

**Human Rights and Human Wrongs:
A Human Rights Analysis of Queensland Restrictive Practices Legislation**

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Phillip French

The Preamble of the Universal Declaration of Human Rights, adopted by the international community against the backdrop of the horrors of the second-world-war, proclaims the inherent dignity and equal and inalienable rights of all members of the human family. This recognition is reiterated in Article 1 of the Declaration which proclaims that all human beings are born free and equal in dignity and rights. Article 2 elaborates further, establishing the juridical and ethical foundations for the equality of all persons. It proclaims that "everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind." That proclamation has always applied to persons with disability on an equal basis with others. However, it is clear that the Declaration's promise of human rights for persons with disability was in many respects, a cruel illusion. In spite of the fact that persons with disability were among the first to experience the horror of the Nazi human experimentation and extermination programs, the human rights framework formulated first by the victors of that war, and elaborated later by the international community more generally, has failed to penetrate to the lived experience of persons with disability, and to the human rights violations that limit and sometimes obliterate their lives. For most people with disability, the second half of the twentieth century was very much like the first.

Nowhere is this more the case than it is in relation to the treatment of persons with intellectual disability who engage in behaviours that cause concern to others. The question for us all today is: will the 21st century be any different for this group of people? And in this respect, what are the human rights implications of the 'restrictive practices' legislation introduced to Queensland in 2008? Does this legislation promote and protect the human rights of persons with disability, as it purports to do? Or does it diminish or even violate human rights? The task I have been set in this presentation is to begin to answer these questions. In doing so, I acknowledge that some aspects of these questions, and their answers, are complex and uncertain, and in the time available I will only be able to provide a

superficial overview of the applicable principles and issues. On the other hand, there are some implications that I believe are abundantly clear.

I will use the Convention on the Rights of Persons with Disabilities (or CRPD) as the basic framework of my analysis, drawing upon other aspects of international law where relevant (principally the International Covenant on Civil and Political Rights (or ICCPR) and the Convention Against Torture and Cruel, Inhuman or Degrading Treatment or Punishment). Due to time constraints, I am not able to lay out this framework in any detail. However, I do want to make a few initial observations about the implications of the CRPD in this area.

The CRPD was adopted by the United Nations in 2006, and it was ratified by the Australian Government in 2008. It is now fully binding upon the Australian federation (that is to say, all levels of government are equally bound by its terms). The CRPD does not purport to recognise any new human rights. Its underlying rationale is to apply existing human rights to the circumstances of persons with disability. It is constituted by 50 articles, about 35 of which have substantive human rights content. Some of the key rights it recognises in terms of today's discussion include: the right to equality before the law, the right to liberty and security of the person, the right to freedom from torture and cruel, inhuman and degrading treatment, and the right to freedom of movement. Some of these rights are particularised in new highly focused ways. For example, the rights to liberty and freedom of movement are particularised to recognise the right of persons with disability to live independently and be included in the community. The rights to liberty and security of the person and to freedom from torture and other cruel, inhuman and degrading treatment or punishment are particularised to recognise the right to freedom from abuse, neglect and exploitation and the right to personal integrity. These new formulations of these traditional rights are particularly relevant today because they penetrate to human rights abuses more likely to be, or uniquely, experienced by persons with disability. There are two other key features of the CRPD relevant to today's discussion, which we only have time to note briefly. First, although the CRPD is based upon the pre-existing human rights framework, it incorporates many additional state obligations in relation to these rights that transform former non-interference based rights into rights that require positive action from parties to ensure that rights are realised in fact. For example, the CRPD reaffirms the pre-existing right

to life with respect to persons with disability, but incorporates a new obligation that requires state parties to take all necessary measures to ensure that persons with disability are able to enjoy this right on an equal basis with others. Second, the CRPD is based upon a social model of disability. In very brief terms, the social model understands disability to be the outcome of persons with disability attempting to interact with a barrier filled social environment. The 'problem' of disability is understood not to lie in the individual but in the environment. The social model's action implication is therefore not the treatment or cure of the person. Instead it requires action to remove disabling barriers to equality with others.

The CRPD has concurrent effect with other core human rights treaties, each of which continue to apply to persons with disability on an equal basis with others. In addition to its own direct applicability to the human rights of persons with disability, the CRPD assists in illuminating the ways in which the rights and obligations contained in prior human rights instruments are to be applied with respect to persons with disability. Most notably, for the discussion in which I now want to engage in, it assists in illuminating the implications for persons with disability of the rights recognised by the International Covenant on Civil and Political Rights and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment and Punishment.

