, or degrading treatment of persons with disabilities as defined under the Convention against Torture. It is also clear that use of restrictive practices and instances of non-compliance are both under-reported to the NDIS Commission,[163] so the goal of transparency and accountability promised by the authorization regime is far from being fully realized.[164] In addition, during the COVID-19 pandemic, Public Health Directives effectively overrode the restrictive practices authorization regime so that people with disabilities were detained in their rooms without attendant safeguards.[165]

Some human rights advocates are calling for an immediate repeal of the restrictive practices authorization regime on the grounds that a restrictive practice inevitably amounts to the torture or other cruel, inhuman, or degrading treatment of persons with disabilities.[166] Flaws in current

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[157] *Id.* at 66.

[158] COMMONWEALTH OMBUDSMAN, *supra* note 88, at 8.

[159] *Id.* at 92.

[160] *See* SPIVAKOVSKY ET AL., *supra* note 25, at 148–150.

[161] *See id.* at 246; *see also* AUSTL. DISABILITY & AGED CARE OPCAT WORKING GROUP, *supra* note 64, at 3-4.

[162] SPIVAKOVSKY ET AL., *supra* note 25, at 219 ("Indeed, during the one-year period of 1 July 2020 to 30 June 2021, unauthorised uses of restrictive practice were shown to have increased on a month-to-month basis, with the NDIS Quality and Safeguards Commission indicating that during this one-year period, 7,862 people with disability had been subjected to a total of 1,032,064 unauthorised uses of restrictive practices").

[163] *Id.* at 226.

[164] QUEENSLAND ADVOCACY INC., RESTRICTIVE PRACTICES 6-7, 16 (2020), *available at* https://disability.royalcommission.gov.au/publications/sub10001080-queensland-advocacy-incorporated [https://perma.cc/H524-QM4E] [hereinafter QUEENSLAND ADVOCACY].

[165] AUSTL. DISABILITY & AGED CARE OPCAT WORKING GROUP, *supra* note 65, at 2.

[166] *See id.* at 14, n.52.

regulation and safeguarding give fuel to proposals for abolition, which would leave support workers exposed to criminal law sanctions should such practices continue.[167] Current law is such that restrictive practices must be underpinned by evidence-based behaviour support to ensure they are administered in a way which works towards their reduction and elimination—both in individual cases and across the system[168]—and the safeguards provided by regulation, reporting, and authorization of restrictive practices are intended to further this aim. However, there is a risk that, in practice, the regulatory regime legitimizes coercion while providing ineffective independent scrutiny, so that restrictive practices are used "routinely" rather than as a last resort.[169]

The legislation in Victoria provides people with disabilities the right to review by an independent tribunal of decisions to impose restrictive practices.[170] Additionally, the Disability Act 2006 (Vic) also establishes the role of the "Independent Person" who has an obligation to explain to a person with disability their review rights.[171] All of this has the appearance of providing an important safeguard, but there is no data on how often these review rights are exercised, with anecdotal reports advising that such reviews are extremely rare.[172] It appears that these review rights may be hollow in practice, suggesting that the existence of procedural safeguards in legislation can have the effect of shrouding, rather than containing, increases in deprivations of liberty. Lucy Series has opined that this may be the case with new proposed procedural safeguards for deprivations of liberty in England and Wales.[173]

V. RECENT POLICY DEVELOPMENTS IN AUSTRALIA

Established by the Commonwealth Government in 2019, the Royal Commission into the Neglect, Abuse and Exploitation of People with Disabilities (the Disability Royal Commission) handed down a report after three years of extensive investigation and research.[174] Therein, the Disability Royal Commission recommended that Australian governments immediately

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[167] SPIVAKOVSKY ET AL., *supra* note 26, at 86.

[168] NDIS, *supra* note 7, at s 21(2).

[169] *See* SERIES, *supra* note 7, at 205; but see SPIVAKOVSKY ET AL., *supra* note 25, at 20.

[170] *Disability Act 2006* (Vic) s 139(2) (Austl.).

[171] *Id.*at s 140.

[172] The authors are aware of one unpublished case of a review to the tribunal, instigated by a person with disability with the support of a government advocacy service.

[173] *See* SERIES, *supra* note 7, at 205.

[174] *Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability*, GOV'T N.S.W., https://dcj.nsw.gov.au/community-inclusion/disability-and-inclusion/disability-royal-commission.html [https://perma.cc/R9UV-YTS2] (last updated Apr. 4, 2024).

proceed to implement OPCAT, and that they accept that homes where restrictive practices are used fall within the definition of places of detention.[175] It has also recognised the vulnerability of many residents living in group homes to violence and abuse, and therefore recommended the replacement of group homes with more acceptable accommodation alternatives.[176] At the time of writing, the Commonwealth Government has not formally responded to this report.[177] However, given the Disability Royal Commission's findings, assumptions that homes for people with disability are inevitably safe and that increased regulation and oversight by NPMs and the SPT would intrude inappropriately and unnecessarily into private spaces are less tenable than ever. Moreover, the SPT's 2023 release of its draft General Comment on Article 4 of OPCAT further clarifies the expansive definition of places of detention, foreclosing any wriggle room the Government may otherwise have considered it had in relying on a narrow interpretation.[178]

The Commonwealth Government has also just released a report of an independent review of the NDIS, prompted by an anticipated funding crisis.[179] Many of the recommendations amount to cost-shifting from the Commonwealth Government to the States in a federal fiscal system where States have very small tax bases and are dependent on revenue distributions from the Commonwealth Government to fund health and social services.[180] While the Commonwealth Government has yet to respond to that report's recommendations, it is of real concern that, without accountability to the international human rights community, governments could all too readily reduce costs at the expense of foregoing their obligations to reduce and eliminate restrictive practices. A wealthy Western nation such as Australia should be leading the way in human rights protection and accountability, rather than being singled out as a laggard.

