***Draft Guidelines on Deinstitutionalisation, including in emergencies***

**Committee on the Rights of Persons with Disabilities**

**Written submission from the Government of Australia**

**Introduction**

**Australia thanks the Committee on the Rights of Persons with Disabilities for sharing the draft *Guidelines on Deinstitutionalisation, including in emergencies*. We welcome its release and are supportive of its purpose.**

**In preparing our submission, we have recognised that the *travaux préparatoires* to the CRPD indicate that its drafters did not intend to create a right not to reside in an institutional facility. Accordingly, there is no reference to either institutionalisation or deinstitutionalisation in articles 14 or 19 of the Convention. We understand that there remain legitimate forms of differential treatment and of housing in facilities, which do not constitute discrimination and are consistent with anti-discrimination obligations.**

**We recognise as well that these Guidelines do not pose any new legal obligations on states parties, but rather provide guidance on the deinstitutionalisation process.**

**Australia thanks the Committee once again for the opportunity to provide comments on these draft Guidelines. We look forward to reading the contributions of other stakeholders and to reviewing the final Guidelines when they are released.**

**Comments on the draft *Guidelines on Deinstitutionalisation, including in emergencies***

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| **Paragraph** | **Textual suggestions** |
| **2** | They draw on the experiences of persons with disabilities before and during the pandemic, which reported the widespread prevalence of institutionalization of persons with disabilities; the harmful impact**s** **~~of~~** institutionalization **can have** on the well-being of persons; and the violence, neglect, abuse, ill-treatment and torture, including chemical, mechanical, and physical restraints**,** experienced by **some** persons with disabilities in institutions. The pandemic has exacerbated these phenomena, while **many** human rights oversight systems and independent monitoring were limited or suspended.  ***Rationale:***  We suggest amendments to clarify meaning in this paragraph. It is not true that *all* persons living in institutions have experienced harmful impacts, violence, neglect, ill treatment and torture, nor to imply that all human rights oversight systems were suspended during COVID‑19. |
| **5** | The Committee has observed that institutionalization processes are not compliant with the Convention **~~and in some cases are long overdue~~**.  ***Rationale:***  We suggest removing the second half of this sentence to avoid suggesting that Article 19(a) is a progressively realisable right. General Comment No. 5 clarified that Article 19(a) is “immediately applicable as it is a civil and political right”. |
| **6** | Institutionalization **~~is~~** **may amount to** **~~a~~** discriminat**ion** **~~ory practice~~** against persons with disabilities (article 5 of the Convention)**~~. It~~ and** may **~~carries the de-facto~~** den**y the** **~~ial of~~** legal capacity of persons with disabilities in breach of article 12 of the Convention. **In many cases,** it is an arbitrary detention and deprivation of liberty on the basis of impairment, contrary to article 14 of the Convention. It **may** expose**~~s~~** persons with disabilities to forced medical intervention with psychotropic medications, such as sedatives, tranquillizers, mood stabilizers, electro-convulsive treatment, and conversion therapy, which infringes articles 15, 16 and 17 of the Convention. It **may** also expose**~~s~~** them to administration of drugs and other interventions without the free, **~~prior,~~** and informed consent of persons with disabilities, which infringes articles 15 and 25 of the Convention.  **Rationale:**  Similar to our comments on Paragraph 2, we suggest amendments to clarify meaning. In this case, institutionalisation does not forcibly amount to discrimination in all circumstances. There remain legitimate forms of differential treatment which do not constitute discrimination. This is consistent with anti-discrimination obligations such as Article 5.  Additionally, language should be amended to reflect that institutionalisation does not *necessarily* lead to denial of legal capacity, forced medical intervention or the administration of drugs.  While we are in principle supportive of “free, prior and informed consent” as a language formulation, this formulation is not set out in Articles 15 and 25 of the CRPD. We suggest referring instead to “free and informed consent” as formulated in the Convention. |
| **14** | **Institutionalisation includes all forms of placement and detention based on disability, alone or in conjunction with other grounds such as “care” or “treatment”, and/or where persons with disabilities find their rights under article 19 of the CRPD infringed, excepting detention under criminal law that is compliant with the existing human rights obligations of States.**  **Rationale:**  **We suggest amendments to this paragraph to reflect that placement and detention does not forcibly contravene CRPD obligations in all circumstances. This is especially important in relation to the criminal justice system. When somebody has been found guilty of a crime, but equal access to representation and justice have been adequately provided, placement and detention would not be contrary to CRPD obligations.** |
| **36** | **All persons with disabilities have the right to live in the community and selection processes about who leaves institutions ~~are~~ may be discriminatory.**  **Rationale:**  **We suggest clarifying that not all selection processes around departure from institutions are discriminatory. In some instances, differential treatment may be required. Australia notes that differential treatment is permissible if the criteria for such differentiation is reasonable and objective and there is a clear and reasonable relationship of proportionality between the aim sought and the measures and their effects.** |