As I have already begun to explain, the dignity of the human person is the source of all human rights, and all human beings are born in equal dignity. In my view, the inherent dignity of persons with disability is of fundamental importance to our discussion today. This is because so many of the human right abuses to which persons with disability are subject now, and to which they have been subject to in the past, proceed from a belief that they are somehow not really, or not fully, human. Such beliefs have anesthetised us to the real impact of many treatment interventions that are now, or have been, widely practiced in disability service settings under the guise of 'behaviour management.' I want to illustrate this point using the following news segment.

Screen clip - <http://abcnews.go.com/Nightline/shock-therapy-massachusetts-school/story?id=11047334&page=1>

I believe and hope that an Australian audience would have little difficulty in reaching the same conclusion as Manfred Nowak, the United Nations' Special Rapporteur on Torture, that the behaviour management techniques used at the Judge Rotenberg Centre constitute cruel, inhuman and degrading treatment, and more specifically, that the electronic shocking of students who engage in unwanted behaviour meets the very high threshold required to constitute torture. As far as I am aware, electronic shock is no longer used as a behaviour modification technique in Australia, and has not been for some time, although it certainly was in use when I started working in the field 25 years ago. Because it is not part of our contemporary experience, or service culture, we are able to see these techniques more clearly for what they are. We can see immediately that the emperor is without his clothes.

I am less certain of our ability to see as clearly the human right implications of other behaviour modification techniques routinely used upon in contemporary disability service settings. For example, as I will shortly explain, I cannot see how chemical restraints can be viewed other than as prohibited medical and scientific experimentation in many instances, or how physical restraint, in most instances, is to be viewed as other than an assault upon the security of the person and his or her physical integrity. However, like the emperor's courtiers, our contemporary service culture has created a false consciousness that obscures this reality. In this respect I think the real challenge for us today is to begin to glimpse treatment and procedures such as these through a new lens – a human rights lens – and in doing so to see them for what they are.

As you saw in the clip, the director of the Judge Rotenberg Centre, Dr Israel, rejects the characterisation of the Centre's behaviour modification techniques as torture and inhuman treatment claiming instead that these are highly effective techniques which are analogous to essential medical procedures, including surgery, that cause pain and discomfort in order to promote or restore health. For him the end justifies the means. Among the many other things I believe we can learn from this story is that the end result DOES NOT always justify the means, particularly where the means are incompatible with the dignity of the person. I invite you to consider that there are things that human beings must not be permitted to do to other human beings in any circumstances, even if this would have a socially productive result. Moreover, as Paul Ramcharan recently reminded me some ends are not justifiable irrespective of the means by which they are achieved. For example, when

I first started working in this field, it was considered sophisticated clinical practice to teach persons labelled autistic to engage socially by forcing them to maintain eye contact with others. In order to maintain this behaviour, lemon juice was squirted into the person's eyes when they attempted to redirect their gaze. This simply taught many people to stare in ways that caused alarm and fear in others. In this case both the "means" and the "ends" are unjustifiable. This now seems an extreme example of a futile and damaging behaviour modification practice. However, less than 25 years ago, it was considered good practice. The question I pose is: how many of the behaviour modification strategies we devise today also have false goals.

Fortunately, and contrary to what Dr Israel claims, the infliction of pain and humiliation is not the most or only effective way to assist persons with disability to develop life protecting and enhancing behaviours. We are capable of making other choices that will respect, protect and fulfil the dignity and human rights of this group. This is an issue that I know will be taken up by other speakers at this forum.

So, as I have said, my task in this presentation is to analyse the human rights implications of Queensland's restrictive practices legislation and related governmental initiatives. Before doing so, it will probably be helpful for me to briefly summarise the purpose, scope, and operational elements of this legislation.

What I refer to in this presentation as Queensland's restrictive practices legislation was introduced by the *Disability Services and Other Legislation Amendment Act 2008*. This legislation amends the *Disability Services Act 2006* and the *Guardianship and Administration Act 2000*. The legislation has a particular target group which, in effect, is persons with intellectual or cognitive disability who are in receipt of support services from service providers funded under the *Disability Services Act 2006*.

The stated purpose of this legislation is to protect the rights of adults with intellectual or cognitive disability by regulating the use of restrictive practices by funded service providers. This stated purpose includes the objective of reducing or eliminating the need for the use of restrictive practices, and ensuring transparency and accountability in the use of restrictive practices.