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[175] 11 ROYAL COMM'N INTO VIOLENCE, ABUSE, NEGLECT & EXPLOITATION OF PEOPLE WITH DISABILITY, Independent oversight and compliant mechanisms 99-100 (2023), *available at* https://disability.royalcommission.gov.au/system/files/2023-09/Final%20Report%20-%20Volume%2011%2C%20Independent%20oversight%20and%20complaint%20handling.pdf (last visited Apr. 11, 2024).

[176] *Id.* at 37.

[177] Press Release, Ministers for the Dep't of Soc. Serv., Joint Statement on Australian, State and Territory responses to the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Mar. 5, 2024), available at https://ministers.dss.gov.au/media-releases/14011 [https://perma.cc/T49E-R4JT].

[178] Draft Gen Comment No. 1, *supra* note 108, at ¶ 10.

[179] AUSTL. DEP'T OF THE PRIME MINISTER & CABINET, WORKING TOGETHER TO DELIVER THE NDIS, INDEPENDENT REVIEW INTO THE NATIONAL DISABILITY INSURANCE SCHEME (2023), https://www.ndisreview.gov.au/sites/default/files/resource/download/working-together-ndis-review-final-report.pdf [https://perma.cc/EK8L-E5MQ].

[180] *See id.* at 33-52.

CONCLUSION

To date, Australia has neglected to fulfill its obligations under OPCAT in relation to all places of detention within its jurisdiction. Moreover, for homes where people with disabilities are subject to restrictive practices, governments have no plans for implementation in the short term. When the original suggestion was made for a distinction to be made between primary and secondary places of detention in 2008, it was accompanied by advice that the categories should be continually reviewed and updated.[181] Given the findings of the Disability Royal Commission, Australian governments need to expressly acknowledge those situations where "deinstitutionalisation" has failed, and people with disabilities remain vulnerable to abuse and neglect behind closed doors.

By focusing on the situation of people with disabilities who are subject to restrictive practices, this article does not want to deflect attention from—or minimise the implications of—Australia's wider failure in relation to OPCAT. However, the case of restrictive practices deserves specific attention due to the already wide condemnation of authorization schemes as being contrary to human rights obligations. In 2013, the United Nations Special Rapporteur on torture and other cruel, inhuman, or degrading treatment or punishment recommended "[a]n absolute ban on all forced and non-consensual measures, including restraint and solitary confinement of people with psychological or intellectual disabilities . . . in all places of deprivation of liberty, including in psychiatric and social care institutions."[182]

In Australia, restrictive practices for people with disability are authorized by legislation at the Commonwealth, State, and Territory levels.[183] Authorized restrictive practices may comprise physical, mechanical, environmental, or chemical restraint and seclusion.[184] The policy of authorization is premised on the need for restrictive practices to be available as a last resort to protect people with disabilities from harm to themselves or others, and this is situated within the wider goal of ongoing practice improvements to enable reduction of their use and eventual elimination.[185]

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[181] Harding & Morgan, *supra* note 119, at 10.

[182] Juan E. Méndez, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, ¶ 63, U.N. Doc. A/HRC/22/53 (Feb. 1, 2013).

[183] *See Disability Reform Ministerial Council*, AUSTL. GOV'T DEP'T OF SOC. SERV., https://www.dss.gov.au/our-responsibilities/disability-and-carers/programmes-services/government-international/disability-reform-ministers-meeting [https://perma.cc/PE3P-MZTM] (last updated Mar. 5, 2024).

[184] *Restrictive Practices in Australia*, AUSTL. GOV'T DEP'T OF SOC. SERV. (May 20, 2014), https://www.alrc.gov.au/publication/equality-capacity-and-disability-in-commonwealth-laws-dp-81/8-restrictive-practices/restrictive-practices-in-australia/#:~:text=These%20primarily%20include%20restraint%20(chemical,social%20or%20physical)%20and%20seclusion [https://perma.cc/3GET-X47W].

[185] *See* AUSTL. GOV'T DISABILITY REFORM COUNCIL, *supra* note 63 (all Australian jurisdictions agreeing that

While some commentators are of the view that restrictive practices are inevitably and always abusive,[186] the aim of regulation is to ensure that they are practised in a context where harms are minimised and in a way that does not constitute torture or other cruel, inhuman or degrading treatment. Nevertheless, the evidence is clear that risks of abuse and neglect are heightened in situations where people are denied choice and control, and that, across all settings, people with disabilities disproportionately suffer abuse in our communities.[187]

The Commonwealth Government, in designating only so-called "primary" places of detention as subject to OPCAT oversight, is out of step with other OPCAT signatories. In carving out homes where restrictive practices are imposed from international human rights scrutiny, it relies on unfounded assumptions that private, personal spaces are inevitably safe and that institutionalization, with its attendant failings, is a thing of the past. In the context of a practice where there is such a "fine line" between acceptable protection on the one hand and torture on the other, oversight is crucial. Procedural safeguards are essential, but without acknowledgement that people subject to restrictive practices are at higher risk of torture and inhuman treatment, such safeguards risk merely hiding actual abuse and neglect. Full implementation of OPCAT by Australian governments would both acknowledge these risks and provide a crucial external driver for their minimisation and elimination.

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behaviour support plans be developed with a view to de-escalating behaviours, thereby reducing the need for restrictive practices).

[186] QUEENSLAND & ROYAL COMM'N INTO VIOLENCE, *supra* note 164.

[187] *See* SENATE CMTY. AFFAIRS REFERENCES COMM., PARLIAMENT OF AUSTL., 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 48 (2015).