

Draft Guidelines on Deinstitutionalization

This is a joint submission by Queensland Advocacy for Inclusion (QAI) and People with Disability Australia (PWDA). The submission was written in consultation with the Australian Civil Society delegation who attended the 15th Session of the Conference of States Parties to the Convention on the Rights of Persons with Disabilities (CRPD) in New York between 14- 16th June 2022.

The delegation welcomes the draft guidelines on deinstitutionalization and endorse their contents. The guidelines will play an important role in clarifying the obligations of States Parties to ensure the right to live independently and be included in the community is realised for all persons with disabilities.

The guidelines successfully contextualise the realisation of many rights contained in the CRPD, such as the right to legal capacity and the right to an adequate standard of living, as interconnected and intertwined with the deinstitutionalization movement. This is particularly helpful for States Parties who erroneously consider that they have successfully achieved deinstitutionalization through the removal of State funded group homes and the provision of 'community- based' group homes.

We particularly welcome the clarification that the creation of new segregated services, such as small group homes or sheltered workshops, should be prevented during the deinstitutionalization process and that they do not constitute community-based services, as per paragraph 26. The discussion regarding remedies, reparations and redress is also helpful and constitutes an important part of the deinstitutionalization process that is frequently overlooked.

However, we bring the following issues to the Committee's attention:

- **The extent to which the guidelines apply to custodial settings is ambiguous.** At paragraph 14, the guidelines state that 'mainstream institutional settings, such as prisons...should also be included in deinstitutionalization efforts'. Further consideration could be given to whether certain settings, such as custodial settings, require setting-specific guidelines. We are fully supportive of the extension of deinstitutionalization efforts to custodial settings in order to avoid the shifting of institutionalization from one carceral form to another. However, under these guidelines it is unclear how this would apply, such as whether States Parties should adopt a 'moratorium on new admissions' of people with disability to prisons under paragraph 13, for example.
- **The role of State Parties in the deinstitutionalization process, as stated at paragraph 18, is somewhat unclear.** The guidelines state that 'processes of

deinstitutionalization should not be led by management or those involved in the maintenance of institutions'. Whilst this likely infers the need for people with disability and their representative organisations to lead the deinstitutionalization movement, the wording could have the unintended consequence of absolving State Parties of their joint responsibility to lead and initiate change.

- **Clarify that State Parties must ensure that the delivery of any support system is separate to any system that provides housing**, as a key and driving component to realising choice and the will and preference of persons with disabilities. Paragraphs 27-29 in the Draft Guidelines, should make it clear that the allocation of funding and resources by State Parties should not see a provider deliver both housing and supports. As the Special Rapporteur on the right to adequate housing as a component of the right to an adequate standard of living, and the right to non-discrimination in this context, clarified in a 2017 Report to the UN General Assembly (A/72/128) that governments to be compliant in the implementation of rights under Articles 2 and 11 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and Articles 19 and 28 of the CRPD: “Services should be matters of free choice for persons with disabilities, not linked to security of tenure or residency” (see para 54).
- **Provide clear guidance to State Parties in paragraphs 31-32 that the right to accessible housing is a pre-condition for the realisation of Article 19 of the CRPD**, and so direct all State Parties to remove all barriers immediately. As General Comment No. 5 clarified, Article 19 is tied to Article 9 of the CRPD, “because the general accessibility of the whole built environment is a precondition for living independently in the community” (at para 78). These rights must also be realised on a non-discriminatory basis, which therefore means these rights are for immediate realisation, and must not be progressively realised by State Parties. As the Special Rapporteur on the right to adequate housing as a component of the right to an adequate standard of living, and the right to non-discrimination in this context, clarified in a 2017 Report to the UN General Assembly (A/72/128) noted: The right to non-discrimination also requires Governments and private actors to take positive measures to reasonably accommodate the needs of persons with disabilities insofar as such accommodation is “necessary and appropriate” and does not impose a “disproportionate or undue burden”. Reasonable accommodation is not restricted to physical modifications to existing housing. It also includes an obligation to adapt the application of laws and policies. As a component of the right to non-discrimination, reasonable accommodation is considered an immediate obligation of States.

- **The discussion regarding intersectionality at paragraphs 38 and 39 could more clearly articulate the significant barriers to deinstitutionalization that older persons experience.** The institutionalization of older persons could receive its own sub-heading, in the same way that 'Women and girls' and 'Children with disabilities' are discussed in greater detail within the guideline. Greater attention to risks experienced by older persons with disabilities in institutions, such as the risk of chemical and mechanical restraint, would enhance the scope of the guideline. An intersectional approach would also be improved by greater recognition of cultural supports, including but not limited to supports for Indigenous peoples and ethnic minorities.
- The guideline would benefit from further detail regarding **the role of supported decision-making** and how this ensures the right to legal capacity for persons with disabilities.
- **The reference to legal representation in paragraph 54 should be amended to read 'free and accessible legal representation'.** The reference to the effective right to call police and file criminal charges should be expanded to read 'an effective right to call police, lawyers and other oversight bodies and to file criminal, civil or human rights complaints while inside an institution.'

Thank you for consideration of these submissions and your highly commendable work on the development of these guidelines.

Regards

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