The legislation establishes a closed or exclusive definition of 'restrictive practice' which is defined to mean containment, seclusion, chemical, mechanical or physical restraint, and restricting access. The legislation operates by permitting the use of restrictive practices only in circumstances where certain procedural safeguards are adhered to. Notably, containment is defined to EXCLUDE the locking of doors, gates and windows where service users have a skills deficit that potentially exposes them to physical harm should they exit the premises.

There are three primary procedural safeguards into the legislation in relation to the use of restrictive practices:

First, there must be a positive behaviour support plan in place that is based upon a multi-disciplinary assessment of the person and their behaviour.

Second, the restrictive practice must be approved by a designated substitute decision-maker. Containment or seclusion may only be consented to by the Guardianship and Administration Tribunal, whereas chemical restraint, mechanical restraint and physical restraint may be approved by a Guardian for restrictive practices appointed by the Guardianship and Administration Tribunal. Restricting access may be approved by a Guardian for restrictive practices, if such a person has been appointed by the Guardianship and Administration Tribunal, or otherwise by an informal decision-maker. There are some differences in the approval levels required for respite and community access services. Broadly speaking, decisions to authorise restrictive practices made by substitute decision makers are time-limited and are reviewable by the Guardianship and Administration Tribunal or by a superior court.

Third, a restrictive practice may only be approved if it is necessary to prevent the person causing harm to themselves or others, and if it is the least restrictive way of ensuring the person's safety and that of others.

In addition, there are a range of other procedural safeguards, including the requirement for service providers to develop and maintain a relevant policy, to keep records, and to consult with guardians and family members.

All persons exercising functions under this legislation, including substitute decision-makers, MUST have regard to a 'human rights principle' recognised in the legislation in performing functions and exercising powers under that legislation. This human rights principle provides, among other things, that persons with disability have the right to respect for their human worth and dignity as individuals, and to live lives free from abuse, neglect or exploitation.

The legislation provides service providers and their staff with prospective immunity from criminal and civil prosecution in relation to the use of restrictive practices provided they do so honestly and without negligence in accordance with the legislation. The legislation also provides service providers and their staff with retrospective immunity from prosecution in relation to restrictive practices, subject to certain conditions.

I reiterate that this is only a brief sketch of the legislation, which is quite dense and complex.

Well, what are the human rights implications of this legislation?

We can see that at least at a rhetorical level, or in what the courts might refer to as a 'horatory' way, the legislation purports to establish a human right based approach to the regulation of restrictive practices. As we have already noted, all relevant actors are required to 'have regard to' the human rights principle provided in section 19 of the Act.

This principle is constituted by 4 separate elements. First, by a declaratory statement that people with disability have the same human rights and other members of society and should be empowered to exercise their rights. This declaration is obviously welcome so far as it goes, but it begs some questions in a State that does not have a Charter or Bill of Rights that enumerates the human rights enjoyed by any member of society.

Related to this, the capacity to enforce rights and obtain remedies for violation is crucial to the full realisation of human rights. Surely this must be what is meant by being empowered to exercise rights? Yet it is difficult to identify anywhere in the DSA legislation where a person with disability would obtain a remedy for a violation of the human rights principle. It would appear that it is only service providers who are afforded any rights of review under the legislation, and then only in relation to a very narrow class of decisions.

Perhaps the answer is that these rights are to be protected by general law? Well, again, there are some difficulties with this in a state that does not explicitly recognise human rights. Moreover, as we have noted, the restrictive practices legislation creates immunities for service providers and their staff that would significantly limit, and perhaps negate entirely, any cause of action brought by a person with disability seeking to vindicate their human rights at general law, through an action in tort for example. Of course, the legislation does not permit any kind of conduct. Negligent and dishonest conduct by a service provider in relation to the use of a restrictive practice is not eligible for immunity. However, this would require the prosecution or the person to prove to a Court that such conduct was negligent or dishonest, imputations which are not lightly accepted in our legal system. In reality, I think there is very little prospect of this happening.

Perhaps the answer is that these rights are protected by the Guardianship and Administration Tribunal when it considers applications that concern restrictive practices. Well, in addition to its responsibility to have regard to the human rights principle under the *Disability Services Act 2006* the Guardianship and Administration Act also requires recognition of the fact that persons dealt with under that legislation have the same basic rights as other persons. But, again, as a matter of law, what are the constituent elements of these requirements in the absence of a Charter of Rights? Subsections 2, 3 and 4 of section 19 provide some assistance as to the content of the principle. For example, among other things, subsection 2 provides that people with disability have the right to 'live lives free from abuse, neglect or exploitation.'