| **39, General comment** | **[…] Multiple and intersecting forms of discrimination and de jure or de facto discrimination may also occur in the community through a lack of support services […]**  **Rationale:**  **Australia’s preferred long-agreed, internationally recognised formulation of this phrase is “multiple and intersecting forms of discrimination”. It better reflects the compounding relationship between the differing forms of discrimination, and how they can lead to double, triple or greater discrimination.**  **As a general comment, in all instances where “multiple discrimination” is used, we would prefer “multiple and intersecting forms of discrimination”.** |
| **50, General comment** | **We suggest that an added subsection on older persons with disabilities, following the subsection on children with disabilities, would be relevant to these Guidelines.** |
| **40, General comment** | **States Parties should acknowledge that women and girls with disabilities are subject to multiple and intersecting forms of discrimination, including on the grounds of gender and disability, and they are not a homogeneous group. Women and girls with disabilities are at an unacceptably heightened risk of all forms of violence, exploitation, and abuse compared to other women and girls, and are at high risk of sexual and gender-based violence and harmful practices, such as forced contraception and sterilization, during institutionalization. They are denied the right to legal capacity more often than men with disabilities, and more often than women and girls without disabilities, leading to denial of access to justice, choice, and self-control. […]**  **Rationale:**  **While multiple discrimination is the phrasing used in the CRPD, Australia’s preferred long-agreed, internationally recognised formulation of this phrase is “multiple and intersecting forms of discrimination”.**  **Both women and girls are at an unacceptably high risk of violence. We suggest amending wording to reflect best-practice internationally agreed language on sexual and gender-based violence.** |
| **41** | **States Parties should ensure that intersectionality is considered throughout all aspects of deinstitutionalization processes, especially the design, implementation, financing and monitoring of closure of institutions; in developing inclusive community support systems and inclusive mainstream services; and with regard to the participation of persons with disabilities throughout these processes, while employing gender-~~sensitive~~ responsive and age-appropriate approaches.**  **Rationale:**  **The closure of institutions and movement towards community-based services requires additional financing.**  **In our view, gender-sensitive is a passive phrase. In contrast, gender-responsive connotes an active response to the specific needs of women and girls.** |
| **54** | **The right to live independently and be included in the community is closely connected to the right to access to justice for all persons with disabilities, particularly for women and girls living in or leaving institutions and those who experience sexual and gender-based violence. […]**  **Rationale:**  **We suggest amending wording to reflect best-practice internationally agreed language on sexual and gender-based violence.** |
| **73** | **States Parties should not rely exclusively on ~~use~~ medical criteria when developing new needs assessment tools, and medical professionals should not be granted with prevailing or higher status than other professions involved in assessments ~~involved~~. Instead, ~~a person-centred~~ processes should be tailored to the individual ~~used~~, identifying the range of supports a person may need to live independently and be included in the community.**  **Rationale:**  **Medical expertise contributes to the range of tools used when making informed, individualised assessments of support needs. We suggest amending language so the paragraph recognises that, while there is value in medical criteria, they should not be the sole or dominant factor in making assessment tools.** |
| **88** | **[…] Deinstitutionalization plans should ensure the realisation of all human rights, including the right to privacy, personal mobility, accessibility, health care, family, employment, an adequate standard of living including housing, inclusive education, political participation, ~~housing,~~ social protection, participation in cultural and community life, leisure, and recreation. […]**  **Rationale:**  **Article 28 of the CRPD recognises housing as a component of the right to an adequate standard of living, rather than as a separate right. We suggest amending language to clarify this distinction.** |
| **97** | **Persons leaving institutions require to experience a more robust vista of possibilities of daily living, life experiences and opportunities to thrive in the community.**  **Comment:**  **We are unclear on what this sentence means – perhaps it is a problem of translation. We would suggest that the Committee amend this sentence to clarify meaning.** |
| **101** | **[…] Health care services should ~~must~~ respect the choice, will and preferences of persons with disabilities leaving institutions […]**  **Rationale:**  **Amending typo (originally reads “should must”).** |
| **106** | **~~The prohibition of disability-based detention and t~~ The right to ~~legal capacity are~~ recognition before the law is non-derogable, including during emergencies.**  **Rationale:**  **Recommend amending to recognise the right to recognition before the law in Article 12(1) is non-derogable (on the basis that it is derived from article 16 of the International Covenant on Civil and Political Rights).**  **These Guidelines should reflect ongoing debate surrounding whether derogation from other rights under the CRPD is permissible. For example, some States and commentators consider Article 12(2) – 12(5) (providing the right to legal capacity) may be permissibly limited, including in situations of emergency.** |