However, neither piece of legislation asserts a right to freedom of movement, to liberty of the person, to freedom from torture or cruel, inhumane, or degrading treatment or punishment, to freedom from medical and scientific experimentation without consent, or to personal integrity, just to highlight a few highly relevant rights.

In any event, the Guardianship and Administration Tribunal's powers are ultimately very limited. In the end all it can really do is approve or not approve seclusion, or appoint, refuse to appoint or remove, a guardian to make other decisions concerning restrictive practices. It has no power to order a substantive remedy for a human rights violation perpetrated upon a person with disability.

Indeed, and perhaps I should say this tentatively at that stage (I would be pleased if I were wrong), in the restrictive practices cases I have reviewed to date, it is difficult to identify any explicit or even implicit discussion of human rights issues in the Guardianship and Administration Tribunal's discussion of the issues.

In summary, my conclusion is that the human rights principle set out in s 19 of the Disability Services Act, 2006 is declaratory only, and moreover, it is non-performative. Certainly, it encourages us to take human rights into account, but it is simply not made operational with respect to the restrictive practices regime.

Now let us turn to the target group of the legislation which is persons with intellectual and cognitive impairment who use funded disability services. International human rights law guarantees the equality of all persons and prohibits discrimination on the basis of any characteristic, including disability. Moreover, it guarantees all persons equality before and under the law, and equal protection and benefit of the law without discrimination.

An act or practice is not discriminatory under international human rights law if it is based upon objective criteria and if it is a proportionate response to that justifying factor. Additionally, differential treatment is not unlawful discrimination if it is a reasonable accommodation, or a positive measure designed to overcome pre-existing disadvantage.

Clearly, Queensland's restrictive practices regime is, *prima facie*, discriminatory legislation because it exposes persons with intellectual and cognitive disability to treatment that would be unlawful if performed on other persons. This differential treatment could be justifiable either on the basis that it represents an objective and proportionate response to the justifying factor (that is to say, to the behaviours of concern), or that it represents a reasonable accommodation or positive measure designed to overcome pre-existing disadvantage.

In my view it would be very difficult, if not impossible, to argue that Queensland's restrictive practices regime in any way advantages persons with disability over other persons. For example, while it provides immunities for service providers and their staff who engage in restrictive practices it offers no immunities for persons with disability who

engage in behaviours of concern. At least in theory, they remain exposed to the full extent of the criminal law. Fundamentally, what the restrictive practices regime does is to authorise acts and practices to be performed on persons with disability that are unlawful under criminal and civil law: for example, assault, battery and deprivation of liberty. In my view this is clearly a detrimental impact, rather than a positive one.

At best it may be said that the restrictive practices regime mandates a more enlightened approach to dealing with persons with challenging behaviours. In this respect it may in some respects be an improvement on previous unlawful conduct, but as far as I can see that does not amount to any advantage over other persons. Perhaps it could be described as a 'less detrimental' approach, but I am not sure that even this is the case, and even if it were, it would not reverse the inevitable conclusion that these measures violate the right of persons with disability to equality with other persons.

If that is the case, the question becomes: is this legislation justifiable on objective grounds and is it a proportionate response to the justifying factor?

Well, I don't think there can really be any argument that at least some of the behaviours of concern which have given rise to this legislation have the potential to justify differential treatment of persons with disability. However, I would caution against any unqualified grasping of this principle as a justification of the legislation for a number of reasons, only a couple of which I have time to note here. First, what may at first glance appear to be an objective basis for such action, once closely examined, may emerge to be mere prejudice in disguise. In short, it may only be objectively justifiable if we perceive and position persons with disability as less human than others. The CRPD, in particular, prevents us from doing so. To return to an earlier point, the 'ends' cannot justify some means, and some 'ends' cannot be justified at all from a human rights point of view.

Second, and perhaps more significantly from a strictly legal perspective, the legislation does not explicitly, or even implicitly, incorporate a proportionality test that must be satisfied as a precondition to the imposition of a restrictive practice that will result in limitation to a person's human rights. And I note again in this context that the Guardianship and Administration Tribunal restrictive practice cases I have read do not evidence any

explicit, considered human rights analysis of the issues, including in relation to the proportionality of the proposed restrictions.

I acknowledge that in a number of its provisions the legislation requires that any such restriction be the 'least restrictive' possible, and this requirement is at least adverted to, though in the cases I have read not at all interrogated, by the Guardianship and Administration Tribunal. This is certainly a necessary element of a proportionality test, but it is only one such element.

By comparison, the proportionality test that must be satisfied in order to justify to the limitation of a human right incorporated into the Victorian Charter of human rights and responsibilities requires consideration of all relevant factors including, the nature of the right that will be limited, the importance and purpose of the limitation, the nature and extent of the limitation, the relationship between the limitation and its purpose, AND any less restrictive alternatives available to achieve the purpose the limitation seeks to achieve. And, having considered all of these factors, the ultimate test that must be satisfied is whether the limit to a human right is demonstrably justifiable in a society that is based on human dignity, equality and freedom.

In summary, my view is that it would be difficult to successfully argue that the Queensland restrictive practices regime is based upon objective justifying factors both because, on careful analysis, those factors are indistinguishable from the structural discrimination faced by persons with disability (including inadequate housing, lack of appropriate support services etc), and perhaps more clearly, because the legislation fails to incorporate a comprehensive proportionality test that would ensure that any limitations to human rights are objectively justifiable having regard to fundamental values.

The final general observation I want to make is that the legislation operates so as to permit and restrict, rather than so as to prohibit, restrictive practices. Its primary emphasis is on service provider compliance with a regime of procedural safeguards designed to reduce or eliminate unnecessarily restrictions. One of the objectives of the legislation, certainly, is the reduction and elimination of restrictive practices. However, the legislation does not prohibit any restrictive practice in fact, nor does it provide any power to do so at a

later date. In this sense, the legislation contains no substantive safeguards against the use of restrictive practices.

But! You might say, human rights are not absolute. They can be limited for good reason and any restrictive practice must be approved by an authorised substitute decision-maker and any decision made by such a person is subject to review. Well, that is only true in part. International law does not permit the limitation of some human rights in any circumstances. For example, it is relevant to note that no limitations are permissible in relation to the right to freedom from torture or cruel, inhuman or degrading treatment or punishment. Additionally, in my view, consent is irrelevant or immaterial when one considers the harm associated with most forms of restrictive practice to which persons with disability are subject. To use a provocative comparison, under the Queensland Criminal Code a person's consent is immaterial to culpability for murder. Why should it be any different in relation to physical restraint, particularly in light of the risk of fatal harm that is associated with these practices?

Furthermore, most substitute decision-makers will, in the end, will make sub-optimal decisions, either because they have limited knowledge of the alternatives, limited capacity to challenge the system to do otherwise, or because the service system will not respond to their challenges (in my experience Guardianship Tribunals have a propensity to remove family members as guardians where they come into conflict with service providers over service quality issues, and public guardians as entities within government tend to have a limited willingness to challenge government). In summary, requiring the consent of a substitute maker to a restrictive practice is so weak a safeguard against abuse that it is no safeguard at all. Procedural safeguards are not enough, and in some cases, are not appropriate at all. In this respect I note that all of the procedures inflicted on children and adults at the Judge Rotenberg Centre have been approved by parents or guardians and by a Court!

In my view, at the very least, the legislation ought to have prohibited any conduct or practice that causes pain or discomfort, or that intimidates or humiliates a person, or which is utilised to seclude a person, to physically restrain a person, or to punish a person in relation to their behaviour. It may have been appropriate for some of these prohibitions to

have a staged implementation period. The failure to designate substantive targets for the elimination of restrictive practices means that there is a great risk of goal shifting under the legislation away from elimination to mere compliance with the procedural safeguards associated with the permissive regime. Indeed, the legislation in its present permissive form may have the opposite of its intended effect and entrench and proliferate restrictive practices.

How will we know if this is the case? Well, if I read the legislation correctly, while service providers are now required to keep records in relation to restrictive practices and while a limited number of issues must be brought to the attention of the Chief Executive Officer responsible for the administration of the legislation, there is no systemic data collection process associated with the approval, use and review of restrictive practices, and there is no requirement to publicly report such information if it is collected. In the absence of these measures I cannot possibly see how the legislation can fulfil the purpose of ‘ensuring transparency and accountability in the use of restrictive practices.’ The legislation has now been in effect for more than 2 years, and as far as I can establish, no-one knows how many people in Queensland are subject to what form of restrictive practices or for how long. The legislation operates to confine these issues to the private sphere.

I would like to very briefly make the additional observation that the compliance approach that underpins the restrictive practices regime is ultimately based in an individual model of disability. It incorporates the latent assumption that persons with disability can and ought to change their behaviour. The approach does not fundamentally locate the problems encountered by persons with behaviours of concern in the environment or mandate or compel change to that environment (although in fairness I should acknowledge that the environment of the person is one of the factors that must be taken into account in determining if a restrictive practice should be approved). Therefore inevitably, at least for some people, the restrictive practices regime will provide the means by which some people with disability are forced to live in and adapt to inadequate social environments, perhaps even environments that violate their human rights.

In the remaining time available to me, I want to briefly note some key human rights that are engaged by the use of restrictive practices and which are at risk under Queensland

restrictive practices regime for the reasons I have already outlined. These examples are not exhaustive.

First, the right to life:

Physical restraint in particular is a very dangerous intervention both for those persons upon whom it is performed, and for those who perform the procedure. Many persons with disability have been killed in the course of being physically restrained. Under international law, state parties have a particular obligation to control security forces so as to ensure that they do not arbitrarily take human life. Security services includes persons who work in places of detention, and in many situations where physical restraint is used, people with disability are held in detention as that term is understood in international law. Chemical restraints may also place the right to life at significant risk.

Second, access to justice

Queensland's restrictive practices regime does not provide persons with disability with access to justice. Persons subject to proposed restrictive practices do not have automatic legal representation. Nor does the regime provide a capacity for the person to obtain any independent assessment, or second opinion, that could operate to contradict an application.

Liberty and security of the person:

Obviously, a primary purpose of the legislation is to permit restrictions on liberty and to authorise practices that would otherwise amount to assault.

Freedom from Torture and other cruel, inhuman or degrading treatment or punishment

Abuse neglect and exploitation:

Personal integrity:

The United Nations special rapporteur on Torture has made it clear that many restrictive practices to which persons with disability are routinely subjected, such as seclusion, physical and chemical restraint, may amount to torture or to cruel, inhuman or degrading treatment

or punishment. He can specifically called for the 'reframing' of much of the abuse and neglect experienced by persons with disability as torture or cruel inhuman or degrading treatment.

Restrictive practices may also result in the abuse and neglect of persons with disability, and may violate their right to personal integrity.

Freedom from experimental medical and scientific treatment

Many people with disability are subject to chemical restraints that can only properly be regarded as experimental medical or scientific treatment. For example, many people are prescribed medications that have been developed and tested for other purposes to control behaviour. Many people are prescribed medications outside recommended dosage rates. Many people are prescribed medications in combinations that have never been subject to therapeutic testing. Under international law, experimental medical treatment is only permissible in circumstances where this treatment as been fully consented to. Full consent requires the ability to balance benefits and risks. It is impossible to do this in the circumstances outlined above.

The right to live independently and be included in the community:

Some restrictive practices result in, or are associated with, living environments that compel or oblige persons with disability to live in a particular place, and with other people they have not chosen to live with. These living environments may also segregate and isolate persons with disability from the community. Circumstances such as these may violate the human right of persons with disability to live in and be a part of the community.

In this paper, I have sought to analyse the human rights implications of Queensland's restrictive practices regime. I have no doubt that this legislation was, at least in part, motivated by a concern for the human rights of persons with disability. However, in my analysis, it falls short of recognising respecting, protecting and fulfilling these rights. Very unfortunately, Queensland does not formally recognise human rights, and so reference to them in the restrictive practices legislation is almost meaningless. Certainly, there does not appear to be any basis upon which human rights can be asserted under Queensland legislation and remedies obtained for their violation. The restrictive practices legislation

also discriminates on the basis of disability. It permits things to be done to persons with disability that would be unlawful if done to others. In some instances there may be objective reasons that could potentially justify limitations to the human rights of persons who engage in behaviours of concern, however, the legislation does not include a robust proportionality test that would confine these limits as required by international law. In the final analysis, I think the legislation is essentially non-performative and may be counter-productive. Its stated aim of reducing and eliminating restrictive practices is not supported by effective legislative machinery, and the regime it establishes in relation to restrictive practices is a permissive one, rather than one based on prohibition. Contrary to all our hopes, this may simply entrench and proliferate restrictive practices because it rests upon a false assumption of equivalence: compliance with procedural safeguards does not equal recognition, respect protection and fulfilment of substantive human rights.

Thank you.